THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2012-000377
Case No. 2012-CP-40-7752

DRV Fontaine, LLC,..Respondent,

v.

Fontaine Business Park, LLC, Fontaine Business Park 2, LLC,
Fontaine Business Park 3, LLC, Fontaine Business Park 4, LLC,
Fontaine Business Park 5, LLC, Fontaine Business Park 6, LLC,
Fontaine Business Park 7, LLC, Fontaine Business Park 8, LLC,
Fontaine Business Park 9, LLC, Fontaine Business Park 10, LLC,
Fontaine Business Park 11, LLC, Fontaine Business Park 12, LLC,
Fontaine Business Park 13, LLC, Fontaine Business Park 14, LLC,
Fontaine Business Park 15, LLC, Fontaine Business Park 16, LLC,
Fontaine Business Park 17, LLC, Fontaine Business Park 18, LLC,
Fontaine Business Park 19, LLC, Fontaine Business Park 20, LLC,
Fontaine Business Park 21, LLC, Fontaine Business Park 22, LLC,
Fontaine Business Park 23, LLC, Fontaine Business Park 24, LLC,
Fontaine Business Park 25, LLC, Fontaine Business Park 26, LLC,
Fontaine Business Park 27, LLC, Fontaine Business Park 28, LLC,
Fontaine Business Park 29, LLC, Fontaine Business Park 30, LLC,
and Fontaine Business Park 31, LLC,.. Appellants.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

This is a commercial mortgage foreclosure action brought by the Respondent mortgagee (DRV) against the Appellants mortgagors (Fontaine). Fontaine answered and counterclaimed, demanding a jury trial on its counterclaims. DRV moved for the appointment of a receiver and an order referring the case to the master in equity. The circuit court (Judge Lee) granted the receivership motion but declined to hear the reference motion until after a trial on Fontaine's legal counterclaims, for which Fontaine had demanded a jury trial. After Judge Lee's order, DRV moved to strike Fontaine's jury trial demand. The circuit court (Judge Cooper) granted DRV's motion and referred the entire case to the master in equity.

Fontaine appealed, arguing that Judge Cooper erred in striking Fontaine's jury trial demand and violated the rule that one circuit court judge cannot overrule another by referring the case to the master, because Judge Lee had earlier ruled that the reference motion would be deferred until after the adjudication of the legal issues, *i.e.*, Fontaine's counterclaims. This Court affirmed, ruling that Judge Cooper properly granted DRV's motion to strike Fontaine's jury trial demand, and Fontaine's argument was not preserved for appeal, because it had not been raised to Judge Cooper.

Fontaine petitions for rehearing but does not challenge this Court's ruling that Judge Cooper properly struck Fontaine's jury trial demand. Thus, that ruling is the law of this case and is not subject to further review, including any future writ of certiorari.[1] Fontaine continues to argue that Judge Cooper improperly referred this case to the master, and it also argues that this issue is not subject to South Carolina's error preservation rules. These arguments have no merit.

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[1] *Mazloom v. Mazloom*, 709 S.E.2d 661, 661 (S.C. 2011). Any attempt to challenge this ruling by way of a rehearing reply would be futile, because an argument for rehearing cannot be made for the first time in a reply. See *Herron v. Century BMW*, 719 S.E.2d 640, 642-643 & n.6 (S.C. 2011) (issue cannot be raised for first time in a rehearing petition <u>or</u> at argument on rehearing); *Nelson v. QHG of S.C., Inc.*, 608 S.E.2d 855, 858-859 (S.C. 2005) (argument made for the first time in rehearing petition before the Court of Appeals not preserved for review by the Supreme Court)

SUMMARY OF ARGUMENT

Judge Cooper did not overrule Judge Lee. South Carolina has a rule that one circuit court judge cannot rule on an issue already ruled upon by another judge, but this "judge v. judge" rule does not apply if different facts or legal theories are presented to the second judge. When Judge Lee ruled, Fontaine still claimed right to a jury trial on its legal counterclaims. In such situations, the law requires that the jury claims be tried first and, therefore, Judge Lee rightly declined to rule on the issue of referring the case to the master. Thereafter, Judge Cooper correctly struck Fontaine's jury trial demand, thereby changing the facts and law relevant to the reference issue. Accordingly, Judge Cooper did not violate the "judge v. judge" rule. See Arg. I at pp. 4-8, *infra*.

Fontaine's "judge v. judge" argument is not preserved for appeal. Fontaine does not deny this. Rather, Fontaine argues that Judge Lee's prior order deprived Judge Cooper of subject matter jurisdiction over the reference issue and, therefore, its "judge v. judge" argument is saved by the subject matter jurisdiction exception to the error preservation rules. See Arg. II at p. 9, *infra*.

Fontaine's subject matter jurisdiction argument has no merit. There is only one circuit court in South Carolina, and it has statewide subject matter jurisdiction. Judge Lee and Judge Cooper were sitting as the circuit court and therefore had the same subject matter jurisdiction. Moreover, there is a distinction between having subject matter jurisdiction and having the authority to exercise that jurisdiction. The "judge v. judge" rule goes to Judge Cooper's authority to exercise subject matter jurisdiction, not its existence. Such "authority" issues are subject to the error preservation rules. Accordingly, this Court correctly held that Fontaine's argument is not preserved for appeal. See Arg. III at pp. 9-12, *infra*.

In any event, Fontaine has failed to satisfy its appellate burden of showing reversible error, *i.e.*, error resulting in prejudice. It is the law of this case that Fontaine does not have a right to a

jury trial on any issue. Thus, the entire case is now to be tried before a judge in a bench trial. Fontaine has not shown how it would be prejudiced by a bench trial before a master rather than a circuit court judge. There can be no prejudice because, upon the reference of a case to a master, the master has the same power and authority that the circuit court would have in trying the case. Accordingly, Fontaine's appeal has no merit. See Arg. IV at pp. 12-13, *infra*.

Fontaine also argues that it was deprived of due process, because it had no notice that Judge Cooper would be considering the reference issue. This "due process" argument has no merit, because Fontaine had notice and actual knowledge before the hearing and at the hearing before Judge Cooper. In any event, this argument is not properly before this Court, because Fontaine did not make it to Judge Cooper or in its Brief of Appellant before this Court. Fontaine alluded to this argument in its Reply Brief, but arguments for reversal cannot be made for the first time in a reply brief. Moreover, claims based on lack of notice and due process do not involve subject matter jurisdiction and, therefore, the subject matter jurisdiction exception to the error preservation rules does not apply. Finally, Fontaine has not shown any reversible error, *i.e.,* any prejudice resulting from its claimed lack of notice. See Arg. V at pp. 13-15, *infra*.

In a last ditch effort to save its "due process" argument from the error preservation rules, Fontaine fabricates a new rule that any "void" order can be attacked for the first time on appeal. There is no such exception to South Carolina's error preservation rules – the exception is limited to orders issued without subject matter jurisdiction. Fontaine's "judge v. judge" and "due process" arguments do not involve the subject matter jurisdiction of the circuit court and, therefore, Fontaine's "void order" argument has no merit. See Arg. VI at pp. 15-17, *infra*.

In short, as summarized above and detailed below, Fontaine's arguments are not preserved and have no merit. It is therefore respectfully submitted that this Court should deny rehearing.

ARGUMENT

I. Judge Cooper did not violate the "judge v. judge" rule that one circuit court may not rule upon an issue already ruled upon by a different circuit court judge.

A circuit court judge may not rule upon an issue already ruled upon by another circuit court judge, but this "judge v. judge" rule does not apply if the second judge rules upon the basis of different facts or different legal theories than ruled upon by the first judge. *Salmonsen v. CGD, Inc.*, 661 S.E.2d 81, 88 (S.C. 2008); *Binkley v. Burry*, 573 S.E.2d 838, 843 (S.C. App. 2002); *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985); *Andrick Dev. Corp. v. Maccaro*, 311 S.E.2d 95, 97 (S.C. App. 1984). As shown below, Judge Lee declined to hear the reference motion based on a then-valid assumption that Fontaine had a right to a jury on its counterclaims due to its jury trial demand. When Judge Cooper thereafter struck Fontaine's jury trial demand, it dramatically changed the factual and legal landscape that had been presented to Judge Lee. Thus, the "judge v. judge" rule did not preclude Judge Cooper from referring the case to the master in accordance with the ordinary South Carolina practice in foreclosure actions having no jury trial issues.

DRV commenced this non-jury foreclosure action on November 20, 2012. (R-I at 24). On the next day, DRV filed motions for the appointment of a receiver and for a reference to a master. (R-II at 605; 727). The reference motion was filed immediately, because Fontaine had waived the right to a jury trial in the loan documents. (See R-I at 129-130, § 10.8; 169, § 22). Despite this, Fontaine's answer and counterclaim included a jury trial demand. (See R-I at 229; 271; 340).

Judge Lee heard the motions for a reference and appointment of a receiver in February 2013. (R-II at 761). The focus of the hearing was the receivership issue. (R-II at 764-845). Judge Lee appointed a receiver, and Fontaine has never challenged this ruling.

Prior to the hearing, Fontaine filed a response in opposition to the reference, arguing that a reference was impermissible because Fontaine had demanded a jury trial on its counterclaims,

which were based on alleged misconduct that related to DRV's claims of default and resulting right to foreclose. (R-II at 729-732; 765). Thus, Fontaine argued, it had a right to jury trial in the circuit court on its compulsory legal counterclaims and, therefore, its counterclaims had to be tried to a jury before any reference of DRV's foreclosure claim to the master. (R-II at 731).[2]

At the very beginning of the hearing, Judge Lee noted that DRV had moved to refer the case to the master and she had Fontaine's response to that motion. (R-II at 765). The parties then presented their arguments on the receiver issue with no discussion of or argument on the reference issue. (R-II at 766-846). At the very end of the hearing, Judge Lee stated that, as to the reference issue, "let me just *put that aside* for the time being," noting that she knew "what *some* of the issues are relating to the reference." (R-II at 846) (emphasis added). In an obvious reference to Fontaine's response in opposition that it had a right to a jury trial in the circuit court on its compulsory legal counterclaims, Judge Lee continued: "But – and certainly, you know, *the law is – to the extent* that there are *legal claims* that need to be decided *that arise out of the lawsuit*, that those *have to be* taken care of *before* the *equitable* matters are taken care of." (R-II at 846) (emphasis added).

After the hearing, Judge Lee issued an order that appointed a receiver. (R-I at 1-11). Judge Lee summarily addressed the reference issue in the opening paragraph, noting only that the motion

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[2] Importantly, there was no motion to strike Fontaine's jury demand pending at the time the hearing before Judge Lee, and she therefore did not and could not consider any such issue. DRV filed its complaint, motion for receiver, and motion for reference in November 2012. (R-II at 765). Defendant Fontaine Business Park filed its answer and counterclaim (demanding a jury trial), as well as its responses in opposition to the motions for a receiver and a reference, in early December 2012. (*Id.;* R-I at 229). On January 4, 2013, the circuit court issued notice that the motions for a receiver and a reference would be heard on February 1, 2013. (R-II at 726, 733). On January 7, 2013, DRV filed its reply to Fontaine Business Park's answer and counterclaim, denying that it had a right to a jury trial, and thereby effecting a joinder of the jury trial issue between DRV and Fontaine Business Park. (R-I at 312-313, ¶ 2, denying right to jury trial claimed in Answer, R-I at 254, ¶ 113(f)). On January 8, 2013, the remaining Fontaine defendants filed their answer and counterclaim, also demanding a jury trial. (R-I at 271). **After** the February 1, 2013, hearing before Judge Lee, DRV filed its reply to this answer and counterclaim on February 14, 2013, asserting a waiver of any right to a jury trial, thereby effecting a full joinder of the jury trial issue between DRV and all of the Fontaine defendants. (R-I at 325; 337, ¶ 93). **After** Judge Lee's June 4, 2013 order, DRV filed its motion to strike all jury trial demands in August 2013. (R-I at 350). Judge Cooper heard this motion and granted it in January 2014. (R-I at 12-20). Fontaine never argued that Judge Lee's order precluded a reference of the case to the master.

had come before her and that she "*declined to hear* [DRV's] Motion for Order of Reference *pending* the resolution of the *legal* claims asserted in this matter." (*Id.* at 2) (emphasis added).[3]

In short, Judge Lee never ruled upon the reference issue. Rather, she "put that aside" and "declined to hear" it. This was an entirely reasonable approach because, at the time of the hearing before her and at the time of her order, Fontaine maintained that it had a right to a jury trial on its counterclaims and DRV had not yet moved to strike Fontaine's jury trial demand. Under these circumstances, and as Judge Lee rightly observed, "the law is" that, "to the extent" the defendant in an "equitable" action asserts "legal" counterclaims "that arise out of the lawsuit," the legal counterclaims must be tried to a jury "before the equitable matters are taken care of." (R-I at 2 and R-II at 846). See See *Wachovia Bank, N.A. v. Blackburn*, 755 S.E.2d 437, 441 (S.C. 2014) (if case involves factual issues that are common to equitable clams to be tried by the court and legal claims to be tried by a jury, the legal claims must first be tried to a jury, and the jury's findings on the common factual issues are binding upon the court in subsequently deciding the equitable claims). **See also** *Time Warner Cable Co. v. Condo Servs., Inc.*, 672 S.E.2d 816, 819 (S.C. App. 2009) (noting same procedure of jury trial on legal claims *before* bench trial on equitable claims) [cited by Fontaine to Judge Lee in support of its argument that its counterclaims had to be tried to a jury *before* DRV's foreclosure claim could be referred to the master. (R-II at 731)].

After Judge Lee issued her order, DRV moved to strike Fontaine's jury trial demand. (R-I at 350-351). Judge Cooper granted the motion, and his ruling is now the law of this case. Having

[3] Judge Lee did not reserve jurisdiction over the reference issue. (R-I at 1-11, *passim*). At times, Fontaine seems to argue that Judge Lee did so, stating that Judge Lee had taken the issue "under advisement.". (Rhg. Pet. at 2 and 3). Nowhere in her order did Judge Lee take the issue under advisement or otherwise reserve jurisdiction over it. In any event, any such argument is not preserved for appeal, because Fontaine never made it to Judge Cooper (R-II at 754-759) and never raised it to this Court. (App. Br., *passim*). Moreover, it does not involve subject matter jurisdiction and is therefore not exempt from the error preservation rules. *Brown v. Brown*, 709 S.E.2d 679, 682-683 & n.1 (S.C. App. 2011) (argument that prior judge had reserved jurisdiction over issue does not involve subject matter jurisdiction and is not preserved for appeal unless first raised to the trial court).

stricken the jury trial demand, Judge Cooper referred the case to the master as routinely done in foreclosure actions that do not involve a jury trial on any issues.[4]

For Fontaine to prevail on its "judge v. judge" argument, all of the following conditions must be true, because it is the only way to conclude that Judge Lee's Order precluded Judge Cooper from referring the case to the master:

1. Judge Lee's Order was a final and binding ruling that Fontaine's legal claims had to be tried first in the circuit court before the foreclosure could be referred to the master.

2. Judge Lee's Order remained binding on Judge Cooper:

   (a) even though Judge Cooper thereafter struck Fontaine's right to a jury trial on any issue in the case;

   (b) even though Judge Lee was never presented with, and never considered or ruled on, the question of whether Fontaine had any right to a jury trial and, if so, whether Fontaine had waived that right; and

   (c) even though Judge Lee was never presented with, and never considered or ruled on, the question of whether, in the absence of a jury trial right, Fontaine was *nevertheless* improper to refer the case to the master and Fontaine's counterclaims had to first be tried in a circuit court bench trial before the foreclosure action could be referred to the master.

3. And all of this is true, even though Judge Lee's specific ruling was that she had "put that aside" and "declined to hear" the motion for the reference. (R-I at 2; R-II at 846).

In a very real sense, to state Fontaine's argument is to refute it. The "judge v. judge" rule simply does not operate in this broad and sweeping manner. Rather, it is limited to the specific rulings on specific issues, as held by the Supreme Court in *Brandt v. Gooding*, 630 S.E.2d 259 (S.C. 2006).

In *Brandt*, the plaintiff produced a letter in discovery that was favorable to his claims against the defendant. The plaintiff also obtained a favorable expert opinion for use in the lawsuit

[4] Rule 71(a), SCRCP *prescribes* that foreclosure actions "*shall* ordinarily be referred to a master pursuant to Rule 53." (Emphasis added). Rule 53(b), SCRCP provides for the reference of all issues in a foreclosure action unless there is a right to a jury trial on an issue. Here, Fontaine did not have a right to a jury trial on any issue, as found by Judge Cooper and affirmed by this Court. And this Court's affirmance of Judge Cooper is the law of this case, because Fontaine has not challenged it in its petition for rehearing. See n.1 and accompanying text, *supra*.

that was based in part on the letter. The defendant claimed that the letter was fraudulent, requested a hearing to determine the authenticity of the letter, and moved for a citation of contempt if the letter was found to be fraudulent. 630 S.E.2d at 262. Upon hearing the motion, the circuit court dismissed the contempt motion without prejudice as being premature and set forth a procedure for determining the authenticity of the letter. *Id.* at 263. Thereafter, the defendant again moved for contempt and presented expert testimony that the letter was a forgery. *Id.* A second judge heard this motion and, upon finding the letter was a forgery, granted the motion for contempt. *Id.*

On appeal, the plaintiff argued that the first judge's order precluded the second judge from ruling on the second contempt motion under the "judge v. judge" rule. 630 S.E.2d at 262. The Supreme Court rejected this argument, limiting the binding effect of the first judge's order to its specific rulings, finding that the second judge had acted in accordance with first judge's order, and finding that the first judge had decided the issue based on different facts that developed after the ruling by the first judge.

Here, the same analysis yields the same result. Under the "judge v. judge" rule, the first judge's order is limited to the specific issues and specific rulings in the order. To hold otherwise would detrimentally interfere with the efficient handling of cases that is committed to the sound discretion of the circuit court. Moreover, as in *Brandt*, Judge Cooper was presented with a motion that was based on a very different landscape that developed after the first ruling by Judge Lee. In short, Judge Cooper did not violate the "judge v. judge" rule, because the rule is a narrow one that does not apply when the facts or legal issues presented to the second judge are different from those considered and ruled upon by the first judge.

II. Fontaine's argument that Judge Cooper violated the "judge v. judge" rule is not preserved for appeal.

Fontaine did not raise the "judge v. judge" argument to Judge Cooper. (R-II at 754-759, *passim*). Fontaine does not dispute this in its rehearing petition. (Rhg. Pet., *passim*). Thus, this Court correctly held that Fontaine's argument is not preserved for appeal. (Op. at 3, § 2). See *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985) (argument that one judge cannot rule upon an issue already ruled upon by another is not preserved for appeal if not first raised to the trial court); see also *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006) (issue cannot be raised for first time on appeal) and *Harris v. Bennett*, 503 S.E.2d 782, 786 (S.C. App. 1998) (same). To avoid its failure to preserve this argument, which has no merit in any event, Fontaine argues that Judge Lee's Order deprived Judge Cooper of subject matter jurisdiction. This argument has no merit.

III. The subject matter jurisdiction exception to the error preservation rules does not apply to Fontaine's argument that Judge Cooper violated the "judge v. judge" rule.

The argument that a trial court lacked subject matter jurisdiction to issue the appealed order is an exception to the error preservation rules and can be raised for the first time on appeal. Fontaine argues that Judge Lee's order deprived Judge Cooper of subject matter jurisdiction to refer the case to the master. Fontaine's argument has no merit.

Subject matter jurisdiction is the *court's* "power to hear and determine cases of the *general class* to which the proceedings in question belong." *Dove v. Gold Kist*, 442 S.E.2d 598, 600 (S.C. 1994) (emphasis added). Manifestly, foreclosure actions are within the "general class" of cases that the circuit court has "power to hear and determine." Concomitantly, the circuit court also manifestly has subject matter jurisdiction to refer a foreclosure action to a master. See Rule 71(a), SCRCP (foreclosure actions "shall be tried by the [circuit] court, and shall ordinarily be referred to a master") and Rule 53(b), SCRCP (all causes of action in a foreclosure case may be referred to

the master unless there is a right to a jury trial on some cause of action). Thus, Judge Cooper had subject matter jurisdiction over these matters when sitting as the circuit court.[5]

The circuit court is the "general trial court with original jurisdiction in civil and criminal cases" unless the General Assembly has given exclusive jurisdiction to some inferior court. *Jeter v. South Carolina Dept. of Transp.*, 633 S.E.2d 143, 146 (S.C. 2006), *quoting* S.C. Const. Art. V, § 11. "There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction 'throughout the state.'" *Id.* (emphasis added), *quoting Dove*, 442 S.E.2d at 600. Here, both judges were sitting as the circuit court and therefore had the same subject matter jurisdiction. Thus, Judge Cooper had subject matter jurisdiction over the reference issue when sitting as the circuit court.

Using the definition of subject matter jurisdiction found in *Dove* and its progeny, the courts have developed a distinction between the existence of subject matter jurisdiction and the "authority" to exercise that jurisdiction.[6] When a court has subject matter jurisdiction but does not have "authority" to exercise that jurisdiction, the aggrieved party must raise the "lack of authority"

[5] As this Court knows, prior to the Supreme Court's decision in *Dove*, South Carolina's jurisprudence on "subject matter jurisdiction" was an eclectic collection of case-specific rulings with no unifying definition of subject matter jurisdiction. The *Dove* definition has become the "black letter law" in South Carolina. It, or a case relying on it, is cited in virtually every post-*Dove* case on subject matter jurisdiction. The *Dove* definition has been used to overrule numerous cases on whether a court lacked subject matter jurisdiction. *E.g., Farmer v. Monsanto Corp.*, 579 S.E.2d 325, 327-328 (S.C. 2003) (citing *Dove* in overruling prior cases that the door-closing statute deprived a court of subject matter jurisdiction); *Bardoon Props., N.V. v. Eidolon Corp.*, 485 S.E.2d 371, 372-374 (S.C. 1997) (citing *Dove* in overruling prior cases that a party's lack of standing deprived a court of subject matter jurisdiction); *Washington v. Whitaker*, 451 S.E.2d 894, 898 (S.C. 1994) (citing *Dove* in overruling cases hold that "sovereign immunity" deprives a court of subject matter jurisdiction); *Dove*, 442 S.E.2d at 600 (overruling prior cases that circuit court had no subject matter jurisdiction over workers comp appeal when appeal was filed in wrong county/venue). See also *McCullar v. Estate of Campbell*, 672 S.E.2d 784, 784 (S.C. 2009) (noting that whether a party has "capacity to sue" or is a "real party in interest" are not questions of subject matter jurisdiction); *McLendon v. South Carolina Dept. Hwys. and Pub. Transp.*, 443 S.E.2d 539, 540 (S.C. 1994) (citing *Dove* and holding that a statute of limitations does not deprive a court of subject matter jurisdiction); and *T. v. T. (In re S.N.T.)*, 662 S.E.2d 413, 416 (S.C. App. 2008) (noting that preclusive concepts like res judicata and collateral estoppel do not deprive a court of subject matter jurisdiction).

[6] *Beach First Nat'l Bank v. Gurnham*, 754 S.E.2d 875, 882(S.C. 2014) (using "power" to describe "authority" as used in other cases); *Theisen v. Theisen*, 716 S.E.2d 271, 274 (S.C. 2011); *Majors v. South Carolina Secs. Comm'n*, 644 S.E.2d 710, 713 (S.C. 2007); *Coon v. Coon*, 614 S.E.2d 616, 617 (S.C. 2005); *Fryer v. South Carolina Law Enforcement Div.*, 631 S.E.2d 918, 920 (S.C. App. 2006); *Hopkins v. Harrell*, 574 S.E.2d 747, 749-750 (S.C. App. 2002); see also *South Carolina Div. of Motor Vehicles v. Holtzclaw*, 675 S.E.2d 756, 758-760 (S.C. App. 2009) (noting distinction between having subject matter jurisdiction and mistaken or improper exercise of that jurisdiction).

issue to the trial court or the issue is not preserved for appeal.[7] Here, since Judge Lee and Judge Cooper were both acting as the circuit court and therefore had the same subject matter jurisdiction, it necessarily follows that the "judge v. judge" rule goes to the "authority" of a second circuit court judge to exercise subject matter jurisdiction, not the existence of it. Thus, any "judge v. judge" argument must first be raised to the trial court (the second judge), or it is not preserved for appeal. Fontaine did not do so and, therefore, its argument is not preserved for appeal.

In *Brandt, supra* (the forged letter case), the Supreme Court applied the "authority to exercise" distinction to the "judge v judge" rule. There, the plaintiff argued that the second judge did not have subject matter jurisdiction to cite him for contempt. 630 S.E.2d at 262. The Supreme Court rejected this argument under the following analysis:

(1) South Carolina's jurisprudence on subject matter jurisdiction under the *Dove* definition requires only that the case be of the class that the court has the power to hear;

(2) the circuit court is the general trial court with original jurisdiction in civil cases as set forth in the South Carolina Constitution, *i.e.*, the issues before the second judge were in a class of case over which the Constitution granted the circuit court jurisdiction; and

(3) therefore, the question is limited to whether the circuit court (second judge) "had the *authority* to rule on the [contempt] issue."

Id. at 262 n.2. (emphasis added). Although *Brandt* did not involve an error preservation issue, the Supreme Court's analysis demonstrates that the "judge v. judge" rule is a question of the authority to exercise subject matter jurisdiction, not the existence of it. Therefore, under the post-*Dove* cases on error preservation, "judge v. judge" arguments cannot be raised for the first time on appeal.[8]

[7] *E.g., Gainey v. Gainey*, 675 S.E.2d 792, 797 (S.C. App. 2009); *Fryer v. South Carolina Law Enforcement Div.*, 631 S.E.2d 918, 920 (S.C. App. 2006); *Hopkins v. Harrell*, 574 S.E.2d 747, 749-750 (S.C. App. 2002). *Accord, Johnson v. Sam English Grading, Co.*, 772 S.E.2d 544, 556-557 (S.C. 2015).

[8] In *Brandt*, the first judge dismissed the motion without prejudice. Here, the first judge (Judge Lee) declined to hear the motion under an explanation that was based on an assumption that later proved to be wrong. The distinction between dismissing a motion without prejudice and declining to hear a motion is irrelevant to the question of whether a second judge would thereafter have subject matter jurisdiction. Depending on the specifics of the particular order, the first judge's order may impact the authority of a second judge to exercise the circuit court's subject matter jurisdiction, but it does not and cannot alter or limit that subject matter jurisdiction.

Finally, and perhaps most importantly, the "authority" distinction is mandated by axiomatic principles of constitutional law. The Constitution grants the circuit court plenary, state-wide subject matter jurisdiction in all civil cases unless the General Assembly grants exclusive jurisdiction to an inferior court. S.C. Const. Art. V, § 11. The "judge v. judge" rule is a court made rule that cannot deprive the circuit court of subject matter jurisdiction granted by the constitution, because the constitutional power to alter the circuit court's subject matter jurisdiction is granted to the General Assembly. It is axiomatic and constitutionally prescribed that the courts cannot exercise a power granted by the constitution to the legislature. S.C. Const. Art. I, § 8. Thus, the "judge v. judge" rule is not and cannot be a limitation on the subject matter jurisdiction of a circuit court judge. Accordingly, an alleged violation of the "judge v. judge" rule cannot trigger the subject matter jurisdiction exception to the error preservation rules.

IV. Fontaine has failed to carry its appellate burden of demonstrating any prejudice resulting from any presumed violation of the "judge v. judge" rule.

It is axiomatic that an appellant must show reversible error, which requires a showing of both error and resulting prejudice.[9] As noted earlier, it is now the law of this case that Fontaine is not entitled to a jury trial on its counterclaims. See n.1 and accompanying text, *supra*. Thus, all issues are now to be tried by the court without a jury in a single proceeding. Accordingly, to show any reversible error in Judge Cooper's order of reference, Fontaine must demonstrate some prejudice resulting from the case being tried by a master rather than a circuit court judge.

Fontaine has not made any argument that trying the case before a master rather than the circuit court will cause it any prejudice. Moreover, there can be no prejudice because, upon a reference, the master "shall exercise all power and authority which a circuit court judge sitting

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[9] *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 142-143 (S.C. 2010); *Fields v. J. Haynes Waters Bldrs., Inc.*, 658 S.E.2d 80, 86-87 (S.C. 2007); *Clark v. Cantrell*, 529 S.E.2d 528, 539 (S.C. 2000).

without a jury would have in a similar matter." Rule 53(c), SCRCP; see also Rule 71(a), SCRCP (foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master") and Rule 53(b), SCRCP (all causes of action in a foreclosure case may be referred to the master unless there is a right to a jury trial on some cause of action).

Finally, Fontaine has not shown that, in the absence of the right to a jury trial, it remains entitled to a circuit court bench trial on its counterclaims before any reference of the foreclosure action to the master. Moreover, Fontaine has not made any argument regarding the requirements for a separate trial of issues under Rule 42(b), SCRCP, *e.g.*, convenience, avoidance of prejudice, expedition, or economy. Again, therefore, Fontaine has failed to show reversible error.

V. Fontaine's "due process" argument has no merit, is not preserved for appeal, is not saved by the subject matter jurisdiction exception to the error preservation rules, and fails to demonstrate any resulting prejudice.

Fontaine argues that Judge Cooper's order of reference deprived it of due process, because it had no notice that Judge Cooper would be presented with or consider the reference issue. (Rhg. Pet. at 3, 4). This argument has no merit and provides no basis for reversing the appealed order.

DRV's motion to strike Fontaine's jury trial demand included a request "to maintain and/or return the case to the non-jury docket." (R-I at 350). Thus, Fontaine knew or should have known that, if the motion to strike was granted, the foreclosure case would be on the non-jury docket and, as a matter of routine practice in South Carolina, would then be referred to the master. [10] Fontaine clearly understood that the reference question was at issue, because in its memorandum in opposition to the motion, Fontaine argued that it had a right to a jury trial on its counterclaims and,

[10] Rule 71(a), SCRCP *prescribes* that foreclosure actions "*shall* ordinarily be referred to a master pursuant to Rule 53." (Emphasis added). Rule 53(b), SCRCP provides for the reference of all issues in a foreclosure action unless there is a right to a jury trial on an issue. Here, Fontaine did not have a right to a jury trial on any issue, as found by Judge Cooper and affirmed by this Court. And this Court's affirmance of Judge Cooper is the law of this case, because Fontaine has not challenged it in its petition for rehearing. See n.1 and accompanying text, *supra*.

therefore, its "counterclaims should be tried to a jury *before DRV's foreclosure action is referred to the Master-in-Equity*." (R-II at 567) (emphasis added).

Moreover, Judge Cooper asked whether there had been a reference in this case. (R-II at 754). DRV responded that it had moved for a reference but there had been no ruling on the motion, that Judge Lee had earlier deferred any decision on it, and that the motion remained pending. (*Id.*). DRV continued that, if Judge Cooper granted the motion to strike Fontaine's jury trial demand, then the case should be referred to the master. (*Id.* at 755). Thus, Fontaine again had notice and actual knowledge that the reference issue was being presented to Judge Cooper.

At the hearing, Fontaine did not object to Judge Cooper considering the reference issue or DRV's request for a reference upon any basis, including any argument that Fontaine lacked notice of the issue. Thus, Fontaine's appellate argument is not preserved for appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006) (issue cannot be raised for first time on appeal). This error preservation rule applies even if the argument involves a constitutional issue, including a due process claim. *Herron v. Century BMW*, 719 S.E.2d 640, 642 (S.C. 2011); *Caldwell v. Wiquist*, 714 S.E.2d 583, 589 (S.C. App. 2013). Moreover, Fontaine's "due process" argument is also not properly before this Court, because Fontaine never made this argument in its Brief of Appellant. (App. Br., *passim*). Fontaine made this argument in its Reply Brief (Reply Br. at 11), but it is axiomatic that an argument cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011). Finally, the subject matter jurisdiction exception to these error preservation rules does not apply here, because an alleged lack of notice and due process does not deprive a trial court of subject matter jurisdiction. *South Carolina Dep't of Soc. Servs. v. Mack*, 575 S.E.2d 846, 849 (S.C. App. 2002), *accord Mims v. Babcock Ctr., Inc.*, 732 S.E.2d 395, 398 (S.C. 2012) (improper service does not deprive the trial court of subject matter jurisdiction).

In any event, Fontaine has not shown any reversible error, *i.e.*, any prejudice from the alleged lack of notice. Fontaine has never demonstrated how, if it had notice (which it did), it would have made any meritorious argument to Judge Cooper that referring the case to the master, rather than having a bench trial in the circuit court, would result in any prejudice. Indeed, Fontaine has never made any such showing to this Court on appeal. Moreover, as shown earlier, there simply is not and cannot be any prejudice to Fontaine resulting from trying this non-jury case before the master rather than the circuit court. Accordingly, any presumed "due process" error has not prejudiced Fontaine and, therefore, there is no reversible error.

VI. Fontaine's argument for a "void order" exception to error preservation has no merit.

Fontaine fabricates the following new, overbroad, and meritless exception to the error preservation rules: "If an order is void, it can be attacked at any time, even for the first time on appeal." (Rhg. Pet. at 4). Fontaine's purpose is create an exception for its failure to raise its "due process" argument to Judge Cooper or properly argue it to this Court. Fontaine fabricates this new rule under the following "logic," which cleverly begins with a correct statement of law:

1. Orders issued without subject matter jurisdiction are void and may be attacked for the first time on appeal. (Rhg. Pet. at 2-4, 5).

2. Therefore, void orders can be attacked for the first time on appeal.

3. Orders issued without due process, like orders issued without subject matter jurisdiction, are void under Rule 60(b)(4), SCRCP. (Rhg. Pet. at 4, *citing Linda Mc Co. v. Shore*, 703 S.E.2d 499 (S.C. 2010).

4. Therefore, orders issued without due process are void and may be attacked for the first time on appeals. (*Id., citing Thornton v. Alford*, 260 S.E.2d 179 (S.C. 1979); *Turner v. Malone*, 24 S.C. 398 (S.C. 1886); *Webster v. Clanton*, 192 S.E.2d 214 (S.C. 1972); and *South Carolina Dept. of Health and Envtl. Control v. Columbia Organic Chem. Co.* (*ex parte Reichlyn*), 427 S.E.2d 661 (S.C. 1993).

Points 1 and 3 are correct statements of law. Points 2 and 4 are incorrect statements of law. Fontaine uses them to fabricate an error preservation exception that is separate from the subject

matter jurisdiction exception. Disassembling Fontaine's fabrication merely requires a reading of the South Carolina cases.

In *Linda Mc Co. v. Shore*, 703 S.E.2d 499, 552 (S.C. 2010), the court addressed the requirements for motions to set aside "void" judgments under Rule 60(b)(4), SCRCP. It had nothing to do with exceptions to South Carolina's error preservation rules. Notably, the Supreme Court also held that a party's failure to submit an affidavit allegedly required by a statute in seeking an order had no bearing on the trial court's subject matter jurisdiction to issue the order. *Id.* at 503-504. Thus, *Linda Mc Co* further demonstrates that Fontaine's arguments involve the authority to exercise subject matter jurisdiction, not the existence of that jurisdiction. Finally, it is axiomatic that a Rule 60 motion cannot be used to raise issues that were not first raised to the trial court in the underlying proceedings, *i.e.*, a Rule 60 motion is not a substitute for compliance with the error preservation rules. *Gainey v. Gainey*, 675 S.E.2d 792, 797 (S.C. App. 2009), *accord Wachovia Bank of S.C., N.A. v. Player*, 535 S.E.2d 128, 130 (S.C. 2000). In short, nothing in the jurisprudence under Rule 60 creates any exception to the error preservation rules, and Fontaine's "void order" attempt to do so is a meritless fabrication.

The remaining South Carolina cases are cited as direct authority for Fontaine's fabricated rule. All of these cases pre-date the *Dove* definition of subject matter jurisdiction, and none of them support Fontaine's assertion. In *Thornton v. Alford*, 260 S.E.2d 179 (S.C. 1979), *Turner v. Malone*, 24 S.C. 398 (S.C. 1886), and *Webster v. Clanton*, 192 S.E.2d 214 (S.C. 1972), the Supreme Court ruled that an order issued without personal jurisdiction due to improper service was void as to the rights (if any) of the person not properly served. Here, there is no dispute that the trial court had personal jurisdiction over Fontaine, so these cases are irrelevant here. Moreover,

in all three cases, the issue was presented to and ruled upon by the trial court; and the Supreme Court did not discuss any error preservation rules or any exceptions thereto.[11]

In *South Carolina Dept. of Health and Envtl. Control v. Columbia Organic Chem. Co. (ex parte Reichlyn)*, 427 S.E.2d 661 (S.C. 1993), the Supreme Court held that an order issued after the filing of a bankruptcy petition was void for lack of subject matter jurisdiction. This ouster of the circuit court's otherwise existing subject matter jurisdiction resulted from the federal bankruptcy statute, the Supremacy Clause of the Constitution of the United States, and federal pre-emption law. There are no such "ouster" issues here. Thus, *Reichlyn* is irrelevant to the question at issue here, to-wit: whether the trial court had subject matter jurisdiction under South Carolina law.

Fontaine also cites two foreign cases – one from Iowa and one from Virginia. The Iowa case admittedly says a "void judgment can be attacked at any time," but the Iowa court specifically noted that the issue had been raised to and ruled upon by the trial court, thereby satisfying Iowa's error preservation rules. *Li v. Rizzio*, 801 N.W. 2d 351, 358 (Iowa Ct. App. 2011). Thus, this foreign case offers nothing to support Fontaine's arguments here, and any presumed support from Iowa law does not and cannot change South Carolina law.

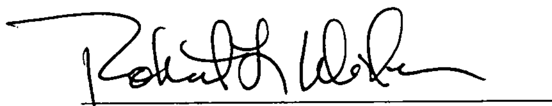
The Virginia case actually supports this Court's error preservation ruling. Virginia, like South Carolina, recognizes a distinction between the existence of subject matter jurisdiction and the authority to exercise that jurisdiction, and again like South Carolina, Virginia applies its error preservation rules to issues involving the authority to exercise subject matter jurisdiction. *Nelson v. Warden of the Keen Mt. Corr. Ctr.*, 552 S.E.2d 73, 74-78 Va. 2001), *accord Mohammud v. Commonwealth*, 691 S.E.2d 513, 514-516 (Va. App. 2010), *citing Nelson, supra.*

[11] These cases are distinguishable on numerous other grounds, but DRV will not burden this Court with a full analysis of what appears readily upon even a casual reading of those cases. Notably, all three cases involved a claimed lack of personal jurisdiction due to improper service of the pleadings. Under South Carolina's current law, such defects do not deprive the court of subject matter jurisdiction. *Mims v. Babcock Ctr., Inc.*, 732 S.E.2d 395, 398 (S.C. 2012).

CONCLUSION

Courts have subject matter jurisdiction, not *judges*. The Constitution grants plenary subject matter jurisdiction to the circuit court in all civil cases on a state-wide basis, unless the General Assembly grants exclusive jurisdiction to an inferior court. Every claim and issue in the present case manifestly falls within this plenary grant to the circuit court. Judge Lee and Judge Cooper were both acting as the circuit court in this case and therefore had identical subject matter jurisdiction. The "judge v. judge" rule is a court made rule that does not and cannot impinge upon the constitutional grant of plenary subject matter jurisdiction to the circuit court. Rather, it is a rule that limits the authority of a judge to exercise the circuit court's subject matter jurisdiction if, and only if, another circuit judge has already ruled specifically and differently on the identical issue. Thus, any party challenging the authority of a judge under the "judge v. judge" rule must first raise that issue to the trial court (second judge) or the issue is not preserved for appeal. Fontaine did not raise this issue to Judge Cooper and, therefore, this Court correctly held that this issue was not preserved for appeal. For this reason, and for the other reasons set forth above, it is respectfully submitted that this Court should deny Fontaine's Petition for Rehearing.

Respectfully Submitted,



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November 20, 2015
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2012-000377
Case No. 2012-CP-40-7752

DRV Fontaine, LLC,..Respondent,

v.

Fontaine Business Park, LLC, Fontaine Business Park 2, LLC,
Fontaine Business Park 3, LLC, Fontaine Business Park 4, LLC,
Fontaine Business Park 5, LLC, Fontaine Business Park 6, LLC,
Fontaine Business Park 7, LLC, Fontaine Business Park 8, LLC,
Fontaine Business Park 9, LLC, Fontaine Business Park 10, LLC,
Fontaine Business Park 11, LLC, Fontaine Business Park 12, LLC,
Fontaine Business Park 13, LLC, Fontaine Business Park 14, LLC,
Fontaine Business Park 15, LLC, Fontaine Business Park 16, LLC,
Fontaine Business Park 17, LLC, Fontaine Business Park 18, LLC,
Fontaine Business Park 19, LLC, Fontaine Business Park 20, LLC,
Fontaine Business Park 21, LLC, Fontaine Business Park 22, LLC,
Fontaine Business Park 23, LLC, Fontaine Business Park 24, LLC,
Fontaine Business Park 25, LLC, Fontaine Business Park 26, LLC,
Fontaine Business Park 27, LLC, Fontaine Business Park 28, LLC,
Fontaine Business Park 29, LLC, Fontaine Business Park 30, LLC,
and Fontaine Business Park 31, LLC,..Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the *Respondent's Return to Appellant's Petition for Rehearing* this 30th day of November, 2015, via E-mail and by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to the parties listed below at the following addresses:

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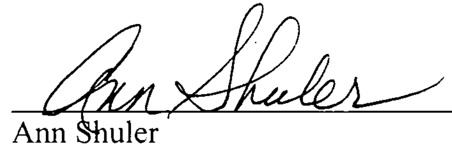

Ann Shuler