

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

70471

APPEAL FROM YORK COUNTY  
Master in Equity

The Honorable S. Jackson Kimball, III., Master in Equity

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NOV 22 2013

**SC Court of Appeals**

Lower Court Case No. 2013-CP-46-0015  
Appellate Court Case No. 2013\_\_\_\_\_

York County and Cultural Heritage Commission of York  
County,..... Respondents,

v.

Culture and Heritage Foundation, Inc.; Sustainable Development Group, Inc.; SDG  
Properties, LLC; and CHF Property Management, LLC..... Appellants,

**MOTION TO DISMISS AND IMMEDIATELY REMIT APPEAL**

This is an appeal from the trial court’s Order denying the Appellants’ motion to dismiss, which the trial court converted to a motion for summary judgment. In addition to denying summary judgment, the trial court ordered discovery. It is black letter law that such an order is not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) (“This Court has repeatedly held that the denial of summary judgment is not directly appealable.”);<sup>1</sup> *Ex parte Whetstone*, 289 S.C. 580, 580, 347

<sup>1</sup> Likewise, denials of motions to dismiss based on Rule 12(b)(6) and 12(b)(7) are interlocutory and do not involve the merits or affect a substantial right. Accordingly, they are not subject to immediate appeal. See S.C. Code Ann. § 14-3-330 (limiting the appellate courts’ ability to hear appeals from interlocutory orders to those that involve the merits or affect a substantial right); see also *Huntley v. Young*, 319 S.C. 559, 560, 462

S.E.2d 881, 881 (1986) (“An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 (1976).”).

In their cover letter to the Notice of Appeal, the Appellants also characterize the Order as one that orders an accounting; however, the Master-in-Equity specifically noted that his order requiring the Appellants to submit to discovery was not an order for an accounting, explaining: “Plaintiffs must prove both a right to receive payment and the amount to which they are entitled **before** they can obtain an order for an ‘accounting,’ establishing the form and amount of relief.” (emphasis added) (*See* p. 5 of October 14, 2013 Order of S. Jackson Kimball). The Master did not order an accounting.<sup>2</sup>

The Respondents respectfully ask this Court to dismiss the appeal and to fashion its Order of Dismissal in such a way that discovery is no longer delayed in this case, either by issuing an immediate remittitur or by including a provision that allows discovery to proceed while jurisdiction remains with the Court of Appeals.

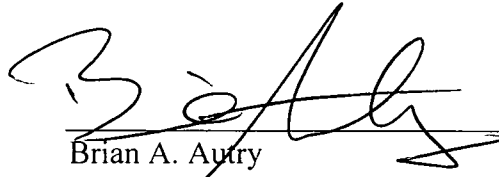
*[Signature block on following page]*

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S.E.2d 860, 861 (1995) (“Since the order denying the Rule 12(b)(6) motion does not finally decide any issue, it is not directly appealable.”); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.”).

<sup>2</sup> Notably, when a trial court refers a case to a master for an accounting, such an order is not directly appealable; thus, if the Master ordered an accounting in this case, which he did not, the Order would still not be appealable. *Devereux v. McCrady*, 49 S.C. 423, 27 S.E. 467 (1897).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Autry", is written over a horizontal line.

Brian A. Autry

Tanya A. Gee

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*Attorneys for Respondents*

November 22, 2013

Columbia, South Carolina

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In The Court of Appeals

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APPEAL FROM YORK COUNTY  
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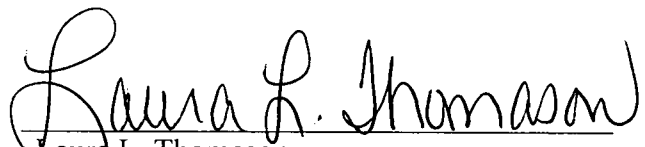
**PROOF OF SERVICE**

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I, Laura L. Thomason, hereby certify that a copy of Respondents' Motion to Dismiss and  
Immediately Remit Appeal has been served upon counsel of record via electronic mail and by  
depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the  
22<sup>nd</sup> day of November, 2013, to the address shown below:

James W. Sheedy  
Susan E. Driscoll  
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11520 N. Community House Road  
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Laura L. Thomason

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Brian A. Autry  
Special Counsel

November 22, 2013

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

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**SC Court of Appeals**

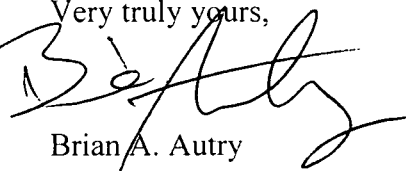
**Re: York County, et. al v. Culture and Heritage Foundation, Inc. et. al  
Lower Ct. Case No. 2013-CP-46-0015**

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the *Respondent's Motion to Dismiss and Immediately Remit Appeal* along with a \$25 filing fee. By copy of this letter and by Proof of Service, we are serving all counsel of record by both first class mail and electronic mail. We have included an extra copy of these filings and ask that you please clock in this extra copy and return it to our courier.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Brian A. Autry

BAA/lt  
Enclosures

cc: James W. Sheedy (via e-mail and U.S. Mail)  
Susan E. Driscoll (via e-mail and U.S. Mail)

- Charleston
- Charlotte
- Columbia**
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh