THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Master in Equity

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

Lower Court Case No. 2013-CP-46-0015
Appellate Court Case No. 2013-002377

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,

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REPLY TO APPELLANT'S MEMORANDUM ON APPEALABILITY

Nearly simultaneously, this Court requested a memorandum of appealability from the Appellants and the Respondents filed a motion to dismiss Appellants' appeal. The Appellants have since filed a memorandum, arguing: (1) that the denial of a motion to dismiss based on Rule 12(b)(7) [failure to join indispensable parties] is an immediately appealable interlocutory order and (2) that the trial court's discovery order is a "final order on the accounting cause of action." These arguments are incorrect.

As the Supreme Court held in *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000), "this Court does not allow immediate appellate review of the *denial* of any Rule 12(b), SCRCP motion." (italicized emphasis in original; underlined emphasis added). This is so because piecemeal litigation is disfavored. *Id.* at

94, 29 S.E.2d at 13 ("Requiring a defendant to wait until after trial to appeal the issue [raised in a 12(b) motion to dismiss] is the most appropriate course to take where any error in that decision will not prejudice the defendant any more than other interlocutory orders which, if in error, would require a new trial.").

Appellants argue that a motion to dismiss based on Rule 12(b)(7) must be immediately appealable because an immediate appeal of the issue was entertained in *Stewart v. State Crop Pest Commission et al.*, 207 S.C. 133, 414 S.E.2d 121 (1992), a case that pre-dates *Breland.* However, the issue of appealability was not raised in *Stewart*, and therefore, that case has no bearing on the appealability of the orders in this case. "The fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised." *Breland*, 339 S.C. at 95, 529 S.E.2d at 14; *see also Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995); *State v. Lockhart,* 275 S.C. 160, 267 S.E.2d 720 (1980); *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 144 S.E.2d 813 (1965).

Next, Appellants argue that the trial court's discovery order is actually a final order of an accounting. This same argument was made below, and the trial court specifically explained that an accounting had not been ordered:

> Defendants argue that by virtue of the discovery process, Plaintiffs are gaining an accounting without first proving their entitlement to such relief. However, the two are unrelated. Discovery is not the relief sought, and does not establish any obligation on the part of Defendants for an "accounting." Discovery serves only as a mechanism to establish the right to relief, and the amount thereof. 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. To prove both, they are entitled to discovery within the scope permitted by the applicable rules.

(*See* p. 5 of October 14, 2013 Order of S. Jackson Kimball).

The trial court ordered discovery, not an accounting.[1] Orders that compel a party to submit to discovery are interlocutory and not directly appealable. *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 433, 205 S.E.2d 184, 185 (1974).

For the reasons stated above as well as those set forth in the Respondents' pending motion to dismiss, 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.

Respectfully submitted,

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Attorneys for Respondents

December 11, 2013
Columbia, South Carolina

[1] 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).

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

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PROOF OF SERVICE

I, Laura L. Thomason, hereby certify that a copy of Respondents' Reply to Appellant's Memorandum on Appealability 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 11th day of December, 2013, to the address shown below:

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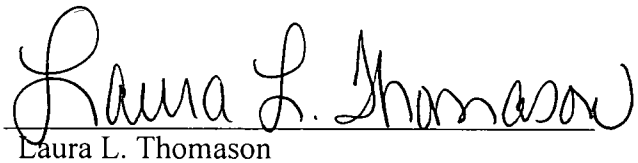

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Laura L. Thomason
Legal Practice Assistant

December 11, 2013

VIA HAND DELIVERY

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

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 please find the original and eight (8) copies of the Respondent's Reply to Appellant's Memorandum on Appealability to be clocked and filed. 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 extra copies of this filing and ask that you please clock it in and return it to our courier.

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

Very truly yours,

Laura Thomason

Laura L. Thomason
Legal Assistant to Brian A. Autry

/llt
Enclosures

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