STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	C/A NO.: 2011-CP-40-6705
Frank J. Cumberland, Jr., et al. Plaintiff(s), v. City of Columbia, Defendant(s).	**ORDER GRANTING DEFENDANT'S MOTION TO ALTER OR AMEND, AND GRANTING DEFENDANT'S MOTION TO STRIKE**

This matter initially came before the Court for a hearing on August 4, 2016, on Defendant's Motion to Strike. At the conclusion of the hearing, this Court requested proposed orders from the parties. This Court entered an Order on August 31, 2016, denying Defendant's Motion to Strike. Thereafter, Defendant timely filed and served a Rule 59(e), SCRCP, motion to alter or amend the August 31, 2016, Order.

In Azar v. City of Columbia, the Supreme Court affirmed the trial court's dismissal of Plaintiffs Azar and Letts for lack of standing, and expressly directed that Plaintiff Cumberland "shall be the sole plaintiff on remand." Azar, 414 S.C. 307, 317 n. 10, 778 S.E.2d 315, 320 (2015). The Supreme Court also affirmed the trial court's denial of class certification pursuant to Rule 220(b)(1). The Plaintiff subsequently moved to file a Third Amended Complaint, which was granted by this Court. The Third Amended Complaint, however, continued to name Mr. Azar and Mr. Letts as Plaintiffs, and continued to assert a purported class action, in clear contravention of the Supreme Court's order. Consequently, Defendant moved to strike all references to Mr. Azar and Mr. Letts, and all references to a class, a class action or class certification. In addition, Defendant argued that, without a class certification, the remedy of a common fund

requested within the pleadings should also be stricken as immaterial; or in the alternative, that reference to a common fund should be stricken as immaterial because the Plaintiffs' own description of what they call a common fund does not meet the common law definition of a common fund.

This Court entered an order denying Defendant's Motion to Strike. The order accepted the Plaintiffs' voluntary agreement to delete all references to Mr. Azar and Mr. Letts, as well as allegations regarding a class action. In deciding the issue of whether the common fund remedy should be stricken, this Court agreed with the Plaintiffs that the Plaintiffs' requested common fund could not be stricken because Judge Kinard's order denying class certification is the law of this case, and the law of the case is that Judge Kinard created a common fund. Further, denial of Defendant's Motion to Strike was appropriate because Defendant's arguments moved beyond the limited test applicable to a motion to strike and in any event, a remedy of a common fund is available even without a certified class of plaintiffs.

Defendant moved to alter or amend this Court's Order denying its Motion to Strike. Upon careful review of Defendant's Motion, for the reasons stated herein, this Court now grants Defendant's Motion to Alter or Amend. This Court hereby withdraws its previous Order Denying Defendant's Motion to Strike entered on August 31, 2016, and substitutes this Order granting Defendant's Motion to Strike.

LAW/ANALYSIS

This Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. "A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to

dismiss under Rule 12(b)(6), SCRCP." Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009). The matter of striking from a pleading is largely within the discretion of the court and the grant of a motion to strike will not be reversed except for an abuse of discretion or an error of law. Id.

1. **Motion to Strike References to Messrs. Azar and Letts, and to Class Representation.**

The Plaintiffs' continued reference to Messrs. Letts and Azar as Plaintiffs in this case, and reference to class representation, is immaterial in light of the Supreme Court's order clearly dismissing Messrs. Letts and Azar, and denying class certification. A decision by an appellate court is binding as the law of the case. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). An appellate court's determination of an issue is the law of the case on remand to the trial court. Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011).

Plaintiffs Azar and Letts shall be stricken from the caption of this action, and Paragraphs 1 and 3 shall be stricken from the Third Amended Complaint. Further, the Clerk of Court is directed to remove Plaintiffs Azar and Letts from the public index system concerning this matter. This Court also strikes from the caption the following statement: "*Class Action Pursuant to SCRCP 23,*" and the caption's description of the Plaintiffs as class representatives. This Court further strikes from the Third Amended Complaint the following paragraphs in full: 8, 10, and 38. Lastly, this Court strikes from the pleadings any allegations in the following paragraphs concerning class action status or relief, as shown below:

46. The Plaintiffs, ~~individually and on behalf of the class,~~ are informed . . .

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49. That the Plaintiffs are informed and believe under the statutes and case law of the State of South Carolina that Plaintiffs, ~~both individually and as class representatives,~~ had an agreement . . .

50. The Plaintiffs, ~~individually and on behalf of the class,~~ are further informed . . .

52. That Plaintiffs asks [sic] for a judgment ~~individually and as a class~~ against the Defendant . . .

55. That the Plaintiffs, ~~individually as a class representatives,~~ requests [sic] that this Court . . .

59. That Plaintiffs, ~~individually and as class representatives,~~ are informed . . .

60. That Plaintiffs ~~individually and on behalf of a class~~ request a common fund . . .

62. The Plaintiffs ~~individually and as class representative of a class of individuals who~~ paid fee . . .

65. That as an unfair . . . returned to the Plaintiff ~~individually and as class representative for the class of affected taxpayers.~~

69. That Plaintiffs ~~individually and on behalf of the class~~ requests the Court issue its order . . .

70. That Plaintiffs requests ~~judgment for the class and for~~ a common fund . . . .

The Court also strikes the following allegations from the Prayer of the Third Amended Complaint:

A. ~~That this Court certify a class under SCRCP 23.~~

B. On the First Cause of Action ~~individually and as a class~~ for preliminary and permanent injunction . . . .

C. On the Second Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

D. On the Third Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

E. On the Fourth Cause of Action ~~individually and on behalf of a class~~ for refund of all fees . . . .

G. [The Court orders that this entire paragraph be stricken.]

2. Motion to Strike Reference to a Common Fund

The more difficult issue is the Defendant's argument that all references within Plaintiffs' Third Amended Complaint to a common fund must be stricken. The Plaintiffs' primary rebuttal is that Judge Kinard's order denying class certification envisioned a common fund and in fact required the creation of a common fund in the event the Plaintiffs succeed on the merits of this case. Plaintiffs assert that their reading of Judge Kinard's order constitutes the law of the case, thereby preventing the Defendant from arguing at any point now or in the future whether a common fund is a proper or appropriate remedy should Plaintiffs prevail at trial. Keeping in mind the general rule that denial of a motion to strike "is not conclusive upon the trial of the case on the merits," Tate v. Oxner, 236 S.C. 313, 317, 114 S.E.2d 225, 225 (1960), it is incumbent upon this Court, as a matter of fairness, to carefully evaluate the law of the case doctrine as applied to Judge Kinard's order(s) and the Supreme Court's order before foreclosing an opportunity for the Defendant to argue in the future that the Plaintiffs have failed to

meet the elements of a common fund, or even foreclosing this Court's discretion in deciding whether a common fund is fair and appropriate in the event Plaintiffs succeed on the merits. After careful consideration, this Court, for the following reasons, strikes Plaintiffs' reference to a common fund remedy as immaterial.

First, Plaintiffs impermissibly pick a particular ground for denial of class certification found within Judge Kinard's orders as the law of the case, while ignoring other grounds raised, and assume, without any basis, that the Supreme Court affirmed that particular ground.

Although Plaintiffs posit only one basis for Judge Kinard's denial of class certification, Judge Kinard's initial order (filed June 26, 2012) denied class certification for two reasons. First, Judge Kinard relied upon Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684 (6th Cir. 1976) and United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), to conclude that there was no need for the complexities and extra costs associated with class actions. Secondly, Judge Kinard found that Plaintiffs could not establish all five elements required for class certification. Plaintiffs moved for reconsideration, which Judge Kinard denied.

Plaintiffs appealed Judge Kinard's ruling to the Supreme Court. In their appeal, Plaintiffs asserted that Judge Kinard erred in applying Craft and Delray Beach and that Judge Kinard erred in holding that Plaintiffs had not met the third and fifth elements of Rule 23(a), SCRCP. On appeal, Defendant (as Respondent) raised additional sustaining grounds addressing Plaintiffs' failure to meet the fourth requirement of Rule 23, SCRCP. See Jones v. Lott, 387 S.C. 339, 346-347, 692 S.E.2d 900, 904 (2010) ("A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower

court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.'") citing to Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.").

Pursuant to Rule 220(b)(1), SCACR, and without discussion, the Supreme Court affirmed Judge Kinard's denial of class certification. Azar v. City of Columbia, 414 S.C. 307, 317 n. 10, 778 S.E.2d 315, 320 (2015).[1] The Supreme Court did not provide any discussion concerning the denial of class action certification, and there is no indication as to the ground upon which the Supreme Court based its affirmance. Under the two issue rule, it is unnecessary for an appellate court to address all grounds appealed where one ground provides a basis for affirmance. Anderson v. South Carolina Dep't of Hwys. & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996) (stating that when "the defendant has appealed both issues, the appellate court would affirm on the basis of ... the 'two issue' rule, if either of the two issues supported affirmance.") (emphasis added). The Supreme Court's general affirmance could have rested upon either of the two grounds raised by Plaintiffs, or the additional sustaining ground raised by Defendant. Plaintiffs cannot pick and choose which basis for denial is the law of the case. The only decision constituting the law of this case is the Supreme Court's unexplained decision to affirm the denial of class certification.[2] Judge Kinard's reasoning, whatever it may have

[1] Plaintiffs did not petition the Supreme Court for rehearing on this issue.

[2] A decision by an appellate court is binding as law of the case. Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969). An appellate court's determination of an issue is the law of the case

been, does not constitute the law of the case. The end result of Judge Kinard's orders, affirmed in result by the Supreme Court, constitutes the law of the case.

Secondly, the common fund remedy was not even in front of Judge Kinard. Judge Kinard's orders addressed the sole issue of whether to certify a class pursuant to Rule 23, SCRCP. Plaintiffs made clear that they were seeking class certification "only with respect to the claim for injunctive relief . . . ." Order Denying Plaintiffs' Motion for Reconsideration, p. 1. Judge Kinard did not mention the term "common fund" in his discussion concerning injunctive relief. Plaintiffs' cause of action for injunctive relief did not mention a common fund. Plaintiffs' pleadings seek to enjoin the City from: 1) "continuing to collect these fees and not placing them in a special account to be used only for operation of and capital improvements of the water and sewer systems;" and 2) "spending any of the fees generated for operations of and capital improvement of water and sewer systems for any other purpose . . . ." Plaintiffs further sought to require through injunctive relief an order directing the City to "return" or "replace" all monies it had previously spent for purposes allegedly unrelated to the water and sewer utility back to the Enterprise Fund. The "special" or "restricted" account Plaintiffs referred to in their pleadings is not a common fund, but rather, a reference to S.C. Code Ann. § 6-1-330 requiring local governments to place service fee revenues in a segregated, separate account from other local government revenues. See Second Amended Complaint, ¶ 32. Judge Kinard's orders cannot be read as envisioning or creating a common fund when the Plaintiffs' Second Amended Complaint did not seek a common fund via their cause of

on remand to the trial court. Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011).

action for injunctive relief. This Court declines to read into Judge Kinard's orders any determination or decision regarding Plaintiff's entitlement to any form of remedy.

Thirdly, even if Plaintiffs' chosen ground for denial of class certification could reasonably be viewed as the law of the case, Judge Kinard's statement that injunctive relief "would inure to the relief of other similarly situated individuals" does not go so far as to create a common fund. Plaintiffs' arguments to the contrary impermissibly isolate a sentence of the orders to construe the orders out of context. See Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013) (stating that, in construing a judicial order, the intent of the order is determined by considering the entire order, not isolated parts). Relying upon the rationale found in Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976) and United Farmworkers of Florida Housing Project, Inc. v. Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974), Judge Kinard simply concluded that the injunctive and declaratory relief sought by an individual plaintiff would, if granted, apply to all effected ratepayers of the City. Neither of the cases cited by Judge Kinard concerned an injunction to create a common fund. Judge Kinard did not cite to any case law addressing the common fund remedy and he did not find that Plaintiffs' action was a "suit for the creation, recovery, preservation, or increase of a common fund or common property." Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Therefore, this Court now finds that Judge Kinard's statement that injunctive relief given to the named plaintiffs, if granted, would inure to the benefit of other similarly situated individuals, does not "envision" a common fund remedy, nor does it create a common fund.

Lastly, Plaintiffs' requested injunctive relief bears no resemblance to the common fund doctrine. The availability of a common fund remedy is recognized by South Carolina courts in a limited number of contexts. A common fund is available in a class action seeking damages or refunds. See Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003) (stating, in a class action, that an amount to be refunded directly to taxpayers was a common fund); Shillito v. City of Spartanburg, 214 S.C. 11, 24, 51 S.E.2d 95, 100 (1948) ("This suit was not instituted by the respondent taxpayer in his individual capacity nor for his private gain, but was brought as a class action on behalf of all the taxpayers of the city of Spartanburg to recover the money collected."). This case is not a class action.

In other cases, a common fund is available where a sum of money is ready to be distributed to litigants and others who may have a legal right to such property. See Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) (allowing a common fund only where others are entitled to share in a recovery, and property is to be distributed to litigants and others who have a legal right to such property). A common fund necessarily requires an identifiable pool of monies to be returned to ascertainable individuals that have a lawful claim to a share of those monies. Caughman v. Caughman, 247 S.C. 104, 146 S.E.2d 93 (1965) (finding the plaintiff did not create, preserve, or protect a common fund that provided a return of property or funds to any ascertainable takers); Benjamin v. South Carolina Nat'l Bank, 269 S.C. 250, 253, 237 S.E.2d 72, 74 (1977) (holding that a common fund remedy is not available if the monies claimed by plaintiff have been paid out and are no longer held by the trustee).

Here, Plaintiffs' requested relief is not to refund to City utility customers monies that the City allegedly misspent. Instead, Plaintiffs seek an order requiring the City to

raise whatever amount of money they believe was misspent in past years and deposit that amount into its Water and Sewer Enterprise Fund, to be used for improving the City's water and sewer infrastructure. This injunctive relief does not contemplate a refund of money that was paid by Plaintiffs in the past which remains in the possession of the City. Those monies have already been spent in a manner that Plaintiffs claim is unlawful. Plaintiffs are not requesting that any funds be returned to them or to others. In sum, Plaintiffs' requested injunctive relief does not bear resemblance to a common fund. Thus, the Plaintiffs' reference to a common fund is immaterial.

The allegations concerning the request for a common fund are stricken. The specific paragraphs of the Third Amended Complaint to be stricken in their entirety are as follows: Paragraphs 60, 69, and 70, and Paragraph I of the Prayer. In addition, Paragraph B of the Prayer is stricken as follows: "On the First Cause of Action . . . for improvement of the water and sewer system ~~and for an Order of this court holding such fees in a common fund pending the outcome of this litigation. Plaintiffs only seek such an Order as to excess fees collected and not fees used for operating the water/sewer system~~."

AND IT IS SO ORDERED.[3]

G. Thomas Cooper, Jr.
Circuit Court Judge

October 17, 2016

[3] Defendant also argues that this Court, in addition to denying the Motion to Strike, went one step further and improperly granted the common fund remedy. Defendant also asserts that this Court improperly found that a motion to strike cannot be used to dismiss a novel issue. This Court agrees, but finds it unnecessary to address these issues in light of the Court's ruling that Defendant's Motion to Strike should be granted.