

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas for the Third Judicial Circuit
G. Thomas Cooper, Circuit Court Judge

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JUN 08 2017
SC Court of Appeals

Circuit Court Docket No. 2011-CP-40-6705
Appellate Case No. 2016-002446

FRANK J. CUMBERLAND, JR.;
JENNIFER B. GARDNER AND
AND MICHAEL R. UGINO,

Appellants,

vs.

CITY OF COLUMBIA,

Respondent.

MOTION TO ENFORCE AUTOMATIC STAY PENDING APPEAL
OR, IN THE ALTERNATIVE, TO GRANT STAY PENDING APPEAL

Appellants, by and through their undersigned counsel, hereby move for an Order of this Court enforcing the automatic stay arising from Appellants' pending appeal in this case or, in the alternative, granting a stay during the pendency of Appellants' pending appeal in this case.

The grounds for this Motion are as follows:

1. This is an action to recover millions of dollars in water and sewer fees collected by the City of Columbia and unlawfully diverted and used by the City of Columbia for purposes other than the City's water and sewer system in violation

of South Carolina statutory law¹. This is Appellants' second appeal in this case. The Circuit Court previously dismissed Appellants' case. Appellants appealed that ruling. The South Carolina Supreme Court assumed jurisdiction in that appeal and ultimately, in a unanimous 5 to 0 decision, reversed the Circuit Court, reinstated Appellants' lawsuit and remanded the case to the Circuit Court for further proceedings. (See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015)²).

2. Following remand after the first appeal, Appellants' sought "common fund" status which the Circuit Court denied³, notwithstanding the fact that this case has all the necessary factors or elements required in previous "common fund" cases in this State. This issue is argued in detail in the "Initial Brief of Appellants" filed with this Court on April 10, 2017 and which is incorporated herein by reference. Respondent has obtained an extension of time to file its Initial Brief and Designation through June 9, 2017.
3. After Appellants' Notice of Appeal was filed and served the Circuit Court has continued to exercise jurisdiction in this case including, but not limited to, issuing a Scheduling Order ("**Exhibit 1**") which, among other things, calls for the case to proceed in the Circuit Court and go to trial on the merits of the case at the end of 2017 or early 2018, which is well before any decision is anticipated to be made in

¹ The City of Columbia's water and sewer system has approximately 140,000 water and/or sewer customers. The actual number of customers is "dynamic", meaning that it changes regularly with the addition of new customers and/or loss of existing customers.

² Following remand after the first appeal, Appellants Azar and Letts were dismissed as parties to the case and Appellants Gardner and Ugino were added as parties to the case. Appellant Cumberland is the only remaining original Plaintiff.

³ In its current status Appellants' case is "Two men (Cumberland and Ugino) and a woman (Gardner)" vs. City of Columbia).

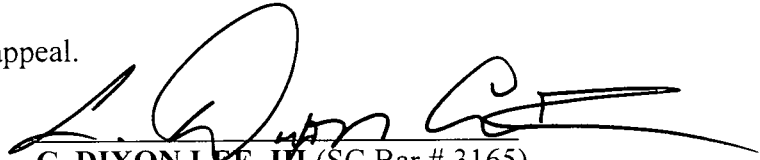
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the Appellants' pending second appeal in this case, which, in turn, may result in the possibility of a third appeal in this case.

4. The general rule is that service of a Notice of Appeal in a civil case, like this case, "automatically" stays further proceedings in the trial court. See Rule 241, *SCRPC*. There has been no Order from the Circuit Court in this case lifting the automatic stay arising from Appellants' pending appeal in this case nor has that stay been lifted by this Court.

CONCLUSION

Based upon the foregoing, Appellants respectfully request that this Court issue an Order enforcing the automatic stay in the Circuit Court arising from Appellants' pending appeal in this case or, in the alternative, granting a stay in the Circuit Court during the pendency of Appellants' pending appeal.



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ATTORNEYS FOR APPELLANTS

Columbia, South Carolina
Dated: June 8, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
)
 Frank J. Cumberland, Jr.,)
 Jennifer B. Gardner, and)
 Michael R. Ugino,)
)
 Plaintiffs,)
)
 vs.)
)
 City of Columbia,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT
 C/A # 2011-CP-40-6705

SCHEDULING ORDER

RICHLAND COUNTY
 FILED
 2017 FEB - 7 PM 2:51
 JENNIFER B. GARDNER
 C.C.P. & C.S.

To facilitate the orderly conduct of this litigation, the following schedule is hereby ordered:

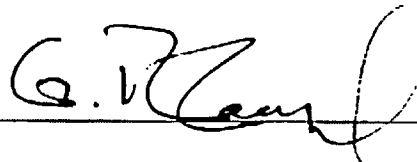
1. Plaintiffs' identification of their expert witness or witnesses whom Plaintiffs propose to use as a witness at trial shall be made no later than June 1, 2017. Expert witnesses not disclosed by this date shall not be called at trial.
2. Defendant's identification of its expert witness or witnesses whom Defendant proposes to use as a witness at trial shall be made no later than July 1, 2017. Expert witnesses not disclosed by this date shall not be called at trial.
3. Service of written discovery requests under Rules 33, 34 and 36, SCRCP, as well as the taking of all depositions, shall conclude on or before September 1, 2017. This deadline does not include any supplemental responses to discovery requests made pursuant to Rule 26(c), SCRCP.
4. Discovery motions shall be filed no later than October 1, 2017.
5. Mediation shall occur no later than October 15, 2017.

G. J. # 1

6. Any dispositive motions shall be filed no later than November 1, 2017.
7. Pursuant to Rule 16, SCRCP, pre-trial briefs shall be filed on or before December 1, 2017.
8. Supplemental discovery responses made pursuant to Rule 26(e), SCRCP, shall be served no later than December 1, 2017.
9. A pre-trial hearing to discuss matters as stated in Rule 16, SCRCP, shall be held no later than December 15, 2017.
10. The case shall be called for a non-jury trial after the any dispositive motions are decided and pre-trial hearing is held, and in no case any earlier than January 15, 2018, and will be set for a date certain before The Honorable G. Thomas Cooper.

This Order may be amended upon motion by either Party for good cause shown.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper
Fifth Judicial Circuit

February 7, 2017.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas for the Fifth Judicial Circuit
G. Thomas Cooper, Circuit Court Judge
J. Ernest Kinard, Jr., Circuit Court Judge

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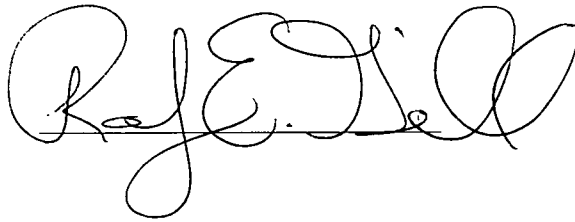
PROOF OF SERVICE

The undersigned hereby certifies that on the 8th day of June 2017 he/she did serve one (1) copy of the Appellants' MOTION TO ENFORCE AUTOMATIC STAY PENDING APPEAL OR, IN THE ALTERNATIVE, TO GRANT STAY PENDING APPEAL in this case on counsel for the Respondent by depositing the same in the United States Mail, sufficient first class postage prepaid, addressed to the attorneys for the Respondent City of Columbia as follows:

M. Mullen Taylor
Mullen Taylor, LLC
1230 Richland Street
Columbia, SC 29201

Peter M. Balthazor, Esquire
Riley Pope & Laney, LLC
Post Office Box 11412
Columbia, SC 29211

Dated this 8th day of June 2017 at Columbia, South Carolina.

A handwritten signature in black ink, appearing to read "Peter M. Balthazor". The signature is written in a cursive style with a horizontal line underneath the letters.