THE 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

Docket No. 2011-CP-40-6705

Frank J. Cumberland, Jr.; Jennifer B. Gardner
and Michael R. Ugino ..... Appellants

vs.

City of Columbia ..... Respondent

INITIAL REPLY BRIEF OF APPELLANTS

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I. JUDGE COOPER'S ORDER DENYING APPELLANT'S REQUEST FOR A "COMMON FUND" IS AN ORDER WHICH AFFECTS THE "MODE OF TRIAL" AND THUS IS DIRECTLY APPEALABLE.

Judge Cooper's Order in this case denied Appellants "Common Fund" status. As a result, unless that ruling is reversed the case will go to trial as "Frank J. Cumberland, Jr.; Jennifer B. Gardner and Michael R. Ugino (a/k/a two men and a woman) vs. the City of Columbia" as opposed to going to trial as a common fund case. In other words, Judge Cooper's Order has determined that the mode of trial in this case will not be as a "Common Fund" case.

Under South Carolina law it is clear and unambiguous that orders affecting the mode of trial affect a substantial right and are immediately appealable. S.C. Code Ann. § 14-3-330 (Supp. 2016); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.") and *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008) ("These cases not only permit, but indeed require, immediate appeal in the event of the denial of a mode of trial to which one is entitled as a matter of right.").

Judge Cooper's Order denying appellants a trial is a "common fund" case is directly appealable. Respondent's argument to the contrary is in error.

II. THE RESPONDENT'S ARGUMENT THAT THE COMMON FUND THEORY IS ONLY USED IN CLASS ACTIONS IS ERRONEOUS.

The City argues vigorously in its Initial Brief that the common fund theory of recovery is only used in class actions. The doctrine found its way into American law through the case of *Trustees v. Greenough*, 105 U.S. 527 (1881). In *Greenough*, Francis Vose, a large holder of bonds of the Florida Railroad Company filed suit on behalf of himself and other bondholders against the

trustees of the Internal Improvement Fund of Florida and various other named defendants. The fund consisted of ten or eleven million acres of land which had been conveyed by the state as security for a bond issue of the Florida Railroad Company. Vose charged the trustees of the fund with waste and destruction of the fund by selling the land at nominal prices and failing to provide for the payment of interest on the bonds. His lawsuit prayed that the fraudulent conveyances be set aside, the trustees be enjoined from selling more lands, and a receiver be appointed to manage the fund.

After more than a decade of litigation, Vose's lawsuit resulted in the restoration of a large amount of the trust fund and the appointment of a court appointed receiver to manage the fund. Vose, without assistance from other bondholders, bore the entire financial burden of the litigation and advanced the money used to reach the successful results. Vose petitioned the court for reimbursement of his expenses from the fund which, as a result of the judicially appointed receiver, was still within the control of the court. The Supreme Court observed:

> ...where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from the proceedings, -- if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. 105 U.S. at 532.

Less than four years after the *Greenough* decision was rendered, its boundaries were tested. In *Central Railroad & Banking Company v. Pettus*, 113 U.S. 116 (1885), the Western Railroad Company, an Alabama corporation, purchased and took possession of the railroad and all other property of the Montgomery and West Point Railroad Company. Western agreed, as a condition of the sale, to assume the payment of all outstanding debts and obligations of West Point. Several years after this transaction, secured creditors of Western Railroad Company initiated a suit to procure a sale of the property of the railroad, including that purchased from the former Montgomery

and West Point Railroad Company. A sale was ordered subject to a lien in respect to the property formerly owned by West Point in favor of holders of its mortgage bonds.

Thereafter, several holders of bonds of West Point, who were not secured by mortgage, hired Pettus & Dawson and Watts & Sons to represent them in litigation against Western Railroad Company. Ultimately, the plaintiffs were successful in having their unsecured mortgage interest adjudged superior to any executed by Western Railroad Company.

In *Pettus*, unlike *Greenough*, the claim on the fund was asserted by the attorneys directly. Unsecured creditors, who had not retained but who had benefited from the attorneys' services, objected to the claim for fees on the grounds that the attorneys had already been compensated by their clients pursuant to a contract. 113 U.S. at 125. The Supreme Court, in response to this contention, noted that the unsecured creditors who retained the attorneys understood that the attorneys believed

> They had the right to demand, and would demand, such additional compensation as was reasonable, in respect of unsecured creditors who accepted the fruits of their labor by filing claim; that, but for this understanding, appellees would have stipulated a larger compensation than that agreed to be paid by their particular clients.... 113 U.S. at 125.

The next case in the evolution of the common fund doctrine was *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). In that case, petitioner deposited in trust certain funds with the Ticonic Bank. Ticonic subsequently was taken over by People's National Bank which acquired all the assets, including petitioner's deposits and assumed all indebtedness of the Ticonic Bank. After both banks went into receivership, petitioner filed a bill against the banks to impress upon the proceeds of the bonds a lien for her trust deposits. The proceeding terminated in favor of petitioner, who then sought contributions for legal expenses, including attorney's fees, from the beneficiaries of fourteen other trusts that had been similarly situated. Petitioner alleged that by vindicating her

claim to a lien on the proceeds, she had established as a matter of law the right of the beneficiaries of the similarly situated trusts to recover. 307 U.S. at 163.

The Court found that *Sprague* presented a variation of the situation where a petitioner's litigation benefits a group which he does not profess to represent. 307 U.S. at 163.

The point of the citation of the these old cases is to show the Court that first, the common fund theory is not only for class action litigation, but it is a sound and reasoned policy which has been used by the courts for hundreds of years to allow for attorneys' fees and litigation costs for one who preserves a fund for others. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" beneficiaries do not receive their benefits at no cost to themselves. *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981); *Dennis v. State*, 451 N.W.2d 676, 687 (Neb. 1990); *Guild, Hagan & Clark, Ltd. v. First National Bank*, 600 P.2d 238 (Nev. 1970) (the policy underlying the common fund doctrine is based on fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by expenses; correlative to the prevention of an unfair advantage to the others who are entitled to a share in the fund and should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute the proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful. 600 P.2d at 239, *First National Bank.*

In sum, there is no logical reason to limit the doctrine to class actions and trust cases. The imposition of a trust or class action requirement "would be inconsistent with the equitable foundations of the common benefit exception.... The form of suit is not a deciding factor; rather the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others. (*Tandycrafts, Inc.*, 562 A.2d at 1166. (quoting

Resier v. Del Monte Properties Co., 605 F.2d 1135, 1139-40 (9th Cir. 1979)); *see also Citizens Action Coalition v. PSI Energy, Inc.*, 664 N.E.2d 401 (Ind. Ct. App. 1996). This position is consistent with that of the United States Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) wherein it was observed that "the absence of an avowed class action...hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation." 307 U.S. at 167.

The South Carolina Supreme Court has also taken a similar tact on this issue in the case of *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). In that case, the plaintiff, a resident and taxpayer of the City of Spartanburg, challenged the constitutionality of an Act of the General Assembly which provided for an annual tax levy on the City of Spartanburg for the benefit of the Spartanburg City Firemen's Pension Fund. The action as it states was brought not only by the plaintiff in his individual capacity but as a taxpayer to recover tax which was levied against his property and which he paid under protest. The defendants moved to strike various allegations from the complaint among those allegations which sought to set up a taxpayer's action. It appears that about $25,000.00 was collected under the Act and that only the plaintiff paid the tax under protest. Significantly, the plaintiff individually obtained a temporary injunction, later made permanent, restraining the Defendant Spartanburg from turning over the proceeds of the tax fund collected. The case was heard on the pleadings. The Court overruled the motion to strike and upheld the contention of the plaintiff that the action could be brought. The Court in a significant ruling found:

> As a rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. An apparent exception to this rule exists when the Act sought to be enjoined is an unlawful diversion of public funds. In such cases, a taxpayer who may be compelled to pay the assessment, or has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal Act. The decided preponderance of authority holds that a taxpayer singly or in a class suit, may maintain a suit in equity to restrain unlawful municipal action which leads, directly or indirectly, to taxation, and that a taxpayer, as specially damaged by the increase of the

> burden of taxation on his property, has a special interest, distinct from the general public, in the subject matter of such a suit which entitles him to relief. 51 S.E.2d at 97.

In sum, in the *Shillito* case, the Court found that a citizen and/or taxpayer had standing to contest the expenditure of public funds under circumstances such as what we find in this case. Several cases were cited by the Supreme Court in *Shillito* for the principal that the taxpayer's attorney was entitled to a fee recovered on a claim against a county. The reasoning being that citizens who successfully bring suit to recover public funds wrongfully appropriated should be allowed compensation for their attorneys, payable out of the fund. In effect, the law of this state is that citizens are encouraged to bring suits like this and when they succeed in recovering into the treasury money for the benefit of the people of the county that would otherwise be lost it is no more than right and just that they should have their fees. See *Shillito*, 51 S.E.2d at 97. The *Shillito* Court cited numerous cases from around the country including Ohio, Tennessee and Kentucky which all have allowed such recoveries for the taxpayer's counsel.

Appellants believe the *Shillito* case law demonstrates that if Appellants/taxpayers are successful and this Court orders monies to be returned to the Water and Sewer Enterprise Fund, it will benefit over a hundred thousand water and sewer customers in the City of Columbia by making sure their funds are used for the appropriate purpose. See *Hall v. Cole*, 412 U.S. 1 (1973) (extending the common fund doctrine by allowing a successful plaintiff to recover from third party beneficiaries even when the court was not in possession of a common fund and even when the benefit is not pecuniary in nature.)

Appellants also find the Court's Order troubling in that the Court has made a preemptory ruling through a motion to strike on whether a common fund can be formed before making a ruling on the merits of the case. The circuit court was correct in its original order denying the motion to strike the allegation of a common fund as it should have been reserved by the trial court for a

hearing on the merits. Appellants find themselves in the uncomfortable position of arguing to this Court about an issue which should be reserved after a trial on the merits. A motion to strike is not a motion for summary judgment and should not be treated as such by the circuit court.

Respondent makes Appellants' point when it cites to the case that Judge Kinard cited in his Order, *Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684 (6th Cir. 1976). In *Craft*, the Sixth Circuit Court of Appeals found that even though the class action status was denied, the requested injunctive relief would benefit not only the individual appellants and the non-profit corporation but all other persons subject to the practice under attack. This reasoning is precisely why if Appellants win the case, the common fund doctrine is appropriate. Appellants' singular action in bringing this case will affect 100,000 rate payers and make certain that the funds they pay for water and sewer service go only to water and sewer services and not to other City services. Accordingly, Judge Kinard in his Order envisioned that if Appellants won, all similarly situated rate payers would receive a benefit which is precisely why the common fund theory is applicable in this case.

III. RESPONDENT'S ARGUMENT THAT A MOTION TO STRIKE IS THE PROPER MOTION TO CHALLENGE PLAINTIFFS' REQUEST FOR A COMMOM FUND IS ERRONEOUS.

As set forth by the South Carolina Supreme Court in its decision in *Layman, et. al. vs. The State of South Carolina and The South Carolina Retirement System*, 376 S.C. 434, 658 S.E.2d 320 (2008):

"The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorneys' fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Petition of Crum. Johnson v. Williams,* 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941). Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund

created or preserved. *Id.* The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* at 531-32, 14 S.E.2d at 23. In this case Appellants are seeking to recover millions of dollars in water and sewer fees from Respondent which were spent in flagrant violation of South Carolina statutory law. *See Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). By summarily denying this case common fund status before trial on the merits of the case, Judge Cooper has summarily ruled against Appellant's on the issue of attorney's fees before the case has ever been heard and determined on its merits and irrespective of the ultimate outcome of the merits of the case. This was palpable error by the Circuit Court and should be reversed by this Court on Appeal.

IV. JUDGE COOPER GRANTING RESPONDENT'S MOTION TO STRIKE APPELLANT'S PRAYER FOR A COMMON FUND WAS ERROR.

Appellants' rely upon their arguments set forth elsewhere in this Reply Brief and in Brief of Appellant on this issue.

V. JUDGE COOPER COMMITTED ERROR BY RULING THAT A COMMON FUND WAS IMMATERIAL TO APPELLANT'S CLAIMS IN THIS CASE.

Again, Appellants' rely upon their arguments set forth elsewhere in this Reply Brief and in Brief of Appellant on this issue.

CONCLUSION

For the reasons set forth hereinabove and in the Brief of Appellants, both individually and collective, Appellant's respectfully requests that this Court reverse the Orders of the Circuit Count being appealed in this case.

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July 10, 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

Docket No. 2011-CP-40-6705
Appellate Case No. 2014-000032

AZAR, FRANK J. CUMBERLAND, JR., JENNIFFER B. GARDNER, AND MICHAEL R. UGINO,

Appellants,

vs.

CITY OF COLUMBIA,

Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the 10th day of July 2017 he/she did serve one (1) copy of the Initial Reply Brief of Appellants' on counsel for the Respondent by depositing the same in the United States Mail, sufficient first class postage prepaid, addresses as follows:

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July 10, 2017

VIA U.S. MAIL
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Re: *Frank J. Cumberland, Jennifer B. Gardner and Michael R. Ugino. v. City of Columbia*
Appellate Case No. 2016-002446
Trial Court Docket No. 2011-CP-40-6705

Dear Mr. Kitchings:

Enclosed for filing, I am forwarding to you by U.S. Mail for filing:

1) The original of the Initial Reply Brief of Appellants in the above-referenced case.

2) Original Proof of Service of the foregoing Initial Reply Brief of Appellants being served on the attorneys for the Respondent in this case.

Should you have any questions regarding this matter, please contact me.

Yours very truly,

C. Dixon Lee, III

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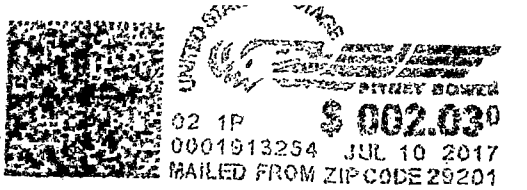

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