THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 2011-CP-40-6705
Appellate Case No. 2016-02446

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

v.

City of Columbia .... Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This civil action is currently pending in circuit court on remand from the South Carolina Supreme Court. *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). In the previous appeal, the supreme court affirmed both the circuit court's denial of class certification and the circuit court's finding that two of the original Plaintiffs – Azar and Letts - lacked standing.[1] *Azar*, 414 S.C. at 317 n.10, 778 S.E.2d at 320 n.10. The supreme court reversed the grant of summary judgment to Respondent, and remanded the case to the circuit court for further proceedings. *Azar*, 414 S.C. at 317, 778 S.E.2d at 320. In its substance, this case involves Appellants' challenge to Respondent's use of its water and sewer revenues.

After being remanded, Plaintiff Frank J. Cumberland, Jr., moved to amend the Complaint. The circuit court granted the motion to amend and Appellants filed their Third

[1] Judge Kinard, as circuit court judge, issued these orders in 2012.

Amended Complaint. (R.p. 91) The Third Amended Complaint was identical in all substantive respects to the Second Amended Complaint (R.p. 37), with the exception of adding two new Plaintiffs (Gardner and Ugino). The Third Amended Complaint continued to characterize itself as a class action on behalf of all past and current water and sewer customers and continued to list Azar and Letts as Plaintiffs. (R.pp. 91-110)

Respondent filed its motion to strike. (R.p. 85) Respondent's motion sought an order requiring Appellants to strike all references and allegations concerning the dismissed plaintiffs, class action certification, and class action status. Respondent also sought an order striking references to a common fund because the previous denial of class certification rendered Plaintiffs' request for a common fund immaterial. (R.pp. 85-87) In opposition to the motion, Appellants focused on the common fund issue, arguing that Judge Kinard's previous orders denying class certification had nonetheless "envisioned" and created a common fund, and Judge Kinard's "envisioned" common fund constituted the law of the case. (R.pp. 74-77)

After a hearing, Judge Cooper denied Respondent's motion to strike. (R.pp. 18-21) Respondent filed a motion to alter or amend the circuit court's denial of the motion to strike. (R.p. 62) Judge Cooper then issued an Order Granting Defendant's Motion to Alter or Amend, and Granting Defendant's Motion to Strike. (R.p. 23)

In the order granting Respondent's motion to strike, Judge Cooper ordered that all references to the dismissed Plaintiffs (Azar and Letts) be stricken, and also that all references and allegations concerning class action status or relief be stricken. (R.pp. 25-27) Appellants have not appealed these rulings.

Judge Cooper also ordered stricken from the Third Amended Complaint all allegations concerning Appellants' request for a common fund. (R.pp. 27-33) Judge Cooper ruled that

Appellants' request for a common fund was immaterial because this action is not being brought on behalf of a class and because Appellants' requested injunctive relief - in the form of requiring Respondent to "return" spent monies to the Enterprise Fund - "does not bear resemblance to a common fund." (R.p. 33) Judge Cooper also ruled that the law of the case is simply that class certification was denied. (R.p. 29) Because the Supreme Court affirmed the denial of class certification without addressing the multiple grounds argued in support of denial or the multiple reasons cited by Judge Kinard in his order, Judge Cooper ruled that whatever Judge Kinard's stated rationale within his orders cannot constitute the law of the case. (R.pp. 29-30) In any event, Judge Cooper further found that the previous orders in the case did not envision or create a common fund. (R.pp. 30-31)

Appellants filed a motion asking the circuit court to reconsider this order. (R.p. 54) The circuit court denied Appellants' motion to alter or amend, and this appeal followed. (R.p. 35)

STANDARD OF REVIEW

A motion to strike pursuant to Rule 12(f), SCRCP, "seeks to have stricken from a pleading 'any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.'" *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990), (quoting Rule 12(f), SCRCP). "In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Id.*

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. *Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009).

ARGUMENT

I. JUDGE COOPER'S ORDER STRIKING THE COMMON FUND IS NOT IMMEDIATELY APPEALABLE.

Appellants appeal from Judge Cooper's order granting Respondent's motion to strike Appellants' request for a common fund. In general, an order is not final if there is some further act that must be done by a court prior to a determination of the rights of the parties. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010). "A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment." *Id.* The merits of Appellants' case have yet to be determined at trial and no order has been issued disposing of the factual issues regarding the merits of the action. Therefore, the order on appeal is not a final judgment subject to appellate review.

An intermediate order is immediately appealable if the order finally determines "some substantial matter forming the whole or part of some cause of action or defense." *Mid-State Distribs. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). The order at issue here does not determine a substantial matter constituting an element of a cause of action raised in Appellants' Third Amended Complaint. Instead, the order addresses the materiality of Appellants' prayer for the creation of a common fund in light of the absence of a class action. Nothing in the order touches any cause of action raised by Appellants; therefore, this appeal should be rejected as premature.

Under S.C. Code Ann. § 14-3-330(2), an order is immediately appealable if it affects a "substantial right." An order affects a substantial right if it eliminates a cause of action, prevents an appeal, grants or denies a new trial, or strikes out an action or defense. *Mid-State Distribs.*, 310 S.C. at 334 n. 4, 426 S.E.2d at 780 n. 4 (1993). "Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "Generally, this subsection has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." *Id.* Courts have given this section a narrow construction, and in examining the issue of appealability pursuant to this section, courts should "focus on the effect of the order, not the label given to the motion or to the order granting it." *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 487 (Ct. App. 2011); *see id.* (stating that "the use of the word 'strike' in both Rule 12(f) and S.C. Code Ann. § 14-3-330(2)(c) does not mean that an order granting a Rule 12(f) motion is automatically immediately appealable"). An order does not affect a substantial right if the issue can be vindicated on appeal at the end of a trial. *See Breland*, 339 S.C. at 94-95, 529 S.E.2d at 14.

The striking of the common fund does not affect a substantial right because it does not foreclose Appellants from litigating their case on the merits. Appellants' causes of action remain intact. Because the order striking the common fund involved a question of law, not fact, the order does nothing to prevent fact-finding on the merits at trial. There is no reason the common fund issue could not be vindicated in an appeal at the end of any trial in this case. Therefore, Judge Cooper's order does not affect a substantial right.

II. JUDGE COOPER'S ORDER STRIKING THE COMMON FUND ALLEGATIONS DID NOT RULE ON ANY ISSUES THAT CONSTITUTED THE LAW OF THE CASE AND THAT HAD PREVIOUSLY BEEN DECIDED IN THIS CASE.

Appellants' entire brief is premised on the false assumption that Judge Kinard, in denying Appellants' motion for class certification in 2012, "envisioned" a common fund. Appellants argue that Judge Cooper, by granting Respondent's motion to strike, overruled Judge Kinard's previous orders. Appellants argue that Judge Kinard's orders, and the reasoning contained therein, constitute the law of the case.

To properly evaluate this issue, it is necessary to first look at Judge Kinard's orders and then at the supreme court's holding. Judge Kinard's initial order denied class certification for two reasons. (R.p. 11) First, Judge Kinard applied *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 find that there was no need for the complexities and extra costs associated with class actions. (R.p. 12) Second, Judge Kinard found that Plaintiffs could not establish all five elements required for class certification. (R.p. 13) Appellants moved for reconsideration, which Judge Kinard denied. (R.p. 16) Although Judge Kinard's order denying reconsideration repeated only one of the two grounds for denial, the order's silence on the Appellants' failure to meet all elements of Rule 23 does not negate this second basis for denial.

Appellants appealed Judge Kinard's orders to the supreme court. In their appeal, Appellants asserted that Judge Kinard erred in applying *Craft* and *United Farmworkers* and that Judge Kinard erred in holding that Appellants had not met the third and fifth elements of Rule 23(a), SCRCP. (R.pp. 156-162) On appeal, Respondent raised additional sustaining grounds addressing Appellants' failure to meet the fourth requirement of Rule 23, SCRCP. (R.pp. 234-237) *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.'"); *see also* 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.").

The supreme court affirmed Judge Kinard's denial of class certification pursuant to Rule 220(b)(1), SCACR. *Azar v. City of Columbia*, 414 S.C. 307, 317 n.10, 778 S.E.2d 315, 320 n.10 (2015). Appellants did not petition the supreme court for rehearing on this issue. The supreme court did not provide any discussion concerning the denial of class action certification, and there is no indication whether the supreme court adopted or rejected Judge Kinard's reasoning for denying class certification.

The supreme court's affirmance of Judge Kinard's denial of class certification does not specify which ground for denial it relied upon. The supreme court's general affirmance could have rested upon either of the two grounds raised by Appellants, or the additional ground asserted by Respondent. The supreme court could have affirmed the denial of class certification because it did not believe that Appellants met the fourth requirement of Rule 23, SCRCP. It could have found that Appellants met the third element of Rule 23 but had not met the fifth element of Rule 23. Or it could have rejected Appellants' argument that Judge Kinard erred in applying *Craft* and *United Farmworkers*. Despite not receiving any indication from the supreme court regarding its basis for affirmance, Appellants have now conveniently chosen the reasoning that benefits them most by asserting that Judge Kinard denied class certification because Judge Kinard envisioned the creation of a common fund.

Appellants cannot rely on this reasoning any more than Respondent can now rely on the reasoning that Appellants did not meet the elements of Rule 23(a), SCRCP. The only decision constituting the law of the case, which can be relied upon, is the supreme court's unexplained decision to affirm the denial of class certification. 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 on remand to the trial court. *Prince v. Beaufort Memorial Hosp.*, 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011); *see also Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999) (stating the law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision"). Thus, the supreme court's decision subsumed Judge Kinard's orders and reasoning.

Appellants now want to receive a benefit from those same orders that they once wanted reversed. Based on the supreme court's holding, Judge Cooper surely would not be permitted to grant class certification. On remand Appellants want to go one step further and require Judge Cooper be faithful to everything "envisioned" in Judge Kinard's orders. Whatever Judge Kinard may have envisioned is no longer the law of the case.

Appellants cite to the *Charleston Lumber* trilogy[2] as a "prime example" of the application of the law of the case doctrine. In *Charleston Lumber I*, the defendant appealed the grant of summary judgment on its counterclaim for fraud; this Court reversed and held that further factual development was needed to determine the extent of damages on the fraud counterclaim. 318 S.C. at 481, 458 S.E.2d at 437. On remand, the circuit court again granted summary judgment

[2] *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (*Charleston Lumber I*); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 329 S.C. 414, 496 S.E.2d 637 (Ct. App. 1998) (*Charleston Lumber II*); and, *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000) (*Charleston Lumber III*).

on the fraud counterclaim, finding the issue of damages was res judicata based on the jury's finding in *Charleston Lumber I* of no damages on a counterclaim for unfair trade practices. *Charleston Lumber II*, 329 S.C. at 418, 496 S.E.2d at 639. This Court, *en banc*, affirmed the circuit court's grant of summary judgment. *Id.*, 329 S.C. at 426, 496 S.E.2d at 643.The supreme court put the matter to rest by holding that the "trial judge erred by failing to follow the directive of *Charleston Lumber I*" to develop the facts concerning the extent of damages. *Charleston Lumber III*, 338 S.C. at 175, 525 S.E.2d at 872. The *Charleston Lumber* trilogy effectively demonstrates that appellate decisions become the law of the case on remand to the circuit court, and the circuit court is bound to follow the directives of the appellate decision. The trilogy does not support Appellants' argument that Judge Cooper is somehow bound by the statements and reasoning in Judge Kinard's previous orders.

In the present case, the controlling appellate decision constituting the law of the case is that of the supreme court in *Azar*, *supra*. The Supreme Court affirmed the lower court's denial of class certification without explanation. Judge Cooper, in his order granting the motion to strike, did not make any rulings on class certification, and he did not fail to follow any directives of the supreme court opinion. Judge Cooper did not violate the law of the case doctrine.

III. A MOTION TO STRIKE IS THE PROPER MOTION TO CHALLENGE PLAINTIFFS' REQUEST FOR A COMMON FUND.

Appellants argue that Judge Cooper erred by striking the common fund allegations without using the summary judgment motion standard. Appellants state that a motion to strike may not be used in place of a motion for summary judgment.

However, in this same argument, Appellants cite to the proper standard for a motion to strike under Rule 12(f), SCRCP. This rule provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." *Id.* This is the standard employed by Judge Cooper in ruling on Respondent's motion. Appellants have not cited any case law demonstrating why this standard was improperly employed by Judge Cooper or why the summary judgment standard should have been used.

Appellants argue that under general Rule 12 standards a *dismissal* is improper if the facts alleged and inferences deducible therefrom would entitle a plaintiff to any relief. Here, Judge Cooper was not faced with the *dismissal* of a cause of action or a theory of recovery. Judge Cooper was faced only with the issue of whether the common fund allegations were material to the Third Amended Complaint. He correctly found that the common fund allegations were immaterial to the injunctive relief sought by Appellants. Judge Cooper did not dismiss any of Appellants' causes of action and his ruling does not prevent Appellants from obtaining relief under their causes of action (subject to the burdens of production and proof).

Appellants go on to state that Judge Cooper's recognition that he was dealing with a "difficult issue" somehow "raises a serious question about [the order's] legality." This argument has no relevance to whether the proper standard was employed by Judge Cooper. An issue's difficulty bears no relation to whether an order is legal.

Appellants vaguely argue that the striking of the common fund allegations before a trial on the merits does not promote justice. This does not explain why Judge Cooper should have been required to employ the summary judgment standard. The portions of the pleadings stricken by Judge Cooper are immaterial to the causes of action alleged by Appellants. A trial on the merits – where Appellants will be required to prove that Respondent's use of water and sewer revenues was not related to the provision of water and sewer services and that funds transferred to the General Fund were not properly considered "surplus revenues"[3] – is not necessary to deal with whether a common fund is material to the causes of action alleged by Appellants. Judge Cooper was not deciding the merits of the case and he was not dealing with questions of fact that require further development. The granting of the motion to strike does not prevent Appellants from obtaining a trial on the merits. Appellants do not explain why the common fund should be dealt with at trial other than to say that this case involves matters of substantial public interest. While that may be, public interest is not the standard for a Rule 12 motion or a Rule 56 motion. It also fails to explain why the common fund allegations are material to the causes of action or why it was error not to use the summary judgment standard.

Judge Cooper's order should be affirmed because Judge Cooper correctly evaluated Respondent's motion to strike under the proper standard of review, and the order does not prevent Appellants from obtaining a trial on the merits of the action.

IV. THE GRANTING OF A MOTION TO STRIKE A COMMON FUND IS NOT A NOVEL ISSUE.

Appellants argue that the striking of the common fund allegations is a novel issue and "novel issues should never be decided on a motion to dismiss."

First, it must be decided whether the issue in this case is novel. Even if the answer to this first question is "yes", it does not necessarily require that a court should refrain from deciding the issue on a Rule 12 motion. Appellants state that courts should "never" decide a novel issue on a motion to dismiss, but our courts have not issued an absolute rule requiring that novel issues should be allowed to survive a motion to strike or dismiss.

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[3] *Azar*, 414 S.C. at 308, 778 S.E.2d at 315-16.

Appellants characterize the novel issue as "the use of the common fund remedy in an injunctive action." [*See* p.7 of Appellants' Initial Brief] Appellants say that "the remedy requested is not that the plaintiffs receive monies for themselves, but instead that the monies that were paid by them be returned to the Water and Sewer Enterprise Fund . . . ." [*Id.*] This issue simply requires an application of the law concerning the common fund doctrine. This doctrine has been discussed, and applied or rejected, in numerous situations. In their brief, Appellants cite a litany of cases where issues concerning the common fund doctrine have been analyzed and decided.

While examples can be found of a court declining to address a novel issue, "[w]hen the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (2005) (internal citation omitted); *see Unisys Corp. v. S.C. Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001) (affirming the dismissal of a complaint alleging novel issues where the questions involved were questions of law and the non-movant pointed to no factual issue requiring further development). The issue faced by Judge Cooper was not as to the underlying facts and does not require a trial or further development of the facts. Appellants do not explain how further factual development of the merits of this case would affect the analysis of the common fund. Therefore, even assuming the present issue has some novelty, it is an issue of law that can be decided at this time. *See Brown v. Theos*, 338 S.C. 305, 313, 526 S.E.2d 232, 237 (Ct. App. 1999) ("[W]hile our courts have held important questions of novel impression generally should not be decided on demurrer, this is not always true.").

Judge Cooper did not issue a ruling on a novel issue, and regardless of the issue's novelty, it is an issue of law and was ripe and ready to be ruled upon.

V. JUDGE COOPER CORRECTLY FOUND THAT JUDGE KINARD'S ORDERS DID NOT ENVISION OR CREATE A COMMON FUND.

In their final two arguments, Appellants continue to assert that Judge Kinard's orders envisioned a common fund. Appellants' "primary rebuttal" to Respondent's motion to strike was, and is, the notion that a common fund was envisioned by Judge Kinard. (R.p. 27) This position required Judge Cooper to make a ruling regarding whether Judge Kinard's orders envisioned a common fund or created a common fund. Appellants now assert it was error for Judge Cooper to find that a common fund had not been envisioned and that a common fund was not created.

Appellants do not vigorously argue that the common fund allegations are material or necessary to their pleadings.[4] Appellants instead concentrate their focus on the argument that the common fund issue was previously decided by Judge Kinard. Appellants' entire Argument IV assumes that Judge Kinard's orders are still controlling. As explained earlier, Judge Kinard's orders are no longer the law of the case and the parties and the court should not concern themselves with what the orders may have envisioned. However, even if we assume that Judge

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[4] In fact, Appellants are seeking the return or replacement of spent monies, regardless of whether a common fund is established. (R.p. 103; Third Am. Compl., ¶¶ 42 and 44.] Thus, a common fund is unnecessary and immaterial to the action. A common fund is "necessary" only as a possible vehicle to obtain attorney's fees. The common fund doctrine is a method allowing a court, in its equitable jurisdiction, to award attorney's fees from a fund in which the plaintiffs have a property interest. *Matter of Estate of Kay*, 418 S.C. 400, 417, 792 S.E.2d 907, 916 (2016). Appellants are attempting to manufacture a "common fund" by ignoring key components of the law governing the formation of a common fund. Appellants' requested injunctive remedy - that monies paid by them be returned to the Water and Sewer Enterprise Fund - has not been stricken by the circuit court. Also still in place is Appellants' request for attorneys' fees which may be awarded pursuant to S.C. Code Ann. § 15-77-300.

Kinard's orders are controlling, Judge Cooper correctly found that the orders did not "envision" a common fund.

Appellants are impermissibly zeroing in on Judge Kinard's statement that injunctive relief "would inure to the benefit of the other similarly situated individuals" to conclude that he envisioned a common fund. (R.p. 12) "As a general rule, judgments are to be construed like other written instruments." *Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013). In construing a judicial order of the court, the intent of the order is determined by considering the entire order, not isolated parts. *Id.* Judge Kinard's orders were limited to the issue of whether to certify a class pursuant to Rule 23, SCRCP.

The case law cited within Judge Kinard's order reasoned that a certified class was not necessary because an order determining the constitutionality or propriety of the defendant's actions would apply to all affected individuals. *See Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976) ("As to a Rule 23(b)(2) class asserting claims to injunctive and declaratory relief, the district court properly recognized that such relief to the extent 'granted [would] . . . accrue to the benefit of others similarly situated', and, consequently, as the Eighth Circuit has recognized, 'no useful purpose would be served by permitting this case to proceed as a class action' because 'the determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action.'"); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) ("Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants and the nonprofit corporation but all other persons subject to the practice under attack.").

Based on this reasoning, Judge Kinard concluded that Plaintiffs' injunctive relief of "directing the City of Columbia to comply with Section § 6-1-330 of the South Carolina Code" would apply to similarly-situated ratepayers as the Plaintiffs without the need to certify a class. (R.p. 12) Neither of the cases cited by Judge Kinard concerned an injunction to create a common fund, and Judge Kinard did not cite to any case law addressing the common fund remedy. 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 equate to the creation of a common fund and should not be read to do so. The common fund issue was not even in front of Judge Kinard. Thus, it would have been incorrect for Judge Cooper to have read into Judge Kinard's orders that he was addressing, deciding, or envisioning a common fund.

Appellants made clear that they were seeking class certification "only with respect to the claim for injunctive relief . . . ." (R.p. 16) Judge Kinard did not mention the term "common fund" in the discussion concerning injunctive relief, and Appellants' cause of action for injunctive relief did not mention a common fund. The Second Amended Complaint sought 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 . . . ." (R.p. 46) Plaintiffs further sought injunctive relief 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. (R.pp. 46-7) The "special" or "restricted" account Plaintiffs referred to in their Second Amended Complaint was 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. (R.p. 45, ¶ 32] Judge Kinard's order cannot be read as granting a common fund when Appellants' Second Amended Complaint did not seek a common fund via their cause of action for injunctive relief.

Therefore, Judge Cooper correctly found that Judge Kinard's orders did not envision or create a common fund.

VI. JUDGE COOPER CORRECTLY FOUND THAT A COMMON FUND WAS IMMATERIAL TO PLAINTIFF'S CLAIMS.

In the few instances when Appellants are not asserting that Judge Kinard's orders foreclosed Judge Cooper from making any determination concerning a common fund, Appellants argue that South Carolina has approved the common fund doctrine and that the common fund doctrine should be applied in this case if Appellants prevail after a trial on the merits.

Respondent does not contend that our courts have not approved the common fund doctrine. However, as used by our courts, the common fund doctrine is not material or applicable to Appellants' action.

Appellants' main argument for a common fund is the idea, first asserted here on appeal, that the common fund doctrine is similar to the "substantial benefit doctrine." Appellants do not claim that our courts have adopted the substantial benefit doctrine, but rather that other courts around the country use this doctrine to allow for attorney's fees in cases where nonpecuniary benefits are recovered.[5]

Initially, Appellants' argument concerning the substantial benefit doctrine is not preserved for review by this Court. Appellants never argued to Judge Cooper that the substantial benefit doctrine would provide a rationale or a reason to deny Respondent's motion to strike. *See*

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[5] Appellants' acknowledgment here that the issue in this appeal is whether attorney's fees can be allowed further demonstrates that Judge Cooper's order is not immediately appealable.

Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004) (stating that the first step in preserving an issue for appellate review is to actually raise it to the lower court). The central issue in this appeal concerns the allegations of the pleadings. Appellants are now attempting to present a theory to this Court that was not raised in the pleadings and was not raised to the circuit court. Generally, a party cannot present one theory and attack the result below by presenting another theory. *See Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997) (holding an appellate court has no authority to consider an allegation not raised below). Therefore, it is respectfully asserted that this Court should not address whether nonpecuniary benefits justify a common fund.

Appellants assume in this appeal, without proof, that the return of monies to the water and sewer fund will benefit Appellants and other ratepayers. Appellants assert that this nonpecuniary benefit to ratepayers is all that is needed to establish a common fund. However, our case law indicates that a common fund must convey a direct benefit in the form of a return of ascertainable funds or property to a class or a defined group of claimants. *See Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003) (stating, in a class action, an amount to be refunded directly to taxpayers was a common fund); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (stating a common fund to award attorney's fees was proper where each member of a certified class had an ascertainable claim to a part of a lump-sum recovery).

Judge Cooper was correct to recognize that the relief or remedy requested by Appellants does not bear a resemblance to a common fund. As a remedy in this lawsuit, Appellants are seeking a return to the water and sewer fund of monies that were used for purposes unrelated to the provision of water and sewer services. The use of a common fund for this purpose is not recognized or proper in this state because Appellants are not seeking the return of any monies to themselves, or to other similarly situated individuals. Appellants are asking for Respondent to raise funds which have already been spent and to refund those monies to the water and sewer fund.[6] (R.pp. 102-103)

A common fund is unnecessary, redundant, and immaterial in light of Appellants' request that monies that were removed from the water and sewer fund be replaced. A common fund is only employed in class action suits, or in very limited situations that are not applicable here, where there are ascertainable funds or property to be returned to a defined class or group of claimants, and a party is seeking attorney's fees. *See Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21 (1941) (allowing an attorney's fee out of funds to be distributed to a defined group of claimants).[7]

The only thing similar between the present case and the common fund doctrine is Appellants' request for attorney's fees. In their brief, Appellants alternate back and forth between referring to a common fund as a "theory of recovery" or a remedy. Appellants also refer to a common fund as an "equitable exception which compensates the parties who create or preserve a common fund for the benefit of others" and a doctrine for the "equitable allocation of attorney's fees among a benefitted group." [Appellants' Initial Brief, pp. 9-10] The common fund doctrine is not a separate "theory of recovery" or a remedy as sometimes characterized by

[6] Appellants assert, for purposes of a refund, that Respondent would be required to calculate how much money would need to be returned to the general fund. Respondent denies that this correctly states the burden of proof in this action.

[7] Appellants cite to *Edwards v. Alaska Pulp Corp.*, 920 P.2d 751 (Alaska 1996) and *Scholtens v. Schneider*, 671 N.E.2d 657 (Ill. 1996), as examples of the common fund doctrine being applied outside of the class action context. However, like our state jurisprudence, these cases allowed the application of the doctrine only where there was an identifiable group and benefits could be accurately traced to the group (*see Edwards*, 920 P.2d at 756 n.9) and where a fund was created by a party in which others have an ownership interest (*see Scholtens*, 671 N.E.2d at 663). Here, there are no benefits traceable to any identifiable group of owners.

Appellants in their brief.[8] It is a doctrine allowing, in proper circumstances, for the provision of attorney's fees out of funds belonging to a class or a defined group of claimants. *See Matter of Estate of Kay*, 418 S.C. 400, 417, 792 S.E.2d 907, 916 (2016) (stating the "doctrine allows a court in its equitable jurisdiction to award reasonable attorney's 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."). The doctrine is not to be used to return or replace monies that have already been spent.

The common fund doctrine is largely a vehicle for the recovery of attorney's 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." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). According to the Restatement, a common fund "consists of money or other property in which two or more persons (the 'beneficiaries') are entitled to share by reason of their common or parallel interests therein." Restatement (Third) of Restitution and Unjust Enrichment § 29 (2011). The cases in South Carolina discussing a common fund do so in the context of an award of attorney's fees where a plaintiff has secured a sum of money or property to be distributed to a class. *See Layman*, 376 S.C. at 452, 658 S.E.2d at 329 (stating that attorney's fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved).

[8] An example of a "theory of recovery" that was stricken is such as that in *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009). In *Robinson*, the defendant landlord moved to strike all allegations concerning smoke detectors on the basis that S.C. Code Ann. § 5-25-1310 to 1380 does not provide for a negligence cause of action. The plaintiff's theory of recovery, i.e., a negligence cause of action, was stricken by the trial court. *Robinson*, 384 S.C. at 588, 682 S.E.2d at 498.

Appellants provide a history of the common fund in South Carolina and direct this Court's attention to *Crum*[9] and *Shillito*[10] for the allowance of a common fund. Neither case should be relied upon for the establishment of a common fund in the present case.

In *Crum*, an action was commenced to determine to whom property should pass under a will. The heirs of a deceased devisee answered, and the court determined that the heirs could take under the will. The attorney for the successful heirs then "move[d] the Court for an order allowing him a fee out of the funds distributable among the children of [all of the deceased devisees], which group included all those who would reap a benefit from the contest he had waged." 196 S.C. at 531, 14 S.E.2d at 23. There, a common fund existed because there was a sum of money ready to be **distributed** to litigants and others who had a legal right to such personal property. The claimholders were "standing by, anxious, ready and willing to claim its benefits." *Id.* at 533; 14 S.E.2d at 23-24. In the present case, there are no litigants or others with any right to the funds at issue and there is nothing to be distributed. *Crum* stands only for the proposition that a common fund is proper where there are others who are entitled to share in some recovery.

Appellants also rely on *Shillito* and characterize *Shillito* as being similar to the present case. However, the plaintiff in *Shillito* brought the suit as a class action to recover monies unlawfully collected under an unconstitutional statute. *Id.*, 214 S.C. at 24, 51 S.E.2d at 100. The current action is not on behalf of a class and neither Appellants, nor any other claimants, have any legal right for a return to them of the monies paid.

In its simplest terms, a common fund cannot be created based on Appellants' requested relief. Appellants create the fiction that the replacement of monies in the water and sewer fund is

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[9] *Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21 (1941).

[10] *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948).

a common fund. However, in the present case, the class action has been foreclosed and with it the opportunity to establish a common fund. Moreover, Appellants are not seeking a return of funds or property to them or to other similarly-situated persons. There is no authority for a common fund where a plaintiff and other claimants cannot personally establish a right to a return of funds. *See Crown Cent. Petroleum Corp. v. Elmwood Properties*, 244 S.C. 588, 138 S.E.2d 38 (1964) (finding a common fund where the plaintiff had recovered real property to be returned for the benefit of itself and others); *cf. Caughman v. Caughman*, 247 S.C. 104, 146 S.E.2d 93 (1965) (denying a request for a common fund where the plaintiff life tenant did not create a fund that provided a return of property or funds to any ascertainable remaindermen).

[remainder of page left intentionally blank]

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Judge Cooper's order granting Respondent's motion to strike should be affirmed.[11]

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August 25, 2017

[11] In the event this Court decides to reverse, it is respectfully requested that the Court specifically provide that Appellants will still need to prove their entitlement to a common fund. A reversal of the Judge Cooper's order, i.e., a denial of Respondent's motion to strike, would simply mean that the common fund allegations in the Third Amended Complaint are still viable. Appellants have not asked the lower court for a ruling on the establishment of a common fund. It would be error for this Court to grant a common fund, especially in light of Appellants' statements in this appeal that the common fund doctrine should not be decided or applied until after a trial on the merits.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C/A No. 2011-CP-40-6705

Case No. 2016-002446

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

v.

City of Columbia.. Respondent.

CERTIFICATE OF COMPLIANCE

This is to certify that Respondent's Brief complies with Rule 211(b), SCACR.

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