THE 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

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SC Court of Appeals

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

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

vs.

City of Columbia ..... Respondent

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did Judge Cooper committ error by materially altering or amending and effectively overruling Judge Kinard's earlier order which had been affirmed by the South Carolina Supreme Court in Appellant's previous appeal in this case.

II. Did the trial court err in granting Defendant's motion to strike?

III. Did the trial court err in granting Defendant's motion to strike since it involved a novel issue?

IV. Did the trial court err in striking the common fund remedy requested by the Plaintiffs from the Complaint?

V. The trial court's ruling that there is no common fund remedy is erroneous as a matter of law.

STATEMENT OF THE CASE

This matter is before the Court based on an appeal by the Plaintiffs concerning the trial court's order striking the common fund allegations from the Complaint. This is the second time this matter has been before this court and in the prior appeal the South Carolina Supreme Court reversed and remanded this matter to the trial court with specific instructions See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015).

The City of Columbia filed its motion to strike on June 3, 2016. The Plaintiffs filed their response on August 4, 2016. The trial court entered an Order Denying Defendant's Motion to Strike on August 31, 2016. The Defendant City of Columbia then filed a motion to alter or amend on September 12, 2016. The trial court then reversed its order and granted Defendant's motion to strike on October 17, 2016. The Plaintiffs then filed a motion to alter/amend the judgment on October 27, 2016 and the trial court denied Plaintiffs motion to alter and/or reconsider on November 12, 2016.

The trial court in its order granting Defendant City of Columbia's motion to strike held that Plaintiffs' request for a common fund should be stricken from the complaint. The Plaintiffs have set forth four reasons why this Court should reverse the order of the trial court. They are as follows:

(1) Judge Kinard's previous order was affirmed by the Supreme Court and the trial court cannot overrule that order on remand.

(2) The trial court's use of a motion to strike in place of a motion for summary judgment is impermissible and violates the South Carolina Rules of Civil Procedure.

(3) The trial court erred in striking a novel remedy from the Complaint.

(4) Appellants' request for a common fund remedy is consistent with South Carolina law.

STANDARD OF REVIEW

The standard of review for this appeal is set forth in *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114-115, 682 S.E.2d 871, 874 (Ct.App. 2009). In that case, the Court of Appeals was analyzing a motion to strike which actually challenged a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike. The *Hackworth* Court held that our courts had always looked at trial court rulings based on the orders and not on the labels on the motions. (682 S.E.2d at 872.)

Further, our Appellate Courts have repeatedly held, "If a motion to strike raises a doubtful question or the case is such that justice may be promoted by a trial on the merits, the court should exercise fair judicial discretion to that end." (*Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 666 (S.C. 1993). A motion to strike which challenges a theory of recovery in the complaint is comparable to a motion to dismiss. (*Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009)). If a motion to strike challenges a theory of recovery it is akin to a motion to dismiss and such a motion cannot be sustained if the facts alleged and inferences reasonably deducible would entitle the plaintiff to relief on any theory of the case. *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 43 (S.C.App. 1997) (Court of Appeals reverses trial court which struck allegations from the complaint.) See also

Alladin Plastics v. Wintenna, 301 S.C. 90, 390 S.E.2d 370 (S.C.App. 1990) (trial court erred in granting a motion to strike since the order effectively precluded any evidence proving the defense).

ARGUMENTS

I. JUDGE COOPER[1] COMMITTED ERROR BY MATERIALLY ALTERING OR AMENDING AND EFFECTIVELY OVERRULING JUDGE KINARD'S EARLIER ORDER WHICH HAD BEEN AFFIRMED BY THE SOUTH CAROLINA SUPREME COURT IN APPELLANT'S PREVIOUS APPEAL IN THIS CASE.

As stated above, this case is on remand from the South Carolina Supreme Court. The Respondent in its Motion to Strike requested that Judge Cooper strike all of Plaintiff's allegations concerning a common fund. Judge Cooper court initially denied Defendant's motion to strike. (R.pp. 18 - 21; Order dated August 31, 2016). In its order denying the Respondent's original motion to strike dated August 31, 2016, the Judge Cooper affirmed the previous ruling Judge Kinard's earlier Orders, as affirmed by the South Carolina Supreme Court, which stated:

> These courts concluded that class certification was unnecessary because any declaratory or injunctive relief given in the individual action of the named plaintiffs would inure to the benefit of the other similarly situated individuals." (emphasis added) (R. pp. 11-15; Order of Judge Kinard filed June 26, 2012.)
>
> Judge Kinard also held in his order denying the Plaintiffs' motion for reconsideration:
>
> That is, if the Plaintiffs prevail on their cause of action for injunctive relief against the City of Columbia, the relief entered in this action will inure to the benefit of other similarly situated individuals." (emphasis added) (R. pp. 16-17; Order Denying Reconsideration filed September 20, 2012).[2]

In his original Order on the subject, Judge Cooper further cited with approval the case of *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E. 2d 95 (1948) which holds that "A taxpayer singly or in a class suit may maintain a suit in equity to restrain unlawful municipal action which

[1] For the purpose of providing clarity in argument on this issue and in an effort to avoid confusion between the two different Circuit Court Judges who have issued Orders in this case, Appellants' argument on this issue refers to Circuit Court Judge G. Thomas Cooper, Jr. as "Judge Cooper" and Circuit Court Judge J. Ernest Kinard, Jr. as "Judge Kinard".

[2] The Supreme Court affirmed these findings on appeal in *Azar v. City of Columbia.*

leads, directly or indirectly, to taxation and 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 as suit which entitles him to relief."

Thereafter, Defendant filed a Motion to Alter or Amend Judge Cooper's original Order denying the Defendant's Motion to Strike. Judge Cooper then issued a second Order reconsidering and vacating his original Order denying Defendant's Motion to Strike and Granting that Motion. (R.pp. 23 - 33; Order dated October 17, 2016). In the Order granting Defendant's Motion to Strike Judge Cooper completely reversed his earlier analysis. In its second order granting the motion to strike the common fund from Plaintiffs' pleadings the court found "Judge Kinard's reasoning, whatever it may have been, does not constitute the law of the case. The trial court then also said "Judge Kinard's orders cannot be read as envisioning or creating a common fund ...." (R.pp. 23 - 33; Order dated October 17, 2016).

This determination by the trial court in reversing its original order denying Defendant's motion to strike violates the law of the case doctrine. It is well settled law that one circuit judge may not overrule another and that if one circuit judge has ruled on a matter the second circuit judge may not change it.

Under the law of the case doctrine, a party is precluded from re-litigating, after an appeal, the matters that were not raised on appeal, but should have been, or raised on appeal or expressly rejected by the appellate court. CJS Appeal and Error § 991 (2008). See also *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become the law of the case); I*n re Morrison*, 321 S.C. 370, n.2, 468 S.E.2d 651, n.2. (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry, et al.* 261 S.C. 531, 201 S.E.2d 245 (1973) (holding that where a ruling on a

demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 101 S.E.2d 657, 658 (refusing to consider jurisdictional matter of underlying case for issue had been ruled upon and not challenged on appeal); *see also D.R. Horton v. Wescott Land Co.*, 410 S.C. 319, 764 S.E.2d 701 (S.C. 2014) (unchallenged ruling is the law of the case and requires affirmance); *see also Transport Insurance Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010).

South Carolina case law is clear and unambiguous that one Circuit Court Judge may not overrule another Circuit Court Judge. See *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 340 S.E.2d 546 (1986); *Cook v. Taylor*, 272 536, 252 S.E.2d 923 (1979).

In summary, an unchallenged ruling, right or wrong, is the law of the case and the trial court incorrectly struck from Plaintiffs' complaint a request for a common fund in violation of Judge Kinard's order which clearly envisioned such a common fund in his order which was affirmed by the Supreme Court.

A prime example of the law of the case doctrine is found in *Charleston Lumber Co. v. Miller Housing*, 329 S.C. 414, 496 S.E.2d 637 (Ct. App. 1999) and *Charleston Lumber Co. v. Miller Housing*, 338 S.C. 171, 525 S.E.2d 869 (S.C. 2000). In those two respective cases, the Supreme Court found that the trial court in *Charleston Lumber* II (the second case) were bound by the directive in *Charleston Lumber* I (the first case). Similarly, in this case, Judge Kinard's order envisioned a remedy for everyone should injunctive relief be granted against the City of Columbia. Thus, it was error by the trial court to not pay homage to Judge Kindard's prior order. *See Huggins v. Winn-Dixie Greenville Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) ("It is well settled in this jurisdiction that a decision of this court on a former appeal is the law of the case. The questions therein decided are *res judicata* and this court will not on a subsequent appeal review its former decision...we are not convinced that our former opinion was erroneous, but even if it were, we are

precluded under the well-settled rule from reviewing it on this subsequent appeal." In sum, the trial court erred as a matter of law in striking the common fund remedy from Plaintiff's Complaint based on the law of case doctrine.

II. THE TRIAL COURT ERRED IN GRANTING A MOTION TO STRIKE TO STRIKE WITHOUT USING THE SUMMARY MOTION JUDGMENT MOTION STANDARDS.

While Appellants believe that Judge Kinard's Order from *Azar*, *supra* is the law of the case, there are also other reasons why the trial court erred in granting Defendant's motion to strike. A motion to strike is governed by SCRCP 12(f). A motion to strike may not be used in place of a proper motion for summary judgment. SCRCP 12(f) states:

> The court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Since a motion to strike is subpart of SCRCP 12, the trial court must evaluate the motion to strike in the light most favorable to the plaintiffs and if there are facts and inferences which would entitle the plaintiff to a relief on any theory, then a SCRCP 12 motion is improper. See *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (S.C. 2012). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal for failure to state a claim is improper.

In this case, the trial court recognized its order was a resolution of a difficult issue (See Order of Judge Cooper on reconsideration September 12, 2016). This language in the trial court's own orders on the motion to strike raises a serious question about its legality. Our case law on this issue holds justice is promoted by trial on the merits and the trial court should exercise fair, judicial discretion to that end in ruling on motions regarding substantive issues. In this case striking (a potential remedy) the common fund remedy before the trial on the merits does not promote justice and is especially troubling because it involves an issue which should be addressed at the trial of the

case and not on preliminary discovery motion which prohibits the plaintiff from offering evidence on this issue.

The Supreme Court addressed it succinctly in *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (S.C. 1967). In that case, the court noted "In the instant case, justice, not only to the litigants but to the general public requires that the case be tried on the merits and the evidence be fully developed before we are called upon to decide whether the instant case should properly be held an exception to the rule...." *Springfield*, 153 S.E.2d at 188.

This is surely such a case since it involves matters of substantial public interest. It is for this reason that this court should reverse the trial court's ruling.

III. A MOTION TO STRIKE CANNOT DECIDE A NOVEL ISSUE.

While Appellants believe that Judge Kinard's Order is the law of the case, if Appellants are incorrect, then the use of the common fund remedy in an injunctive action is clearly a novel issue in South Carolina since it has not been addressed by our courts. In this case, 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 to be used for the appropriate purposes under the law. Since such a remedy is a novel issue in South Carolina, it should not to be decided on a SCRCP 12 motion. The Supreme Court has repeatedly held that novel issues should never be decided on a motion to dismiss. See *Bessinger v. BiLo Inc.*, 366 S.C. 426, 622 S.E.2d 564, *cert denied (*S.C. 2005); *Unisys Corp. v. S.C. Budget Control Board Division of General Services Information Technology Management Office*, 346 S.C. 158, 551 S.E.2d 263, *rehearing denied* (S.C. 2001); *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (S.C. 2001).

In this case, which is one of great public interest, denying a common fund remedy should not to be decided on a preliminary motion to strike. The Supreme Court has already reversed this case one time and it is now on appeal for a preliminary legal issue decided by the trial court without

the benefit of a trial or discovery being completed. Accordingly, this court should reverse the trial courts denial of the motion to strike the common fund allegations.

IV. THE TRIAL COURT ERRED IN STRIKING THE COMMON FUND REMEDY FROM PLAINTIFFS' COMPLAINT.

The trial court in its final ruling on the matter held:

> 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.
> (Order granting Defendant's motion to alter or amend October 17, 2016.)

A. South Carolina has approved the common fund doctrine.

It is respectfully submitted that the trial judge's understanding of the common fund remedy is misguided. South Carolina Courts have been at the forefront of allowing the common fund doctrine in taxpayer litigation such as this. In *Shillito v. City of Spartanburg* , 214 S.C. 11, 51 S.E.2d 95 (1948), the Supreme Court held a single taxpayer was entitled to sue for unlawful municipal action. In *Shillito*, the Supreme Court held "Citizens should be encouraged to bring suits like this, and when they have succeeded in recovering into the county treasury money for the benefit of the people of the county that otherwise would be lost, it is no more than right and just that they should have these fees. If attorney's fees could not be allowed in cases like this, and a citizen were required to pay out of his own means attorney's fees expended in collecting, for the benefit of the public, a public fund, there are not many citizens who would care to voluntarily incur this expense. They would rather bear the probably trifling personal loss sustained by the illegal appropriation than subject themselves to the much larger loss that would be incurred in attorney's fees." 51 S.E.2d at 101.

Plaintiffs assert that this was what Judge Kinard envisioned when he wrote in his Order that any action of the plaintiff would "inure to the benefit of all similarly situated individuals." (Order of

Judge Kinard, affirmed in *Azar*). Thus, the current trial judge's ruling striking the common fund theory of recovery if the plaintiff wins, is not sustainable on appeal.

The common fund theory is an equitable exception which compensates the parties who create or preserve a common fund for the benefit of others. The common fund theory incorporates the substantial benefit doctrine which is very similar to the common fund doctrine except it typically applies to nonpecuniary benefits such as this case where Plaintiffs seek to require the Defendant to return monies to the Water and Sewer Enterprise Fund.

It was first applied in South Carolina in *Nimmons v. Stewart*, 13 S.C. 445 (S.C. 1880). In that case, the Court affirmed an award for reasonable attorney's fees from a common fund. The case was not a class action and the Court simply wrote:

> In such cases as this the court generally deems it just and equitable that services rendered for the benefit of the common interest, should, as upon a quantum meruit be paid out of the common fund. 13 S.C. at 445.

The *Nimmons* case was followed by another important South Carolina Supreme Court case entitled *Petition of Crum*, 196 S.C. 528, 14 S.E.2d 21 (1941). In that case, an attorney representing one group of heirs established that his group and two others were entitled to take under a will. The Court held it was equitable that the attorney should be allowed a fee out of the entire funds distributable from all three groups of heirs even though he did not represent all groups of heirs and it was not a class action. The Court held that his success yielded an award that would not have existed but for his diligent efforts.

The *Petition of Crum* case was followed by *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E. 2d 95 (1948). In that case, the Supreme Court held a single taxpayer was entitled to sue for unlawful municipal action and was entitled to fees from the fund he created. In *Shillito* (similar to this case), the Supreme Court found "Citizens should be encouraged to bring suits like this, and when they have succeeded in recovering into the county treasury money for the benefit of the

people of the county that otherwise would be lost, it is no more than right and just that they should have these fees. If attorney's fees could not be allowed in cases like this, and a citizen were required to pay out of his own means attorney's fees expended in collecting, for the benefit of the public, a public fund, there are not many citizens who would care to voluntarily incur this expense. They would rather bear the probably trifling personal loss sustained by the illegal appropriation than subject themselves to the much larger loss that would be incurred in attorney's fees." 51 S.E.2d at 101.

The *Shillito* and *Crum* cases have been expanded by additional case law in South Carolina which has discussed the common fund doctrine. In *Layman v. State*, 376 S.C. 434, 658 S.E. 2d 320 (2008), the Supreme Court stated that the common fund doctrine was based upon the equitable allocation of attorney's fees among a benefited group. This legal principle was reaffirmed in the case of *In Re: The Estate of Marion M. Kay Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay v. Martha Brown*, 418 S.C.400 , 792 S.E.2d 907 (S.C.App. 2016). In *Kay* the court noted the rationale for awarding attorney's fees is based on the principal 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 share of the expenses." *Layman v. State*, 376 S.E. 434, 452, 658 S.E.2d 320, 329 (2008), citing *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941).

B. Other Courts have adopted common fund theory in cases that do not involve class actions.

Other courts have found that the common fund doctrine is applicable in cases that do not involve class actions. In *Kline v. Eyrich*, 69 S.W.3d 197, 210 (TN 2002), the Supreme Court of Tennessee found that the common fund doctrine applied in a wrongful death action. The Court noted the common fund doctrine is supported by two primary rationales. First, the doctrine prevents the beneficiaries of legal services from being unjustly enriched by requiring them to pay for those services according to the benefit received. Second, the doctrine served to spread the cost of

litigation proportionately among all the beneficiaries so that the plaintiff does not bear the entire burden alone.

The Tennessee Supreme Court in *Kline, supra,* went cited other cases from other jurisdictions which have applied the common fund doctrine outside the class action context.[3] See *Edwards v. Alaska Pulp Corp.*, 920 P.2d 751, 755 (Alaska 1996) (the common fund doctrine is implicated anytime one litigant's success releases well defined benefits for a limited and identifiable group); *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240, 257 (1975); *see also Scholtens v. Schneider*, 671 N.E.2d 657, 663 (Ill. 1996) (the common law does not prevent the doctrine from being applied in such an action as the doctrine can be applied generally to all funds that are created, increased or preserved by a party in which others have an ownership interest.)[4]

In sum, Judge Kinard in his ruling clearly contemplated a potential common fund recovery if the Plaintiffs prevailed. It is respectfully submitted that the trial court erroneously decided at an early date in its litigation that "injunctive relief given to the named plaintiffs, if granted, would inure to the benefit of the other similarly situated individuals does not envision a common fund remedy, nor does it create a common fund." (See Order October 17, 2016). In fact, this is contra to the Order of Judge Kinard affirmed by the Supreme Court in that if the Plaintiffs prevail in this case, everyone who is a water and sewer customer would see the funds that were spent by the City of Columbia returned to the Water and Sewer Enterprise Fund for much needed system repairs and upgrades. Clearly over a hundred thousand water and sewer customers would receive a substantial benefit since the monies that the City of Columbia spent and did not put into the Water and Sewer Enterprise Fund would be returned to that fund to be used solely for the benefit of the water and sewer customers. If one assumes the Appellants win this case, the City of Columbia would have to

[3] The United States Supreme Court established the doctrine in the 1880s. See *Trustees v. Greenbough*, 105 U.S. 527 (1881); *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980) (persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.) (Boeing, 444 U.S. at 478).

[4] *In Re Estate of Brandon*, 902 P.2d 1299 (1319 N.23) (Alaska 1995) (Alaska Supreme Court remands case with instruction to Superior court that it "could choose to apply the common fund doctrine".)

calculate how much money would have to be returned from the General Fund to the Water and Sewer Enterprise Fund. If Appellants' litigation is successful, it will have benefited every water and sewer customer in the City of Columbia since every water and sewer customer in the City of Columbia has a vested interest in making sure that the water and sewer funds are spent only on the water and sewer systems and for no other City program.

Appellants assert that what Judge Kinard wrote and what he envisioned was that if the Appellants prevail, then any action of the Plaintiffs would "inure to the benefit of all similarly situated individuals." (Order of Judge Kinard, affirmed in *Azar*). Thus, Judge Cooper's ruling striking the common fund theory of recovery should be reversed.

V. THE TRIAL COURT'S RULING THAT THERE IS NO COMMON FUND REMEDY IS ERRONEOUS AS A MATTER OF LAW.

It is respectfully submitted that the trial court's finding that Judge Kinard's Order that injunctive relief given to the named Plaintiffs, if granted, would inure to the benefit of the other similarly situated individuals does not envision a common fund remedy, nor does it create a common fund is erroneous. First, as has been indicated above, this issue should never be decided on a motion to strike. Second, the City of Columbia would be required to refund to the Water and Sewer Enterprise Fund all monies it had used for other purposes. There would be one lump sum payment or a series of payments because the City of Columbia would be required to calculate how much money had been used by them for an improper purpose.

Further, the trial court's ruling which states "injunctive relief bears no resemblance to the common fund doctrine" is erroneous as a matter of law. (See Order of Judge Cooper dated October 17, 2016). In fact, other courts around the country have found that part of the common fund doctrine is an extension of that doctrine called the substantial benefit rule. The substantial benefit rule allows for attorney's fees in cases where nonpecuniary benefits are recovered. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1989); *see also, Pfifer Ex Relation Devry, Inc. v.*

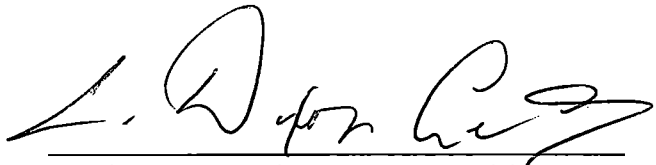
Begley, 27 N.E.3d 670 (Ill. App. 2015) (changes in internal operating procedures that are designed to produce savings in the future is viewed as a fund creating action); *XL Specialty Ins. Co. v. Loral Space & Communication, Inc.*, 918 N.Y.S.2d 57, 82 A.3d 108 (N.Y.App. Div. 2011) (when there is no common fund but the corporation nevertheless receives a benefit, shareholders' counsel can still seek fees from the corporation); *see also Peart v. District of Columbia Housing Authority*, 972 A.2d 810 D.C. (2009) (common fund has been extended to permit reimbursement in cases where the litigation has conferred a substantial benefit on members of an ascertainable group); s*ee also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 395 (1970) (substantial benefit occurs when the litigation produces a result regardless of whether the benefit is pecuniary in nature); *see also, Hall v. Cole*, 412 U.S. 1 (1973) (where respondent's suit vindicated not only his own rights but rights of others an award of attorney's fees was applicable under the inherent equitable power of the court.).

In sum, Appellants injunctive action, if granted, would clearly inure to the benefit of all City water and sewer customers in Columbia. This action, if successful, will create a common fund that will give non-pecuniary benefit to all individuals, corporations and businesses that are water and sewer customers. If the action is successful, injunctive relief would require the City of Columbia to return millions of dollars to the Water and Sewer Enterprise Fund all as the result of the Appellants' taxpayer action. Accordingly, the trial court erred in striking the common fund remedy from the complaint prior to the trial on the merits.

In sum the common fund doctrine and substantial benefit doctrine which is a part and parcel of the common fund doctrine are appropriate remedies in this case should Plaintiffs succeed. Accordingly, this issue should not have to be decided on a motion to strike. The ruling by the trial court is premature and to affirm such a ruling at this juncture of the case creates significant evidentiary obstacles to the Plaintiffs and accordingly it should be reversed.

CONCLUSION

For the reason set forth hereinabove both individually and collectively, Appellants respectfully requests that this Court reverse the Orders of the Circuit Count being appealed in this case



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August 23, 2017

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

Appellants,

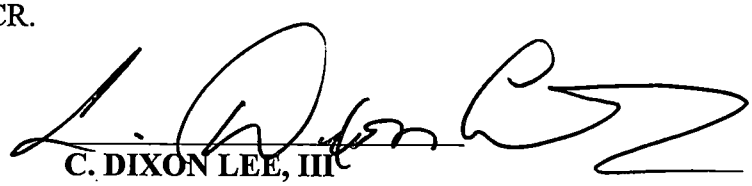
vs.

CITY OF COLUMBIA,

Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned attorney for Appellants for the Appellants hereby certifies that the Final Brief of Appellants and the Final Reply Brief of Appellants in this appeal comply with Rule 211(b), SCACR.



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