

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY  
STATE OF GEORGIA

FILED BY OFFICE

2015 MAY -1 PM 2:46

LINDA PIERCE, Clerk of Superior, )  
State, and Juvenile Courts of )  
Muscogee County, and the )  
Columbus Board of Equalization, )

M. LINDA PIERCE  
MUSCOGEE COUNTY  
SUPERIOR COURT

Plaintiff, )

v. )

Civil Action Number:  
SU14CV3472

COLUMBUS, GEORGIA, TERESA P. )  
TOMLINSON, Individually and as Mayor, )  
JERRY "POPS" BARNES, Individually )  
and as District 1 Councilor, )  
GLENN DAVIS, Individually and as )  
District 2 Councilor, BRUCE HUFF, )  
Individually and as District 3 Councilor, )  
EVELYN TURNER PUGH, Individually )  
and as District 4 Councilor, MIKE BAKER, )  
Individually and as District 5 Councilor, )  
GARY ALLEN, Individually and as )  
District 6 Councilor, EVELYN "MIMI" )  
WOODSON, Individually and as District 7 )  
Councilor, JUDY THOMAS, Individually )  
and as District 9 Councilor, BERRY "SKIP" )  
HENDERSON, Individually and as District )  
10 Councilor, ISAIAH HUGLEY, )  
Individually and as City Manager, )  
PAMELA HODGE, Individually and as )  
Director, REATHER HOLLOWELL, as )  
Human Resource Director, CLIFTON C. )  
FAY, Individually and as City Attorney, )

Defendants. )

**DEFENDANTS' EXPEDITED MOTION TO STAY**

COME NOW all Defendants, pursuant to O.C.G.A. §§ 5-6-46(a) & 9-11-62(c) and (d), and hereby move the Court to stay this action pending the appeal to the Georgia Supreme Court filed by the Defendants. Because the Court's Order on Plaintiff's Motion for Authority to Retain Independent Counsel requires certain compliance within ten (10) days, Defendants hereby request expedited consideration of their Motion.

Respectfully submitted, this 1<sup>st</sup> day of May, 2015.

PAGE, SCRANTOM, SPROUSE,  
TUCKER & FORD, P.C.

By: 

James C. Clark, Jr.  
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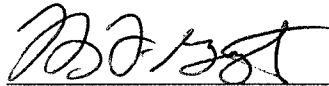
**CERTIFICATE OF SERVICE**

I do hereby certify that I am counsel for Defendants and that a true and exact copy of the foregoing document has been served upon counsel of record in the within matter by email, as follows:

William S. Stone  
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David Wm. Boone  
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This 15<sup>th</sup> day of May, 2015.



\_\_\_\_\_  
Counsel for Defendants

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY  
STATE OF GEORGIA

FILED IN OFFICE  
2015 MAY -1 PM 2:47

H. LINDA PIERCE  
MUSCOGEE COUNTY  
SUPERIOR COURT

LINDA PIERCE, Clerk of Superior, )  
State, and Juvenile Courts of )  
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Plaintiff, )

v. )

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Director, REATHER HOLLOWELL, as )  
Human Resource Director, CLIFTON C. )  
FAY, Individually and as City Attorney, )

Defendants. )

**MEMORANDUM IN SUPPORT OF DEFENDANTS' EXPEDITED  
MOTION TO STAY**

Defendants submit this Memorandum in Support of their Expedited Motion to Stay, respectfully showing the Court the following:

**INTRODUCTION**

It is black letter law that Defendants' April 28 and 29, 2015 Notices of Appeal divest this Court of jurisdiction. "As a general rule, in civil actions other than injunctions, a trial court, upon the filing of a notice of appeal, loses jurisdiction to modify or enforce a judgment which is the subject of the appeal during the period of supersedeas." *Guthrie v. Wickes*, 295 Ga. App. 892, 893 (2009).<sup>1</sup> Only matters "which are independent of and distinct from the judgment[s] on appeal remain within the jurisdiction of the trial court." *Davis v. Harpagon, Co., LLC*, 281 Ga. 250, 252 (2006) (trial court had no jurisdiction to order parties to pay special master fees during pendency of appeal underlying action). Given the breadth of the matters covered by the Notices of Appeal, this entire case is now on appeal. Therefore, nothing can happen in this case during the pendency of appeal.<sup>2</sup> The matter should be stayed.

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<sup>1</sup> O.C.G.A. § 5-6-46(a) ("In civil cases, the notice of appeal filed as provided in Code Section 5-6-37 and 5-6-38 shall serve as supersedeas upon payments of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond or other form of security be filed....").

<sup>2</sup> This includes a discovery stay, which makes particular sense in cases like this one where sovereign, legislative and official immunity are on appeal. *Anderson v.*

As is also shown below, the stay should also apply to the enforcement of the April 22, 2015 injunction and/or extraordinary mandamus remedy -- “the Attorney’s Fees Order” -- with respect to the payment and budgeting of attorneys’ fees and expenses. Defendant hereby moves for such a stay pursuant to O.C.G.A. § 9-11-62(c) and (d). The Attorney’s Fees Order grants Plaintiff an injunction, a writ of mandamus and/or other extraordinary relief. A stay should be granted because absent a stay, Defendants appeal would be mooted,<sup>3</sup> and Defendants have made a strong showing that they likely will succeed on the merits. The injunction requiring CCG to pay the attorney’s fees from the other appropriated funds rather than Plaintiff’s budgeted funds is a case of first impression and expands O.C.G.A. § 45-9-21 beyond its plain language and in a manner inconsistent with O.C.G.A. § O.C.G.A. § 36-5-22.1. Defendants will be irreparably harmed absent a stay, and the appeal would be mooted. Plaintiff will not be harmed by the issuance of a stay, and the public’s interest in the proper and lawful expenditure of taxpayer funds is great.

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*Creighton*, 438 U.S. 635, 646 n.6, 107 S. Ct. 3034, 3042 n.6 (1987) (the immunity defense is intended to protect officials from the “broad ranging discovery” that can be “peculiarly disruptive of effective government”). Immunity is an “entitlement not to stand trial’ rather than a ‘mere defense to liability.’” *Cameron v. Lang*, 274 Ga. 122, 124 (2001) (addressing official immunity); *Eshleman v. Key*, 326 Ga. App. 883, 884 (2104) (same).

<sup>3</sup> See *Jackson v. Bibb County School Dist.*, 271 Ga. 18, 19 (1999)(to prevent appeal of injunction from becoming moot, it was incumbent upon the plaintiffs to seek a supersedeas from the trial court); *Bd. of Com’rs of Richmond County v. Cooper*, 259 Ga. 785, 785 (1990)(same with respect to mandamus order).

## PROCEDURAL BACKGROUND

Plaintiff (the “Clerk”) filed this action on November 13, 2014. Defendants moved to dismiss all claims and filed a separate motion to dismiss all claims against them in their individual capacities. The Court held a hearing on January 15, 2015 on Defendants’ motions and heard extensive argument from the parties. On January 26, 2015, the Clerk dismissed certain claims asserted in the complaint.

On April 22, 2015, the Court issued an order (the “Motion to Dismiss Order”) granting Defendants’ motion to dismiss the Clerk’s injunctive claims against the Columbus Consolidated Government (“CCG”) and the individual defendants in their official capacities. The Court denied Defendants’ motion to dismiss the Clerk’s declaratory judgment, mandamus, and other claims against the CCG and the individual defendants.

In the separate Attorney’s Fees Order also entered on April 22, 2015, the Court ordered the CCG to pay the Clerk’s attorney’s fees and expenses as approved by the Court from the CCG’s “general fund” pursuant to O.C.G.A. § 45-9-21(e). The Court also ordered the parties, *including Defendants*, and their counsel to submit proof of their rates and fees to the Court within 10 days of the entry of the Attorney’s Fees Order. Along with this submission, the Court ordered

Defendants to submit to the Court all previous bills sent to the CCG for an *in camera* inspection by the Court.<sup>4</sup>

Defendants filed their Notice of Appeal to the Georgia Supreme Court on April 28, 2015. After it was determined that the Motion to Dismiss Order and the Attorney's Fees Order were not physically filed with the Clerk of Court until April 29, 2015, Defendants filed a second Notice of Appeal on April 29, 2015.

### **ARGUMENT AND CITATION OF AUTHORITY**

The Court has enjoined the CCG and its counsel and/or issued an extraordinary mandamus remedy requiring them to perform acts in the manner in which the Court has directed. *See, e.g., Abel & Sons Concrete, LLC v. Juhnke*, 295 Ga. 150, 151 (2014) (finding that “[the] portions of [the trial court’s] order comprised, in substance, an interlocutory injunction[,]” although no order was ever entered titled as such). Whether viewed as an injunction or writ of mandamus, the Court’s Order is directly appealable under O.C.G.A. § 5-6-34(a)(4) or O.C.G.A. § 5-6-34(a)(7) to the Georgia Supreme Court, and it has been so appealed, along with all such other “judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below....” O.C.G.A. § 5-6-34(d).

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<sup>4</sup> It should be noted that nothing in O.C.G.A. § 45-9-21(e) provides for an *in camera* review of the Clerk’s or the Defendants’ invoices for legal services. Given that the Clerk has not requested a jury trial in this case, having the fact-finder review attorney’s fee bills of the parties which will contain work product and privileged materials raises a significant conflict issue for the Court.



Defendants' Notices of Appeal divest this Court of jurisdiction over this matter. O.C.G.A. § 5-6-46(a) ("In civil cases, the notice of appeal filed as provided in Code Section 5-6-37 and 5-6-38 shall serve as supersedeas upon payments of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond or other form of security be filed..."). "As a general rule, in civil actions other than injunctions, a trial court, upon the filing of a notice of appeal, loses jurisdiction to modify or enforce a judgment which is the subject of the appeal during the period of supersedeas." *Guthrie*, 295 Ga. App. at 893. The only jurisdiction the trial court could possibly retain would be as to matters totally independent of and distinct from the judgment or order on appeal. *Davis*, 281 Ga. at 253.

There are no independent issues not on appeal in this case. The Attorney's Fees Order, whether viewed as an injunction or writ of mandamus, is directly appealable. The Motion to Dismiss Order concerned all remaining issues in the case, including the Court's rejection of the defenses of sovereign immunity, official immunity, and/or legislative immunity, all of which are also directly appealable. *Liberty Cnty. Sch. Dist. v. Halliburton*, 328 Ga. App. 422, 425-26 (2014) ("Although this trial court's order denying the motion to dismiss did not explain its ruling, the unambiguous posture of this case, including the grounds of sovereign and qualified immunity raised in the answer and repeated in the motion

to dismiss, suggests that the trial court's rejection of the defenses of sovereign and qualified immunity was 'conclusive' such that defendants were entitled to a direct appeal under the collateral order doctrine."); *Bd. of Regents v. Canas*, 295 Ga. App. 505, 507 (2009) ("Based on these authorities, we conclude that an order that denies a motion to dismiss, based on a conclusive determination that the State (or a state officer or employee) is not immune from suit on the basis of sovereign immunity, meets these criteria. Because the interlocutory order at issue meets the criteria of the collateral order doctrine, we have jurisdiction over the Board's direct appeal.").

Respectfully, Defendants believe the Court's Motion to Dismiss Order and the Attorney's Fees Order are incorrect. The ultimate decision on the Orders will come in due course from the Georgia Supreme Court. In the meantime, Defendants' filing of their Notices of Appeal divests the Court of jurisdiction over this proceeding as all substantive proceedings in this case are now on appeal. The Attorney's Fees Order, however, requires compliance by the CCG and/or its counsel within ten (10) days and continuing thereafter for an undefined period of time. Because the Attorney's Fees Order requires certain compliance within a specified time, and out of an abundance of caution, Defendants request that the Court stay the Attorney's Fees Order and all other matters in this case pending Defendants' appeal.

1. **The Court's Orders Are Substantively Incorrect.**

The Court has received substantial briefing on the Motion to Dismiss Order and the Attorney's Fees Order. The Court has made its decision and Defendants will not reiterate all of their arguments here. Those arguments can and will be made in due time in the Georgia Supreme Court. With respect to the Court's Attorney's Fees Order, however, it requires compliance by Defendants within a specified time. Defendants previously set forth all of their arguments in opposition to the Clerk's Motion, but three bear repeating and support a stay of these proceedings pending appeal.

First, the Attorney's Fees Order appears incongruous with the Court's reasoning. In the Motion to Dismiss Order, the Court acknowledged that sovereign immunity would bar any injunctive claims against the CCG and the other Defendants in their official capacities under the recent Georgia Supreme Court opinion in *Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 596 (2014). Despite this holding, the Court has simultaneously enjoined CCG from paying the Clerk's fees from her budget and **ordered** the CCG to pay the Clerk's attorney's fees in a specific manner out of the CCG's "general fund." The Court has further ordered counsel for Defendants to submit a schedule of rates and to provide attorney's fees bills for *in camera* inspection by the Court. The Court has enjoined Defendants and their counsel to perform specific tasks – while

simultaneously finding in the Motion to Dismiss Order entered the same day that Defendants are immune from injunctions.

If the Court has not enjoined Defendants, it could only be said that the Court has granted some sort of mandamus relief in the form of an order compelling the Defendants to pay the Clerk's attorney's fees bills out of the CCG's "general fund." To the extent the Court's Attorney's Fees Order is an order of mandamus, however, it is contrary to applicable case law in Georgia. Before an applicant is entitled to mandamus relief against a public official, they must first show a clear legal right to the relief sought, and nothing in O.C.G.A. § 45-9-21(e) entitles the Clerk to the relief provided her in the Attorney's Fees Order. *See Murray County v. R & J Murray, LLC*, 280 Ga. 314, 315 (2006). And just as importantly, mandamus cannot compel a discretionary act. *Bibb County v. Monroe County*, 294 Ga. 730, 736 (2014). The Court has ordered the Defendants not just to pay the Clerk's legal bills, but also to pay them in a specific manner out of a specific fund. The Court has no jurisdiction to issue mandamus relief to compel government officials to exercise discretion in that manner. *See, e.g., Bland Farms, LLC v. Ga. Dep't of Agric.*, 281 Ga. 192, 193 (2006) ("Mandamus can be used to compel an

official to exercise his or her discretion, but not direct the manner in which that discretion is exercised.”).<sup>5</sup>

Second, through entry of the Court’s Attorney’s Fees Order, the Court has acted beyond its jurisdiction. O.C.G.A. § 45-9-21(e) expressly states that monies to be paid to fund litigation brought by a constitutional officer shall be paid by monies of the “governing authority.” O.C.G.A. § 36-5-22.1 expressly defines the monies of the “governing authority” to include those monies appropriated to elected officials for the use and benefit of citizens of the jurisdiction. O.C.G.A. § 45-9-21(e) does not alter the definition of “governing authority” monies. The statute merely allows for litigation initiated by a constitutional officer to be taxpayer funded, as opposed to that officer having to fund the litigation out of his or her own pocket. Accordingly, neither the statutory text nor the constitutional

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<sup>5</sup> The Court’s Attorney’s Fees Order seeks to compel the result the Court apparently believes is just, *i.e.*, payment of the Clerk’s attorney’s fees out of the CCG’s “general fund.” Respectfully, that is not a proper use of mandamus powers. *Bibb County*, 294 Ga. at 738-39 (“[W]hile mandamus could properly issue to compel the Secretary to determine the boundary line and record the survey and plat reflecting such line, the trial court erred in dictating the result of the review by directing the Secretary to record the Scarborough survey.”); *State ex rel. Bd. of Public Ed. For City of Savannah and Chatham County v. Johnson*, 214 Ga. 607, 611-12 (1958) (“[w]hile mandamus will lie to compel performance of specific acts, where the duty to discharge them is clear, it is not an appropriate remedy to compel a general course of official conduct for a long series of continuous acts to be performed under varying conditions”). The Court’s Attorney’s Fees Order impermissibly dictates the outcome of budgetary decisions that rest within the exclusive jurisdiction of the Council of the CCG.

breadth of the court's powers allows the judiciary to intervene into the administering of accounts or assignment of monies of the "governing authority."

Georgia law plainly provides that the CCG has "original and exclusive" jurisdiction over all money and property of the CCG. O.C.G.A. § 36-5-22.1(a); *see also* O.C.G.A. § 36-5-22.1(a)(7) (Providing that funds appropriated to "all officers," such as the Clerk, for the "use and benefit" of the county remain funds of the "governing authority"). Through the Attorney's Fees Order, the Court has directed the CCG to spend monies already budgeted for other items to pay for the Clerk's prosecution of her lawsuit against the Defendants. Respectfully, the Court has no jurisdiction to provide any such relief to the Clerk. *See, e.g., Turner County v. City of Ashburn*, 293 Ga. 739, 744 (2013) ("It follows that issues relating to how tax revenues should be allocated are also left solely to legislative discretion and are not matters for determination by the courts so long as there is no manifest abuse of power or failure to abide by constitutional or legislative directives regarding the purposes for which the revenues may be spent."); *Dekalb County v. Adams*, 272 Ga. 401, 403 (2000) (Court has no inherent authority to direct a county to pay funds absent "statutory authority or a constitutional mandate").<sup>6</sup>

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<sup>6</sup> Nothing in O.C.G.A. § 45-9-21(e) directs that the Clerk's legal fees must come from any particular fund, account, or budget. The Court, however, has apparently determined that the *intent* of the statute requires that the funds for the Clerk's prosecution of her lawsuit must come from the CCG's "general fund." (Attorney's Fees Order, ¶¶ 13-14). O.C.G.A. § 45-9-21(e) is not vague or equivocal. Where

Third, and finally, the Attorney's Fees Order likewise fails to recognize significant public policy concerns. The very gist of the Clerk's case is that she controls the amounts budgeted for her office and that she can spend those monies however she sees fit. O.C.G.A. § 45-9-21(e) cannot expand the constitutional duties of the Clerk beyond those mandated by the Constitution. Yet, the Court's Order does just that. It allows the Clerk through aid of the Court to tell the CCG how to spend not just the Clerk's money *but also the CCG's money*. And the expenditure the Court has ordered the CCG to pay for is for a lawsuit *against the CCG*. Defendants submit that the Court's Order is erroneous.

**2. This Court Should Enter A Stay Pending Appeal.**

Defendants recognize that the Court has ruled against them on the Clerk's Motions. The issues raised by the Clerk's Motions are, however, substantial to the CCG and to county governments throughout the state. Defendants submit that given the gravity of the issues involved, the Court should stay this action pending the outcome of Defendant's appeal to the Georgia Supreme Court. This Court and the Georgia Supreme Court have jurisdiction to stay a grant of injunctive relief pending appeal. *See* O.C.G.A. § 9-11-62(c); *Worley v. Southernaire Corp.*, 230

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the words of a statute are clear and unequivocal, the Court is bound to construe it as written. *Hollowell v. Jove*, 247 Ga. 678, 681 (1981) (internal quotations omitted) (“[W]here a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms.”).

Ga. 489, 490 (1973) (“[I]n an injunction case the trial court is empowered to suspend or modify the injunction after a notice of appeal is filed”).

With regard to the Court’s Attorney’s Fees Order, the terms of the Order technically require certain compliance by the Defendants within ten (10) days. Defendants submit that such compliance should not be required pending appeal. O.C.G.A. § 45-9-21(e) was enacted so that government officials did not have to pay for an attorney out of their own pocket when the county attorney had a conflict of interest. The statute was never designed to encourage constitutional officers to litigate their budgets every year when the litigation (whether frivolous or not) has no cost or risk to the constitutional officer. The interpretation of the statute by this Court leads directly to that result, which is inherently disruptive to the budget process of the CCG and county governments throughout the State.

The CCG and county governments throughout the State are required to maintain balanced budgets. After a long and hard deliberative budget process, all funds of the CCG have been allocated for the FY 2015 budget year. That necessarily means that the funds the Court has now ordered the CCG to pay for the Clerk’s attorney’s fees must come out of monies already budgeted to other departments, boards, or agencies. In other words, the Attorney’s Fees Order requires the CCG to now adjust its budget to account for a cost associated with the Clerk that was never provided for in her budget. That cost could also go on for



some years into future budgets, which raises significant constitutional questions as the Court's order purports to bind future Council Members of the CCG as to the allocation of the Clerk's attorney's fees. *See, e.g., Int'l Bhd. of Police Officers Local # 471 et al., v, Chatham County*, 232 Ga. App. 507, 508 (1998) (Holding that the county commission was free each year to fund or not fund positions as "[n]o one legislature can tie the hands of its successors with reference to a subject upon which they have an equal power to legislate").

While the parties certainly disagree on the issues, there is one point of agreement. No case in Georgia prior to this one has ever determined whether the CCG (or any other county government) is required to pay for a constitutional officer's attorney's fees out of a "general fund." Requiring Defendants to comply with the Attorney's Fees Order pending an appeal to the Georgia Supreme Court would work a substantial injustice on Defendants.<sup>7</sup>

At present, there are no remaining issues in this case requiring any sort of compliance by Defendants. To the extent any issues arise in the future while this case is on appeal, Defendants submit that the Court lacks jurisdiction to consider those issues and should stay any further action whatsoever in this case until

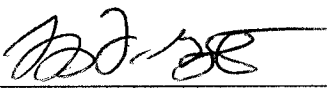
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<sup>7</sup> Although compliance with the Court's Attorney's Fees Order necessarily will require re-allocation of monies by the CCG from some other department, agency, or board for the benefit of the Clerk, the Court did not conduct an evidentiary hearing to assess how that re-allocation would take place, or what other department, agency, or board would be required to have their budgeted funds reduced to ensure compliance with the Attorney's Fees Order.

Defendants' appeal is concluded. *See, e.g., Gomez v. Innocent*, 323 Ga. App. 1, 4 (2013) ("A notice of appeal divests the trial court of jurisdiction to supplement, amend, or modify the judgment while the appeal of that judgment is pending."). For these reasons, and the other reasons set forth herein, Defendants respectfully request that the Court stay these proceedings pending the appeal pursued by Defendants.

Respectfully submitted, this 1<sup>st</sup> day of May, 2015.

PAGE, SCRANTOM, SPROUSE,  
TUCKER & FORD, P.C.

By: 

James C. Clark, Jr.  
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**CERTIFICATE OF SERVICE**

I do hereby certify that I am counsel for Defendants and that a true and exact copy of the foregoing document has been served upon counsel of record in the within matter by email, as follows:

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Atlanta, Georgia 30305

This 1<sup>st</sup> day of May, 2015.



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Counsel for Defendants