THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2013-000246

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2010-CP-10-8911

Ellington Woods I Homeowners Association, Inc.; Ellington Woods II Homeowners Association, Inc.; Ellington Woods III Homeowners Association, Inc.; Ellington Woods IV Homeowners Association, Inc.; Ellington Woods V Homeowners Association, Inc.; Alan Arthur, individually and as class representative; and John Doe, Respondents,

v.

Dunes West Property Owners Association, Inc., Appellant.

RESPONDENTS' MOTION TO DISMISS

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Respondents move to dismiss the appeal filed by Appellant because this Court lacks jurisdiction. Appellant claims an interlocutory order granting the certification of a class action is immediately appealable and is the basis of appellate jurisdiction. However, it is well established in South Carolina that such interlocutory orders are not appealable. Thus, the within appeal should be dismissed.

ARGUMENT

APPELLATE JURISDICTION DOES NOT EXIST FOR AN ORDER GRANTING CLASS CERTIFICATION

Appellant appeals the Order of The Honorable Roger M. Young, Sr. granting class certification on October 26, 2012 (the "Order"), and a subsequent Order entered January 2, 2013, denying a Motion to Reconsider the Order. The Order certifies a class of over 600 homeowners, and makes no other extraneous rulings associated with the future handling of the class. In Salmonsen v. CGD, Inc., 377 SC 442, 451, 661 S.E.2d 81, 87 (2008), the South Carolina Supreme Court unequivocally held that class action certification orders are not immediately appealable. In Salmonsen, Appellant CGD argued against precedent and urged the Supreme Court to reverse the long-standing rule prohibiting the appeal of class certification orders. Id. 661 S.E.2d at 85. Our Supreme Court fully evaluated the issue and noted that state jurisdictions that have granted immediate appeal usually do so by a state rule of civil procedure or specific statute authorizing them to do so. Id. 661 S.E.2d at 86. Of course, no such rule or statute exists in South Carolina. The Salmonsen Court determined that granting such a review to a class certification "...would represent a significant departure from the state's established appealability jurisprudence" and declined to accept the appeal on that basis. Id. 661 S.E.2d at 87.

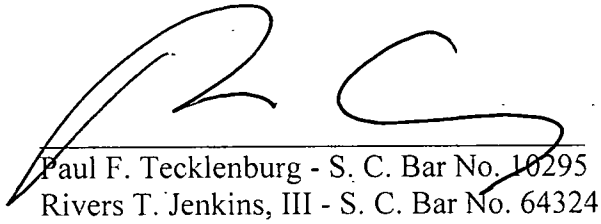
Appellant attempts to circumvent this well-established jurisprudence regarding class-certification orders by urging that the issuance of such an order affects "mode of trial". However, in Knowles v. Standard Sav. & Loan Asso., the Supreme Court of South Carolina stated that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment." 274 S.C. 58, 59, 261 S.E.2d 49 (1979). Instead, South Carolina courts have commonly held mode of trial is "whether or not a party is erroneously denied a trial by jury in a law case or is erroneously required to proceed before a jury in an equity case." Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, (2000). "...[T]he mode of trial analysis indubitably includes the consideration of the availability of trial. The question of the denial of an actual trial is intrinsic." Salmonsen, supra, 661 S.E.2d at 87 (lower court order requiring "opt in" procedure is appealable, because persons may be denied an actual trial).

Appellant claims that its mode of trial is affected because it will "...bear the burden of excessive costs and fees associated with proceeding under the class action." (App. Br. p. 17). Further, Appellant urges a class action affects mode of trial, because it "...produces irresistible pressure on the defendant to settle." (App. Br. p. 18). However, no case in South Carolina jurisprudence adopts Appellant's argument that the mode of trial exception to the interlocutory order rule applies because there may additional work or expense required by a party in a legal proceeding or a court order may encourage settlement. Appellant has not been denied an actual trial, as the potential "opt in" participants were in Salmonsen. As a result, Appellant's mode of trial argument should be summarily rejected.

Citing cases decided under the Federal Rules of Civil Procedure, Appellant argues, without the filing of a motion to change precedent, "...a review of an appeal of a class certification is discretionary to the Court." (App. Br. p. 16). However, Rule 23(f), FRCP states that orders of class certification are immediately appealable within ten (10) days after entry of the order. Such is not the case in South Carolina, and reference to federal jurisprudence on the issue is misplaced.

Because exercising appellate jurisdiction over the Order in the case at bar would be contrary to well-established precedent, Respondents respectfully request that the within appeal be dismissed.

TECKLENBURG & JENKINS, LLC



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May 23, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Respondents' Motion to Dismiss*** was served upon all counsel of record this 23rd day of May, 2013, via U.S. First Class Mail, postage pre–paid, and addressed as follows:

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