

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BERKELY COUNTY  
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge  
Robert E. Watson, Master-in-Equity

**RECEIVED**

DEC 12 2013

**SC Court of Appeals**

Case No. 2011-CP-08-03412  
Appellate Case No. 2013-002378

First Citizens Bank and Trust Company, Inc,  
Successor-in-interest to the Federal Deposit Insurance  
Corporation, receiver of Georgian Bank..... Respondent,

v.

Goose Creek II, LLC, James C. Wallace a/k/a James C.  
Wallace, Sr., John S. Paulson a/k/a John Paulson, Jiri Jilich  
a/k/a Jiri Jilich, Jr., James K. Price, Eastwood Homes, Inc.,  
Charles Huff, as the Personal Representative of the Estate  
of Richard P. Huff, Jr., Seamon, Whiteside & Associates, Inc.,  
Monarch Plantation Homeowners' Association, Inc., ..... Defendants,

Of whom:  
Eastwood Homes, Inc., is..... Appellant.

**RETURN TO MOTION TO DISMISS APPEAL**

Now comes Appellant, Eastwood Homes, Inc., and responds to the Motion to  
Dismiss Appeal filed by Respondent First Citizens Bank and Trust Company, Inc.,  
alleging that Appellant's Notice of Appeal filed October 30, 2013, was improper based

on Rules 201(a), 203(d)(3), and 240 of the South Carolina Appellate Court Rules. In opposition to the Motion to Dismiss Appeal, Appellant submits the following.

### STATEMENT OF THE CASE

For purposes of this filing, Appellant generally adopts and incorporates the facts and procedural history as set forth in the Statement of the Case in Respondent's Motion to Dismiss Appeal.

### ARGUMENT

**I. Appellant's Decision Not to Take an Immediate Appeal From Judge Harrington's Order Does Not Bar Appeal From the Order at this Point.**

The thrust of Respondent's Motion to Dismiss is the proposition that because Appellant could have taken an immediate appeal of Judge Harrington's Order under section 14-3-330(2) of the South Carolina Code, it had to do so, or forever waive all rights to appeal the Order. That proposition is contrary to both the statutory language of section 14-3-330 and the settled decisions of the South Carolina Supreme Court. Respondent's Motion on this basis should be denied.

A party's right to appeal arises from and is governed by statutory law. *Ex Parte Capital U-Drive It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (citation omitted).

Section 14-3-330 provides in pertinent part that appellate review may be sought from:

(1) Any intermediate judgment, order or decree in a law case involving the merits . . . *provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;*

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial

*or (c) strikes out an answer or any part thereof or any pleading in any action[.]*

S.C. Code. Ann. § 14-3-330(1) to (2) (emphasis added).

The South Carolina Supreme Court has explicitly rejected “the idea that § 14-3-330(1) and (2) are exclusive provisions, and that a given ruling may not fall within the confines of both.” *Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 178 (1990). More specifically, the Supreme Court has recognized that an order that is immediately “appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading [may also be] appealable under § 14-3-330(1) as ‘involving merits.’” *Id.* (citing *Jefferson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988)); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011).

An order “involving the merits” under section 14-3-330(1) has been defined “as an order which ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (citing *Jefferson*, 295 S.C. at 318, 368 S.E.2d at 456; *Knowles v. Standard Savings & Loan Ass’n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)). Further, it has long been held that “the phrase ‘necessarily affecting the judgment’ [in section 14-3-330(1)] has the equivalent meaning as the phrase ‘involving the merits,’ and that the legislature meant to use these phrases interchangeably.” *Link*, 302 S.C. at 6, 393 S.E.2d at 179 (citing *Blakely & Copeland v. Frazier*, 11 S.C. 122 (1878)).

In *Link*, the Supreme Court was faced with the issue of whether an order granting a summary judgment motion that was determined to be immediately appealable under

section 14-3-330(2)(c), was also appealable after the final judgment was entered under section 14-3-330(1) as an order involving the merits. “To decide whether a particular . . . order fits into either subsection, however, the court must examine the order to determine if it meets the subsection’s criteria for appealability.” *Thornton*, 391 S.C. at 306, 705 S.E.2d at 480. In addressing this issue, the *Link* court found that an order granting a dismissal of claims based on “[a] summary judgment ruling, as well as a 12(b)(6) dismissal” properly fits within the definition of an order involving the merits. 302 S.C. at 6, 393 S.E.2d at 179. Because “[s]ection 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders ‘necessarily affecting the judgment not before appealed from[,]’” the appellant was not required to immediately appeal. *Id.* The fact that appellant could have immediately appealed under section 14-3-330(2)(c) did not bar his later appeal pursuant to section 14-3-330(1). Indeed, pursuant to section 14-3-330(1), Appellant “was entitled . . . to wait until final judgment to appeal.” *Id.*

Similarly, in the case at hand Appellant seeks to appeal Judge Harrington’s Order dismissing its counterclaims. It is undisputed that Appellant could have immediately appealed pursuant to section 14-3-330(2)(c) because the Order had the effect of striking a pleading. *See* Resp’t Mot. Dismiss Appeal 6 (citing directly to § 14-3-330(2)(c) and *Link* for the proposition that the “Order was immediately appealable because it struck and dismissed Eastwood’s counterclaims and because it affected a substantial right of Eastwood[.]”). As *Link* makes abundantly clear, however, entitlement to an interlocutory appeal pursuant to section 14-3-330(2)(c) does not act as a bar to Appellant’s Appeal at this stage. The Order was an intermediate order “involving the merits” that necessarily

affected the judgment. Therefore this Appeal is proper under section 14-3-330(1) and timely under Rule 203(d)(3), SCACR.

**II. Respondent Confuses South Carolina Supreme Court Precedent From *Neeltec Enterprises* Which Addressed an Interlocutory Appeal Under Section 14-3-330(2)(a) With This Appeal Which Implicates Section 14-3-330(2)(c).**

Respondent mistakenly bases its argument that Appellant was required to immediately appeal the Order on the Supreme Court's decision in *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012). In *Neeltec*, petitioner, who was plaintiff at the trial level, immediately appealed an order requiring it to substitute corporate defendants in place of the individual whom it had chosen to sue. Noting that "[t]he right of plaintiff to choose her defendant is a substantial right [and that the] order effectively discontinues petitioner's suit against [the individual defendant,]" the court found that interlocutory appeal under section 14-3-330(2)(a) was appropriate. *Id.* at 566-67, 725 S.E.2d at 928-29.

In coming to this conclusion, the *Neeltec* court reviewed longstanding precedent which held that an order of substitution or other order appealable under subsection (2)(a) of section 14-3-330 that is not immediately appealed may not be later appealed after final judgment. *Neeltec*, 397 S.C. at 567, 725 S.E.2d at 928 (citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985); *Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780 (1933)). The *Neeltec* court affirmed longstanding precedent as to appeals under subsection (2)(a), but did not extend that rule to appeals that *may* be taken immediately under subsections (2)(b) or (2)(c) of section 14-3-330(2).

Nowhere in Respondent's Motion to Dismiss Appeal is there any contention that Appellant's Appeal in this case falls under section 14-3-330(2)(a). The Order here would

not have been appealable under subsection (2)(a) because an order dismissing counterclaims does not “determine[] the action and prevent[] a judgment . . . or discontinue the action.” § 14-3-330(2)(a); *see also Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 95 (1986) (stating that “[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2)[(c)] because it affects a substantial right and *strikes out part of a pleading[]*” (emphasis added)). Indeed, as previously noted, Respondent explicitly acknowledges that this Appeal falls under subsection (2)(c) of section 14-3-33. *See* Resp’t Mot. Dismiss Appeal 5-6 (italicizing subsection (2)(c) to emphasize that appeal was taken under that subsection and, further, citing specifically to subsection (2)(c) to note that the Order was immediately appealable).

Here, Respondent makes an inferential leap that is not supported by any reported case law when it asks this Court to extend the *Neeltec* decision regarding the appealability after final judgment of orders that were immediately appealable under subsection (2)(a) to Judge Harrington’s Order, which was indisputably appealable immediately under subsection (2)(c)—not subsection (2)(a). This leap is inapposite and as such this Appeal is properly before this Court.

### **III. Appellant’s Appeal of the Notice of Sale is a Proper Part of the Overall Appeal.**

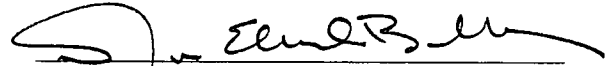
Respondent submits that the Notice of Appeal should be dismissed, in part, because a Notice of Sale is not a “final judgment, appealable order or decision” under Rule 201(a), SCACR. This is not a stand-alone appeal of the Notice of Sale, however, but also an appeal of the Master’s Decree—filed simultaneously with the Notice of Sale by the Honorable Robert E. Watson—and of the earlier Order filed by Judge Harrington.

The Notice of Sale is directly tied to and was issued as a direct result of the Master's Decree. Appellant does not contend that the Appeal would be proper based on the Notice of Sale alone; however, as the Notice of Sale was issued in conjunction with, and as an adjunct to the Master's Decree, its inclusion in the Notice of Appeal is not grounds upon which to base a dismissal of this Appeal. This Court may properly review the Notice of Sale as part of its consideration of Judge Watson's Order on Appellant's Appeal.

CONCLUSION

Based on the foregoing, Appellant respectfully prays that this Court deny Respondent's Motion to Dismiss Appeal.

Respectfully submitted, this the 12th day of December, 2013.



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Monarch Plantation Homeowners' Association, Inc., ..... Defendants,

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Eastwood Homes, Inc., is.....Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the Appellant, Eastwood Homes, Inc.'s Return to Motion to Dismiss Appeal by depositing a copy in the United States Mail, postage prepaid, on December 12, 2013, addressed to the following:

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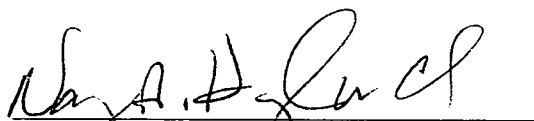
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