THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000218
Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,.....Appellant/Respondent,

and

South Carolina State Plastering, LLC,.....Appellant/Respondent,

v.

Del Webb Communities, Inc., Pulte Homes, Inc.,
and Kephart Architects, Inc., ...Third-Party Defendants,

OF WHOM Del Webb Communities, Inc.,
and Pulte Homes, Inc., are, ...Respondents/Appellants.

PETITION FOR REHEARING

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INTRODUCTION & SUMMARY OF ARGUMENT

The Respondents/Appellants (Del Webb or defendants) respectfully submit this Petition for Rehearing pursuant to Rules 221(c) and 240(j), SCACR. For the reasons set forth below, Del Webb respectfully requests this Court to withdraw its order dismissing Del Webb's appeal and issue an amended order holding that the orders appealed by Del Webb, which SCSP also appealed among others, are immediately appealable.

Del Webb appealed two orders issued by Judge Dickson. (Tab G). On February 15, 2017, Del Webb served and filed its "Motion to Determine Appealability" with respect to these two orders. The Respondents (plaintiffs) never filed a return to this motion. See Rule 240(e), SCACR (10 days to serve and file return to motion). Also on February 15, 2017, the plaintiffs served and filed a motion to dismiss the appeal of Appellant/Respondent (SCSP). (Tab H). This motion never mentioned Del Webb's separately filed appeal and never sought dismissal of Del Webb's appeal. (*Id.*). On March 17, 2017, this Court dismissed Del Webb's appeal under the following ruling, which included three analytical points:

> **[1]** [SCSP and Del Webb] have filed separate *motions to determine the appealability* of the orders on appeal. [The plaintiffs] have also *filed a motion to dismiss*, arguing the orders on appeal are not immediately appealable. We find the orders on appeal are interlocutory and not appealable pursuant to [§ 14-3-330]; *accordingly, we grant [the plaintiffs'] motion and dismiss the instant appeals. See* **[2]** *Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) ("Class certification essentially procedural in nature, does not involve substantial or legal rights which require attention prior to final judgment. . . . Neither does certification reach the 'merits' of the underlying cause of action . . . ."); **[3]** *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010) ("[The] rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights.").

(Tab I at 1-2) (emphasis added) (brackets added). Del Webb respectfully submits that these rulings are in error for the following reasons:

[1] The plaintiffs' motion to dismiss did not mention Del Webb's appeal, nor seek dismissal of Del Webb's appeal. Thus, granting the plaintiffs' motion to dismiss does not support dismissal of Del Webb's appeal. (See Arg. I, *infra*).

[2] In *Knowles*, the trial court certified the putative class for a trial on the merits, and the appellant sought to challenge the merits of the certification decision. That is not the situation here. Rather, Del Webb's appeal presents the issue of this case being forced to trial as a class action without any judicial finding or order that the class should be certified for a trial on the merits. (See Args. IV-V, *infra*). Del Webb, therefore, does not challenge the merits of a class certification order, and the Supreme Court's ruling that class certification orders are not appealable is not applicable here. (See Arg. II, *infra*).

[3] Del Webb does not challenge the Supreme Court's decision in *Grazia*, nor does its appeal have anything to do with the rights or procedures afforded by the Right to Cure Act. Thus, the Supreme Court's observations about the Right to Cure Act, quoted by this Court, have no bearing on Del Webb's appeal. (See III, *infra*).

As this Court noted, Del Webb filed a motion to determine appealability (to which the plaintiffs never filed a return nor otherwise responded), but this Court did not address Del Webb's arguments that the orders appealed by Del Webb are immediately appealable. As explained more fully herein, those orders are immediately for one or more of the following reasons:

1. The circuit court's failure to certify the class before trying the case as a class action, as mandated by Rule 23(d)(1), SCRCP, dramatically affects the merits, because the issuance of a certification order identifies the parties to the action and defines the merits issues to be resolved at trial. The failure to do so in this case is "final," because the trial judge assigned to this complex civil litigation refuses to entertain class certification issues any further before trying the case as a class action. Thus, the order is immediately appealable under § 14-3-330(1). (See Arg. VI(A), *infra*).

2. There is a substantial right in every class action to have a circuit court determination on whether the putative class should be certified for a trial on the merits before the case is tried as a class action. The appealed order denies this substantial right and, absent an immediate appeal, it will: (a) encourage rather than prevent piecemeal litigation and appeals; (b) limit the meaningful remedies available in an appeal after final judgment; and (c) make it difficult to determine whether the appellant has suffered prejudice in appeal after a trial on the merits. (See Args. VI(B)-(D), *infra*). Thus, the order is immediately appealable under § 14-3-330(2)(a).

For all of these reasons, as explained more fully herein, it is respectfully submitted that this Court should grant rehearing and reinstate Del Webb's appeal.

BACKGROUND FACTS and PROCEDURAL HISTORY

The Grazias (plaintiffs) are homeowners in the Sun City residential development in Bluffton, South Carolina. Del Webb was the builder, and State Plastering was the subcontractor that applied exterior stucco to most of the homes in the development. The plaintiffs brought a putative class action against State Plastering for alleged defects in the exterior stucco work, and State Plastering brought in Pulte and Del Webb as third-party defendants (all jointly referred to as the defendants). The trial court (Judge Early) granted the defendants' motion to strike the class allegations, holding that a class action was inherently incompatible with the requirements of the Right to Cure Act.[1] The plaintiffs appealed, and the Supreme Court reversed and remanded in a 3-1-1 decision. *See generally Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010).

The Supreme Court held that a class action was not inherently incompatible with the Right to Cure Act but specifically noted that "the question of whether certification of a class in this case is proper, much less the manner in which it could be achieved and managed, [was not] before the Court." *Grazia*, 703 S.E.2d at 203 n.5. The Court also outlined the procedure to be followed on remand. First, if and when a motion for class certification was filed, it would be "*incumbent* upon the circuit court to determine whether or not the action *meets each of the five* prerequisites" imposed by Rule 23, SCRCP for any class action. *Id.* at 204 (emphasis added). Second, "*[i]f and when these prerequisites are met*," the circuit court could consider whether the class action and class members could satisfy the requirements of the Right to Cure Act. *Id.* (emphasis added).

On remand, the case was designated as complex litigation and assigned to the Honorable J. Michael Baxley. As envisioned by the Supreme Court in *Grazia*, the plaintiffs filed a motion

[1] The Right to Cure Act, officially entitled the "Notice and Opportunity to Cure Construction Dwelling Defect Act," is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Rev. 2011). It imposes various pre-trial procedural requirements for bringing residential construction defect claims, all of which are designed to promote settlement discussions and settlement before the filing of a complaint.

for class certification. In response, Judge Baxley issued his Preliminary Order and made a "preliminary finding" that the proposed class met the requirements of Rule 23, SCRCP, and set forth the procedures for compliance with the Right to Cure Act. (Tab A at 1).[2] The only reasonable reading of Judge Baxley's Preliminary Order is that he was not certifying the class for a trial on the merits. Rather, he created a preliminary class for the purpose of "class" compliance with the Right to Cure Act and would thereafter use the information gathered in the Right to Cure process to determine whether a class should be certified for a trial on the merits. (See Args. IV-V, *infra*).

The defendants appealed the Preliminary Order, arguing *inter alia* that Judge Baxley had improperly deviated from the process outlined by the Supreme Court in *Grazia, supra.* This Court dismissed the appeal, finding that the Preliminary Order was not immediately appealable. (Order, Aug. 31, 2012, App. Case No. 2012-212364). This Court denied the defendants' petition for rehearing, and the defendants petitioned the Supreme Court for a writ of certiorari, which the Supreme Court denied. (Sup. Ct. Order, Dec. 10, 2013, App. Case No. 2013-000233).

After remand, the parties proceeded under the Right to Cure process established by the Preliminary Order, gathering voluminous evidence on the homes in the class which included questionnaire answers from thousands of homeowners, inspections of thousands of homes, depositions of some homeowners, and destructive testing on some homes. Judge Baxley retired, and the Honorable Edgar W. Dickson was appointed to replace him. By April 2016, the parties were nearing the completion of the Right to Cure process imposed by the Preliminary Order, and Judge Dickson issued a scheduling order in May 2016. (Tab B at 1). As one would have anticipated under the plain language of Judge Baxley's Preliminary Order, the scheduling order set a date for

[2] The full title of Judge Baxley's order was: "Order Making *Preliminary Finding* that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act." (Emphasis added).

a "*final* hearing" on class certification and continued the existing stay on merits discovery "until the Court issues its ruling on *final* certification." (*Id.* at 2, ¶¶ 3(c) and 4) (emphasis added).

In compliance with the terms of Judge Dickson's scheduling order (Tab B at 2, ¶ 3(a)), the defendants submitted briefs and additional evidence in August 2016 to be presented at the September 1, 2016, "final hearing" on whether a class should be certified for a trial on the merits. Judge Dickson, however, cancelled the hearing and issued an order holding that Judge Baxley's Preliminary Order was, in fact, a final determination on the question of class certification, and that Judge Dickson would not entertain any further arguments on the issue of class certification. (Tab C at 1-4, *passim*) (hereinafter referenced as "No Motions Order"). Judge Dickson's "No Motions Order" is completely at odds with the Supreme Court's opinion in *Grazia, supra*, Judge Baxley's Preliminary Order, Judge Dickson's own scheduling order, and the due process rights of the absent class members and the defendants. And, as shown below, it is immediately appealable.

GROUNDS and ARGUMENTS FOR REHEARING

I. The plaintiffs' motion to dismiss did not seek dismissal of Del Webb's appeal and, therefore, granting their motion does not result in the dismissal of Del Webb's appeal.

The plaintiffs' motion to dismiss was directed solely at the appeal of SCSP. (Tab H). The plaintiffs never mentioned Del Webb's separately filed appeal, and they never sought dismissal of Del Webb's appeal. (*Id.*). Accordingly, it is respectfully submitted that granting the plaintiffs' motion to dismiss does not affect the appeal of Del Webb.

II. The decision in *Knowles* does not support dismissal of Del Webb's appeal.

This Court cited *Knowles* for the following proposition: "Class certification, essentially procedural in nature, does not involve substantial or essential rights which require attention prior to final judgment. . . . Neither does certification reach the 'merits' of the underlying cause of action

. . .." (Tab I at 1-2, quoting *Knowles*, 261 S.E.2d at 49). Respectfully, the decision in *Knowles* does not support the dismissal of Del Webb's appeal.

In *Knowles*, the Supreme Court held that "class certification orders" are not immediately appealable. 261 S.E.2d at 49. In the present appeal, however, Del Webb does not appeal from an order that certified the class, nor does Del Webb challenge the merits of class certification. Rather, Del Webb appeals Judge Dickson's erroneous interpretation of Judge Baxley's Preliminary Order as certifying the class for a trial on the merits and his refusal to entertain any further arguments on the issue of class certification. In short, Del Webb's appeal involves the question of sending this case to a trial on the merits as a class action without any circuit court order or finding that certified the class for a trial on the merits. This is completely different from the situation in *Knowles*, in which there was no dispute on whether the trial court had certified the class for a trial on the merits, and in which the appellant sought to challenge the merits of that class certification. As a result, the relevant analysis and proper result here is different from *Knowles*. (See Args. IV-V, *infra*).

III. The decision in *Grazia* does not support dismissal of Del Webb's appeal.

This Court cited *Grazia* for the following proposition: "[The] rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights." (Tab I at 2, quoting *Grazia*, 703 S.E.2d at 202). Respectfully, the decision in *Grazia* does not support the dismissal of Del Webb's appeal, because the orders appealed by Del Webb have nothing to do with the ruling in *Grazia*, the rights or procedures under the Right to Cure Act, or the notice provisions in the Right to Cure Act. (See Args. IV-V, *infra*).

IV. The Preliminary Order was not a "final" determination on class certification.

The first question to be decided is whether Judge Baxley's Preliminary Order was a "final" determination on class certification as ruled by Judge Dickson. It plainly was not.[3]

A trial court's order is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge at the time of the order. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the order itself under the plain and ordinary meaning of the words used in the order. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the language of the order is plain and unambiguous (as it is here), there is no room for construction and the order must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If, but only if, there is some ambiguity within the four corners of the order, then, and only then, the court may go beyond the four corners of the order and consider extrinsic evidence to determine the meaning of the order. *Id.*; *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Here, a plain reading of the Preliminary Order yields the inescapable conclusion that it was a preliminary certification only and did not certify the class for a trial on the merits. Rather, the Preliminary Order clearly contemplated that the question of certifying the alleged class for a trial on the merits would be decided after the completion of the Right to Cure process.

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[3] Judge Baxley and Judge Dickson referred to the hearing and determination on class certification required by the Preliminary Order as being a "final" determination and "final" hearing. Ordinarily, no class certification order is truly final until after final judgment, and the issue remains viable throughout the course of the case. Rule 23(d)(1), SCRCP (providing that class certification orders may be altered or amended until final determination of the merits). Judge Dickson, however, has ruled that he will not entertain any further arguments on class certification, because he now interprets the Preliminary Order as being a "final" class certification order. (Tab C at 2).

At the hearing that resulted in the Preliminary Order, the plaintiffs argued that their evidence proved the required showings under Rule 23 and, therefore, the class should be certified for a trial on the merits. The defendants countered that the plaintiffs' evidence failed to satisfy the Rule 23 requirements and, therefore, class certification should be denied. Rather than decide whether the class should be certified for a trial on the merits, Judge Baxley created a middle ground in his Preliminary Order. He found that the plaintiffs had made a sufficient evidentiary showing to justify certifying the class but only on a "preliminary" basis. He reserved the question of whether the class should be certified for a trial on the merits until after the parties completed the Right to Cure process. He would then hold an additional hearing for the taking of additional evidence, including the evidence gathered during the Right to Cure process, and he would then make a final determination of whether the class should be certified for a trial on the merits.

Judge Baxley opened his Preliminary Order with a finding that the "[p]laintiffs' *proposed* Class *preliminarily meets* the requirements for class certification." (Tab A at 2) (emphasis added). He then described the Preliminary Order as "set[ting] forth the procedures and requirements for compliance [with the Right to Cure Act] in this *putative* class setting." (*Id.*) (emphasis added). The opening paragraph of the Preliminary Order concluded that, after the compliance with the Right to Cure procedures set forth in the Preliminary Order, "the Court *will make a final decision* as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the" Right to Cure process set forth in the Preliminary Order. (*Id.*) (emphasis added).[4]

Judge Baxley acknowledged the numerous evidentiary problems and failures argued by the defendants "and recognize[d] that factual and legal differences may exist within the *putative*

[4] Judge Baxley also later noted that, because other subcontractors applied the stucco exterior to some of the homes in Sun City but were not a party to the action, "the *putative* class [was] limited homes (sic) on which [State Plastering] installed the stucco in whole or part." (*Id.* at 3) (emphasis added).

class." (Tab A at 10) (emphasis added). Because of those evidentiary problems, Judge Baxley made it clear that the class was being certified on a preliminary basis only: "For these reasons, this Order makes *only a preliminary finding* that the requirements of Rule 23 *have been met* by [the plaintiffs]." (*Id.*) (emphasis added). Judge Baxley intended to supplement the existing evidence on class certification with the information developed in the Right to Cure process and otherwise to later decide whether the class should be certified for a trial on the merits, including the possibility of using sub-classes to address the factual and legal differences existing within the putative class. (*Id.*). Regarding the affirmative defenses raised by the defendants as to some of the homes in the putative class, Judge Baxley ruled that he would address those issues "*should* a Class be *finally* certified." (*Id.*) (emphasis added). He concluded his preliminary Rule 23 analysis: "Accordingly, *for purposes of* attempted compliance with the Right to Cure [Act], this Court finds that [the plaintiffs] have met the requirements of Rule 23(a), and are entitled to a *preliminary determination* that [the plaintiffs] may proceed *at this juncture* using a class approach." (*Id.* at 11) (emphasis added). Judge Baxley later reiterated the preliminary nature of the class certification, noting that "based upon the Right to Cure responses, the Court will make a *final determination* of class certification." (*Id.* at 12) (emphasis added).

Judge Baxley's Preliminary Order plainly did not certify the class for a trial on the merits. He repeatedly referred to the class as being "putative" (alleged) and repeatedly stated that the class was certified on a preliminary basis only. This preliminary certification was for the specified purpose of working through the Right to Cure process on a "class" basis. Upon completion of that process, Judge Baxley would decide whether the class should be certified for a trial on the merits based upon all of the evidence, including the evidence produced by the Right to Cure process. There is no other reasonable reading of Judge Baxley's Preliminary Order.

V. Judge Dickson misconstrued the plain meaning of Judge Baxley's Preliminary Order, and he further erred by refusing to hold a final and full evidentiary hearing on the issue of class certification as envisioned by the Preliminary Order.

Judge Dickson ruled in his "No Motions Order" that Judge Baxley's Preliminary Order was a final determination on class certification and that the class would therefore proceed to a trial without any further hearings or determinations on whether the class should be certified for a trial on the merits – Judge Dickson expressly refused to entertain any further arguments on class certification. (Tab C at 2). This was manifest error under the plain meaning of the Preliminary Order. Moreover, Judge Dickson impermissibly overruled Judge Baxley's finding that the evidence did not yet meet the requirements to certify a class for a trial on the merits, and that this issue would be revisited in a full evidentiary hearing after the completion of the Right to Cure process. See *Frampton v. South Carolina Dep't of Transp.*, 752 S.E.2d 269, (S.C. App. 2013) (one circuit court judge cannot overrule another on the manner in which the case is to be tried).

Judge Dickson's "No Motions Order" is replete with errors. First, the order treats the appeal of the Preliminary Order as having been a "review" of that order. (Tab C at 2, 4). The merits and meaning of the Preliminary Order was never reviewed on appeal, because the appeal was dismissed for lack of appellate jurisdiction.

Second, Judge Dickson (like Judge Baxley before him) mistakenly concluded that the Supreme Court's opinion in *Grazia, supra*, was a ruling on the merits of class certification in this case. (Tab C at 3) ("the Supreme Court had the clear opportunity to *deny class status in this very case* but affirmatively chose not to do so.") (emphasis added). This is simply wrong. As the Supreme Court expressly ruled in *Grazia* that no motion for class certification had been filed at the time of the appealed order in *Grazia*, and the question of whether a class should be or could be certified in this particular case was not before and not decided by the Supreme Court in *Grazia*.

703 S.E.2d at 203 n.5 and 204. Rather, the only issue before the Supreme Court was the purely legal question of whether the Right to Cure Act was so inherently incompatible with a class action that there could never be a class action for alleged residential construction defects that were subject to the Right to Cure Act. *Id.* at 203 n.5.[5]

Third, Judge Dickson refused to consider the briefs submitted on class determination after completion of the Right to Cure process, because "[n]o motion accompanied [these] filings and no action is hereby taken." (Tab C at 2). No motion was necessary, because the issue of final class certification remained open under the Preliminary Order and, therefore, the plaintiffs' motion for class certification remained pending before the court. Judge Baxley plainly ruled in his Preliminary Order that the issue of class certification would be revisited after completion of the Right to Cure process, at which time the court would hold a full evidentiary hearing and decide whether the class should be certified for a trial on the merits. Moreover, the briefs were filed as specifically directed by Judge Dickson in his own scheduling order, which itself set a hearing date for a final hearing on the issue of whether the preliminary class determination should be or could be converted into a final class certification for a trial on the merits. (Tab B at 2, ¶¶ 3-4).

Finally, and most importantly, Judge Dickson ignored the plain and unambiguous meaning of the Preliminary Order. Judge Baxley plainly ruled that the question of certifying a class for a trial on the merits remained opened and was to be decided after the Preliminary Order in a full evidentiary hearing that would include the results of the Right to Cure process. To justify his rewrite of the Preliminary Order as being a final class certification order, Judge Dickson

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[5] The Supreme Court specifically ruled as follows: "[T]he question of whether certification of a class in this case is proper, much less the manner in which it would be achieved and managed, is not an issue that is properly before the Court. Consequently, the issue is not whether *these* claims could be properly certified, but rather whether class certification could be achieved under *any circumstances* under the Right to Cure Act." *Grazia*, 703 S.E.2d at 203 n.5 (emphasis by court). The question of whether a class action would be or could be proper in this case was a matter to be decided by the trial court, upon a motion for class certification made after the remand in *Grazia*. *Id.* at 204.

impermissibly went outside the four-corners of the unambiguous Preliminary Order to consider statements made by Judge Baxley long after the Preliminary Order as extrinsic evidence on the meaning of the Preliminary Order. Moreover, those statements are taken out of context, and Judge Baxley never issued any order or made any statement altering the fact that his Preliminary Order was not a final determination on class certification for a trial on the merits.

Throughout his "No Motions Order," Judge Dickson repeatedly states that Judge Baxley's Preliminary Order was a final determination on class certification. (Tab C, *passim*). Notably and tellingly, however, Judge Dickson never cites anything in the Preliminary Order itself to support this conclusion. (*Id., passim*). This is not surprising, because the only reasonable reading of the Preliminary Order is that Judge Baxley was not making a final determination on class certification, and that a final decision would not be made until after a full evidentiary hearing that included the evidence gathered in the Right to Cure process. (See Arg. I, *supra*). To avoid this, Judge Dickson relied on comments made by Judge Baxley after the Preliminary Order.[6]

Judge Dickson never found and the plaintiffs have never argued that Judge Baxley's Preliminary Order was ambiguous, and it clearly is not. Nevertheless, Judge Dickson went outside the four corners of the Preliminary Order to determine its meaning based on extrinsic evidence. The only way to get outside the four corners of the Preliminary Order, however, is to first find that

[6] Judge Dickson referenced the Preliminary Order for a few statements that have nothing to with the question of whether the Preliminary Order was a final determination of class certification. First, he noted Judge Baxley's rejection of the defendants' argument that the factual and legal differences within the individual cases "automatically defeat a class action" in this case. (Tab C at 3). This is true but, as shown earlier, Judge Baxley specifically ruled that this issue would be revisited and finally determined based on the evidence to be submitted and considered at a later date, including the evidence produced by the Right to Cure process. (See Arg. I, *supra*). Second, Judge Dickson noted Judge Baxley's observation that a class approach was the best approach. (Tab C at 3). Again, this is true, but Judge Baxley thereafter specifically ruled that the class approach being used was "for [the] purposes of attempted compliance with the Right to Cure [Act]" and, therefore, Judge Baxley made a "*preliminary determination* that [the plaintiffs] may proceed *at this juncture* using a class approach." (Tab A at 11) (emphasis added). Third, Judge Dickson noted that Judge Baxley, like Judge Dickson, viewed the Supreme Court's decision in *Grazia, supra*, as being an approval of using a class action in this case. (Tab C at 3). As shown earlier, this is a mistaken reading of *Grazia*. See n.5 and accompanying text, *supra*.

it is ambiguous. *Petition of White* and *Weil*, both *supra*. The Preliminary Order is not ambiguous and, therefore, Judge Dickson erred in going outside the four corners of the order to give it a meaning that has no support in Preliminary Order itself. Moreover, Judge Dickson relied on extrinsic evidence of post-order statements by Judge Baxley that are incomplete and quoted out of context, thereby masking mask the true import of the statements.

First, Judge Dickson quoted the following statement by Judge Baxley at a motion hearing held on April 30, 2012: "It takes us back to the issue . . . that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you." (No Motions Order at 2). This quote comes from the hearing on the motion to reconsider and clarify the Preliminary Order and, more specifically, from a colloquy between Judge Baxley and defense counsel on the issue of clarifying the class definitions set forth in the Preliminary Order. (Tab D at 5, 70-72). Judge Baxley declined to clarify the definition in an order but invited suggested changes in the form of a proposed class notice that he would consider in making the upcoming decision on the form of the class notice. (*Id.* at 71). Defense counsel responded that it was very difficult to determine who should be and not be in the class. (*Id.*). Judge Baxley's response included the statement quoted by Judge Dickson (in underlining below), but his response shows no intent to change the clear meaning of the Preliminary Order when considered in context and its entirety:

> **The Court:** Right. It takes us back to the issue, [defense counsel], that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you. And again ultimately, *who knows where this case will go.* But, that decision in this case [*i.e.*, the Preliminary Order], hard fought, *preliminarily made in favor of* [the plaintiffs], and I just simply decline to back up and start all over again and say well, no this is too much trouble, we are not going to have a class.

(Tab D at 71-72) (italics added) (underlined portion quoted by Judge Dickson in No Motions Order). In short, Judge Dickson erred in two respects. First, the Preliminary Order is not

ambiguous and, therefore, extrinsic evidence cannot be used to determine the meaning of the Preliminary Order or create the impression of ambiguity. Second, Judge Baxley's above-quoted statement, when considered in full and in context, does not demonstrate any intent to change the plain meaning of the Preliminary Order. To the contrary, Judge Baxley continued to refer to the Preliminary Order as "*preliminarily made* in favor of" the plaintiffs and, in an obvious reference to the future hearing on class determination, he observed: "who knows where this case will go [?]"

Second, Judge Dickson quotes the following colloquy from the February 1, 2013 hearing on finalizing the content of the Class Notice to be sent to the members of the preliminary class created in the Preliminary Order:

> **Counsel:** - - - and one of the first places that appears in that statement, It should include, at a very minimum, it should include the words "the Court has preliminarily certified.
>
> **The Court:** Well, let me just broach that now. I don't believe that's appropriate . . . because when I said I preliminarily certified it, what I mean was that's a certification . . ..

(Tab C at 2). From this statement, Judge Dickson inferred that Judge Baxley's failure to refer to the class certification as "preliminary" in his subsequent Order Approving Class Notice showed that the Preliminary Order was, in fact, a final determination on class certification. (*Id.* at 2-3).

The purpose of the February 1, 2013, hearing was to finalize the Class Notice envisioned by the Preliminary Order. (Tab E at 5). As requested by Judge Baxley, the parties had submitted competing proposals, and the hearing was held to "hammer out the differences between them." (*Id.* at 8). Judge Baxley and the parties engaged in this process by working from the plaintiffs' proposal. (*Id.* at 17).

An issue arose as to the failure of the plaintiffs' proposal to advise the class members, as required by the Preliminary Order, that class certification was preliminary only. The Preliminary Order provided in relevant part as follows:

> [The] Notice should inform the potential class members that *class certification is preliminary at this juncture pending the results of the Right to Cure process*; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that *based upon the Right to Cure responses, the Court will make a final determination of class certification*; and, that the potential *class members will be notified of this final decision and the legal ramifications thereof.*

(Tab A at 12) (emphasis added). A colloquy ensued, and Judge Baxley expressed a concern that the language envisioned by the Preliminary Order might confuse the potential class members. Therefore, he approved the absence of such language in the Class Notice, but he noted that the issue of class certification would still be revisited after completion of the Right to Cure process as envisioned by the Preliminary Order. If that hearing resulted in the preliminary class not being certified as a class for a trial on the merits, then the class members would be notified of that. (See generally Tab D at 36-39). Here, in his "No Motions Order," Judge Dickson quoted only part of this colloquy to change the meaning of the Preliminary Order.

The language quoted by Judge Dickson appears in the statement by Judge Baxley (quoted below in full), in which Judge Baxley first responded to the absence of any "preliminary only" language in the Class Notice (underlined language is the language quoted by Judge Dickson):

> **The Court:** Well, let me just broach that now. I don't believe that's appropriate [including the "preliminary only" language], because when I said I preliminarily certified it, what I meant was that's a certification, *it's just not in its final form because we have to deal with the Right to Cure Statute*. But I don't want to confuse the homeowners with the concept that, well, all of these pages you're looking at *may be reversed as some later point in the process*.
>
> I would say that the presumption is that it will not be reversed, or it would not have been *preliminarily certified* to begin with. But secondly, I believe that's going to interject confusion and uncertainty into this entire process, particularly when we're dealing with laymen.
>
> What do you [defense counsel] – how do you respond to that?

(Tab E at 37-38) (italics added) (underlining represents language quoted by Judge Dickson). Defense counsel responded that he was only trying to follow the language in the Preliminary Order.

(*Id.* at 38). Judge Baxley respond with his last comment on the matter (never mentioned by Judge Dickson), stating in full as follows:

> **The Court:** Well, *that's valid, but* I believe *as a policy decision at this juncture*, I'm going to alter what sounds like the plain meaning of what you read [from the Preliminary Order] so as to not confuse the potential Class members *with the preliminary status of the class. Of course, we all know that if we determine,* as the [preliminary] order says, *later on that we cannot, due to the particular facts and circumstances of these cases, the Right to Cure Act, and the Class status we must decertified* (sic) well, we'll just lay that news on the Class at that time, *without warning them in advance that such could happen.* Because, again, I feel like it's an unlikely circumstance, and it is one that is confusing to the layman. So I will follow the plaintiffs' proposed language with regard to whether the Class is *preliminarily certified.*

(*Id.* at 38-39) (all emphasis added). In short, although Judge Baxley altered the language to be put in the Class Notice, a review of his entire colloquy with defense counsel demonstrates that he did not alter the preliminary nature of the class as set forth in the Preliminary Order. To the contrary, the colloquy demonstrates that Judge Baxley still viewed the class determination as preliminary and still envisioned (as set forth in the Preliminary Order) that the issue of class certification would be revisited after the completion of the Right to Cure process, with a final determination to be made at that time on whether the class should be certified for a trial on the merits. All of this explains why Judge Baxley did not mention the class as being preliminary in his subsequent Order Approving Class Notice. It simply was not relevant to the subject matter of that order.

In summary, the plain and unambiguous meaning of the Preliminary Order was that the class was being certified on a preliminary basis only, and the issue would be revisited in a subsequent final and full evidentiary hearing, including the evidence yielded by the Right to Cure process outlined in the Preliminary Order. Since the Preliminary Order is not ambiguous, it was error for Judge Dickson to consider any extrinsic evidence on the meaning of the Preliminary Order, including any comments by Judge Baxley made from the bench in 2012 and 2013, long

after the entry of the Preliminary Order in 2011. In any event, when that extrinsic evidence is considered in its entirety and in proper context, it is clear that Judge Baxley never changed the preliminary nature of the class certification set forth in the Preliminary Order. He never converted or viewed the Preliminary Order as being a final determination on class certification for a trial on the merits. He never abandoned the procedure set forth in the Preliminary Order that final class certification would be determined after a future and full evidentiary hearing that included the evidence to be gathered during the Right to Cure process. Thus, Judge Dickson erred in rewriting and overruling Judge Baxley's Preliminary Order to make it a final determination on class certification, and he likewise erred in refusing to hold the scheduled hearing on whether the preliminary class certification should be made final for a trial on the merits.[7]

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[7] The defendants filed a motion to reconsider Judge Dickson's "No Motions Order." Judge Dickson dismissed the motion without considering it, ruling that: (1) his "No Motions Order" was interlocutory and therefore not appealable; (2) a motion to reconsider cannot be made and is not available for an interlocutory, unappealable order; (3) a motion to reconsider is available and applies only when there has been an appealable final adjudication on the merits; and (4) therefore, he dismissed the motion without considering it. (Tab F at 1-2). Judge Dickson's order was based on a fundamentally flawed view of South Carolina law.

First, as shown herein, the "No Motions Order" is immediately appealable despite being interlocutory. Second, Judge Dickson, as a circuit court judge, does not have subject matter jurisdiction to determine the appellate jurisdiction of this Court or the Supreme Court, *i.e.*, to determine whether the "No Motions Order" is immediately appealable. Third, and perhaps most importantly, Judge Dickson's dismissal of the motion to reconsider is based on an erroneous understanding of motions to reconsider.

A motion to reconsider serves two distinct and separate functions. First, the motion is the means for asking the trial court to reconsider its actual ruling and change its mind on that ruling. The Supreme Court has referred to this function as the moving party's right to a "second bite at the apple." See generally *Elam v. South Carolina Dep't of Transp.*, 602 S.E.2d 772 (S.C. 2004). It has nothing to do with appealability or error preservation, and it is available for any order. For example, it is axiomatic that the denial of a summary judgment is never appealable, even after a judgment on the merits. Under Judge Dickson's view of motions to reconsider, a party could not move to reconsider the order, even though summary judgment was denied on the basis of the failure to present any evidence on an issue that the opposing party had conceded. Thus, a party that was absolutely entitled to summary judgment as a matter of law could never get any relief from an order that erroneously and mistakenly denied summary judgment, and that would have been changed if the moving party had simply moved to reconsider the order.

The second function of a motion to reconsider involves the preservation of issues for appellate review. It is axiomatic that a timely motion to reconsider is required to preserve any issue for appeal that was raised to but not ruled upon by the trial court, or that was ruled upon but never raised to the trial court. It is equally axiomatic that a motion to reconsider must be made within 10 days after receiving notice of the entry of the order. Under Judge Dickson's view of motions to reconsider, a party could never preserve issues for eventual appellate review of an interlocutory order after a final judgment on the merits, because it cannot make a timely motion to reconsider the interlocutory order. Nothing in the SCRCP, the SCACR, or South Carolina case law supports Judge Dickson's ruling that a motion to reconsider cannot be made except for orders that are immediately appealable.

VI. Judge Dickson's "No Motions Order" is immediately appealable.

Judge Dickson's "No Motions Order" is an interlocutory order, The question of whether it is immediately appealable is to be determined under S.C. Code Ann. § 14-3-330 (Rev. 2017). The appealability of interlocutory orders under § 14-3-330 is decided on a case-by-case basis. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144, 146 (S.C. 2015). Judge Dickson's order is immediately appealable under subsections (1) and (2)(a) of § 14-3-330.

As noted earlier, the fundamental question presented here is whether Judge Dickson erred in construing Judge Baxley's Preliminary Order as certifying the class for a trial on the merits. The controlling, plain and ordinary meaning of the language in Judge Baxley's Preliminary Order, viewed through the prism of the controlling law on the interpretation of orders, conclusively demonstrates that Judge Baxley never certified the class for a trial on the merits. He expressly reserved that issue until after the completion of the Right to Cure process ordered in the Preliminary Order. Judge Dickson therefore erred in his interpretation of Judge Baxley's Preliminary Order as a matter of law, and consequently also erred in refusing to further entertain the issue of whether the class should be certified for a trial on the merits. As a result, this case is being forced to trial as a class action without any judicial order or judicial finding that the class should be or is certified for a trial on the merits, a direct violation of the contrary mandate in Rule 23(d)(1), SCRCP ("As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.").

A. Judge Dickson's "No Motions Order" affects the merits of this case and is therefore immediately appealable under § 14-3-330(1).

An interlocutory order is immediately appealable under § 14-3-330(1) if it affects the merits. The cornerstone order in every class action is a class certification order that defines the class and the issues for a trial on the merits, and that sets forth the court's findings and conclusions

on whether the putative class survives a "rigorous analysis" of the five certification requirements in Rule 23, SCRCP. *Gardner v. S.C. Dep't of Rev.*, 577 S.E.2d 190, 200 (S.C. 2003) (plaintiff "bear[s] the burden of proving the five prerequisites," and the trial court "must apply a *rigorous analysis* to determine" whether the plaintiff's evidence satisfies each of the five prerequisites.) (emphasis added). Here, as a result of Judge Dickson's failure to abide by the plain meaning of Judge Baxley's Preliminary Order, the parties are being forced to trial without such an order. This dramatically affects the merits, because there is no order identifying the parties and defining the merits issues to be resolved at trial.

Moreover, Judge Dickson has pronounced that he will not review the evidence, will not make any Rule 23 findings, and will not otherwise entertain any further argument on the issue of whether the class should be certified for a trial on the merits. This directly and adversely affects the merits of the case, because it sends an uncertified class to a trial on the merits. It does so without considering whether subclasses are needed to address the factual and legal differences that exist between the homes in the class, a procedural safeguard plainly contemplated by Judge Baxley in the Preliminary Order that would protect the due process rights of the absent class members and the defendants. It also impermissibly cuts off the parties' right under Rule 23(d)(1) to seek alteration and amendment of the certification order until final judgment, which is yet another procedural safeguard designed to protect the due process rights of the absent class members and the defendants. In short, Judge Dickson's order directly and adversely affects the merits of this case by refusing to address and decide the single-most important question in any class action, to-wit: whether the class can be and should be certified for a trial on the merits.

In addition, an interlocutory order that affects the merits is sufficiently final and immediately appealable under § 14-3-330(1) if "[n]o further action is required in the [trial] court

to determine the parties' rights" on the matter decided in the interlocutory order. *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 468 (S.C. 2006) (order unsealing a family court divorce file for discovery of evidence relevant to a civil action held immediately appealable). Here, no further action is required by the trial court, because Judge Dickson has ruled that he will not "entertain *any* further argument on the issue" of class certification. (Tab C at 2) (emphasis added). Contrary to the admonition in Rule 23(d)(1), SCRCP, that the issue of class certification may be reconsidered at any time before a decision on the merits, Judge Dickson's ruling precludes any further argument by the defendants. Rule 43(i), SCRCP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). Thus, the "No Motions Order" is sufficiently final and immediately appealable under § 14-3-330(1).

B. The "No Motions Order" affects a substantial right and is therefore immediately appealable under § 14-3-330(2)(a).

An interlocutory order is immediately appealable under § 14-3-330(2)(a) if it affects a "substantial right" and effectively decides the matter and prevents a judgment from which an appeal can be taken after final judgment. Manifestly, a fundamental and "substantial right" in every class action is the right to have a full hearing on and final determination of whether a class should be certified under the rigorous requirements of Rule 23 *before* the case is tried on the merits as a class action. *E.g.*, Rule 23(d)(1), SCRCP. Judge Dickson has denied that right in his "No Motions Order" by converting Judge Baxley's Preliminary Order into a final class certification and precluding any further argument on the issue of class certification. Despite the plain meaning of the Preliminary Order, Judge Dickson ordered this case to a trial on the merits as a class action without a full evidentiary hearing on and a final determination of whether the preliminary class created by the Preliminary Order meets the rigorous requirements of Rule 23 for all class actions.

Here, in an appeal after a final judgment on the merits, it will be impossible to determine whether a class should have been certified for a trial on the merits, because the "No Motions Order" has prevented a full and proper determination on this cornerstone question. Indeed, Judge Dickson has already precluded defendants from presenting evidence that the class should not be certified and has ruled that he will not consider certification further. Thus, the record on appeal after a trial on the merits will lack the evidence required to determine class certification, because the defendants are not being permitted to enter that evidence into the record. As a necessary result, any appeal will require a remand to determine the question of whether a class should be certified, and the losing party will have to appeal again, even though there has already been a trial on the merits. Allowing an immediate appeal of the "No Motions Order" will prevent this bizarre procedural quagmire and ensure that, upon an appeal after a final judgment the merits, the appellate courts will be able to immediately review and decide with finality the question of whether a class should have been certified in this case for a trial on the merits.[8]

C. The "No Motions Order" is immediately appealable under § 14-3-330(2)(a), because disallowing an immediate appeal would result in piecemeal litigation and limit the remedies available in an appeal after final judgment.

The avoidance of piecemeal litigation and the promotion of judicial economy is the public policy underlying § 14-3-330, and the question of whether an interlocutory order "is immediately appeal is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144, 146 (S.C. 2015). An interlocutory order is immediately appealable if preventing an immediate appeal "would encourage piecemeal litigation and limit [the appellant's]

[8] If the defendants prevail in the trial on the merits, they will nevertheless be subject to claims by the preliminary class members that their due process rights were violated in the class certification process and, therefore, they should not be bound by the result of the trial. This "due process" problem can be only be avoided by following the process set forth in Preliminary Order, to-wit: a full evidentiary hearing and a full determination as to whether the preliminary class in fact meets the rigorous requirements of Rule 23 for any class action. This will protect the due process rights of the absent class members and thereby protect the finality of any judgment rendered after a trial on the merits.

appellate remedies after the first trial" on the merits. *Id.* Here, disallowing an immediate appeal of the "No Motions Order" will result in piecemeal litigation and limit the appellate remedies available in an appeal after a trial on the merits.

As noted earlier, any appeal after final judgment in favor the plaintiffs will result in piecemeal litigation of the class certification issue, because it will be necessary to remand the issue for a final determination and subsequent appeal. Moreover, there is a substantial possibility that the remand could result in even greater piecemeal litigation due to the following:

1. As Judge Baxley noted in his Preliminary Order, the evidence presented to him revealed the distinct possibility that subclasses would be needed to address the potential factual and legal differences between the homes in the putative class, including the resolution of the affirmative defenses asserted in the case.

2. On remand from an appeal after a trial on the merits, if the trial court decides that a class could be certified but that subclasses are necessary to resolve all issues in the case, then the only remedy would be a new class action trial.

3. This order would then be appealed and, if affirmed there would be a remand for the new trial.

4. After the new trial, the losing party would again appeal.

In short, disallowing an immediate appeal of the "No Motions Order" will produce rather than avoid piecemeal litigation and, therefore, it is immediately appealable under *Morrow, supra.*

In addition, disallowing an immediate appeal of the "No Motions Order" will limit the remedies available in an appeal after the merits. In an ordinary class action, a successful appeal after a final judgment on the merits would include the appellate remedy that it was error to certify the class and a resulting reversal of the class judgment. Here, the extraordinary circumstances of this case, *i.e.*, a trial on the merits without a final determination on whether a class should be certified, precludes this appellate remedy. A reversal of the "No Motions Order" will have only one potential appellate remedy, that being a remand for a final determination and the inevitable

appeal from that determination. In short, disallowing an immediate appeal in this case will limit the remedies available in an appeal after a trial on the merits and, therefore, the "No Motions Order" is immediately appealable under *Morrow, supra.*

D. The "No Motions Order" is immediately appealable under § 14-3-330(2)(a), because it will be difficult if not impossible to demonstrate prejudice in an appeal after final judgment.

An interlocutory order is immediately appealable when "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interest because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the [interlocutory order]." *Hagood v. Sommerville*, 607 S.E.2d 707, 710 (S.C. 2005). Here, in an appeal after final judgment, it will be impossible to demonstrate any prejudice from the certification of the class, because there has never been a full and final hearing on and determination of whether a class should be certified. Moreover, it will be difficult and likely impossible to demonstrate that the evidence at trial failed to prove liability for the class claims, because the class (and therefore the class claims) was not finally determined, defined, and established before the trial on the merits. Accordingly, the "No Motions Order" is immediately appealable under *Hagood, supra.*

CONCLUSION

The essential and mandatory cornerstone for any class action trial on the merits is a pre-existing order that certifies the class for a trial on the merits. This is the teaching of Rule 23(d)(1), SCRCP, which expressly states that "the court shall determine by order whether" the case is to be "maintained" (*i.e.*, tried) as a class action. Here, the circuit court has never issued any such order. Judge Baxley clearly did not do so in the Preliminary Order, and Judge Dickson has refused to decide the question of or issue an order on whether the class should be certified as class for a trial

on the merits. For this reason, and for the other reasons set forth above, it is respectfully submitted that this Court should grant rehearing and issue an amended order finding that the orders appealed by Del Webb are immediately appealable.

Respectfully Submitted,

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