THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Appeal No. 2017-000218

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

v.

South Carolina State Plastering, LLC, ... Petitioner.

AND

South Carolina State Plastering, LLC, ... Petitioner,

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.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Undersigned counsel for Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 11, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Certain Intermediate Orders issued by the trial court were not immediately appealable when those Orders fall within the provisions of S.C. Code Ann. §14-3-330 in that they involve the merits of the case, affect SCSP's substantial rights, and/or prevent judgments from which appeal can later be taken?

   A. Did the Court of Appeals err in finding intermediate orders are not immediately appealable when those orders refuse SCSP's request that Plaintiffs comply with Rule 23 of the South Carolina Rules of Procedure regarding class action certification, and thereby involve the merits of SCSP's defense of the case?

   B. Did the Court of Appeals err in finding intermediate orders are not immediately appealable when those orders create an *ad hoc* Right to Cure process, create a class certification "opt-in" procedure, and thereby deny SCSP's right to a particular mode of trial?

   C. Did the Court of Appeals err in finding intermediate orders are not immediately appealable when those orders dismiss SCSP's Rule 59(e) Motions for Reconsideration and deny SCSP's ability to preserve issues for appellate review, thereby preventing a judgment from which an appeal may be taken?

2. Do the Certain Intermediate Orders contain clear errors of law which must be reviewed and corrected by this Court?

STATEMENT OF THE CASE

The details of the litigation proceedings on the issues relating to the Certain Intermediate Orders now on appeal to this Court can be found in reams of documents previously filed in the Appellate Courts.[1] The Petitioner provides the following brief summary to provide context and background for purposes of this Petition for Writ of Certiorari.

Plaintiffs Anthony and Barbara Grazia, homeowners in a Sun City community in Bluffton, South Carolina, brought the underlying action alleging defective exterior stucco work by SCSP and seeking to pursue claims individually and on behalf of other homeowners as a class action. In its Answer, Petitioner South Carolina State Plastering, LLC ("SCSP") denied the allegations, disputed the propriety of the class action, and argued Plaintiffs had failed to comply with the express provisions of the Right to Cure Act, which entitles a contractor or subcontractor to notice of any qualifying construction defect, and the opportunity to cure, before the action is commenced. After the Grazias individually complied with the Act, SCSP moved to dismiss the class allegations, and, in the alternative, requested a stay of the proceedings until each of the similarly situated claimants complied with the Right to Cure Act notice requirements. The circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act, and appeal was taken at that time and heard by the Supreme Court. The Supreme Court held that the circuit court erred in striking the Grazias' class allegations on the basis that the Right to Cure Act is incompatible with Rule 23. Grazia v. S. C. State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (Grazia I).

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[1] Grazia I briefing; and Appellate Case Nos. 2011-212212; 2013-000233; 2017-000218.

In Grazia I, this Court gave specific instructions to the trial court for anticipated proceedings on remand – namely that, when presented with a motion for class certification, the trial court must FIRST determine whether or not the action meets each of the five perquisite proponents of class certification and THEN, IF the perquisites are met, it must determine whether the Right to Cure Act might be appropriate.[2] Grazia I, 703 S.E.2d at 202-03.[3] This Court's instructions to the trial court implied a sequential process with discreet steps by which the trial court should handle a motion for class certification, once made.

On remand, as to be expected, the Plaintiffs made a motion for class certification, to which SCSP objected on numerous grounds. In response, the trial court conflated the discreet steps set forth by this Court to handle the motion for class certification, both confusing the legal and factual issues of this case and confounding the substantial rights of the parties, by issuing the Certain Intermediate Orders from which SCSP now appeal, to wit:

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[2] With all due respect to the previous decision of this Court, SCSP maintains that the instructions do not comport with the Legislative intent to comply FIRST with the Act before moving forward with the legal action and that certifying a class first is improper and inefficient because any members that do not comply with the Act cannot proceed to participate in the class in any event.

[3] As noted by this Court, at that stage of litigation, no motion for class certification had yet been made; however, the Court gave certain instructions for anticipated proceedings on remand, namely:

> Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove.
> ****
> **If and when** these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate.

Id. at 204 (emphasis added).

1. Judge Baxley issued an Order[4] making a *preliminary* finding that Plaintiffs met the five Rule 23 requirements, before requiring Plaintiffs to meet their burden imposed by Rule 23, SCRCP, and created his own *ad hoc* process for compliance with the Right to Cure Act;
2. Judge Baxley issued an Order[5] *dismissing as improper* Defendants' Motions to Reconsider and Motions for Clarification of his preliminary finding that Plaintiffs met the five Rule 23 requirements, on the grounds that there is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order;
3. Judge Baxley issued an Order[6] approving a Class Notice and a procedure whereby class members would be given a 60-day period to return a Questionnaire to Plaintiffs' counsel or have their claims dismissed, with prejudice;
4. Judge Dickson issued an Order[7] limiting SCSP's discovery on the 4100+ houses involved in this litigation to destructive testing of only 47 houses;

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[4] The order of the Honorable J. Michael Baxley, "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," dated December 8, 2011 and filed December 19, 2011.

[5] The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motion for Clarification of Order Preliminarily Certifying Class," dated May 1, 2012 and filed May 7, 2012

[6] The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014 and filed April 18, 2014

[7] The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016 and filed February 12, 2016

5. Judge Dickson issued an Order[8] allowing the stay to be lifted upon final class certification, prior to completion of the process set forth by the Right to Cure Act and by the Order of this Court;

6. Judge Dickson issued an Order[9] proclaiming that Judge Baxley's *preliminary* finding that Plaintiffs met the five Rule 23 requirements was actually a "final" finding, before requiring Plaintiffs to meet their burden imposed by Rule 23, SCRCP, and before applying a rigorous analysis to determine whether that burden was met; and

7. Judge Dickson issued an Order[10] *dismissing as improper* Defendants' Motions to Reconsider his previous Order that Judge Baxley's preliminary finding was actually a "final" class certification, on the grounds that there is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order.

On February 6, 2017, SCSP filed its appeal of these Certain Intermediate Orders with the Court of Appeals and then filed a Motion to Determine Appealability on February 8, 2017. On March 17, 2017, the Court of Appeals filed an Order, dismissing SCSP's appeal of the Certain Intermediate Orders upon a finding that the Orders "are interlocutory and not appealable pursuant to section 14-3-330 of the South Carolina Code (2017)." According, the Court of Appeals granted

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[8] The order of the Honorable Edgar W. Dickson, "Scheduling Order" dated May 16, 2016 and filed May 26, 2016

[9] The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)," dated September 7, 2016 and filed September 9, 2016

[10] The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017

Plaintiffs' Motion to Dismiss SCSP's appeal. On March 17, 2017, SCSP filed a Petition for Rehearing with the Court of Appeals.[11]

On May 11, 2017, the Court of Appeals filed an Order, denying SCSP's petition for rehearing on the grounds that it was "unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing." SCSP has filed this Petition for Writ of Certiorari, now before this Court, asking this Court to reverse the decision of the Court of Appeals and find that the Certain Intermediate Orders are immediately appealable and contain clear errors of law which this Court must review and correct before remanding this case to the Circuit Court with instructions to fully comply with Rule 23, SCRCP, and the Right to Cure Act.[12]

ARGUMENT

I. The Court of Appeals erred in holding that the Certain Intermediate Orders issued by the trial court are not immediately appealable.

By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis. Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). Thus, each Certain Intermediate Order must be examined individually and a separate finding of immediate appealability must be made as to each Order. See Salmonsen

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[11] SCSP would direct this Court's attention to each of the arguments set forth in SCSP's previous filings submitted during the course of this appeal, which are found in the Appendix filed herewith and incorporated in this Petition as if fully restated herein.

[12] Of note, there are four other petitions and one motion which are also currently pending in this matter and have not yet been decided by this Court: (1) SCSP's Petition for Extraordinary Relief, filed February 15, 2017; (2) Del Webb's Motion to Certify Appeal for Review, filed February 23, 2017; (3) Del Webb's Petition for a Writ of Certiorari to the Circuit Court, filed February 23, 2017; (4) Del Webb's Petition for a Writ of Mandamus to the Circuit Court, filed February 23, 2017; and (5) Del Webb's Petition for a Writ of Mandamus to the Circuit Court, filed February 23, 2017.

v. CGD, Inc., 377 S.C. 442, 448, 661 S.E.2d 81, 85, (2008) (explaining the "substantive differences between the orders at issue [on appeal] necessitates that this Court engage in a bifurcated appealability analysis."). The Court of Appeals erred in summarily dismissing this appeal based on the characterization of the orders appealed, rather than on the effect of the orders appealed.[13]

This Court has previously declined to determine appealability of interlocutory orders based on the manner in which a motion is characterized or a trial court order is styled. Morrow v. Fund. Long-Term Care Holdings, LLC, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (where this Court declined to base its decision of appealability on the manner in which the order being appealed was characterized – in that case, an order of bifurcation). Instead, "an appellate court must look to the *effect* of the interlocutory order to determine its appealability." Id. (quoting Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011)) (emphasis added). Accordingly, while many of the Certain Intermediate Orders now on appeal are styled as Orders relating to class certification and/or litigation rights under the Right to Cure Act, that alone is not determinative of their immediate appealability.

Instead, the determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2003). An order generally must fall into one of several categories set forth in that statute to be immediately

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[13] See the Order issued by the Court of Appeals:

> We find the orders on appeal are interlocutory and not appealable pursuant to section 14-3-330 of the South Carolina Code (2017); accordingly, we grant Respondents' motion and dismiss the instant appeals. See Knowles v. Standard Say. & 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 essential legal rights which require attention prior to final judgment.... Neither does certification reach the 'merits' of the underlying cause of action .... "): 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.").

appealable. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005); Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) (Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C.Code Ann. § 14–3–330.) Applying S.C.Code Ann. § 14–3–330, this Court has held an intermediate order is immediately appealable if it "involve[s] the merits, affect[s] a substantial right, or prevent[s] a judgment from which an appeal may later be taken." Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006).

Each of the Certain Intermediate Orders now on appeal involve the merits of the underlying case, affect a substantial right of the parties in the underlying case, and/or prevent a judgment from which an appeal may later be taken. Therefore, each of the Certain Intermediate Orders are immediately appealable, and the Court of Appeals erred in holding they were not immediately appealable.

This Court may, on motion of any party, issue a writ of certiorari to review a final decision of the Court of Appeals. Rule 242(a), SCRCP. A writ of certiorari may be granted where there are special and important issues presented by the appeal and, specifically, in cases where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. See Rule 242(b), SCRCP. Here, the decision to dismiss SCSP's appeal of the Certain Intermediate Orders is in conflict with various prior decisions of this Court, as discussed in detail, below. Further, this appeal presents very important questions of law that need to be answered, including but not limited to, whether the trial court has impermissibly refused to make Plaintiffs comply with the Rules of Civil Procedure and whether the confluence of attempting to manage class certification at the same time as the Right to Cure process has led the trial court to violate SCSP's substantial and due process rights and to create a prohibited "opt-in" class. For the reasons discussed herein, the exceptional

circumstances of this case warrant a writ of certiorari because only this Court can clear up the confusion created by the Certain Intermediate Orders now on appeal and provide the direction necessary for this case to proceed forward on the correct path to discovery and final resolution on the merits.[14]

A. The Certain Intermediate Orders, which refuse SCSP's request that Plaintiffs comply with Rule 23 of the South Carolina Rules of Civil Procedure regarding class action certification, involve the merits of SCSP's defense of the case and are immediately appealable.

When an order involves the merits of a case, it is immediately appealable. Edwards, 369 S.C. at 94, 631 S.E.2d at 529. An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid–State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Specifically, where a defendant has the right to require compliance with the rules of civil procedure to adequately defend its case, this Court has found that the refusal of that right involves the merits and is immediately appealable. See Matheson v. American Telephone & Telegraph Co., 125 S.C. 297, 118 S.E. 617 (1923).

In Matheson, this Court held that a trial court order was immediately appealable when the order refused a defendant's motion to require that the plaintiff comply with the strict requirements of the rules of civil procedure by making its complaint more definite and certain, to enable the defendants to assert adequate defenses thereto.[15] Id. There, this Court found that the defendant had

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[14] SCSP would direct this Court's attention to each of the arguments set forth in SCSP's Motion to Determine Appealability and SCCP's Petition for Extraordinary Relief, which expand upon the various reasons this appeal warrants a writ of certiorari to this Court. These pleadings are found in the Appendix filed herewith and incorporated in this Petition as if fully restated herein.

[15] Specifically, the Court in Matheson discusses the Code of Civil Procedure of South Carolina, § 218 (1912), which is now restated in South Carolina Rule of Civil Procedure, Rule 8(e). Interestingly, in discussing this Rule, the Court in Matheson explained: "The plain words of the

the right to require the plaintiff to make its complaint more definite pursuant to the rules of civil procedure, and the refusal of that right involved the merits of the defense and was immediately appealable. Id.

Here, Plaintiffs are required by the South Carolina Rules of Civil Procedure to bear the burden of proving the five prerequisites for class action under Rule 23. Rule 23, SCRCP; Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). It is the trial court's duty to apply a rigorous analysis to determine whether Plaintiffs met that burden set forth by the South Carolina Rules of Procedure. Waller v. Seabrook Island Prop. Owners Ass'n, 388 S.E.2d 799, 801, 300 S.C. 465, 466 (1989) (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982)). By issuing orders certifying a class before requiring Plaintiffs to meet their burden imposed by the Rules of Civil Procedure and before the trial court applied a rigorous analysis to determine whether that burden was met, the trial court issued orders finally determining substantial matters that effectively denied SCSP's ability to defend this action on the merits. Accordingly, those Certain Intermediate Orders[16] certifying a class in violation of the procedure

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statute negative the idea that two or more causes of action may be 'jumbled.'" This language still exists in the Notes to Rule 8, SCRCP, today. See S.C. R. Civ. P. 8(e) n.4 ("This Rule does not allow "jumbling" of two or more causes of action in one count.")

[16] Specifically: The order of the Honorable J. Michael Baxley, "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," dated December 8, 2011 and filed December 19, 2011; and, The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motion for Clarification of Order Preliminarily Certifying Class," dated May 1, 2012 and filed May 7, 2012; and, The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)," dated September 7, 2016 and filed September 9, 2016; and, The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

set forth by the South Carolina Rules of Civil Procedure and the instructions of this Court are immediately appealable.

The appeal of these Certain Intermediate Orders, which display the trial court's refusal to require that Plaintiffs comply with Rule 23 of the South Carolina Rules of Civil Procedure, is distinct from other appeals of orders relating to class certification which have come before this Court. Though the general rule established by this Court is that class certification orders are not immediately appealable, exceptions to this general rule are made in certain circumstances. Salmonsen, 377 S.C. at 448, 661 S.E.2d at 85. Specifically, this Court has "reviewed interlocutory orders involving class certification when they contain other appealable issues." Id. (citing Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002)); Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) ("An order that is not directly appealable may be considered if there is an appealable issue before the court.").

Here, the Certain Intermediate Orders certifying a class are appealed for their refusal to require that Plaintiffs comply with the strict requirements of the South Carolina Rules of Procedure. As such, these Orders made a final determination on a substantial matter affecting the whole or part of SCSP's defenses and are, therefore, immediately appealable. Mid–State Distribs., 310 S.C. at 334, 426 S.E.2d at 780 (An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense."). This Court is therefore free to evaluate the trial court's orders as what they are – orders refusing to make Plaintiffs comply with the South Carolina Rules of Civil Procedure – and not merely what they appear to be – orders of class certification. See Morrow, 412 S.C. at 539, 773 S.E.2d at 146. Accordingly, this Court should find that these orders involve the merits of the case and that the Court of Appeal erred in finding they are not immediately appealable.

B. The Certain Intermediate Orders, which deny SCSP's right to a particular mode of trial, affect SCSP's substantial rights and are immediately appealable.

An order which affects a substantial right is immediately appealable. S.C. Code Ann. §14-3-330(2). An order affects a substantial right when it can "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid–State Distribs., at 335 n. 4, 426 S.E.2d at 780 n. 4; Edwards, 369 S.C. at 94, 631 S.E.2d at 530. Further, this Court has repeatedly held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2). See, e.g., Hagood, 362 S.C. at 196, 607 S.E.2d at 709; Salmonsen, 377 S.C. at 452, 661 S.E.2d at 87 ("[W]hen a trial court order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable."). Because Certain Intermediate Orders now on appeal (outlined below) deny SCSP's right to a particular mode of trial and affect the substantial rights of SCSP and other parties to this action, the Court of Appeals erred in finding they are not immediately appealable.

Orders Creating *ad hoc* Right to Cure Process[17]

Importantly, an order need not deny a party's right to a jury trial to be immediately appealable for denying a party's right to a "particular mode of trial." See, e.g. Hagood, 362 S.C. at 197-98, 607 S.E.2d at 710 (granting immediate appeal of an order disqualifying a party's attorney in a civil case because the "right to be represented by one's preferred attorney is *closely*

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[17] Specifically: Judge Baxley's Order, dated December 8, 2011 and filed December 19, 2011, sets forth his own process for compliance with the Right to Cure Act; and Judge Baxley's Order, dated April 9, 2014 and filed April, 18, 2014, sets forth additional details, including guidelines for inspections and testing; and Judge Dickson's Order, dated January 9, 2016 and filed February 12, 2016, limits SCSP's discovery testing to 47 of the 4100+ homes involved in this litigation; and Judge Dickson's Order, dated May 16, 2016 and filed May 26, 2016, allows for the Right to Cure stay to be lifted upon final class certification, prior to compliance with the Right to Cure Act.

related to the right to a particular mode of trial, a well-established substantial right") (emphasis added).

In Hagood, this Court considered whether an order granting a motion to disqualify a party's attorney in a civil case was immediately appealable. In concluding the order was immediately appealable, the Court found it persuasive that if a new trial were ordered after an appeal in the distant future – rather than after an immediate appeal of the order – then the new trial may not be able to correct the error appealed from, for purposes of the new trial. Id. at 195, 607 S.E.2d at 709 ("If a new trial were ordered after an appeal in the distant future, the preferred attorney may not be available or a litigant may not be able to afford the attorney for a second trial."). The Court reasoned the order was immediately appealable because an appeal of the order after final judgment "would not adequately protect a party's interest because it would be difficult or impossible for the affected party or appellate court to ascertain by any objective standard whether prejudice resulted from the order." Id. at 198, 607 S.E.2d at 710.

The Certain Intermediate Orders of Judge Baxley and Judge Dickson, which create an *ad hoc* Right to Cure process, deny SCSP its rights under the Right to Cure Act and deny SCSP's right to a particular mode of trial. Specifically, the *ad hoc* Right to Cure process created by these orders denies SCSP's ability to conduct discovery and to complete settlement negotiations with claimants in the way it is entitled to do under the Act, prior to trial. [18] These orders inherently affect

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[18] As of the filing of this Petition, SCSP has made separate settlement offers to each claimant homeowner in individual letters separately addressed to each claimant homeowner, which were personally served and delivered via hand-delivery to Plaintiffs' counsel, on June 9, 2017. Upon receipt of these individual offer letters, each individual claimant homeowner must respond before the stay imposed under the Right to Cure Act can be lifted. At that point in time, additional discovery is needed to allow all parties to discover information necessary to allow them to ultimately try the case on the merits.

SCSP's right to a particular mode of trial, as they directly impact the discovery conducted prior to, the parties involved in, and the arguments and defenses presented at the trial of this case.

An appeal of these orders after final judgment would not adequately protect SCSP's interest in this regard, as it would be impossible for the appellate court to objectively determine whether prejudice resulted from the orders. There is no way for the appellate courts to objectively determine, for instance, what SCSP *might* have discovered or with whom SCSP *might* have settled prior to trial, if given the appropriate opportunity to do so pursuant to the actual procedure set forth by the Right to Cure Act. And, even if a new trial were ordered after a final judgment was rendered in this case, a new trial could not turn back the hands of time to allow SCSP an identical opportunity, as it would currently have, to complete the discovery and testing necessary to make settlement offers to the claimants before it is forced to, again, try the case on the merits. Realistically, a new trial would not afford SCSP any opportunity to discover identical information that present-day discovery would afford or to engage in settlement negotiations with present-day Plaintiffs who, by the time of the new trial, may not even own homes in the Sun City development any longer.

Because these Certain Intermediate Orders create an improper *ad hoc* Right to Cure Process and thereby deny a particular mode of trial to SCSP – and because a new trial, ordered after an appeal preceding final judgment at a trial of this case, would not adequately protect SCSP's substantive rights in this regard – the Court of Appeals erred in finding these orders are not immediately appealable.

Order Creating "opt-in" Procedure[19]

This Court has held that an order changing the characterization of a class from opt-out to opt-in fundamentally alters the nature of the class, thereby affecting the mode of trial, and is immediately appealable. See Salmonsen, 377 S.C. at 453, 661 S.E.2d at 87. (holding that an order establishing an "opt-in" procedure "affects a substantial right of class members and the mode of trial" and is immediately appealable). Such orders are have been carved out by this Court as a specific exception to the general rule that class certification orders are not immediately appealable. Id. at 452, 661 S.E.2d at 87.

In Salmonsen, the trial court judge determined an "opt-in" procedure was the most pragmatic procedure to facilitate the management of the case and determined the makeup of the class should "only contain, at most, a narrow group of members, namely the homeowners identified by sales invoices provided by Defendants." Id. at 447, 661 S.E.2d at 84. This Court found that process created an "opt-in" procedure, which impermissibly denied a mode of trial to those homeowners not identified as group members. Because the "opt-in" procedure affected the mode of trial, this Court held that the order approving the opt-in procedure was immediately appealable. Id. at 453, 661 S.E.2d at 87.

Here, Judge Baxley issued an Order approving a Class Notice and procedure whereby putative class members would have a 60-day period to return a Questionnaire to Plaintiffs' counsel or have their claims dismissed, with prejudice. The Questionnaire also warns claimants that their claim may be dismissed if the Questionnaire is not returned. Regardless of Judge Baxley labeling this Questionnaire as an opt-out notice, the reality is that, as a practical matter, the notice of a

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[19] The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014 and filed April 18, 2014

preliminary class certification together with the Right to Cure Questionnaire constitutes an opt-in notice. See Salmonsen, 377 S.C. at 459, 661 S.E.2d at 92 ("The 'opt-in' class action and the 'opt-in' notice procedure are a distinction in name only, the practical effect is the same."). Also, as in Salmonsen, the opt-in" procedure created by Judge Baxley's order impermissibly denies a mode of trial to those homeowners who did not return their Questionnaires to Plaintiffs within the 60-day time period. Therefore, the order approving this opt-in procedure is immediately appealable, and the Court of Appeal erred in finding that it was not.

C. The Certain Intermediate Orders which prevent a judgment from which an appeal may be taken are immediately appealable.

If the effect of an order is to prevent a judgment from which an appeal might be taken, then the order is immediately appealable. S.C. Code Ann. § 14-3-330(2). Here, two of the Certain Intermediate Orders[20] ("the dismissal Orders"), *dismissing as improper* SCSP's Motions to Reconsider on the grounds that interlocutory orders cannot be challenged by Rule 59(e), effectively prevent a judgment from which an appeal might be taken by denying SCSP's ability to seek "reconsideration" of issues and arguments to preserve those issues for appellate review.

As the Court is well aware, the "absolute necessity" of issue preservation and the importance of making motions for reconsideration to preserve issues for appellate review can be found in a myriad of opinions with references to the consequences of failure to meet mandatory preservation requirements. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004); Trial Handbook for South Carolina Lawyers § 36:5.

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[20] The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motion for Clarification of Order Preliminarily Certifying Class," dated May 1, 2012 and filed May 7, 2012; and, The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017

In Elam, the Supreme Court discusses the proper use of a Rule 59(e) motion to seek "reconsideration" of issues and arguments:

> [I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. ***It is inherently unfair to disallow such an opportunity.***

602 S.E.2d 772, 778-79 (2004) (citations omitted/emphasis added).

Further, this Court has clearly established that trial court intermediate orders are amendable on motions for reconsideration. Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993); see also Rule 54(b), SCRCP ("the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."). The consequences of failing to make a motion for reconsideration of an intermediate/pretrial order are evidenced in Ness v. Eckerd Corp., 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002), where on appeal from an order of a trial judge vacating his prior order, which denied the defendant relief from entry of default and recused himself, the Court of Appeals held that issues related to recusal were not preserved for appellate review because the party did not make a Rule 59(e) motion.

Not only did SCSP properly make a Rule 59(e) motion, asking the trial court judges to reconsider their findings relating to class certification, SCSP was *required* to make a Rule 59(e) motion to preserve the issues for appellate review. By *dismissing* SCSP's properly made Rule 59(e) motions, rather than hearing and granting or hearing and denying the motions, the

two dismissal Orders prevent a judgment from which an appeal might be taken. As such, those Orders are immediately appealable under Section 14-3-330(2).[21]

II. This Court should review and correct the clear errors of law contained within the Certain Intermediate Orders.

Once this Court determines the Certain Intermediate Orders from which SCSP appeals are immediately appealable, this Court must then analyze the errors contained within those orders to give instructions for further proceedings consistent with its opinion. See Salmonsen, 377 S.C. 442, 661 S.E.2d 81 (where this Court first bifurcated its analysis of the immediate appealability of multiple orders and then separately reviewed the trial judge's legal decisions contained within an order, after finding it to be immediately appealable). The myriad of clear errors of law within the Certain Intermediate Orders, which need to be reviewed and corrected by this Court, are set forth extensively hereinabove and in other petitions and filings submitted to this Court.[22] SCSP respectfully requests this Court review the Certain Intermediate Orders now on appeal and correct the many errors contained therein so this case can move forward toward a proper determination of the Rule 23 class certification factors, compliance with the Right to Cure Act as intended by the Legislature, and, ultimately, to a trial on the merits. This Court's review and correction of the

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[21] SCSP also maintains that the dismissal orders are appealable because they were dismissed on a "purely legal ground," Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385 (1897) ("While the granting or refusing of an interlocutory order of injunction, upon the merits, is not, as a rule, appealable, it is appealable when granted or refused upon a 'purely' legal ground."), and because trial court's refusal to allow the opportunity for reconsideration is "inherently unfair" and thus affects SCSP's substantial rights to reconsideration. Elam, 602 S.E.2d at 779 ("It is inherently unfair to disallow such an opportunity [for reconsideration].").

[22] SCSP has extensively briefed its objections to clear errors of law relating to actions taken and the orders issued by the trial court on matters relating to class certification and compliance with the Right to Cure Act, among other things. SCSP would direct the Court's attention to SCSP's previous filings submitted during the course of this appeal, found in the Appendix filed herewith and incorporated in this Petition as if fully restated herein.

errors contained in the Certain Intermediate Orders now on appeal would best serve the interests of judicial economy by addressing the important issues at this stage of litigation, rather than having the parties proceed through more years of extensive litigation that would be wasted were the Court to reverse on appeal from a final judgment.

Correction of Errors Relating to Compliance with Rule 23, SCRCP

As noted by this Court in Grazia I, Plaintiffs bear the burden of proving the prerequisites for class action under Rule 23, SCRCP. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether Plaintiffs have met their burden as to each prerequisite for class action. Waller, 388 S.E.2d at 801, 300 S.C. at 466.

Neither Judge Baxley nor Judge Dickson have yet made findings as to whether the Plaintiffs have proven any of these factors to warrant class certification; moreover, neither has conducted the rigorous analysis necessary to make any such findings. Nor has the trial court considered or made findings, as part of its class certification determination, as to how this case will proceed at a trial on the merits. See Noel v. Hudd Distrib. Servs., Inc., 274 F.R.D. 187 (D.S.C. 2011) (explaining the court should consider how a class action will unfold at trial – a "mental dress rehearsal of anticipated proof, the jury instructions, the verdict sheet, and the burdens imposed on the jury").

SCSP contends that, had the trial court made proper findings as to either of these two issues, the court would have unequivocally concluded that a class of homeowners in this case cannot and should not be certified. The factual and legal differences between the homeowners – of which there are many, including legal issues of duty, negligence, causation, damages, and multiple defenses –

overwhelmingly outnumber and outweigh any articulated common issues or claims.[23] Further, due process requires that SCSP be allowed to challenge each Plaintiff's claim and establish its affirmative defenses against each of those claims at an individual level. By any fair estimate, the presentation of evidence for each Plaintiff's claim will take four to five days, resulting in a trial that lasts years. Not only is there no possibility of seating a jury that can hear all of the claims, but the complexity of jury instructions and verdict forms can only be imagined. Affording due process requirements will effectively result in a joint trial of as many as 4100+ claims, will impose a huge burden on the parties, their counsel, and the circuit court of Beaufort Court – and, ultimately, will not serve the purposes of Rule 23.

From one perspective, this Court could remand the case with directions to the trial court to fully consider the Rule 23 issues prior to making a determination of whether class certification is appropriate in this case. However, in view of Judge Dickson's abject refusal to hear any other arguments on class certification and the number of years of extensive, expensive litigation and the corresponding burden on court staff and docket in Beaufort County — without yet even moving forward on the merits of the defect allegations – SCSP asks this Court to retain jurisdiction of this appeal and issue explicit instructions to the circuit court on how to handle the class certification issues, so this case can get back on track and move toward a final resolution.

Correction of Errors Relating to the Right to Cure Act

As noted above, in Grazia I, this Court gave explicit instructions to the trial court that, when presented with a motion for class certification, it should FIRST determine whether the action

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[23] Judge Baxley has already rejected SCSP's objections and limited discovery on the class list because the case was, at that time, six years old. [4/18/14 Order, p. 3] The length of the process does not justify depriving SCSP of its due process rights to insist on a rigorous analysis that forces the Plaintiffs to meet their burden under Rule 23 and allows the Defendants to challenge class certification.

meets each of the five prerequisites proponents of class certification and THEN, IF those prerequisites are met, determine whether the Right to Cure Act could be properly harmonized with Rule 23, such that representative notice under the Right to Cure Act might be appropriate. 703 S.E.2d at 202-03. Instead, on remand, Judge Baxley and Judge Dickson conflated these steps, resulting in the *ad hoc* Right to Cure process outlined in detail, above.

On June 9, 2017, SCSP made separate settlement offers to each claimant homeowner in individual letters, separately addressed to each claimant homeowner, by personally serving and delivering them via hand-delivery to Plaintiffs' counsel. Now, despite the fact that SCSP is still in the middle of attempting settlement negotiations with the claimants (as is its right under the Act), the stay of discovery properly imposed under the Act, and approved by this Court[24], has been prematurely lifted.[25] Moreover, Judge Dickson has declared that he will call this case for trial within 30 days from the issuance of any remittitur from this appeal back to the Circuit Court, seemingly without regard to whether the RTC compliance is complete or whether SCSP has been allowed full discovery necessary to defend the case on the merits and present its defenses:

> [H]ere is what you can expect from Judge Dickson: on the day the remittitur is received, if at all, from the Court of Appeals, Judge Dickson will issue an order setting the trial date for thirty (30) days after the date of the remittitur; in addition, you should expect Judge Dickson to require you all to submit your pretrial briefs, voir dire, and proposed jury instructions to the court five (5) days after the date the court receives the remittitur, if at all, from the Court of Appeals.

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[24] See Grazia I, 703 S.E.2d at 202 ("The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.")

[25] Judge Dickson's "Scheduling Order," dated May 16, 2016 and filed May 26, 2016, did contemplate that the Right to Cure process would be completed by September before the scheduled hearing set on final class certification; however, compliance has not yet been completed and the Plaintiffs are pursuing discovery on the presumption that the stay has been lifted with Judge Dickson's 9/9/16 order declaring class certification already was final.

See Email from Judge Dickson's Law Clerk, John Dodds, to Vic Rawl (March 21, 2017, 10:59 AM), included in the Appendix submitted herewith.[26]

SCSP maintains that the confused and confusing *ad hoc* Right to Cure process created by the trial court does not meet the purpose or express provisions of the Act or of this Court's explicit instructions in Grazia I, and it denies SCSP its due process rights under the Act.

In light of the existing errors already made and the exceptional confusion raised by the confluence of managing class certification issues at the same as Right to Cure compliance issues, which has only been confounded by the reassignment of this case to three different circuit court judges, SCSP asks this Court to retain jurisdiction of this appeal and issue explicit instructions to the circuit court on how to properly comply with the Right to Cure Act, so this case can move expeditiously toward a final resolution.

Correction of Errors Relating to SCSP's Motions to Reconsider

As explained above, SCSP has twice made motions for reconsideration of certain orders, which the trial court has issued Certain Intermediate Orders dismissing as improper on the reasoning that Rule 59(e) does not allow reconsideration of intermediate orders. These Orders are in direct opposition to the clearly established law that a Rule 59(e) motion is the proper vehicle to request review of intermediate orders. See Elam, 361 S.C. 9, 602 S.E.2d 772; Trial Handbook for

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[26] Of note, the Trial Court is overlooking, or disregarding, the fact that there are multiple motions still outstanding, which go to the merits of the claimants' claims and SCSP's right to discovery on key issues affecting the affirmative defenses, such as: Motion to Compel Depositions of the Class Members, Motion to Compel Plaintiff's Discovery Responses, Motion to Reconvene Depositions, Motion for Destructive Testing on Grazia Home, Motion to Remove Members of the Class Who have Failed to Return the Right to Cure Questionnaire, Motion to Remove Members Who Entered Into an Agreement to Not Participate in any Class Litigation. and Motion to Remove Members of the Class Who Do Not Meet the Class Definition.

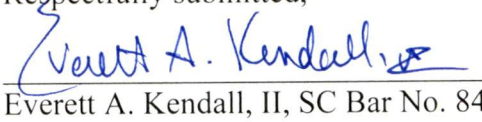
South Carolina Lawyers § 36:5. While the trial court may have discretion to deny the motions, it does not have the discretion to dismiss a proper motion.

From one perspective, this Court could remand the case with directions to the trial court to properly address the merits of the Rule 59(e) motions for reconsideration. However, both of the motions for reconsideration were filed in response to Certain Immediate Orders, relating to class certification and the Right to Cure procedure implemented by the trial court, which are now currently on appeal to this Court. Should this Court accept this Petition for Writ of Certiorari and correct the errors contained within those Certain Immediate Orders, which SCSP encourages the Court to do for the reasons already set forth herein, then the trial court's errors relating to the motion to reconsider will be simultaneously resolved. In the alternative, SCSP asks this Court to find that the motions for reconsideration were dismissed in error and remand to the trial court with instructions to address and rule on the merits of the Rule 59(e) motions.

CONCLUSION

For the reasons set forth herein and for the reasons set forth in the filings in the Court of Appeals relating to this appeal and in opposition to the dismissal of this appeal, which are also incorporated and adopted herein, South Carolina State Plastering, LLC respectfully petitions this Court to grant its Petition for Writ of Certiorari, reverse the decision of the appellate court to find that the Certain Intermediate Orders are immediately appealable, and remand the case to the trial court with instructions for it to fully comply with Rule 23, SCRCP, and the Right to Cure Act.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Appeal No. 2017-000218

RECEIVED
JUN 09 2017
S.C. SUPREME COURT

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

v.

South Carolina State Plastering, LLC, ... Petitioner.

AND

South Carolina State Plastering, LLC, ... Petitioner,

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.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 2017, addressed to their attorneys of record and all counsel of record, listed as follows:

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June 9, 2017