THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Order of March 17, 2017 (S.C. Ct. App.)
S.C. Sup. Ct. App. Case No. 2017-001305
S.C. Ct. App. Case No. 2017-000218
Lower Court 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,..... Petitioner/Respondent,

and

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

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Respondents/Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 11, 2017.

QUESTIONS PRESENTED

I. Whether Judge Baxley's "Preliminary Order" was a ruling that certified the putative class for a trial on the merits.

II. Whether Judge Dickson erred in interpreting Judge Baxley's "Preliminary Order" as a final class certification order that certified the class for a trial on the merits, and whether Judge Dickson further erred in refusing to consider the question of whether the class should be certified for a trial on the merits and ordering the case to trial as a class action.

III. Whether Judge Dickson's orders are immediately appealable under S.C. Code Ann. § 14-3-330.

IV. Whether the Court of Appeals erred in dismissing Del Webb's appeal of Judge Dickson's orders on the ground that the orders were not immediately appealable.

STATEMENT OF THE CASE

Introduction: The cornerstone of every class action trial is a pre-trial order certifying the class for a trial on the merits. The validity, finality, and enforceability of every class action judgment rests upon the existence and correctness of this cornerstone order. The class certification order is so important that the South Carolina Rules of Civil Procedure specifically mandate that it be entered: "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." Rule 23(d)(1), SCRCP (emphasis added).

This case presents the question of whether the circuit court may conduct a class action trial on the merits ***without*** a pre-trial order certifying the class for a trial on the merits. More specifically, the question is whether Judge Baxley certified the class for a trial on the merits in his "Preliminary Order." Judge Dickson held that Judge Baxley's "Preliminary Order"—despite

being expressly preliminary—was nonetheless somehow a "final" class certification order that certified the class for a trial on the merits. Respondents/Petitioners (Del Webb and Pulte, referenced together as "Del Webb") appealed this order by Judge Dickson. The Court of Appeals dismissed Del Webb's appeal, ruling that the order was not immediately appealable. (App. 001). Del Webb petitioned for rehearing, which the Court of Appeals denied. (App. 003). Pursuant to Rule 242, SCACR, Del Webb respectfully requests this Court to issue a writ of certiorari to the Court of Appeals, to reverse the Court of Appeals, and to reinstate Del Webb's appeal for a full consideration on the merits.

Background Facts & Procedural History: The Grazias (plaintiffs) are homeowners in the Sun City residential development in Bluffton, South Carolina. Del Webb was the builder, and South Carolina State Plastering (Petitioner/Respondent, sometimes referenced as "State Plastering") was the subcontractor that applied exterior stucco to many 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 (for ease of use, all jointly referred to as the defendants).

The plaintiffs' construction defect claims were governed by the "Notice and Opportunity to Cure Construction Dwelling Defect Act" (the Right to Cure Act).[1] 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. The plaintiffs appealed, and this 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).

[1] The Right to Cure 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.

This 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. This 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. *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 civil litigation and assigned to the Honorable J. Michael Baxley. Thereafter, the plaintiffs filed a motion for class certification. Judge Baxley held an evidentiary hearing and took the matter under advisement, ultimately issuing the "Preliminary Order" that is the centerpiece of this appeal.

Judge Baxley's "Preliminary Order": On August 22, 2011, Judge Baxley announced his tentative ruling in a letter directing the plaintiffs to draft a proposed order in accordance with the letter. (App. 005). This letter was merely a communication providing direction to counsel; it was never entered as an order of the court.

On September 15, 2011, the plaintiffs responded to Judge Baxley's letter with a three page proposed order entitled "Order Certifying Class" that essentially regurgitated the letter. (App. 007). After receiving comments from all parties, Judge Baxley spent the next month personally drafting the Preliminary Order. This order—which was entered as a order—deviated significantly from the initial letter, as was Judge Baxley's prerogative. *Brailsford v. Brailsford*,

669 S.E.2d 342, 346 (S.C. App. 2008) ("until the entry of the written order the judge is free to change his mind").

On October 12, 2011, Judge Baxley emailed the draft Preliminary Order to the parties. His email noted the following: "We have now completed a proposed *preliminary* class certification order in this case, which involved a *substantial revamping of the proposed certification order submitted by Plaintiffs*. That draft is attached." (App. 020) (emphasis added). After receiving the parties' comments and holding a hearing, Judge Baxley revised and entered the Preliminary Order as an Order of the Court in December 2011.

By its terms, the Preliminary Order was just that—preliminary. Indeed, the Preliminary Order used the word "preliminary" at least six (6) times:

1. The title of the order: "Order Making *Preliminary Finding* that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP" (Tab A at 1).[2]

2. "[T]he Court finds that Plaintiffs' proposed Class *preliminarily* meets the requirements for class certification" (*Id.* at 2) (emphasis added).

3. "[T]his Order makes *only a preliminary finding* that the requirements of Rule 23 have been met by Plaintiffs." (*Id.* at 10) (emphasis added).

4. "[F]or purposes of attempted compliance with the [Right to Cure Act], this Court finds that Plaintiffs . . . are entitled to a *preliminary determination* that Plaintiffs may proceed *at this juncture* using a class approach." (*Id.* at 11) (emphasis added).

5. "The class is *preliminarily recognized* as follows" (*Id.*) (emphasis added).

6. "[C]lass certification is *preliminary* at this juncture *pending the results of* the Right to Cure process." (*Id.* at 12) (emphasis added).

Moreover, on at least five (5) occasions, the Preliminary Order referred to the class as "putative," *i.e.*, alleged:

[2] The full title of Judge Baxley's signed and filed 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).

1. "[T]he Court . . . hereby establishes the parameters of the *putative class*." (App. 022) (emphasis added).

2. This order "sets forth the procedures and requirements for compliance [with the Right to Cure Act] in this *putative class setting.*" (*Id.*) (emphasis added).

3. "[T]he *putative class* is limited (sic) those homes on which [State Plastering] installed the stucco in whole or in part." (*Id.* At 023) (emphasis added).

4. "The Court . . . recognizes that factual and legal differences may exist within the *putative class*[,]" and therefore makes "*only a preliminary finding* that the requirements of Rule 23 have been met by Plaintiffs." (*Id.* At 030) (emphasis added).

5. The plaintiffs "are approved as representatives of the *putative class* " (*Id.* At 032) (emphasis added).

(See also App. 033, referring to the class created by the opt-out process as a "*proposed* class" and *id.* At 034, referring to class counsel as "*Proposed* class counsel" (emphasis added.)).

Finally, on at least five (5) occasions, the Preliminary Order referenced the fact that a "final" class determination would be made after the completion of discovery, including the completion of the Right to Cure Act process established by the Preliminary Order:

1. After the completion of the Right to Cure process, "the Court will make a *final determination* as to *whether a class action vehicle is practicable* under the specific facts and circumstances disclosed by" the Right to Cure process. (App. 022) (emphasis added).

2. The plaintiffs' UTPA claim is dismissed without prejudice, "however, *in the event* a Class is *certified with finality* in this case, the dismissal will be with prejudice." (*Id.* At 028) (emphasis added).

3. "[S]hould a Class be *finally certified*, after the passage of an appropriate *period for discovery* as to the applicability of affirmative defenses, the Court will" address the procedures for handling those defenses. (*Id.* at 030) (emphasis added).

4. 6. "[C]lass certification is *preliminary* at this juncture *pending the results of the Right to Cure process*" (*Id.* at 032) (emphasis added).

5. "[B]ased upon the Right to Cure responses, the Court will make a *final determination of class certification* " (*Id.*) (emphasis added).

In short, the Preliminary Order repeatedly and specifically makes it clear that Judge Baxley certified the class on a preliminary basis only. He deferred any "final" determination on class certification until after the completion of the Right to Cure process and discovery, so that he could consider that evidence in deciding whether to certify the class for a trial on the merits.

The defendants filed a motion to reconsider and clarify the Preliminary Order. Judge Baxley held a hearing on this motion on April 30, 2012, in which there was colloquy between Judge Baxley and defense counsel on the issue of clarifying the class definitions set forth in the Preliminary Order. (App. 037). Defense counsel noted that it was very difficult to determine who should be and not be in the class. (*Id.*). Judge Baxley responses as follows:

> **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.

(*Id.* at 038) (all emphasis added).

Plaintiffs contend that this colloquy somehow changed the plain meaning of the Preliminary Order. This is plainly incorrect. Indeed, in the colloquy itself, 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 final class determination, he observed: "who knows where this case will go [?]"

On February 1, 2013, Judge Baxley held a hearing to finalize the content of the Class Notice to be sent to the preliminary class. (App. 040). At this hearing, an issue arose as to the failure of the plaintiffs' proposal to advise the class members, as required by the Preliminary

Order, that the class was certified on a preliminary basis only. The Preliminary Order had 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.*

(App. 032) (emphasis added). During the ensuing colloquy, the following statements were made:

> **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 [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?

(App. 041) (all emphasis added) Defense counsel responded that he was only trying to follow the language in the Preliminary Order. (*Id.* at 042). Judge Baxley responded with his last comment on the matter, 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 042) (all emphasis added).

Plaintiffs have argued that the above colloquy somehow converted the preliminary certification into a final certification. It plainly did not. Nothing in the colloquy purported to 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.

After the close of the opt-out period set forth in the Class Notice, the parties proceeded under the Right to Cure process established in 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 certain homeowners, and destructive testing on certain homes. Formal discovery was stayed under the Right to Cure statute throughout this period.

Judge Baxley retired before the completion of the Right to Cure process. The Honorable Edgar W. Dickson was appointed to replace him.

The Appealed Orders (by Judge Dickson): By April 2016, the parties were nearing the completion of the Right to Cure process, and Judge Dickson issued a scheduling order in May 2016. (App. 044). As one would have anticipated under the plain language of Judge Baxley's Preliminary Order, the scheduling order set a date for 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 045, ¶¶ 3(c) and 4) (emphasis added).

In compliance with the terms of Judge Dickson's scheduling order (App. 045), the defendants submitted briefs and additional evidence in August 2016 to be presented at the September 1, 2016, "final hearing" on whether the putative 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, despite the plain language to the contrary, a final determination on the question of class certification. In so ruling, Judge Dickson relied on the colloquies between Judge Baxley and counsel at the hearing on the motion to reconsider and the hearing to finalize the Class Notice and ignored the text of the Preliminary Order itself. Judge Dickson also ruled that he 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 order and the errors therein are discussed more fully below.

The defendants filed a timely motion to reconsider, which Judge Dickson denied. The defendants appealed these orders by Judge Dickson.

Appellate Proceedings: Del Webb served and filed a notice of appeal from Judge Dickson's "No Motions Order" and his order denying reconsideration. Shortly thereafter, Del Webb filed a Motion to Determine Appealability in the Court of Appeals. (App. 047). Del Webb also filed the following with this Court a Motion to Certify Appeal to this court, a petition for a Writ of Certiorari, and a Petition for a Writ of Mandamus. The purpose of the petitions filed with this Court were to obtain relief from Judge Dickson's "No Motions Order" if it was determined that his order was not immediately appealable as a matter of right under S.C. Code Ann. § 14-3-330.

The plaintiffs never filed a response to Del Webb's Motion to Determine Appealability, but they opposed Del Webb's motion to certify this appeal to this Court. The plaintiffs also filed a motion to dismiss the appeal by South Carolina State Plastering, but this motion never mentioned and never sought dismissal of Del Webb's separate appeal. (App. 117).[3]

Before this Court ruled on Del Webb's Motion to Certify, the Court of Appeals issued its order dismissing Del Webb's appeal from Judge Dickson's orders. (App. 001). Del Webb petitioned for rehearing, which the Court of Appeals denied. For the reasons set forth below, Del Webb respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals, reverse the order dismissing Del Webb's appeal, reinstate Del Webb's appeal, and order that Del Webb's appeal proceed to a review on the merits.

SUMMARY OF ARGUMENTS

Before a class action is tried to a jury, the parties and the absent class members are entitled to an order that rigorously analyzes the five (5) class action prerequisites set forth in Rule 23, SCRCP, and determines based on the available evidence that all five prerequisites are met. No such order has ever been issued in this case, and the circuit court has unequivocally held that it will not hear the evidence or issue a final certification order.

The circuit court's refusal to comply with Rule 23 is immediately appealable because it affects the merits and abridges the parties' (and absent class members') substantial right to rigorous, evidence-based findings on each of the Rule 23 prerequisites before a class action trial. Indeed, there is no more substantial right in a class action than the right to a certification order, as everything that transpires in a class action trial revolves around that certification. It was therefore error for the Court of Appeals to dismiss this appeal for want of appellate jurisdiction.

[3] State Plastering appealed from the same orders appealed by Del Webb and several other orders. State Plastering also filed motions and petitions with this Court.

This issue is worthy of *certiorari* because the parties and absent class members are on the precipice of undergoing a lengthy and extraordinarily expensive class action trial without the benefit of the certification order that Rule 23 requires be issued. Moreover, the circuit court has refused to hear evidence developed over several years by defendants that certification is not proper. The circuit court's process—*i.e.*, ignoring the plain text of a "preliminary" certification order, declaring that a class is certified without evidence, and refusing to hear the evidence in opposition to certification—is antithetical to Rule 23 and to the Due Process Clauses of the state and federal constitutions. *Certiorari* should issue to stop this travesty before the circuit court's manifest errors are further compounded and before the parties expend untold hours and resources on a wholly improper class action trial.

ARGUMENTS

I. Judge Baxley's Preliminary Order did not certify the class for a trial on the merits.

The first question to be decided is whether Judge Baxley certified the class for a trial on the merits in his Preliminary Order. He plainly did not.

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). Thus, the inquiry focuses on the order itself, applying 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, court 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 unambiguously certified the class on a preliminary basis only and did not certify the class for a trial on the merits.

At the hearing that resulted in the Preliminary Order, the plaintiffs argued that 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. 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 set forth in the Preliminary Order. He would then hold another hearing for the taking of additional evidence, ***including the evidence gathered during the Right to Cure process***, to decide 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." (App. 022) (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* [*i.e.*, alleged] class setting." (*Id.*) (emphasis added). The opening paragraph of the Preliminary Order concluded that, after the compliance with the Right to Cure procedures, "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. (*Id.*) (emphasis added).[4]

[4] Judge Baxley also later noted that "the *putative* class [was] limited homes (sic) on which [State Plastering] installed the stucco in whole or part." (App.023) (emphasis added).

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* class." (App. 029) (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 031) (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 032) (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" 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.

II. Judge Dickson misconstrued the plain meaning of Judge Baxley's Preliminary Order and therefore erred in refusing to hold a final evidentiary hearing on the issue of certifying the class for a trial on the merits.

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 consideration of whether the class should be certified for a trial on the merits; Judge Dickson expressly refused to entertain any further arguments on class certification. (App. 092). 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 warrant class certification 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 prior appeal of the Preliminary Order as having been a "review" of that order. (App. 093). The merits and meaning of the Preliminary Order was never reviewed on appeal, because the appeal was dismissed for lack of appellate jurisdiction.[5]

Second, Judge Dickson mistakenly believed that this Court's opinion in *Grazia, supra*, was a ruling on the merits of class certification in this case. (App. 094) ("the Supreme Court had the clear opportunity to *deny class status in this very case* but affirmatively chose not to do so.")

[5] The defendants appealed the Preliminary Order, arguing *inter alia* that Judge Baxley had improperly deviated from the process outlined by this Court in *Grazia, supra*. The Court of Appeals dismissed the appeal, finding that the Preliminary Order was not immediately appealable. (App.181). The Court of Appeals denied the defendants' petition for rehearing, and the defendants petitioned this Court for a writ of certiorari, which this Court denied. (Sup. Ct. Order, Dec. 10, 2013, App. Case No. 2013-000233).

(emphasis added). This is simply wrong. As this Court expressly ruled, 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 was not decided by this Court in *Grazia*. 703 S.E.2d at 203 n.5 and 204. Rather, the only issue before this 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 construction defects that were subject to the Right to Cure Act. *Id.* at 203 n.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." (App. 093). No motion was necessary, however, 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. (App. 045).

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, and

Judge Dickson cited nothing in the order to the contrary.[6] To justify his atextual reading of the Preliminary Order, Judge Dickson 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, as shown earlier, those statements are heavily redacted and taken out of context. (See pp. ___, *supra*). When these statements are examined in their entirety and in context, it is clear that Judge Baxley never altered the fact that his Preliminary Order was not a final determination on class certification for a trial on the merits.

In summary, the plain and unambiguous meaning of the Preliminary Order is that the class was certified on a preliminary basis only, and the question of certifying the class for a trial on the merits would be determined in a subsequent final and full evidentiary hearing, including the evidence yielded by the Right to Cure process outlined in the Preliminary Order. This final determination was never made. 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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[6] Judge Dickson referenced the Preliminary Order for a few statements that have nothing to with the question of certifying the class for a trial on the merits. 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. (App. 094) (emphasis added). 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. Second, Judge Dickson noted Judge Baxley's observation that a class approach was the best approach. (App. 094). 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." (App. 031) (emphasis added). Third, Judge Dickson noted that he viewed the Supreme Court's decision in *Grazia, supra*, as being an approval of using a class action in this case. (App. 094). This was a mistaken reading of *Grazia*. See n. 8 and accompanying text, *supra*.

[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

III. 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. As demonstrated above, Judge Dickson erred in his interpretation of Judge Baxley's Preliminary Order, 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

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merits; and (4) therefore, he dismissed the motion without considering it. (App. 094). 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.

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.

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 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: 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]

[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: 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.

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] 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.*

IV. The Court of Appeals erred in dismissing Del Webb's appeal.

The Court of Appeals dismissed Del Webb's appeal in a one-paragraph order that stated in full:

> [South Carolina State Plastering 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*.

(App. 001) (citations omitted) (emphasis added). The Court cited two cases two cases to support the dismissal of Del Webb's appeal, *Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010) and *Knowles v. Standard Sav. & Loan Ass'n*, 261 S.E.2d 49 (S.C. 1979). As shown above, the orders appealed by Del Webb are immediately appealable. As shown below, the Court of Appeals contrary order is in error, and the authorities cited by the Court do not support dismissal of Del Webb's appeal.

A. The plaintiffs' motion to dismiss did not seek dismissal of Del Webb's appeal and, therefore, granting their motion does not support dismissing Del Webb's appeal.

The plaintiffs' motion to dismiss was directed solely at the appeal of South Carolina State Plastering. (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 did not and could not affect the appeal of Del Webb.

B. 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 . . .." (App.001 quoting *Knowles*, 261 S.E.2d at 49). 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*.

C. This Court's decision in *Grazia* does not support dismissal of Del Webb's appeal.

The Court of Appeals 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." (App. 001, quoting *Grazia*, 703 S.E.2d at 202). 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 IV-V, *infra*).

* * * * *

In sum, the Court of Appeals erred in dismissing this appeal. Plaintiffs did not request dismissal of Del Webb's appeal, and the case law cited by the Court of Appeals does not support dismissal. Therefore, *certiorari* should be granted, and the case remanded to the Court of Appeals for consideration of the merits of the appeal.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari*, reverse the Court of Appeals decision dismissing the appeal, and remand to the Court of Appeals for consideration of the appeal on its merits.

Respectfully Submitted,

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Columbia, SC
July 5, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Order of March 17, 2017 (S.C. Ct. App.)
S.C. Sup. Ct. App. Case No. 2017-001305
S.C. Ct. App. Case No. 2017-000218
Lower Court 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,..... Petitioner/Respondent,

and

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

PROOF OF SERVICE

I, Dana L. Miller, an employee of Gordon Rees, LLP, certify that I have served the Respondent/Petitioners Del Webb Communities, Inc. and ,Pulte Homes, Inc.'s PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS by depositing a copy in the United States Mail, postage prepaid, on July 5, 2017, addressed to all attorneys of record, as follows:

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