THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2016-CP-26-00673
Case No. 2016-CP-26-00674
Case No. 2016-CP-26-00743
Case No. 2016-CP-26-00744
Appellate Case No. 2018-000041

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

The Myrtle Beach resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

K.A. Diehl and Associates, Inc., The Myrtle Beach resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc., Defendants,

Of whom Mark Dos Santos is the Appellant,

And

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc. are the Respondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS

Appellant Mark Dos Santos, by and through his undersigned counsel, hereby responds to the Motion to Dismiss filed by Respondents. In their Motion, Respondents submit that the above-captioned case should be dismissed because Appellant's Notice of Appeal was untimely. However, as explained more fully below, this ground for dismissal

should be rejected by this Court.

On September 21, 2017, the trial court entered its Order Granting Defendants' Motion to Enforce Settlement Agreement. Among other things, the Order stated that the Settlement Agreement contemplated by the parties would resolve each of the following civil actions: 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743 and 2016-CP-26-00744 (the "Actions"). *See* Order Denying Plaintiffs' Motions to Reconsider, p. 4. The Actions are related, but distinctly separate, as case numbers 2016-CP-26-00673 and 2016-CP-26-00674 are class action lawsuits and Case Nos. 2016-CP-26-00743 and 2016-CP-26-00744 are derivative actions, each with different parties. *See* Consolidated Motion for Preliminary Approval of Settlement Agreement dated July 3, 2017, ¶ IV attached hereto as **Exhibit A**. The Settlement Agreement referred to in the Order was intended to settle *each* of the four Actions simultaneously, but it did not consolidate them into one case. *See* **Exhibit A**, ¶ V.

On September 29, 2017, Plaintiffs filed their Motion to Reconsider the Order and Final Judgment pursuant to Rule 59(e), *SCRCP*. On December 5, 2017, The Honorable William H. Seals, Jr. entered an Order Denying Plaintiffs' Motion to Reconsider and Granting Defendants' Motion to Enforce Settlement Agreement entered on September 21, 2017 in case number 2016-CP-26-00673 ("December 5th Entry"). Thereafter, on December 7, 2017, Judge Seals entered an identical order in case numbers 2016-CP-26-00674, 2016-CP-26-00743 and 2016-CP-26-00744 ("December 7th Entries").

On January 8, 2018, Appellant timely filed and served his Notice of Appeal of the Orders Granting Defendants' Motion to Enforce Settlement Agreement and Order Denying Plaintiffs' Motion to Reconsider which were filed on December 7, 2017.

Appellant does dispute that the filing of his notice of appeal was untimely as to case number 2016-CP-26-00673, subject to the arguments set forth below.

As a threshold matter, Appellant submits that the trial court's Orders Granting Defendants' Motion to Enforce Settlement Agreement may be interlocutory and not yet ripe for appeal. It is unclear under South Carolina law whether these Orders are considered interlocutory; therefore, it is likewise unclear to Appellant whether such Orders are immediately appealable.[1]

"As a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 10, 625 S.E.2d 205, 206 (2005); *and see Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control,* 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010); *citing Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.,* 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). However, there are some exceptions to this general rule:

> 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. Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1). An order which involves the merits is one that must finally

[1] The United States District Court for the Eastern District of Pennsylvania has held that, "[t]he correctness of a decision to approve class action treatment is an appropriate ground for interlocutory appeal. Similarly, we find that the correctness of a decision regarding the enforceability of a class action settlement is a controlling question of law amenable to interlocutory review." *In re Frascella Enters.,* No. 08-100, 2008 U.S. Dist. LEXIS 68279, at *6 (E.D. Pa. Sep. 10, 2008). Appellant is aware that this opinion runs contrary to South Carolina claw regarding the appealability of class certification, *see Ferguson v. Charleston Lincoln Mercury, Inc.,* 349 S.C. 558, 564 S.E.2d 94 (2002); *Knowles v. Standard Sav. & Loan Asso.*, 274 S.C. 58, 261 S.E.2d 49 (1979). However, because there is no controlling authority as to the particular question presented here, Appellant filed his appeal out of an abundance of caution to avoid possibly waiving the right to appeal Judge Seals' orders at a later point in time. *See, e.g., Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (failure to timely appeal an immediately appealable interlocutory order effects a waiver of right to appeal).

> determine some substantial matter forming the whole or a part of some cause of action or defense. Interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.

Ex parte Wilson, 367 S.C. 7 at 8.

Appellant submits that the Orders to Enforce the Settlement Agreement are not final orders involving the merits, nor orders affecting a substantial right, because they anticipate that final orders approving the settlement will be issued after the fairness hearings that are required by Rule 23, *SCRCP*. *See* Order Granting Defendants' Motion to Enforce Settlement Agreement, p. 4, Footnote 1 ("Defendants also seek preliminary approval of the proposed class settlement described in the Settlement Agreement. The Court will issue a subsequent, separate order regarding such approval as described below."); p.5 (...[T]he Court will resolve such motion before entering a subsequent order regarding the Court's approval of the proposed class settlement."). Therefore, the Orders are likely not immediately appealable.

"Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1). 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." *Ex parte Wilson*, 367 S.C. 7 at 8. No South Carolina authority exists which might dictate whether an order to enforce a settlement agreement is an order that involves the merits of the case, such that this type of order would be rendered immediately appealable. In the absence of such authority, it would appear that the Orders Enforcing the Settlement Agreement in the matters at bar do not "finally determine some substantial matter forming the whole or a part of some cause of action or defense,"

chiefly because they do not end any of the lawsuits or any of particular claims asserted within those lawsuits.

"Interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Ex parte Wilson*, 367 S.C. 7 at 14. Appellant submits that the Orders Enforcing the Settlement Agreement do not affect a substantial right; they do not discontinue the Actions because Rule 23, *SCRCP* requires the court to hold fairness hearings regarding the settlement agreement and subsequently issue a final order approving the settlement.[2] The Orders clearly state that the Court anticipates final approval of the proposed settlement and issuing orders to that effect[3]; it does not grant or refuse a new trial; and it does not strike out an action or defense. Accordingly, the Orders Enforcing the Settlement Agreement in the matters at bar do not affect a substantial right and, therefore, are not immediately appealable.

In the alternative, if this Court finds that the Orders Granting Defendants' Motion to Enforce Settlement Agreement are not interlocutory and therefore immediately appealable, then Appellant submits that his Notice of Appeal was timely filed within thirty (30) days of written notice of entry of the trial court's December 7th Entries.

Respondents claim that, because Appellant received notice of the December 5th Entry, Appellant's January 8, 2018 Notice of Appeal was untimely served four (4) days beyond the 30 day deadline mandated by Rule 203(b), *SCACR* and should be dismissed. This argument should be rejected by this Court. Rule 203(b), *SCACR*, states, in pertinent

---

[2] *See* Rule 23, *SCRCP*.
[3] *See* Order Granting Defendants' Motion to Enforce Settlement Agreement, p. 4, Footnote 1; p. 5.

part: "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." *See* Rule 203(b), *SCACR.* "Rule 203(b), SCACR requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal." *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999).

Appellant's Notice of Appeal was timely filed within thirty (30) days of written notice of entry of the trial court's December 7th Entries. Irrespective of the fact that the December 7th Entries may have been "identical" to the December 5th Entry or that the Actions may have been "related," Rule 203(b) does not require that an appellant file an appeal within thirty (30) days of the entry of the *first* order received in a series of related cases. Rather, Rule 203(b) requires that an appellant serve a notice of appeal within thirty (30) days after receipt of written notice of entry of a final order *in that particular case*. Appellant does not presume to know the reasoning behind the trial court's decision to separate the December 5th Entry and the December 7th, but Appellant unquestionably met Rule 203(b)'s thirty (30) day deadline as to the December 7th Entries. Accordingly, Respondents' Motion to Dismiss the Appeal should be denied.

Respondents contend that the December 5th Entry and the December 7th Entries were a "single, consolidated Order" that "resolved all four Actions." *See* Respondents' Memorandum of Law in Support of its Motion to Dismiss Appeal, p. 3. Nothing in the record suggests that the Actions were ever consolidated. Indeed, the entry of four separate, albeit identical, orders is proof that they were not. Simply because the parties to the Actions elected to negotiate a settlement of each of the four Actions under the auspices of one

settlement agreement does not mean that the Actions became one, single, consolidated case. The trial court's filing of a separate order in each of the cases is significant because "[r]eceipt of written notice [of an order having been filed] is the critical event under Rule 203(b)(1)." *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015).

Appellant submits that his Notice of Appeal was timely served on January 8, 2018, thirty (30) days from the date of the December 7th Entries pursuant to Rule 203(b) and, accordingly, Respondents' Motion to Dismiss the Appeal should be denied.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court deny Respondents' Motion to Dismiss the Appeal on the grounds of untimeliness.[4] Appellant believes that there may be a sufficient basis to dismiss the appeal as being interlocutory, but otherwise the appeal is timely under Rule 203(b), SCACR.

Respectfully submitted,

Kirby D. Shealy III
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29201
(803) 254-4190
kirby.shealy@arlaw.com
Attorneys for Appellant

February 5, 2018.

[4] Except with respect to case number 2016-CP-26-00673, subject to Appellant's argument that the entire appeal may be interlocutory.

THE STATE OF SOUTH CAROLINA
SOUTH CAROLINA COURT OF APPEAL

APPEAL FROM THE HORRY COUNTY COURT OF COMMON PLEAS

THE HONORABLE WILLIAM H. SEALS, JR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H.Seals, Jr., Circuit Court Judge

Case No. 2016-CP-26-00673

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., ...Plaintiffs,

Of whom Mark Dos Santos is.....Appellant,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc., .Respondents.

Case No. 2016-CP-26-00674

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, ...Plaintiffs,

Of whom Mark Dos Santos is.....Appellant,

v.

The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe Past board of directors of The Myrtle Beach Resort Homeowners Association, Inc., ... Respondents.

Case No. 2016-CP-26-00743

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders, ... Plaintiffs,

O whom Mark Dos Santos is ..... Appellant,

v.

K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., ... Respondents.

Case No. 2016-CP-26-00744

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., ... Plaintiffs,

Of whom Mark Dos Santos is ..... Appellant,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,.. Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the **APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS** by depositing a copy in the United States Mail, postage prepaid, on February 5, 2018, addressed to the following:

Lucas James Asper, Esq.
Phillip Arthurs Kilgore, Esq.
300 North Main Street, Suite 500
PO Box 2757
Greenville, South Carolina 29601
Attorneys for Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, Ocean Front Spa Horizontal Property Regime, Inc., Myrtle Beach Resort Homeowners Association, Inc., Wayne Urban, Phil Cox, Ken Perkins

Andrew Preston Brittain, Esq.
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
Attorneys for Plaintiffs

Henrietta U. Golding, Esq.
McNair Law Firm
PO Box 336
Myrtle Beach, South Carolina 29587
Attorney for KA Diehl and Associates, Inc.

Ashley A. Jordan, Legal Assistant

February 5, 2018
Columbia, South Carolina

ADAMS AND REESE LLP

Attorneys at Law
Alabama
Florida
Louisiana
Mississippi
South Carolina
Tennessee
Texas
Washington, DC

Kirby D. Shealy III
Direct: 803.212.4966
Fax: 803.779.4749
Kirby.shealy@arlaw.com

February 5, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Jim Perkins, et. al., v. Ocean Front Spa Horizontal Property Regime, Inc., et. al.*
Appellate Case No.: 2018-000041

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Appellant's Return to Respondent's Motion to Dismiss Appeal. Please file the original and return the clocked copies to my office via our personal courier.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me. By copy of this letter, I am informing all counsel of record of same. Thank you for your assistance. With kind regards, I remain

Sincerely,

Kirby D. Shealy III

KDS/aaj
Enclosures
cc: Phillip Arthur Kilgore, Esq.
Lucas James Asper, Esq.
Henrietta U. Golding, Esq.
Andrew Preston Brittain, Esq.