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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM Charleston County

Bentley D. Price, Circuit Court Judge

Appellate Case No.: 2019-001487

Snee Farm Lakes Homeowner's Association, Inc., Individually and on Behalf of those Similarly Situated.....Respondent,

v.

The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Appellant.

**Respondent's Motion to Dismiss**

Limitations on appellate jurisdiction hew to the belief that as a general matter, allegations of trial court error that fail to determine any portion of the case with finality should not be entertained on appeal until the final judgment is rendered. This policy serves the interests of judicial economy and ensures the reviewing court has the requisite record on which to consider the issues posed. With these considerations in mind, interlocutory orders addressed to class certification have routinely been held not immediately appealable.[1] Yet, without suggesting why a departure from settled precedent is appropriate, Appellant The Commissioners of Public Works

[1] It is curious that MPW would seek review of this interlocutory order when the case law is unequivocal. However, MPW has consistently hindered progress of the case and it appears this appeal offers another manner to interpose delay. Specifically, it could further delay the already protracted discovery process. MPW refused to produce the MPW commissioners for deposition after Respondent moved for class certification—despite the fact that class certification is not a motion on the merits and will not end the case. And even though the trial court has twice concluded the case is appropriate for class action, MPW has refused to answer discovery.

for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks (MPW) requests this Court review the trial court's grant of class certification.[2] As discussed herein, a class certification order is provisional by design and therefore presents a classic example of why interlocutory appeals are not favored. The trial court may reconsider the order in its discretion at any time prior to a decision on the merits. It would be injudicious to review an order that may be amended in two months. Accordingly, Respondent Snee Farm Lakes Homeowner's Association, Inc., requests this Court dismiss this appeal pursuant to Rule 240 of the South Carolina Appellate Court Rules and allow litigation to proceed. *See* Rule 221, SCACR.

By way of background, MPW is a municipal water and sewer authority established pursuant to ordinance of the Town of Mount Pleasant, South Carolina and state law. It is a government entity that enjoys a monopoly in its area for water and sewage services. Respondent is a non-profit homeowners' association that owns, manages, and maintains the common elements articulated in Snee Farm Lakes' restrictive covenants. Part of its duties includes the provision of water and wastewater services, which Respondent obtains through a contract with MPW.

MPW charges its commercial customers like Respondent monthly Basic Facility Charges (BFC) in addition to the traditional water and sewer fees based on metered (volumetric) usage.

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[2] Respondent acknowledges the Court has carved out an exception in special cases—such as where the class involves minors who may not know they have been adopted—under the rationale that class notification would "involve[] the disclosure of personal and potentially sensitive information for which there would be 'no appellate remedy . . . likely to repair any damage done by an improper disclosure.'" *BLH by Hensley v. S.C. Dep't of Soc. Servs.*, 423 S.C. 422, 429, 814 S.E.2d 638, 642 (Ct. App. 2018), *cert. granted* (oral argument set for Oct. 29, 2019) (second alteration in original) (quoting *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006)). This case involves commercial customers and therefore offers no similar threats of exposure. Indeed, MPW identified and contacted hundreds of customers with excessive REU based on its own internal audit prior to this litigation's inception. These customers were never offered refunds and comprise the Class. This information is public, and these details were obtained through a Freedom of Information Act Request.

According to MPW's Cost Recovery Policy, BFC are designed to recover "fixed costs" for providing services to its customers including, but not limited to, Renewal and Replacement debt service, capital costs, operating and maintenance costs, and general administrative costs. BFC are calculated based on the number of Residential Equivalent Units (REU)[3] assigned to each account.[4] This assignment is calculated prior to establishing service or on a customer's change in use and though it is meticulously calculated, it is ultimately a prediction used to calculate the associated "impact fee." Once service begins, customers pay a BFC calculated based on these initial REU assignments.

However, these predictions are not revisited by MPW and Respondent uses significantly less water and wastewater than its assigned REU. So MPW unlawfully collects excessive BFC from Respondent each month. Specifically, MPW assigned Respondent 148 REU (approximately 1,332,000 gallons per month), yet Respondent's actual monthly consumption has almost always been much less than that assigned amount. Every month, Respondent's usage failed to reach 1,332,000 gallons, it necessarily paid excessive BFC. Respondent has been overcharged thousands of dollars by MPW over years. Despite this discrepancy and at all times knowing or having the means to know of Respondent's actual monthly usage relative to its REU assignment, MPW continues this collection.

Based on this illegal practice, Respondent filed the underlying class action Complaint June 1, 2018, seeking to represent a class of similarly situated individuals in requesting declaratory relief and alleging causes of action for breach of contract, conversion, and unjust

[3] As a general matter, REU is based on the amount of water a residential user would consume in a month. MPW's residential customer are automatically assigned a single REU.
[4] One REU is equal to 300 gallons per day, so an account assigned one REU is estimated to use approximately 9,000 gallons per month.

enrichment/money had and received. MPW filed a motion to dismiss July 5, 2018, and after a hearing September 27, 2018, before the Honorable Jennifer B. McCoy, the Court denied the motion by form order November 30, 2018. Respondent moved for class certification January 21, 2019, and after a hearing May 31, 2019, before the Honorable Bentley D. Price, the court granted Respondent's motion June 14, 2019. MPW filed a motion to reconsider pursuant to Rules 59(e) and 60 of the South Carolina Rules of Civil Procedure June 20, 2019 and Judge Price conducted a hearing on the matter August 26, 2019. He denied the motion from the bench and by written order the following day. MPW then filed this notice of appeal.

**Argument**

Section 14–3–330 of the South Carolina Code establishes appellate jurisdiction over cases arising at law and dictates which judgments and orders are appealable. The statute provides, in pertinent part:

> The Supreme Court shall have appellate jurisdiction for correction of error of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

§ 14-3-330(1)-(2). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707,

709 (2005). "The provisions of Section 14–3–330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Id.* at 196, 607 S.E.2d at 709. "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014).

It is well-settled a class certification order is, as a general matter, not immediately appealable. *E.g.*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) ("The general rule established by this Court is that class certification orders are not immediately appealable."); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances."). This conclusion draws in part from the fact that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment [nor does it] reach the 'merits' of the underlying cause of action." *Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979). In addition to failing to touch the merits or implicate substantial rights, a class certification order is uniquely—and expressly—*provisional*. Rule 23 invites the trial court's discretion to revisit orders issued pursuant to that Rule, whether on motion by a party or *sua sponte*. *See* Rule 23(d)(1)-(2), SCRCP ("An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended."); *see Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 305, 705 S.E.2d 475, 479 (Ct. App. 2011) (dismissing appeal from an order to strike class allegations as interlocutory because it was in effect

"an order denying class certification which, under Rule 23(d)(1), 'may be altered or amended before the decision on the merits'"). Accordingly, the now appealed order granting class certification fails to fall within the ambit of the Court's appellate jurisdiction under section 14–3–330 because it is interlocutory, and, as a procedural rule, it decides nothing of the substance of the matter.

Moreover, allowing this appeal would undermine the policy of efficiency that drives the scope of appellate jurisdiction and the procedures outlined in Rule 23. As noted above, a hallmark principle of appellate review is that piecemeal litigation should be avoided absent clear exceptions. Grounded in this notion is the belief that the path to resolution of a case should not be hindered by pausing to reconsider each turn. *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) ("The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment."). What is more, an opinion of this Court will not bless a class certification order with the finality Rule 23 itself mandates against. Rule 23 empowers the trial court to revisit the issue of class certification at any time "before the decision on the merits."[5] So allowing an appeal now would suggest an order addressed to class certification could be taken up each time the trial court tweaks it as Rule 23 contemplates. Practically, the class action procedure works to allow the courts as well as all parties avoid unnecessary expenditures of time and money. *E.g.*, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue

[5] In that way, it is similar to an order denying summary judgment, which is not immediately appealable because it merely poses issues that may be revisited over the course of litigation. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." (internal citations omitted)).

potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (second alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979))). These benefits are exemplified in Rule 23's flexibility. Because the order is by nature modifiable, Rule 23(d)(1) encourages the trial court to issue a ruling on class certification promptly. *See* Rule 23(d)(1) ("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." (emphasis added)). The Rule envisions that as the case proceeds and discovery progresses, information may be uncovered that requires amendment of a class certification order.

**Conclusion**

Based on the foregoing, Respondent requests this Court dismiss the appeal as interlocutory and allow litigation to proceed.

Respectfully submitted,

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APPEAL FROM Charleston County

Bentley D. Price, Circuit Court Judge

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The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Appellant.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on September 16, 2019, she served counsel of record with the Motion to Dismiss in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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September 16, 2019

**VIA U.S. MAIL:**
The Honorable Jenny Kitchings
Clerk of South Carolina Court of Appeals
PO Box 11629
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Re: *Snee Farm Lakes Homeowner's Association, Inc., Individually & on Behalf of Those Similarly Situated v. The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks*
Appellate Case No.: 2019-001482

Dear Ms. Kitchings:

I hope this finds you well. Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of Respondent's Motion to Dismiss and Proof of Service. Also enclosed, please find our firm's check in the amount of $50.00 to cover the filing fee. Please file the original and return the extra clocked copy to our office in the enclosed, self-addressed, stamped envelope. By copy of this correspondence to counsel for the Appellant, we are serving them with the same.

With kind regards, I am

Ranee Saunders

Enclosures
cc: (via U.S. Mail)

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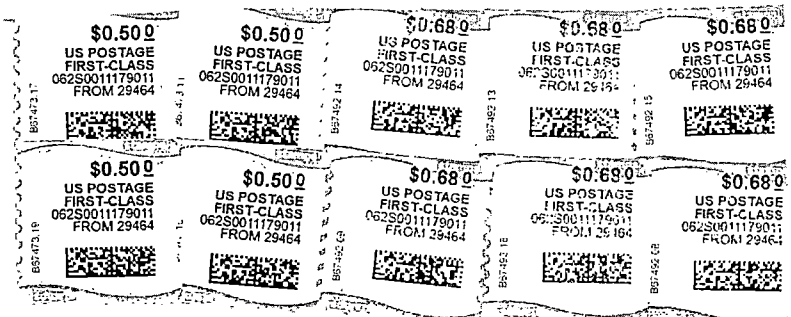


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