THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

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S.C. Supreme Court

Case No. 2007-CP-07-1396
Supreme Court Appellate Case No. 2013-000238

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

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

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 ..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
or in the alternative,
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 15, 2013. (JA 1-2).

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to deny class certification.

2. Whether the Court of Appeals erred in dismissing this appeal.

3. Whether this Court should exercise its discretion to review any unappealable parts of the appealed orders in conjunction with any appealable parts of the orders.

4. Whether this Court should exercise its discretion to issue a writ of certiorari to the Court of Common Pleas and review the merits of the trial court's orders or, in the alternative, remand for reconsideration of the class certification issue under specific guidelines.

STATEMENT OF THE CASE

This is an appeal after remand in a class action for various alleged construction defects in the application of stucco siding to approximately 4,000 homes. In *Grazia v. South Carolina State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010), the trial court struck the class allegations from the complaint in this case, because it found that class actions are incompatible with the requirements of the Right to Cure Act as a matter of law. *Id.* at 199.[1] This Court disagreed and reversed. In so ruling, this Court specified a mode of trial whereby the trial court would first decide whether the alleged class met the certification requirements of Rule 23, SCRCP, and, if so, the trial court would then decide whether representative notice under the Right to Cure Act was feasible:

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

[1] The "Right to Cure Act" is the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, and it is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2012). For a brief summary of the Right To Cure Act, and its stated purpose of encouraging pre-trial settlement through a statutorily required pre-action alternative dispute resolution procedure, see the Addendum at the end of this Petition.

703 S.E.2d at 204 (emphasis added) (citation omitted). On remand, after two years of class discovery, the Plaintiffs moved to certify the class alleged in their complaint:

> All present owners of houses located in Sun City of Bluffton, South Carolina, which properties have had stucco exteriors applied *or partly applied* by [SCSP] in Beaufort County, South Carolina, *who will incur damages in excess of $100 for* loss of use of the premises and the cost of repair of these houses, depreciation, *and for* sums *paid in the past for repairs* to stucco exterior of the houses. This class is *limited to matters dealing with* the stucco exteriors of the houses.

(JA 85, ¶1) (emphasis added). After hearing the motion, and rather than rule on the motion as directed by this Court in *Grazia*, the trial court *sua sponte* created a new class definition:

> All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head *to which SCSP applied the exterior stucco in whole or part* prior to July 31, 2007, *which allegedly are damaged due to* (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, *and/or* (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

(JA 20) (emphasis added). The Plaintiffs' complaint alleged an unfair trade practice claim but such claims cannot be brought as a class action. Rather than properly deny class certification for this reason, the trial court *sua sponte* dismissed the unfair trade practice claim to preserve the class. (JA 16-17). Next, the trial court immediately and again *sua sponte* certified its newly defined class on a preliminary basis and ordered that notice be given with an opt out deadline. (JA 20).[2]

There had been no discovery on the trial court's new class definition. It is unknown whether the named plaintiffs satisfied the court's new class definition, *i.e.*, it is unknown whether the named plaintiffs could be the class representative for this new class. Recognizing all of this,

[2] The court ordered that the class notice have the following minimum requirements: (1) the notice would have a deadline for opting out of the class; (2) the notice would advise the class members that class certification was preliminary pending the results of the Right to Cure Act process being ordered by the court; (3) after the end of the opt out period, a Right to Cure Act "document must be individually completed for each claimant"; and (4) based on the Right to Cure Act responses, the trial court would make a final determination on class certification and notify the preliminary class members of the final decision and legal ramifications thereof. (JA 20).

the court *sua sponte* ordered the following Right to Cure process as a court-ordered discovery device for determining whether the trial court's new class even existed:

1. after the expiration of opt-out period, a "Right to Cure" notice of claim must be filed for each member of the class;

2. the notice of claim "must be filed in a representative capacity by proposed class counsel, and must be signed by counsel"; and

3. the notice must include the information required by the Act and "*specificity* of the *exact* nature of the stucco defect and defect results with regard to *each individual property* shall be *required.* A *uniform notice* listing all possible defects and all possible damages within the class *will not suffice.*"

(JA 20, 22-23) (emphasis added). The trial court would "employ the Right to Cure process outlined [above] to further analyze and perhaps organize the various claims that exist in these cases" (JA 18) and to "make a final decision as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the [Right to Cure] Act." (JA 10).

In short, the trial court reversed the mode of trial ordered by this Court in *Grazia.* The trial court disobeyed this Court's directive to first decide the question of certifying the class alleged by the Plaintiffs and, if this class was certified, to then determine whether "representative notice" under the Right to Cure Act was appropriate. Rather, the trial court *sua sponte* changed the class definition, *sua sponte* changed the class complaint to eliminate the unfair trade practice claim, *sua sponte* and immediately certified the class, and *sua sponte* created a "Right to Cure" process as a court-ordered discovery device to determine whether any class actually existed.

Del Webb and Pulte (Del Webb) appealed the trial court's order, as well as the trial court's order denying their motion for reconsideration and clarification. On appeal, Del Webb filed a motion to determine appealability, and the Plaintiffs thereafter filed a motion to dismiss the appeal. The Court of Appeals summarily dismissed the appeal "because these orders are not

immediately appealable" without addressing the issues raised in opposition to the motion to dismiss – the court also denied the motion to determine appealability as moot. (JA 5-6). Del Webb petitioned for rehearing, and the Court of Appeals denied the petition. (JA 1-2; 197-199).

Pursuant to Rule 242, SCACR, Del Webb respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals, reverse the Court of Appeals, and either retain the appeal or remand it to the Court of Appeals for a decision on the merits. In the alternative, and assuming the appealed orders are not immediately appealable, Del Webb respectfully submits this Court should issue a writ of certiorari to the Court of Common Pleas and review the merits of the trial court's orders. As a third alternative, and assuming the merits of the trial court's orders are not to be addressed by this Court or the Court of Appeals, Del Webb respectfully submits that this Court's order should correct the trial court's fundamentally flawed reading of this Court's opinion in *Grazia* as a directive to certify some class in this case.

ARGUMENT

The Plaintiffs moved to certify the class alleged in their complaint. Rather than rule on this question as ordered by this Court in *Grazia*, the trial court *sua sponte* stepped outside its proper role as a neutral decision maker and became a *de facto* advocate for certification of some class in this case. The trial court was not motivated by bias or some other improper motive. Rather, the trial court mistakenly read this Court's opinion in *Grazia* as a directive that some class be certified in this case: "[T]he Supreme Court had the *clear opportunity* to deny class status *in this very case* but affirmatively *chose not to do so*, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties." (JA 19) (emphasis added). This is a clearly erroneous reading of *Grazia*. This Court specifically

noted that no motion for class certification had been made and the issue of class certification was not before this Court. *Grazia*, 703 S.E.2d at 203 n.5 and 204 n.6.

I. The trial court erred in failing to deny class certification.

The linchpin prerequisite for any class action is the existence of a representative claim whereby the court can try the representative claim and apply the result across the class without individual consideration of each class member's claim. *Gardner v. South Carolina Dep't of Rev.*, 577 S.E.2d 190, 201 (S.C. 2003). Here, a representative claim means a representative house with defects and damages that are representative of the houses owned by all of the class members, such that the trial court can try the issues for that house and apply the results to the other houses in the class without individual consideration of each house in the class. As demonstrated below, the Plaintiffs failed to prove the requirements for certifying the class. Importantly, *all* of the Plaintiffs *own experts* agreed that each house in the class would have to be inspected and tested to determine the existence of any defect and any resulting damage, which is the antithesis of a class action. *Gardner,* 577 S.E.2d at 201 (reversing class certification because case required individualized examination of each class member's claim).

A. The Plaintiffs failed to prove the prerequisites for class certification.

The 4,000 houses at issue here were built over a 10-year period. These houses comprise myriad combinations of different types of stucco systems produced by different stucco manufacturers that were applied under different installation instructions, different building codes, and different industry standards. Against this backdrop of inherent differences between the houses, the testimony of the Plaintiffs' *own experts* conclusively establishes that there is no representative house in the class. They agree that determining the existence, nature, extent, and cause of any stucco defect, as well as the existence, extent, and cause of any damage to the stucco or any

consequential damage to the house requires a house-by-house inspection and destructive testing, all of which is the antithesis of a class action.[3] They also agree that determining the existence of a defect depends on the type of stucco system used to build each house and the manufacturer's instructions for that system, as well as the building code and industry standards that existed at the time of construction for each house, *i.e.*, the instructions, codes, and standards establish the applicable duties in applying the stucco, and then there must be house-by-house inspection and destructive testing to determine if there was any breach of duty.

Robert Gallagher is a general contractor and one of the Plaintiffs' experts. He testified that: (a) inspection and destructive testing of each house is required to determine the cause of any crack in the stucco and any consequential damages caused by the cracked stucco, as well as the scope of any repairs needed to correct any defect and repair any consequential damage (JA 96-97, 101-103, 109-110, 115-117, 119); and (b) in conducting the inspection and testing of each house, he would need to know the type of stucco system used in building the house, the manufacturer's installation specifications for the particular type of stucco system used in building the house, the installation method actually used in building the house, the building code requirements that existed at the time the house was built, and the industry standards that existed at the time the house was built. (JA 114-115). Robert Sisnroy is an engineering expert. He agreed that determining the existence, cause, and any resulting damage from a stucco defect required an inspection of each house, destructive testing to each house, and consideration of the building code and industry standard requirements that existed at the time each house was built.

[3] The trial court implicitly recognized that the Plaintiffs had failed to prove the requirements for certification of their alleged class when it acknowledged all of the differences between the claims of individual class members and the individual defenses thereto: "This Court is cognizant of [petitoners'] arguments, and recognizes that factual and legal differences my exist within the putative class." (JA 17-18). Rather than deny class certification for the Plaintiffs' failure of proof, the trial court *sua sponte* created a new class and then *sua sponte* created a Right to Cure process to discover whether the new class even existed. (JA 18). But, as shown later, the Right to Cure process created by the trial court is itself the antithesis of a class action. (See Arg. I(B), *infra*).

(JA 136, 138, 141-143, 147). Peter Sherratt is an architectural expert. He agreed that determining the existence, cause, and any resulting damage from a stucco defect required an inspection of and destructive testing to each house. (JA 124-125). Thomas Carlson is another general contractor expert. He also agreed that determining the existence, cause, and any resulting damage from a stucco defect required an inspection of and destructive testing to each house. (JA 128-131).

In short, *all* of the Plaintiffs' *own experts* agreed that each house in the class must be inspected and tested. This is the antithesis of a class action. Accordingly, the trial court should have denied class certification under the undisputed testimony of *all* of the Plaintiffs' *own experts*.[4] The Plaintiffs obviously failed to prove their alleged class, because the trial court did not certify that class. The Plaintiffs obviously failed to prove the trial court's new class should be certified, because the trial court did not certify the class. Rather, the trial court *sua sponte* created a "Right to Cure" process to discover whether the new class even existed. This process, however, cannot and will not change the undisputed testimony of the Plaintiffs' *own experts* that destructive testing is required for each house to identify any defect or resulting damage.

B. The Right to Cure process ordered by the trial court is the antithesis of a class action.

Rather than deny class certification due to the Plaintiffs' failure of proof, the trial court created a new class and then ordered a "Right to Cure" process to discover whether that class even existed. In short, after *sua sponte* redefining the class, the trial court *sua sponte* invoked the Right to Cure Act for a purpose for which it was never intended by the General Assembly –

[4] In the opening paragraph of its order, the trial court stated that "Plaintiffs' proposed Class preliminarily meets the requirements for certification." (JA 10). The remainder of the order, however, demonstrates that this statement is simply false. Were it true, the trial court would have but did not certify the class alleged by the Plaintiffs. Rather, the trial court *sua sponte* created a new class and then *sua sponte* converted the Right to Cure Act into a discovery device to determine whether the new class even existed.

attempting to provide the evidence on whether there could be or should be a class action.[5] The four major steps in that process are summarized below, and each step suffers from immediate and insurmountable problems that preclude certification of the class alleged by the Plaintiffs and the class created *sua sponte* by the trial court.[6]

First, over a period of 180 days (six months), the notice of claimed defect and damage required by the Right to Cure Act had to be filed for each house in the class. (JA 22). This notice would be "representative" in the sense that class counsel would give the notice rather than the owner of each house, and the defendants' counsel would receive the notice in a "representative" capacity. (*Id.*). Each notice for each house had to specify "the exact nature of the stucco defect and defect results with regard to each individual property." (JA 23).

There is an immediate and insurmountable problem with the "representative" notice ordered by the trial court – class counsel does not and cannot know the defect and resulting damage for each house. Such knowledge requires the inspection and testing of each house in the class as established by the testimony of the Plaintiffs' *own experts*. These experts, however, had not inspected and tested each house in the class, *i.e.*, the Plaintiffs had failed to prove the requirements for certification of the alleged class.

Second, to overcome the Plaintiffs' failure of proof, the trial court ordered an "initial investigation" of each house during the 180 day notice period. (JA 22). The court divided this 180-day period into four 45-day periods, with one-fourth of the class houses (1,000) to be inspected during that time period and notice given for each of those houses at the end of the 45-

[5] The trial court also envisioned that the Right to Cure Notices would reveal the necessity for creating subclasses, but it is axiomatic that each subclass requires a class representative. The Grazias are the only named plaintiffs in this case, and they cannot be the representative for more than one subclass. The Plaintiffs have not alleged any sub-classes; there has been no discovery on any sub-classes; there has been no Rule 23 analysis of any sub-classes; and no sub-class representatives have been identified for any sub-classes.

[6] For a more detailed explanation of the trial court's Right to Cure process and the problems with that process, see the separately filed Certiorari Petition of South Carolina State Plastering. All grounds presented by State Plastering in its petition for granting certiorari are incorporated herein and adopted by Del Webb and Pulte.

day period. (JA 22-23). Recognizing the overwhelming amount of work required to comply with this process, the trial court ordered all parties to "acquire adequate staff to meet the timetables set forth herein." (JA 22).

There are two immediate and insurmountable problems with this inspection process. Conducting an inspection of each house is the antithesis of a class action – it requires an individualized consideration of each class member's house and the claims for each house and the individual defenses to those claims. This Court and the Supreme Court of the United States have held that such individualized consideration precludes class certification. *Gardner,* 577 S.E.2d at 201 (reversing class action because case required individualized examination of each class member's claim); *Wal-Mart Stores v. Dukes*, 131S Ct. 2541 (2011) (due process precludes class certification when there are individualized defenses to the class claims). Moreover, individualized consideration of claims or defenses destroys the "economy" achieved through the representative claim process that is the heart of any class action. As ordered by the trial court, each party must now acquire the staff and other personnel necessary to inspect 4,000 homes in 180 days, *i.e.*, approximately 22 homes *per day*. Again, this is the antithesis of a class action, and it completely destroys the resource-saving purpose of any class action.

Third, at the end of each 45-day inspection period, and after receiving the notices for each of the 1,000 homes inspected during that period, any request for additional information as authorized by the Right to Cure Act must be made within 60 days. (JA 22-23). Thus, after the first 45-day inspection period, it will be necessary to continue inspecting 22 houses per day while also preparing any requests for additional information, thereby exacerbating the already overwhelming workload imposed *sua sponte* by the trial court and thereby further destroying the resource-saving purpose of any class action.

Fourth, as required by the Right to Cure Act, settlement offers could be made on each house, and each "claimant [*i.e.*, each member of the class] shall be given thirty (30) days after the date of service" of the offer to respond to the offer. (JA 23). In other words, each class member could settle out of the class on an individual basis, but this process creates an inherent and irreconcilable conflict between class counsel and each class member.

Class counsel owes their duty to the class as a whole, not any particular member of the class. It is in the best interest of the class and class counsel for the class to be as large as possible. Class counsel, therefore, cannot advise any class member on whether or not to settle out of the class on an individual basis. Thus, each class member will have to consider a settlement offer without benefit of counsel or hire independent counsel to advise them. This is the antithesis of a class action, and having to hire independent counsel defeats the resource-saving purpose of any class action.[7]

In short, the Right to Cure process created *sua sponte* by the trial court requires an inspection of every house in the class to determine what claim, if any, can be made for that house. This is the antithesis of a class action. Moreover, the process created by the trial court imposes an overwhelming workload on the parties that requires the acquisition of additional personnel, which destroys the resource-saving purpose of any class action. Also, the process created by the trial court gives rise to an irreconcilable conflict between class counsel and each class member regarding individual settlement of each class member's claim.

[7] This "settlement conflict" exacerbates already-existing conflicts that the class representatives and class counsel have with the class members. The class representatives and class counsel have waived any claim that a class member may have for prior repairs made by the class member, and the trial court excluded this claim from its new class definition. (See JA 19-20). Also, the trial court struck any claim that a class member may have under the South Carolina Unfair Trade Practices Act from the class action, and the class representatives and class counsel have acquiesced in this in order to further their personal interests in having the class certified. (See JA 16-17). Thus, the class representatives and class counsel have waived potential claims held by class members to serve their own personal interests in having the class certified. For further discussion on this conflict issue, see the separately filed petition of South Carolina State Plastering.

II. The Court of Appeals erred in finding the "class order" is not immediately appealable.

A. The "class order" is immediately appealable because it affects the mode of trial.

Orders affecting the mode of trial are immediately appealable and must be appealed immediately, or the right to appeal is lost. *Creed v. Stokes*, 331 S.E.2d 351 (1985) (order denying right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (1978) (order denying right to non-jury trial). This rule is not limited to orders affecting the right to a jury trial or non-jury trial. It also applies to orders that substitute a defendant over the plaintiff's objection,[8] orders that grant a motion to disqualify counsel,[9] and orders that create an opt-in class.[10] Here, the trial court's order affects the mode of trial in several different ways.

1. The "class order" affects the mode of trial ordered by this Court in *Grazia*.

In *Grazia*, this Court ordered the trial court to first determine whether the Plaintiff's had proven the requirements for certification of their alleged class and, if the class was certified, to then determine whether representative notice for the class under the Right to Cure Act was appropriate. 703 S.E.2d at 204. This is the law of this case because, on remand, the rulings of the appellate court are binding on the parties and the trial court. *Robert E. Lee & Co. v. Commission of Public Works of City of Greeneville*, 158 S.E.2d 185, 188 (S.C. 1967); *Prince v. Beaufort Mem. Hosp.*, 709 S.E.2d 122, 125 (S.C. App. 2011). The trial court, however, did the exact opposite of what this Court ordered.

As envisioned by this Court in *Grazia*, the parties conducted two years of class discovery after the remand by this Court, and the Plaintiffs thereafter moved to certify the class alleged in their complaint. As shown earlier, the testimony of *all* of the Plaintiffs' *own experts*

[8] *Neeltec Enterprises, Inc. v. Long*, 725 S.E.2d 926 (S.C. 2012), *rev'g* 705 S.E.2d 57 (S.C. App. 2011).
[9] *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005).
[10] *Salmonsen v. CGD, Inc.*, 661 S.E.2d 81, 87 (S.C. 2008).

demonstrated that class certification should be denied, because determining the existence, nature, extent, and cause of any stucco defect, as well as the existence, extent, and cause of any damage to the stucco or any consequential damage to the house, requires an inspection of each house and destructive testing to each house, all of which is the antithesis of a class action. Thus, under the procedure ordered by this Court in *Grazia*, the trial court should have denied class certification and never reached the question of representative notice under the Right to Cure Act.

Rather than rule upon the issues and evidence presented by the parties, as was ordered by this Court in *Grazia*,[11] the trial court *sua sponte* changed the class definition and created a "Right to Cure" discovery process designed to determine whether this *court-created* class even existed. In other words, the trial court *sua sponte* used the Right to Cure Act as a last-ditch attempt to prove what the Plaintiffs had failed to prove after two years of class discovery. This is not the purpose of the Right to Cure Act and, more importantly, it is the exact opposite of what this Court ordered in *Grazia*.

2. The "class order" creates an impermissible opt in class.

In *Salmonsen v. CGD, Inc.*, 661 S.E.2d 81, 87 (S.C. 2008), this Court held that an "opt-in" class does not exist under South Carolina law and that an order creating an opt-in class is immediately appealable because it affects the mode of trial. *Id.* at 87-91. Here, the trial court has created an opt-in class because: (1) a Right to Cure Act notice must be filed for each house in the class as a prerequisite for remaining in the class after the opt-out period; and (2) each member of the class must permit an inspection of his or her home in order to remain in the class after the opt-out period. Moreover, the trial court's creation of a "preliminary class certification" procedure has no basis in Rule 23, SCRCP, or South Carolina law. Thus, this case "presents a novel question of law

[11] This Court ordered the trial court: "Upon a motion for class certification, it will be *incumbent upon the circuit court* to determine *whether or not* the action meets each of the five prerequisites proponents of class certification are required to prove." 703 S.E.2d at 204 (all emphasis added).

which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar." *Salmonsen*, 661 S.E.2d at 87.

3. The "class order" is immediately appealable, because it denies every litigant's substantial right to a mode of trial wherein the trial court is a neutral decision maker rather than an advocate for the position of one party, and it strikes out part of the complaint and answer.

Manifestly, every litigant has a substantial right to a mode of trial wherein the trial court is a neutral decision maker and decides the issues *presented by the parties* based on the arguments and evidence *presented by the parties*. Here, due to its mistaken reading of this Court's opinion in *Grazia* (and not any bias or improper motive), the trial court was compelled to step outside the role of neutral decision maker and become a *de facto* advocate for class certification. Thus, the "class order" affects the mode of trial. Moreover, in *sua sponte* changing the definition of the class to save it from the Plaintiffs' failure of proof, the trial court effectively struck the class definition from the complaint and the defenses thereto. Thus, the Class Order is immediately appealable under § 14-3-330(2)(c) as an order that affects a substantial right and "strikes out an answer or any part thereof *or any pleading* in *any action*." (All emphasis added).

B. The "class order" is immediately appealable because it affects the merits.

An order that "affects the merits" is immediately appealable under S.C. Code Ann. § 14-3-330(1). Here, rather than rule upon the issues presented to it, the trial court *sua sponte* changed the merits question by redefining the class. The trial court's order also affects the merits by waiving class members' claims for past repairs and any claims for unfair trade practice. (See n.7 and accompanying text, *supra*). In short, the trial court's order profoundly affects the merits of this case and is therefore immediately appealable.

Indeed, the class definition is the starting point for any discovery and for the Rule 23 analysis of class certification. By changing the class definition and immediately certifying that class

without any discovery, without any Rule 23 analysis, and without any opportunity to make any arguments against the new class, the appealed order profoundly affects the merits.

III. Assuming only one or more parts of the "class order" is immediately appealable, this Court should exercise its discretion to review any unappealable part(s) of the order in connection with the appealable issue(s).

The appellate courts have discretion to exercise "pendent" appellate jurisdiction and review unappealable parts of an order in connection with appealable parts of the order when doing so will promote judicial economy and avoid the need for a future appeal after final judgment. *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390 (S.C. 2005); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 98 (S.C. 2002). Here, early resolution of all issues presented will promote judicial economy and avoid the need for a future appeal of those issues. Thus, assuming not all issues presented are immediately appealable, it is respectfully submitted that this Court should exercise its discretion to review those issues now.

IV. Assuming the "class order" is not immediately appealable, this Court should issue a writ of certiorari to the Court of Common Pleas and review the merits of the order.

This Court may review unappealable orders by issuing a writ of certiorari to the trial court. S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). The writ is particularly appropriate when a case presents important novel questions of law, and early resolution of those issues would serve the interests of judicial economy. *In re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Here, this case presents several important and novel questions on class actions under Rule 23, SCRCP, the Right to Cure Act, and the interplay between the two. Early resolution of these issues will best protect the resources of the judiciary and the parties.

(1) The trial court did the exact opposite of what this Court ordered in *Grazia*. The propriety of doing so should be addressed by this Court before the parties undertake the overwhelming workload imposed by the trial court as a result of ignoring the procedures ordered by this Court in *Grazia*.

(2) The trial court *sua sponte* created and immediately certified a "preliminary class" to justify its subsequent use of the Right to Cure Act as a court-ordered discovery device designed to fill the void left by the Plaintiffs' evidence on class certification. The novel question of whether a "preliminary class" even exists under South Carolina, and the parameters of any such class if it does exist, is a matter that should be addressed by this Court. The novel question of whether a trial court can act *sua sponte* to change the definition of a class, and then act *sua sponte* again to order a discovery process under the Right to Cure Act for determining whether that new class even exists, is also a matter that should be addressed by this Court before that process goes any further.

(3) To remain in the class after the opt-out period, a Right to Cure notice must be filed for each house in the class and each class member must allow the inspection of his or her house. This is an opt in class that is not permitted by South Carolina law. Assuming the trial court's order does not rise to the level of an "opt in" class, which is an immediately appealable order, the propriety of imposing any requirement for remaining in any class after the expiration of the opt out period should be addressed by this Court.

(4) The trial court's actions in this case, including its *sua sponte* actions in attempting to rescue the class from the Plaintiffs' failure of proof, were driven by the trial court's mistaken reading of this Court's opinion in *Grazia* as a directive to certify some class in this case. As a result of that mistake, the trial court became a *de facto* advocate for class certification rather than

a neutral decision maker. The trial court's mistake should be addressed by this Court before the parties undertake the overwhelming workload imposed by the trial court due to that mistake.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals should be granted for the reasons set forth above, and for the reasons set forth in the certiorari petition of South Carolina State Plastering (which are incorporated and adopted herein), as well as for the reasons set forth in the filings in the Court of Appeals in opposition to dismissal of this appeal by Del Webb, Pulte, and State Plastering (which are also incorporated and adopted herein).

In the alternative, and assuming the issues raised here are not otherwise immediately reviewable, it is respectfully submitted that this Court should issue a writ of certiorari to the circuit court so that this Court can address immediately the issues raised herein.

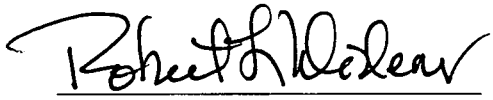
As a third alternative, and assuming the other issues raised herein are not to be reviewed immediately, it is respectfully submitted that this Court should issue an order that corrects the trial court's mistaken reading of this Court's opinion in *Grazia* and instructs the trial court to reconsider class certification under the following guidelines:

1. This Court did not express any opinion in *Grazia* on whether the class should be or could be certified, and this Court has no opinion on that issue.

2. The trial court must rule on the Plaintiffs' motion for class certification based on the class alleged by the Plaintiffs and not any class created by the trial court.

3. The trial court must rule on the Plaintiffs' motion for class certification without any reliance on or consideration of any process under the Right to Cure Act. Any question regarding application of the Right to Cure Act is not relevant, and is not before the trial court, unless and until the trial court first certifies the class alleged by the Plaintiffs.

Respectfully Submitted,



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ATTORNEYS FOR PETITIONERS

July 8, 2013
Columbia, SC

ADDENDUM
Summary of Right to Cure Act

The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the Right to Cure Act) is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2012). The Act includes an express statement of the General Assembly's public policy purposes in enacting the Act: (1) there is a need for an alternative dispute resolution method to promote settlement of construction disputes "*without litigation*"; and (2) the Act is designed to promote this public policy by requiring the would-be plaintiff to file a "notice of claim" with the would-be defendant and provide an opportunity to "resolve the claim *without litigation*." Act No. 82, 2003 S.C. Acts 943 (emphasis added). The Act achieves its purpose of avoiding litigation with a mandatory five-step process that must be completed before a homeowner (such as Plaintiffs here and the class members) may sue:

1. At least "ninety days before filing" a lawsuit, the homeowner "must" serve the contractor with a "written notice of claim" that "must contain the following" information:

   (a) statement that the homeowner asserts a construction defect;
   (b) a description of the claim with sufficient detail to determine the general nature of the construction defect; and
   (c) a description of any known results of the defect.

   S.C. Code Ann. § 40-59-840 (emphasis added).

2. Within 15 days after receiving the notice, the contractor may request clarification if the notice does not describe the construction defect sufficiently. *Id.*

3. After receiving a proper notice, the contractor may request and the homeowner "shall give" the contractor access to the home to inspect the construction defect. S.C. Code Ann. § 40-59-850(A).

4. The contractor has 30 days to make a written offer to remedy or settle the claimed construction defect, or the claim is deemed denied. *Id.*

5. If the contractor makes a written offer, the homeowner must respond in writing within 10 days after receiving the offer. § 40-59-850(B).

"If the parties" do not settle under the foregoing process, then the homeowner "may proceed with a civil action." § 40-59-850(C) (emphasis added). The Act further provides that if a homeowner files a lawsuit before complying with the notice and settlement procedures mandated by the Act, then the action "shall" be stayed upon contractor's motion "until the claimant [homeowner] has complied with the requirements of [the Act]." § 40-59-830 (emphasis added).

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Appellate Case No. 2013-000238

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

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

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 ..... Petitioners.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellants Del Webb Communities, Inc. and Pulte Homes, Inc.'s *PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS or in the alternative, PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS* and *JOINT APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS or in the alternative, PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS* by depositing a copy in the United States Mail, postage prepaid, on July 8, 2013, addressed to all attorneys of record, as follows:

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