THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2013-000233
Case Tracking No.: 2013-000238

RECEIVED
AUG - 9 2013
S.C. Supreme Court

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

v.

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

and

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

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . . . Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are ....Petitioners.

**RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

After years of procedural maneuvers aimed solely at delaying the disposition of this case, the Defendants now ask this Court to issue a Writ of Certiorari to either the Court of Appeals or the Circuit Court in this Class Action following Appeals taken by Appellants Del Webb Communities, Inc., an Arizona Corporation, Pulte Homes, Inc.("Del Webb"), and South Carolina State Plastering, Inc. ("SCSP"), from two interlocutory Orders. (JA 5-24). In opposition to this Petition, Plaintiffs/Respondents would show as follows.

PRELUDE

The entire defense of this case has been centered around delay in hopes that the Plaintiffs will ultimately expire. Counsel for the Defendant Pulte has made that point very clear as the following excerpt graphically illustrates:

> ...how long is the case going to be stayed? Most likely indefinitely. These are all homeowners that have to be over 55 to live there. By the time all 4,000 comply, which they probably never will, half of them will already be dead. (excerpt from Motion Hearing on December 5, 2007, JA 237-238).

INTRODUCTION

SCSP and Del Webb noticed an Appeal from two separate interlocutory Orders entered by the Circuit Court in the conduct of this class action (JA 5-24). Because neither of the Orders is immediately appealable, Plaintiffs/Respondents filed Motions to Dismiss the Appeals which were granted by the Following Order:

> Appellant has filed a Notice of Appeal from an "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" and an order denying reconsideration and clarification. Respondents have

> filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal is dismissed, this Court need not act on Appellant's Motion to Determine Appealability." (JA 5-8).

To date, in pursuit of an improper Appeal, Defendants have spent two years, asked for ten (10) extensions from the Supreme Court and Court of Appeals, all in an effort to delay this case to the detriment of the Plaintiff Class. As of today, this case is stayed as a result of the Defendants pursuing this Petition for Writ of Certiorari to be issued by the Supreme Court to either the Court of Appeals or the Circuit Court. There is no actual appeal pending. The stay whether mandated by the Rules of Court, or not, serves only one purpose, delay; and has only one effect, prejudice to the Plaintiffs as each day passes. So too, does this Petition seeking relief from two (2) non-appealable Orders.

Petitioners base their argument, in large part, on their view that the Circuit Court has somehow *"sua sponte"* issued orders and rulings in what is a very simple and straightforward case. The Grazias own a house in Sun City. It has design and construction problems that we found in over 4,000 homes built by Respondents. The Respondents have spent years attempting to avoid class certification by relying on what they believe is the preclusive effect of the Right to Cure Process. This Court, in *Grazia,* addressed that issue and the Circuit Court, at the request of Respondents, fashioned a process that goes beyond any protections contemplated by the Right to Cure Statute. They now would have this Court believe the Circuit Court has issued Orders and proceeded in a manner inconsistent with motions, rules and directives from this Court, which is pure and simple nonsense.

BACKGROUND

The Plaintiffs/Respondents are homeowners in Sun City Hilton Head ("Sun City"), a large-scale, planned retirement community in Bluffton, developed by Del Webb, with Del Webb also serving as general contractor for the construction of all of the class homes, some 4300 in total. The Respondents brought the present action on behalf of themselves and their similarly situated Sun City neighbors to recover damages as a result of the deficient design and construction of the stucco exterior on class members' homes.

After three hearings, the Circuit Court entered an Order granting the Respondents' motion for class certification. (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, JA 9-24). Thereafter, Del Webb and SCSP filed motions seeking reconsideration and/or clarification of the class certification Order.

Following another hearing held on April 30, 2012, the Circuit Court entered an Order denying Del Webb and SCSP's motions for reconsideration and/or clarification of the class certification Order. (JA 40-41).

On or about June 7, 2012, Del Webb and SCSP noticed Appeals of the Orders issued by this Court. (JA 62-66). Both parties also filed Motions to Determine Appealability. Both Appeals have been dismissed. Ten (10) months later, after five (5) requests for extension, Del Webb and Pulte have filed Petitions for Writ of Certiorari. There is currently no Appeal pending in any Court on these two Orders and the request

by the Defendants is for a Writ of Certiorari to be issued either to the Court of Appeals, or in the alternative, the Circuit Court.

ARGUMENT

Neither of the Interlocutory Orders Identified in Del Webb's Notice of Appeal is Immediately Appealable and There is Currently No Appeal Pending.

Both Orders issued by the Circuit Court are interlocutory, a fact that is observed by the Court in its May 1, 2012, Order, and by the Court of Appeals. (JA 40-41).

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). "To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters." Jean Hoefer Toal, et al., Appellate Practice in South Carolina 83 (2002).

As is the case here, "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." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); *see also* Toal, supra at 86 ("'Final judgment' is a term of art denoting the disposition of all issues in the action."). Here, Del Webb has appealed six separate Orders (each of which will be more particularly identified and analyzed below), none of

which are final judgments; they are all interlocutory (and not immediately appealable).

"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." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. Neither Order falls within the statute. In pertinent part, § 14-3-330 provides as follows:

> The Supreme Court shall have appellate jurisdiction for correction of errors 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; . . .

Accordingly, "[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1)." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. "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.'" Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, "[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2)." Id. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or

strike out an action or defense." (citing Mid-State Distribs., 301 S.C. at 335, 426 S.E.2d at 780 n. 4).

As to subsection (2) of § 14-3-330, "[g]enerally, this subsection has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." Toal, supra at 87. "'[T]he 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.'" Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsen v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) (Pleicones, J., dissenting)).

As is more particularly set forth below, neither of the Orders Del Webb tries to appeal and failed are final judgments. Neither involves the merits. Neither discontinues this action, prevents a later appeal, grants or refuses a new trial, or strikes out a defense pled by Del Webb. Neither abridges Del Webb's constitutional right to a jury trial. Neither is immediately appealable. Against this backdrop, Del Webb's appeal was dismissed. Accordingly, there is no Appeal pending in this case for these two Orders.

Order Granting Class Certification, dated December 19, 2011 (JA 9-24)

This is a procedural Order granting class certification and setting the structure of the case moving forward. Generally, Orders under Rule 23 are interlocutory and not immediately appealable. *See* Salmonsen, 377 S.C. 442, 661 S.E.2d 81 (refusing to entertain interlocutory appeal of class certification despite express argument against precedent to do so, and also despite Court simultaneously addressing the merits of another issue in the case on appeal); Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); *see also* Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d

at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49.

Within that Order are several case management directives from this Court. The first is an Order staying proceedings pending compliance with the S.C. Right To Cure Statute (S.C. Code Ann. § 40-59-810, et. seq.) and setting certain conditions for the notice and timing of compliance with the Right To Cure Act by the Plaintiffs/Respondents. While Plaintiffs can imagine no basis for an Appeal by Del Webb, as it was on their Motion that the framework of compliance with the Statute was set, this Order is certainly not appealable because it is not a final Order, and is consistent with the Right To Cure Act and the Supreme Courts recent decision in Grazia v. South Carolina State Plastering, LLC, et al, 390 S.C. 562, 703 S.E.2d 197 (2010).

Also contained within the Class Certification Order, is an Order striking Plaintiffs' Unfair Trade Practices claims. Again, this is a matter of procedure mandated by the legislature (unfair trade claims cannot be brought in a representative capacity) and Plaintiffs have no complaint with the rules. It is no more than the grant of a Motion to Amend. Moreover, it is without prejudice and plainly not appealable. The Court of Appeals recognized this to be true.

Order Denying Del Webb Communities, Inc.'s Motion for Reconsideration and/or Clarification, dated May 1, 2012 (JA 40-41)

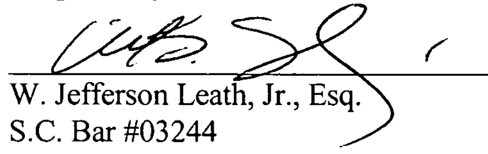
This Order merely denies reconsideration and/or clarification of the circuit court's prior procedural Order granting class certification. Once again, generally, Orders under Rule 23 are interlocutory and not immediately appealable. *See* Salmonsen, 377 S.C. 442, 661 S.E.2d 81; Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); *see also* Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49. Del Webb and SCSP, after spending countless months

trying to convince this Court to change its mind, asked the Court of Appeals to impose a change that the rules do not allow, and failed.

CONCLUSION

This case has been pending for six (6) years. The defense has been to delay at all costs. This Petition is yet another in a long line of improper tactics which should be denied so as to avoid further prejudice to the Plaintiffs.

Respectfully Submitted,



W. Jefferson Leath, Jr., Esq.
S.C. Bar #03244
Michael S. Seekings, Esq.
S.C. Bar #64850
Leath, Bouch & Seekings, LLP
92 Broad Street
P. O. Box 59
Charleston, SC 29402
(843) 937-8811

John T. Chakeris, Esq.
S.C. Bar #7060
The Chakeris Law Firm
231 Calhoun Street
P. O. Box 397
Charleston, SC 29402
(843) 853-5678

Phillip W. Segui, Jr., Esq.
S.C. Bar #7029
Segui Law Firm, LLC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865

Attorneys for the Respondents

Charleston, South Carolina
August 6, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2013-000233
Case Tracking No.: 2013-000238

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

v.

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

and

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

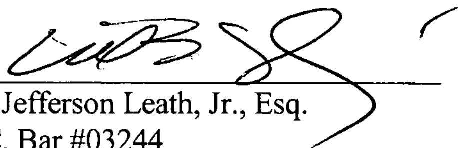
v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . . . Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are ....Petitioners.

PROOF OF SERVICE

Respectfully Submitted,



W. Jefferson Leath, Jr., Esq.
S.C. Bar #03244
Michael S. Seekings, Esq.
S.C. Bar #64850
Leath, Bouch & Seekings, LLP
92 Broad Street
P. O. Box 59
Charleston, SC 29402
(843) 937-8811

John T. Chakeris, Esq.
S.C. Bar #7060
The Chakeris Law Firm
231 Calhoun Street
P. O. Box 397
Charleston, SC 29402
(843) 853-5678

Phillip W. Segui, Jr., Esq.
S.C. Bar #7029
Segui Law Firm, LLC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865

Attorneys for the Respondents

Charleston, South Carolina

August 6, 2013

I, Michael S. Seekings, do hereby certify that on August 6, 2013, I served opposing counsel with a copy of Respondents' Return to Petition for Writ of Certiorari via regular first class United States mail, postage prepaid, addressed as follows:

Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
Sweeny Wingate & Barrow, P.A.
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211

Laura Paris Paton, Esq.
R. Michael Ethridge, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401
Attorneys for Petitioner South Carolina State Plastering, LLC

A. Victor Rawl, Jr., Esq.
Robert L. Widener, Esq.
McNair Law Firm
P.O. Box 11390
Columbia, SC 29211
Attorneys for Petitioner Del Webb Communities, Inc., and Pulte Homes, Inc.

David S. Cobb, Esq.
Turner Padget Graham & Laney, P.A.
40 Calhoun Street, Suite 200
P.O. Box 22129
Charleston, SC 29413
Attorney for Third-Party Defendant Kephart Architects, Inc.

Michael S. Seekings

August 6, 2013
Charleston, South Carolina