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.

**RESPONDENTS'
RULE 241(d) MOTION TO LIFT STAY**

RECEIVED
AUG 13 2013
S.C. Supreme Court

TO: THE HONORABLE CHIEF JUSTICE JEAN HOEFER TOAL:

This Motion is brought by the Plaintiffs/Respondents in this Class Action pursuant to SCACR 241 for a lift of a stay that was imposed by the Circuit Court of July 12, 2013, (Exhibit 1), 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. Certified copies are attached as Exhibits 2 and 3. In support of this Motion, 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, attached as Exhibit 4).

As of the date of this filing, that defense is, regrettably, working. By this Motion, the Plaintiff Class seeks the lift of a stay that is the product of wholly improper delay tactics by the Defendants. Absent such relief, the harm that may result this Class will be irreparable.

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. 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."

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 asking for a 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.

To the extent prejudice is a determining factor for this, or any Court's analysis, a lifting or dissolution of the stay will have no detrimental effect on any party to this litigation. If the stay is lifted or dissolved, which it properly should be, the only thing that will happen is that notice will go out to the 4,000 plus homeowners explaining what is happening in this case. Information these citizens have awaited for years. Once that notice is sent, the case is stayed as a matter of course.

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, Exhibit 2). 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. (Exhibit 5).

On or about June 7, 2012, Del Webb and SCSP noticed Appeals of the Orders issued by this Court. (Exhibit 6). 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. (Exhibit 7). There is currently no Appeal pending in any Court of 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. (Exhibit 5).

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 (Exhibit 2)

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 (Exhibit 5)

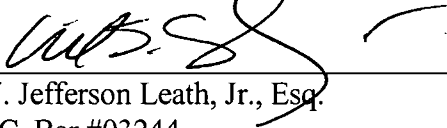
This Order merely denies reconsideration and/or clarification of the circuit court's prior procedural Order granting class certification. Once again, generally, Orders under Rule 23 are interlocutory and not immediately appealable. *See* Salmonsen, 377 S.C. 442, 661 S.E.2d 81; Eldridge, 308 S.C. at 127, 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. A stay of the proceedings while Defendants pursue an extraordinary writ, and while no actual appeal is pending from the Class Orders, will further serve to prejudice Plaintiffs and allow Defendants to continue on their course of delay at all costs. Plaintiffs respectfully request that this Court lift the stay.

Respectfully Submitted,



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Charleston, South Carolina

August 8, 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
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Of whom Del Webb Communities, Inc., and
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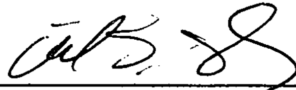
PROOF OF SERVICE

Respectfully Submitted,



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Attorneys for the Respondents

Charleston, South Carolina

August 8, 2013

I, Michael S. Seekings, do hereby certify that on August 8, 2013, I served opposing counsel with a copy of Respondents' Rule 241(d) Motion to Lift Stay via regular first class United States mail, postage prepaid, addressed as follows:

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Attorney for Third-Party Defendant Kephart Architects, Inc.

Michael S. Seekings

August 8, 2013
Charleston, South Carolina

VERIFICATION

I, Anthony Grazia, who, being duly sworn, hereby certify that the statements and information contained herein are true and correct to the best of my knowledge and belief and the document is, therefore, verified.

Anthony Grazia

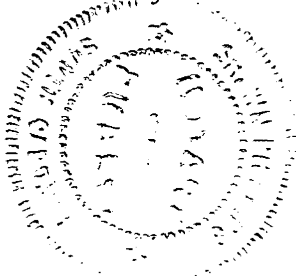
SWORN to before me this 22

day of July, 2013.

(SEAL)

Notary Public for South Carolina

My Commission Expires: My Commission Expires December 16, 2013

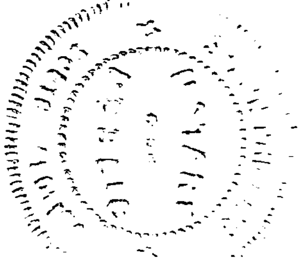


VERIFICATION

I, Barbara Grazia, who, being duly sworn, hereby certify that the statements and information contained herein are true and correct to the best of my knowledge and belief and the document is, therefore, verified.

Barbara Grazia
Barbara Grazia

SWORN to before me this 22
day of July, 2013.
_____________________(SEAL)
Notary Public for South Carolina
My Commission Expires:
My Commission Expires
December 16, 2013



Tab 1

1

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007 CP-07-1396

2013 JUL 17 PM 12:21
[illegible] BEAUFORT COUNTY, S.C.
CLERK OF COURT

Anthony and Barbara Grazia, et al — PLAINTIFF(S)

South Carolina State Plastering, LLC, et al — DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Pages 2-3 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: See Pages 2-3 for additional information.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : This case is stayed pending disposition of a petition for certiorari by the South Carolina Supreme Court

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2121 Judge Code	7/12/13 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 _to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

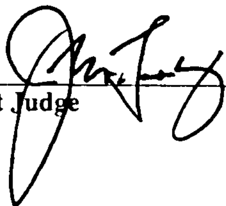
ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This class action, which has been pending for six years, arises from allegations of damages resulting from defective stucco cladding of approximately 4,000 homes in Sun City, Beaufort County, South Carolina. By an Order dated December 19, 2011, the Court certified this

Class, finding that Plaintiffs met the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure. Defendant South Carolina State Plastering, LLC ("SCSP") and Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. ("Del Webb/Pulte") filed an appeal challenging this Order. In response, Plaintiffs filed a Motion to Dismiss the Appeal, which was granted by the South Carolina Court of Appeals and the appeal dismissed in an Order filed August 31, 2012. Subsequent Petitions for Rehearing, made by both SCSP and Del Webb/Pulte, were denied by the Court of Appeals on January 15, 2013. Since that time, Defendant SCSP has sought and received several extensions to file a Petition for Writ of Certiorari from the South Carolina Supreme Court.

Rule 205 of the South Carolina Appellate Court Rules provides that "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]" This rule prevents the lower court from proceeding further, except with regard to "matters not affected by the appeal." *Id.* In addition, Rule 221(b) states that "[w]here a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court...until the time to petition for a writ of certiorari under Rule 242(c) has expired." Plaintiffs wish to proceed with the case at the circuit level on matters pertaining to class notice, opt out provisions, and Right to Cure Construction Defect issues, arguing that the Court of Appeals has dismissed the pending appeal over class certification. A recent decision by the Supreme Court is instructive. In *Lancaster v. Georgia-Pacific Corp.*, No. 2013-000175 (May 20, 2013), the Supreme Court took the opportunity to remind the bench and bar that the lower courts should not take any further action in matters within the exclusive jurisdiction of the appellate courts, except with regards to matters not affected by the appeal. Because the issue on appeal – class certification – is so closely intertwined with issues of class notice and the Right to Cure process, this Court finds that the most prudent course is to stay all matters in this case, except with regard to "matters not affected by the appeal." *See* SCACR 205. Accordingly, the Court will stay the matters under consideration related to class notice and the Right to Cure process until a remittitur is received.

IT IS SO ORDERED.



	2121	7/12/13
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on 17 **July, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on 17 **July, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

Court Reporter-N/A

Jerri Ann Roseneau - Clerk of Court

Tab 2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) CASE NUMBER: 07-CP-07-1396

ANTHONY AND BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs,

Plaintiffs,

vs.

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendants.

ORDER MAKING PRELIMINARY FINDING THAT PLAINTIFFS' PROPOSED CLASS MEETS THE REQUIRMENTS 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

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

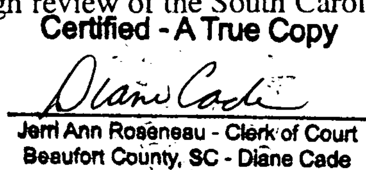
DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC., and KEPHART ARCHITECTS, INC.,

Third-Party Defendants.

---

11 DEC 19 PM 3:31
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRCP, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRCP, are not incompatible with the requirements of the Right to Cure Construction Dwelling Defect Act (hereafter, Act) (S. C. Code Ann. 40-59-810, et. seq.). See Grazia v. S. C. State Plastering, LLC, et. al., 390 SC 562, 703 SE 2d 197 (2010). After a thorough review of the South Carolina


Certified - A True Copy
Jerri Ann Roseneau - Clerk of Court
Beaufort County, SC - Diane Cade

Rules of Civil Procedure, relevant case law, the specific appellate decision in this case, extensive memoranda of law and correspondence submitted by counsel, affidavits, and the various oral arguments presented by all parties at multiple hearings, the Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of the putative Class, approves the proposed Class representatives and counsel, imposes a stay of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance in this putative class setting. Thereafter, the Court will make a final decision as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act. See Rule 23(d)(1), SCRCP.

The named Plaintiffs (Anthony and Barbara Grazia) and those they represent as proposed class members are all individuals or legal entities who own stucco-clad residences in the Sun City development of Bluffton, Beaufort County, South Carolina ("Sun City"). There are currently about 140 individual cases already pending in Beaufort County, and Plaintiffs allege there are an approximate additional 4,000 similar housing units that are not yet in litigation. The pending cases have been declared complex and assigned to this Court for disposition. To attempt to individually try the already pending cases and those yet unfiled would be overwhelming to this Court and all judicial resources available within the Fourteenth Judicial Circuit, and has the potential impact of denying meaningful access to the justice system for some of the parties.

The Plaintiffs' complaint focuses on damages allegedly flowing from defects in exterior wall stucco design, construction, manufacture, and application. Plaintiffs allege that the Defendants participated in the design and installed the stucco system in the Grazia residence and

many other Sun City residences as well, and the Third-Party Defendants, who have extensively participated in opposing this motion, were the designers and sellers of the residences.

As a threshold issue, Plaintiffs attempt to certify a Class that consists of all stucco-clad residences within the Sun City Development, but have named as the sole Defendant South Carolina State Plastering, LLC (SCSP), the entity that performed the stucco work on the vast majority of the homes at Sun City. South Carolina State Plastering in turn filed suit against third-party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. as the entities engaged in the development, layout, design, and were allegedly ultimately responsible for construction of the Sun City Development, asserting that any work done by SCSP was at the direction of and in accordance with the specifications and instructions of Del Webb/Pulte. Kephart Architects, Inc., who designed some of the Sun City homes, was also brought in as a third-party Defendant. Of the 140 Sun City stucco cases already pending, counsel agree that less than ten (10) do not involve stucco applied in whole or in part by SCSP. Of the approximate 4000 cases not yet filed, counsel agree that almost all, if not every one, involve stucco applied in whole or in part by SCSP. Accordingly, because no other stucco applicators are a party to this action and have not been permitted to contest the allegations or afforded due process of notice and an opportunity to be heard on the issue of class certification, the putative class is limited those homes on which SCSP installed the stucco in whole or in part.

With regard to those homes, by competent evidence presented to this Court, including affidavits and testimony of an architect, engineer, and a general contractor, the Court finds that the Plaintiffs' case presents a single critical issue that is common in law and fact: the improper design, mix, and installation of stucco exterior wall systems by SCSP on the houses at Sun City Hilton Head built before July 31, 2007. These design, manufacture, and installation issues have

led to generally consistent claimed problems within these structures, and generally consistent damages flowing therefrom. These damages include, according to the complaint, cost of repairs, loss of use, depreciation, incidental and consequential losses, and sums previously paid for attempted repairs. A discussion of the specific certification requirements of Rule 23(a), SCRCP, follows.

The "Numerosity" Requirement of Rule 23(a)(1)

The numerosity requirement of 23(a)(1) is often referred to as the impracticality of joinder requirement. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, § 1762. No arbitrary measure of impracticability or numerosity has been established, and this issue is determined by the facts of each case. The objective of this requirement is to prevent members of a class from being unnecessarily deprived of their rights and a day in court by either the opposing party or by a few members of the proposed class. Ripply v. Denver U.S. National Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). In this case, the Court finds that the numerosity requirement is met. The Plaintiffs have presented credible evidence, including testimony of Pulte representatives, that the number of houses clad with stucco in a similar manner as the Plaintiffs' house is over 4,000. There is no possibility that each case could be tried individually or joined as individual cases. Because the volume of cases presented here would certainly overwhelm the Beaufort County docket, and because joinder is impractical, this Court finds that the Rule 23 requirement of numerosity has been met.

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Questions of Law and Fact Common to the Class

The Court finds that this case satisfies the commonality requirement because it is limited to claims related to the design, installation, and condition of the stucco cladding, and common issues of fact and law exist. To establish commonality, a party must show that "there are

questions of law or fact common to the class." SCRCP, Rule 23(a)(2). See McGann v. Mungo, 287 S.C. 561, 567-568, 340 S.E. 2d 254, 157-158 (Ct. App. 1986). In practical terms, this means the party must articulate the existence of "significant common, legal, or factual issues" that bind the proposed class together. Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court must examine whether, in its judgment, the issues are similar such that class resolution will provide a more efficient method of resolving the litigation.

After a thorough review of the allegations, defenses, and facts distilled thus far in the cases, this Court finds that all of the owners in the class are similarly affected by the alleged acts of the Defendants, and each owner may face significant costs to repair their houses. Common legal and factual questions that exist in each case include, but are not limited to, whether (1) the original design of the stucco system was proper and (2) the installation of the system was proper.

The Court finds that Plaintiffs have met their burden of proving commonality. Specifically, pursuant to South Carolina law, Plaintiffs have established the following three elements of commonality:

1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.

2) That the Court will not have to investigate each class member's individual claim for purposes of establishing or failing to establish liability; and,

3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The "Typicality" Requirements of Rule 23(a)(3)

South Carolina requires that a plaintiff prove that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP.

These requirements "ensure that only [those] who can advance similar factual and legal arguments are grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). See also, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)(commonality and typicality "serve as guideposts" to determine whether "a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"); Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)(commonality and typicality not satisfied when "taken as a whole the class claims were based on widely divergent facts").

The typicality requirements focus on the characteristics of the class representative. Typicality entails an inquiry into whether the named plaintiff's individual circumstances and the legal theory upon which the claims are based are typical with respect to the claims of other class members. The typicality requirement focuses on the consideration of whether the representative's interests are truly aligned and consistent with those of the class members. Smith v. The B&O Railroad Company, 473 F. Supp. 572 (D. Md. 1979). The Court finds that Plaintiffs satisfy these requirements.

In this case, plaintiffs assert that the design and installation of the stucco is improper on over 4000 Sun City Homes. Evidence has been reviewed by this Court in the form of expert testimony and affidavit. This Court finds that evidence establishes typicality.

The proposed class representatives' claims are typical because each class member owns a residence with a similar allegedly defective stucco system allegedly designed, installed, and/or sold by the Defendants/third-party Defendants. Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Decisions construing Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members and if the claims are based on the same legal theories. See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th. Cir.), *cert. denied* 429 U.S. 870 (1976); 1 H. Newberg, Newberg on Class Actions §3:13 (2002) (cases collected). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class." 7A Wright and Miller, Federal Practice & Procedure §1764 (1986). Here, the Court finds that the claims of Anthony and Barbara Grazia are typical of the claims of the other homeowners.

Adequacy of Class Representatives and Counsel

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRCP, Rule 23(a)(4). Adequacy of representation consists of two components: (1) there must be no disabling conflicts of interest between the class representative and the class and (2) the class representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), *cited with approval in* Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 388 S.E. 2d 799 (1990). In this case, the Court finds that the proposed class representatives and the class members' interests are identically aligned. They seek to have their homes repaired and hold liable those responsible for the damages. This Court notes that the Grazia complaint was filed in 2007 and that the Grazias have pursued this claim in a representative capacity for four (4) years, including a trip to the Supreme Court and back, as have their counsel. Plaintiffs' counsel are qualified, experienced, and able to conduct class

litigation. Attorney W. Jefferson Leath, Jr. has approximately thirty (30) years of experience in construction litigation and is familiar with issues surrounding class litigation, as is Attorney Michael S. Seekings with more than twenty (20) years' experience, and Attorneys John T. Chakeris and Phillip W. Segui, Jr., are similarly experienced.

The Amount in Controversy Meets the Statutory Requirement

Defendants argue that some houses in the putative class have no damage at all; thus, they further argue that Plaintiffs do not meet the one hundred dollar ($100.00) per claim threshold amount for a class to be certified. This argument is disputed by the Plaintiffs, who counter that even if damage is not currently visible on a particular structure, the defective stucco system will eventually cause damage. Plaintiffs allege that the only appropriate repair is to de-clad and then re-clad the houses with an appropriate stucco system, at a cost of approximately $75,000.00 per structure. Clearly, after reviewing the pleadings and the evidence of record, the Court finds that plaintiffs' allegations of the amount in controversy well exceed Rule 23's threshold requirement.

Responses of the Defendants in Opposition to Class Certification

The Defendants have raised numerous legal and factual arguments in opposition to class certification, contesting all requirements of Rule 23. First, Defendants argue Plaintiffs' claims under the SC Unfair Trade Practices Act are by law not amenable to class action prosecution. This position is correct, and as a part of this preliminary Order, these claims will be dismissed without prejudice by the Court. See Grazia v. S. Carolina State Plastering, LLC, at id. The dismissal is without prejudice at this juncture; however, in the event a Class is certified with finality in this case, the dismissal will be with prejudice.

On the issue of dismissing the Unfair Trade Practices Claim (UTPA), counsel for Del Webb/Pulte argues that the Court does not have the authority to *sua sponte* dismiss this claim

without a motion from Plaintiffs or any other party to do so; rather, the Court's only option is to deny certification of the class. The Court does not accept this argument. In moving for class certification, Plaintiffs have implicitly requested the dismissal of the UTPA claim, and in open Court on the record acknowledged that South Carolina law does not permit the UTPA claim to be prosecuted in a representative capacity, and acquiesced in the dismissal. Rule 23(d), SCRCP, permits the Court to impose such terms as are necessary to protect the interests of the parties. This dismissal protects the interests of the third-party Defendant, who now complains of it. Thus, third-party Defendant's objection is overruled.

The Defendants further argue that a class action will be of no benefit to the parties because each claim will still have to be individually investigated and determined, including individual structure destructive testing, and the damages for each home separately calculated. Moreover, Defendants argue that similarity of claims, in and of itself, does not meet the commonality requirement of Rule 23, and the alleged specific defects at the Grazia home are not probative as to the alleged problems at other claimants' residences.

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To demonstrate this argument, Defendants raised factual points in opposition to class certification. They argue that some of the homes in question may have alleged defects as to inadequate or thin application of stucco, while others have a problem with the mix of ingredients used to create the stucco. Some houses have alleged problems with head flashing, some with sealant joints, others with control joints, some have cracking stucco while others do not, and some houses have alleged problems with weep configurations while others do not. The houses in question do not all use the same type stucco system or stucco product, and the stucco systems may be manufactured by different companies. Moreover, because the completion date of these structures spans a period of almost ten years, construction standards may differ. Some houses

may have had multiple owners who may have altered the stucco. Defendants also argue that certain members of the putative class are subject to certain affirmative defenses, while others are not, and that the class action procedure cannot be used to alter substantive law and deprive Defendants of these defenses with respect to any individual claim.

The Court is cognizant of Defendant's and third-party Defendants' arguments, and recognizes that factual and legal differences may exist within the putative class. For these reasons, this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs. The Court intends to employ the Right to Cure process as outlined below to further analyze and perhaps organize the various claims that exist in these cases. The Court opines that there may be certain sub-groups formed within the class action to facilitate the determination of liability and damages issues, if such procedure is found to be fair and efficient. See McGann v. Mungo, 287 S.C. at 570-71, 340 S.E.2d at 159 ("In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses."). Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses, the Court will require the Defendants to provide a listing of claimants for whom Defendants allege a specific affirmative defense is applicable, and the Court may thereafter form additional sub-groups within the Class to accommodate these defenses. The specifics of these procedures, if necessary, will be deferred until further development of the evidence through the discovery process. The Court specifically rejects Defendant's and third-party Defendants' contention, however, that the factual and legal components within the cases automatically defeat a class action approach to resolution

JMS
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of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class.

After hearing arguments of counsel and reviewing the pleadings and exhibits submitted, it appears to the Court that common issues exist for all homes to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, as specifically defined below. While the Court recognizes Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of this Court that common, core issues are present in all the cases and that a class approach is not only the best, but the only method available to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs.

State case law directs that this Court take an expansive rather than narrow view of class action motions. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart"). This Court finds that this case presents a core set of facts contemplated by Rule 23 when considering certification. Moreover, the 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. See Grazia v. S. Carolina State Plastering, LLC, *Id.*, rehearing denied (Jan. 20, 2011).

JMB 11

Accordingly, for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act, this Court finds that Plaintiffs have met the requirements of Rule 23(a), and are entitled to a preliminary determination that Plaintiffs may proceed at this juncture using a class approach. The class is preliminarily recognized as follows: 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 in 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. Further, Anthony and Barbara Grazia are approved as representatives of the putative class, and attorneys W. Jefferson Leath, Jr., Michael S. Seekings, John T. Chakeris, and Phillip W. Segui, Jr., are found to be competent and capable class counsel.

Requirement of Notice to Putative Class Members

The Court has requested the parties to reach an agreement on the contents of an opt-out class notice to all potential members. Counsel has been unable to do so. Accordingly, each party is requested to present to the Court a proposed opt-out Notice of Class Action and Exclusion Request Form for distribution to all potential class members within thirty (30) days of the date of this Order, consistent with the remaining provisions of this Order. This Notice must contain the standard information concerning the obligations, rights, and ramifications of acceptance or rejection of class membership, and include a date certain for closure of the opt-out period. Additionally, this Notice should inform the potential members that class certification is preliminary at this juncture pending the results of the Right to Cure process; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that based upon the Right to Cure responses, the Court will make a final determination of class certification; and, that the potential class members will be notified of this final decision and the legal ramifications thereof.

JMB 12

Once the parties have submitted a proposed Notice to Potential Class Members and Exclusion form, the Court will either choose one party's form or combine portions of the submitted forms to reach its decision as to the final format of the document. It is likely that an additional hearing may be conducted on this matter prior to a final decision, and in such hearing the Court will resolve related issues such as the timetable for initiating the notice process, the necessity and authorization of permission to enter a property for inspection, and the result of failure of cooperation by a particular claimant.

Compliance with the Right to Cure Act and Future Imposition of Stay

The following procedures are imposed, pursuant to Rule 23(d)(2), SCRCP, to fairly and adequately protect the divergent interests of the multiple parties before the Court. Within seven (7) days following the closure of the opt-out period, Plaintiffs shall be required to provide to this Court at the Hartsville office, Defendants, third-party Defendants, and filed with the Clerk of Court a complete list of the proposed class, identifying the properties by name of owner(s) and street address. This listing shall be organized in two separate ways – one shall be in alphabetical order by name of the owner with street address and contact information included (mailing address if different from street address and home telephone number, or cellular number if no home number exists), and a second shall be a listing by street address, set forth street by street in sequential address number, with name of owner(s) included. Once this listing is filed and distributed as outlined above, it may only be amended (except for a change in contact information) by motion of a party and written permission of the Court, which shall not be freely given. At the time this listing is filed with the Clerk, pursuant to S. C. Code Ann 40-59-830, a Stay of proceedings shall be imposed until the requirements of the Act are met and procedures set out thereunder are completed. This Stay shall be automatic without need of issuance of a

JMB 13

further Order from this Court. This Stay shall remain in effect until the conclusion of the claims procedure for all properties as outlined below, and shall be ended only upon issuance of an Order Lifting Stay from this Court after proper motion of any party.

To provide structure for compliance in such a large number of cases, Plaintiffs shall be given a period of one hundred and eighty (180) days from the imposition of the Stay to provide Defendants with the notice of claim required by Section 40-59-840 for all properties within the proposed class. Rather than provide all notices at once at the end of this entire period, working from either the alphabetical list or the sequential street list at the choice of Plaintiffs' counsel, Plaintiffs must provide one fourth of the total notices due on the final day of each forty-five day period within the given one hundred eighty days. In setting these deadlines, the Court realizes that this is an ambitious schedule; however, given the current age of this case and the number of potential claims, the need for timely disposition of this litigation demands that both parties acquire adequate staff to meet the timetables set forth herein.

Because there is no specific exclusion in either case law or the language of the Act, the notice to the contractor required under the Act must be filed in a representative capacity by proposed class counsel, and must be signed by counsel and dated as to the date of service to contractor. For purposes or record keeping and administration, Contractor SCSP shall receive service of the notices in a representative capacity through counsel. The date of service on each individual notice shall trigger the response dates as set forth herein. Because of the magnitude of the number of claims, the amount of work required in the initial investigation of the claims by contractor, and the fact that Plaintiffs have chosen to proceed by class action, the Court will grant a period of sixty (60) days to contractor to provide the individual claim response required by Section 40-59-850, and failure to respond within sixty (60) days shall be deemed a denial of the

claim. These claim responses shall be signed and dated by counsel, and shall be served upon class counsel. If contractor does respond with an offer of settlement, claimant shall be given thirty (30) days after the date of service to respond to contractor's offer as required by Section 40-59-850(b).

The required content for each notice of claim is set forth in Section 40-59-840. Proposed class counsel is hereby advised that, for purposes of analyzing and organizing class certification issues, 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.

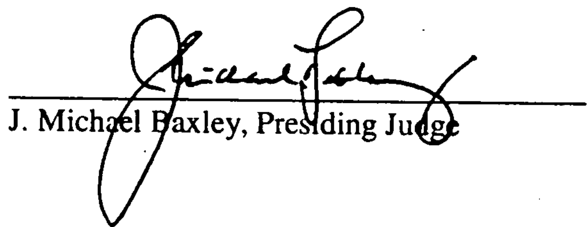
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel specifically excluded. However, an inspection may not be cancelled or postponed because one or more of the attorneys for any party cannot be present. The contact information is provided on the alphabetical list of potential class members so that the parties may engage in the inspection process directly between themselves without need of counsel, if such is determined to be practicable by all concerned.

Conclusion

Compliance with all of the procedures and requirements contained in this Order will prove beneficial for everyone involved in this dispute. At this juncture in this litigation, the use of the class action vehicle will operate to conserve valuable judicial resources as well as concentrate and clarify the common issues of law and fact that predominate this dispute. At the

same time, the rights and interests of all parties will be fully protected by adhering to the guidelines outlined by the Court.

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

Tab 3

The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

ORDER

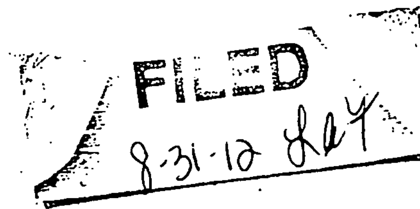
Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and 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."

CERTIFIED TRUE COPY:
V. Claire Allen
Deputy Clerk, S.C. Court of Appeals

FOR THE COURT

Columbia, South Carolina

cc:
Everett Augustus Kendall, II
Christy Elizabeth Mahon
Phillip Ward Segui, Jr.
John T. Chakeris
W. Jefferson Leath, Jr.
Michael S. Seekings



CERTIFIED TRUE COPY:
V. Claire Allen
Deputy Clerk, S.C. Court of Appeals

The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC, Defendant.

South Carolina State Plastering, LLC, Defendant,

v.

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

Of Whom Del Webb Communities, Inc., and Pulte Homes, Inc. are the Appellants.

Appellate Case No. 2012-212364

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

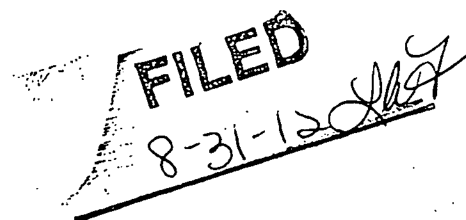
CERTIFIED TRUE COPY:
V. Claire Allen
Deputy Clerk, S.C. Court of Appeals

is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."

FOR THE COURT

Columbia, South Carolina

cc:
Robert L. Widener
A. Victor Rawl, Jr.
W. Jefferson Leath, Jr.
Michael S. Seekings
Phillip Ward Segui, Jr.
John T. Chakeris



Tab 4

1 putative plaintiffs, the putative class members, the
2 people that the Oroses claim to be prosecuting this case
3 on behalf of, they also have to comply with the statute.
4 The defendant has the right, before they're
5 sued, to have notice of what the claim is and have a
6 right to try to cure the claim.
7 And, so, technically, pursuant to the statute,
8 the case cannot be prosecuted against any other or on
9 behalf of any other homeowners until that homeowner has
10 complied with the statute.
11 Now, what does that realistically mean? That
12 means that the case is stayed until all putative class
13 members comply with the statute. And we just argued this
14 exact same motion on Monday, before Judge Dukes, in
15 another class action, these same gentlemen brought
16 against my client. And the problem is that these
17 gentlemen don't represent all 4,000 homeowners in Sun
18 City/Hilton Head. But they are attempting to in a
19 representative capacity. And, so, by actually staying
20 the case, until all putative homeowners comply with the
21 statute, which they have to do, pursuant to South
22 Carolina law, how long is the case going to be stayed?
23 Most likely indefinitely. These are all homeowners that
24 are have to be over 55 to live there. By the time all
25 4,000 comply, which they probably never will, half of

1 them will be already be dead.

2 And, so, which leads us to the next rational

3 statement, which other courts around the country have all

4 set down, that the right to cure statute in class actions

5 are incompatible. Since a procedural rule cannot abridge

6 a substative right and substative law, you know, the most

7 rational decision would be to say, at this point, to

8 strike the class allegation so that the individuals

9 plaintiffs, who actually do have a problem, can go

10 forward with their own litigation.

11 MR. WILLS: You could never have a class

12 action in a construction litigation.

13 MR. RAWLS: In a construction defect case

14 against a contractor.

15 MR. WILLS: Yes.

16 MR. RAWLS: And

17 MR. WILLS: Or developer.

18 MR. ETHERIDGE: Or architect.

19 MR. WILLS: Or architect.

20 MR. RAWLS: You can have one against a

21 manufacturer. For example, if the claim was that the

22 stucco that was developed by MasterWall, that was put on

23 the house out there, was somehow defective, then the

24 plaintiffs could maintain a class action against the

25 manufacturer, and that happens. You know, you may stop

Tab 5

FORM 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	Case No. 2007-CP-07-1396
ANTHONY and BARBARA GRAZIA, individually and on behalf of all other similarly situated plaintiffs,	)	
Plaintiffs,	)	**ORDER DISMISSING DEFENDANTS' MOTIONS TO RECONSIDER AND DENYING DEFENDANTS' MOTIONS FOR CLARIFICATION OF ORDER PRELIMINARILY CERTIFYING CLASS**
v.	)	
SOUTH CAROLINA STATE PLASTERING, LLC,	)	
Defendant,	)	
and	)	
SOUTH CAROLINA STATE PLASTERING, LLC,	)	
Third-Party Plaintiff,	)	
v.	)	
DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC. and KEPHART ARCHITECTS, INC.,	)	
Third-Party Defendants.	)	

2012 MAY -7 PM 3:49
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCP, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

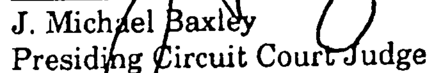
Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. There is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order. Indeed, Rule 59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, **the Court hereby dismisses Defendants' Motions to Reconsider as improper.**

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, **the Court hereby denies Defendants' motions for clarification.**

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Circuit Court Judge

May 1, 2012
Hartsville, SC

Tab 6

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2007-CP-07-1396

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

v.

South Carolina State Plastering, LLC,.. Defendant,

and

South Carolina State Plastering, LLC,.. Defendant,

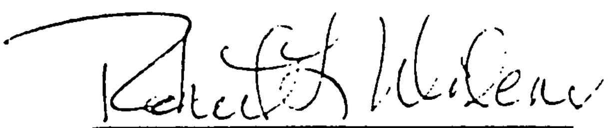
v.

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... Appellants.

NOTICE OF APPEAL

Del Webb Communities, Inc., and Pulte Homes, Inc., appeal the order of the Honorable J. Michael Baxley, dated December 8, 2011 and filed December 19, 2011. Appellants made a timely motion to reconsider this order, and Appellants also appeal the order Honorable J. Michael Baxley, dated May 1, 2012 and filed May 7, 2012, which denied the motion to reconsider. Appellants received written notice of the entry of May 1, 2012 order on May 9, 2012.



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Columbia, SC
June 7, 2012

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2007-CP-07-1396

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

v.

South Carolina State Plastering, LLC,.. 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... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the *Notice of Appeal*, by depositing a copy in the United States Mail, postage prepaid, on June 8, 2012, addressed to all attorneys of record, as follows:

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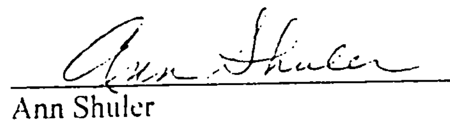

Ann Shuler

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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JUN 06 2012
SC Court of Appeals

Case No. 2007-CP-07-1396

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

v.

South Carolina State Plastering, LLC, ...Appellant,

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 ....Appellants.

NOTICE OF APPEAL

South Carolina State Plastering, LLC appeals the order of the Honorable J. Michael Baxley dated December 8, 2011 and filed December 19, 2011. Appellant received written notice of entry of this order and timely filed a Motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Appellant also appeals the Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminary Certifying Class dated May 1, 2012 and filed by the Clerk on May 7, 2012. Appellant received written notice of the entry of the May 1, 2012 order via electronic transmission on May 9, 2012.

June 8, 2012

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

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

v.

South Carolina State Plastering, LLC,..Appellant,

v.

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

Of Whom Del Webb Communities, Inc., and Pulte Homes, Inc. are ....Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal of Appellant South Carolina State Plastering, LLC on Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs by depositing a copy of it in the United States Mail, postage prepaid, on June 8, 2012, addressed to their attorneys of record and all counsel of record, listed as follows:

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Attorney for Appellants Del Webb Communities, Inc.,
and Pulte Homes, Inc.

June 8, 2012

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Attorneys for Appellant South Carolina
State Plastering, LLC

FORM 4

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT) Case No. 2007-CP-07-1396

ANTHONY and BARBARA GRAZIA, individually and on behalf of all other similarly situated plaintiffs,

Plaintiffs,

v.

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendant,

and

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

v.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC. and KEPHART ARCHITECTS, INC.,

Third-Party Defendants.

ORDER DISMISSING DEFENDANTS' MOTIONS TO RECONSIDER AND DENYING DEFENDANTS' MOTIONS FOR CLARIFICATION OF ORDER PRELIMINARILY CERTIFYING CLASS

2012 MAY -7 PM 9:49
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCP, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. There is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order. Indeed, Rule 59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, **the Court hereby dismisses Defendants' Motions to Reconsider as improper.**

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, **the Court hereby denies Defendants' motions for clarification.**

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

IT IS SO ORDERED.

J. Michael Baxley
Presiding Circuit Court Judge

May 1, 2012
Hartsville, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) CASE NUMBER: 07-CP-07-1396

ANTHONY AND BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs,

Plaintiffs,

vs.

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendants.

ORDER MAKING PRELIMINARY FINDING THAT PLAINTIFFS' PROPOSED CLASS MEETS THE REQUIRMENTS 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

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC., and KEPHART ARCHITECTS, INC.,

Third-Party Defendants.

---

11 DEC 19 PM 3:31
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRCP, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRCP, are not incompatible with the requirements of the Right to Cure Construction Dwelling Defect Act (hereafter, Act) (S. C. Code Ann. 40-59-810, et. seq.). <u>See Grazia v. S. C. State Plastering, LLC, et. al.</u>, 390 SC 562, 703 SE 2d 197 (2010). After a thorough review of the South Carolina

Rules of Civil Procedure, relevant case law, the specific appellate decision in this case, extensive memoranda of law and correspondence submitted by counsel, affidavits, and the various oral arguments presented by all parties at multiple hearings, the Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of the putative Class, approves the proposed Class representatives and counsel, imposes a stay of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance in this putative class setting. Thereafter, the Court will make a final decision as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act. See Rule 23(d)(1), SCRCP.

The named Plaintiffs (Anthony and Barbara Grazia) and those they represent as proposed class members are all individuals or legal entities who own stucco-clad residences in the Sun City development of Bluffton, Beaufort County, South Carolina ("Sun City"). There are currently about 140 individual cases already pending in Beaufort County, and Plaintiffs allege there are an approximate additional 4,000 similar housing units that are not yet in litigation. The pending cases have been declared complex and assigned to this Court for disposition. To attempt to individually try the already pending cases and those yet unfiled would be overwhelming to this Court and all judicial resources available within the Fourteenth Judicial Circuit, and has the potential impact of denying meaningful access to the justice system for some of the parties.

The Plaintiffs' complaint focuses on damages allegedly flowing from defects in exterior wall stucco design, construction, manufacture, and application. Plaintiffs allege that the Defendants participated in the design and installed the stucco system in the Grazia residence and

many other Sun City residences as well, and the Third-Party Defendants, who have extensively participated in opposing this motion, were the designers and sellers of the residences.

As a threshold issue, Plaintiffs attempt to certify a Class that consists of all stucco-clad residences within the Sun City Development, but have named as the sole Defendant South Carolina State Plastering, LLC (SCSP), the entity that performed the stucco work on the vast majority of the homes at Sun City. South Carolina State Plastering in turn filed suit against third-party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. as the entities engaged in the development, layout, design, and were allegedly ultimately responsible for construction of the Sun City Development, asserting that any work done by SCSP was at the direction of and in accordance with the specifications and instructions of Del Webb/Pulte. Kephart Architects, Inc., who designed some of the Sun City homes, was also brought in as a third-party Defendant. Of the 140 Sun City stucco cases already pending, counsel agree that less than ten (10) do not involve stucco applied in whole or in part by SCSP. Of the approximate 4000 cases not yet filed, counsel agree that almost all, if not every one, involve stucco applied in whole or in part by SCSP. Accordingly, because no other stucco applicators are a party to this action and have not been permitted to contest the allegations or afforded due process of notice and an opportunity to be heard on the issue of class certification, the putative class is limited those homes on which SCSP installed the stucco in whole or in part.

With regard to those homes, by competent evidence presented to this Court, including affidavits and testimony of an architect, engineer, and a general contractor, the Court finds that the Plaintiffs' case presents a single critical issue that is common in law and fact: the improper design, mix, and installation of stucco exterior wall systems by SCSP on the houses at Sun City Hilton Head built before July 31, 2007. These design, manufacture, and installation issues have

led to generally consistent claimed problems within these structures, and generally consistent damages flowing therefrom. These damages include, according to the complaint, cost of repairs, loss of use, depreciation, incidental and consequential losses, and sums previously paid for attempted repairs. A discussion of the specific certification requirements of Rule 23(a), SCRCP, follows.

The "Numerosity" Requirement of Rule 23(a)(1)

The numerosity requirement of 23(a)(1) is often referred to as the impracticality of joinder requirement. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, § 1762. No arbitrary measure of impracticability or numerosity has been established, and this issue is determined by the facts of each case. The objective of this requirement is to prevent members of a class from being unnecessarily deprived of their rights and a day in court by either the opposing party or by a few members of the proposed class. Ripply v. Denver U.S. National Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). In this case, the Court finds that the numerosity requirement is met. The Plaintiffs have presented credible evidence, including testimony of Pulte representatives, that the number of houses clad with stucco in a similar manner as the Plaintiffs' house is over 4,000. There is no possibility that each case could be tried individually or joined as individual cases. Because the volume of cases presented here would certainly overwhelm the Beaufort County docket, and because joinder is impractical, this Court finds that the Rule 23 requirement of numerosity has been met.

Questions of Law and Fact Common to the Class

The Court finds that this case satisfies the commonality requirement because it is limited to claims related to the design, installation, and condition of the stucco cladding, and common issues of fact and law exist. To establish commonality, a party must show that "there are

questions of law or fact common to the class." SCRCP, Rule 23(a)(2). See McGann v. Mungo, 287 S.C. 561, 567-568, 340 S.E. 2d 254, 157-158 (Ct. App. 1986). In practical terms, this means the party must articulate the existence of "significant common, legal, or factual issues" that bind the proposed class together. Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court must examine whether, in its judgment, the issues are similar such that class resolution will provide a more efficient method of resolving the litigation.

After a thorough review of the allegations, defenses, and facts distilled thus far in the cases, this Court finds that all of the owners in the class are similarly affected by the alleged acts of the Defendants, and each owner may face significant costs to repair their houses. Common legal and factual questions that exist in each case include, but are not limited to, whether (1) the original design of the stucco system was proper and (2) the installation of the system was proper.

The Court finds that Plaintiffs have met their burden of proving commonality. Specifically, pursuant to South Carolina law, Plaintiffs have established the following three elements of commonality:

1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.

2) That the Court will not have to investigate each class member's individual claim for purposes of establishing or failing to establish liability; and,

3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The "Typicality" Requirements of Rule 23(a)(3)

South Carolina requires that a plaintiff prove that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP.

These requirements "ensure that only [those] who can advance similar factual and legal arguments are grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). See also, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)(commonality and typicality "serve as guideposts" to determine whether "a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"); Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)(commonality and typicality not satisfied when "taken as a whole the class claims were based on widely divergent facts").

The typicality requirements focus on the characteristics of the class representative. Typicality entails an inquiry into whether the named plaintiff's individual circumstances and the legal theory upon which the claims are based are typical with respect to the claims of other class members. The typicality requirement focuses on the consideration of whether the representative's interests are truly aligned and consistent with those of the class members. Smith v. The B&O Railroad Company, 473 F. Supp. 572 (D. Md. 1979). The Court finds that Plaintiffs satisfy these requirements.

In this case, plaintiffs assert that the design and installation of the stucco is improper on over 4000 Sun City Homes. Evidence has been reviewed by this Court in the form of expert testimony and affidavit. This Court finds that evidence establishes typicality.

The proposed class representatives' claims are typical because each class member owns a residence with a similar allegedly defective stucco system allegedly designed, installed, and/or sold by the Defendants/third-party Defendants. Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Decisions construing Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members and if the claims are based on the same legal theories. See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th. Cir.), *cert. denied* 429 U.S. 870 (1976); 1 H. Newberg, Newberg on Class Actions §3:13 (2002) (cases collected). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class." 7A Wright and Miller, Federal Practice & Procedure §1764 (1986). Here, the Court finds that the claims of Anthony and Barbara Grazia are typical of the claims of the other homeowners.

Adequacy of Class Representatives and Counsel

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRCP, Rule 23(a)(4). Adequacy of representation consists of two components: (1) there must be no disabling conflicts of interest between the class representative and the class and (2) the class representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), *cited with approval in* Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 388 S.E. 2d 799 (1990). In this case, the Court finds that the proposed class representatives and the class members' interests are identically aligned. They seek to have their homes repaired and hold liable those responsible for the damages. This Court notes that the Grazia complaint was filed in 2007 and that the Grazias have pursued this claim in a representative capacity for four (4) years, including a trip to the Supreme Court and back, as have their counsel. Plaintiffs' counsel are qualified, experienced, and able to conduct class

litigation. Attorney W. Jefferson Leath, Jr. has approximately thirty (30) years of experience in construction litigation and is familiar with issues surrounding class litigation, as is Attorney Michael S. Seekings with more than twenty (20) years' experience, and Attorneys John T. Chakeris and Phillip W. Segui, Jr., are similarly experienced.

<u>The Amount in Controversy Meets the Statutory Requirement</u>

Defendants argue that some houses in the putative class have no damage at all; thus, they further argue that Plaintiffs do not meet the one hundred dollar ($100.00) per claim threshold amount for a class to be certified. This argument is disputed by the Plaintiffs, who counter that even if damage is not currently visible on a particular structure, the defective stucco system will eventually cause damage. Plaintiffs allege that the only appropriate repair is to de-clad and then re-clad the houses with an appropriate stucco system, at a cost of approximately $75,000.00 per structure. Clearly, after reviewing the pleadings and the evidence of record, the Court finds that plaintiffs' allegations of the amount in controversy well exceed Rule 23's threshold requirement.

<u>Responses of the Defendants in Opposition to Class Certification</u>

The Defendants have raised numerous legal and factual arguments in opposition to class certification, contesting all requirements of Rule 23. First, Defendants argue Plaintiffs' claims under the SC Unfair Trade Practices Act are by law not amenable to class action prosecution. This position is correct, and as a part of this preliminary Order, these claims will be dismissed without prejudice by the Court. <u>See</u> <u>Grazia v. S. Carolina State Plastering, LLC</u>, at id. The dismissal is without prejudice at this juncture; however, in the event a Class is certified with finality in this case, the dismissal will be with prejudice.

On the issue of dismissing the Unfair Trade Practices Claim (UTPA), counsel for Del Webb/Pulte argues that the Court does not have the authority to *sua sponté* dismiss this claim

without a motion from Plaintiffs or any other party to do so; rather, the Court's only option is to deny certification of the class. The Court does not accept this argument. In moving for class certification, Plaintiffs have implicitly requested the dismissal of the UTPA claim, and in open Court on the record acknowledged that South Carolina law does not permit the UTPA claim to be prosecuted in a representative capacity, and acquiesced in the dismissal. Rule 23(d), SCRCP, permits the Court to impose such terms as are necessary to protect the interests of the parties. This dismissal protects the interests of the third-party Defendant, who now complains of it. Thus, third-party Defendant's objection is overruled.

The Defendants further argue that a class action will be of no benefit to the parties because each claim will still have to be individually investigated and determined, including individual structure destructive testing, and the damages for each home separately calculated. Moreover, Defendants argue that similarity of claims, in and of itself, does not meet the commonality requirement of Rule 23, and the alleged specific defects at the Grazia home are not probative as to the alleged problems at other claimants' residences.

To demonstrate this argument, Defendants raised factual points in opposition to class certification. They argue that some of the homes in question may have alleged defects as to inadequate or thin application of stucco, while others have a problem with the mix of ingredients used to create the stucco. Some houses have alleged problems with head flashing, some with sealant joints, others with control joints, some have cracking stucco while others do not, and some houses have alleged problems with weep configurations while others do not. The houses in question do not all use the same type stucco system or stucco product, and the stucco systems may be manufactured by different companies. Moreover, because the completion date of these structures spans a period of almost ten years, construction standards may differ. Some houses

may have had multiple owners who may have altered the stucco. Defendants also argue that certain members of the putative class are subject to certain affirmative defenses, while others are not, and that the class action procedure cannot be used to alter substantive law and deprive Defendants of these defenses with respect to any individual claim.

The Court is cognizant of Defendant's and third-party Defendants' arguments, and recognizes that factual and legal differences may exist within the putative class. For these reasons, this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs. The Court intends to employ the Right to Cure process as outlined below to further analyze and perhaps organize the various claims that exist in these cases. The Court opines that there *may* be certain sub-groups formed within the class action to facilitate the determination of liability and damages issues, if such procedure is found to be fair and efficient. *See* *McGann v. Mungo*, 287 S.C. at 570-71, 340 S.E.2d at 159 ("In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses."). Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses, the Court will require the Defendants to provide a listing of claimants for whom Defendants allege a specific affirmative defense is applicable, and the Court may thereafter form additional sub-groups within the Class to accommodate these defenses. The specifics of these procedures, if necessary, will be deferred until further development of the evidence through the discovery process. The Court specifically rejects Defendant's and third-party Defendants' contention, however, that the factual and legal components within the cases automatically defeat a class action approach to resolution

of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class.

After hearing arguments of counsel and reviewing the pleadings and exhibits submitted, it appears to the Court that common issues exist for all homes to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, as specifically defined below. While the Court recognizes Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of this Court that common, core issues are present in all the cases and that a class approach is not only the best, but the only method available to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs.

State case law directs that this Court take an expansive rather than narrow view of class action motions. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart"). This Court finds that this case presents a core set of facts contemplated by Rule 23 when considering certification. Moreover, the 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. See Grazia v. S. Carolina State Plastering, LLC, *Id.*, rehearing denied (Jan. 20, 2011).

Accordingly, for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act, this Court finds that Plaintiffs have met the requirements of Rule 23(a), and are entitled to a preliminary determination that Plaintiffs may proceed at this juncture using a class approach. The class is preliminarily recognized as follows: All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City

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Hilton Head to which SCSP applied the exterior stucco in whole or in 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. Further, Anthony and Barbara Grazia are approved as representatives of the putative class, and attorneys W. Jefferson Leath, Jr., Michael S. Seekings, John T. Chakeris, and Phillip W. Segui, Jr., are found to be competent and capable class counsel.

Requirement of Notice to Putative Class Members

The Court has requested the parties to reach an agreement on the contents of an opt-out class notice to all potential members. Counsel has been unable to do so. Accordingly, each party is requested to present to the Court a proposed opt-out Notice of Class Action and Exclusion Request Form for distribution to all potential class members within thirty (30) days of the date of this Order, consistent with the remaining provisions of this Order. This Notice must contain the standard information concerning the obligations, rights, and ramifications of acceptance or rejection of class membership, and include a date certain for closure of the opt-out period. Additionally, this Notice should inform the potential members that class certification is preliminary at this juncture pending the results of the Right to Cure process; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that based upon the Right to Cure responses, the Court will make a final determination of class certification; and, that the potential class members will be notified of this final decision and the legal ramifications thereof.

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Once the parties have submitted a proposed Notice to Potential Class Members and Exclusion form, the Court will either choose one party's form or combine portions of the submitted forms to reach its decision as to the final format of the document. It is likely that an additional hearing may be conducted on this matter prior to a final decision, and in such hearing the Court will resolve related issues such as the timetable for initiating the notice process, the necessity and authorization of permission to enter a property for inspection, and the result of failure of cooperation by a particular claimant.

Compliance with the Right to Cure Act and Future Imposition of Stay

The following procedures are imposed, pursuant to Rule 23(d)(2), SCRCP, to fairly and adequately protect the divergent interests of the multiple parties before the Court. Within seven (7) days following the closure of the opt-out period, Plaintiffs shall be required to provide to this Court at the Hartsville office, Defendants, third-party Defendants, and filed with the Clerk of Court a complete list of the proposed class, identifying the properties by name of owner(s) and street address. This listing shall be organized in two separate ways – one shall be in alphabetical order by name of the owner with street address and contact information included (mailing address if different from street address and home telephone number, or cellular number if no home number exists), and a second shall be a listing by street address, set forth street by street in sequential address number, with name of owner(s) included. Once this listing is filed and distributed as outlined above, it may only be amended (except for a change in contact information) by motion of a party and written permission of the Court, which shall not be freely given. At the time this listing is filed with the Clerk, pursuant to S. C. Code Ann 40-59-830, a Stay of proceedings shall be imposed until the requirements of the Act are met and procedures set out thereunder are completed. This Stay shall be automatic without need of issuance of a

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further Order from this Court. This Stay shall remain in effect until the conclusion of the claims procedure for all properties as outlined below, and shall be ended only upon issuance of an Order Lifting Stay from this Court after proper motion of any party.

To provide structure for compliance in such a large number of cases, Plaintiffs shall be given a period of one hundred and eighty (180) days from the imposition of the Stay to provide Defendants with the notice of claim required by Section 40-59-840 for all properties within the proposed class. Rather than provide all notices at once at the end of this entire period, working from either the alphabetical list or the sequential street list at the choice of Plaintiffs' counsel, Plaintiffs must provide one fourth of the total notices due on the final day of each forty-five day period within the given one hundred eighty days. In setting these deadlines, the Court realizes that this is an ambitious schedule; however, given the current age of this case and the number of potential claims, the need for timely disposition of this litigation demands that both parties acquire adequate staff to meet the timetables set forth herein.

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Because there is no specific exclusion in either case law or the language of the Act, the notice to the contractor required under the Act must be filed in a representative capacity by proposed class counsel, and must be signed by counsel and dated as to the date of service to contractor. For purposes or record keeping and administration, Contractor SCSP shall receive service of the notices in a representative capacity through counsel. The date of service on each individual notice shall trigger the response dates as set forth herein. Because of the magnitude of the number of claims, the amount of work required in the initial investigation of the claims by contractor, and the fact that Plaintiffs have chosen to proceed by class action, the Court will grant a period of sixty (60) days to contractor to provide the individual claim response required by Section 40-59-850, and failure to respond within sixty (60) days shall be deemed a denial of the

claim. These claim responses shall be signed and dated by counsel, and shall be served upon class counsel. If contractor does respond with an offer of settlement, claimant shall be given thirty (30) days after the date of service to respond to contractor's offer as required by Section 40-59-850(b).

The required content for each notice of claim is set forth in Section 40-59-840. Proposed class counsel is hereby advised that, for purposes of analyzing and organizing class certification issues, 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.

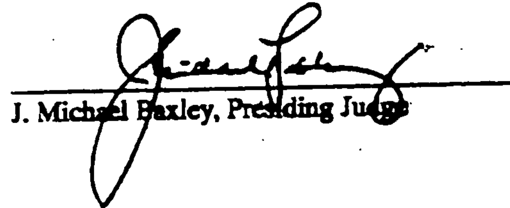
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel specifically excluded. However, an inspection may not be cancelled or postponed because one or more of the attorneys for any party cannot be present. The contact information is provided on the alphabetical list of potential class members so that the parties may engage in the inspection process directly between themselves without need of counsel, if such is determined to be practicable by all concerned.

Conclusion

Compliance with all of the procedures and requirements contained in this Order will prove beneficial for everyone involved in this dispute. At this juncture in this litigation, the use of the class action vehicle will operate to conserve valuable judicial resources as well as concentrate and clarify the common issues of law and fact that predominate this dispute. At the

same time, the rights and interests of all parties will be fully protected by adhering to the guidelines outlined by the Court.

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

Tab 7

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
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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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,

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[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.

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[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.

<u>Fourth</u>, 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.

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[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*

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[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. <u>The "class order" creates an impermissible opt in class.</u>

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: "<u>Upon a motion for class certification</u>, 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.

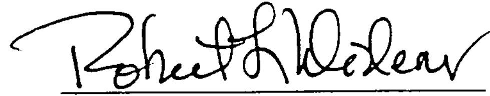
As a third alternative, and assuming the other issues raised herein are not to be reviewed immediately, it is respectfully submitted that this Court should issue an order that corrects the trial court's mistaken reading of this Court's opinion in *Grazia* and instructs the trial court to reconsider class 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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July 8, 2013
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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 <u>before</u> a homeowner (such as Plaintiffs here and the class members) may sue:

1. At least "ninety days <u>before filing</u>" a lawsuit, the homeowner "<u>must</u>" serve the contractor with a "written notice of claim" that "<u>must</u> 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 "<u>shall</u> 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
Supreme Court Appellate Case No. 2013-000233

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

v.

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

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

v.

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

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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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.

QUESTIONS PRESENTED

1. Whether the Court of Appeals err by dismissing the appeal since the Orders deny South Carolina State Plastering Statutory and Due Process Rights by re-writing the Right To Cure Act.

2. Whether the Court of Appeals err dismissing the appeal since requiring Class Members to provide Notice of Defect creates a *de facto* Opt-In Class, thus violating the Due Process Rights of putative Class Members.

STATEMENT OF THE CASE

Petitioner South Carolina State Plastering ("SCSP") appealed the trial court's order, as well as the trial court's order denying their motion for reconsideration and clarification. On appeal, SCSP filed a motion to determine appealability, and the Plaintiffs thereafter filed a motion to dismiss the appeal. By Order of a single judge, the Court of Appeals granted Respondent's Motion to Dismiss the Appeal. Petitioner filed a timely Petition for Rehearing. The Court of Appeals denied the Petition for Rehearing on January 15, 2013. 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 7-8). SCSP petitioned for rehearing, and the Court of Appeals denied the petition. (JA 3-4).

Pursuant to Rule 242, SCACR, SCSP 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, SCSP 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, SCSP 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.

SCSP hereby incorporates and adopts all arguments, statements, and grounds made by Del Webb and Pulte in their separately filed Certiorari Petition.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY GRANTING RESPONDENTS' MOTION TO DISMISS THE APPEAL.

The circuit court's orders dated December 19, 2011[1] and May 7, 2012[2] are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because together they deprive the Petitioner, South Carolina State Plastering, LLC (hereinafter "SCSP") of a substantial right for which it will have no recourse after final judgment. Specifically, the orders deprive SCSP of the ability to meaningfully exercise its rights under the South Carolina Notice and Opportunity to Cure Residential Defect statute, S.C. Code Ann. §§ 40-59-810 *et seq.*, by impermissibly modifying the statutory requirements and creating attorney-client relationships that undermine the legislative intent. In addition, the orders

[1] This order was issued in response to Plaintiffs' Motion to Certify the Class. Hereinafter, referred to as "Class Order."

[2] This Order denies SCSP's Motion to Reconsider and/or for Clarification. Because the trial court declined to make any change to the Class Order, references to "the Order" hereinafter are to the Class Order.

create a *de facto* "opt-in" class, which immediately violates the due process rights of the absent class members and threatens to abrogate SCSP's due process right to a final judgment with *res judicata* protections.

If an interlocutory order is immediately appealable for any reason, all other issues which are intertwined can also be considered in the interest of judicial economy.[3]

Although the Class Order arises from a Motion to Certify a Class, it actually contains multiple orders, as can be readily seen from the title given to it by the trial court: "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; AND, SETTING FORTH PROCEDURES FOR COMPLIANCE WITH THE RIGHT TO CURE CONSTRUCTION DWELLING DEFECT ACT." Portions of the Class Order immediately dispose of issues affecting the due process and statutory rights of SCSP. Because the aspects of the orders directly addressing the Right to Cure Act are immediately appealable, the class order should be considered in their entirety at this time.

The impact of taking this appeal now on judicial economy is substantial. Reviewing this Order now, in its entirety, may avoid years if not decades of further litigation before the Respondents' claims, and the claims of others who have filed individual suits, are resolved. The Class Order raises several significant issues of law.

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[3] *See Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 n.14 (Ct. App. 2008)

The issues include the propriety of the court-created class definition, the manner in which the trial court has defined and made findings of "typicality" and "commonality," the approval of the class representatives and counsel as adequate under the circumstances of claim splitting, claims waiver, and the additional issues set forth in Del Webb and Pulte's Petition incorporated herein by reference.. At some point, these issues (and likely many more) will be before this Court. Between now and then, if this entire order is not immediately reviewed, three very expensive and time consuming phases will take place: 1) the Right to Cure process; 2) individual discovery on all claims and defenses; and 3) individual trials on all non-class claims.[4]

Respondents seek to frame the December 19, 2011 order as a procedural Order granting class certification and setting the procedural structure of the case moving forward. It does neither. In its Order, the trial court does not actually certify a class, but rather has made preliminary findings that the class defined by the court may meet the Rule 23(a) requirements. The court then creates an opt-in procedure involving a court-defined process in lieu of the statutorily enacted Right to Cure Act.

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[4] The trial court has explicitly acknowledged that there are significant issues that are not common or typical to the class that arise from the same transaction or occurrence as the class claims. For example, SCSP has asserted the Statute of Limitations defense as to the Grazias and all other class members. SCSP is entitled to engage in discovery on this and all other individual issues. If the discovery on each house takes no more than one day, working 200 days per year will require more than 20 years to complete discovery. To avoid improper claim splitting, every class member must present his individual claims as part of this trial. There is no jury or judge who could preside over a trial of that length.

A. **The Orders Deny South Carolina State Plastering Statutory and Due Process Rights by Re-Writing the Right To Cure Act.**

In the Class Order, the lower court sets forth a procedure in an effort to conform the typical class certification and notification process to the requirements of the Right to Cure Act (hereinafter sometimes referred to as RTC"). In doing so, the trial court explicitly and implicitly requires the following:

1. Within seven days of the close of the "opt-out" period, class counsel is to file and serve a list of the class members.
2. On the day the list is filed and served, an automatic stay is imposed that will remain in effect until a motion is made and further court order is issued. This motion is to be made only after the "Right to Cure period" has concluded.
3. On the forty-fifth day after the list is filed and served, class counsel must serve notices pursuant to the Right to Cure Act for one-fourth of the properties in the class. Notices for an additional one-fourth of the class must be served every forty-five days thereafter. The effect of this sequence is to require service of all RTC notices 180 days after the stay is imposed.
4. Each time that RTC notices are served, South Carolina State Plastering will have 60 days to exercise its rights to seek clarification of the notice, make an inspection of the property, and submit any offer of settlement to individual class members. In total, this provides a period of 195 days

from the first receipt of RTC notices to address the concerns of potentially 4300 class members.

5. The RTC notices are to be signed by class counsel, acting as the representative of the class member. Each notice must be specific to the particular property.
6. Responses to the notices are to be served on class counsel.
7. Class members, acting through class counsel, have 30 days to respond to any offers of settlement.
8. At some future date, the Court will review the RTC notices and make any refinement of the class definition, including the possibility of creating sub-classes. Presumably, this would require new Notices to be sent.

This process, however well intentioned, suffers from several fatal defects that have an immediate and long-term impact on the due process and statutory rights of SCSP and absent class members which make the Class Order immediately appealable and should be addressed now. For example,

- The process puts the cart before the horse by impermissibly compelling individuals to engage in litigation before first complying with the RTC Act.
- The process requires that property owners submit to the RTC process before a class has been finally certified if they have any interest in participating in the potential class, thus not knowing what class they might be involved in, and what rights will be protected or waived in the action.

- The process effectively denies SCSP a meaningful opportunity to inspect and offer to resolve claims by forcing SCSP to respond to RTC notices in a timeframe and manner never contemplated by the legislature.
- The process creates an involuntary, direct attorney-client relationship between class counsel and individual class members with inherent and non-waivable conflicts of interest.
- The process denies SCSP the right to negotiate directly with property owners who are not represented by counsel with inherent conflicts of interest in the subject matter of the litigation.
- The process creates a *de facto* two-step "opt-in" procedure because a potential class member's failure to comply with RTC process will necessarily require the exclusion of the potential class member in order to allow the litigation to proceed.

A maxim that has been repeated throughout this litigation is that the class action procedure cannot be used to expand or abridge the statutory or due process rights of the litigants. However, in an effort to conform the procedures of the RTC Act with the peculiarities of class litigation, the court has done just that.

First, the court is allowing those who have not complied with the Act to be participants in this litigation. The explicit requirements of the Act are that a claimant

serve the builder with a notice of defect 90 days prior to filing the lawsuit.[5] In addition, the Act provides that if the Act is not complied with pre-suit, the matter must be stayed until compliance. The court has not taken into consideration how it will determine that the Act has been complied with and does not address the very real possibility that not all of the putative class members will comply. Therefore, the Act is rendered meaningless and the rights and protections afforded by the act are nullified.

Second, the Act provides a 15-day period to seek clarification. S. C. Code Ann. § 40-59-840. The court has abrogated SCSP's right to seek clarification of the notice of defect in the event there is any uncertainty. This right is an integral part of the Act, and the protection afforded by this provision is being denied to the Defendants.

Third, although the court nominally gives SCSP 60 days to inspect the residences in response to a notice of defect, given that it could receive as many as 1000 every 45 days, the Court is effectively allowing only about 20 minutes per house over this span of time. The statute allows 30 days to conduct an investigation and make an offer to compromise. S.C. Code Ann. § 40-59-850 (A).

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[5] The General Assembly has expressly stated that the purpose of this Act is to provide for pre-litigation dispute resolution.

WHEREAS, the General Assembly finds that South Carolina needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation, while adequately protecting the rights of homeowners; and

> WHEREAS, the General Assembly declares that an effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation. . . .

Act 82, 2003 S.C. Acts and Jt. Resolutions, p. 943.

Finally, the process outlined by the Court denies SCSP the opportunity to negotiate and resolve claims in the manner intended by this legislation. For example, SCSP would not have the ability to reach a direct settlement with a homeowner who had not opted out because the Court would have to determine whether an individual homeowner's settlement does prejudice to the rights of the other members of the class and may require court approval/input for each settlement which is incompatible with the Right to Cure Act. Also it would negate the efficiency under Rule 23. *See Premium Inv. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) (Individual members of a class may settle their claims against a party to the class action provided they are not class representatives, assumed no fiduciary duty to the class and their settlement does not prejudice the rights of other members of the class").

These modifications are in direct contravention of the court's obligation to protect these statutory rights when seeking to create a class. Moreover, at the end of it all, the conflict of interest between class counsel and class members arising from the RTC process will deprive SCSP of the *res judicata* benefit of the class action.[6] In the event that a class member is dissatisfied with the outcome of the class litigation (possibly because the ultimate distribution is less than an offer of settlement), the class member could point to the conflict as a means of nullifying his decision to participate in the class

[6] For a thorough discussion, please see Del Webb/Pulte's Petition incorporated fully herein by reference.

B. Requiring Class Members to Provide Notice of Defect Creates a *de facto* Opt-In Class

Opt-in class actions are not allowed under South Carolina Law. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008) (under Rule 23, South Carolina law specifically prohibits a class action to be an opt-in). Members should not be required to undertake any action to remain in the class which is what they would be required to do under the RTC Process, thereby creating an opt-in class. Assuming that it is possible to determine who has not complied, the result of non-compliance will be to dismiss these claims with prejudice.

The failure of a class member to comply with the RTC Act must result in exclusion from the class. Both the Class Order (JA 21-23) and the RTC process (S.C. Code Ann. § 40-59-830) contemplate that this litigation is stayed pending compliance with the RTC. If the claims of non-compliant class members are not dismissed, the stay cannot be lifted. This indefinite stay deprives compliant class members of due process because their right to relief has been encumbered by another, over whom they have no control.

This Class Order by the circuit court picks up where the Supreme Court left off in Grazia. In the previous appeal, the Supreme Court addressed a question of law based purely on the pleadings. The holding overturned the trial court on the narrow issue of whether the RTC Act made class action unavailable to all litigants in cases alleging defects in residential construction. The Court explicitly left open the question of how the two inter-related in the event a class were certified, and this issue must be addressed.

II. SOUTH CAROLINA STATE PLASTERING JOINS IN AND INCORPORATES THE ARGUMENTS MADE BY DEL WEBB COMMUNITIES, INC. AND PULTE HOMES, INC.

South Carolina State Plastering joins in, adopts, and incorporates all of the arguments made by Del Webb Communities, Inc. and Pulte Homes, Inc. in the related appeal arising out the same orders in which Del Webb Communities, Inc. and Pulte Homes, Inc. have also filed a Petition for Writ of Certiorari.[7]

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 Del Webb and Pulte (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.

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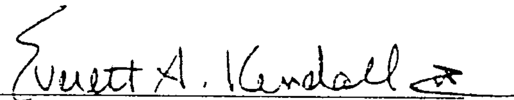
[7] Supreme Court Appellate Case No. 2013-000238.

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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July 8, 2013
Columbia, SC

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. 2013-000233

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

v.

South Carolina State Plastering, LLC,..Petitioner.

South Carolina State Plastering, LLC,....................................Third-Party Plaintiff,

v.

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on July 8, 2013, addressed to their attorneys of record and all counsel of record, listed as follows:

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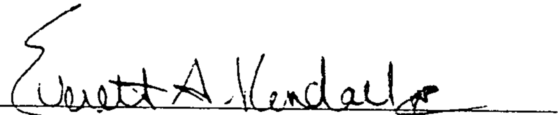
July 8, 2013



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