

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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INDEX

Certificate of Counsel1

Questions Presented1

Statement of the Case.....1

Arguments

- 1. The Court of Appeals erred by granting Respondents’ motion to dismiss the appeal2
 - A. The Orders deny South Carolina State Plastering’s statutory and due process rights by re-writing the Right To Cure Act.....5
 - B. Requiring class members to provide notice of defect creates a *de facto* opt-in class10
- 2. South Carolina State Plastering joins in and incorporates the arguments made by Del Webb Communities, Inc. and Pulte Homes, Inc.11

Conclusion11

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, 2011¹ and May 7, 2012² 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), SCRPC; 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.

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.

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 subclasses. 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).

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. . . .

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. *Salmonsens 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.

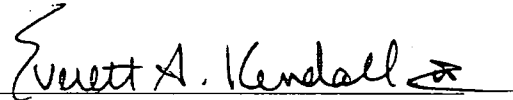
As a third alternative, and assuming the other issues raised herein are not to be reviewed immediately, it is respectfully submitted that this Court should issue an order that corrects the trial court's mistaken reading of this Court's opinion in *Grazia* and instructs the trial court to reconsider class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

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
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Appellate Case No. 2013-000233

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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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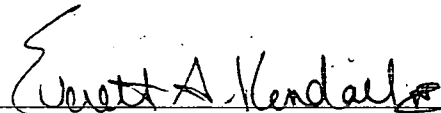
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VIA HAND DELIVERY

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RE: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs v.
Civil Action No.: 2007-CP-07-1396
Our File: 3826-6177

Dear Ms. Kitchings:

Enclosed for filing, please find two copies of South Carolina State Plastering's Petition for a Writ of Certiorari to the Court of Appeals or in the alternative, Petition for a Writ of Certiorari to the Court of Common Pleas, which is being filed with the Supreme Court today.

Please file the Petition and return the file stamped copy to me via our courier.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.

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EAK/mha
Enclosures

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