THE STATE OF SOUTH CAROLINA
In The Supreme Court

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



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

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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.

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

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# REPLY ARGUMENTS

Rather than address the merits of the specific arguments made in the certiorari petition, the Plaintiffs make a few general denials and then accuse counsel of unethical conduct in the prosecution of the defense and appeal. As demonstrated below, the Plaintiffs' general denials do not dispute the arguments made in the certiorari petition, and the accusations of unethical conduct have no merit.

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

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

As emphasized in the certiorari petition, the Plaintiffs' own experts 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. 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. (See Cert. Pet. at 5-7, 9, 11-12). The Plaintiffs do not dispute any of this. (Cert. Ret., *passim*).

In short, *all* of the Plaintiffs' *own experts* agreed that each house in the class must be inspected and tested. The same is true of the preliminary class created and certified *sua sponte* by the trial court. 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*.

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

Rather than deny certification of the class alleged by the Plaintiffs and for which they sought certification, the trial court *sua sponte* created a new class and immediately certified it without discovery on a preliminary basis. (Cert. Pet. at 1-2, 4). The Plaintiffs do not dispute this. (Cert. Ret., *passim*).[1] Recognizing that it was unknown whether this new court-created class existed, the trial court *sua sponte* ordered a notice and inspection process under the Right to Cure Act so that the court could use the results of that process to determine whether the court's newly created class even existed. The Plaintiffs do not dispute this. (Cert. Ret., *passim*; see n.1, *supra*).[2]

As emphasized in the certiorari petition, the Right to Cure process created by the trial court is the antithesis of a class action and is fraught with immediate and insurmountable problems. (Cert. Pet. at 7-10). The Plaintiffs do not dispute this. (Cert. Ret., *passim*; see nn.1 and 2, *supra*). For example, the Plaintiffs do not respond in any manner to the argument that the settlement procedures under the Right to Cure process created by the trial court results in a conflict of interest between class counsel and the class members, and this conflict exacerbates other conflicts of interest identified in the certiorari petitions of all petitioners. (Cert. Pet. at 10 and n.7).

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[1] The Plaintiffs summarily assert that the trial court "grant[ed] the [Plaintiffs'] motion for class certification." (Cert. Ret. at 4). This is simply false. The Plaintiffs moved to certify the class alleged in their complaint – the trial court did not certify this class.

The Plaintiffs' certiorari return also contains three general statements that arguably "respond" to this. At page 3, the Plaintiffs state: "Petitioners base their argument, in large part, on their view that the Circuit Court has somehow "*sua sponte*" issued orders and rulings in what is a very simple straightforward case. . . . They would have this Court believe the Circuit Court has issued Orders and proceeded in a manner inconsistent with motions, rules and directives from this Court, which is pure and simple nonsense." (Cert. Ret. at 3). At page 8, the Plaintiffs state that the appealed order is "consistent" with this Court's opinion in *Grazia*. (Cert. Ret. at 8). These statements, however, set forth no analysis, nor is any analysis set forth anywhere in the Plaintiffs' certiorari return. (Cert. Ret., *passim*).

[2] At one point, the Plaintiffs summarily assert that the Right to Cure process created by the trial court was done "at the request of the [Petitioners]" and later assert summarily that the trial court's "framework of compliance" with the Right to Cure Act was based on Petitioners' motion. (Cert. Ret. at , 8). This is simply false. The Petitioners never asked the trial court to create a new class, certify that class on a preliminary basis, and then use the Right to Cure Act to determine whether the newly created class even existed.

## 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.

As emphasized in the certiorari petition, the trial court misread this Court's opinion in *Grazia v. South Carolina State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010) as a directive to certify some class in this case despite this Court's clearly contrary statements in *Grazia*. (Cert. Pet. at 4-5, 13, 15-16, 16-17). The Plaintiffs do not dispute this. (Cert. Ret., *passim*).

As emphasized in the certiorari petition, this Court directed the trial court to first decide whether the Plaintiffs' alleged class met the certification requirements of Rule 23, SCRCP, and, if so, 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.

*Grazia*, 703 S.E.2d at 204 (all emphasis added) (citation omitted). (Cert. Pet. at 1-2, 3, 4, 11-12, 15). The Plaintiffs do not dispute this. (Cert. Ret., *passim*). When the Plaintiffs moved to certify their alleged class, the trial court did not certify the alleged class. Rather, the court *sua sponte* changed the class definition and immediately certified this court-created class without discovery as a "preliminary" class. The trial court recognized that it was unknown whether the new court-created class even existed. Thus, the trial court ordered the parties to engage in a notice and inspection process under the Right to Cure Act for each of the 4,000 homes in the preliminary class so that the trial court could use the results to determine whether the new court-created class in fact existed. (Cert. Pet. at 1-3). The Plaintiffs do not dispute any of this. (Cert. Ret., *passim*, see n.1, *supra*). In short, the trial court reversed the procedure ordered by this Court in *Grazia*. Rather than first determine whether a class exists and, if so, then address whether compliance with the Right to

Cure Act is feasible, the trial court created a Right to Cure process as a means to determine whether a class exists. (Cert. Pet. at 11-12). The plaintiffs do not dispute this. (See n.1, *supra*).

As argued in the certiorari petition, the trial court created an impermissible opt-in class with its Right to Cure process. (Cert. Pet. at 12-13). The Plaintiffs do not dispute this. (Cert. Ret., *passim*). As also argued in the certiorari petition, the trial court's mis-reading of this Court's opinion in *Grazia* led it to become a *de facto* advocate for class certification. (Cert. Pet. at 13). The Plaintiffs do not dispute this. (Cert. Ret., *passim*).

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

As argued in the certiorari petition, the class order affects the merits and therefore is immediately appealable. (Cert. Pet. at 13-14). The Plaintiffs do not deny this except to summarily assert that the appealed orders are not final and "[n]either involves the merits." (Cert. Ret. at 7).

## 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).

As argued in the certiorari petition, this Court should exercise its discretion to review any unappealable issues in conjunction with its review of any issues that it finds appealable. (Cert. Pet. at 14). The Plaintiffs do not dispute this except to the extent they make general arguments that there are no appealable issues. (Cert. Ret., *passim*).

## 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.

As argued in the certiorari petition, the Petitioners respectfully submit that this Court should issue a writ of certiorari to the Circuit Court and review its decisions in this case, assuming this Court concludes those decisions are not immediately appealable. (Cert. Pet. at 14-16). The Plaintiffs do not dispute this. (Cert. Ret., *passim*).

## V. The Plaintiffs' accusations of unethical conduct have no merit.

As demonstrated above, the Plaintiffs never respond with any specificity or analysis to the arguments made in the certiorari petition. Rather, they make a few general arguments and then falsely accuse Petitioners' counsel of unethical conduct in purposely delaying the proceedings in this case. (Cert. Ret., *passim*). Responding to these accusations requires a Supplemental Joint Appendix (cited as SJA ___). It also requires a digression into the history of the *Oros* case, for which Petitioners apologize to this Court.

The centerpiece of the Plaintiffs' accusations is an excerpt from a motions hearing in the arbitration of the *Oros* case, which the Plaintiffs cite out of context to allege that Petitioners' trial counsel has engaged in delay tactics with the hope that members of the putative class would die before the present case is resolved. (Cert. Ret. at 2). This is simply false.

The *Oros* case was presented to and decided by a panel of arbitrators: Thomas J. Wills, M. Dawes Cooke, Jr., and R. Michael Ethridge. (SJA 23). It involved similar allegations to those made in the present case, and the plaintiffs were represented by the same counsel as the Plaintiffs in the present case, and the *Oros* plaintiffs also sought class certification. A brief digression is necessary to place the cited hearing in proper context:

1. The hearing was held in December 2007. (SJA 1). At issue was a motion to strike the class allegations in the *Oros* complaint, because the plaintiffs had not alleged compliance with the Right to Cure Act. (SJA 2-3).

2. This was the same motion made and granted by the trial court in the present case, which this Court reversed in October 2010, almost three years after the motions hearing in *Oros*. See *Grazia, LLC*, 703 S.E.2d 197 (S.C. 2010).

3. It was against this factual backdrop that Petitioners' counsel stated that full compliance with the Right to Cure Act by all putative class members would likely be a very lengthy process, and it was possible that some homeowners would pass away before there was sufficient compliance to allow the arbitration panel to even consider the issue of class certification.

Ultimately, the Arbitration Panel denied class certification on different grounds, to-wit: that the named plaintiffs were not adequate representative of the class, because they were willing to waive potential claims by other class members in order to achieve certification of the class. As a result, the named plaintiffs had interests that were "adverse to those of the other members of the Putative Plaintiff Class." (SJA 16). Thus, it was "apparent that the Representative Plaintiffs do not adequately represent the interests of the Putative Plaintiff Class." (SJA 17). In addition, and again to achieve class certification, the named plaintiffs limited the class claim to a breach of warranty claim to the exclusion of any other theories. This further demonstrated "the adversity between the [named plaintiffs'] interests and those of the Putative Plaintiff Class." (SJA 18). Accordingly, the Arbitration Panel denied class certification because "the Representative Plaintiffs – in an effort to maximize the likelihood of class certification – have limited the claims asserted on behalf of the class to breach of warranty claims related to alleged stucco defects" and, therefore, they failed to "carry their burden of proof that they are adequate representatives of the Putative Plaintiff Class." (SJA 22).[3]

The Plaintiffs do not dispute the accuracy of the Petitioners' timeline prediction in *Oros*, nor can they in good faith. On July 19, 2012, the Plaintiffs' attorneys conducted a "town hall"

[3] Here, the named Plaintiffs and their counsel are inadequate representatives of the alleged class for the same type of reasons. Here, as in *Oros*, the class claims are limited to stucco defects to the exclusion of any other type of claims that class members may have. In addition, the named Plaintiffs here have also waived all claims for past stucco repairs in order to achieve class certification. They have also agreed to waive any claim under the South Carolina Unfair Trade Practice Act, which is particularly antagonistic to the claims of the class members.

The Plaintiffs and their counsel obviously believe that the SCUTPA claim is a valid claim – otherwise, their complaint violated Rule 11, SCRCP. Waiving this claim dramatically reduces the potential recovery for all class members. The Plaintiffs damage claim is that every home in the class must be stripped and re-clad at a cost of $75,000.00 per home, for a total class recovery of more than Three Hundred Million Dollars (75,000 x 4,000). From this fund, all costs and attorneys fees must be paid before any distribution to the class members. As a result, each member of the class would receive substantially less than the $75,000 that the named Plaintiffs and their counsel claim is needed to make the class members "whole." In a SCUTPA action, however, the class members could receive treble damages of $225,000 **plus** a separate award of attorneys' fees, *i.e.*, the class members could receive substantially more than $75,000.00. The Plaintiffs and their counsel are willing to waive this claim on behalf of the class members in order to advance their own interests in having the class certified. Thus, as in *Oros* and even more so here, there is an irreconcilable conflict of interest that precludes class certification.

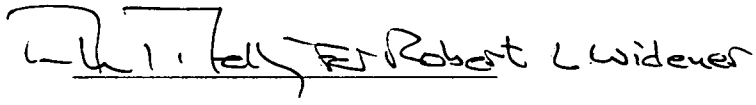
meeting for the putative class members. At that meeting, they stated that it would take over 217 years to try the class members' claims individually if they were to opt out of any class and many of them would pass away before their claims could be tried. (SJA 24). Given this prediction by their own attorneys, the Plaintiffs can hardly dispute the accuracy of the estimate given by Petitioners' counsel in the *Oros* arbitration. Moreover, Petitioners' point was that the Panel should either stay the case or dismiss the class allegations, and given the potential delay of a stay, the better course was to dismiss the class allegations and allow anyone with a problem to bring their own claim.

The Plaintiffs also accuse undersigned counsel of unethical conduct in obtaining extensions for the purpose of delaying this case. Undersigned has never and would never commence or continue any appeal for any improper purpose. For example, the Plaintiffs complain that undersigned counsel obtained several extensions in the certiorari proceedings before this Court. As Plaintiffs' counsel knows, because the grounds were stated in the extension motions which Plaintiffs did not oppose, these extensions were needed due to undersigned counsel's extended absence from work while tending to the needs of his dying mother and the backlog of work that awaited undersigned counsel when he returned to work.

## CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the certiorari reply filed by South Carolina State Plastering, as well as the reasons set forth in all certiorari petitions, it is respectfully submitted that this Court should grant the relief requested in the certiorari petitions.

Respectfully Submitted,



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August 26, 2013
Columbia, SC

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Of whom Del Webb Communities, Inc., and
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## CERTIFICATE OF SERVICE

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I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Petitioners Del Webb Communities, Inc. and Pulte Homes, Inc.'s *REPLY TO RETURN TO PETITION FOR WRIT OF* CERTIORARI, or in the alternative, PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS by depositing a copy in the United States Mail, postage prepaid, on August 26, 2013, addressed to all attorneys of record, as follows:

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