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.

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,

and

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

v.

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

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

Everett A. Kendall, II
Christy Mahon
SWEENY, WINGATE & BARROW, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR PETITIONER
South Carolina State Plastering, LLC

Robert L. Widener
A. Victor Rawl, Jr.
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR PETITIONERS
Del Webb Communities, Inc.
and Pulte Homes, Inc.

Other Counsel of Record

W. Jefferson Leath, Jr., Esq.
Michael S. Seekings, Esq.
LEATH, BOUCH, CRAWFORD & VON KELLER, LLP
Post Office Box 59
Charleston, South Carolina 29402
(843) 937-8811

John T. Chakeris, Esq.
THE CHAKERIS LAW FIRM
Post Office Box 397
Charleston, South Carolina 29402
(843) 853-5678

Phillip W. Segui, Jr., Esq.
SEGUI LAW FIRM, LLC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29464
(843) 884-1865

ATTORNEYS FOR RESPONDENTS

David S. Cobb, Esq.
TURNER PADGET GRAHAM & LANEY, P.A.
Gateway Center, Suite 200
40 Calhoun Street
Post Office Box 22129
Charleston, South Carolina 29413-2129
(843) 576-2803

ATTORNEYS FOR DEFENDANT KEPHART ARCHITECTS, INC.

INDEX

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
: FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) CASE NO. 06-CP-07-454

JOSEPH S. OROS, and MARY A. OROS, on behalf of themselves and others similarly situated,

Plaintiffs,

-vs-

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

Defendants.

MOTIONS HEARING

Given before G. Michael Alexander, Notary Public and Registered Professional Reporter, at the law offices of Wills & Massalon, LLC, 134 Meeting Street, Suite 100, Charleston, South Carolina, on Friday, December 7, 2007, commencing at 8:00 o'clock, a.m.

For the Board of Arbiters:	WILLS & MASSALON, LLC By: Thomas J. Wills M. Dawes Cooke, Jr. R. Michael Etheridge Attorneys at Law 134 Meeting Street Charleston, SC 29401
For the Plaintiffs:	CHAKERIS LAW FIRM By: John Chakeris Attorney at Law 231 Calhoun Street Charleston, SC 29401
	SEGUI LAW FIRM, LLC By: Phillip W. Segui, Jr. Attorney at Law Post Office Box 1450 Mt. Pleasant, SC 29465-1450
	LEATH, BOUCH & CRAWFORD, LLP By: W. Jefferson Leath Attorney at Law 92 Broad Street Charleston, SC 29401
For the Defendants: (Del Webb)	CLAWSON & STAUBES, LLC By: Albert A. Lacour, III Attorney at Law 126 Seven Farms Drive, Suite 200 Daniel Island, SC 29492
(Pulte and Del Webb)	McNAIR LAW FIRM, P.A. By: A. Victor Rawl, Jr. Attorney at Law The Tower at Gervais 1301 Gervais Street Columbia, SC 29201
Also Present:	Rhett Kendall

ÀPROCEEDING BEFORE BOARD OF ARBITERS¾

MR. WILLS: I wrote down what I thought we were here to talk about. And I think, Vic, your e-mail is the same as my list.

We've got two matters to take up I think with the three arbitrator panels, which are the motion to strike class allegations, based on the plaintiff's failure to, alleged failure to comply with the right to cure statute. And within that, as I recall, from Johnny, the last hearing we had, and I've read through my order, it indicated that it was generally agreed that there had not been technical compliance. And then I thought that it would be an effort to comply with it, and then I really haven't heard anything about what was done and who did what. So I would like to know a little bit more about what happened. And then we can take that up.

The other one is the motion to intervene by South Carolina State Plastering. The other matters that are to be the cited by me or discussed with me are the motions, that are really just discovery matters, it looks like, that we can deal with, but I think probably we need to deal those other matters first, especially the motion to stay and the effect of compliance or non-compliance. I guess that's really your motion.

MR. RAWLS: Yes, sir.

MR. WILLS: Now, is that right? Is that all we're here to talk about or did I miss one? Because there's a whole lot of e-mails and I guess a motion a week.

MR. CHAKERIS: I think you got it discovered.

MR. LEATH: Discovery matters.

MR. RAWLS: There are three different discovery motions.

MR. WILLS: Okay. Somebody has failed to comply with. We all want to take Elkins' deposition and most recently there's a deposition you have a conflict, and we can talk about that.

MR. RAWLS: I have to be in court.

MR. LACOUR: Those are all from you after we get the --

MR. RAWLS: Thank you very much, all three of you. We appreciate very much your helping everybody at this table out in this case.

To answer Tom's question, first, yes, Tom issued an order back, I believe it was, I have it right here --

MR. LACOUR: August 30.

MR. RAWLS: -- August 30th, which granted the defendant's motion on the South Carolina notice and

offer to cure construction, as well as defect act, which is section 4059, 810 et sec, which I just call the right to cure statute. And we had moved to stay the case, because the named plaintiff had not complied with the right to cure statute.

And there are a couple of things that were agreed to at the hearing. That we would agree to a shorter stay, there's a 90-day mandatory stay, if the plaintiff didn't comply with the statute, we agreed to a

30-day stay, we agreed to accept, at one of the depositions, as the statutory notice. And what happened then is pursuant to the statute the defendants made an offer to cure the defect, made an offer to fully repair the plaintiff's house, the Oros's house at issue. Got a response back from plaintiff's counsel saying, you know, basically we agree to fully reclad it, and if so what engineering issues will be considered. We sent a letter back saying, "Yes, we'll agree to fully reclad the house. Since our experts disagree as to what the design specifications should be, please give us a list of your specific design specifications."

And then we got a letter back from plaintiff's counsel saying that they could not even consider a settlement offer for only the named plaintiff. The named plaintiff, of course, just like any plaintiff, has to

comply with the right to cure statute before a case is afforded in South Carolina. Our contention here today is, one, the named plaintiff has not complied with that, in that they have not even considered a settlement offer. But it goes beyond that.

You know, first of all, this issue has become a large problem at Sun City/Hilton Head, because we received e-mails from people, who received e-mails from plaintiff's counsel, you know, and it appears, and I have a copy of what we received, and I presume that it is accurate. But this is apparently a memo that's being

sent to Sun City/Hilton Head residents by plaintiff's counsel. And the two of you, that have not been involved in the case the entire time --

MR. LEATH: I don't know what it is.

MR. RAWLS: I'm assuming it's something y'all mailed to --

MR. SEGUI: To our clients.

MR. RAWLS: Well, we received copies of it from homeowners.

MR. LEATH: That's interesting.

MR. RAWLS: Because what happens is the homeowners, you know, the homeowners send my clients information, and kind of play the plaintiff's lawyers against my clients, when it comes to if they want

something fixed. And there's been argument all along, in this case, over can the defendants fix any allegations of defective products in the houses out at Sun City/Hilton Head. And my client's policy has always been if they receive a call about a problem, they go out and look at it, and if it's a defect, they fix it. But the problem with this letter is we sent our request to cure the defects, to settle the case, on the right to cure statute on, and all these letters are attached to the motion to strike allegation. On September 25th we sent the letter saying we would like to settle the case. The intermediate correspondence. And then on October 15th we received a letter back from plaintiff's counsel saying that they're unable to even consider the answer.

MR. ETHERIDGE: What are those dates again? I'm sorry.

MR. RAWLS: September 25th. We e-mailed and mailed to plaintiff's counsel the offer to fully repair.

MR. ETHERIDGE: Right. And when was their response?

MR. RAWLS: The final response was October 15th.

MR. ETHERIDGE: Thanks.

MR. RAWLS: The problem is that this memo,

that is dated October 2nd, 2007, and states specifically that the defendants moved for, and it's in the bottom of the first paragraph of this memo, the defendants moved to stay because of the statutory right to cure the defects in the Oros home. "This right to cure issue was just very recently raised by Pulte, despite the Oros's claim pending for over one year. Not surprising. And it's almost three weeks since Pulte has asserted this. The arbiter and we have heard nothing from them since this issue."

So they're telling the homeowners out there that we have not offered to settle the Oros case, when in fact over a week and a half prior to this memo going out we had in fact offered to fully repair the Oros house.

MR. ETHERIDGE: This might not make any difference, because I don't really understand. But it

looks like this was a, to kind of understand what your saying, but this was a memo from the plaintiff's attorney to their clients.

MR. RAWLS: They sent out, from what we are told from the homeowners, they sent out blanket e-mails to a bunch of Sun City/Hilton Head residents. And, I don't know, but we got several copies, my client had several copies of this sent to them from homeowners.

MR. SEGUI: Mike, this was mailed to 600

people. Or maybe it was e-mailed. Just to the people we have contract with to represent them.

MR. RAWLS: And whoever those people are sent it to us.

MR. ETHERIDGE: Yes.

MR. RAWLS: And the part of the problem is that the plaintiff's counsel have argued, throughout this case, that my client, not the lawyers, but my client, itself, cannot go and try and settle the claims, cannot go and try to fix, you know, the handful of houses that actually do have a problem with stucco. And they're telling their clients, you know, that we're not trying to settle it, but they're telling us that we can't try to settle it. And it's a problem. And the problem is getting worse.

We're receiving, also, copies of letters from homeowners, who are going to hire their own experts, who say, "There's nothing wrong with your house." The letter is sent to plaintiff's counsel saying "Take me off your

list, stop any correspondence. I've already hired my expert on my house, please leave me alone."

We're getting, also, complaints from homeowners saying, "What's this whole stucco issue? I'm worried it's hurting my property value at Sun City/Hilton Head. But it doesn't seem to be anything to it."

Well, that's all just kind of a foreground of what our motion is. Our motion is first that the named plaintiff's case needs to be stayed until they actually comply with the right to cure statute. Which is, you know, considering the offer to settle.

But the reason that we need all three of you here today is the statute -- the motion goes beyond that. Our motion asks to actually strike the class allegations, because the class allegations, in a construction defect claim on a single family house, uh, is inconsistent with South Carolina's right to cure statute.

And just a little bit of background law on class action. This law was cited, in the very last brief that was sent out, it was a reply brief. But throughout this case, and in response to some of our motions, the plaintiffs have argued that basically the right to cure statute can't interfere with a rule 23 consideration. And that's exactly the opposite.

What the United States supreme court has said over and over and over again is that rules of procedure shall not abridge, enlarge or modify any substative

allegedly defective construction. And then the right to offer to repair or to fix whatever the problem is or to settle the case or to have the right to just say, "No, we deny the claim." No question that, any single case, that any plaintiff has to comply with that statute. And basically the statute says if the plaintiff violates the statute, the remedy is an immediate stay of the case until that plaintiff complies with the statute.

Now, in that there's no question that a single plaintiff has to comply with the statute, the U.S. supreme court does not allow that same plaintiff to ignore the substative law of South Carolina, just by being a plaintiff in a class action lawsuit. So all the putative plaintiffs, the putative class members, the people that the Oroses claim to be prosecuting this case on behalf of, they also have to comply with the statute.

The defendant has the right, before they're sued, to have notice of what the claim is and have a right to try to cure the claim.

And, so, technically, pursuant to the statute, the case cannot be prosecuted against any other or on behalf of any other homeowners until that homeowner has complied with the statute.

Now, what does that realistically mean? That means that the case is stayed until all putative class

another class action, these same gentlemen brought against my client. And the problem is that these gentlemen don't represent all 4,000 homeowners in Sun City/Hilton Head. But they are attempting to in a representative capacity. And, so, by actually staying the case, until all putative homeowners comply with the statute, which they have to do, pursuant to South Carolina law, 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 be already be dead.

And, so, which leads us to the next rational statement, which other courts around the country have all set down, that the right to cure statute in class actions are incompatible. Since a procedural rule cannot abridge a substative right and substative law, you know, the most rational decision would be to say, at this point, to strike the class allegation so that the individual plaintiffs, who actually do have a problem, can go forward with their own litigation.

MR. WILLS: You could never have a class action in a construction litigation.

MR. RAWLS: In a construction defect case against a contractor.

MR. WILLS: Yes.

MR. RAWLS: And --

MR. WILLS: Or developer.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT JOSEPH S. OROS, AND MARY A. OROS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DEL WEBB COMMUNITIES, INC., AND PULTE HOMES, INC. Defendants.	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT CASE NO.: 06-CP-07-454

ORDER DENYING CLASS CERTIFICATION

Plaintiffs Joseph S. Oros and Mary A. Oros ("Representative Plaintiffs") seek the certification of a class action on behalf of those similarly situated against Defendants Del Webb Communities, Inc. ("Del Webb") and Pulte Homes, Inc. ("Pulte"). For purposes of class certification, Plaintiffs seek to pursue only the breach of warranty claims alleged in their Complaint as a class action. Del Webb and Pulte have opposed class certification. For the reasons listed below, we deny class certification.

FACTUAL BACKGROUND

Representative Plaintiffs are homeowners at Sun City Hilton Head (hereinafter "Sun City"). In their Complaint, Representative Plaintiffs allege building defects, specifically related to the installation of the stucco cladding on their home. Representative Plaintiffs further allege that these defects have resulted in cracking of the stucco and water intrusion. Representative Plaintiffs' home is one of approximately 4,100 homes in the Sun City development that are clad in stucco. Subsequent to Representative Plaintiffs' commencement of litigation, their attorneys were also retained by approximately 600 homeowners who alleged similar defects in their homes at Sun City. On this basis, Plaintiffs seek certification of a plaintiff class ("Putative Plaintiff Class"), defined as follows:

All persons, firms, corporations, and other entities who own detached single family homes clad in whole or in part with a stucco exterior in the development known as Sun City Hilton Head in Bluffton, South Carolina.

For the reasons that follow, we deny Representative Plaintiff's request to certify the Putative Plaintiff Class.

LAW/ANALYSIS

The requirements for certification of a class in South Carolina are well-settled:

> Proponents of class certification bear the burden of proving five prerequisites under South Carolina law. See Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990); Rule 23(a), SCRCP. The prerequisites are: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class." Rule 23(a), SCRCP. The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation.
>
> In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied. Waller v. Seabrook Island Property Owners Ass'n, supra.

Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). "The failure of the proponents [of class certification] to satisfy any one of the prerequisites is fatal to class certification." Waller, 300 S.C. at 467-68, 388 S.E.2d at 801 (citing Tolbert v. Daniel Const. Co., 332 F. Supp. 772 (D.S.C. 1971)).

As set forth below, because the Representative Plaintiffs cannot establish all of the prerequisites to certification, we must deny certification of the Putative Plaintiff Class.

Numerosity

Though there is no magic number for meeting the rule's requirement of numerosity, when joinder of all members of a proposed class would be impossible, the numerosity requirement is met. The proposed class, as defined, would likely comprise more than 4,000 members. There can

be no doubt that individual joinder of each of these putative parties would be difficult. The Panel concludes that the Putative Plaintiff Class meets the numerosity requirement.

Commonality

SCRCP 23(a)(2) requires there be "questions of law or fact common to the class." This is a disjunctive requirement that permits factually distinct causes of action to be grouped together for the purposes of class action where the actions share a common legal theory. Conversely, the rule permits causes of action arising out of a common set of facts to be grouped together for the purposes of class action even where legally distinct theories of recovery may apply to individual class members. "'Not every issue in the case must be common to all class members.' O'Connor v. Boeing North Amer., Inc., 184 F.R.D. at 311, 329 (C.D.Cal.1998). Commonality is met only where the class shares a determinative issue. See Stott v. Haworth, 916 F.2d 134, 145 (4th Cir.1990) ('certification is proper only when a determinative critical issue overshadows all other issues'; and 'question[s] [that are] in no way dispositive and [which] simply propel the action into a posture where judicial scrutiny is necessary for just adjudication' are insufficient to establish commonality under Rule 23(a)(2), FRCP); see also Peoples v. Wendover Funding Inc., 179 F.R.D. 492, 498 (D.Md.1998) ('a representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff's individual claim.')." .Gardner v. South Carolina Dep't of Revenue, 577 S.E.2d 190, 200(S.C. 2003). Whether commonality exists here is determined by considering the claims that will be made by the Plaintiffs and the defenses to be raised by Defendants. Plaintiffs have agreed to raise only those claims arising out of warranties implied at common law, thus binding the plaintiffs together in a common claim. Although the Defendants may have different legal defenses to the warranty claims of the individual class members (some may be subject to a privity defense, while others may be susceptible to a statute of limitations defense), the differences among these defenses and their applicability may not be so great as to outweigh the common legal theory that undergirds the claims of each of the proposed class

members. The commonality issue is a close question which the Panel concludes it need not decide in light of its determination of the other requirements.

Typicality

Though similar to the "commonality" requirement of Rule 23, the "typicality" requirement, i.e., that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," serves a different purpose. It should be noted that by virtue of the differences between SCRCP 23 and FRCP 23, this panel has made every effort to focus its analysis on South Carolina decisional law. On the subject of typicality, though, South Carolina case law offers scant guidance, and so cases interpreting the similar requirement under federal law have been given consideration. As with the commonality requirement, the Panel feels that typicality is a close question which need not be decided in this case.

Amount in Controversy

SCRCP 23 imposes a requirement not found in the Federal rule, requiring the claims of each proposed class member to result in an amount in controversy in excess of $100. The rule does not require strict proof of this amount--to do so would be to require litigation of damages in advance of litigation of liability. Cases interpreting this element of the South Carolina rule are scant; for that reason, it is instructive to look to the case law interpreting the jurisdictional amount in controversy requirement for Federal diversity jurisdiction. Under the diversity statute, it is well-settled that in addition to allegations in the complaint, courts look may look to additional record evidence available at the commencement of a diversity action to determine whether the amount in controversy threshold is met, but "unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." 28 U.S.C. § 1332 (2006); St. Paul Mercury Indemnity Company v. Red Cab Company, 303 U.S. 283 (1938).

Here, Plaintiffs allege that the average value of the claims of the proposed class members far exceeds the amount in controversy requirement under the rule. Taking that allegation as being made in good faith, the proposed class members have clearly met the amount in controversy requirement of Rule 23. And while Defendants are correct in arguing that Plaintiffs must meet the burden of more specific proof of damages for their breach of warranty claims, that is an issue set aside for litigation after the determination of whether certification is proper.

Adequacy of Representation

"In determining whether a particular named plaintiff will adequately represent a proposed class pursuant to Rule 23(a)(4) one factor we must consider is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." Waller v. Seabrook Island property Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (citing Runion v. U.S. Shelter, 98 F.R.D. 313 (D.S.C. 1983)). Moreover:

> The fact that a proposed class representative is a property owner in a large or highly populated development does not, in and of itself, qualify him to bring a class action on behalf of the remaining property owners. Graham v. Development Specialists, Inc., 180 Ga. App. 758, 350 S.E.2d 294 (1986). Appellants must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately able to protect the interests of the purported class. Sullivan v. Winn-Dixie Greenville, Inc., 62 F.R.D. 370 (D.S.C. 1974).

See Waller, 300 S.C. at 468, 388 S.E.2d at 801 (denying certification because representative plaintiffs' interests were antagonistic to other class members). In the instant case, we find that certification would be improper because the interests of the Representative Plaintiffs are adverse to those of other members of the Putative Plaintiff Class.

In support of their certification contentions, the Representative Plaintiffs assert that their "complaint focuses only on the stucco exterior of the homes, and deals with no other building component. Plaintiffs will demonstrate to the Arbitration panel that what is being claimed here is one thing: defective installation of stucco exteriors on similar, if not virtually identical houses in one discrete subdivision in Beaufort County, South Carolina, developed, constructed and

marketed to the Plaintiffs by one developer, the Defendant." (See Pls.' Mot. and Mem. in Supp. of Class Certif., at 2 (emphasis added)). However, during argument it was conceded by both sides that other members of the Putative Plaintiff Class might have claims relating to other alleged defects in their homes, but the Plaintiffs had chosen to bind their claims to the stucco issues. For example, some Putative Plaintiff Class members may have claims relating to roof or structural defects. If certification is granted, such putative class members may find that their claims for these damages are precluded under the doctrine of res judicata, because those claims could have been asserted in this case:

> "The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action." In re S.N.A. Nut Co., 215 B.R. 1004, 1008 (1997); see also Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'"). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id.

Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C., 360 S.C. 156, 162, 600 S.E.2d 547, 550 (S.C. Ct. App. 2004) (emphasis added). In the context of arbitration, res judicata bars the subsequent litigation of claims that could have been submitted to arbitration. See Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 496, 593 S.E.2d 480, 486 (S.C. Ct. App. 2004) ("In the present case, Contractor's claims existed at the time of the original arbitration and thus could have been arbitrated in the original proceeding.").

If the Putative Plaintiff Class is certified, any potential "non-stucco" claims of members of the Putative Plaintiff Class will probably be precluded. By limiting the scope of the claims in this case to stucco defects, the Representative Plaintiffs — in an effort to support their certification contentions — may be placing their own interests in certification ahead of those of the Putative Plaintiff Class as a whole. Under such circumstances, it is apparent that the Representative Plaintiffs do not adequately represent the interests of the Putative Plaintiff Class.

Moreover, in an effort to support their certification arguments, the Representative Plaintiffs — despite asserting claims in their Complaint sounding in negligence, negligent misrepresentation and breach of contract — have recognized the necessity to limit the stucco claims for which they seek class certification to those sounding in breach of warranty. Again, we find this limitation reflects an adversity between the interests of the Representative Plaintiffs and the Putative Plaintiff Class. If a Putative Plaintiff Class member desires to assert a claim sounding under another legal theory, the Representative Plaintiffs' election to abandon most of their claims would foreclose such an action. We find that the Representative Plaintiffs' necessary election to pursue only breach of warranty claims further demonstrates the adversity between their interests and those of the Putative Plaintiff class.

For these reasons, we find that the Representative Plaintiffs cannot adequately represent the interests of the Putative Plaintiff Class as a whole. We find support for our conclusion from other jurisdictions. For example, in Thompson v. American Tobacco Co., 189 F.R.D. 544, 550-51 (D. Minn. 1999), the representative plaintiffs alleged that the defendant cigarette manufacturers, promoters and distributors engaged in a fraudulent scheme to induce people to smoke and keep them smoking. The representative plaintiffs further alleged that this scheme caused addiction and disease and exposed them to serious latent illnesses, necessitating smoking cessation and medical monitoring programs. The representative plaintiffs asserted claims sounding in common law and statutory fraud, as well as "medical monitoring." In seeking class certification, the representative plaintiffs sought to assert only claims for smoking cessation and medical monitoring, reserving any individual claims for personal injuries. The court refused to certify the class, holding that the representative plaintiffs did not adequately represent the plaintiff class:

> Defendants argue, however, that by reserving the issue of personal injury and damages (to make class certification more likely) the named Plaintiffs have jeopardized the class members' ability to bring personal injury claims in a later lawsuit. (See Defs.' Mem. in Opp'n to Class Certification at 65-67.) If the named Plaintiffs have in fact jeopardized the class members' potential claims for personal injury damages, they would be deemed to have interests "antagonistic" to those of

the class. See Arch v. American Tobacco Co., 175 F.R.D. 469, 479-480 (E.D.Pa.1997).

The Court finds that the named Plaintiffs' efforts to reserve personal injury and damage claims may, in fact, jeopardize the class members' rights to bring such claims in a subsequent case. The governing legal principle is that of res judicata, which precludes subsequent litigation when certain conditions are met. See Youngstown Mines. Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328, 340 (1963). Under Minnesota law res judicata principles apply to "not only to every matter which was actually litigated, but also as to every matter which might have been litigated, therein." Id. (quoting Bazille v. Murray, 40 Minn. 48, 41 N.W. 238 (1889); Swank v. St. Paul City Ry. Co., 61 Minn. 423, 63 N.W. 1088 (1895)). Thus, even if the Court permits the reservation of issues in this case, whether a subsequent court would honor such a reservation is, at best, undeterminable at this time. See Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 679 N.Y.S.2d 593, 601-602 (1 Dept., 1998). A subsequent court may very well find that individual injury and damage claims should have been litigated in this lawsuit. Indeed, as recognized in Small,

> [R]epresentatives who 'tailored the class claims in an effort to improve the possibility of demonstrating commonality' obtained this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.

Id. (quoting Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595, 606-607 (S.D.N.Y.1982)). This possible prejudice to class members is simply too great for the Court to conclude that the named Plaintiffs' interests are aligned with those of the class.

See Thompson v. American Tobacco Co., 189 F.R.D. 544, 550-51 (D. Minn. 1999).

Likewise, the Southern District of New York denied certification of a class for breach of warranty relating to tires, where certification posed the risk of preclusion of other claims of the putative class:

> [A] serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from breach of an implied warranty. Plaintiffs' contemplation is that other claims, such as those for death, injury, accident-related property damage, or other consequential damage, may be pursued in other courts. It is fair to say that, during the course of preliminary hearings in this case, plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement-essentially cosmetic, as the foregoing analysis demonstrates-was purchased at the price of presenting putative

> class members with significant risks of being told later that they had impermissibly split a single cause of action. . . .
>
> It is difficult to imagine many courts sanctioning separate actions for property and injury claims arising out of the same incident. Such a claimant would inevitably face the argument that he "had an obligation in these circumstances to consolidate into a single proceeding all of his causes of action and to raise in one complaint all the claims which he could reasonably foresee could arise out of the same transaction ... Courts should not permit the splitting of causes of action when the result of doing so could result in vexatious litigation for the defendant and an undue clogging of the dockets of the court."

See Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606-07 & n.16 (S.D.N.Y. 1982).

Similarly, the Superior Court of Maine has followed suit and denied certification of a class where certification would create a risk of barring certain claims by class members:

> Several courts have recognized that a named representative is inadequate to represent a class where that representative's waiver or abandonment of a claim places the class members at risk of being precluded from raising that claim in a subsequent law suit based on the doctrine of res judicata. Under plaintiffs' proposed plan, they have specifically excluded claims for personal injury in this action. Complaint ¶ 107. Plaintiffs argue that members of the Contaminated Subclass are given the opportunity to opt out and that this is sufficient to protect their rights regarding their claims for personal injury. This is true with respect to those class members who choose to opt out. However, the right to opt out does nothing to protect the unraised personal injury claims of those class members who decide not to opt out. . . . For these class members, the issue is whether the class representatives' failure to raise claims for personal injury in this action has jeopardized their ability to raise these claims in a subsequent lawsuit. If their claims have been jeopardized, then the Contaminated Subclass representatives would have to be found inadequate.
>
> This court finds that the attempts by the Contaminated Subclass representatives to exclude personal injury claims from this lawsuit may, in fact, jeopardize the subclass members' ability to bring those claims in a later suit. Under Maine law, res judicata applies not only to claims which were litigated in the first action, but also to claims which "might have been litigated in the first action."

See Millett v. Atlantic Richfield Co., 2000 WL 25979, at *9 (Me. Super. Ct. March 2, 2000); accord Hoyte v. Stauffer Chem. Co., 2002 WL 31892830, at *42 (Fla. Cir. Ct. Nov. 6, 2002) ("[T]he putative class representatives have failed to assert potentially valuable compensatory damage claims of absent class members who presently may have symptoms of latent disease.

... A number of courts have recognized that a putative class representative is inadequate to represent a class when that representative fails to assert potentially valuable claims of putative class members").

In an unpublished case, the District of South Carolina has followed this line of cases. In Clark v. Experian Information Sys., Inc., 2001 WL 1946329 (D.S.C. March 19, 2001), the named plaintiffs alleged that defendants willfully failed to set up or maintain procedures to assure accuracy of information contained in their credit reports. Plaintiffs alleged a single cause of action for violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(b) and sought to recover statutory damages, punitive damages, attorneys' fees and costs. The court refused to certify the class, holding that the representatives did not adequately represent the class because of the potential preclusion of class members' claims:

> Defendants contend that Plaintiffs cannot satisfy the adequacy of representation requirement since they "have disclaimed and abandoned the other, more substantial claims that proposed class members might have." Defs.' J. Br. in Opp'n to Mot. for Class Certification at 39. These include other potential claims under the FCRA, claims for actual and compensatory damages, claims under state credit-reporting statutes, and state common law claims. Id. at 39-40. Defendants argue that, by not bringing these additional claims, absent class members may be forever barred by the doctrine of res judicata. Id. at 38.
>
> The Supreme Court and the Fourth Circuit Court of Appeals have long interpreted the adequate representation requirement of Rule 23(a)(4) to preclude certification where a conflict of interest exists between the class representative and class members with respect to the appropriate relief. [Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 338 (4th Cir.1998) (citing cases).] "If the named Plaintiffs have in fact jeopardized the class members' potential claims for [various] damages, they would be deemed to have interests 'antagonistic' to those of the class." Thompson v. American Tobacco Co., 189 F.R.D. 544, 550 (D.Minn.1999) (citing Arch v. American Tobacco Co., 175 F.R.D. 469, 479-80 (E.D.Pa.1997)). Such conduct defeats adequate representation since it places absent class members at the risk of having other claims forever barred by res judicata. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) (indicating that res judicata may bar a member of a losing class from later filing suit on the same claim).
>
> Plaintiffs concede that "[c]laims for actual damages under the FCRA are not suitable for class treatment. This is because individual factors in proving actual damages and defending against certain defenses would make proving such claims

> unmanageable." Pls.' Reply to Defs.' J. Br. in Opp'n to Mot. for Class Certification at 27. Plaintiffs attempt to remedy this shortcoming by arguing that "a class member can bring a separate action through an individual suit or decide to opt out of the present litigation." Id. The court disagrees. "The ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives." Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 601-02 (N.Y.App.Div.1998).
>
> Moreover, the implications of res judicata cannot be ignored. Plaintiffs' efforts to limit their relief to only statutory damages in this case, may, in fact, jeopardize the remaining class members' rights to seek alternative grounds of relief in a subsequent case.

See Clark, 2001 WL 1946329, at *3-*4.

Under the above-cited caselaw, it is clear that the Representative Plaintiffs are not adequate representatives of the class because their interests are adverse to members of the Putative Plaintiff Class. Specifically, the Representative Plaintiffs — in an effort to maximize the likelihood of certification — have limited the claims asserted on behalf of the class to breach of warranty claims related to alleged stucco defects. Certification of the class would threaten to preclude claims by members of the Putative Plaintiff Class for other defects or sounding under other legal theories. Certifying the Putative Plaintiff Class would create a severe risk of some class members forever losing those claims, which could have been asserted herein. For this reason, we find that the Representative Plaintiffs cannot carry their burden of proof that they are adequate representatives of the Putative Plaintiff Class.

We note that our conclusion here is dictated by the circumstances of this case and not by any tactical decision made by the Plaintiffs. If the Plaintiffs had not limited their claims as they did, they would not have been able to satisfy the commonality and typicality requirements for class certification. We do not see any answer to this dilemma, and thus class certification must be denied.

CONCLUSION

Because, as set forth above, the Representative Plaintiffs and the Putative Plaintiff Class have failed to establish the threshold elements of Rule 23, we must deny certification of the class requested in this case.[1]

SO ORDERED!

Thomas J. Wills
Arbitrator

M. Dawes Cooke, Jr.
Arbitrator

R. Michael Ethridge
Arbitrator

April 24, 2008

[1] This Panel and a Circuit Judge have previously denied a motion to intervene filed on behalf of a stucco applicator, South Carolina State Plastering. Those orders are not final because the Circuit Court Order is currently on appeal. The issue of class certification of claims against South Carolina State Plastering is not before this Panel, and it should be noted in any event that the reasons given above for denying class certification in this case might not apply equally to claims against South Carolina State Plastering, inasmuch as Putative Class Members' claims against an applicator would likely pertain only to stucco.

There's going to be plenty of opportunities for you-all to make a decision on what you want to do. We just haven't gotten there yet. In seven years, you-all haven't been given the opportunity to decide what to do. That's what we're trying to do. So after the right to cure period is over, we will then get into discovery. There will be not much to be done because we already know what's going on. And then if we can't get this resolved, we will have a trial. That's where we are procedurally today. We know anecdotally there's been things going on in the community. We know Pulte has been out there offering to make repairs. All of those things are happening. That's fine. We haven't tried to stop them. We are not going to try to stop anybody from doing things. We're not going to ask anyone engaged with anybody. This is your home, this is your community. You need to do what's best for you. We believe we're part of the good side of that process. And we worked very hard to be able to stand before you-all tonight and give you this update. And that's what it is, an update. We wish we could tell you more, but we can't. We are in a position where we believe that you-all are a lot closer to making a decision about the fate of your own process. And let me just sort of show you something that is just simple math that I argued before the supreme court, and I argued to anybody who will listen to me. There's 4,313 of you. I think I said 12. If you got 20 trials a year, which is ambition in Beaufort County -- I know there's at least one lawyer here that would agree with me. Let's say we got going in Beaufort County and things really got going. If we got 20 trials a year, that would be 217 -- actually it's 217.45 years, I rounded up by .45 every year. And that is not access to justice. That's nothing. And that is why we believe this class action vehicle is a good way for you-all to go. And that's why -- and I can tell you this to -- sort of putting egos aside, why we have worked so hard for you, and we have. We have worked very hard. It has been an all-consuming process for me for six or seven years. We know so much about this procedurally. We know about your community. We want to hand it back to you to decide. And in a formula like this, if a class action isn't there and you don't have the option to go at it together, those of you who are numbers 1 through 10 or 20 or even 40, might be in pretty good shape. If you're number 3,350, you're somewhere going towards 217.5 years from trial date. I don't plan on being here. I hope you-all are. So just think about that as you go through this process.

(Stucco Town Hall Meeting @ Beaufort HS, 28:16-30:22, July 19, 2012)