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.

RETURN TO MOTION TO LIFT STAY

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ARGUMENT

The Respondents' motion to lift stay is virtually identical to their Return to the Petition for Writ of Certiorari. (*Compare* motion *with* Certiorari Return at Tab A). Rather than burden this Court with further repetition, Petitioners attach hereto and incorporate herein their earlier filed certiorari reply. (Tab B). This Return focuses on the grounds "argued" in the motion that are specific to the question of lifting the stay.

I. The Respondents' request to lift the stay is barred by the law of the case doctrine.

The trial court found that a stay was proper during the pendency of the certiorari proceedings based on this Court's order in *Lancaster v. Georgia-Pacific Corp.*, No. 2013-000175 (May 20, 2013). (Tab C at 3; 4). The Plaintiffs do not challenge or even mention this ruling or the trial court's reasoning. (Motion to Lift Stay, *passim*). Thus, whether right or wrong, the trial court's ruling and reasoning is the law of this case. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). Accordingly, the motion should be denied.

Any attempt to challenge the trial court's ruling and reasoning by way of a reply, or to add new arguments for lifting the stay, would be an untimely and futile act. See, *e.g.*, *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief." Also holding: "It is axiomatic that an issue cannot be raised for the first time on rehearing."). *Accord Herron v. Century BMW*, 719 S.E.2d 640, 643 (S.C. 2011) (issue raised for first time in a rehearing petition before the Court of Appeals is not preserved for certiorari review by Supreme Court); *Herron v. Century BMW*, 719 S.E.2d 640, 642 n.6 (S.C. 2011) (issue not raised in petition for rehearing could not be raised for the first time at oral argument on the petition).

II. The Plaintiffs' "arguments" for lifting the stay are without merit.

The Plaintiffs argue that lifting the stay would not prejudice any party because, if the stay is lifted, the only thing that will happen is the sending of the class notice to the putative class members and, "[o]nce that notice is sent, the case is stayed as a matter of course." (Motion at 3). This is simply wrong.

The sending of the notice triggers the deadline for opting out of the class. After the opt-out period, the parties must then immediately engage in the Right to Cure process created by the trial court as a means for determining whether the class created *sua sponte* by the trial court even exists. As the trial court recognized, this will require a tremendous amount of work and the parties are required by the trial court's order to retain whatever personnel are necessary to perform this work. In short, the case will not be "stayed" after the sending of the notice. And if the Right to Cure process proceeds, it will endanger the ability of this Court to give any meaningful relief if it finds the trial court erred as argued by the Petitioners.

The Plaintiffs' only other "argument" is that staying the case during the pendency of the certiorari proceedings will cause them to suffer delay. (Motion at 9).[1] Delay is not a ground for lifting a stay – otherwise, there would be no stays during the pendency of any appellate proceedings. The Plaintiffs do not claim any prejudice other than the passage of time and, therefore, the motion should be denied.

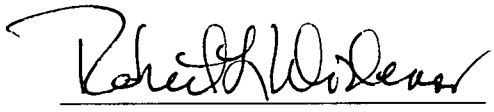
CONCLUSION

The certiorari petition, return, and reply have been filed with this Court. Lifting the stay and moving forward in this case during the pendency of the certiorari proceedings would endanger this Court's ability to grant meaningful relief if certiorari is granted. See Rule

[1] The Plaintiffs argue generally that the appealed orders are not appealable. That issue is before this Court under the certiorari proceedings, and Petitioner's incorporate their certiorari petition and reply in response to these general arguments.

241(c)(2), SCACR (stay is proper and should not be lifted when necessary to preserve the jurisdiction of the court or to prevent contested issues from becoming moot). For this reason, and for the reasons set forth above, including the Plaintiffs' failure to challenge the trial court's ruling and reasoning, it is respectfully submitted that the motion to lift stay should be denied.

Respectfully Submitted,



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August 24, 2013
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Tab A

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' RETURN TO
PETITION FOR WRIT OF CERTIORARI

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

PRELUDE

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

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

INTRODUCTION

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

> Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act" and an order denying reconsideration and clarification. Respondents have

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

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

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

BACKGROUND

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

After three hearings, the Circuit Court entered an Order granting the Respondents' motion for class certification. (Order Making Preliminary Finding That Plaintiffs' Proposed Class Meets The Requirements of Rule 23(a), SCRCP; Setting Parameters For Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing A Stay Of Proceedings; and, Setting Forth Procedures For Compliance With The Right To Cure Construction Dwelling Defect Act, JA 9-24). Thereafter, Del Webb and SCSP filed motions seeking reconsideration and/or clarification of the class certification Order.

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

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

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

ARGUMENT

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

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

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

As is the case here, "any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); *see also* Toal, supra at 86 ("'Final judgment' is a term of art denoting the disposition of all issues in the action."). Here, Del Webb has appealed six separate Orders (each of which will be more particularly identified and analyzed below), none of

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

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. Neither Order falls within the statute. In pertinent part, § 14-3-330 provides as follows:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; . . .

Accordingly, "[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1)." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, "[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2)." Id. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Tab B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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J. Michael Baxley, Circuit Court Judge

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South Carolina State Plastering, LLC,..... Defendant,

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and Kephart Architects, Inc., ... Third-Party Defendants,

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

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.

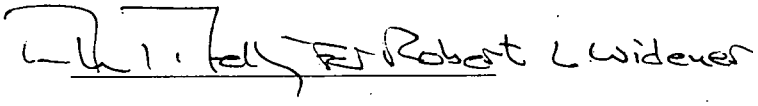
meeting for the putative class members. At that meeting, they stated that it would take over 217 years to try the class members' claims individually if they were to opt out of any class and many of them would pass away before their claims could be tried. (SJA 24). Given this prediction by their own attorneys, 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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ATTORNEYS FOR PETITIONERS

August 26, 2013
Columbia, SC

Tab C

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

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 for Third-Party Defendant Kephart Architects, Inc.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

(2)

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**

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

Anthony and Barbara Grazia, et al.

PLAINTIFF(S)

South Carolina State Plastering, LLC, et al.

DEFENDANT(S)

Submitted by: W. Jefferson Leath, Jr., Esq.	**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**. Plaintiffs' motion to lift the Stay imposed by this Court's order of July 12, 2013 in this case is denied. See below 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

IT IS ORDERED AND ADJUDGED: This Court previously issued a Stay on July 12, 2013 in this case while Defendants' petition for certiorari to the South Carolina Supreme Court over this Court's previous Order preliminarily certifying a class in this case remains pending. Plaintiffs now move to lift the Stay, and this motion is denied for the reasons set out in the Court's Stay Order of July 12, 2013.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

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:

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

7/31/13
Date

(4)

For Clerk of Court Office Use Only

This judgment was entered on the day of , 2013 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 2013 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: N/A

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. 2013-000238

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.

CERTIFICATE OF SERVICE

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 *RETURN TO MOTION TO LIFT STAY* 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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