

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2007-CP-07-1396

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SC Court of Appeals

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

v.

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

and

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

v.

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

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

RETURN TO MOTION TO DISMISS APPEAL

This putative class action involves 4,000 homes built with stucco siding in Sun City near Hilton Head, South Carolina. Appellants Del Webb and Pulte Homes (Del Webb) developed and sold the homes – Appellant South Carolina State Plastering (SCSP) was the stucco subcontractor. It is undisputed that the 4,000 homes comprise myriad combinations of different types of stucco and proprietary stucco systems produced by different stucco manufacturers that were applied under

different installation instructions and different building codes. Against this backdrop of inherent differences between the homes, the plaintiffs sought certification of the following class:

All present owners of houses located in Sun City of Bluffton, South Carolina, which properties have had stucco exteriors applied *or partly applied* by [SCSP] in Beaufort County, South Carolina, *who will incur damages in excess of \$100* for loss of use of the premises and the cost of repair of these houses, depreciation, *and for* sums paid in the past for repairs to stucco exterior of the houses. This class is *limited to matters dealing with* the stucco exteriors of the houses.

(Cmplnt. ¶ 1, Tab B) (emphasis added). This class definition had several immediate problems: (1) determining whether any particular house had stucco applied fully or partly by SCSP, and which part if not all, requires a house-by-house inspection, which is the antithesis of a class action; (2) defining the class by the type of damage incurred requires a house-by-house inspection and testing to determine whether the house is in the class, which is the antithesis of a class action; and (3) by limiting the class to stucco exterior matters, the class representatives and class counsel have waived numerous potential claims held by class member for non-stucco claims. In discovery, the plaintiffs disavowed and thereby waived any claim for past repairs related to any stucco problems for themselves and all class members.

Two years of class discovery conclusively established several undisputed and controlling facts based on the testimony of the *plaintiffs' own experts*: (1) stucco defects, if any, will differ from house to house, and each house must be inspected to determine whether there is any stucco installation defect at that house; (2) destructive testing to each house will be required to determine whether the stucco is damaged and whether there is consequential damage behind the stucco; (3) additional destructive testing will be required to determine whether any “found” damage is related to any stucco installation defect; and (4) inspection and testing of one house cannot prove anything about any other house. (See for example testimony at Tab C). In short, the *plaintiffs' own experts* established that there can be no representative trial of the claims asserted by the plaintiffs, which is

the essence of a class action. Rather, each house will have to be inspected and tested, which is the antithesis of a class action.

The plaintiffs moved to certify their class. They obviously failed to prove the requirements for certification of their class, because the trial court did not certify their class. Rather than deny class certification for the plaintiffs' failure of proof, the trial court stepped outside its proper role of neutral decision maker and became a *de facto* advocate for certification of a Sun City class.

First, the trial court *sua sponte* dismissed the plaintiffs' unfair trade practice claim, because a statute precludes class actions on such claims. (Class Order at 8, Tab A).¹ The plaintiffs and class counsel have acquiesced in this dismissal, because it furthers their personal interests in having the class certified. Thus, the plaintiffs and class counsel, with the *sua sponte* assistance of the trial court, have waived any and all unfair trade practice claims held by any member of the class.

Second, again acting *sua sponte*, the trial court changed the definition of the class to the following:

All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

(Class Order at 12, Tab A) (emphasis added). The plaintiffs obviously did not prove the requirements for certifying this newly defined class, because the trial court did not certify this class.²

¹ See S.C. Code Ann. § 39-5-140(a) (1976) (claims under SCUTPA cannot be brought in a representative capacity).

² Like the plaintiffs' proposed class, the trial court's new and *sua sponte* class definition also has several immediate problems. First, as with the class definition asserted by the named plaintiffs, the trial court's class definition requires a house-by-house inspection to determine whether any particular house had stucco applied fully or partly by SCSP, and which part if not all. Second, and again as with the class pursued by the named plaintiffs, the trial court's new class defines the class in terms of damages incurred and thus requires a house-by-house inspection and testing. Third, the trial court's new class definition hinges on that damage being caused by one of three potential construction defects, and this again requires a house-by-house inspection to determine whether the house suffers from any of these defects and, if so, whether any of those defects caused damage to the house. All of these house-by-house inquiries, which are essential to

Rather than deny certification for the plaintiffs' failure of proof, the trial court *sua sponte* created a new procedure unknown to the law and "preliminarily" certified the newly defined class.

Third, again acting *sua sponte*, the trial court invoked the Right to Cure Act procedures in an attempt to save the new class from the plaintiffs' failure of proof. The trial court imposed a stay to allow compliance with the Act and set forth the process for complying with the Act "in this putative class setting." (Class Order at 2, 13-15, Tab A). The trial court ruled that, after the compliance with the Act, the Court would decide "whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act." (Class Order at 2, Tab A).³ Thus, after redefining the class, the trial court invoked the Act for a purpose for which it was never intended by the General Assembly – attempting to provide the evidence on whether there could be or should be a class action.⁴ (For a brief discussion of the Right To Cure Act, and its stated purpose of encouraging pre-trial settlement through a statutorily required pre-action alternative dispute resolution procedure, see the Appendix at the end of this Return).

The trial court undertook the foregoing extraordinary and *sua sponte* actions, because it misread the Supreme Court's opinion in *Grazia v. South Carolina State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010) as a directive to certify the class: "[T]he Supreme Court *had the clear opportunity to deny class status in this very case* but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties." (Class Order at 11, Tab A). The Supreme Court, however, stated that the

determining whether any particular house is in the trial court's new class, are the antithesis of a class action. The necessity of these house-by-house inquiries is conclusively established by the earlier-noted and undisputed testimony of the named plaintiffs' own experts. Finally, by defining the class in terms of specific defects, the trial court has eliminated and waived all other potential claims held by the class members.

³ See also Class Order at page 12 (Tab A), stating that: "based upon the Right to Cure responses, the Court will make a final determination of class certification"

⁴ The trial court also envisioned that the Right to Cure Notices would reveal the necessity for creating subclasses, but it is axiomatic that each subclass requires a class representative. The Grazias are the only named plaintiffs in this case, and they cannot be the representative for more than one subclass.

issue of whether any class should be certified was not “properly before the Court” and the issue before the Court was “not whether *these* claims could be properly certified.” *Id.* at 203 n.5 (emphasis in original). Thus, the trial court based its decision and its *sua sponte* actions on a reading of *Grazia* that is exactly the opposite of what the Supreme Court said in *Grazia*. Moreover, the trial court impermissibly converted the general purpose of class actions (judicial economy) into a reason for certifying a particular class. This was error, because a putative class action that does not satisfy the requirements of Rule 23, SCRCP, cannot be certified to preserve judicial resources.⁵

To determine whether its newly defined class even existed, the trial court ordered the following process for complying with the Act: (1) the Class Notice would advise the putative class members of the “preliminary” class and, “once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant.” (Class Order at 12, Tab A). In so ruling, the trial court created an impermissible opt-in class, because any class member desiring to stay in the class after the opt-out period must submit a Right to Cure notice through class counsel specifying the “exact nature of the stucco defect and defect results with regard to each individual property.” (Class Order at 15, Tab A). By definition, since the determination of whether a class exists is to be based on the Right to Cure Notices, one cannot be in the class unless they have submitted a Right Cure Notice in compliance with the trial court’s order, *i.e.*, after the end of the opt-out period, the putative class members must opt into the class by giving notice under the Act.

ARGUMENTS

A. The Class Order is immediately appealable, because it affects a mode of trial to which the Appellants are entitled as a matter of right.

Orders affecting the mode of trial are immediately appealable and must be appealed immediately or the right to appeal is lost. *E.g.*, *Salmonsens v. CGD, Inc.*, 661 S.E.2d 81, 87 (S.C.

⁵ Appellants do not suggest that the trial court’s order is the product of any improper motives. Rather, the trial court undertook all of its extraordinary and *sua sponte* actions based on its erroneous reading of the *Grazia* opinion.

2008). The Supreme Court has held that an “opt-in” class does not exist under South Carolina law and that an order creating an opt-in class is immediately appealable because it affects the mode of trial. *Id.* at 87-91. Here, as shown above, the trial court created an “opt-in” class and, therefore, the Class Order is immediately appealable. Moreover, the trial court’s creation of a “preliminary class certification” procedure has no basis in Rule 23, SCRPC or South Carolina law. Thus, this case “presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.” *Salmonsens*, 661 S.E.2d at 87 (allowing immediate appeal to address novel question of opt-in classes under South Carolina law).

Manifestly, every litigant in every case is entitled to a mode of trial wherein the trial court is a neutral decision maker that decides the issues *presented by the parties* based on the arguments and evidence *presented by the parties*. Here, as shown above, the trial court has stepped outside its proper role of neutral decision maker and become a *de facto* advocate for certification of the class, mistakenly believing such is required by the Supreme Court’s opinion in *Grazia*. To further its advocacy for class certification, the trial court *sua sponte* created a process of “preliminary class certification,” which has no basis in Rule 23, SCRPC, or in South Carolina law. All of this deprives the Appellants of the required mode of trial. Thus, the Class Order is immediately appealable.

In *Grazia*, the Supreme Court mandated a mode of trial wherein the circuit court was to first determine whether the plaintiffs had proven the requirements for class certification, and if they did so, then the court could consider the possibility of representative notice under the Right to Cure Act:

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 [plaintiffs here] 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.

703 S.E.2d at 204 (emphasis added). Here, the trial court has inverted the procedures mandated by the Supreme Court in a *sua sponte* attempt to use the Right to Cure Act to determine whether a class can be or should be certified, *i.e.*, to rescue the class from the plaintiffs' failure to prove the prerequisites for class certification. Since the plaintiffs failed to prove those prerequisites, the court should never have reached any question under the Right to Cure Act. The trial court's attempt to use the Right to Cure Act as a vehicle for determining whether class certification is possible deprives the Appellants of the mode of trial established by the Supreme Court in *Grazia* and, therefore, the Class Order is immediately appealable.

Each of the foregoing defects in the Class Order affects the mode of trial and thereby renders the Order immediately appealable. At the very least, the combination of these defects deprives the Appellants of a mode of trial and thereby renders the Class Order immediately appealable.

B. The Class Order is immediately appealable because it affects the merits of the class action.

An interlocutory order that "affects the merits" is immediately appealable under S.C. Code Ann. § 14-3-330(1). Here, rather than rule upon the issues presented to it, the trial court *sua sponte* changed the merits question by redefining the class. Thus, the Class Order affects the merits and is immediately appealable.

C. The Class Order is immediately appealable because it affects the substantial rights of the Appellants.

An interlocutory order that affects a "substantial right" is immediately appealable under S.C. Code Ann. § 14-3-330(2). Every litigant has a substantial and due process right to a judicial process wherein the trial court is a neutral decision maker and decides the issues *presented by the parties* based on the arguments and evidence *presented by the parties*. Here, the trial court has stepped

outside the proper role of neutral decision maker and become a *de facto* advocate for class certification, thereby denying Appellants a substantial right. In *sua sponte* changing the definition of the class to save it from the plaintiffs' failure of proof, the trial court effectively struck the class definition and the Appellants' defenses thereto. Thus, the Class Order is immediately appealable under § 14-3-330(2)(c) as an order that affects a substantial right and "strikes out an answer or any part thereof *or any pleading in any action.*" (Emphasis added).

D. Assuming the Class Order is not immediately appealable for the foregoing reasons, this Court should deny the motion to dismiss if it identifies any ground for an immediate appeal of the Class Order.

The plaintiffs' motion challenges the appellate jurisdiction of this Court. Appellate jurisdiction is this Court's only subject matter jurisdiction. Questions of subject matter jurisdiction may be raised at any time and should be raised by the appellate court on its own motion. See *Travelscape, L.L.C. v. S.C. Dep't of Revenue*, 705 S.E.2d 28, 38 n. 10 (S.C. 2011) (appellate court may *sua sponte* address an issue involving subject matter jurisdiction). Thus, assuming this Court finds there is any basis for an immediate appealable, even if that basis is not argued above, it should reach this basis on its own motion and deny the plaintiffs' motion to dismiss.

E. Assuming the Class Order is not immediately appealable for the foregoing reasons, this Court should exercise pendent appellate jurisdiction over the Class Order in conjunction with the appeal from the order denying injunction.


An interlocutory order denying an injunction is immediately appealable under § 14-3-330(4). The appellate courts have discretion to exercise pendant appellate jurisdiction and review an unappealable order in connection with an appeal from an order that is immediately appealable. *E.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390 (S.C. 2005) (court will entertain appeal of unappealable order when doing so will promote judicial economy and avoid need for a future appeal after final judgment).

Here, Appellants have appealed the denial of an injunction prohibiting class counsel from contacting putative class members until after the end of the opt-out period. (Injunction Order at Tab D).⁶ Considering the appeal of the Class Order in connection with the appeal of the injunction order will promote judicial economy and avoid the need for a future appeal after final judgment. *Edge*, 623 S.E.2d at 390. Moreover, this case “presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.” *Salmonsens*, 661 S.E.2d at 87.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Return of South Carolina State Plastering, which are incorporated herein by reference, it is respectfully submitted that this Court should deny the motion to dismiss appeal.

Respectfully Submitted,



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July 23, 2012

⁶ The basis for the requested injunction is the inherent conflict of interest between class counsel (who has a personal interest in having the class certified with as many members as possible) and the putative class members (who are entitled to know that remaining in the class will result in a waiver of numerous potential claims). This same basic issue relates to the class certification question of whether the named plaintiffs or class counsel are adequate representatives due to their willingness to waive claims of putative class members in order to achieve class certification. This identity of issues in the two orders also makes it appropriate to consider an immediate appeal of the Class Order in connection with the appeal of the order denying injunction.

APPENDIX
Summary of Right to Cure Act

The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the Right to Cure Act) is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2011). The Act includes an express statement of the General Assembly’s public policy purposes in enacting the Act: (1) there is a need for an alternative dispute resolution method to promote settlement of construction disputes “*without litigation*”; and (2) the Act is designed to promote this public policy by requiring the would-be plaintiff to file a “notice of claim” with the would-be defendant and provide an opportunity to “resolve the claim *without litigation*.” Act No. 82, 2003 S.C. Acts 943 (emphasis added). The Act achieves its purpose of avoiding litigation with a mandatory five-step process that must be completed before a homeowner (such as Plaintiffs here and the class members) may sue a contractor:

1. At least “ninety days before filing” a lawsuit, the homeowner “must” serve the contractor with a “written notice of claim” that “must contain the following” information:
 - (a) statement that the homeowner asserts a construction defect;
 - (b) a description of the claim with sufficient detail to determine the general nature of the construction defect; and
 - (c) a description of any known results of the defect.S.C. Code Ann. § 40-59-840 (emphasis added).
2. Within 15 days after receiving the notice, the contractor may request clarification if the notice does not describe the construction defect sufficiently. *Id.*
3. After receiving a proper notice, the contractor may request and the homeowner “shall give” the contractor access to the home to inspect the construction defect.
S.C. Code Ann. § 40-59-850(A).

4. The contractor has 30 days to make a written offer to remedy or settle the claimed construction defect, or the claim is deemed denied. *Id.*
5. If the contractor makes a written offer, the homeowner must respond in writing within 10 days after receiving the offer. § 40-59-850(B).

“If the parties” do not settle under the foregoing process, then the homeowner “may proceed with a civil action.” § 40-59-850(C) (emphasis added). The Act further provides that if a homeowner files a lawsuit before complying with the notice and settlement procedures mandated by the Act, then the action “shall” be stayed upon contractor’s motion “until the claimant [homeowner] has complied with the requirements of [the Act].” § 40-59-830 (emphasis added).

A

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

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

vs.)

SOUTH CAROLINA STATE)
 PLASTERING, LLC,)
 Defendants.)

**ORDER MAKING PRELIMINARY
 FINDING THAT PLAINTIFFS'
 PROPOSED CLASS MEETS THE
 REQUIRMENTS OF RULE 23(a),
 SCRPC; SETTING PARAMETERS FOR
 PUTATIVE CLASS; DISMISSING
 PLAINTIFFS'
 UNFAIR TRADE PRACTICES CLAIM
 WITHOUT PREJUDICE; IMPOSING A
 STAY OF PROCEEDINGS; AND,
 SETTING FORTH PROCEDURES FOR
 COMPLIANCE WITH THE RIGHT TO
 CURE CONSTRUCTION DWELLING
 DEFECT ACT**

SOUTH CAROLINA STATE)
 PLASTERING, LLC,)
 Third-Party Plaintiff,)

vs.)

DEL WEBB COMMUNITIES, INC.,)
 PULTE HOMES, INC., and KEPHART)
 ARCHITECTS, INC.,)
 Third-Party Defendants.)

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 JENNIFER L. STINEBAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

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

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

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

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

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

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

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

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

The “Numerosity” Requirement of Rule 23(a)(1)

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

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Questions of Law and Fact Common to the Class

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

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

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

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

- 1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.
- 2) That the Court will not have to investigate each class member’s individual claim for purposes of establishing or failing to establish liability; and,
- 3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The “Typicality” Requirements of Rule 23(a)(3)

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

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

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

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

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

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

Adequacy of Class Representatives and Counsel

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

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

The Amount in Controversy Meets the Statutory Requirement

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

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Responses of the Defendants in Opposition to Class Certification

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

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

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

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

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

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

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

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

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

State case law directs that this Court take an expansive rather than narrow view of class action motions. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRPC, endorses a more expansive view of class action availability than its federal counterpart"). This Court finds that this case presents a core set of facts contemplated by Rule 23 when considering certification. Moreover, the Supreme Court had the clear opportunity to deny class status in this very case but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties. See Grazia v. S. Carolina State Plastering, LLC, *Id.*, rehearing denied (Jan. 20, 2011).

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

Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab. Further, Anthony and Barbara Grazia are approved as representatives of the putative class, and attorneys W. Jefferson Leath, Jr., Michael S. Seekings, John T. Chakeris, and Phillip W. Segui, Jr., are found to be competent and capable class counsel.

Requirement of Notice to Putative Class Members

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

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

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

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

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

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

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

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

The required content for each notice of claim is set forth in Section 40-59-840. Proposed class counsel is hereby advised that, for purposes of analyzing and organizing class certification issues, specificity of the exact nature of the stucco defect and defect results with regard to each individual property shall be required. A uniform notice listing all possible defects and all possible damages within the class will not suffice.

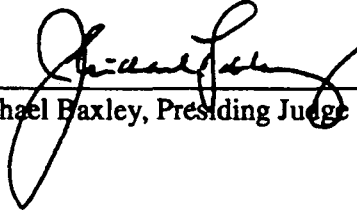
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel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

Conclusion

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

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

IT IS SO ORDERED.



J. Michael Faxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
C/A NO. 07-CP-07-

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

COMPLAINT
(Class Action)

(Construction Defects)
(Jury Trial Demanded)

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2007 MAY 30 PM 2:01

The Plaintiffs, Anthony and Barbara Grazia, through their undersigned counsel on their own behalf, and on behalf of all others similarly situated, complain of the Defendant and allege and show as follows:

1. This action is filed pursuant to Rule 23, South Carolina Rules of Civil Procedure, on behalf of the named Plaintiffs, and those similarly situated as members of a class defined as follows:

All present owners of houses located in Sun City of Bluffton, South Carolina, which properties have had stucco exteriors applied or partly applied by the Defendant in Beaufort County, South Carolina, who will incur damages in excess of \$100 for loss of use of the premises and the cost of repair of these houses, depreciation, and for sums paid in the past for repairs to stucco exterior of the houses. This class is limited to matters dealing with the stucco exteriors of the houses.

2. As set forth in further detail herein below, this action arises from the defective stucco exterior work performed on single family residences owned by class member Plaintiffs which residences were generally marketed by Del Webb Communities, Inc. and Pulte Homes, Inc. and upon which the Defendant South Carolina State Plastering, LLC, acted as a stucco subcontractor. This action involves the erection of stucco systems on the exterior of residential

dwellings which defective construction has proximately caused damages incurred by the representative and individual class members. This action is properly brought as a class action under Rule 23, S.C.R.C.P. for the following reasons:

3. Numerosity. [Rule 23 (a)(1) S.C.R.C.P.] The representative Plaintiffs, and a group of which they are a member, consisting of approximately five hundred and fifty (550) homes, comprise approximately thirteen percent (13%) of a total class of approximately Four Thousand One Hundred (4,100) residences. The owners of these residences are all citizens of the State of South Carolina, and all of property is located in Beaufort County, South Carolina, as is the residence of the Defendant, and all acts of the Defendant causing damage took place in Beaufort County, South Carolina.

4. Commonality. [Rule 23 (a)(2), S.C.R.C.P.] The class members have suffered or will suffer a common injury in that all have been damaged or will be damaged in a similar fashion by the action of the Defendant. There are questions of law or fact common the class which predominate over any questions affecting individual members, which include but are not limited to:

- (a) Whether the Defendant South Carolina State Plastering, LLC, failed to adequately construct, supervise, and inspect the exterior stucco construction on the residences, so as to not employ good construction practices;
- (b) Whether stucco subcontractor, South Carolina State Plastering, LLC, failed to adequately install stucco, stucco systems and water management elements of the stucco systems such as weep systems, control joints, sealant joints, head flashing;
- (c) Whether the stucco subcontractor, South Carolina State Plastering, LLC, breached the Implied Warranty of Good and Workmanlike Service in its construction efforts;

5. Typicality [Rule 23(a)(3), S.C.R.C.P.] The claims asserted by the named Plaintiffs are typical of the claims that the members of the class in that the claims are essentially

identical for the entire class and arise from the same course of wrongful conduct alleged against the Defendant.

6. Adequacy [Rule 23(a)(4) S.C.R.C.P.] Adequacy of representation is satisfied in that the named representatives have no interests that are antagonistic to the absent class members, and counsel representing the class is qualified, experienced, and capable of litigating the case competently.

NATURE OF THE CASE

7. Sun City Bluffton, South Carolina, is a large residential subdivision development located in Beaufort County, South Carolina, and was, and is, being developed by Del Webb Communities, Inc. and Pulte Homes, Inc.

8. That as an essential and integral part of the development, Del Webb/Pulte designed, constructed and marketed approximately Four Thousand One Hundred (4,100) single family residences with stucco exteriors.

9. That Defendant South Carolina State Plastering, LLC, operated as the subcontractor for the stucco systems on these houses, upon information and belief, and executed various subcontracts for the stucco systems on the houses.

10. That South Carolina State Plastering, LLC, is a resident of Beaufort County as are all of the Plaintiffs of the Class, listing an address of 38 Oyster Shell Lane, Hilton Head Island, South Carolina 29926, with the South Carolina Secretary of State's office.

11. That the Defendant installed complete stucco systems, and further had the duty to install weep systems, control joints, sealant joints and head flashing, in conjunction with its work on installing the stucco systems on the homes prior to sale to the class members.

12. That after noticing problems with the stucco systems on their homes, Plaintiffs requested that forensic investigations be conducted, and forensic investigations were therefore conducted, as well as destructive testing and inspections on many of the class member's residences at Sun City.

13. As a result of the investigations and reports, Plaintiffs have learned that their houses have deficient stucco exterior systems which will require the exteriors to be reconstructed as a result of the improper installation work performed by the Defendant.

14. That Plaintiffs have learned and allege that the Defendant's improper stucco installation involves, at the least, improper installation of wall termination weeps, improper installation of control joints, improper installation of sealant joints, improper installation of head flashing, all of which has resulted or will result in cracking and in water infiltration such that reconstruction of the exterior stucco systems is necessitated.

15. The damages caused to the Plaintiffs and class are the direct and proximate result of one or more activities of the Defendant as follows:

**FOR A FIRST CAUSE OF ACTION
(Negligence)**

16. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 15 above as if set forth herein verbatim.

17. At all times material hereto, the Defendant, through their agents, servants and employees, undertook and was under a duty to the Plaintiffs to construct the building and/or provide the materials and services in accordance with the building codes applicable in Beaufort County and the State of South Carolina, properly approved plans and specifications, their subcontractual duties, and sufficient, adequate and accepted construction and workmanlike practices and with due care.

18. The Defendant was negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, inspecting and supplying defective materials, and in failing to comply with the requirements of the building codes, failing to construct the residences in accordance with properly approved construction plans and specifications, manufacturer specifications, and in failing to employ good supervisory and construction practices, and as a direct and proximate result of which the residences have been constructed and ultimately sold to the Plaintiffs herein in the class with all the defects and deficiencies as now exist therein.

19. The Plaintiffs class has sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendant in one or more of the following particulars, to wit:

- a. In installing an improper exterior system on the building,
- b. In improperly installing the exterior finish system on the building,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In failing to apply an exterior stucco finish system so as to result in cracks, sealant failure, a lack of window opening wraps, and gaps in the weather barrier;
- e. In failing and omitting to properly install wall termination weep flashing;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residences according to plans and specifications and applicable building codes;
- j. In failing and omitting to use due care on the stucco exterior systems on the residences;

- k. In failing and omitting to install stucco systems which would provide a sufficient barrier against intrusion of water into the system and an adequate avenue for exit of water that gets into the system;
- l. In failing to construct the stucco cladding in violation of standard building practices, accepted construction industry standards, and in conformity with component product manufacturer installation instructions and specifications;

20. That as a direct and proximate result of the negligence, gross negligence, recklessness, carelessness, willfulness, and wantonness of the Defendant as set forth above, the Class's residences exteriors will have to be completely reconstructed, and the Class will suffer consequential damages as a result thereof.

**FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Good and Workmanlike Services)**

21. Plaintiffs repeats and realleges its allegations made in Paragraphs 1 through 20 above as if set forth herein verbatim.

22. That in undertaking to perform the exterior construction work on the Plaintiffs' residences, South Carolina State Plastering, LLC, impliedly warranted that as a matter of law that all work performed would be of good quality, free from faults and defects, of good and workmanlike quality, and in conformity with the contract documents.

23. The Defendant breached the implied Warranty of Good and Workmanlike Service and the work which was performed by the Defendant was not of good quality or workmanlike, therefore proximately resulting in the damages herein complained of.

24. As a direct and proximate result of the breach of the Implied Warranty of Good and Workmanlike Services, the Plaintiffs have suffered damages.

25. As a direct, foreseeable and proximate cause of the negligence and breach of implied warranties of the Defendant, the Plaintiffs have suffered damages in an amount actual

and punitive to be determined by the Court, exceeding One Hundred Dollars (\$100.00) per class member, for the cost of this action and for such other and further relief as the Court may deem just and proper.

**FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices)**

26. Plaintiffs repeats and realleges its allegations made in Paragraphs 1 through 25 above as if set forth herein verbatim.

27. Plaintiffs and the Defendant are "persons" within the meaning of S.C. Code § 39-5-10(a).

28. The Defendant, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C Code § 39-5-10(b).

29. The Defendant's actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

30. The Defendant's acts are capable of repetition, and, upon information and belief, have been repeated.

31. The Defendant's conduct affects the public interest of South Carolina.

32. The Defendant, knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

33. As a direct foreseeable and proximate result of the Defendant's unfair and deceptive practices, Plaintiffs have suffered an ascertainable loss of money and property.

34. Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

Accordingly, therefore, the Plaintiffs and the Class respectfully pray that this Court certify this action as a Class Action under Rule 23, S.C.R.C.P.; that they demand a jury trial with

respect to all issues triable; and pray that this Court enter judgment against the Defendant on behalf of the Class for such damages as may be found by the trier of fact.

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Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: May 30, 2007

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

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

Plaintiffs,

vs.

CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

DEPONENT: ROBERT GALLAGHER- VOLUME I

DATE: APRIL 20, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
Charleston, South Carolina

REPORTED BY: J. LYNN CLARK, CSR(Iowa) RPR-CP
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I N D E X

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1 stucco, you don't know whether all those things
2 were done correctly or incorrectly with regard to
3 the house at 24 Sunbow or not, correct?

4 A. Right.

5 Q. And you would not be able to answer those
6 questions until you did destructive testing on 24
7 Sunbow, correct?

8 A. Correct.

9 Q. Let's assume that there is a crack in the
10 stucco at 24 Sunbow. Can you tell me what the
11 cause of that crack is?

12 A. No.

13 Q. What would you have to know in order to tell
14 me the cause of the crack in the stucco system at
15 24 Sunbow?

16 A. I need to do some investigation work.

17 Q. With regard to that house at 24 Sunbow, do
18 you know if there's any water damage or other
19 consequential damage to the OSB or framing behind
20 the stucco?

21 A. Can't answer.

22 Q. And what would you have to do in order to
23 tell me whether or not there is any OSB damage or
24 framing damage that was caused by some type of
25 improper stucco system or application?

1 A. Can't answer.

2 Q. You couldn't do that until you did
3 destructive testing, correct?

4 A. Correct.

5 Q. Is there anything you can tell me about the
6 house at 24 Sunbow without doing some type of
7 inspection?

8 MR. CHAKERIS: Objection.

9 A. No, but I think you must have visited it.

10 Q. Have you seen any house at Sun City Hilton
11 Head that does not have control joints?

12 A. Are you meaning absolutely no control joints
13 anywhere in the system at all?

14 Q. Right. What I'm asking you, isn't it true
15 that every house that you've seen at Sun City
16 Hilton Head has control joints somewhere on the
17 house?

18 A. There are some, yes.

19 Q. Is it your opinion that control joints are
20 required on every stucco clad house in Sun City
21 Hilton Head?

22 A. Yes.

23 Q. With regard to 24 Sunbow again, do you know
24 if any of the stucco on that house has been
25 repaired?

1 Q. You're not testifying that SCSP was required
2 to follow that detail in installing a three-coat
3 system, are you?

4 A. No.

5 Q. It's your understanding that at Sun City
6 Hilton Head there are different types of wall
7 terminations, correct?

8 A. Yes.

9 Q. Some of the walls terminate with a stucco
10 with a point like you're seeing in Exhibit 1 or
11 Exhibit Number -- sorry.

12 A. 36.

13 Q. -- 36 to Sisnroy's deposition, correct?

14 A. Correct.

15 Q. And some of them terminate in a casing bead,
16 correct?

17 A. Yes.

18 Q. And those two systems should be +- there are
19 different types of ways of terminating the stucco,
20 correct?

21 A. Yes.

22 Q. With the weep screed such as in Exhibit 1
23 and 36 of Sisnroy's deposition, the WRB should come
24 out over the top of the top portion of the weep
25 screed, correct?

1 that there were four different accessories that
2 were utilized to terminate the wall at Sun City
3 Hilton Head during the time that South Carolina
4 State Plastering was installing stucco out there.

5 A. Three or four.

6 Q. Three or four. Okay. And one of them was
7 what you would consider a casing bead or J weep.

8 A. Yes.

9 Q. And you can't tell me which house has which
10 accessory without looking at that house, correct?

11 A. Correct.

12 Q. Was there any damage behind the stucco that
13 you observed at the Grazia house?

14 A. In the 10 test cut locations that I observed
15 at Grazia, I did not see any damage underneath the
16 stucco system.

17 Q. And when you say no damage behind the stucco
18 system, I just want to make sure we have the same
19 terminology. You mean you didn't see any water
20 damage to the OSB or framing members.

21 A. Correct. I did see some corrosion on some
22 of the metal components, but I did not see any OSB
23 or framing-type damage.

24 Q. And at the -- at any of the other places
25 that you did test cuts, did you observe any damage

1 behind the stucco?

2 A. Yes.

3 Q. So as we sit here today, with regard to the
4 house where you've done destructive testing, you've
5 seen some houses like Grazia where you found no
6 damage, correct?

7 A. In the 10 test cut locations we did not
8 observe damage.

9 Q. Okay. And then you've seen houses, other
10 houses where you've done test cuts, that you did
11 observe damage.

12 A. Yes. In fact, at Oros, there was -- at Oros
13 there was sheathing damage and some framing damage
14 due to past water infiltration. The other thing
15 that we've learned at Oros was the building wrap
16 was not wrapped into the rough openings. It
17 terminated at the edge of the window, and then they
18 relied on a tape between the window flange and the
19 building wrap. And obviously, because of that
20 detail, there was no layering of how they wrapped
21 the window. They just basically ran tape around
22 the four sides.

23 Q. Who installed the windows at the Oros house
24 originally?

25 A. I don't know, but the result was, because we

1 No one knows about some of these conditions until
2 you pull the system.

3 Q. You can't know whether there's damage behind
4 any stucco system at any house at Sun City Hilton
5 Head until you actually cut into the stucco at that
6 house, correct?

7 MR. CHAKERIS: Objection.

8 A. Correct.

9 Q. And with regard to the Grazia house, if you
10 remove the stucco and there is no damage, then
11 that's \$5,000 that the Grazias would not have to
12 spend that the Oros did have to spend, correct?

13 A. Correct.

14 Q. You wrote a letter to Jeff Leath on January
15 19, 2010, and you're welcome to pull it out if you
16 have a copy of it. Is that accurate?

17 A. Yes, I recall that letter.

18 (Exhibit No. 2 was marked for
19 identification.)

20 Q. Is Exhibit Number 2 a copy of a letter that
21 you wrote to Jeff Leath on January 19, 2010?

22 A. It is.

23 Q. Is everything that you wrote in that letter
24 true to the best of your knowledge?

25 A. It is.

1 A. If they're in random areas, in isolated
2 areas, you know, on different elevations, that
3 doesn't concern me so much to say, we need to start
4 tearing off the stucco to look at it, but when you
5 have multiple cracks and known problems in a given
6 set of buildings or structures like at Sun City --

7 Q. Let me stop you for a second. If there are
8 only a handful of cracks and they're hairline
9 cracks, that doesn't concern you and you would not
10 recommend repairs.

11 A. No, I didn't say a handful. I said possibly
12 four.

13 Q. Four. Okay. If there are four cracks and
14 they're hairline, then you would not recommend
15 repairs. You would not say, let's go do
16 destructive testing on this house and determine the
17 cause of this cracking?

18 A. Not necessarily. It wouldn't concern me as
19 much as one that's cracked all over the place.

20 Q. Well, now, if I asked you for any given
21 crack, whether there were a lot of cracks or not a
22 lot of cracks, what is the cause of that crack, how
23 would you determine that?

24 A. The best way is to do destructive testing.

25 Q. So to know definitively the cause of any

1 crack on any house at Sun City Hilton Head, you
2 would have to do destructive testing at that crack
3 to be able to tell me the cause of that crack.

4 A. Yes.

5 Q. Is it your opinion that the lack of control
6 joints off the corners of windows and doors at the
7 Grazia house has caused any damage to the Grazia
8 house?

9 A. Yes. The system, the stucco system is under
10 stress. It's contributing to cracks, and those
11 cracks are damage.

12 Q. So you found cracks that -- you did
13 destructive testing to a crack at the Grazia house
14 to determine that it was related to control joints.

15 A. The lack of.

16 Q. Well, control joints in -- not on the
17 corners of windows and doors. There are control
18 joints on the Grazia house, right?

19 A. There are some.

20 Q. Right. You just don't agree with where
21 they're located, correct?

22 A. Correct.

23 Q. You think instead of being located in the
24 field of the wall they should be located off the
25 corners of the windows and doors.

1 A. They were all covered up by the patch
2 material we put over them.

3 Q. So you don't know.

4 A. No.

5 Q. Did you know at the time that those cracks
6 were covered over, were they greater than an eighth
7 of an inch?

8 A. I didn't personally look at it.

9 Q. Is it your understanding that the South
10 Carolina Residential Construction Standards state
11 that a contractor is not responsible to fix any
12 cracks that are smaller than an eighth of an inch
13 in stucco?

14 MR. LEATH: Objection.

15 A. I wasn't aware of that.

16 Q. And you're a contractor. You might want to
17 look that up. I think it's attached to one of
18 Sisnroy's depositions.

19 A. I think it all hinges on what's causing the
20 crack.

21 Q. With regard to the cracks on the houses that
22 you've done destructive testing on, you've seen
23 several different primary causes for those cracks
24 depending on which house it is, correct?

25 A. Correct.

1 Q. Some of the primary causes for those cracks
2 have been either thin stucco?

3 A. Yes.

4 Q. Low -- or bad mix of stucco giving a low PSI
5 or a low strength to the stucco?

6 A. According to Larry Elkins, yes.

7 Q. And according to Mr. Sisnroy too, right?

8 A. Yes.

9 Q. And you've seen cracks that you thought were
10 caused by the inappropriate lapping of the lath,
11 correct?

12 A. Yes.

13 Q. And I can't remember. What were some of the
14 other reasons that you determined that caused
15 cracks when you did destructive testing on any
16 given crack?

17 A. The lack of proper control joints, lack of
18 through-wall flashing, and water management system,
19 and the conditions at the base of the wall.

20 Q. When you talk about the improper water
21 management system, are you referring to something
22 other than the weep screed at the base of the wall?

23 A. The -- well, I will use Oros as an example
24 because I saw it firsthand there. The building
25 wrap did not turn into the rough openings.

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

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

vs. CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,
Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC
Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC.,
and KEPHART ARCHITECTS, INC.,
Third-Party Defendants.

DEPONENT: ROBERT GALLAGHER- VOLUME II

DATE: APRIL 21, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
CHARLESTON, SOUTH CAROLINA

REPORTED BY: J. LYNN CLARK, CSR(Iowa) RPR-CP
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2

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25

1 that question.

2 Q. And also how thick the stucco is.

3 A. That would be another component, yes.

4 Q. So even if a house at Sun City Hilton Head
5 has control joints off the windows and doors, has
6 through-wall flashing above the windows and doors
7 and has a weep screed with the WRB outboard of the
8 top leg, you would still not okay that house until
9 you did destructive testing on that house to make
10 sure that the lath was not reverse lapped, the
11 sequencing of the accessories was correct, there
12 was no stucco mix issue, and the thickness of the
13 stucco was consistent and the proper thickness,
14 correct?

15 MR. CHAKERIS: Objection.

16 A. Yes, and I mentioned that because we're
17 seeing that as a consistent problem at the homes
18 that we're visiting and inspecting.

19 Q. And you can't know any of those last four
20 issues, the lapping of the lath, the sequencing of
21 the accessories, the stucco mix or the thickness of
22 the stucco, for any house until you do destructive
23 testing on that house, correct?

24 A. Correct.

25 Q. Just because you look at one house that has

1 an area of thin stucco doesn't mean that another
2 house in Sun City Hilton Head also has an area of
3 thin stucco, correct?

4 A. That's what the testing is intended to
5 determine.

6 Q. Right. You have to test the house to find
7 out whether it actually has thin stucco or not,
8 correct?

9 A. Yes.

10 Q. So the issues that you have with the houses
11 at Sun City Hilton Head are not just the three
12 issues that you put in your letter. It's not just
13 the control joint issue, the head flashing issue,
14 and the wall termination issue. You have several
15 other issues that we just discussed, correct?

16 MR. CHAKERIS: Objection.

17 A. Well, those three are the primary problems.

18 Q. Okay.

19 A. All the other factors that we've been
20 discussing are -- basically I consider them
21 contributing factors to the total system being
22 dysfunctional.

23 Q. And you testified yesterday that those four
24 issues have caused damage to the houses that you've
25 observed in Sun City Hilton Head.

1 them to know one way or another whether or not
2 through-wall head flashing should be installed at
3 the head of every window and door or whether
4 control joints should be off the corner of every
5 window and door.

6 MR. SEGUI: Objection.

7 Q. Correct?

8 A. Correct.

9 Q. I'd like to go over what information you
10 would need to know in order to give an opinion
11 about the stucco on any house in Sun City Hilton
12 Head. Okay?

13 A. Okay.

14 Q. The first question you'd need an answer to
15 is does the house have stucco on it, right?

16 A. Certainly.

17 Q. And then you would need to know whether or
18 not the stucco was installed by South Carolina
19 State Plastering.

20 MR. SEGUI: Objection.

21 Q. That's who's being sued in this case.

22 A. Right. I understand that. Yes.

23 Q. So you'd then need to know whether the
24 stucco was installed on the house by South Carolina
25 State Plastering, correct?

1 MR. SEGUI: Objection.

2 A. Well, regardless of who installed it, if
3 there's stucco there -- I'm sorry. What was the
4 original question, please?

5 Q. What information you need to know in this
6 case in order to give an opinion about stucco on
7 any house that would be covered by this case. The
8 only person being sued in this case is South
9 Carolina State Plastering, the installer.

10 A. Okay.

11 Q. Okay. So the first thing you'd need to know
12 was is any of that stucco on that house installed
13 by South Carolina State Plastering?

14 A. Yes.

15 Q. And then on any given house you need to know
16 what stucco was installed by South Carolina State
17 Plastering, right?

18 MR. SEGUI: Objection.

19 A. Yes.

20 Q. Because if any stucco was installed by some
21 other contractor, that would be another
22 contractor's issue and not South Carolina State
23 Plastering's, right?

24 MR. SEGUI: Objection.

25 A. We discussed that yesterday.

1 Q. I'm just trying to summarize some stuff.

2 A. Yes.

3 Q. So your answer was yes?

4 A. It was.

5 Q. For example, the Grazias' next-door
6 neighbor, the Oros house, all the stucco on that
7 house was installed by your company, correct?

8 A. It was.

9 Q. And so it would not be fair to charge South
10 Carolina State Plastering to completely strip and
11 reclad the Oros house because South Carolina State
12 Plastering didn't install any of the stucco on the
13 Oros house at this point, correct?

14 MR. SEGUI: Objection.

15 A. Didn't they originally?

16 Q. I'm talking about the stucco that is present
17 on the Oros house right now, right?

18 A. And I'm talking about the stucco that was on
19 there originally that I removed.

20 Q. Okay. So do you think that South Carolina
21 State Plastering is responsible for the stucco
22 system that is presently on the Oros house?

23 A. Not the present system.

24 Q. Who is responsible for the present system
25 that is presently on the Oros house?

1 A. My company.

2 Q. Why is that?

3 A. Because we installed it.

4 Q. So it's very important to know, in looking
5 at any house at Sun City Hilton Head, who actually
6 installed the stucco on any given elevation,
7 correct?

8 A. Well, I believe the attorneys need that
9 information more than I do.

10 Q. But for you to give an opinion as to South
11 Carolina State Plastering, that they did something
12 right or did something wrong, you'd need to know
13 whether or not they actually installed the stucco
14 on the house, correct?

15 MR. SEGUI: Objection.

16 A. Yes, that's fair to say.

17 Q. Then for any originally installed stucco on
18 the home that was installed by South Carolina State
19 Plastering, you would then need to know what
20 installation methods were used, correct?

21 MR. SEGUI: Objection.

22 A. That would be helpful in the analysis.

23 Q. And you would need to know what type of
24 stucco system was used, correct?

25 A. That would be helpful.

1 Q. And you would need to know what type of
2 accessories were used, correct?

3 A. Yes.

4 Q. And then to determine whether or not that
5 stucco was installed correctly, you would need to
6 know what year the house was constructed.

7 A. Yes.

8 Q. And you would need to know what building
9 code and industry standards relate to that year of
10 construction, correct?

11 A. That's part of the review.

12 Q. That would be something you would need to
13 know though.

14 A. That's part of the review, yes.

15 Q. And then if it was a proprietary stucco
16 system, you would also need to know whether or not
17 the manufacturer gave any written and/or oral
18 installation instructions, correct?

19 MR. SEGUI: Objection.

20 A. Yes.

21 Q. The answer is yes?

22 A. Yes.

23 Q. And then you would need to take what the
24 installation instructions, the code and the
25 industry standards say and compare that to the

1 present condition of the stucco on the given house,
2 correct?

3 MR. SEGUI: Objection.

4 A. Yes.

5 Q. And then you would need to determine if
6 there was any deficiency when comparing the
7 building code, the manufacturer's specification and
8 the industry standards in the application of the
9 stucco.

10 A. Yes.

11 Q. And if you find any deficiency, you would
12 then have to determine whether or not that
13 deficiency caused any damage to the stucco or to
14 the substrate behind the stucco, correct?

15 MR. SEGUI: Objection.

16 A. Yes.

17 Q. And then if you determined that the
18 deficiency caused some damage, you would then have
19 to determine what the proper scope of repair would
20 be to fix that location.

21 A. Correct.

22 Q. And then if there was damage to the stucco,
23 you'd have to determine whether or not that damage
24 to the stucco allowed any water through the system
25 that damaged any of the OSB or the wood, correct?

1 A. Yes.

2 Q. And then you'd have to remove the stucco to
3 see the extent of the damage to the OSB or wood,
4 correct?

5 A. Yes.

6 Q. And then you'd have to determine the scope
7 of repair to repair the damage behind the stucco,
8 meaning to the OSB or the wood, correct?

9 A. Yes.

10 Q. And that would be the information that you
11 would need with regard to each house that you were
12 giving an opinion on.

13 A. Yes.

14 MR. RAWL: I think I'm getting close,
15 so if we want to take a short break, I'll try to
16 consolidate my notes.

17 (A recess was taken.)

18 Q. Mr. Gallagher, you agree that hairline
19 cracks are expected in any stucco system, correct?

20 MR. SEGUI: Objection.

21 A. We discussed that yesterday, and I think my
22 answer was that I would like to understand the
23 cause or the possible reasons why the hairline
24 cracking is occurring.

25 Q. My first question is, you agree that

1 hairline cracks are expected in any stucco system,
2 correct?

3 MR. SEGUI: Objection.

4 A. They can occur, yes.

5 Q. And just because there are hairline cracks
6 in the system doesn't mean you would condemn the
7 entire stucco system, correct?

8 A. Again, I would like to do an evaluation and
9 try to determine why those cracks are occurring.

10 Q. And I don't mind if you explain your answer,
11 but I'd like you to answer my question first and
12 then explain it. So you agree that just because
13 there are hairline cracks in any stucco system that
14 you would not condemn that stucco system just
15 because of the hairline cracks, correct?

16 MR. SEGUI: Objection.

17 A. I can't say that I would or that I wouldn't.

18 Q. You would first need to determine the cause
19 of those cracks before you would know whether to
20 condemn the stucco system or not, correct?

21 MR. SEGUI: Objection.

22 A. Correct.

23 Q. Just because you look at any house and see
24 that there are hairline cracks in the stucco, you
25 would not say that that entire house needed to be

1 reclad until you determined the cause of that
2 crack, correct?

3 MR. SEGUI: Objection.

4 A. I need to do further evaluation, correct.

5 Q. You would need to determine the cause of
6 that crack, correct?

7 MR. SEGUI: Objection.

8 A. Correct.

9 Q. In fact, there are actually hairline cracks
10 on the house that you reclad that's next door to
11 the Grazia house, the Oros house, correct?

12 MR. SEGUI: Objection.

13 A. I haven't been back to look at the home.

14 Q. So you have not inspected the Oros house
15 since you installed the stucco?

16 A. No.

17 Q. Does it surprise you that there are hairline
18 cracks in that stucco system?

19 MR. SEGUI: Objection.

20 A. Who says there's hairline cracks in the
21 system?

22 Q. I'll show you some pictures if you'd like.
23 Does it surprise you that there are hairline cracks
24 in that stucco system?

25 MR. SEGUI: Objection.

1 Q. In this case you have done destructive
2 testing on somewhere between 11 and 13 houses at
3 Sun City Hilton Head, correct?

4 A. Yes.

5 Q. And in addition you've looked at the
6 neighbors of those houses which include maybe
7 another 30 houses, correct?

8 A. Yes.

9 Q. And based on the destructive testing and the
10 other inspections that you've done on the
11 neighbors' houses, you can't say that there is
12 anything else wrong with any other house at Sun
13 City Hilton Head that you have not inspected,
14 correct?

15 MR. SEGUI: Objection.

16 A. I can say that of the 12 to 13 and then the
17 surrounding homes that we visually looked at, I saw
18 the same consistent types of problems, but I have
19 not looked at every home in Sun City.

20 Q. So based on the inspection, whether or not
21 it was visual or destructive, that you've done on
22 the 40-something houses at Sun City Hilton Head,
23 you can't tell me whether there's anything wrong
24 with the stucco system at any other house at Sun
25 City Hilton Head that you have not inspected,

1 correct?

2 MR. SEGUI: Objection.

3 A. Well, if I have not looked at it, no, I
4 can't make a determination if there's a problem or
5 not.

6 Q. And just because you found damage behind the
7 stucco system on some of the houses that you have
8 done destructive testing on, you can't make a
9 determination there's damage behind any stucco
10 system at any other house in Sun City Hilton Head
11 that you have not inspected, correct?

12 MR. SEGUI: Objection.

13 A. Correct.

14 Q. What homeowner maintenance is required to a
15 stucco system, in your opinion?

16 A. I would refer to the manufacturer's written
17 literature depending on the system that's
18 installed.

19 Q. With regard to the systems that you have
20 observed at Sun City Hilton Head, which I believe
21 are the three-coat traditional portland cement
22 systems, what homeowner maintenance, in your
23 opinion, should be done to those houses?

24 A. I have not read the manufacturer's
25 recommendations for the maintenance criteria for

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

DEPOSITION OF PETER SHERRATT
VOLUME 2 5-6-11

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

Plaintiffs,

vs.

CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

DEPONENT: PETER SHERRATT

DATE: MAY 6, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
BLUFFTON, SOUTH CAROLINA

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1 I N D E X

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Exhibit No. 11 221

13 Exhibit No. 12 238

Exhibit No. 13 260

14 Exhibit No. 14 335

Exhibit No. 15 352

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1 A. With the exception of what the plastering
2 company said, if there's no control joints, that is
3 a problem. And if there's no through-wall head
4 flashing at the exposed windows, that is a problem.

5 Q. Let me ask you about that.

6 MR. SEGUI: Were you finished with your
7 answer, Mr. Sherratt?

8 THE WITNESS: Yes.

9 Q. On the Grazia house, you found several other
10 issues such as delamination, thin stucco areas, the
11 lath that is not lapped properly, and I think
12 something else, in addition to your complaints that
13 there were no control joints over the corners of
14 windows and doors and penetrations, correct?

15 A. Yes.

16 Q. Now, are you dropping those other opinions
17 with regard to the thinness of the stucco or the
18 delamination or the mix and those types of issues,
19 or are those problems that you found also important
20 with regard to the Grazia house?

21 A. They're also important.

22 Q. Because if a trier of fact determines that
23 control joints aren't necessary off the corners of
24 windows and doors, your through-wall flashing is
25 not required over the heads of the doors, you've

1 still got problems with the stucco that have been
2 caused by other issues, correct?

3 A. Yes.

4 Q. In order to determine whether there is a bad
5 mix or delamination of stucco on any house, you
6 would have to do destructive testing of that house,
7 correct?

8 A. Not necessarily. I mean there are -- there
9 are some houses out there where the stucco has
10 actually bulged off the wall. You don't need to do
11 destructive testing. It's already off the wall and
12 you can see behind it. So there are some
13 exceptions to the general statement you're making.

14 Q. And I want to be fair. So if I change the
15 statement to, isn't it true that you have to do
16 destructive testing to determine whether or not
17 there is a bad stucco mix or delamination, except
18 for cases where the stucco is either bulging or
19 falling off the wall, would that be generally a
20 true statement?

21 A. Yes, it would.

22 Q. You didn't find any damage to the sheathing
23 or the framing members at the Grazia house,
24 correct? That's all right. Strike that question.
25 You've already answered it.

1 Did you find any damage to any sheathing or
2 framing members at any house that you did
3 destructive testing to?

4 A. Yes.

5 Q. So is it fair to say that you found damage
6 to sheathing or framing on some houses, but on
7 others you did not find damage to framing or
8 sheathing, correct?

9 A. That would be correct.

10 Q. And you can't know whether or not there is
11 any damage to any frame or sheathing until you do
12 destructive testing to a house at Sun City Hilton
13 Head, correct?

14 MR. SEGUI: Objection.

15 A. Correct.

16 MR. SEGUI: I misunderstood. I
17 withdraw my objection. I misunderstood Mr. Rawl's
18 question.

19 A. The same exception applied where it's
20 already fallen off the wall. That's the way I took
21 your question.

22 Q. Right. You have to see the sheathing to
23 know whether it is damaged or not, correct?

24 A. Yes, sir.

25 Q. And another way to put that is, just because

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.)

) DEPOSITION OF:
)
) THOMAS J. CARLSON,
) CSI

Given before G. Michael Alexander, Notary
Public and Registered Professional Reporter, at the law
offices of Clawson & Staubes, LLC, 126 Seven Farms Drive,
Suite 200, Charleston, South Carolina, on Wednesday,
August 22, 2007, commencing at 10:00 o'clock, a.m.

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(Pulte and Del Webb)

McNAIR LAW FIRM, P.A.
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The Tower at Gervais
1301 Gervais Street
Columbia, SC 29201

Also Present:

Darrell W. Carter, Esquire

1 A Correct. It's not one coat, so it's an
2 oxymoron. It's a dry waterfall. Why would you call the
3 name of your product one coat system when it's not?

4 Q It's your understanding that that is what
5 Master Wall considers a proprietary system.

6 A It definitely is a proprietary system.

7 Q And what is your understanding of the meaning
8 of a proprietary system?

9 A It's a system manufactured by either a
10 manufacturer or somebody that the manufacturer contracts
11 with to manufacture products. There is a proprietary
12 specification put together. Typically those proprietary
13 specifications were from industry standards. That was my
14 biggest concern, did it or didn't it? Not my concern, my
15 biggest question in my mind. The manufacturer has to
16 submit its products to testing labs, has to perform for
17 the model code agency.

18 Q Do you have any understanding that the
19 proprietary systems may have a different content of
20 materials in the stucco itself?

21 A I don't think any two stucco systems are alike,
22 ever.

23 Q With regard to the content of the actual powder
24 stucco itself.

25 A The powder? The plaster?

1 house across the street. No formal inspections other
2 than those two dates, I don't think.

3 Q Do you have any type of normal protocol that
4 you do, when asked to render an opinion, as to whether
5 stucco has been properly applied to a building or not?

6 A Do I have a standard protocol like you grilled
7 Mr. Sisnroy about? No.

8 Q So you don't do the same thing every time.

9 A Never. It would be a good role. Never predict
10 what counsel is going to do. Each house has to be
11 evaluated individually. You need to -- You can't take a
12 set of blinders to the house and say "This is what I'm
13 gonna do."

14 Q Why would you have a standard protocol --

15 A Why would there be a certain protocol?

16 Q Wouldn't there be certain items on each house
17 you would need to look at to make sure that the system is
18 applied properly?

19 A Sure.

20 Q Do you look at the same thing in residential
21 houses every time regardless?

22 A Look at the same thing on stucco cladding
23 systems, whether it's on a four story building or
24 single-family house. They're all the same issues. You
25 look for deviations from industry standards. Mr. Rawl,

1 do you mean by you did the groundwork for forming your
2 opinions? Is the second part of that that you haven't
3 formed the opinions yet?

4 MR. SEGUI: Objection.

5 THE WITNESS: Well, the groundwork for
6 most of my forensic reports are inspections and
7 destructive testing. I typically don't condemn
8 a cladding system without doing an invasive
9 cut, and I've criticized other people when they
10 have done that.

11 Q Why is the invasive cut necessary?

12 A So you can see what's really there. All you
13 can see is the surface.

14 Q You can see the result but not the cause if
15 there's a crack in the stucco?

16 MR. SEGUI: Objection.

17 THE WITNESS: No. No. I answered your
18 question. Ask it again, and I'll try and give
19 you a different answer, or another one that you
20 can understand.

21 Q Thank you, sir. Can you tell me why you
22 believe it's important to do invasive cuts before
23 condemning a cladding system.

24 A So that you can see what the cladding system is
25 composed of. How thick it is. How the components are

1 A See, I was getting those mixed up.

2 Q Yes, sir.

3 A Do you know the owner's name?

4 Q I do not.

5 A I was at 26 Seabow on the 16th of March.

6 (The deposition went off the record for a brief
7 period.)

8 THE WITNESS: I don't have any record of
9 any inspection there.

10 Q Can you tell me what's wrong with the stucco on
11 that house.

12 A Of course not. I haven't looked at it.

13 Q Can you tell me if there's anything wrong with
14 the stucco on that house.

15 A Not at this point in time.

16 Q In order to give an opinion about 26 Sunbow,
17 what would you need to do? First of all, you would need
18 to look at it.

19 A I need to think about that.

20 Q Can you give an opinion regarding any house if
21 you have not looked at it?

22 MR. SEGUI: Objection.

23 THE WITNESS: I may be able to.

24 Q Really?

25 A Really. If it's within the limits of Sun City.

1 Q Well, this house is in Sun City. The house in
2 Sun City with hardcoat stucco on it.

3 A Okay.

4 Q What can you tell me is wrong with this house,
5 having not looked at it?

6 A Having not looked at it, I can't tell you
7 specifically what's wrong.

8 Q Can you tell me if there's any damage
9 whatsoever to this house?

10 A No, sir.

11 Q Can you tell me what's wrong with the Oros
12 house?

13 A Probably. But I haven't been asked to yet. If
14 you ask me to, other than what I endorsed from
15 Mr. Sisnroy's report, that I can't remember what he
16 said --

17 Q Please tell me what, in your opinion, is wrong
18 with the Oros house.

19 A I'll have to go back through my photos and my
20 field notes and put that together.

21 Q Okay.

22 A It's got -- I remember one thing right off the
23 top.

24 Q What's that?

25 A Stucco's cracked all over the place. The lath

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)	Case No. 07-CP-07-1396
)	
Anthony and Barbara Grazia,)	
Individually and on behalf of))	
all other similarly situated))	
Plaintiffs,)	
Plaintiffs,)	Deposition of
- vs -)	ROBERT SISNROY
South Carolina State)	October 31, 2008
Plastering, LLC.,)	
Defendant.)	
and)	
South Carolina State)	
Plastering, LLC,)	
Third-Party Plaintiff,)	
- vs -)	
Dell Webb Communities, Inc.,)	
Pulte Homes, Inc., and)	
Kephart Architects,)	
Defendants.)	
)	

Deposition on oral examination of
ROBERT SISNROY, reported by Jeannette M. King,
Court Reporter and Notary Public in and for the
State of South Carolina; said deposition taken
pursuant to Notice of Deposition and in
accordance with the South Carolina Rules of Civil
Procedure at the law offices of Turner, Padgett,
Graham & Laney, 40 Calhoun Street, Charleston,
South Carolina, commencing on Friday, October,
31, 2008, at the hour of 8:30 a.m.

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1 properly wrapped, if water gets through the
2 stucco in whatever manner, the purpose of the
3 secondary moisture is for the water to exit out,
4 correct?

5 A That secondary moisture barrier would
6 direct the water out, yes.

7 Q Okay. And it's to protect the framing
8 members and the sheathing behind it, correct?

9 A That's correct.

10 MS. MAHON: I think I'm about done.

11 (A short break transpired.)

12 EXAMINATION

13 BY MR. RAWL:

14 Q Mr. Sisroy, my name is Vick Rawl.
15 It's nice to see you again. As you know, I
16 represent Dell Webb and Pulte.

17 Just two weeks ago, you were a witness
18 in the Oros trial, correct?

19 A Yes.

20 Q And in that case, you testified that
21 the only proximate cause of any of the damage to
22 the Oros house that you were aware of was the
23 stucco mix issue, correct?

24 MR. CHAKERIS: Objection.

25 THE WITNESS: That was identified as a

1 specific cause, yes.

2 BY MR. RAWL:

3 Q What you are saying is, the only
4 specific proximate cause that you testified to
5 regarding any of the damage or the cracks at the
6 Oros house was the stucco mix, correct?

7 A Correct.

8 Q And as we sit here today, you still
9 don't have testimony in regard to the specific
10 proximate cause for any damage or any cracks on
11 any other house within Sun City, Hilton Head,
12 correct?

13 A Correct.

14 Q And the basis of your testimony
15 regarding proximate cause at the Oros house was
16 some petrographic analysis that was conducted by
17 a group that was hired by the defendantS' expert,
18 Mr. Elkins, correct?

19 A That's correct.

20 Q And did you rely on the petrographic
21 analysis in forming your opinion that the stucco
22 mix was the proximate cause of cracks or damage
23 at the Oros house?

24 A Yes.

25 Q Have you relied on those tests in

1 forming opinions with regard to any other house
2 at Sun City, Hilton Head?

3 A No.

4 Q And just to be clear, the Oros house is
5 a house within Sun City, Hilton Head, correct?

6 A That's correct.

7 Q And do you remember the address of that
8 house?

9 A 218 Stratford Village Way.

10 Q Okay. And the Oros house is literally
11 right next door to the Grazia house, correct?

12 A Yes, it is.

13 Q In the Oros case, it was your opinion
14 that Dell Webb was responsible for the damage to
15 that house, correct?

16 A Yes.

17 Q But it is now your opinion that Dell
18 Webb is not responsible for any of the damage
19 with regard to the Grazia house, correct?

20 MR. CHAKERIS: Objection.

21 THE WITNESS: Say that again.

22 BY MR. RAWL:

23 Q Is it your opinion that Dell Webb
24 Communities, Inc. is responsible for any of the
25 damage that you have seen including the cracks in

1 from another residence, correct?

2 A Yes.

3 Q And then there was one last sample that
4 was taken. It was labeled as No. 3, which was
5 the Oros house, correct?

6 A Yes.

7 Q And as you sit here today, you don't
8 know which house No. 1 was or which house No. 2
9 was, correct?

10 A That's correct.

11 Q You agree that the mix of stucco can
12 vary on one house, correct?

13 A Yes.

14 Q And you agree that the mix of stucco
15 can vary from house to house, correct?

16 A Yes. I testified to that already, yes.

17 Q And you agree that just because the mix
18 of stucco may be bad on one house in Sun City,
19 Hilton Head, it does not indicate that the mix is
20 necessarily bad on any other house that hasn't
21 been tested, correct?

22 A Correct.

23 Q Approximately, how long were you at the
24 Grazia house during your
25 inspection/investigation?

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

CASE NO. 2006-CP-07-454

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

DEPOSITION OF: ROBERT SISNROY, P.E.
VOLUME III

DATE: September 27, 2007

TIME: 10:28 a.m.

LOCATION: CLAWSON & STAUBES
126 Seven Farms Drive
Charleston, SC

TAKEN BY: Counsel for Defendants

REPORTED BY: Karen V. Andersen,
Registered Professional Reporter

Computer-Aided Transcription By:

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25 (INDEX AT REAR OF TRANSCRIPT)

1 other house in Sun City Hilton Head; correct?

2 MR. SEGUI: Objection.

3 THE WITNESS: Correct.

4 BY MR. RAWL:

5 Q. Isn't it true that just by looking at the
6 Oros' house, you can't tell me or tell where sealant
7 joints are located on any other house in Sun City
8 Hilton Head?

9 MR. SEGUI: Objection.

10 THE WITNESS: Correct. Yes.

11 BY MR. RAWL:

12 Q. And you can't tell by looking just at the
13 Oros' house whether any other weep screed in Sun City
14 Hilton Head is coated with stucco product; correct?

15 MR. SEGUI: Objection.

16 THE WITNESS: Correct.

17 BY MR. RAWL:

18 Q. And you can't tell just by looking at the
19 Oros' house that any other house in Sun City Hilton
20 Head has cracks in the stucco; correct?

21 MR. SEGUI: Objection.

22 THE WITNESS: Correct.

23 BY MR. RAWL:

24 Q. And you can't tell just by looking at the
25 Oros' house that there is any damage between the stucco

1 or wood on any other house in Sun City Hilton Head;
2 correct?

3 MR. SEGUI: Objection.

4 THE WITNESS: Correct.

5 BY MR. RAWL:

6 Q. And you can't tell by looking at the Oros'
7 house what types of windows are installed at any other
8 house in Sun City Hilton Head; correct?

9 A. Correct.

10 MR. SEGUI: Objection.

11 BY MR. RAWL:

12 Q. And to make this simple, just by looking at
13 the Oros' house, you can't tell me anything else about
14 any other house in Sun City Hilton Head; correct?

15 MR. SEGUI: Objection.

16 THE WITNESS: Correct.

17 BY MR. RAWL:

18 Q. With regard to control joints, isn't it true
19 that it is your opinion that control joints should be
20 located off the top and bottom of every window and
21 door; correct?

22 A. Correct.

23 Q. And on the Oros' house, if the control
24 joints are located off the top and bottom of every
25 window and door, would there be a need for any

1 material problem?

2 A. No, that would not be my opinion. My
3 opinion would be it is a failure of the lath, but it is
4 a failure because the lath was exposed to chronic water
5 intrusion conditions that it was not designed to
6 resist.

7 Q. Is it fair to say that where you found
8 corroded lath, there has to be a source of water
9 somewhere?

10 A. Yes.

11 Q. In order to determine the reason for the
12 lath or the reason why the lath had corroded, you would
13 have to determine the source of that water?

14 A. Yes.

15 Q. Is it fair to say that with regard to
16 different houses at Sun City Hilton Head that you have
17 observed with cracks in the stucco, that you would
18 expect there would be different proximate causes for
19 the stucco cracks from house to house?

20 MR. SEGUI: Objection.

21 BY MR. RAWL:

22 Q. In other words, not every house is going to
23 crack for exactly the same reason?

24 A. This is true.

25 Q. Is it fair to say that you observed houses

1 at Sun City Hilton Head where there is no evidence of
2 any damage to either the stucco or to the wood behind
3 the stucco?

4 A. With regard to our intrusive observations, I
5 don't think there was an instance where there wasn't
6 evidence of damage behind the stucco.

7 Q. How many houses did you do intrusive
8 observations on?

9 A. Nine.

10 Q. With regard to houses other than those nine
11 that you've observed, is it fair to say that you have
12 seen houses that you have no evidence of any damage
13 that has occurred to these houses?

14 MR. SEGUI: Objection.

15 THE WITNESS: There was no evidence of, with
16 which I observed, no evidence of physical damage, such
17 as cracking.

18 BY MR. RAWL:

19 Q. So the answer to my question is yes?

20 A. Yes.

21 MR. SEGUI: Objection.

22 BY MR. RAWL:

23 Q. And the primary damage you are looking for
24 is cracks; correct?

25 A. Yes.

1 Q. Was this done after the first day or
2 something, first two days maybe?

3 A. Well, to accumulate these totals, yes.

4 Q. And this chart just shows -- does a one mean
5 you checked yes for that line item?

6 A. Yes.

7 Q. And a zero means you checked no for that
8 line item?

9 A. Yes.

10 Q. And according to this chart, you checked yes
11 to every one of these houses with regard to the wall
12 termination, control joint, sealing joint and head
13 flashing?

14 A. Yes.

15 Q. And the first 31 of these houses, you
16 checked yes to seven of the houses were cracking?

17 A. Yes.

18 Q. And you can't tell me the cause of the
19 cracking on any of the 200 something houses in your
20 survey, can you?

21 A. No.

22 MR. SEGUI: Objection.

23 BY MR. RAWL:

24 Q. And for all of the 200 something houses on
25 your survey, you can't tell me there is any damage

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

CASE NO. 2006-CP-07-454

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

Defendants.

VOLUME IV

DEPOSITION OF: ROBERT SISNROY, P.E.

DATE: September 28, 2007

TIME: 10:15 a.m.

LOCATION: CLAWSON & STAUBES
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Charleston, SC

TAKEN BY: Counsel for Defendants

REPORTED BY: Karen V. Andersen,
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24 (INDEX AT REAR OF TRANSCRIPT)

25

1 then look to the South Carolina Residential
2 Construction Standards?

3 A. It provides guidance to contractors, yes.

4 Q. Did you see houses in your survey, of the
5 200-some-odd houses you did, that had cracks that were
6 bigger than those allowed by the South Carolina
7 Residential Construction Standards?

8 A. Yes.

9 Q. And did you document which houses you saw
10 cracks that were bigger than the Residential
11 Construction Standard documents?

12 A. No.

13 Q. And you would agree that many of the houses
14 along which you checked yes on your survey, such as the
15 form on Exhibit 39, where you checked yes to observe
16 cracking in stucco, would have cracks that were smaller
17 than that 1/8th inch standard allowed by the South
18 Carolina Residential Construction Standards; correct?

19 A. Yes.

20 Q. I believe that you had testified in one of
21 the prior days of deposition that the building codes,
22 you would consider the building codes to be violated if
23 water intrudes behind the stucco system; is that
24 accurate?

25 A. Yes.

1 where it is removed or in the section itself of the
2 material that's laying out.

3 Q. Yes, sir, I understand completely. What I'm
4 asking is, there may have been other drill holes where
5 the moisture probe was inserted around the house that
6 wasn't cut into, correct? For example, I remember
7 being out there seeing the locations that were being
8 cut and there were drill holes either above or in the
9 location that was cut?

10 A. Yes.

11 Q. And there were other areas on houses that
12 had the drill holes in it that were not cut. Do you
13 understand what I'm saying?

14 A. Yes.

15 Q. How would I find out what the moisture
16 reading that you received was from those drill holes?

17 MR. CHAKERIS: Objection.

18 THE WITNESS: I don't know. That would have
19 been documented if that occurred, it was just a test
20 hole.

21 BY MR. RAWL:

22 Q. In general, with regard to the additional
23 eight houses you cut into, would you agree that the
24 cracks occurred on those houses for different reasons?
25 It wasn't the same reason every time?

1 A. Yes.

2 Q. Can you do any type of correlation with
3 regard to the percentage on the Oros' house if, for
4 example, approximately 10 percent of your readings
5 showed what you consider an unacceptable moisture
6 reading, would you agree that the other 90 percent of
7 the house then is dry?

8 MR. CHAKERIS: Objection.

9 THE WITNESS: Well, I would agree that the
10 other 90 percent of the locations tested indicated an
11 acceptable moisture level, but there may have been
12 deterioration.

13 BY MR. RAWL:

14 Q. You can have situations where you have a
15 high moisture level and no deterioration, can't you?

16 A. It happens very seldom.

17 Q. Is the answer to my question yes?

18 MR. CHAKERIS: Objection.

19 THE WITNESS: Yes.

20 BY MR. RAWL:

21 Q. In your notes next to some of the moisture
22 readings on the Oros' house, you have either solid
23 medium or solid or some combination thereof?

24 A. Yes.

25 Q. What do those mean to you?

D

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 ANTHONY and BARBARA GRAZIA,)
 individually and on behalf of all other)
 similarly situated plaintiffs,)
)
 Plaintiffs,)
 v.)
)
 SOUTH CAROLINA STATE)
 PLASTERING, LLC,)
)
 Defendant,)
)
 and)
)
 SOUTH CAROLINA STATE)
 PLASTERING, LLC,)
)
 Third-Party Plaintiff,)
)
 v.)
)
 DEL WEBB COMMUNITIES, INC.,)
 PULTE HOMES, INC. and)
 KEPHART ARCHITECTS, INC.,)
)
 Third-Party Defendants.)
)

JMS

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-07-1396

**ORDER VACATING TEMPORARY
 INJUNCTION, DISMISSING AS MOOT
 DEFENDANTS' MOTION TO AMEND
 INJUNCTION, AND DENYING
 MOTION TO RENEW INJUNCTION**

2012 MAY 16 PM 1:21
 JERRI ANN ROSENEAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

This class action concerns allegations of defective stucco on approximately 4000 residences within the Sun City development in Hilton Head, South Carolina. The case has been declared complex and assigned to this Court for disposition. On January 13, 2012, Defendant South Carolina State Plastering ("SCSP") filed a Motion for Temporary Injunction, and on January 18, 2012, Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. likewise filed a Motion for Injunctive Relief. Both of these motions sought to enjoin Plaintiffs' counsel from communicating with stucco homeowners in Sun City Hilton Head prior to the

expiration of any opt-out period for inclusion in the class. According to Defendants, the motions were filed because Plaintiffs' counsel intended to conduct a "community meeting" with reference to this pending lawsuit, and published notice of such meeting in the local newspaper. Before a hearing could be scheduled on the motions, Plaintiffs' counsel submitted a proposed Order to the Court granting the injunction, presented as a consent Order, and the Court signed Plaintiffs' counsel's proposed order.

After the Court signed and issued the Order, Defendant SCSP and Third-Party Defendants Del Webb and Pulte moved to alter the Order. The Court conducted a hearing on this motion, during which Defendants asserted that the timeframe they had requested for the injunction to remain in place in their motions was different from the one actually outlined in the signed Order presented by Plaintiff's counsel. At that point, the Court learned that Defendants had not in fact consented to the proposed Order submitted by Plaintiffs' counsel.

After considering this issue with the knowledge that there was no true consent among the parties, the Court has determined that the Order was improvidently granted; moreover, after close review, the requested injunction was unilateral in nature and failed to require a bond in the event of Plaintiffs' counsels' failure to abide thereby, which is reversible error. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009); Rule 65, SCRPC. Therefore, the Court hereby vacates the Order Granting Temporary Injunction entered on March 15, 2012. As a result, the Court further now dismisses as moot Defendants' motion to alter or amend that injunction.

After learning that the Court intended to vacate the previous injunction, Defendants have now moved to renew the injunction. A telephone conference was conducted on the record on May 9, 2012 to hear arguments on the issue of whether an injunction should issue. In considering this renewed motion, the Court is aware that class actions serve an important function in our system of civil justice, but they also present opportunities for abuse as well as problems for courts and counsel in the management of cases. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2200 (1981). Therefore, because of the potential for abuse, courts have been given the discretion to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Rule 23, SCRPC; *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). To ensure that these interests are protected, courts may find it necessary to issue orders, like the previous one in this case, that limit communication between the parties and potential members of the class.

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But a court's power to issue an order curtailing communication is not unlimited. In fact, one such limitation flows from the framework and general policies contained in Rule 23 itself. As the South Carolina Supreme Court has stated, the specific grant of power to a court under Rule 23(d), SCRPC, are directed towards notifying the parties of the pending litigation. *Id.* Therefore, while it may be necessary for a court to issue an order limiting communications in certain circumstances, such an order "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in [Rule 23]." *Id.*, citing *Gulf Oil Co.* at 101, 101 S.Ct. at 2200.

Another, and perhaps more important, limitation on a court's authority to enter an order prohibiting communication under Rule 23 emerges from the constitutional rights enshrined in the First Amendment. The impact of Defendants' motion is broad sweeping and effectively constitutes a prior restraint on speech. It enjoins the named Plaintiffs and Plaintiffs' counsel from "communicating with prospective class members regarding" the pending litigation, "publishing any statement" regarding the litigation, and "taking any action intended to advise or inform residents of Sun City Hilton Head of their legal rights." A prior restraint, of course, is subject to a heavy presumption against its constitutionality; in order for the restraint to be valid, it must prevent "direct, immediate, and irreparable damage" and be the least restrictive means of doing so. *New York Times Co. v. U.S.*, 403 U.S. 713, 732-33, 91 S.Ct. 2140, 2150-51 (1971). While the Court is well aware of the constitutional implications of Defendants' motion, this decision is not made upon constitutional grounds.

With regard to the motion for temporary injunction, the Court makes the following specific findings in weighing the need for limitation of communications between Plaintiffs' counsel and putative class members versus a potential interference with the rights of the parties:

1. The Court's ability to control the flow of information within a class action is superimposed upon the foundational democratic principles of the need for a free flow of information within society generally and specifically within the justice system;
2. The motions as filed are unilateral in nature, applying only to Plaintiffs' counsel, raising an immediate question as to the propriety of

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disparate treatment of the parties. While Defendants now offer to amend the motion so as to apply to all parties, this does not cure the Court's concerns;

3. This case involves a retirement community where the citizenry is similarly situated as to the construction of their residences by Defendants, and where putative class members have the necessary time, fiscal capability, and level of sophistication to fully participate in this case;

4. This case further involves the most substantial investment that most individuals make in a lifetime, their home, and thus is of core interest. Due to the large number of people involved who live in close proximity to one another, one can anticipate that rumor and misunderstanding will abound. The inability to discuss the issues in this litigation with counsel on either side of the case will result in the potential for confusion and frustration, particularly when individuals are attempting to determine whether or not to opt out of the proposed class;

5. This situation would undermine the confidence of potential litigants in the justice system as the ban on information would be imposed by Court order, as opposed to an agreement between counsel, and the Court finds no reason to impose such a ban;

6. The free flow of information, particularly in light of the requirements and directives of the Right to Cure Dwelling Defect Act, S.C. Code Ann. 40-59-810, et. seq., may lead to the settlement of many of these claims without the necessity of joining the class; and,

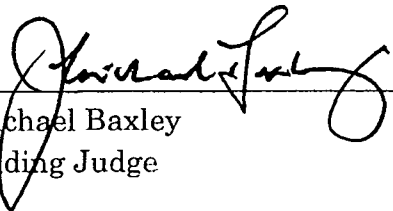
7. The Defendants have shown no "abuse" by Plaintiffs' counsel in their communications with putative class members, and the mere conjecture that such may occur is insufficient for this Court to impose a ban. *Gulf Oil Co.* at 104, 101 S.Ct. at 2202.

After review and consideration of this issue, the Court does not find that direct, immediate, and irreparable harm will result if Plaintiffs' counsel is allowed to communicate with the residents of Sun City Hilton Head. To the contrary, the Court finds that the interests of justice are better served if all counsel are permitted to discuss this case with prospective and potential members of the class, as the free

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flow of information from either side of the case will serve to better inform potential class members as to their rights and the potential to resolve individual claims without the need for litigation prior to the enrollment of the class. For this reason, the Court now declines to issue an injunction, and denies Defendants' motion.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge

Hartsville, South Carolina
May 11, 2012

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MAY 21 2012

McNair Law Firm, PA

CERTIFICATE OF SERVICE

As a ~~Docket~~ Clerk of Court for Common Pleas in Beaufort County, I certify that on 5-18-12, I served a copy of this Order Vacating Temporary Injunction, Dismissing as Moot Defendants' Motion to Amend Injunction, and Denying Motion to Renew Injunction, in this action, dated May 11, 2012, on Michael S. Seekings, Esquire, Everett A. Kendall, II, Esquire, A. Victor Rawl, Jr., Esquire, David S. Cobb, Esquire, by depositing in the U.S. Mail, pre-paid for first class delivery, at the following addresses:

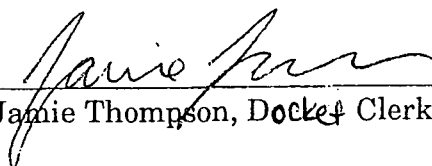
Michael S. Seekings, Esquire
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Everett A. Kendall, II, Esquire
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Columbia, SC 29211

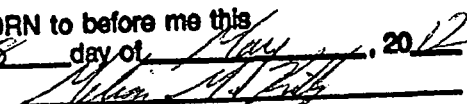
A. Victor Rawl, Jr. Esquire
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2012 MAY 18 AM 11:11
JENNIFER ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT


Jamie Thompson, ~~Docket~~ Clerk

May 18, 2012

SWORN to before me this 18 day of May, 2012

Notary Public for South Carolina
My Commission Expires: 5-28-14

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MAY 21 2012

McNair Law Firm, P.A.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2007-CP-07-1396

RECEIVED
JUL 23 2012
Respondents,
SC Court of Appeals

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

v.

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

and

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

v.

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

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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the *Return to Motion to Dismiss Appeal* by depositing a copy in the United States Mail, postage prepaid, on July 23, 2012, addressed to all attorneys of record, as follows:


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Ann Shuler

MCNAIR
ATTORNEYS

July 23, 2012

Robert L. Widener

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T 803.799.9800
F 803.753.3278

Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs v. South Carolina State Plastering, LLC and South Carolina State Plastering, LLC v. Del Webb Communities, Inc., Pulte Homes, Inc. and Kephart Architects, Inc.
Case No. 2007-CP-07-1396

Dear Madam Clerk:

Enclosed for filing, please find the original and seven copies of Del Webb Communities, Inc. and Pulte Homes, Inc.'s Return to Motion to Dismiss Appeal and the original and one copy of the Certificate of Service. Please return the file stamped copies to me via our courier.

By copy of this letter, we are serving all counsel of record with a copy of the Return.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
Enclosures

RECEIVED
JUL 23 2012
SC Court of Appeals

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Honorable Jenny Abbott Kitchings
July 23, 2012
Page 2

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