

81385

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

OCT 26 2016

SC Court of Appeals

Appeal from Charleston County  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-5559  
Appellate Case No. 2015-000201

Madison at Hamlin Plantation  
Townhome Association, Inc.,  
and Sandy Randall and Cherie  
Berotti, individually and on  
behalf of all others similarly  
situated,

Respondents,

v.

Builders Support Services of  
the Carolinas, Inc., individually  
and f/k/a John Wieland Homes  
and Neighborhoods of the  
Carolinas, Inc. individually and  
f/k/a John Wieland Homes and  
Neighborhoods of NC, Inc.  
individually and f/k/a John  
Wieland Homes and  
Neighborhoods of SC, Inc.,  
John Wieland Homes of SC,  
Inc., John Wieland Homes,  
Inc., John Wieland Homes of  
Charleston, Inc., AAA Plumbing;  
American Residential Services,  
LLC; Builders Firstsource-  
Southeast Group, LLC; Carolina  
Custom Security, Inc.; Creative  
Touch Interiors, Inc., individually  
and f/k/a Rice Planters Carpets,

Defendants,

Inc.; Fogel Services, Inc.; Larry's  
Termite Control, Inc.; McClellan  
Plumbing, LLC; Neighborhood  
Management Associates, Inc.;  
George Ryan Butler; Paul  
Spencer; and John Doe 1-50

Of which Builders Support Services of the Carolinas, Inc., individually and f/k/a John  
Wieland Homes and Neighborhoods of the Carolinas, Inc. individually and f/k/a John  
Wieland Homes and Neighborhoods of NC, Inc. individually and f/k/a John Wieland  
Homes and Neighborhoods of SC, Inc., John Wieland Homes of SC, Inc., John Wieland  
Homes, Inc., John Wieland Homes of Charleston, Inc. are the Appellants.

---

**MOTION TO SUBSITUTE CLASS REPRESENTATIVES**

---

Justin O'Toole Lucey, Esq.  
Joshua F. Evans, Esq.  
Justin O'Toole Lucey, P.A.  
415 Mill Street  
Mt. Pleasant, SC 29464  
(843) 849-8400  
Attorneys for Respondents

COME NOW the Respondents, Madison at Hamlin Plantation Townhome Association, Inc. and Sandy Randall and Cherie Berotti, individually, and on behalf of all others similarly situated, by and through their undersigned counsel, and move before this Honorable Court for an Order to Substitute Class Representatives. And in support thereof, Movants set forth the following:

On February 24, 2014, Plaintiffs moved to certify a class of Madison townhome owners (members of the Respondent Association). On September 24, 2014, the Court granted Plaintiffs' motion to certify a class of Madison townhome owners and designated Sandy Randall and Cherie Berotti as Class Representatives. However, both Randall and Berotti have since sold their units at Madison at Hamlin Plantation. As such, Respondents desire to have other class members substituted as class representatives in this action.

Respondents respectfully request that this Court permit the substitution of Jane A. Marshall for Plaintiff Berotti and the substitution of Thomas C. Koontz for Plaintiff Randall, both to serve as Class Representatives in this matter.<sup>1</sup> Berotti and her proposed substitute, Marshall, are similarly situated in that both individuals purchased their homes directly from Appellants. Randall and her proposed substitute, Koontz, are similarly situated, as neither purchased their residences from Wieland. Substitution of class representatives in these circumstances should be liberally permitted. *Newberg on Class Actions* §2:17 (5th ed. 2011) ("When mootness of the named plaintiff's claims occurs, intervention by absentee members is freely allowed in order to substitute them as class representatives. Once a class complaint is filed, but certainly following certification, Rule

---

<sup>1</sup> Marshall owns and resides at 3436 Billings Street in the Madison townhomes and is a member of the Association. Koontz owns and resides at 3493 Billings Street in the Madison townhomes and is a member of the Association.

23 is designed to assure that the rights of absent class members are not prejudiced by the voluntary actions of the representative plaintiff.”)

Separately, Respondents note to the Court that this substitution may moot this appeal. There are two orders on appeal: the first is the Order denying arbitration; the second is the interlocutory Order granting class certification. The Order denying arbitration only denied arbitration as to Berotti – as that was the sole relief requested by Appellants in the Trial Court. Appellants have never made a motion in the Trial Court to compel any other homeowner to arbitrate.

On the other hand, Appellants may take the position that, as the arbitration issues are likely to arise again in the Trial Court, the Court should proceed with hearing the appeal. Respondents do not think this will be the case; having now litigated and conducted discovery for three years in the trial court without moving to compel any other arbitration, it would appear that the right to compel any other arbitration has been waived.<sup>2</sup>

If the Court decides that the appeal of the Order granting arbitration has been mooted, presumably the appeal of the second Order, the interlocutory Order granting class certification, will be dismissed for lack of jurisdiction, and the case would be remanded to the Trial Court.

Respondents’ counsel certifies that they conferred with opposing counsel, seeking consent for this substitution, but were unable to obtain a definitive response in advance of this filing.

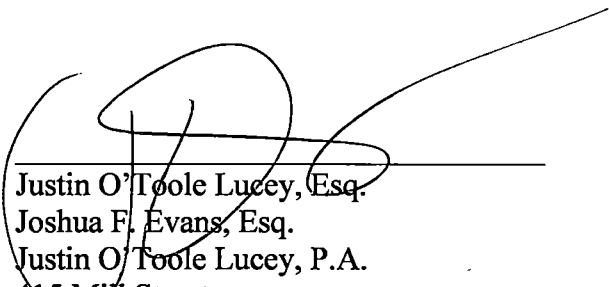
---

<sup>2</sup> The Trial Court denied Appellants’ motion to stay the underlying case, and litigation and discovery have proceeded. In fact, the parties are scheduled to mediate the case in early December. Further, if necessary to avoid further delay in the trial of this matter while the homes continue to deteriorate, Respondents may well stipulate to the exclusion of parties allegedly bound by arbitration from the certified class. Of the 114 townhouses at issue, it is believe that approximately twenty owners or fewer may be first purchasers who may be arguably bound by an arbitration clause in a purchase contract or warranty with Appellants.

WHEREFORE, Respondents respectfully request an Order substituting Jane A. Marshall and Thomas C. Koontz for Cherie Berotti and Sandy Randall, respectively.

FURTHER, if deemed appropriate, Respondents request an Order dismissing the appeal of the Order Denying Appellants' Motion to Compel Arbitration as moot, dismissing the appeal of the Order Granting Class Certification as interlocutory, and remanding the case to the Trial Court.

Respectfully submitted,



---

Justin O'Toole Lucey, Esq.  
Joshua F. Evans, Esq.  
Justin O'Toole Lucey, P.A.  
415 Mill Street  
Mt. Pleasant, SC 29464  
(843) 849-8400  
Attorneys for Respondents

October 21, 2016

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston County  
Court of Common Pleas

RECEIVED

OCT 26 2016

R. Markley Dennis, Jr., Circuit Court Judge SC Court of Appeals

Case No. 2013-CP-10-5559  
Appellate Case No. 2015-000201

Madison at Hamlin Plantation  
Townhome Association, Inc.,  
and Sandy Randall and Cherie  
Berotti, individually and on  
behalf of all others similarly  
situated,

Respondents,

v.

Builders Support Services of  
the Carolinas, Inc., individually  
and f/k/a John Wieland Homes  
and Neighborhoods of the  
Carolinas, Inc. individually and  
f/k/a John Wieland Homes and  
Neighborhoods of NC, Inc.  
individually and f/k/a John  
Wieland Homes and  
Neighborhoods of SC, Inc.,  
John Wieland Homes of SC,  
Inc., John Wieland Homes,  
Inc., John Wieland Homes of  
Charleston, Inc., AAA Plumbing;  
American Residential Services,  
LLC; Builders Firstsource-  
Southeast Group, LLC; Carolina  
Custom Security, Inc.; Creative  
Touch Interiors, Inc., individually  
and f/k/a Rice Planters Carpets,

Defendants,

Inc.; Fogel Services, Inc.; Larry's  
Termite Control, Inc.; McClellan  
Plumbing, LLC; Neighborhood  
Management Associates, Inc.;  
George Ryan Butler; Paul  
Spencer; and John Doe 1-50

Of which Builders Support Services of the Carolinas, Inc., individually and f/k/a John  
Wieland Homes and Neighborhoods of the Carolinas, Inc. individually and f/k/a John  
Wieland Homes and Neighborhoods of NC, Inc. individually and f/k/a John Wieland  
Homes and Neighborhoods of SC, Inc., John Wieland Homes of SC, Inc., John Wieland  
Homes, Inc., John Wieland Homes of Charleston, Inc. are the Appellants.

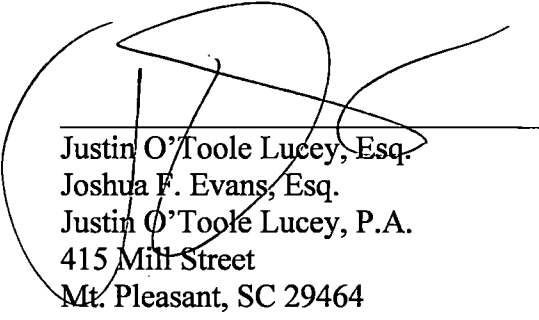
---

**PROOF OF SERVICE**

---

I certify that I have served the **MOTION TO SUBSTITUTE CLASS  
REPRESENTATIVES** on Appellants by delivering a copy of it in the United States Mail,  
postage prepaid, on October 21, 2016, addressed as follows:

Andrew E. Haselden, Esq.  
Howser, Newman & Besley, LLC  
215 East Bay Street, Suite 303  
Charleston, SC 29401  
(843) 216-6940  
*Attorney for Appellants*



Justin O'Toole Lucey, Esq.  
Joshua F. Evans, Esq.  
Justin O'Toole Lucey, P.A.  
415 Mill Street  
Mt. Pleasant, SC 29464  
(843) 849-8400  
Attorneys for Respondents

October 21, 2016

JUSTIN O'TOOLE LUCEY, PA

Attorney at Law

Justin Lucey  
Joshua F. Evans  
Stephanie D. Drawdy  
Dabny Lynn  
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464  
Phone: 843.849.8400 · Fax: 843.849.8406 · office@lucey-law.com

Reply to:  
P.O. Box 806  
Mount Pleasant, SC 29465

October 21, 2016

RECEIVED

OCT 26 2016

SC Court of Appeals

VIA U.S. MAIL

Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: ***Madison at Hamlin Plantation Townhome Association, Inc., et al. v. Builders Support Services of the Carolinas, Inc., et al.***  
**Appellate Case No.: 2015-000201**  
**Common Pleas Case No.: 2013-CP-10-5559**

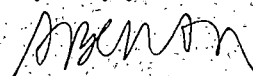
Dear Ms. Kitchings:

I hope this finds you well. Enclosed for filing, please find the original and six (6) copies of Respondents' Motion to Substitute Class Representatives in the above-referenced matter. Also enclosed is a check in the amount of \$25.00, which serves as the appropriate filing fee for this document. Please forward these documents to the appropriate person for filing, and return a file-stamped copy to our office in the enclosed envelope.

Please feel free to contact me should you have any questions or concerns regarding this matter. Thank you in advance for your attention to this request.

With best regards, I remain

Very truly yours,



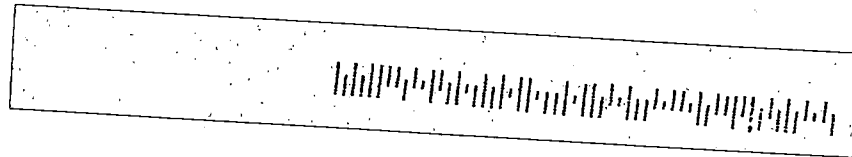
Alicia M. Benton  
Paralegal to Joshua F. Evans

Enclosures (as stated)

cc: Andrew E. Haselden, Esq.



UNITED STATES POSTAGE  
PITNEY BOWES  
\$002.83<sup>0</sup>  
02 1P  
0003273835 OCT 21 2016  
MAILED FROM ZIP CODE 29465



**JUSTIN O'TOOLE LUCEY, PA**

ATTORNEYS AT LAW

415 MILL STREET • P.O. Box 806 • MT. PLEASANT, SC 29465-0806

**RECEIVED**

OCT 26 2016

**SC Court of Appeals**

Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211