82425

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 08 2017
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

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 Kephait Architects, Inc., Third-Party Defendants,

Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are Respondents.

MOTION TO DETERMINE APPEALABILITY

South Carolina State Plastering, LLC has filed a Notice of Appeal from certain intermediate orders in this action, to wit:

1. The order of the Honorable J. Michael Baxley, "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act," dated December 8, 2011 and filed December 19, 2011;

2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;

3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;

4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;

5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;

6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016; and

7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

The Appellant previously filed a Notice of Appeal from Judge Baxley's Orders of December 19, 2011 and May 7, 2012, which appeal was dismissed on the ground that "these orders are not immediately appealable." [Ex. 1 – Ct. App. Order, filed August 8, 2012.] In an attempt to preempt any assertion that the Appellant is being vexatious or frivolous in filing this Notice of Appeal, the Appellant submits this motion to make a prima facie position on several anticipated appealability issues.

I. BACKGROUND

A. Prior Appeals

The details of the litigation proceedings on the issues of class certification and the Right to Cure Act can be found in reams of documents previously filed in the Appellate Courts.[1] The Appellant provides the following brief summary to provide context and background for the

[1]Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*). Appellate Case Nos. 2011-212212; 2013-000233.

purposes of this motion. The Plaintiffs, homeowners in a Sun City community in Bluffton, South Carolina, bring this action alleging defective exterior stucco work by South Carolina State Plastering (SCSP) and seeking to pursue claims on behalf of other homeowners as class action.[2]

In its answer[3], SCSP argued the Grazias had failed to comply with the express provisions of the Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act), S.C. Code Ann. §§ 40-59–810 to 860 which entitles a contractor or subcontractor to notice of any qualifying construction defect, and the opportunity to cure, before the action is commenced. After the Grazias complied with the Act on behalf of themselves, SCSP moved to dismiss the class allegations, and, in the alternative, requested a stay of the proceedings until each of the similarly situated claimants complied with the Right to Cure Act notice requirements. The circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act, and appeal was taken at that time and heard by the Supreme Court. The Supreme Court held that the circuit court erred in striking the Grazias' class allegations on the basis that the Right to Cure Act is incompatible with Rule 23. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*).

As noted by the Supreme Court, at that stage of litigation, no motion for class certification had yet been made; however, the Court gave certain instructions for anticipated proceedings on remand, namely:

---

[2] At the time of the appeal in *Grazia I*, the number of homes with allegedly defective stucco was uncertain. The Grazias' referred to 2,673, while SCSP referenced "some four thousand homes." The Amended Class List filed with the Clerk of Court on January 27, 2016 contains 4518 addresses.

[3] SCSP answered, and brought a third-party complaint against developer Del Webb Communities, Inc., builder Pulte Homes, Inc., and architect Kephart Architects, Inc.

> Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove.
> ****
> If and when these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate. *Id.* at 204.

On remand, as to be expected, the Plaintiffs made a motion for class certification to which SCSP objected on numerous grounds.[4] The matter came before Judge Baxley, to whom the case had been assigned, and after the submission of extensive memoranda and hearings, he issued his order -- "Order Making ***Preliminary*** Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act." (Emphasis added.) SCSP filed a motion for reconsideration, but Judge Baxley dismissed the motion on the ground that it improper because Rule 59(e) does not allow any challenge to an interlocutory order.

SCSP filed a notice of appeal from Judge Baxley's preliminary order as well as his order dismissing its motion for reconsideration/clarification. This Court found that the preliminary order (and the associated order on the motion to reconsider) were not immediately appealable and dismissed the appeal.

[4] The preliminary certification order raises issues of law as to each of the five factors under Rule 23, SCRCP, that must – at some point – be reviewed by the Appellate Courts. These issues include the propriety of the court-created class definition, the manner in which the trial court has defined and made findings of "typicality" and "commonality," the approval of the class representatives and counsel as adequate under the circumstances of claim splitting and claims waiver, as well as issues of numerosity and the amount of each claim.

B. Current Status: The "Preliminary" order has now been deemed "Final".

In the intervening time since the Court of Appeals' dismissal of the earlier appeal of the preliminary class order, the parties have proceeded through four years of processes and procedures established by Judge Baxley, stemming from his preliminary order, that he thought would allow the parties to comply with the Right to Cure Act.[5] As of May 2016, Judge Dickson, who had been assigned to this case in December 2014 after the retirement of Judge Baxley, had set a scheduling order that mandated steps and deadlines regarding Right to Cure Act compliance and Rule 23 class certification,[6] including a hearing date and briefing schedule for final class certification. Thereafter, Judge Dickson reversed himself and opined that Judge Baxley already had made a "final" decision certifying the class, in an "Order (No Motions Pending)," stating that: "The class was certified by Order of Judge Baxley on December 8, 2011," and "the issue of class certification was long-ago settled and reviewed..."[7] [9/9/16 Order (Dickson), pp. 1, 2.] SCSP made a motion for reconsideration which Judge Dickson dismissed on the same reasoning as Judge Baxley – there is no provision in Rule 59(e) to allow reconsideration of a interlocutory order.

---

[5] The record will demonstrate that throughout this process, the Appellant has repeatedly raised various objections to preserve issues for a future appeal, but proceeded in good faith to comply with Judge Baxley's order in the face of this Court's dismissal of the prior appeal. Judge Dickson in his 9/9/16 Order (page 2) decreed that he would not entertain any further argument on the issues of class certification.

[6] The stay on discovery was to remain in effect until the court issued its ruling on final certification. ¶ 4.

[7] Contrary to Judge Dickson's pronouncement, there was no "review" of the issue of class certification. The Court of Appeals dismissed the prior appeal as not immediately appealable without reviewing the merits of the Defendant's challenges to class certification or any other of the issues arising from those two orders.

SCSP maintains that Judge Dickson has committed manifest error in his misreading -- or rewriting -- of Judge Baxley's clear designation of his order as preliminary and his intention to make final determination on class certification at a future time, after further discovery, further briefing, and a full consideration of all relevant information.[8] But, beyond the issue of Judge Dickson's misinterpretation of Judge Baxley's order, Judge Dickson's order now has effectively rendered a "final" decision on Plaintiffs' motion for class certification, without conducting a rigorous analysis of all relevant information and making findings of fact regarding the five Rule 23 factors.

II. APPEALABILITY OF INTERMEDIATE ORDERS UNDER S.C. CODE ANN. § 14-3-330

Section 14-3-330 determines the scope of appellate jurisdiction in law cases:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

---

[8] SCSP maintains that such ruling is wholly inconsistent with and directly contravenes Judge Baxley's clear designation of his order as preliminary and his intention to make final determination on class certification at a future time. As denominated in the very title of the order -- Judge Baxley had made only a preliminary finding that the proposed class meets the Requirements of Rule 23(a). His intention is also found in the express language of this order:

- "Thereafter [after compliance with the Right to Cure Act], the Court will make a final decision as to whether a class action is practicable under the specific facts and circumstances disclosed by the notices and response required under the Act." [12/19/11 Order (Baxley), p. 2.]

- "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." [12/19/11 Order (Baxley), p. 10.]

- Other examples include: "[I]n the event a Class is certified with finality in this case," p.8; "should a Class finally be certified," p. 9.]

> **** (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; ****

This case presents factual and legal issues that are substantially different from other opinions holding that orders granting class certification are not -- as general rule -- immediately appealable. Salmonsen v. CGD, Inc., 377 S.C. 442, 448–49, 661 S.E.2d 81, 85 (2008), and cases cited therein. In Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979), the Court dismissed an appeal from a class certification order as interlocutory on the grounds that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment." However, in *Salmonsen*, the Court found that an order establishing an "opt-in" notification procedure affects a mode of trial and, thus, was immediately appealable. 661 S.E.2d at 87.

While the procedural element of class certification in other cases might not require or justify review prior to final judgment, the Appellant SCSP maintains that Judge Baxley's orders (12/19/11 preliminary class certification and 4/18/14 approving class notice) as interpreted by Judge Dickson's 9/9/16 order, together with Judge Dickson's 2/12/16 order (limiting destructive testing) are immediately appealable pursuant to §14-3-330(2) because, apart from the issues of improper class certification under Rule 23, SCRCP, these orders deprive the Appellant of substantial, legal rights under the Right to Cure Act and they also effectively strike defenses by not allowing discovery or providing a reasonable means to assert defenses. In addition, the orders of Judge Baxley and Judge Dickson dismissing of SCSP's motions for reconsideration also involve the merits and affect substantial rights. Judge Baxley's preliminary order certifying the class (as "finalized" by Judge Dickson's order) and his order approving the class notice are

immediately appealable because they create an impermissible opt-in class that affects the mode of trial under the ruling in *Salmonsen.*

A. The Class Certification/Right to Cure orders

1. Orders affecting SCSP's Substantial Rights under the Right to Cure Act

The Right to Cure Act mandates a presuit process for resolution of homeowner construction complaints. The Act requires claimants to give notice to a contractor ninety days before filing an action against the contractor arising out of the construction of a dwelling; upon receiving a notice, the contractor has fifteen days to request clarification of the alleged defects if the defect is not sufficiently stated. § 40–59–840. The contractor has thirty days after receipt of a notice to "inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects;" and then the claimant has 10 days to respond to the offer. § 40–59–850. If a claimant files an action in court without first complying with the Act, the court must (on motion) stay the action until the claimant has complied with the Act. § 40–59–830.

As noted above, on remand in *Grazia I*, the Supreme Court gave instructions to the trial court that when presented with a motion for class certification -- FIRST to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove and THEN, IF these prerequisites are met, to determine whether the Act could be properly harmonized with Rule 23 such that representative notice under the Right to Cure Act might be appropriate.[9] Grazia I, 703 S.E.2d at 202–03. On remand, Judge Baxley made only a

[9] With all due respect to the Supreme Court's decision, SCSP maintains that the instructions do not comport with the Legislative intent to comply FIRST with the Act before moving forward with the legal action, and that certifying a class first is improper and inefficient because any members that do not comply with the Act cannot proceed to participate in the class in any event.

preliminary finding that the Plaintiffs met the five Rule 23 requirements, and created his own process for compliance with the Right to Cure Act. In his 2011 order Judge Baxley articulated the compliance process in a broad concept, and later, in his 4/18/14 order, Judge Baxley set forth additional details, including approval of the notice. In his 2/12/16 order, Judge Dickson limited SCSP to certain necessary testing to only 47 houses; and in his 5/26/16 scheduling order, Judge Dickson allows for the stay to be lifted upon final class certification prior to compliance with the Right to Cure Act.[10]

As of the filing of this appeal, SCSP is still attempting to complete necessary testing before it can make offers to the claimants, then the claimants must respond before this stay can be lifted to allow the parties to proceed with conducting discovery necessary to allow them to ultimately try the case on the merits. Thus, a presuit process that is supposed to take 90 days has already consumed almost three years, and, the end of the presuit process may only be seen in a crystal ball because there is an unresolved disagreement between SCSP and class counsel over the process of making the offers.[11] Meanwhile, the stay of discovery has been prematurely lifted.[12]

They also incur an extraordinary expense of dealing with as many as 4500 claims as opposed to just one.

[10]The scheduling order did contemplate that the Right to Cure process would be completed by September before the scheduled hearing set on final class certification; however, compliance has not yet been completed and the Plaintiffs are pursuing discovery on the presumption that the stay has been lifted with Judge Dickson's 9/9/16 order declaring class certification already was final.

[11] SCSP intends to make individual offers to each claimant/putative class member; however, SCSP counsel contemplate that Plaintiffs' counsel will object and insist on a global "class" offer.

[12] *See* Grazia I, 703 S.E.2d at 202 ("The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.")

SCSP maintains that this process does not meet the purpose or express provisions of the Act or the instructions in *Grazia I*, and deprives SCSP of its rights under the Act. As such, these orders are appealable now under §14-3-330(2).

2. Opt-in Class Notice Orders affecting the Mode of Trial

The denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2). Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005), and cases cited therein. As noted above, the Court has previously reviewed a class certification order under this principle in *Salmonsen*, supra. In that case, the Supreme Court was presented with an appeal from orders of Judge Dennis certifying the class/denying decertification and an order of Judge Young establishing an "opt-in" notification procedure. The Court held that the certification orders of Judge Dennis were not immediately appealable, but the Court held that Judge Young's opt-in order was immediately appealable because it affected a mode of trial inasmuch as class members would be excluded and denied a right to trial. Reaching the merits, the Court rejected any opt-in procedure for class notification because it undermines due process, and adopted" the 'opt-out' class action and notification procedure as the exclusive method of class action litigation in this state." 661 S.E.2d at 91.

Judge Baxley, in his "preliminary" certification order of 12/19/11, speaks of an opt-out class notice, but in actuality, he was creating an opt-in process:

> 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.

In his 4/18/14 order Judge Baxley approved a class notice that also expressly purports to give the claimants/putative class members the opportunity to opt-out. However, Judge Baxley also approved a RTC Questionnaire to be mailed to all putative class members and allowed 60 days for the return of the Questionnaires, stating: "Plaintiff's Counsel shall have additional time to contact class members that do not timely return the Questionnaire, but at some point, to be determined in the future, class members who fail to return the RTC Questionnaire shall have their claims dismissed with prejudice." [13] The Questionnaire also warns claimants that their claim may be dismissed.[14] Ultimately, the process for preliminary class certification and RTC compliance, as created by Judge Baxley, creates a de facto opt-in process because a claimant cannot participate in the class UNLESS they affirmatively choose to return the Questionnaire. Under *Salmonsen*, these orders are immediately appealable.

B. The Orders Dismissing the Motions for Reconsideration

In a separate, but parallel view, the orders dismissing the motions for reconsideration are appealable under §14-3-330(2) because the trial court's refusal to allow the opportunity for reconsideration affects SCSP's substantial rights that could prevent them from raising certain issues on appeal. As the Court is well aware, the "absolute necessity" of issue preservation and the importance of making motions for reconsideration to preserve issues for appellate review can be found in a myriad of opinions with references to the consequences of failure to meet mandatory preservation requirements. *See generally*, Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004); Trial Handbook for South Carolina Lawyers § 36:5. In

[13] The final date was set by the May 26, 2016 order.

[14] There is currently pending before the trial court a motion to dismiss the claims of those who did not return the Questionnaire.

Elam, the Supreme Court discusses the proper use of a Rule 59(e) motion to seek "reconsideration" of issues and arguments:

> [I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. ***It is inherently unfair to disallow such an opportunity.***

602 S.E.2d 772, 778–79 (2004) (citations omitted/emphasis added). The consequences of failing to make a motion for reconsideration of an intermediate/pretrial order can be seen in Ness v. Eckerd Corp., 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002), where on appeal from an order of a trial judge vacating his prior order denying the defendant relief from entry of default and recusing himself, the Court of Appeals held that issues related to recusal were not preserved for appellate review because the party did not make a Rule 59(e) motion.

In view of the decades of precedent on issue preservation, SCSP made a motion for reconsideration as to Judge Baxley's preliminary order and Judge Dickson's order declaring that preliminary class certification order as a final ruling. Notwithstanding the well-settled principle that trial court intermediate orders are amendable on motions for reconsideration, *see* Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993), both Judge Baxley and Judge Dickson have dismissed the Appellant's motions for reconsideration as "improper" on the ground that no such motion is permitted by Rule 59 to challenge an interlocutory order, and as noted above, Judge Dickson has decreed that he will not allow any further argument on the class certification matters.

To the extent that the Judges did not deny the motions, but instead dismissed the motions on a purely legal ground, those dismissal orders are immediately appealable. *See* Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385, 387 (1897) ("While the granting or refusing of an interlocutory order of injunction, upon the merits, is not, as a rule, appealable, it is appealable when granted or refused upon a 'purely' legal ground, and especially a jurisdictional ground.") Appellant also maintains that the dismissal orders are appealable because the trial court's refusal to allow the opportunity for reconsideration is "inherently unfair" and thus affects their substantial rights to reconsideration that could prevent them from raising certain issues on appeal. *See* Elam, 602 S.E.2d at 779 ("It is inherently unfair to disallow such an opportunity [for reconsideration.]")

III. Interlocutory Appeals in the Interest of Judicial Economy

"An order that is not directly appealable may be considered if there is an appealable issue before the court." Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005). The Court will allow such appeals "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)." *Id.* Similarly, in *Salmonsen*, the Court chose to address an issue in an interlocutory appeal because it was "in the interest of judicial economy and guidance to the bench and bar." 661 S.E.2d at 87.

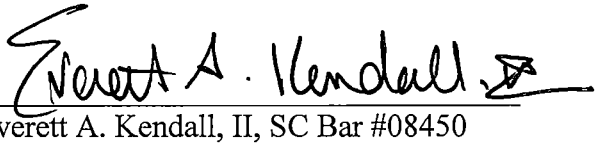
In *Knowles*, the Court spoke of the "debilitating effect on judicial administration caused by piecemeal appeals." 261 S.E.2d at 49. However, in this case, the postponement of appellate review of orders affecting substantial rights and affecting the mode of trial on multiple points is producing a far more debilitating effect on resources of the circuit court. This case was filed in May 2007, it has already been up on appellate review once, and after remand from the Supreme Court, the case has required incalculable hours of court time and produced court filings that fill

up the Clerk's office, not to mention the hours of attorney time and litigation expenses incurred by the parties. Still, the Right to Cure process has not yet been completed, which must be accomplished before the stay can be lifted to allow the parties to begin discovery and eventually move toward trial on the merits.

CONCLUSION

The statute allows immediate appeal of these orders and the interests of justice and the administration of the judicial system are best served by proceeding with review of all the issues raised in regards to these orders at this stage, rather than years from now.

Respectfully submitted,



Everett A. Kendall, II, SC Bar #08450
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233
eak@swblaw.com

Attorneys for Appellant
South Carolina State Plastering, LLC

February 8, 2017

EXHIBIT 1

The South Carolina 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.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

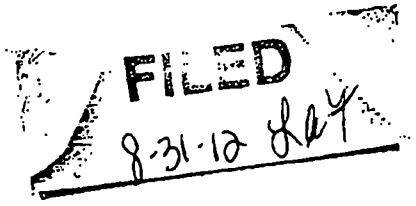
ORDER

Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act" and an order denying reconsideration and clarification. Respondents have filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."

FOR THE COURT

Columbia, South Carolina

cc:
Everett Augustus Kendall, II
Christy Elizabeth Mahon
Phillip Ward Segui, Jr.
John T. Chakeris
W. Jefferson Leath, Jr.
Michael S. Seekings



The South Carolina 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.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Fleming C.J.

J.

Daniel G. Pieper J.

FILED
JAN 1-15-13

Columbia, South Carolina

cc:
Everett Augustus Kendall, II
Christy Elizabeth Mahon
Phillip Ward Segui, Jr.
John T. Chakeris
W. Jefferson Leath, Jr.
Michael S. Seekings

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

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 Respondents.

PROOF OF SERVICE

I certify that I have served the Motion to Determine Appealability on Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs and on Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc. by depositing a copy of the same in the United States Mail, postage prepaid, on February 8, 2017 to all attorneys of record. The addresses for the attorneys of record are as follows:

W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch & Seekings, LLP
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
Attorneys for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

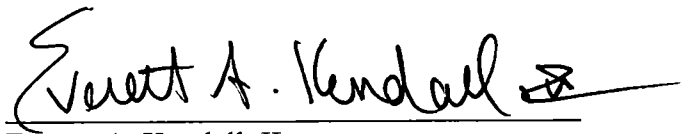
Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Boulevard, Suite A (29464)
Post Office Box 1450
Mt. Pleasant, South Carolina 29465
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

John T. Chakeris
The Chakeris Law Firm
231 Calhoun Street
Post Office Box 397
Charleston, South Carolina 29402
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

David S. Cobb
Turner, Padget, Graham & Laney, P.A.
Gateway Center, Suite 200
40 Calhoun Street
Post Office Box 22129
Charleston, South Carolina 29413-2129
Attorney for Third-Party Defendant Kephart Architects, Inc.

A. Victor Rawl, Jr.
Robert L. Widener
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, South Carolina 29402
Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.

[SIGNATURE PAGE TO FOLLOW]



Everett A. Kendall, II
eak@swblaw.com
Marshall C. Crane
mcc@swblaw.com
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
803-256-2233

ATTORNEYS FOR APPELLANT SOUTH CAROLINA STATE PLASTERING, LLC

February 8, 2017

S·W·B

SWEENY WINGATE & BARROW P.A.

2/8/2017

Per telephone conversation with Monica, the filing fee for this Motion has already been received. When the Notice of Appeal was filed on Monday, the check was written for $125, instead of $100.

Please call if there are any questions.

Danyelle Young 803-256-2233 x7131.

MAIN OFFICE: T ▪ 803-256-2233 F ▪ 803-256-9177 1515 LADY ST. (29201) ▪ POST OFFICE BOX 12129 ▪ COLUMBIA, SC 29211
PEE DEE OFFICE: T ▪ 843-878-0390 F ▪ 843-878-0393 115 CARGILL WAY ▪ SUITE B ▪ POST OFFICE BOX 88 ▪ HARTSVILLE, SC 29551

S·W·B

SWEENY WINGATE & BARROW P.A.

February 8, 2017

Reply to: Main Office

Everett A. Kendall, II
(803) 256-2233 x7130
eak@swblaw.com

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29202

RE: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs v. South Carolina State Plastering, LLC, Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc.
Civil Action No.: 2007-CP-07-1396
Our File: 3826-6177

Dear Ms. Kitchings:

Enclosed for filing please find the original Motion to Determine Appealability along one (1) copy of the same along with the original Proof of Service of the Motion to Determine Appealability and one (1) copy to be file-stamped. Please return all file-stamped copies with the Courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do you hesitate to contact me.

Very truly yours,

SWEENY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

EAK/dvy
Enclosures

cc: W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch & Seekings, LLP
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
Attorneys for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Boulevard, Suite A (29464)
Post Office Box 1450
Mt. Pleasant, South Carolina 29465
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

John T. Chakeris
The Chakeris Law Firm
231 Calhoun Street
Post Office Box 397
Charleston, South Carolina 29402
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs

David S. Cobb
Turner, Padget, Graham & Laney, P.A.
Gateway Center, Suite 200
40 Calhoun Street
Post Office Box 22129
Charleston, South Carolina 29413-2129
Attorney for Third-Party Defendant Kephart Architects, Inc.

A. Victor Rawl, Jr.
Robert L. Widener
McNair Law Firm, P.A.
1221 Main Street
Columbia, South Carolina 29201
Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.