

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

Appellate Case No.: 2017-000218

Case No. 2007-CP-07-1396

RECEIVED

MAR 09 2017

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

Respondents.

**Return to Motion to Dismiss
South Carolina State Plastering, LLC's Appeal**

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The Appellant South Carolina State Plastering, LLC submits this Return to the motion to dismiss filed by Respondents Anthony and Barbara Grazia seeking dismissal of SCSP's 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), SCRCF; 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.

First, Appellant SCSP would direct the Court's attention to the fact that it has, from the onset of this appeal, acknowledged potential appealability issues, and in fact, SCSP has already filed a Motion to Determine Appealability addressing virtually all the points raised by the Grazia

Respondents in their motion. The Appellant SCSP craves reference to and incorporates those arguments without belaboring the Court with a full restatement herein.¹ The Appellant does take this opportunity to specifically address certain key points to each of the numbered arguments as raised by the Respondents in their motion.

1. The number of days that this action has been pending has no relevance to the legal issues of whether the intermediate orders are reviewable at this time under S.C. Code Ann. §14-3-330 and applicable case law. Moreover, it should be noted that the years long delays have not been the fault of this Appellant, and in fact, much of that time lapse was derived from the Plaintiffs' prior to appeal. The Plaintiffs Grazias could have long ago achieved resolution of their complaints about the construction and application of stucco on their home if they were not determined to certify a class action to resolve claims by over 4,500 other home owners in the Sun City community. Moreover, the time involved in the Plaintiffs' efforts to certify the class and the Appellant's assertion of its rights under the Right to Cure Act² is largely a product of the nature of class actions and the enormity of the process of complying with the Right to Cure Act for so many homes.

2. While the most current scheduling order has set a trial date of April 17, 2017, this appeal is taken because, as a matter of law, this action cannot be tried that soon because:

(a) the trial court has not yet made a proper analysis of the five requirements of Rule 23 necessary for class for certification, and in fact, the trial court has not yet made a final ruling on the Plaintiffs' motion to certify the class;

¹ SCSP also would note that a Motion to Transfer this appeal has been filed with the Supreme Court on February 9, 2017.

² The Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act), S.C. Code Ann. §§40-59–810 to 860.

(b) the Right to Cure process has not yet been completed and the statutory-based stay cannot be lifted until there has been full compliance with the RTC; and

(c) the Appellant/Defendant has not been afforded the opportunity to conduct discovery on the merits of the claims inasmuch as heretofore, the parties have been dealing with class certification issues and the negotiating and navigating a process attempting RTC compliance in the context of a preliminary class of 4,500 claims, and full discovery on the merits of the claims has been stayed since June 17, 2008 until September 9, 2016. Moreover, since the stay was lifted, Plaintiffs have prevented SCSP from engaging in discovery by refusing to allow depositions of the homeowners, refusing to allow destructive testing on the Grazia residence, and refusing to provide information to substantiate the claims of the class members. At the time the Notice of Appeal was filed, motions to compel had been filed and were yet unresolved.³

3. This appeal is taken for the purpose of asserting the Appellant's substantial statutory and due process rights, namely:

(a) the trial court has never required the Plaintiffs to meet their burden of establishing each and all of the five requirements for class certification under Rule 23, S.C.R.Civ.P., and the Appellant has never been afforded a full and fair opportunity to submit evidentiary matters to challenge/rebut whatever evidence the Plaintiffs might produce to substantiate their motion to certify the class;

(b) the Appellant SCSP has not been fully afforded its rights under the RTC Act; and

³ The following motions are pending: Motion to Compel Depositions of Class Member (9/30/16); Motion to Compel Plaintiffs' Discovery Responses (10/24/16); Motion for Destructive Testing on Grazia residence (10/26/16).

(c) the trial court has refused to rule on the motions for reconsideration filed by Appellant SCSP.

4. The class was NOT certified by Judge Baxley on December 8, 2011. This is one of the key issues to be raised on this appeal. The fact is that neither Judge Baxley nor Judge Dickson have yet made a final decision on whether the Plaintiffs have proven all these factors to warrant class certification. By his own express terms, Judge Baxley only made a preliminary decision in his December 29, 2011 “Order Making *Preliminary* Finding that Plaintiffs’ Proposed Class Meets the Requirements of Rule 23(a), SCRCP....” (emphasis added.) By his September 9, 2016 “Order (No Motions Pending)”, Judge Dickson simply ruled that Judge Baxley’s decision was final – without any pending motion and without making any independent finding on the Rule 23 factors. The critical – reversible – error being that neither trial judge has ever conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification.

5. In regards to the Supreme Court’s prior opinion in this case, the Appellant again takes issue with the term “prior to certification” because Judge Baxley only made a preliminary certification. The prior action previously came before the Supreme Court on appeal from Judge Early’s order dismissing the class action allegations. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In that opinion, the Supreme Court specifically noted that no motion for class certification had yet been made at that point in the litigation. While the Court did note that class actions are, as a general matter, favored, the Court did NOT make any anticipatory ruling on whether a class should be certified in this case as Judge Baxley and Judge Dickson seem to believe. [See Baxley 12/19/11 order p. 11; Dickson 9/9/16 Order p. 2.]

6. SCSP has NOT made a motion to decertify the class because the class has never been fully certified. SCSP did make a motion asking Judge Baxley to reconsider his 11/19/11 “Order Making Preliminary Finding that Plaintiffs’ Proposed Class Meets the Requirements of Rule 23(a),...” Judge Baxley did NOT deny the motion; rather, he dismissed the motion on the ground that it was improper because Rule 59(e) does not allow any challenge to an interlocutory order. This is one the issues raised on appeal because it is well settled 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). Concomitantly, the dismissal of that motion on a purely legal ground is immediately appealable. *See Salinas v. C. Aultman & Co.*, 49 S.C. 325, 27 S.E. 385, 387 (1897).

7. YES, as SCSP explicitly noted and acknowledged in its Motion to Determine Appealability, it DID file an appeal attempting to challenge Judge Baxley’s preliminary order and his dismissal of its motion for reconsideration, and the Court of Appeals did dismiss the appeal on the ground that “these orders are not immediately appealable.”

8. Class Notice was initially sent April 21, 2014 and the “so-called” opt-out period supposedly closed 60 days later. Subsequently, the Mailing List was amended and additional Notices were sent on two separate occasions.⁴ However, that notice was sent under a preliminary class determination and it was contemplated that a second notice would – and still does – need to be sent after the RTC compliance is complete and the trial court conducts a full Rule 23 analysis.

⁴ The Amended Class List was filed with Court on January 25, 2016.

Further, the final roster of class members still has not been settled because potential claimants may be excluded through the RTC compliance and other pending motions.⁵

9. While each of the seven orders – standing alone -- might not be immediately appealable, they all are reviewable at this time based on Judge Dickson’s last two orders which triggered the appealability of all earlier related orders. The Court of Appeals held that Judge Baxley’s order of December 19, 2011, and May 7, 2012, were not immediately appealable, and by the same reasoning, Judge Baxley’s 5/7/12 order approving the class notice was not immediately appealable when issued. However, arguably, those orders are no longer *preliminary* since Judge Dickson has decreed that Judge Baxley’s preliminary class certification was a final ruling.

Of the seven orders noted for appeal, # 6 -- the order of the Honorable Edgar W. Dickson, “Order (No Motions Pending)”, filed September 9, 2016 – is the order that triggered the appealability of all the orders by “**finalizing**” Judge Baxley’s *preliminary* class certification. Until this order, the matter was proceeding on the understanding that the class certification was preliminary. Beyond the explicit language of Judge Baxley’s orders, it is apparent that Judge Dickson also had been treating the certification as preliminary as evidenced by his scheduling order of May 26, 2016, wherein he was referring to the preliminary nature of the class certification. For example, Judge Dickson refers to the “preliminary class list;” and he schedules a hearing and sets a briefing schedule for “the parties positions on class certification.” Most significantly, Judge Dickson stated: “The stay on discovery in this case shall remain in effect **until the Court issues**

⁵ In his April 18, 2014 Order, Judge Baxley specifically left the class open for revisions by virtue of giving SCSP permission “during the RTC process, to eliminate errors in the mailing list and/or remove homeowners that do not meet the class criteria.” And, in fact, SCSP has made several motions which are currently pending: Motion to Remove Class Members who have Failed to Return the RTC Questionnaire (9/27/16); Motion to Remove Members who Entered Into an Agreement not to Participate in any Class Litigation (10/31/16); Motion to Remove Members who do not Meet the Class Definition (9/29/16).

its ruling on final certification.” (Emphasis added). The 30-day time period to appeal the 9/9/16 Order was stayed when a timely motion for reconsideration was filed on September 23, 2016.

The most recent order # 7 -- The order of the Honorable Edgar W. Dickson, “Order Dismissing Defendants’ Motions to Reconsider Pursuant to Rule 59(e),” filed January 6, 2017 – is the order that set the 30-day appeal time period in motion. Thus, the Notice of Appeal served on Monday, February 6, 2017, was timely⁶. With this timely appeal, all the prior intermediate orders are subject to review under the authority of Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005): “An order that is not directly appealable may be considered if there is an appealable issue before the court.” The Appellate Court may allow such interlocutory review of an intermediate order “in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy).” Id. Similarly, in Salmonsens v. CGD, Inc., 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.” 377 S.C. 442, 661 S.E.2d 81, 87 (2008).

11-14. *S.C. Code Ann. § 14-3-330.* SCSP has fully addressed the appealability of intermediate orders under § 14-3-330 in its Motion to Determine Appealability. As fully discussed in that motion, the Appellant SCSP maintains that Judge Baxley’ 12/19/11 preliminary class certification order and his 4/18/14 order approving class notice (as finalized 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, SCRCPP, these orders deprive the Appellant of substantial, legal rights under the

⁶ The notice of appeal time runs from receipt of the notice of entry (i.e. the clocked copy); thus, SCSP’s notice of appeal is “early” in that it was served within 30 days of filing.

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 (as opposed to denying) SCSP's motions for reconsideration also involve the merits and affect substantial rights because they deny SCSP the right to seek reconsideration and to adequately preserve issues for appeal. 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 Salmonsens, supra.

15-20. *Mode of Trial*. Again, SCSP has addressed the point regarding appealability of orders affecting the mode of trial point in its Motion to Determine Appealability. The current precedent cited by the Grazias is not definitive of all possible circumstances under which a court order may affect the mode of trial. As SCSP discussed, these orders are immediately appealable under the reasoning of Salmonsens, supra, because regardless of the "opt-out" label, the unique process for preliminary class certification and RTC compliance, as created by Judge Baxley in this case, creates a de facto opt-in process. Notwithstanding the Grazias' insistence (§§19-20), the interplay of the RTC compliance process does require claimants to take affirmative action to "opt-in," namely, they have to return the Questionnaire. A claimant's failure to timely return the questionnaire amounts to noncompliance that bars the claimant from proceeding with any legal action, thereby disqualifying them from participating in this class action and depriving them of a right to trial by jury, e.g. Salmonson, supra.

21-23. The Respondents Grazias repeatedly state that the class was long ago certified – as if saying it often enough will make it true. However, as discussed above and in the Motion to Determine Appealability, Judge Baxley's 2011 certification order was **PRELIMINARY** until September

2016 when Judge Dickson said differently. The Grazias cite to Judge Baxley's comments from the bench during certain hearings as "proof" that Judge Baxley had already made a "final" certification – irrespective of the express language of his written, filed order. Ultimately, however, the written order controls over any comments from the bench in the absence of any formal amendment to the 12/19/11 order or any new order explicitly clarifying his decision or making a new "final" ruling on class certification. See Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.")

24. Again, as discussed above and in SCSP's Motion to Determine Appealability, the Supreme Court did NOT have the opportunity to deny class status in this case because that issue was not before the Court in the *Grazia I* appeal. The Supreme Court did NOT "affirmatively" make a choice on this issue as asserted by the Grazias. (¶ 24.) The Supreme Court's discussion of the general underlying purpose of class actions did not constitute an advisory opinion; particularly, where the Court very clearly stated that no motion for class certification had yet be made.

25. There is nothing in Judge Baxley's order approving the class notice that expressly altered his 12/19/11 order making a preliminary ruling on the class certification. Notably, the order on the class notice included directions regarding the RTC compliance process which has to be completed before a final ruling can be made. For, as Judge Baxley expressly stated in his 12/19/11 order, no final decision would be made on certification until after compliance is complete: "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.] This would appear

to be consistent with the Supreme Court's opinion in *Grazia I* regarding the use of the RTC process in the Rule 23 determination: "Enforcing a stay provision [RTC §40-59-830] does absolutely nothing to restrict the furtherance of that purpose; instead, the purpose is better served by allowing the use of the Right to Cure Act's stay provision to allow a court to determine whether or not a class action is feasible under the circumstances in each individual case, rather than striking the class allegations in toto at the outset." 703 S.E.2d at 203.

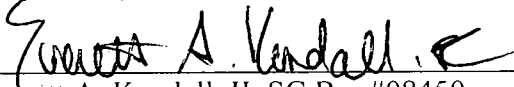
26. Judge Baxley's 12/19/11 order is clear that he was only making a preliminary ruling on class certification subject to later evaluation after RTC compliance is complete, and it is clear that the class certification and RTC compliance process was proceeding along pursuant to that preliminary ruling until Judge Dickson's 9/9/16 order. As discussed above, it is Judge Dickson's order that triggers the provisions of §14-33-330, and the timely appeal from that order provides review for all the earlier orders.

CONCLUSION

Section 14-3-330 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.

WHEREFORE, the Appellant SCSP requests that the motion to dismiss be denied.

Respectfully submitted,



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March 9, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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J. Michael Baxley, Circuit Court Judge
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Case No. 2007-CP-07-1396

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

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v.

South Carolina State Plastering, LLC,

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and

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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, the undersigned legal assistant, of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for the Appellant South Carolina State Plastering, do hereby certify that I have served a copy of the foregoing **Return to Motion to Dismiss, South Carolina State Plastering, LLC's Appeal** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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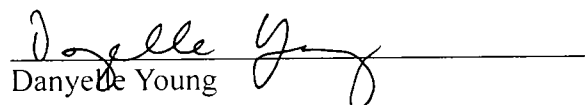
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RE: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs v. South Carolina State Plastering, LLC, Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc.
Appellate Case No.: 2017-000218
Civil Action No.: 2007-CP-07-1396
Our File: 3826-6177

Dear Ms. Kitchings:

Enclosed for filing please find the original Return to Motion to Dismiss South Carolina State Plastering, LLC's Appeal and six (6) copies of the same along with Return to Petition to Lift the Automatic Stay and six (6) copies of the same. 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,

SWEENEY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

EAK/dvy
Enclosures

March 9, 2017

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