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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

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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.....Respondents.

Appellate Case No. 2017-000218

**RESPONDENTS', ANTOHNY AND BARBARA GRAZIA, INDIVIDUALLY AND ON
BEHALF OF ALL OTHER SIMILARLY SITUATED PLAINTIFFS, REPLY TO
APPELLANT SOUTH CAROLINA STATE PLASTERING, LLC'S RETURN TO
MOTION TO DISMISS APPEAL**

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Respondents, Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs, (hereinafter referred to as "Respondents") hereby Reply to Appellant's, South Carolina State Plastering, LLC's (hereinafter referred to as "SCSP") Return to Motion to Dismiss Appeal, as follows:

INTRODUCTION

By its filing, with this court, SCSP is attempting to appeal from interlocutory orders and case management directives that it knows are not appealable in an effort to further delay the ultimate resolution of a case that has now been pending for a decade. In support of its effort to get this Court to review the unreviewable, SCSP focuses on four (4) incorrect assertions: (1) that interlocutory case management directives are immediately appealable (and that by filing this appeal, SCSP somehow has revived the time to appeal long out-of-time orders of the court, some of which have already been rejected by this Court); (2) that Judge Baxley did not certify a Class Action (when the record below is directly to the contrary); (3) that the Class is an "opt-in" Class (when the record directly contradicts this notion); and, (4) that SCSP has been unable to conduct sufficient discovery (when the record reveals that a) SCSP has inspected every house, b) one-half (1/2) of all the houses in Sun City have been tested by Pulte, the results of which are available to SCSP, c) SCSP has been provided answers to more than 3,500 questionnaires, and d) depositions of individual class members have been taken.) This Court should dismiss this Appeal, as it has previously done when SCSP attempted the same strategy of appealing that which was not appealable.

THE ORDERS SOUGHT TO BE APPEALED ARE INTERLOCUTORY, AND ARE SIMILAR IF NOT IDENTICAL TO THOSE ALREADY DISMISSED BY THIS COURT

As has been pointed out to this Court in numerous filings, and as stated in Judge Dickson's Order of September 9, 2016, SCSP previously asked Judge Baxley to reconsider his Class Certification Order. Judge Baxley declined, and SCSP appealed to this Court. The appeal was dismissed in August of 2012. This Appeal is identical to that effort. SCSP failed to file any Motions before Judge Dickson, but sought instead to have Judge Dickson reconsider Class Certification. He declined to do so, citing the record. Notwithstanding its numerous attempts at collaterally attacking the Court's interlocutory orders, SCSP again filed a Motion to Reconsider and Amend dated September 19, 2016. Judge Dickson dismissed these Motions, noting, "The Court's Order dated September 9, 2016, was interlocutory, and therefore Defendants' Motions to Reconsider were improvidently filed. As this Court has previously ruled, there is no provision in Rule 59(e), South Carolina Rules of Civil Procedure (hereinafter referred to as "SCRCP"), allowing a party to challenge an interlocutory order." (Order of Jan. 6, 2017 – the subject of this Appeal). There is nothing to Appeal here – no underlying Motion to Reconsider Class Certification, only an attempt to appeal a *dismissal* of an improvidently filed Rule 59(e) Motion to Reconsider, an interlocutory case management directive. Here, unlike the 2012 attempt at an appeal, there is not even an underlying Motion, nor a denial of such a motion – the entire matter being interlocutory. The Class Certification at issue was made nearly five (5) years ago by Judge Baxley, and SCSP then-attempted appeal of that Certification which was rejected by this Court in August of 2012.

Now, SCSP propounds an even farther-fetched theory which goes something like this: Since Judge Dickson's Order Dismissing the Rule 59(e) Motion was arguably timely

appealed (although not in-fact appealable), then somehow, this Appellate filing resurrects SCSP's ability to appeal all of the Courts' previous interlocutory orders, including those already rejected by this Court in 2012. There is no precedent for such a theory, and SCSP does not provide any. Instead, it cites *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 366 S.C. 511 (S.C. 2005). *Edge*, and its predecessors do not stand for this proposition. To the contrary, *Edge* holds that an Appellate Court may consider some orders which may not have been directly appealable for reasons of judicial economy "if there is an appealable issue before the Court." *Cox v. Woodmen of the World Insurance Company*, 556 S.E.2d 397, 402, 347 S.C. 460 (S.C.App. 2001). Here, there is no appealable issue before the Court, and even if there were, these decisions do not revive SCSP's ability to appeal time-barred orders.

**THE RECORD DEMONSTRATES THAT JUDGE BAXLEY
CERTIFIED THIS CLASS IN 2012**

As noted above, Judge Baxley did not, as SCSP continues to urge, certify a "preliminary" class. SCSP attempted to appeal his Class Certification in 2012. This Class was certified, and the Notice to the putative class members was approved by Judge Baxley after hours of exhaustive hearings. Judge Dickson in his September 9, 2016 Order, cited the record, and the hearing transcript wherein Judge Baxley stated his certification was not preliminary. Judge Baxley also approved the very detailed and specific Notice and Exclusion forms which went out to all Class members. Nowhere in the Notice is there any mention of "preliminary" certification. Judge Dickson is careful to cite Judge Baxley's Order Approving Class Notice – an order Judge Baxley himself composed – in which he "declined to refer to the class as 'preliminary', for the reason that it was not and is not preliminary." (Order of 9/09/16 at pp. 3-4). SCSP does not have any evidence

to challenge these orders. Instead, SCSP simply continues to argue that the orders and transcripts somehow do not mean what they say.

THE RECORD DEMONSTRATES THAT THIS CERTIFIED CLASS IS AN OPT-OUT CLASS, THERE IS NO EVIDENCE TO THE CONTRARY

The certification of the Class here is no more nor less than the classic opt-out class permitted in this state, and elsewhere, as is clear when reading the Notice and Exclusion (Opt-Out) forms sent to all members of the class (attached hereto as Exhibits A and B, respectively).

Orders granting class certification are not appealable. *Salmonsens v. CGD, Inc.* 661 S.E.2d 81, 87, 377 S.C. 442 (S.C. 2008). (“Because a decision by this Court to grant immediate appellate review of a class certification order would represent a significant departure from this states *[sic]* established appealability jurisprudence, we decline to do so.”)¹ There is nothing here to appeal. There was no timely notice of appeal made. There is no opt-in class. There is nothing for this Court to do but to dismiss this improvidently filed appeal, taken for the sole purpose of delay, and remand this case back to the Circuit Court with directions to move it expeditiously to a trial on the merits.

EVEN THOUGH DISCOVERY FROM INDIVIDUAL CLASS MEMBERS IS GENERALLY NOT PERMITTED, SCSP HAS ENGAGED IN MASSIVE INDIVIDUAL DISCOVERY

This is a group of some 4,500 single family homes, involving more than 8,000 individuals. Apparently SCSP wants to depose each of these people, contemplating a discovery period exceeding the class members’ life expectancy, and/or the careers of all

¹ *Salmonsens* permitted an appeal only because the improper “opt-in” class would have barred some of the claims of the putative class members due to the statute of limitations, and this was agreed to by all parties, so that those persons might have been denied a trial at all, thus “affecting a mode of trial.” Nothing like that situation exists here.

counsel involved. This notion strikes at the very concept of judicial economy envisioned by Rules 1 and 23, SCRCP, and the decisional law favoring class actions in this State.

The General Rule regarding discovery of individual class members is as follows, "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

While some courts have permitted discovery of absent class members, they have done so only where the proponent of the discovery establishes that (1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class, (2) the discovery is necessary, (3) responding to the discovery requests would not require the assistance of counsel, and (4) the discovery seeks information that is not already known by the proponent. *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-42 (7th Cir. 1974)).

There are superior and more efficient ways for individual issues to be handled in this case in a manner more consistent with Rule 23, SCRCP. For example, inquiry into individual issues can take place during a second phase of trial or during the claims administration process:

"Class members are sometimes called upon to provide the court with information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual relief under a judgment or settlement... Class members should not, however, be required to submit proofs of claim as a condition of membership in the class, which would be equivalent to establishing an opt-in procedure. Nor should such claim forms or questionnaires be used to evade the general limitation on discovery from absent class members."

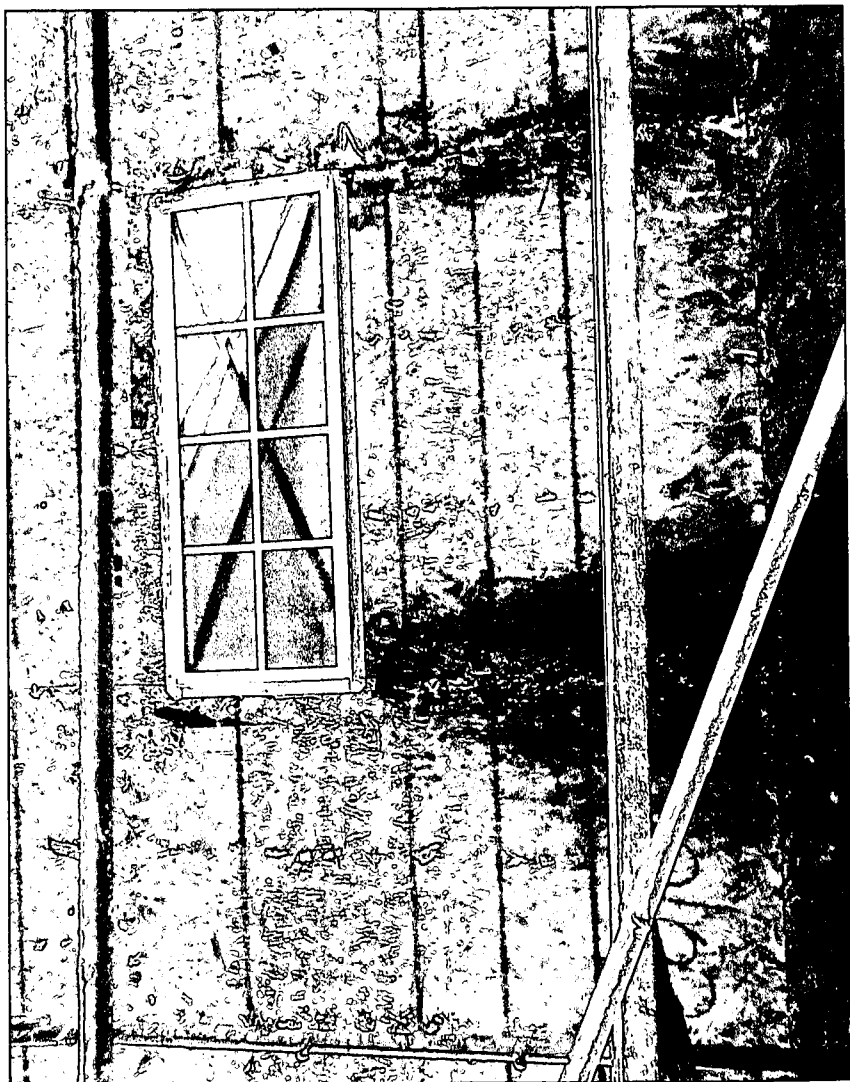
McPhail v. First Command Fin. Planning, Inc., 251 F.R.D. 514, 519-520 (S.D. Cal. 2008) (quoting Federal Judicial Center, Manual for Complex Litigation Sec. 30.232 (3d Ed. 1995)).

“[T]he most appropriate time to gather any necessary information from individual class members is generally after a determination of liability and before payment of individual claims.” *On the House Syndication, Inc. v. Fed. Exp. Corp.*, 203 F.R.D. 452, 458 (S.D. Cal. 2001).

In spite of this concept, it is useful to examine the extent to which SCSP has in fact been permitted to conduct discovery.

1. Respondents Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter referred to as “Webb/Pulte”) has conducted moisture meter testing and/or infrared testing, and has destructively tested and partially repaired some 2,000+ houses at a cost of \$23 million, and has shared the test results, repairs, and extensive photographic evidence (see examples attached below).





2. SCSP has physically inspected more than 4,000 homes.
3. SCSP has, with its own experts, destructively tested, photographed, and documented, some 47 houses (see examples attached below).





4. All parties have received responses to extensive questionnaires from more than 3,500 homeowners (see example attached hereto as Exhibit C), and
5. Depositions of eighteen (18) individual homeowners have been taken.

CONCLUSION

This appeal must be dismissed. There is no Appellate jurisdiction, and this Appeal is taken only for the purpose of delaying the trial currently set for April 17, 2017.

Respectfully Submitted,

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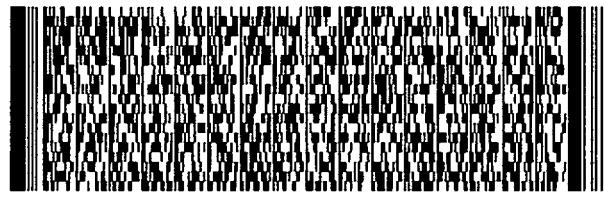
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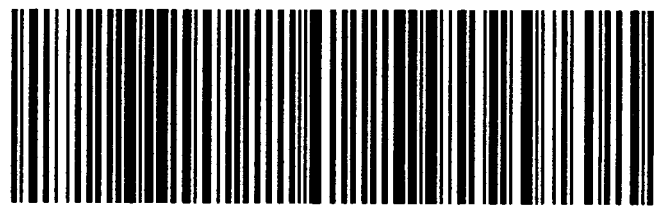


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