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

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/Appellants.

Appellate Case No. 2017-000218

RESPONDENTS', ANTOHNY AND BARBARA GRAZIA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED PLAINTIFFS, RETURN IN OPPOSITION TO PETITIONS FOR REHEARING OF APPELLANTS SOUTH CAROLINA STATE PLASTERING, LLC AND RESPONDENTS/APPELLANTS DEL WEBB COMMUNITIES, INC., AND PULTE HOMES, INC.

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INTRODUCTION AND SUMMARY

The petitions for rehearing filed by Appellant South Carolina State Plastering, LLC (hereinafter "SCSP") and Respondents/Appellants Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter collectively "Webb/Pulte") are nothing more than a restatement of the identical arguments originally made to this Court in an effort to justify their appeal of interlocutory orders. These arguments have been made over and over – first in 2012, then with this Appeal, and now on motion for rehearing. This Court has twice rejected these improper appeals, and it should reject the arguments now made in what is a fourth attempt to bring an interlocutory appeal. These parties continue to advance the notion that a Class has not been finally certified, when they know, absolutely, that such an assertion is incorrect, and they continue to invent appellate issues, when none exist. In fact, a reading of the exhibits attached to the latest petitions will demonstrate to this Court that the filings here have but one purpose: delay in an attempt to avoid a trial on the merits.

SCSP AND WEBB PULTE HAVE FAILED TO IDENTIFY ANY ERRORS MADE BY THIS COURT IN ITS DISMISSAL OF THESE APPEALS

This Court has dismissed these Appeals as being interlocutory and not appealable. This is the second dismissal of the identical appeals, the first having taken place in 2012. Rather than point out any errors in this Court's rulings, these parties simply rehash two rejected propositions: 1) that interlocutory case management directives are somehow immediately appealable, and, 2) that Judge Baxley did not finally certify this matter as a Class Action.

These instant Petitions are a further attempt to have this Court reject its two previous opinions in this case, with no new reason advanced in support. In 2012, when this Court

originally rejected these interlocutory appeals, both SCSP and Webb/Pulte petitioned for rehearing. The Respondent's Reply and Return are attached hereto and made a part of this memorandum to demonstrate that these identical arguments have already been rejected (Exhibits A and B).

Perhaps the most egregious position continually advanced before this Court is that Judge Baxley did not certify a Class. In fact, as previously briefed, this is incorrect, and directly contrary to documents authored by Judge Baxley, as these parties know. Judge Baxley's letter to counsel of August 22, 2011, sent to the Court for filing, and part of the record below (attached hereto as Exhibit C), demonstrates that not only did Judge Baxley find all of the necessary Rule 23 elements had been proved for Certification, but also, no reference can be found as to any "preliminary" Class.

As to the remainder of the same arguments, Respondents will incorporate by reference their Reply to SCSP's Return to Motion to Dismiss Appeal attached hereto as Exhibit D.

THESE PETITIONS AND THE INSTANT APPEALS ARE ONLY FILED FOR THE PURPOSE OF DELAY

Trial in the Beaufort County Common Pleas Court was originally set for a two-week term in December of 2016. After the numerous protestations of SCSP and Webb/Pulte, additional time was given in this ten (10) year old case, setting trial for April 17, 2017. These Appeals followed. Respondents promptly filed their Motion to Dismiss the Appeal, and the Motion was granted. What occurred next is instructive.

Examining the exhibits attached to SCSP's Petition for Rehearing, this Court will see copies of e-mail exchanges with the trial court subsequent to this Court's dismissal of these Appeals. When the plaintiffs asked the Circuit Court for a status conference in

preparation for a trial (now that the automatic stay had been lifted) Webb/Pulte objected, stating that the Circuit Court, even in light of the Dismissal of the Appeal, lacked jurisdiction to do anything, and stating its intention to continue to file petitions to appellate courts. Again, to delay a trial on the merits. This tactic has been the hallmark of the defendants in this class action – to avoid a trial at any cost and by any means.

CONCLUSION

The Petitions for Rehearing filed by SCSP and Webb/Pulte, having demonstrated no errors committed by this Court in its dismissal of the Appeals, should, and must, be denied.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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J. Michael Baxley, Circuit Court Judge
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Case No. 2007-CP-07-1396

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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/Appellants.

Appellate Case No. 2017-000218

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I, W. Jefferson Leath, Jr., Esq., do hereby certify that on April 5th, 2017, I served opposing counsel with a copy of the Respondents' Motion to Dismiss Appellant South Carolina State Plastering, LLC's Appeal via regular first class United States mail, postage prepaid, addressed as follows:

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EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212364

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

v.

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

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.

RESPONDENTS' RETURN TO DEL WEBB/PULTE'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT OF RULE 269 SCRAP MOTION

INTRODUCTION AND SUMMARY

This brief is filed in opposition to Pulte's Petition for Rehearing. For the reasons stated below, not only should Pulte's Petition be denied but this Court should issue an Order pursuant to SCRAP 269 finding that this Appeal and Petition is frivolous and filed solely for the purpose of delay and fashion an appropriate remedy. After receiving notice of this Court's dismissal of its Appeal of the Court's Class Certification Order, Del Webb/Pulte has now petitioned for a rehearing. In so doing, it cites nothing new but rather relies on arguments which were fully briefed by both sides prior to the Dismissal. In their Motion to Dismiss the Appeal filed on June 21, 2012, Respondents also moved this Court to conduct a Rule 269 SCRAP inquiry into the issue of whether, instead of filing legitimate Appeals, Webb/Pulte's actual motive was delay in violation of that Rule. As is shown below, Pulte's entire strategy in this case is centered on delay, not only in this Appeal, but also in a companion Class Appeal in the matter of *Lancaster, et al vs. Del Webb, et al*, Appellate Case No. 2012-210927. Del Webb/Pulte's conduct in filing Notices of Appeal of orders which it knows do not to constitute final adjudications and therefore are not appealable, and its continual pursuit of these improper Appeals will reveal to this Court a pattern of behavior which must be dealt with in accordance with the requirements of Rule 269.

THE SUN CITY STUCCO AND TRIM CLASS CASES

As this Court is fully aware, there exist two Class cases involving the Del Webb/Pulte Sun City development. The instant *Grazia* case involving 4,300 homes with

allegations of defectively designed and installed stucco exteriors, and the *Lancaster* case, involving fewer homes with allegations of defective trim manufactured by Georgia Pacific Corporation and sold by Del Webb. Lower Courts have certified classes in both cases, and Del Webb has filed Appeals of these orders. Additionally, there are approximately 140 cases on the Beaufort County docket filed by individual homeowners against Del Webb/Pulte, Del Webb filed an Appeal in one of them (*Carlson, et al v. South Carolina State Plastering, LLC, et al,* Case No. 2008-CP-07-3386) following the Lower Court's Order that Pulte had waived any right to arbitration contained in its sales contract by waiting to seek enforcement of arbitration and instead utilizing the Court system.

DEL WEBB/PULTE'S APPELLATE ACTIVITIES IN THE STUCCO CASES

As noted above, Del Webb/Pulte has appealed virtually every Order issued by the Lower Court, whether or not appealable. In the instant Appeal, Pulte filed an Appeal of a Class Certification and case management order. When Pulte filed its Appeal, it had actual notice that the Lower Court's Order was not appealable, but filed the Appeal in spite of that knowledge. By this Petition Pulte now seeks to perpetuate that conduct. Its Appeal was filed on June 7, 2012. Prior to that date, it had received the Order from this Court in *Lancaster, et al v. Georgia-Pacific Corporation, et al,* Case No.: 2007-CP-07-3166, in which this Court reiterated that Class Certification Orders are not immediately appealable. As further evidence of this knowledge of non-appealability, Pulte also filed a document entitled, "Motion to Determine Appealability" - presumably attempting to

excuse its conduct in filing this patently improper Appeal, having just been told in a companion case that such an Appeal was subject to dismissal.

Respondents filed their Motion to Dismiss this Appeal, both sides fully briefed the issues raised by Appellant, and this Court issued its Order Dismissing this Appeal having considered those arguments. Now once again, Del Webb/Pulte attempts to keep the stucco class in the Appellate Courts and out of the Lower Court, where Class Notices will issue, discovery will be conducted, and a trial can take place. In its Petition for Rehearing, Pulte raises nothing new, nothing not already considered by this Court, and advances no reasoning entitling it to a rehearing. What it appears to be seeking is to require this Court to issue specific rulings on each of its complaints regarding the Class procedure as embodied in the case management section of the Order presumably for use either in the Lower Court or for further Appellate attempts. This procedure has never been the practice of this Court.

Concurrently, in Appeal No. 2012-212364 in the *Grazia* case, Pulte filed another Appeal from the Lower Court's dissolving an injunction prohibiting Class Counsel from discussing the Class case with class members. A review of this Appeal will demonstrate it lacks merit, and represents, at best, a minor, collateral issue, having little or no bearing on the ultimate decision to be made at the trial of the Class case.

In Appeal No. 2012-202907 in the *Carlson* case, this Appellant asserted a right to arbitrate rather than litigate, pursuant to language in its sales contract. It has appealed the Lower Court's finding of waiver, and again, an examination of that Appeal will demonstrate a highly questionable position.

DEL WEBB/PULTE'S APPELLATE ACTIVITIES IN THE *LANCASTER* TRIM CASE

Following its pattern of seeking delay at all costs, in the *Lancaster* case, Pulte has appealed essentially every Order of the Lower Court, from Class Certification orders, to case management Orders - none of which are appealable, as this Court has found. Now it has, as here, petitioned for Reconsideration of the Dismissal of that Appeal. In *Lancaster*, Judge Roger Young certified the Class, then issued case management orders. Significantly, below, this Appellant asked the Lower Court to conduct discovery of each Class Member and asked for a stay which, if granted would have prolonged almost indefinitely, any ultimate Class trial. The Lower Court declined. Thereafter, Del Webb appealed from six Orders. After the Appeal of the six interlocutory Orders, Del Webb then requested a conference call to ask the Lower Court to confirm Del Webb's position that all of its six Orders issued were stayed because of these Appeals. The Lower Court declined to so rule, stating, "I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case. " (See attached Exhibit "A").

Del Webb's response to this Order? Appeal it, after asking the Lower Court to reconsider it. This Court dismissed the latter two Appeals as moot on June 1, 2012.

Del Webb's true motive – delay - can be seen it its activities in the Lower Court prior to its Appeal of the eight Orders of the Lower Court, especially, it's Appeal of the preliminary case management and scheduling order. It did not like the Court's Scheduling Order, as such Order puts the case on track for a trial on the merits, which

Pulte hopes to indefinitely postpone. Indeed reference to the Proposed Discovery Scheduling Order it submitted to the Lower Court in the *Lancaster* case presents an accurate picture of its strategy (attached as Exhibit "B"). Therein, Pulte proposes a ten (10) year Discovery schedule and a trial which will take place in 2024, setting trial 16 years after initiation of the claims. Presumably, by that time, most of the claimants in this retirement community -and even counsel - will no longer be able to prosecute these claims.

DELAY SIGNIFICANTLY HARMS THE *GRAZIA* CLASS

The Lower Court's Order, the subject of this Appeal, sets up a procedure wherein the Defendants have the right to Notice of Defects, and an opportunity to settle these claims pursuant to the Right to Cure Construction Dwelling Defect Act. For six years, Pulte has vigorously asserted the importance of that Act. The Order at issue envisions a procedure wherein after a Class is formed after Notice and opt-outs, Del Webb/Pulte can inspect, and make offers. The homeowners will be aware of their rights by then, having been represented by Class Counsel and oversight provided by the Court.

With this Appeal, and the delay it causes at the trial level, Del Webb/Pulte has felt free to ignore and contravene the procedure the Lower Court has ordered. Instead, it has embarked upon a course of conduct designed to eliminate as many Class members as possible by unilaterally soliciting "opt-out agreements" in advance of Class Notice publication where homeowners are not represented by counsel and do not know their rights under the Class Order. They cannot know of their rights, as the stay caused by these frivolous appellate proceedings has prevented the notice forms from being

approved and issued. Having learned of these activities, Respondents filed a Rule to Show Cause on Jan 23, 2012, (attached as Exhibit "C," caselaw exhibits D and E omitted) and this Appeal has effectively stayed a hearing on this Motion.

The document which Del Webb/Pulte requires an unrepresented homeowner to sign, in exchange for patch repairs to their residence (attached as Exhibit "D") is entitled: "Sun City Hilton Head Homeowner Request for Stucco Repairs and Agreement Not to Participate in Class Actions." This document is designed as a release and is designed to reduce or eliminate the Class. Upon information and belief, this partial repair/Class Exclusion outside of the judicial framework, and in total derogation of the Lower Court's Class Order is ongoing, and has become a large operation, the true scale and effect of which will not be revealed until the Lower Court conducts a hearing on this Rule to Show Cause and issues a Class Notice.

CONCLUSION

If, by means of continued Appeals, a defendant can avoid discovery and trial while divesting the Lower Court of jurisdiction, it maintains a huge litigation advantage. If, during this time of delay, it is able to implement a plan to reduce or eliminate the size of the potential Class claims it is facing, it not only has an advantage, it has also scored a large partial victory, never having to face justice in a courtroom.

Very respectfully, Respondents ask this Court to examine the overall situation here and decide, as Rule 269, SCRAP, indeed requires, what is the proper role of an Appellate Court. Is it to correct errors of law in matters requiring judicial oversight, or is it to serve - by means of delay - as an adjunct to litigation strategy?

One of the key phrases in Rule 269 is the following: "and discouragement of like conduct in the future may require." Without the inquiry by this Court that the Rule requires, it is probable that the strategy outlined above will continue, and every case management order - or indeed, any other pre-trial order - will end up before this Court within 30 days of its issuance. The drafters of Rule 269 understood the pernicious effects of delay in litigation. This is especially true here, where the population of the Class is made up of aging retirees, who, quite, understandably, are hoping for a speedy resolution to the problems with their homes. This Court should accordingly grant the Respondent's Rule 269, SCRAP Motion.

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212212

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.

RESPONDENTS' REPLY TO SCSP'S PETITION FOR REHEARING

Respondents, Anthony and Barbara Grazia, as Class Representatives, oppose the Petition for Rehearing filed by South Carolina State Plastering. The Petition seeks a rehearing of this Court's dismissal of SCSP's attempted Appeal of the Lower Court's Class Certification and other interlocutory case management orders.

In its Petition, SCSP advances nothing not already briefed and argued by both sides prior to the dismissal. Rather, it restates previous positions considered and rejected by this Court. Respondents incorporate their arguments against these positions previously stated in their Reply to SCSP's Return to Respondents' Motion to Dismiss Appeal (attached as Exhibit "A").

Interestingly, SCSP seems to be asking this Court for an advisory opinion. It asks this Court, "to issue an amended order that rules specifically upon the grounds raised in the returns to the motions to dismiss so that they may file a more informed petition for rehearing." The purpose of such a request is not readily understandable to the Respondents, although several possibilities present themselves. First, if this Court were to agree to this procedure, presumably then SCSP would file another Petition for Rehearing, thus serving the purpose of delay. Secondly, SCSP may be looking to gain some collateral advantage in the Lower Court's case management by a pronouncement by this Court. Third, SCSP may wish to flesh out a record for further delaying Appeals.

None of these reasons, nor indeed any others, present this Court with any reason to grant SCSP's Petition, and such Petition should be denied, so that the Lower Court can move forward with the management of the Class in this six year old case.

Respectfully Submitted,

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Attorneys for the Respondents

Dated: Sept. 25, 2012

Charleston, South Carolina

EXHIBIT C

State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL BAXLEY
JUDGE

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RE: Grazia, et al. v. SC State Plastering, LLC, et al. (07-CP-07-1396)
Plaintiffs' Motion for Class Certification

Counsel:

Thank you for your patience while the Plaintiffs' motion for class certification in this case has been under advisement. You may accept this letter as notice of the decision in this matter. This letter is being sent only to counsel who argued the motion in Court, please forward the letter to other named counsel representing your party.

Upon review of the South Carolina Rules of Civil Procedure, relevant case law, as well as extensive memoranda of law and oral arguments presented to the Court by all parties, the Court finds certification appropriate under the statutes and caselaw governing class actions. According to evidence presented, the Court finds that the Plaintiffs have met the five part test set forth under SCRCP 23(a). The Court finds that the putative members of this class, currently about 140 with pending cases but totaling a potential 3500, are far too numerous for joinder. Moreover, to try these cases individually would be overwhelming for the judicial resources within the Fourteenth Judicial Circuit. In addition, the Plaintiffs' complaint focuses only on exterior wall stucco installation and, thus, the predominant questions at issue are common in both fact and law. Next, the Court finds that the claims made by Plaintiffs and that the subsequent defenses available to Defendants are typical and not of a nature that would require individual investigation on the part of this Court. The Court also finds that the representative parties will adequately protect the interests of the class, and that the representative parties' interests are neither adverse nor antagonistic to the interests, economic or otherwise, of the putative class. Lastly, as to the prerequisites set forth under Rule 23(a), the Court finds that the Plaintiffs meet the amount in

controversy requirement and notes that historically this requirement was intended to limit class actions where the costs of litigation would exceed the amount in controversy, which based on the limited evidence already presented to the Court, litigation costs will not exceed actual damages claimed by each member of this class.

In making this ruling, the Court is aware of the Defendants' position that differences within the stucco application process, lack of uniformity in alleged resulting damages, and variances within the facts of the specific cases negate the utility of a class vehicle in resolving these claims. While the Court accepts Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of the Court that common issues predominate all the cases, and that a class approach is the best method available to enhance judicial economy, speedy disposition, and reduction of litigation costs. Moreover, the Supreme Court had a clear opportunity to prohibit a class action in this very case, and affirmatively chose not to do so, extolling in their decision the utility of the class action device to save the resources of the Courts and the parties. Grazia v. SC State Plastering, et al, Sup. Ct. Op. 26882, filed October 4, 2010.

Attorney Seekings is requested to prepare a proposed Order of this Court's decision and forward the same to both Attorney Kendall and Attorney Rawl for review. Neither Attorney Kendall nor Attorney Rawl are asked to agree or consent to the Order, but are requested to review it for mistake of fact or misstatement of his party's position. Should further clarification or ruling on specific points not mentioned herein be necessary, counsel should send an email to the Court, with all parties included, requesting same. Thereafter, Attorney Seekings is asked to forward the finalized Order to this office (jbaxleylc@sccourts.org), this will come to law clerk Mason King) in Word format for review and signature. The finalized, signed Order will be returned to Attorney Seekings for filing and formal service on the parties.

As you are also aware, this office has pending under advisement the Defendant Pulte/Del Webb's motion to compel arbitration in the Carlson case. This signed Order will be simultaneously provided to Mr. Seekings for filing and service, along with the finalized class certification order.

I have enjoyed working with you in these rather complex issues, and appreciate the professional way in which these matters have been briefed and argued. Thank you for the courtesy and the level of professionalism you and your co-counsel have each brought to the Court.

Sincerely,

J. Michael Baxley
JMBelo

Honorable Jerri Ann Roseneau (for filing)

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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and

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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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Attorneys for the Respondents

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. *Salmonsen 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] *Salmonsen* 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:

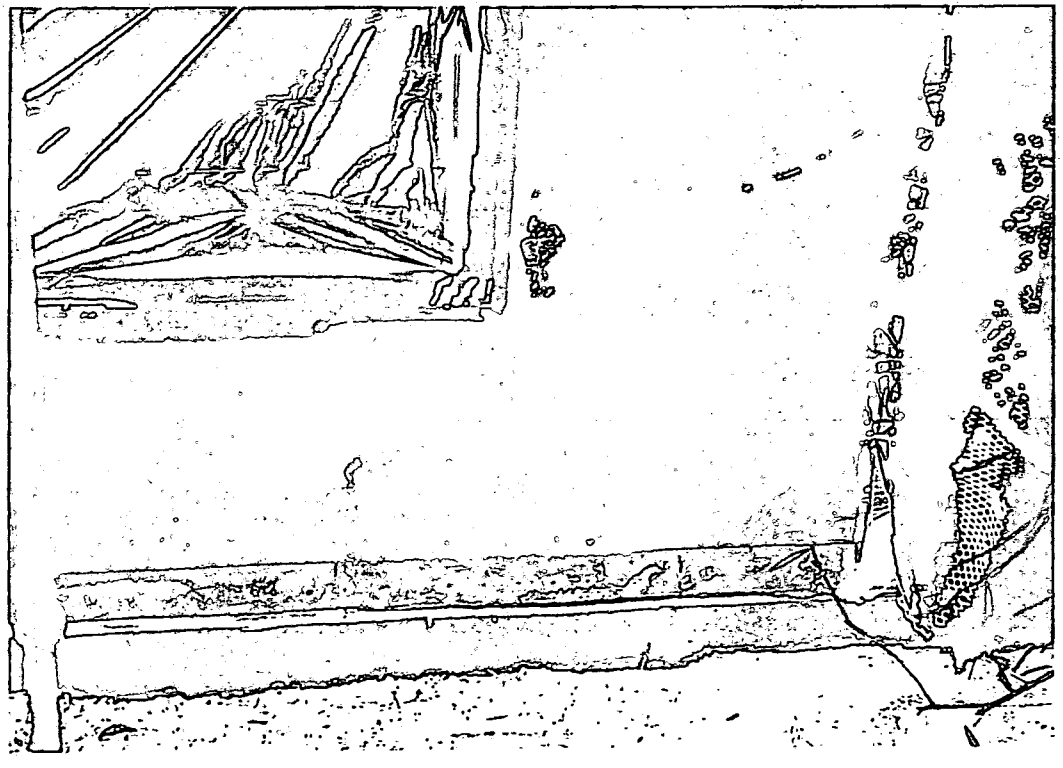
> "Class members are sometimes called upon to provide the court with information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual 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."

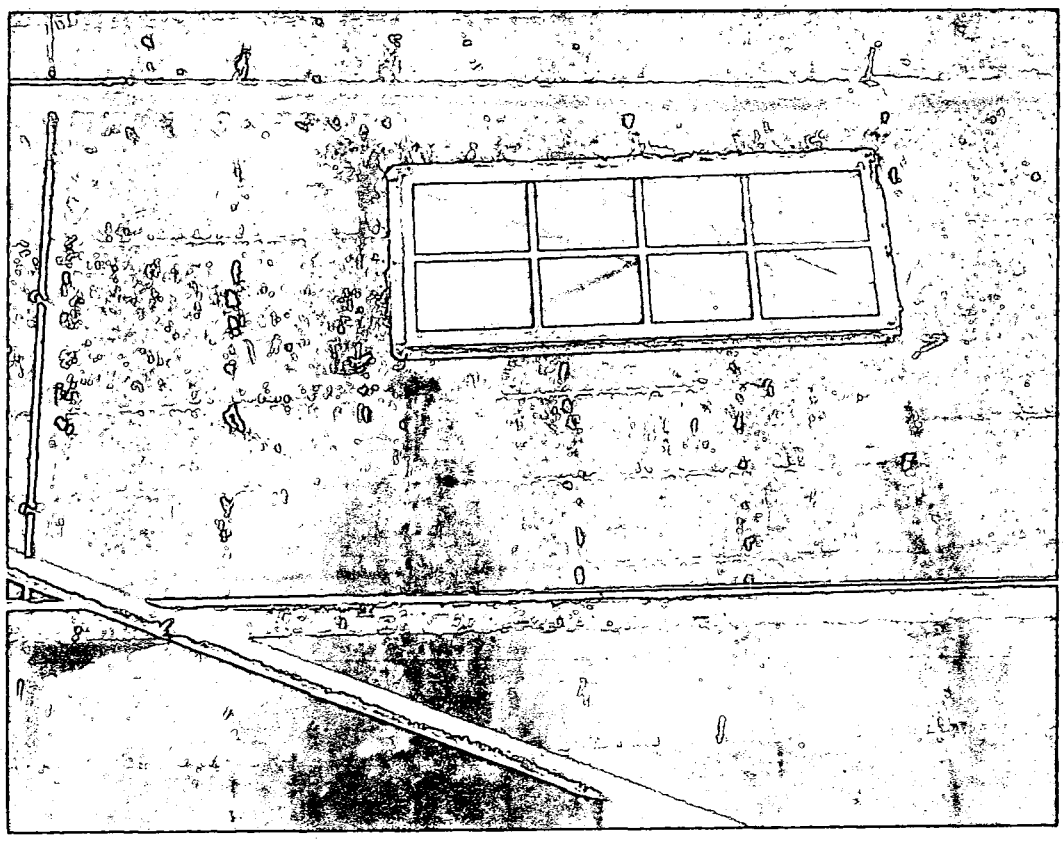
McPhail v. First Command Fin. Planning, Inc., 251 F.R.D. 514, 519-520 (S.D. Cal. 2008) (quoting Federal Judicial Center, Manual for Complex Litigation Sec. 30.232 (3d Ed. 1995)).

"[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.

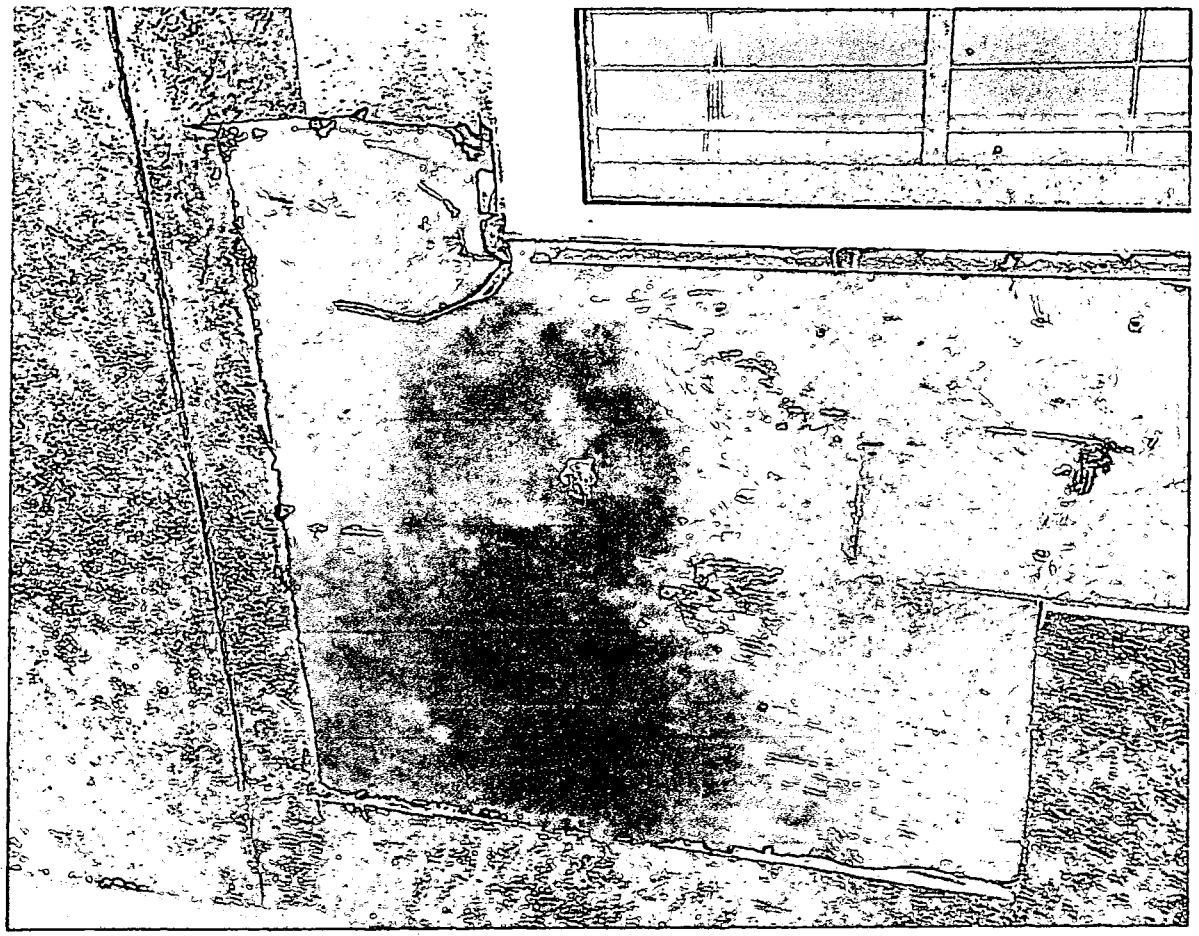
1. Respondents Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter referred to as "Webb/Pulte") has conducted moisture meter testing and/or infrared testing, and has destructively tested and partially repaired some 2,000+ houses at a cost of $23 million, and has shared the test results, repairs,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

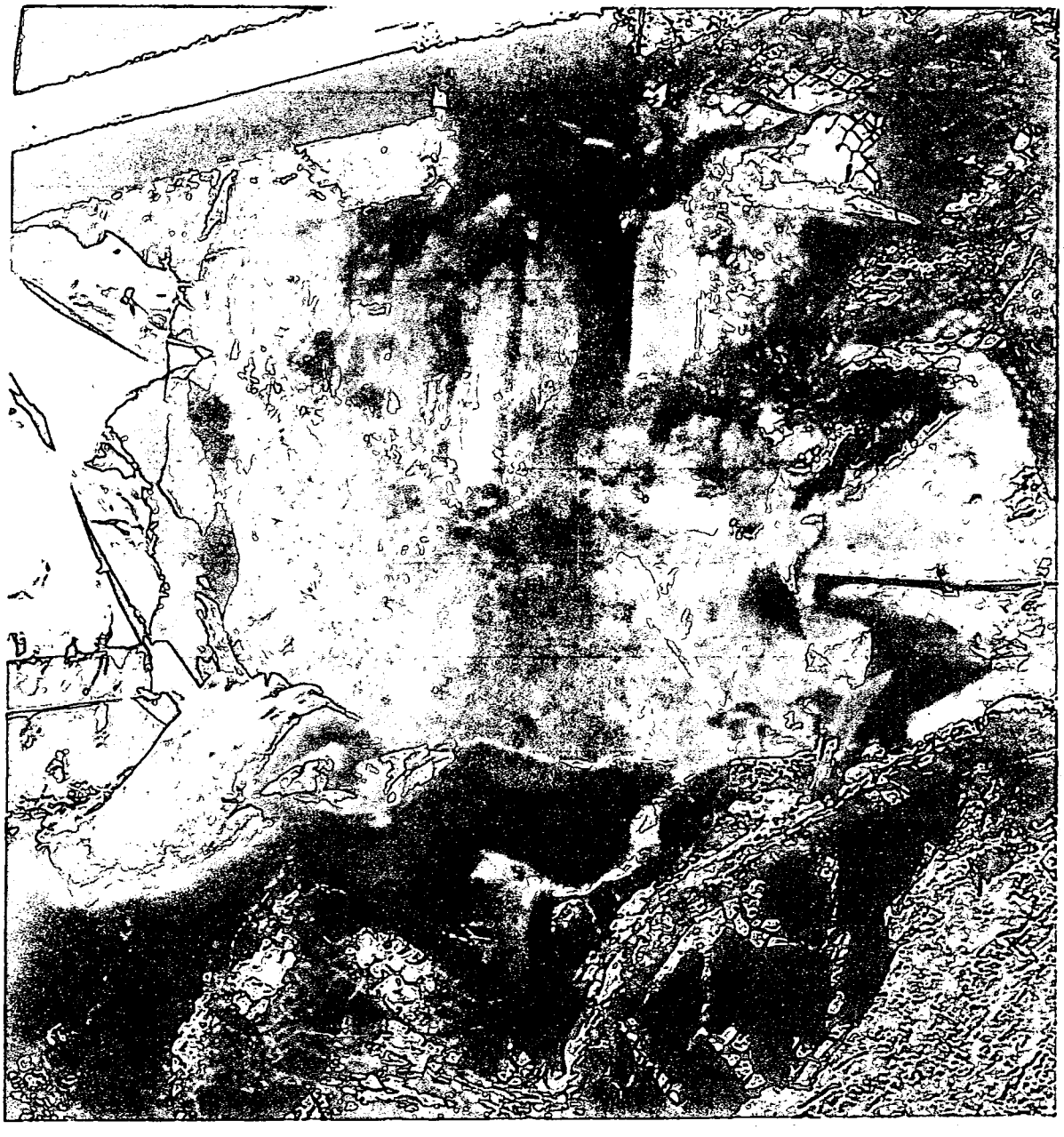




2. SCSP has physically inspected more than 4,000 homes.

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,

Jefferson Leath

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COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

April 5, 2017

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

RE: *Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC*
Case No.: 2007-CP-07-1396
Appellate No.: 2017-000218

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Respondents' Return in Opposition to Petitions for Rehearing of Appellants South Carolina State Plastering, LLC and Respondents/Appellants Del Webb Communities, Inc. and Pulte Homes, Inc., along with a Proof of Service in the above-referenced matter. By copy of this letter, I am serving one copy of each upon opposing counsel.

Thank you and with best regards, I am

Yours very truly,

LEATH, BOUCH & SEEKINGS, LLP

Jefferson Leath

W. Jefferson Leath, Jr.

WJLjr/bah
Enclosures as stated
cc: All Counsel of Record