

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000218  
Case No. 2007-CP-07-1396

**RECEIVED**

APR 26 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/Respondent,

and

South Carolina State Plastering, LLC,.....Appellant/Respondent,

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.

REPLY TO RETURN TO PETITION FOR REHEARING

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## REPLY ARGUMENTS

The Respondents/Appellants (Del Webb) respectfully submit this Reply to Return to Petition for Rehearing. For the reasons set forth below, and for the reasons set forth in Del Webb's previously filed Petition for Rehearing and Motion to Determine Appealability, Del Webb respectfully requests this Court to grant rehearing and reinstate Del Webb's appeal.

Before addressing the specific arguments in the Return of the Respondents (the plaintiffs), two preliminary matters must be noted. First, the plaintiffs complain that Del Webb's Petition for Rehearing is a "restatement of the identical arguments originally made to this Court." (Ret. at 3). This is the nature of rehearing petitions. See Rules 221(a) & 242(d)(2), SCACR.

Second, throughout their Return, the plaintiffs conflate the appeal of Del Webb with the appeal of Appellant-Respondent (SCSP). Del Webb only appeals the two orders of Judge Dickson. There has never been a prior appeal of these orders. The plaintiffs have never addressed the issues presented by Del Webb on the appealability of Judge Dickson's appealed orders, nor have they ever addressed the core issue, to-wit: the meaning of Judge Baxley's "Preliminary Order" under the language used in the order. Despite the plaintiffs' erroneous assertions to the contrary, the meaning of Judge Baxley's "Preliminary Order" has never been addressed by any appellate court in any prior appeal.

### **I. The Preliminary Order did not certify the class for a trial on the merits.**

The plaintiffs rely on an August 2011 letter from Judge Baxley to argue that the Preliminary Order was not a preliminary class certification. (Ret. at 4). The issue is the meaning of Judge Baxley's "Preliminary Order," not the meaning of his letter. Under well-settled principles of law, the letter is irrelevant to the meaning of the Preliminary Order unless it is first established that the Preliminary Order is ambiguous. It is not ambiguous – the plaintiffs have never argued that it is

ambiguous – and Judge Dickson never found that it was ambiguous. Thus, the letter is irrelevant. In any event, the letter proves too much when the “rest of the story” is told.

As the plaintiffs correctly note, Judge Baxley announced his initial ruling in an August 2011 letter, directing the plaintiffs to draft a proposed order and inviting comment from opposing counsel. (Return, Exh. C). On September 16, 2011, the plaintiffs responded with a three page proposed order entitled “Order Certifying Class” that essentially regurgitated the letter. (Tab B). After receiving comments from all parties, Judge Baxley spent the next month personally drafting the Preliminary Order. This order deviated significantly from the letter-ruling as was Judge Baxley’s prerogative. *Brailsford v. Brailsford*, 669 S.E.2d 342, 346 (S.C. App. 2008) (“until the entry of the written order the judge is free to change his mind”).

On October 12, 2011, Judge Baxley emailed the draft Preliminary Order to the parties. His email noted the following: “We have now completed a proposed *preliminary* class certification order in this case, which involved a *substantial revamping of the proposed certification order submitted by Plaintiffs*. That draft is attached.” (Tab C at 1) (emphasis added). After receiving the parties’ comments and holding a hearing, Judge Baxley revised and issued the Preliminary Order in December 2011. Although Judge Baxley never said “preliminary” in his August 2011 letter, he clearly changed his mind by the time of his October 2011 email and had decided to use a “preliminary” class. He used the word “preliminary” at least six (6) times in the order that he drafted, signed, and filed in December 2011:

1. The title of the order: “Order Making *Preliminary Finding* that Plaintiffs’ Proposed Class Meets the Requirements of Rule 23(a), SCRCP . . .” (Tab A at 1).
2. “[T]he Court finds that Plaintiffs’ proposed Class *preliminarily* meets the requirements for class certification . . .” (*Id.* at 2) (emphasis added).
3. “[T]his Order makes *only a preliminary finding* that the requirements of Rule 23 have been met by Plaintiffs.” (*Id.* at 10) (emphasis added).

4. “[F]or purposes of attempted compliance with the [Right to Cure Act], this Court finds that Plaintiffs . . . are entitled to a *preliminary determination* that Plaintiffs may proceed *at this juncture* using a class approach.” (*Id.* at 11) (emphasis added).
5. “The class is *preliminarily recognized* as follows: . . .” (*Id.*) (emphasis added).
6. “[C]lass certification is *preliminary* at this juncture pending the results of the Right to Cure process; . . .” (*Id.* at 12) (emphasis added).

Moreover, on at least five (5) occasions, Judge Baxley referred to the class as “putative,” *i.e.*, alleged:

1. “[T]he Court . . . hereby establishes the parameters of the *putative class* . . .” (Tab A at 2) (emphasis added).
2. This order “sets forth the procedures and requirements for compliance [with the Right to Cure Act] in this *putative class setting*.” (*Id.*) (emphasis added).
3. “[T]he *putative class* is limited (sic) those homes on which SCSP installed the stucco in whole or in part.” (*Id.* at 3) (emphasis added).
4. “The Court . . . recognizes that factual and legal differences may exist within the *putative class*[.]” and therefore makes “*only a preliminary finding* that the requirements of Rule 23 have been met by Plaintiffs.” (*Id.* at 10) (emphasis added).
5. The plaintiffs “are approved as representatives of the *putative class* . . .” (*Id.* at 12) (emphasis added).

(See also Tab A at 13, referring to the class created by the opt-out process as a “*proposed class*” and *id.* at 15, referring to class counsel as “*Proposed class counsel*” (emphasis added).)

Finally, on at least five (5) occasions, Judge Baxley referenced the fact that a “final” class determination would be made after the completion of discovery, including the completion of the Right to Cure Act process established by his Preliminary Order:

1. After the completion of the Right to Cure process, “the Court will make a *final determination* as to *whether a class action vehicle is practicable* under the specific facts and circumstances disclosed by” the Right to Cure process. (Tab A at 2) (emphasis added).

2. The plaintiffs' UTPA claim is dismissed without prejudice, "however, *in the event* a Class is *certified with finality* in this case, the dismissal will be with prejudice." (*Id.* at 8) (emphasis added).
3. "[S]hould a Class be *finally certified*, after the passage of an appropriate *period for discovery* as to the applicability of affirmative defenses, the Court will" address the procedures for handling those defenses. (*Id.* at 10) (emphasis added).
4. "[C]lass certification is *preliminary* at this juncture *pending the results of the Right to Cure process*; . . ." (*Id.* at 12) (emphasis added).
5. "[B]ased upon the Right to Cure responses, the Court will make a *final determination of class certification* . . ." (*Id.*) (emphasis added).

In short, the Preliminary Order repeatedly and specifically made it clear that Judge Baxley certified the class on a preliminary basis only, and he deferred any "final" determination on class certification until after the completion of the Right to Cure process and discovery. Judge Baxley never made this final determination, because he retired before the completion of the Right to Cure process. Judge Dickson never made this final determination and never considered the results of the Right to Cure process, because he accepted the plaintiffs' erroneous argument that the Preliminary Order was a final class determination, an argument that is manifestly without merit under the plain language of the Preliminary Order. Thus, absent an immediate appeal, this case will be tried as a class action despite there being no judicial determination that the class should be certified for a trial on the merits.

## **II. The plaintiffs have never addressed the appealability of Judge Dickson's orders.**

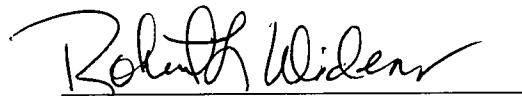
Del Webb appeals only the two orders issued by Judge Dickson. Del Webb filed a motion to determine the appealability of these orders – the plaintiffs never filed a return to this motion. The plaintiffs filed a motion to dismiss SCSP's appeal – but they never sought dismissal of Del Webb's appeal. In their return to Del Webb's rehearing petition, the plaintiffs again ignore the question of whether Judge Dickson's orders are immediately appealable. Rather, they conflate

Del Webb's appeal with SCSP's appeal of numerous other orders, arguing that appealability was already decided by this Court in the prior appeals from those other orders. In those prior appeals, however, no court addressed the meaning of Judge Baxley's "Preliminary Order." Those prior appeals did not and could not address the appealability of Judge Dickson's orders, because those orders did not exist at the time. This appeal is the first time that Judge Dickson's orders have been appealed. The plaintiffs have never addressed the issue of whether those orders are immediately appealable. They have not done so in their return to Del Webb's rehearing petition.

### CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Del Webb's previously filed Petition for Rehearing and Motion to Determine Appealability, it is respectfully submitted that this Court should grant rehearing and reinstate Del Webb's appeal.<sup>1</sup>

Respectfully Submitted,



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Del Webb Communities, Inc., and Pulte  
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Columbia, SC  
April 26, 2017

<sup>1</sup> The plaintiffs again accuse Del Webb of pursuing this appeal for the sole purpose of delay, but they have withdrawn their attending motion for sanctions. Del Webb incorporates its prior responses to this false accusation, and will respond further if the plaintiffs renew their sanctions motion.