

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Supreme Court Case No. 2017-001305
S.C. Ct. App. Case No. 2017-000218
Lower Court 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,.....Petitioner.

and

South Carolina State Plastering, LLC,.....Petitioner,

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/Petitioners.

**RESPONDENTS', GRAZIAS', RETURN IN OPPOSITION TO SOUTH CAROLINA
STATE PLASTERING, LLC'S AND DEL WEBB COMMUNITIES, INC.'S AND PULTE
HOMES, INC.'S PETITIONS FOR A WRIT OF CERTIORARI**

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This Return is filed by the Grazia Respondents (hereinafter "Respondents") in this Class Action opposing the Petitions for Certiorari filed by South Carolina State Plastering, LLC (hereinafter "SCSP") and Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter, collectively, "Webb/Pulte") from the South Carolina Court of Appeals dismissal of their second appeal of the Circuit Court's Interlocutory Orders. SCSP and Webb/Pulte previously appealed from two (2) of these Orders. That appeal was dismissed by the Court of Appeals in 2012, and certiorari was denied by this Court in 2013.¹ Three (3) of the orders, subjects of these Petitions, were issued years ago and by any measure are out of time, and the final order appealed was issued with no SCSP or Webb/Pulte motions having even been filed, therefore there was and is no basis procedurally or substantively for an appeal. The instant appeal was dismissed by the Court of Appeals on March 17, 2017.² Both SCSP and Webb/Pulte now petition this Court to review this dismissal. In opposition to these Petitions, Respondents would show as follows.

INTRODUCTION AND BACKGROUND

This matter is a class action and as of the date of this filing has been pending before the trial court for more than 3,690 days. Trial had been twice scheduled for date certain – in December 2016 and April 2017. The instant, second appeal and second petitions are taken for no other purpose than to avoid discovery and to avoid a date certain trial. They are another in a long series of delay tactics engaged by both SCSP and Webb/Pulte. A short procedural history of this long pending case is instructive.

¹ South Carolina Supreme Court Case Nos. 2013-000233 and 2013-000238

² See Order included in Appendix filed with South Carolina State Plastering, LLC's Petition for a Writ of Certiorari (hereinafter "SCSP's Appendix") at 0326.

The class was certified by Judge Baxley on December 8, 2011 following a hearing on October 5, 2011.³ Prior to Certification, this Court remanded the matter to the trial court emphasizing the utility of the class action device to save the resources of the Courts and the parties, and stating “class actions are favored in this state” (Grazia v. S.C. State Plastering, 390 S.C. 562, 703 S.E.2d 197 (S.C. 2010)). SCSP and Webb/Pulte sought to have Judge Baxley reconsider class certification, which motion was denied by order dated May 7, 2012.⁴ Appeals were taken by SCSP and Webb/Pulte challenging class certification in 2012, and, upon motion of the Respondents, the appeals were dismissed. According to the Court of Appeals, the orders of Judge Baxley were “not immediately appealable.”⁵ This Court agreed and also denied certiorari in 2013.

There are currently 4,557 houses included in the *Grazia* class. Notice of the class was long ago sent and the opt-out period closed years ago. The Notices of Appeal filed by both SCSP and Webb/Pulte separately list the seven (7) interlocutory orders which they now ask this Court to further review, after the Court of Appeals dismissed these appeals stating, “We find the appeals are interlocutory and not appealable pursuant to § 14-3-330 of the South Carolina Code.” Those seven (7) orders are as follows:

- 1) The order of the Honorable J. Michael Baxley, "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRPC; 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'

³ See Order included SCSP's Appendix at 0001.

⁴ See Order included in SCSP's Appendix at 0017.

⁵ See Order included in SCSP's Appendix at 0181 and 0183.

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**.

ARGUMENT

Not one of the orders is independently appealable; they are not appealable as a group or bundle of orders, nor were these notices of appeal filed within any time contemplated by any rule of civil procedure, appellate procedure or statutory provision. SCSP and Webb/Pulte rest their entire argument for appealability on the following statement "The statute S.C. Code Ann. § 14-3-330 allows immediate appeal of these orders..." The law addressing the propriety of interlocutory appeals in this state is well settled. "[A]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the

rights of the parties, then the order is interlocutory.”); see *also* Toal, supra at 86 (“ ‘Final judgment’ is a term of art denoting the disposition of **all** issues in the action.” (emphasis supplied)).

Further, “absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330.” Wilson, 367 S.C. at 13, 625 S.E.2d at 208. There is no “specialized statute” that guides the procedure or substance of this case. In pertinent part, S.C. Code Ann. § 14-3-330 provides as follows:

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

Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

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 Court has held on numerous occasions that when a trial court’s order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.

The “mode of trial” exception to the general rule that only final orders are appealable **is confined** to orders which abridge a party’s constitutional right to trial by jury. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000). Salmonsens v. CGD, Inc.,

377 S.C. 442, 661 S.E.2d 81 (S.C. 2008). (emphasis supplied) Notwithstanding the clear rule of law in this state, the Court of Appeals' prior dismissal of SCSP's and Webb/Pulte's interlocutory appeals, this Court's prior denial of certiorari, and the fact that class certification was long ago decided, in February 2017, both SCSP and Webb/Pulte filed an appeal seeking review of the previously noted seven (7) interlocutory Orders, including two (2) Orders from which they have already taken an appeal and which appeal was dismissed, and certiorari denied by this Court. The instant appeal was dismissed by the Court of Appeals on March 17, 2017 and rehearing was denied on May 11, 2017.

It appears that SCSP and Webb/Pulte seek review by this Court on two (2) grounds. The first is that the trial court has somehow created an "opt-in class" and that impermissibly and negatively impacts SCSP and Webb/Pulte and the "mode of trial." The second is that, notwithstanding a long line of jurisprudence to the contrary, this Court should review the trial court's class certification process, and overturn the Court of Appeals' dismissal.

The class is defined as follows: "All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab." This plain language shows it is a well-defined class requiring no action on the part of a member to participate.

Notice⁶ was sent to all homeowners that meet the class definition as was an opt-out form.⁷ The opt-out period closed on December 23, 2015, some 553 days ago. The mode of trial is by jury. The fact that class members were asked to fill out a questionnaire⁸ (drafted by SCSP and Webb/Pulte) does not alter the mode of trial nor does it (or could it possibly) have any adverse impact on SCSP or Webb/Pulte.

As for the class itself, it was long ago certified as SCSP and Webb/Pulte are both well aware, and as the following statement from Judge Baxley during a motion hearing more than five (5) years ago shows, "It takes us back to the issue...that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you," (*Motion Hearing 71: 21-23, April 30, 2012*).⁹ On February 1, 2013, Judge Baxley again addressed the issue:

COUNSEL: - - - and one of the first places that appears is in that statement, It should include, at a very minimum, it should include the words "the Court has preliminarily certified.

THE COURT: Well, let me just broach that now. I don't believe that's appropriate... because when I said I preliminarily certified it, what I meant was that's a certification... (*Tr. R. 37:9-16, Feb. 1, 2013*)¹⁰

Judge Baxley's observations are consistent with all of his rulings and continued rejections of challenges to the class "The Court specifically rejects the Defendant's and Third-Party Defendants' contention...that the factual and legal components within the cases automatically defeat a class action approach to resolution of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class." He continued to address the arguments and subsequently dismissed them, stating that "it is the firm belief

⁶ See Notice included in SCSP's Appendix at 0304

⁷ See Opt-Out Form included in SCSP's Appendix at 0313

⁸ See Questionnaire included in SCSP's Appendix at 0315

⁹ See Portion of Transcript included in SCSP's Appendix at 0238

¹⁰ See Portion of Transcript included in SCSP's Appendix at 0241

of this Court that common, core issues are present in all the cases and that a **class approach is not only the best, but the only method available** to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs” (*Order* dated Dec. 8, 2011 at 11) (emphasis supplied)¹¹. Moreover, Judge Baxley noted that this Court had the clear opportunity to deny class status in this very case but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the court and the parties (*Id.* at 11).

Lastly, in his Order Approving Class Notice (that Judge Baxley himself wrote), he once again declined to refer to the class as “preliminary,” for the reason that it was not and is not preliminary. Judge Baxley’s choice to do so even further evidences his intention that the class was, indeed, already certified. The years of rulings by the trial court could not be clearer, nor could the procedural history of this case. All of the orders that SCSP and Webb/Pulte now seek this Court to review are interlocutory and none are immediately appealable under S.C. Code Ann. § 14-3-330. And, by observation, even if there was some mechanism that would allow for appeal, none of them were “immediately appealed”.

CONCLUSION

These petitions are nothing more than another attempt at reconsideration of orders long ago issued, and it is an extreme and desperate attempt at that. The Petitions should be immediately denied by this Court, and jurisdiction restored to the trial court.

¹¹ See Order in SCSP’s Appendix at 0011

Respectfully Submitted,



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I, W. Jefferson Leath, Jr., Esq., do hereby certify that on July 10th, 2017, I served opposing counsel with a copy of the Respondents', Grazias', Return to South Carolina States Plastering, LLC's and Del Webb Communities, Inc.'s and Pulte Homes, Inc.'s Petitions for a Writ of Certiorari via regular first class United States mail, postage prepaid, addressed as follows:

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