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.: 2012-212840

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 . . . . . .Appellants.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

On December 19, 2011, the Trial Court issued its Order preliminarily certifying this matter as a Class Action, and approving the undersigned as Class Counsel (R. pp. 10-25). In so doing, the Court defined the Class. At that juncture, a defined Class of homeowners existed, and Class Counsel representing this Class was approved. The concept of a "putative" Class to which the Appellant refers is used only due to the fact that the final Class cannot be formed up until the expiration of the Notice and Opt-Out period.

Less than thirty days from the issuance of the Certification Order, South Carolina State Plastering, LLP ("SCSP") attempted to forestall any communication between Class counsel and the Class members. It filed a Motion for a Temporary Injunction. (R. pp. 99-122).

While Defendants were seeking to limit the flow of information to the Class, Class Counsel learned that in fact, the Third-Party Defendant, Del Webb/Pulte, was communicating with selected Class Members on a unilateral basis, and was offering to perform spot or patch repairs in exchange for an agreement of the homeowner to opt-out of the Class Action. The participation, if any, of SCSP, in this plan to obtain opt-outs in advance of final Class Certification is unknown.

Respondents, with this information, filed their Request for Relief, which Request has not yet been heard. (R. pp. 78-99).

Respondents initially consented to SCSP's injunction request so as to avoid any delay in the case and the delivery of notice to the Class, but SCSP and Webb/Pulte wanted an injunction against Class Counsel's communication with the class all the way through the expiration of the opt-out period. Class Counsel would have been prohibited from answering any homeowner questions concerning decisions to remain or not remain in the class. The Trial Court conducted a hearing on SCSP's Injunction Motion, and denied the same by Order of May 16, 2012, which vacated the agreed-to temporary injunction. (R. pp. 3-7). SCSP and Webb/Pulte thereupon filed a Motion pursuant to Rule 59(e), SCRCP, which was denied. (R. pp. 1-2). This Appeal followed.

FACTS

SCSP in the "FACTS" section of its Initial Brief, cites no actual facts supporting its conclusory statements. It states that "Since this putative class action was initiated in 2007, the attorneys representing Anthony and Barbara Grazia, the representative Plaintiffs, have engaged in an extended process of trying to convince homeowners in the Sun City development to join the putative class action." Thereafter, SCSP goes on to list the "promotional activities" of Class Counsel - a review of this list is instructive.

1. January 4 2012, newspaper article - This document on its face is authored by a reporter, not Class Counsel.

2. Internet comments generated by homeowners, not Class Counsel.

3. January 9, 2012, newspaper article - This document is again authored by a reporter, not Class Counsel.

4. Correspondence of December 2011, from Class Counsel to defense counsel. No allegation of any publication to any putative class member.

5. Defense Counsel response to the above. No allegation of any publication to any putative class member.

6. "Memo" without date, without attribution, without any information as to distribution.

7. Counsel for Appellant letter to Class Counsel. No allegation of any publication to any putative class member.

ARGUMENT

I. STANDARD OF REVIEW

An order granting or denying an injunction is reviewed for abuse of discretion. *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 627 S.E.2d 687, 689 (2006).

II. THE TRIAL COURT'S REFUSAL TO ORDER A ONE-SIDED COMMUNICATION BAN IS NEITHER UNSUPPORTED BY EVIDENCE, NOR CONTROLLED BY AN ERROR OF LAW.

An examination of the Appellant's Initial Brief will disclose no citation to the record demonstrating an error of law committed by the Trial Court, nor will it disclose any analysis that the Trial Court's refusal to order a one-sided communication ban is unsupported by evidence. The Appellant apparently concedes that it cannot meet this burden of proof, and instead, concentrates on the argument that any communication between anyone and the putative class prior to finalization of the Class has the "potential" for abuse. Essentially the Appellant simply wants no class member to have any information from Class Counsel - it just doesn't like it.

A review of the Trial Court's Order filed May 16, 2012, (R. pp. 3-7) demonstrates a thorough and correct legal analysis of a Court's ability to ensure proper communication within the framework of Rule 23, SCRCP. Not only does the Trial Court correctly analyze the decisional law surrounding this issue, but also, it makes seven specific findings underpinning its decision that communications should not be prohibited.

While this instant Appeal constitutes an Appeal of a specific order, the Appellant does not comment on the Order, nor does it demonstrate to this Court wherein the Trial Court has committed any abuse of discretion within the definitions above. The Trial Court's careful analysis of the scope of its ability to restrain communication within the ambit of Rule 23 SCRCP and within the parameters of the First Amendment, is left without comment by the Appellant.

In terms of the seven specific findings by the Trial Court, again, the Appellant takes no steps to demonstrate that these findings are unsupported by evidence or are legally erroneous. The reason is simple - it cannot do so, and does not even attempt to do so.

A reading of Appellant's Initial Brief together with the Trial Court's Order demonstrate that not only is there no demonstration of legal error, Appellant and the Trial Court refer to the same precedent. Both cite the decision of *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992), for communications treatment pursuant to Rule 23, SCRCP. Both cite and discuss the underlying U.S. Supreme Court decision in *Gulf Oil v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193 (1981), which together with *Eldridge*, instructs the Trial Court in this area of limiting communications. The directive is that "an order limiting communications between parties and potential class members

should be based on a clear record and specific findings that reflect the need for a limitation and the potential interference with the rights of the parties." *Eldridge*, 417 S.E.2d at 534.

This directive is precisely what the Trial Court followed here as is stated in its Order. It made seven specific findings which demonstrated that a one-sided limitation of communications would not be appropriate. Appellant cannot challenge these findings as unsupported by evidence, and indeed does not do so.

Next, and somewhat inexplicably, instead of trying to show this Court that an abuse of discretion took place, Appellant launches into a lengthy discussion of the Notice which is to issue to the Class. Notice has nothing to do with the underlying Order under Appeal. The Trial Court has received proposed Notices from Appellant and Respondents, but has yet to approve a Notice, and none has issued. This discussion is confusing, as Appellant seems to be concerned that Class Counsel might not inform the Class of all possibilities, yet, at the same time, urges that Class Counsel not be permitted to inform the Class of ANYTHING.

The Appellant, in its frenzy of attack on the entire Rule 23 concept, takes the position, that when a Class is certified regarding claims for product defects, counsel representing the class have some sort of conflict of interest and/or violate Professional Rules just by the mere event of representing the Class in an attempted recovery of one versus all defects - even if all of the other defects may not be common and typical. This is the same broken logic attempted in the Trial Court, with a paraphrase of this concept being, "The houses we built and sold are so bad, with multiple defects, you, Class Counsel, have professional problems because you are attempting to make claims on the

certified and typical stucco defects alone and are not suing for unfair trade practices (which the legislature specifically prohibits)." An amazing argument.

Finally, Appellant, in its last section of the Initial Brief, and without meaning to do so, comments on the innate wrongful act of soliciting opt-outs as Webb/Pulte is doing. (R. p. 243) when it states "If reasonable restrictions are not placed on contact and solicitation by parties and attorneys with prospective class members, Defendants will necessarily need to enter the information arena, to make certain that Sun City homeowners are being given all of the information for the ramifications of becoming members of the class. Signatures on opt-out or opt-in forms will become the objectives of all parties in an escalating information/solicitation battle. The stakes are very high, which will elicit significant effort." Webb/Pulte admits that it is performing some level of patch repairs on houses of class members without any notification to or input by Class Counsel. In consideration for these repairs, the homeowner is required to sign a Class Opt-out form (R. pp. 239-243) all this before any Notice is sent out to the Class advising Class members of their rights under Court supervision. Ironic, considering SCSP's attempts to stop information from reaching the homeowners at all costs.

CONCLUSION

Appellant has the burden of convincing this Court that the Trial Court committed an abuse of discretion in its refusal to restrict communications. To meet this burden, it must show that the Trial Court's Order is either legally erroneous or factually wrong. Not only has it not met this burden, it has not even attempted to do so. Instead, it has relied on the irrelevant - and sometimes just plain inaccurate - themes it asserted at the Trial Court, in an attempt to stop any relevant information regarding this litigation from

reaching the potentially four thousand plus homeowners at Sun City who have defective stucco systems installed on their homes.

Respectfully Submitted,

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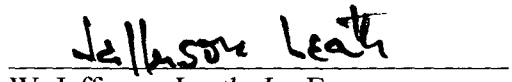
CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' Final Brief complies with the provisions of Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

Respondents, by and through its undersigned counsel, hereby certify that all personal data identifiers and other sensitive information in Respondents' Final Brief are redacted or sealed as required by the August 13, 2007, Order of the South Carolina Supreme Court.

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