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

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

v.

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

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.

REPLY BRIEF OF APPELLANT

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REPLY

I. RESPONDENTS INCORRECTLY ASSERT THAT APPELLANTS FAILED TO ESTABLISH THAT THE TRIAL COURT MADE AN ERROR OF LAW IN DENYING APPELLANT'S MOTION FOR A TEMPORARY INJUNCTION.

Respondents' Brief asserts that Appellant failed to establish that the trial court made an error of law in denying Appellant's motion for a temporary injunction. It should be noted that Respondents had previously recognized the need for such an injunction by consenting to the action, Brief, p.2, as reflected in the trial court's Order of March 8, 2012. R. 8. Respondents should not now be heard to complain of the imposition of such an injunction.

Respondent's Brief is premised on the idea that Appellant has failed to establish that the trial court made an error of law in denying the mutually-agreed injunction. That is incorrect. The trial court, in fact, made at least four errors of law in its Orders vacating the injunction, Order of 5/16/2012; R. 3, and denying Appellant's Rule 59(e) motion, Order of 6/29/2012; R. 1. As addressed below, the court erred in failing to protect the legal rights of South Carolina State Plastering (SCSP); in failing to prevent a foreseeable conflict of interest between Respondent's attorneys and homeowners in Sun City who have damages other than, or in addition to, the three specific categories of damage that define the class; in failing to make clear that Respondents' Counsel do not and cannot represent all homeowners in Sun City; specifically they do not, and cannot, represent any homeowner whose interests conflict with their own or those of the representative plaintiffs, the Grazias.

A. The Court's Orders of May 16 and June 29 Fail to Protect the Due Process Rights of Appellant.

As addressed in Appellant's Brief, pp. 8-11, defendants in class actions have due process rights "to secure a determination of...the composition of the class and the form of notice to the members prior to the determination of the merits of the action." Civil Service Employees Ins. Co. v. Superior Court, 22 Cal.3d 362, 372 (1978). Professor James Flanagan, of the University of South Carolina School of Law, states directly that the court "**must** supervise the content and mechanism of **any** notice procedure." *South Carolina Civil Procedure*, 196-97 (3d ed. 2010) (emphasis added).

Respondent's communications with all of the residents of Sun City are *de facto* notice – without supervision – to people who *are* members of the class and to people who *are not* members of the class. There is no regard paid to the "composition of the class." SCSP, therefore, has no say whatsoever in who is to receive or the form or substance of the notice. Appellant is thereby deprived of due process rights that should be inherent in class actions.

The unsupervised notice to all residents is also likely to deprive SCSP of due process rights in another regard. If people who are members of the class as defined by the court have damages in addition to those class-defining damages, their participation in the class action will inferrably result in a waiver of those additional damages. They likely would be able to collaterally attack the damage award in the class action and bring additional litigation against SCSP. A court-supervised mechanism of, and content for, notice should preclude such an infringement of these constitutional rights. The trial court's appealed orders fail to protect these rights, which is an error of law.

B. The Court's Order does not take cognizance of or preclude a Conflict of Interest between some residents of Sun City and the Plaintiff's Attorneys.

The trial court's Order of December 19, 2011 does not include all residents of Sun City as members of the class. Some residents of the development do not have stucco on their homes. The Order specifically limits the class to homeowners who currently own stucco-clad homes, to which SCSP applied the stucco in whole or in part prior to July 31, 2007, and who have damages due to:

a. lack of head flashing above doors and windows,

b. failure to install stucco control joints; and/or

c. moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

Order, p. 11-12; R. 20-21.

There are unquestionably homeowners in Sun City who, while having one or more of the class defining defects, also have damages from other construction and/or stucco defects. Damages from one or more defects other than those which define the class may, in fact, be far more extensive than those from class-defining defects. If these homeowners are enticed or cajoled to participate in the class action by Plaintiffs' attorneys, their claims for outside-the-class damages may be waived. This possibility puts them in a conflict of interest with the class counsel. As the federal district court for South Carolina has held, "...the class representative [and his agent, the attorney] should not have *any*...conflicting interests to the unnamed members...." Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983). Here, the damages alleged by the class representatives may all be resolved by the class action; but that is not true for homeowners who have damages caused by factors outside the three used by the court to define the class. The

attorney for the class representatives and the class representatives, moreover, have a pecuniary interest in adding as many homeowners as possible to the class. They may – and by such actions as holding "town meetings" and seeking press coverage of developments in the litigation have – encouraged maximum participation in the class litigation. Such participation may not, however, be in the best interest of some homeowners who may be encouraged to join. For such people to be enticed to join the class action creates a direct conflict of interest. The court's order does nothing even to recognize the possibility of such a conflict, much less to prevent such a conflict by limiting solicitations by Respondents' attorneys at least until the official notice is decided and published.

Respondent's Brief does not address in a substantive fashion Appellant's issue about Respondents' attorneys' conflict of interest with any homeowner who has damages other than those which define the class. By failing to argue this issue, but addressing it in only a conclusory fashion, Respondents have abandoned this issue on appeal. Jinks v. Richland County, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003); Buist v. Buist, 399 S.C. 110, 121, 730 S.E.2d 879, 885 (Ct. App. 2012) ("when an issue is not argued within the body of the brief but is only a short, conclusory statement, it is abandoned on appeal," *citing* Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App.2004)).

C. The Court's Order fails to make clear that Respondents' Counsel do not represent all of the homeowners in Sun City, leading to the de facto Legal Error of their claiming to represent all Homeowners in Sun City.

Respondents' counsel have repeatedly asserted – and continue to assert in their brief –that they represent all of the homeowners in Sun City. The trial court's order of

May 16, 2012, may reasonably be read to support that position, inasmuch as it says *de facto*, that, "Plaintiff's counsel is allowed to communicate with the residents of Sun City Hilton." Order of 5/16/2012, p.4; R. 6. The court's Order of December 9, 2011, however, had limited the class to those experiencing damages from the actions of SCSP prior to July 31, 2007 which caused damage from the three factors: lack of head flashing, failure to install stucco control joints, or moisture encapsulation by failing to provide a gap between the stucco exterior and structure slab. R. 21. It is only the members of this class who are represented by Respondents' attorneys, despite the trial court's expansive words in the Order of May 16, 2012. The court's order failed plainly to say that Respondents' counsel cannot represent anyone with whom they, or the representative plaintiffs, have a conflict of interest.

Respondents have, because of the incorrect interpretation of who they are representing, complained to the court about Pulte Homes doing warranty work at selected houses in Sun City. *See*, Respondent's Brief, pp. 1, 6, Respondents seek to have a monopoly of access to homeowners in Sun City based on the erroneous idea, not corrected by the trial court, that they represent all of the homeowners. It is an error of law not to correct Respondents' claim of universal representation.

This is a situation which cries out for the court's involvement to keep this litigation fair and well-ordered. The trial court erred in declining to take the opportunity presented by Appellants' motion for a temporary injunction to bring better order to this litigation to ensure the proper administration of justice.

II. APPELLANTS ARE NOT SEEKING TO HAVE A MONOPOLY ON COMMUNICATIONS WITH HOMEOWNERS IN SUN CITY, THOUGH RESPONDENTS SEEK THAT END.

The Appellants filed a motion for a temporary injunction against the Respondent's contacts with the homeowners of Sun City simply because it was Respondents who were aggressively seeking to convince the homeowners to join the class action. Appellant's Brief, pp. 3-5, outlines the actions of which Appellants were aware at the time of filing the motion.[1] Since the motion was filed and decided, Respondents' attorneys have in fact, conducted a town meeting. The incidents referenced reflect an aggressive attempt to jump-start the class action before any approved notice has been issued. Combined with that, Respondents have attempted to prevent Appellants from making contact with homeowners for purposes of doing warranty or right-to-cure work under S.C. CODE §§ 40-59-830, -840 For example, Respondents have filed a "Rule to Show Cause" to prevent Pulte Homes from contacting homeowners to do warranty work. Respondents' Brief, p. 1.

Appellant is simply trying to level the playing field, which has been tilted toward allowing the class action plaintiffs and their attorneys to have access which has been unavailable to the defendant/third-party defendants in the action. As in sports events, the offensive team has the initiative and is seeking to accomplish a specific goal. The defense is necessarily reactive. In this class action, however, the defending parties have been constrained in what they are able to do. Appellant's motion for a temporary injunction to restrain Respondents' contact with the homeowners was an attempt to bring the parties into parity. As pointed out above, Respondents agreed to the temporary injunction and inferably the trial court recognized the justice of imposing such a

[1] Respondents' Brief attempts to discount these incidents, pp. 2-3, but tellingly Respondents do not deny that they occurred or that Respondents' attorneys were not in some way involved in making these contacts with the residents of Sun City. Obviously, the fact that a reporter's name is on a story does not preclude the possibility that the story was planted or stimulated by some action of an interested attorney.

compelled pause in the Respondents' solicitation efforts. After discovering that the previously-signed order was not a consent order, Order of 5/16, p. 2; R. 4, the trial court abruptly rescinded the prior order. He knew that Appellants had offered "to amend the motion to apply to all parties," id., p. 4; R. 6, but nonetheless denied the motion for a temporary injunction, considering many factors to the exclusion of the "interference with the rights" of SCSP. Eldridge v. City of Greenwood, 308 S.C. 125, 128, 417 S.E.2d 532, 534 (1992).

This case requires the active involvement of the trial court as a referee or umpire to establish ground rules before the fact. Doing so better brings to fruition the purposes of the SCRCP: "to secure the just, speedy and inexpensive determination of every action." Rule 1, SCRCP. All parties need procedural rules regarding what is allowable for parties dealing with potential members and non-members of the defined class, even as civil courts have rules of procedure in place **before** litigation.

CONCLUSION

The trial court's orders of May 16, 2012 and July 12, 2012 should be vacated and the matter remanded to the trial court for the establishment of rules for the parties' communication with members and non-members of the putative class.

Signature Page Immediately Follows

Respectfully submitted,

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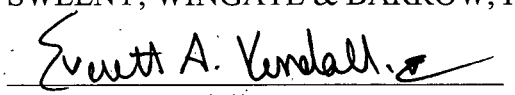

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February 28, 2013

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CERTIFICATE OF COUNSEL

The undersigned certified that this Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant on Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs, by depositing a copy of it in the United States Mail, postage prepaid, on March 1, 2013, addressed to their attorneys of record and all counsel of record, listed as follows:

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