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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case No. 2019-CP-07-00223
Appellate Case No. 2020-001659

Tracey Lee Lunenburg, Respondent,

v.

Vincent J. Aiello, Jr.,
Atlantic Heritage Builders, Inc.,
Yuko Construction, Inc., d/b/a Advanced Roofing, Inc.,
Bismark Lara, Premium Stucco, and
Shaw Manufacturing's Wrought Iron Works, Inc., Defendants.

Vincent J. Aiello, Jr., and
Atlantic Heritage Builders, Inc., Third-Party Plaintiffs,

Palatial Homes, Inc., Palatial Homes, LLC,
Palatial Homes Design, LLC, and
Palatial Building Group, LLC, Third-Party Defendants,

Of whom Vincent J. Aiello, Jr., and
Atlantic Heritage Builders, Inc., are the Appellants.

APPELLANTS' PETITION FOR REHEARING

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By and through their undersigned counsel, pursuant to Rule 221(a), SCACR, Appellants[1] hereby petition this Honorable Court for rehearing of this matter, which it decided by order filed September 15, 2023 (the "Subject Order"), dismissing "the appeal because the order granting the motion to lift the stay is interlocutory and not immediately appealable." As particularly stated and explained below, Appellants most respectfully contend that the Court misapprehended or overlooked material points in dismissing this appeal and that it should grant rehearing, reinstate the appeal, and decide it on the merits in Appellants' favor.

BACKGROUND

This is a residential construction defect lawsuit by Plaintiff[2], the homeowner, against, among others, Appellants, both of whom Plaintiff identifies as the general contractor for the construction of the subject residence. (R. pp. 7–18.) Without question, Plaintiff is a "claimant"[3] and this lawsuit is an "action"[4] under, and thus subject to, the Right to Cure Act[5].

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[1] "Appellants" refers to Defendants/Appellants, Vincent J. Aiello, Jr. ("Aiello"), and Atlantic Heritage Builders, Inc., collectively.

[2] "Plaintiff" refers to Plaintiff/Respondent, Tracey Lee Lunenburg.

[3] *See* S.C. Code Ann. § 40-59-820(2) (defining "Claimant").

[4] *See* § 40-59-820(1) (defining "Action").

[5] The "Right to Cure Act," or simply the "Act," is the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860.

The Right to Cure Act requires that, no later than 90 days before filing an action against a contractor arising out of the construction of a dwelling, the claimant must serve a written notice of claim on the contractor. S.C. Code Ann. § 40-59-840(A). The contractor has 30 days from service of the notice "to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850(A). At the contractor's election, the claimant must give the contractor reasonable access to the dwelling and allow the contractor to inspect the alleged defect at a mutually agreeable time. *See Id.* If the contractor timely responds to the notice of claim with an offer to remedy the alleged defect or settle,[6] the claimant has 10 days to serve a response. § 40-59-850(B).

Compliance with the Act's requirements is a prerequisite for the claimant to "proceed with a civil action or other remedy provided by contract or by law." § 40-59-850(C). "If the claimant files an action in court before first complying with the requirements of [the Act], on motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of [the Act]." § 40-59-830 (emphasis added).

Construction on the subject residence began in 2008, and the certificate of occupancy was issued November 18, 2009. (R. p. 10 ¶ 7.) Again, Plaintiff alleges

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[6] If the contractor does not respond within 30 days it is deemed a denial of the claim. § 40-59-850(A).

Appellants both acted as the general contractor during original construction. (*See* R. pp. 11 ¶ 11, 13 ¶ 15.) Plaintiff purchased the subject residence from Aiello in 2012, and at Plaintiff's behest, Appellants made certain repairs and modifications to the subject residence between 2014 and 2017. In June of 2018, however, Plaintiff began making significant repairs to the subject residence, specifically, to the roof and flashing. Appellants did not perform that work; nor were they informed of the work or given the opportunity to inspect the purported defective areas.

Plaintiff filed this lawsuit on February 4, 2019, in the Beaufort County Court of Common Pleas, alleging negligence against Appellants in their capacities as general contractors of the subject residence,[7] and Appellants timely answered. (R. pp. 19–46.)

On May 8, 2019, Appellants were permitted to inspect the subject residence pursuant to Rule 34(a)(2), SCRCP. Appellants' liability expert, Robert Kenney, was present at the inspection. It was clear that Plaintiff had been effecting repairs and modifications to the subject residence for months. Almost all of Appellants' work that Plaintiff alleges was negligent had been removed and destroyed. (*See* R. pp. 61–62.) Appellants were not given notice of these alleged defects and subsequent repairs or the opportunity to inspect or offer to cure them prior to

[7] (R. pp. 7–18.)

Plaintiff effecting the repairs and destroying Appellants' work. (*See Id.*; *see also* R. pp. 63–66.)

Upon discovering the state of the subject residence, Appellants' counsel sent Plaintiff's counsel a letter on June 28, 2019, requesting that Plaintiff not alter or destroy any alleged defective conditions at the subject residence and asking for Plaintiff to comply with the Right to Cure Act. (*See* R. pp. 63–64.) Plaintiff did not cease repairs and continued to actively destroy the alleged construction defects. On September 16, 2019, more than four months after the initial inspection and almost three months after Appellants' counsel's letter of June 28, 2019, Plaintiff's counsel informed defense counsel that a small area of the turret section of the subject residence would be repaired and that counsel were invited to inspect the turret prior to the work being scheduled. (*See* R. p. 65.) There was no opportunity to cure the alleged defects to the turret. Believing it to be clear that Plaintiff had no intention of complying with the Right to Cure Act, Appellants' counsel sent Plaintiff's counsel a letter on October 10, 2019, complaining that Plaintiff had destroyed all the evidence against his clients, thereby denying them their rights under the Right to Cure Act, as well as the ability to effectively defend the case against them. (*See* R. p. 66.)

On January 9, 2020, Appellants moved to stay the action pursuant to § 40-59-830. (R. pp. 47–48.) By order filed May 20, 2020, the circuit court, the

Honorable Deadra L. Jefferson presiding, found that Plaintiff had filed suit without first complying with the requirements of the Right to Cure Act and, pursuant to § 40-59-830, stayed the action pending Plaintiff's compliance with the requirements of the Act. (R. pp. 1–3.)

Section 40-59-840(A) of the Right to Cure Act requires the claimant to "serve a written notice of claim on the contractor." Section 40-59-820(5) defines "serve" or "service" to mean "personal service or delivery by certified mail to the last known address of the addressee."

According to Plaintiff, in an attempt to comply with the Right to Cure Act, Plaintiff's counsel sent "Right to Cure" letters dated June 18, 2020, to Appellants via certified mail on June 19, 2020. (*See* R. pp. 93–96, 102.) Plaintiff provided no proof of service for the same showing "personal service or delivery by certified mail to the last known address of the addressee." (*See* R. pp. 93–96.) Indeed, Plaintiff admits the letters were never actually signed for by Appellants. (R. p. 73 ("Atlantic Heritage Builders, Inc. and Vincent J. Aiello, Jr., were sent a letter to their last known address, which is also the address listed with the South Carolina Secretary of State, and never signed for the same.").) Appellants' counsel was not made aware of the letters until receiving copies of them via email from Plaintiff's counsel on June 25, 2020. (*See* R. pp. 93-96, 105–07.)

Plaintiff's counsel's June 18, 2020, letter generally lists certain alleged construction defects. (*See* R. pp. 93–96.) More importantly, the letter admits that "some repairs have already been made" and that "[t]he completion of these repairs might affect your ability to examine the evidence of original construction." (*Id.*)

Despite Appellants having never actually received the letters, and their counsel only receiving courtesy copies via email, Appellants erred on the side of caution and opted to request clarifications pursuant to § 40-59-840 of the Act. The clarification letter was sent to Plaintiff's counsel on July 14, 2020. (R. pp. 97–99.) That letter requested both clarification of the alleged construction defects and to schedule a time to inspect the alleged defects. (*Id.*) Plaintiff's counsel responded to the clarification letter on September 15, 2020, simply stating that he had not received the clarification letter within 15 days of issuing his Right to Cure letter[8] and that he was moving to lift the stay. (*See* R. p. 100.) The letter specifically declines to clarify the alleged defects and does not allow or invite any inspection of the alleged defects as requested by Appellants' counsel pursuant to the Act some two months prior. (*Id.*)

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[8] In pertinent part, § 40-59-840 provides, "The contractor . . . shall advise the claimant within fifteen days of *receipt* of the claim if the construction defect is not sufficiently stated and shall request clarification" (emphasis added). Again, Plaintiff provided no proof of service for the Right to Cure Letters showing their receipt by Appellants via "personal service or delivery by certified mail to the last known address of the addressee," (*see* R. pp. 93–96), and indeed admitted the letters were never actually signed for by Appellants. (R. p. 73.)

On September 28, 2020, Plaintiff moved to lift the stay. (R. pp. 71–74.) Over Appellants' objection,[9] the circuit court, the Honorable Carmen T. Mullen presiding, granted Plaintiff's motion to lift the stay by order filed November 20, 2020. (R. pp. 4–6.)

This appeal timely followed by notice served and filed on Monday, December 21, 2020,[10] and in due course, it was briefed and made ready for decision.

The appeal was scheduled for oral argument on October 11, 2023, but on September 15, 2023, the Court filed the Subject Order, dismissing "the appeal because the order granting the motion to lift the stay is interlocutory and not immediately appealable" and cancelling the scheduled argument. The body of the Subject Order is brief enough to recite it here in full:

> After careful consideration, we dismiss the appeal because the order granting the motion to lift the stay is interlocutory and not immediately appealable. *See Carolina Water Serv. Inc. v. Lexington Cnty. Joint Mun. Water. & Sewer Comm'n*, 373 S.C. 96, 98, 644 S.E.2d 681, 682 (2007) (reversing this court's holding that an order lifting a stay was immediately appealable); *see also Edwards v. SunCom, Inc.*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) (holding an order granting a stay was not immediately appeal able). The remittitur will be sent as provided by Rule 221 (b) of the South Carolina Appellate Court Rules. Accordingly, the oral argument scheduled for October 11, 2023 is cancelled.

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[9] (*See* R. pp. 61–66, 75–100.)

[10] (R. pp. 109–15.)

This petition for rehearing timely follows.

STANDARD OF REVIEW

Both the instant petition and the appeal itself center on the interpretation of statutes (namely, the general appealability statute, S.C. Code Ann. § 14-3-330, and the Right to Cure Act), and the issue of interpretation of a statute is a question of law for the court that is subject to de novo review. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) (citing *Muci v. State Farm Mut. Auto. Ins. Co.*, 478 Mich. 178, 732 N.W.2d 88, 93 (2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.")); *see also Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984) (even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law). Issues of law are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

ARGUMENT

I. The Court erred in dismissing this appeal because the circuit court's order lifting the mandatory statutory stay under § 40-59-830 of the Right to Cure Act is immediately appealable under § 14-3-330.

Our Supreme Court has recognized that the Right to Cure Act affords substantial rights to the builder.[11] The *Grazia* Court held that § 40-59-840 "imposes an *absolute condition precedent* to the filing of lawsuits that qualify under the Right to Cure Act," that it "encompasses civil lawsuits filed against a contractor or subcontractor," and that it "*requires* the claimant to serve written notice no later than ninety days before filing the action." 390 S.C. at 571, 703 S.E.2d at 200–01 (emphasis added). In fact, the express public policy intent of the Right to Cure Act is: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners, and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. *Id.* at 572, 703 S.E.2d at 202 (citing 2003 South Carolina Laws Act 82 (S.B. 433)). "The stated public policy, therefore, is not abridged when a court, on

[11] *See Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 571, 573, 703 S.E.2d 197, 202 (2010) ("These rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of sections 40-59-840 and 850, as opposed to during an action's normal discovery period."). By recognizing that the "rights" conferred on builders by the Right to Cure Act are not completely "new," but rather an effort by the legislature to grant builders an advanced timeline for asserting such "rights," the *Grazia* Court necessarily recognized that the Act grants builders substantial "rights."

motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions." *Id.* (emphasis in original).

Again, these rights under the Act are not *new* substantive rights (though, again, they are substantial rights), but instead represent an effort by the General Assembly to provide contractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of §§ 40-59-840 and -850, as opposed to during an action's normal discovery period. *Id.* at 573. More specifically, the rights afforded to the builder include: the right to request clarification of the alleged defects (§ 40-59-840); the right to inspect the alleged defects (§ 40-59-850); the right to offer to remedy the alleged defect (§ 40-59-850); the right to offer to settle the claims related to the alleged defects (§ 40-59-850); and the right to deny the claim (§ 40-59-850).

As Judge Jefferson ruled, Plaintiff categorically failed to comply with the Right to Cure Act. Plaintiff had not served Appellants with written notice of the alleged construction defects as required by §§ 40-59-820(5) and -840. Plaintiff's failure to comply denied Appellants their rights to request clarification of the alleged defects, to inspect the alleged defects, to offer to remedy the alleged

defects, to offer to settle the claims related to the alleged defects, and/or to deny the claim.

A stay pursuant to the Right to Cure Act is not discretionary, it is mandatory, as § 40-59-830 directs that "on motion of a party to the action, the court *shall* stay the action until the claimant has complied with the requirements of this article" (emphasis added). Plaintiff never complied with the Right to Cure Act, and the stay Judge Jefferson entered should have been left in place pursuant to § 40-59-830. Specifically, Plaintiff has not:

(a) shown proof that the Right to Cure letters were received by Appellants via the required service;

(b) clarified the vague and general allegations of construction defects;

(c) allowed for inspection of the alleged defects; or

(d) stated which alleged defects have been repaired, destroyed, and/or altered and which alleged defects are no longer available for inspection.

Without clarification of the alleged defects and without the ability to inspect the alleged defects, Appellants continued to have their rights under the Right to Cure Act denied, and Plaintiff continued to fail to comply with the Act, mandating the continued stay of the action pursuant to § 40-59-830.

And, of course, in any event, it is no longer possible for Plaintiff to comply with the requirements of the Act; nor, in turn, is it possible for Appellants to be afforded their rights thereunder. Plaintiff has knowingly and intentionally destroyed and repaired virtually all of the original construction for which she is suing Appellants. In fact, Plaintiff's counsel has conceded that "some repairs have already been made," and "[t]he completion of these repairs might affect your ability to examine the evidence of original construction." (*See* R. pp. 93–96, 105–07.)

And this (Plaintiff's inability to comply with the requirements of the Act) was already established by the time Plaintiff first attempted compliance (albeit without any possibility of success, of course) via the purported notice of claim letter dated June 18, 2020. (*See* R. pp. 93–96.) Again, more than a year earlier, on May 8, 2019, Appellants had been permitted to inspect the subject residence pursuant to Rule 34(a)(2), SCRCP,[12] and Appellants' liability expert, forensic engineer Robert Kenney, P.E., was present at the inspection. As Mr. Kenney attested in his affidavit,

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[12] In this regard, Appellants would again note that the legislature intended the Act to provide contractors the right to entry onto and inspection of the claimant's dwelling pre-suit. *See Grazia*, 390 S.C. at 571, 573, 703 S.E.2d at 202 ("These rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of sections 40–59–840 and 850, as opposed to during an action's normal discovery period.").

it was clear that Plaintiff had been effecting repairs and modifications, significant construction activities were already ongoing, and the majority of Appellants' allegedly deficient work (i.e., the claimed construction defects of which Plaintiff was supposed to give Appellants prior notice pursuant to the Act) had been removed and destroyed, such that the work no longer existed, and thus no longer possible to inspect, some of it even already completely repaired, and thus not only impossible to inspect but also impossible to offer to cure. (*See* R. pp. 61–62.) Again, even in the purported notice of claim letter itself, Plaintiff admitted that "some repairs have already been made" and that "[t]he completion of these repairs might affect your ability to examine the evidence of original construction." (*See* R. pp. 93–96.)

The primary consideration in interpreting a statute is finding the intent of the legislature. *State v. Squires*, 311 S.C. 11, 14, 426 S.E.2d 738, 739 (1992). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

Properly reading and construing the Act as a whole, it is clear that to provide the notice of claim required by the Act, the notice must be given in respect of claimed *existing* defects, i.e., defects the contractor is capable of inspecting and offering to cure. Otherwise, §§ 40-59-840 and -850 are rendered nonsensical, and the legislative

intent to promote settlement of construction disputes without litigation and the rights it granted contractors to that end are hopelessly undermined. *Compare* § 40-59-840(A) ("In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor. The notice of claim must contain the following: (1) a statement that the claimant asserts a construction defect; (2) a description of *the* claim or claims in reasonable detail sufficient to determine the general nature of *the* construction defect; and (3) a description of any results of *the* defect, if known.") (emphasis added) *with* § 40-59-850(A) ("The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny *the* claim regarding *the* defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of *the* construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs.") (emphasis added). Just as a contractor can neither inspect nor offer to cure a claimed defect that does not exist, a claimant, like Plaintiff here, cannot comply with the requirements of the Act by providing the contractor with a (purported) notice of a claim that does not exist.

The Right to Cure Act not only expressly calls for a "stay" when a claimant files an action before compliance but also expressly calls for the stay to remain in effect "*until* the claimant *has complied* . . . ." § 40-59-830 (emphasis added). Moreover, the language of the Act makes plain the legislature's intent that no "civil action or other remedy provided by contract or by law" proceed until there has been compliance. *See* § 40-59-850(C) ("*If* the parties cannot settle the dispute pursuant to [the Right to Cure Act], the claimant *may* proceed with a civil action or other remedy provided by contract or by law.") (emphasis added).[13] Here, Plaintiff has made compliance with the Right to Cure Act impossible. Plaintiff substantially repaired and remodeled the home and, in the process, destroyed the alleged construction defects without giving Appellants the *required* notice of those alleged defects and an opportunity to inspect and/or offer to cure them. Because Plaintiff

[13] "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); *see also id.* ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); *id.* at 499, 640 S.E.2d at 459 (In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted) ("If the statute is ambiguous . . . courts must construe the terms of the statute."); *id.* (statutory language must be construed in light of the intended purpose of the statute); *id.* (a statute should not be construed in a way which leads to an absurd result or renders it meaningless).

has plainly not complied with the Right to Cure Act, the act plainly required the stay to remain in place, and the circuit court erred in granting Plaintiff's motion to lift it.

To determine, as the Subject Order has, that the circuit court's error in lifting the stay under the Right to Cure Act is not immediately appealable is essentially to determine that such error is never subject to meaningful review, and respectfully, this Court erred in so doing.

In determining that the circuit court's order lifting the stay under the Right to Cure Act is not immediately appealable, the Court cited only case law (namely, *Carolina* Water and *Edwards*) dealing pertaining to *discretionary* stays. Here, however, the stay in question is *statutory* and it is *mandatory*—and, because Plaintiff cannot possibly comply with the Act, it should be *permanent*.

The circuit court's order lifting the stay is immediately appealable under § 14-3-330(1) as an order "involving the merits" and/or under § 14-3-330(2) as an order that "affects a substantial right," deprives Appellants of "a mode of trial to which [they are] entitled as a matter of right,"[14] and/or "strikes out an answer or any part thereof." *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006) (addressing subsection (1)'s allowance of immediate appeals of orders involving the merits: "An order 'involves the merits,' as that term is used in

[14] *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)

Section 14-3-330(1) . . . and is immediately appealable when it finally determines some substantial matter forming the whole *or part* of some cause of action *or defense*.") (emphasis added) (footnote omitted)); *see also Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, (2015) (holding that, under the circumstances, a bifurcation order was immediately appealable because it "*effectively* grant[ed] the [defendants] *potential* summary judgment on [certain] issues") (emphasis added); *id.*, 773 S.E.2d at 147 n.2 (noting that the order *sub judice* "implicated a substantial right . . . [and] [j]ust because *part* of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330(2)(a)") (emphasis in original)); *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452–53, 661 S.E.2d 81, 87 (2008) ("'[Pursuant to§ 14-3-330(2), this Court has held on numerous occasions that when a trial courts order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable.'") (quoting *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333; *see, e.g., Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) ("The interlocutory adjudication in this case determines that the defenses interposed by defendant are without merit and that he is liable to the plaintiff on the claim asserted in the complaint, leaving only the amount of the damages at issue. It thus finally decides the merits of every issue in the case, except that of damages. We think that such a determination involves the merits

and comes within the class of interlocutory or intermediate orders from which an immediate appeal is allowed under [§ 14-3-330's predecessor in the 1962 Code].").

Under Rule 8(c), SCRCP, "affirmative defenses" include "any . . . matter constituting an avoidance or other affirmative defense." Appellants both pled the Right to Cure Act as an affirmative defense. (R. pp. 27, 40.) The circuit court's erroneous lifting of the mandatory stay effectively determines and/or strikes out Appellants' defense and/or the part of their answers setting forth their defense based on the Right to Cure Act.

Moreover, the circuit court's erroneous lifting the mandatory stay denies Appellants the substantial rights afforded them under the Act—and at the same time wrongfully allows Plaintiff to simply disregard those rights and the requirements of the Act (i.e., to simply ignore the "absolute condition precedent" to filing suit that the Act imposes) without consequence. And again, if this Court adheres to its determination that the circuit court's order lifting the stay is not immediately appealable, the order will avoid meaningful review, allowing the circuit court to disregard the statutory mandatory stay required by the Act without consequence.

Lastly, by establishing compliance with the Act as an "absolute condition precedent" to filing suit and, in the event that suit is nonetheless filed without compliance, mandating the imposition of a stay unless and until there is

compliance, the legislature has conferred upon Appellants the right to a trial that does not proceed unless and until the Act complied with (and, in turn, Appellants' rights thereunder are afforded). If this Court adheres to its determination that the circuit court's order lifting the stay is not immediately appealable, it will deny Appellants' right to such a trial.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Order, and to decide this appeal on the merits via an opinion that reverses the circuit court and, as mandated by § 40-59-830, stays this action unless and until Plaintiff complies with the Right to Cure Act (or, alternatively, remands the case to the circuit court with instructions that it stay this action unless and until Plaintiff complies with the Right to Cure Act).

<SIGNED ON THE FOLLOWING PAGE>

Respectfully Submitted,

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