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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2021001055

Andrew and Kimberly McIntire……. *Appellants*,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants,

AND

Seaquest Development Company, Inc. ..... Third-Party Plaintiff/*Appellant*,

v.

Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC, Third-Party Defendants,

of which Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; and New South Construction Supply, LLC are the .....*Respondents*.

RECORD ON APPEAL
VOL. II

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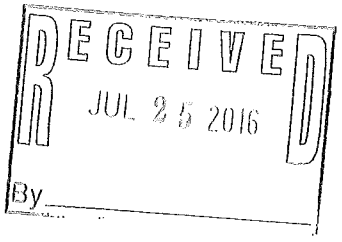
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AFFIDAVIT OF SERVICE

State of South Carolina | County of Charleston | Common Pleas Court

Case Number: 2016-CP-10-1833

Plaintiff:
ANDREW AND KIMBERLY MCINTIRE
vs.
Defendant:
SEAQUEST DEVELOPMENT COMPANY, INC ET AL



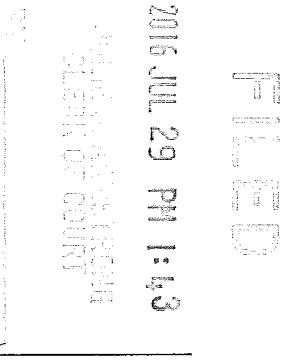
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Received by PROCESS SERVICE, INC. to be served on **SOUTHCOAST EXTERIORS, INC, 1275 ABERCORN TRACE, MT PLEASANT, SC 29464**.

I, John Gordon, being duly sworn, depose and say that on the **20th day of July, 2016** at 3:00 pm, I:

SERVED the within named CORPORATION by delivering a true copy of the **CIVIL ACTION COVERSHEET; SUMMONS; COMPLAINT;** with the date and hour of service endorsed hereon by me to **JAMES KRAMER, REGISTERED AGENT** for **SOUTHCOAST EXTERIORS, INC at 1275 ABERCORN TRACE, MT PLEASANT, SC 29464**

I am over eighteen and have no interest in the above action.



John Gordon
Process Server

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

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Subscribed and Sworn to before me on the 21st day of July, 2016 by the affiant who is personally known to me.

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STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2016-CP-10-1833

ANDREW MCINTIRE,

PLAINTIFF,

VS.

SEAQUEST DEVELOPMENT COMPANY, ET AL.,

DEFENDANTS.

TRANSCRIPT OF RECORD

OCTOBER 13, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE (RET) CHIEF JUSTICE TOAL, JUDGE

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Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

(The following proceedings were held October 13, 2016, Charleston County, South Carolina, @ 10:25 a.m.)

THE COURT: This is Nos. 9, 10, 11, 12 all involving McIntire against SeaQuest and many others. There are motions to stay and compel and motions to dismiss or stay proceedings and a motion for protective order. Most of these motions evolve around the issue of arbitration as I understand it. So who wants to begin?

MR. DAIGLE: Your Honor, Jason Daigle and Ed Buckley for SeaQuest Development Company.

THE COURT: Very good.

MR. DAIGLE: There are four motions outstanding. Two of those motions are the motions to stay pending compliance with the Right to Cure Act which requires a mandatory -- statutory mandatory stay. I think it would be easier to hear those first because that stay would then obviate the need to hear the motion for protective order or the motion to compel arbitration because those would stay -- that act would stay the other motions in this case.

THE COURT: All right, sir.

MR. EPTING: Your Honor, my name is

Drew Epting.

THE COURT: Yes, sir. Mr. Epting.

MR. EPTING: Judge, I hope you won't hold this against me.

THE COURT: Wait a minute, Mr. Epting. Hold it. Who is the moving party in the first motion that was just mentioned?

MR. EPTING: Well, I took it that Jason was finished and he just basically described his motion in relation to arbitration and I'm the one who moved to compel arbitration, so I thought I should start, but obviously --

THE COURT: Well, I want to get an idea all the motions that are here. The motion he described is a motion to stay, right?

MR. DAIGLE: Yes, Your Honor. My motion was actually filed a month before Mr. Epting's motion was filed for arbitration. Red Bay Constructors filed a mirror motion to my motion.

THE COURT: And the motion to stay is based on the right to cure?

MR. DAIGLE: Yes, ma'am.

THE COURT: All right. And then -- that's SeaQuest.

MR. DAIGLE: Yes, ma'am.

THE COURT: And then Mr. Epting has a motion to compel arbitration.

MR. EPTING: And the motion for protective order, Your Honor.

THE COURT: And motion for protective order. What's the fourth one?

MR. DAIGLE: Fourth one is Red Bay Constructor's motion. It's a mirror motion to my motion to stay pending compliance with the Right to Cure Act.

THE COURT: So SeaQuest is one motion to stay and Red Bay?

MR. MCKIE: Your Honor, Blake McKie on behalf of Red Bay Constructors.

THE COURT: Here's what we will do. Mr. Epting, let's -- your motion to stay is a motion to stay the arbitration?

MR. DAIGLE: My motion is a motion to stay the entire case.

THE COURT: The entire case.

MR. DAIGLE: Which would include the arbitration.

THE COURT: Let's go forward, Mr. Epting, first and hear his motion to stay and then we will get right to you on your motion to compel.

MR. DAIGLE: If I may approach, Your Honor, I have got a memorandum.

THE COURT: Very good.

MR. DAIGLE: Your Honor, just by way of a little background on this case. This case involves a single family residence in Bell Hall. The case -- the house was built or the permits were pulled in August of 2007. There's actually a contract between the Plaintiffs, the McIntires, and SeaQuest Development dated August 22nd, 2007. SeaQuest acted as general contractor, but they did -- all their work was performed through subcontractors, the majority of which are actually named as direct defendants in this case or third-party Defendants in this case.

The certificate of occupancy for that home was pulled about 13 months later on September 25th, 2008. The Plaintiffs filed suit on April 6th -- April 8th, 2016, so a few months shy of the statute of repose running. They brought actions for negligence, gross negligence, breach of warranty of habitability, negligent misrepresentation, constructive fraud and breach of warranty of good and workmanlike work.

On June 17th, 2016, I filed our answer

to their complaint and contemporaneously with that filed this motion to stay -- to dismiss or stay the proceedings for the McIntires compliance with the Right to Cure Act.

The Right to Cure Act which is Section 40-59-810 and the following code sections require that as a condition precedent before a claimant or Plaintiff can bring a case either in civil court or in arbitration, they have got to give notice that to the builder, to the general contractor or subcontractor for that matter, that includes a statement that the claimant asserts a construction defect, a description of the claim, a description of the result and a resulting defect. They have to serve that, personal service or certified mail, to the last known address of the addressee.

And if the claimant files a lawsuit prior to that, prior to complying with the statute, then there's a provision that can fix that which is 40-59-830 which states that on motion of a party to the action the Court shall stay the action until a claimant has complied with the requirements of this article, which is the right to cure article.

The Supreme Court in South Carolina has

recognized that's the cure to afford substantial rights to the builder and to the claimant.

The rights that the builder has that we need to take advantage of include the right to request clarification of the alleged defects, the right to inspect the alleged defects, the right to offer remedy for the alleged defects and the right to either settle those claims or deny the claims. Those are all conditions precedent that must be gone through prior to filing a lawsuit or in this case the proceedings must be stayed in order for both the claimant and the builders to comply with the statute.

In this case the Plaintiffs have done nothing, nothing even remotely related to trying to comply with the statute. There has been no notice, no notice in writing or proper notice of these alleged defects, no notice for us to cure, no notice for us to inspect the defects.

They have denied substantial substantive statutory rights to SeaQuest by filing this lawsuit without first complying with the Right to Cure Statute. The stay in this case is not discretionary. It is a mandatory stay that the Court shall stay the proceedings so that the

parties can comply with the statute.

What is interesting in this case is that I don't think that the Plaintiffs can ever comply with the statute. It's my understanding that the Plaintiffs have already engaged liability experts and construction experts and are virtually finished with the entire repair to their home and renovations, whatever they have done to it, thereby completely destroying any alleged defects

If you look at Section 40-59-850, there is a right of the builder to inspect those defects. We can never inspect those defects because the Plaintiffs destroyed them. I don't think there is any way for them to comply with the statute and that the Court has to stay the statute until they comply with it.

So we need either to -- SeaQuest is requesting a stay of at least 90 days to try to get the Plaintiffs to comply with the statute or until they move to lift the stay to prove they have complied with the statute. The dismissal may be an argument for another day because certainly they haven't tried to comply with the statute, maybe I am wrong, maybe they can comply with it, but I don't think there is any way that they can. So we

would also like the complaint either be restricted or dismissed without prejudice so they can comply with the statute.

THE COURT: Now, Red Bay has a similar motion as I understand it, Mr. Buckley?

MR. MCKIE: Mr. McKie.

THE COURT: Excuse me.

MR. MCKIE: As Mr. Daigle said, it's a mirror motion so I won't rehash his argument, but we maintain a similar position and also request a stay of the litigation.

THE COURT: All right. Now, Mr. Epting, to you.

MR. EPTING: Thank you.

THE COURT: And what you will be doing at this point is arguing against the stay.

MR. EPTING: Judge, the argument against the stay commences with the arbitration act.

THE COURT: I know you want to argue mandatory arbitration, but explain to me to begin with what the implication is about this statutory notification of right to cure.

MR. EPTING: Judge, there is such a statute. It requires the notice be served, they

have an opportunity to review. And in this case, let me get the case, Judge, this court and for some reason you weren't sitting on this case, Judge, but it's Grazia v. South Carolina State Plastering.

THE COURT: Spell that.

MR. EPTING: G-R-A-Z-I-A.

THE COURT: Against?

MR. EPTING: The housing authority. South Carolina State Plastering, sorry. You want the cite, Judge?

THE COURT: Sure.

MR. EPTING: 703 S.E. 2d 197.

THE COURT: All right.

MR. EPTING: So what the Court says in Grazia, Judge, is that it's not appropriate on motion to dismiss to be taking this issue up. And as you sit here, there's nothing before you to show that we didn't comply with the statute.

THE COURT: Well, we are going to find that out right now. What happened in that regard?

MR. EPTING: Well, what happened in that regard, Judge, is this house started out as a lightening strike. And --

THE COURT: Started out as a what?

MR. EPTING: A lightening strike.

Lightening hit this home. And then they thought they had a plumbing problem. And after some months and at the time, Judge, not even anticipating that there would be a lawsuit, a contractor is brought in because they think there's a problem with the chimney.

Well, about this time we realize there is a statute of repose problem. And so it's very difficult, Judge, to discover problems to be a statute of repose problem and engage in review of what are we going to do about these problems and so the client mainly because of the expense simply carried forward and completed the work.

And so -- I am fairly sure, Judge, we made all of the statute of repose deadlines. It is not unlike in the Grazia case Judge Pleicones talks about the same problem what do you do when you have got a statute of limitations problem. That's his example.

And so in this case what the record would show, Judge, is that the general contractor's sister or sister-in-law owns the property next door. Both principals of Red Bay and SeaQuest were on the site, were asked for assistance, and did nothing. And that went on for a period of months.

I don't want to be overly technical about this, Judge, and I would like to go back to the question of arbitration. Not whether or not to compel it, but here's the question that I have got for the Court.

In this case in the record there is an out of state Defendant so we know there's interstate commerce which means the Federal Arbitration Act applies. The Federal Arbitration Act, Judge, has no requirement such as this statute, one. But more importantly, Judge, this Court and I think you were sitting on one or two of these cases, say that in the event that there's an arbitration provision the Court's entire obligation is to look and see if there is an agreement to arbitrate. And if there is the Court is to go no further.

In the case, Judge, of Housing Authority v. Cornerstone, there was a statute that basically said well, the general contractor couldn't sue because he wasn't properly licensed. The court of appeals in that case relying on the Supreme Court case of Munoz said those are questions of procedural arbitrability. Our job is to simply determine is there an arbitration

provision. And if there is, everything else is for a panel of arbiters.

So it really is a chicken or the egg Judge, but, if you're me, if we sent out a letter and we engaged in this process under this statute, I would be sitting here arguing how it is that I waived my right to arbitration by engaging in these state procedures. And so I think the proper thing Judge, is and, Judge, just to finalize this, they served requests for admissions. It's to that we filed a protective order because we viewed that as inconsistent with the right of arbitration and another reason that they would say that we waived the right to arbitrate.

And so I think the Court's inquiry is first is there an agreement to arbitrate. There is. And then everything else goes to the panel.

THE COURT: All right. I saw somewhere in here the contract between these parties. I think I got it right. Where is the arbitration agreement?

MR. EPTING: Right on the front page top of the page, Judge.

MR. DAIGLE: Your Honor, if I may?

THE COURT: Just a second. Let me just

look at this. I see a stamped this agreement is subject to arbitration. Where is the arbitration clause in the contract itself?

MR. EPTING: It's actually in the 201, Judge, that is referenced in the bottom. And here's the 201.

THE COURT: My first question is I see something that is not signed, but it does say August 22nd, 2007. Andrew and Kim McIntire and SeaQuest Development Company. The McIntire residence and wherein and it's stamped with this arbitration thing. Is there an arbitration clause within the document itself?

MR. EPTING: Well, I think the arbitration clause, Judge, is the provision that this shall be governed by the South Carolina Arbitration Act.

THE COURT: I am asking whether beyond that warning there is an actual agreement to arbitrate. Where is it?

MR. EPTING: It's in the 201, Judge.

THE COURT: What is a 201?

MR. EPTING: If you look at the bottom of that contract, Judge, in your hand on the front page, it says that it shall be read in accordance

with the 201 which are the general conditions and supplemental conditions to that particular agreement.

THE COURT: I see on the first page of this document has important legal consequences. The 201, AIA 201 is adopted in this document by reference. Is that what you are talking about?

MR. EPTING: Yes, ma'am.

THE COURT: So there isn't any arbitration clause other than the adoption in the very small print of the AIA 201. That's the very first time I have ever seen it done like that. We have had a whole lot of debate about how big the warning has to be and so forth and so on, but I have never seen one that is exactly like this.

MR. EPTING: Judge, can I address that?

THE COURT: Sure.

MR. EPTING: The size of the print and where it is on the document is wholly irrelevant for purposes of the application of the Federal Arbitration Act. That language only is necessary if you do not have interstate commerce and you are enforcing arbitration under the South Carolina act. But the federal act applies to any agreement to arbitrate.

THE COURT: Well, of course this thing references a South Carolina code.

MR. EPTING: Right.

THE COURT: That's what it references as the arbitration provision. So if it's an arbitration provision it's that. Certainly the Federal Arbitration Act is applicable when it's interstate commerce and most of these construction contracts are held to be that. I'm just simply making the observation that this is as thin a notice to everybody. Of course SeaQuest is the one who made the contract so they got certain responsibilities in that regard. But what I am trying to figure out is this: Let's say that we agree you do have an arbitration clause. We have got this statute that talks about staying things. It doesn't waive anything. But it stays until the right to cure procedures are followed.

And what I am trying to determine, apparently this house rocked along without any fuss about its construction until something else happened to damage it and when they got into fixing it I guess they discovered all these other things; is that right?

MR. EPTING: That's essentially it,

yes.

THE COURT: And but as I understand, you all have not attempted to comply with the Right to Cure Statute.

MR. EPTING: We have not sent anything in writing, Judge, that's true.

THE COURT: All right.

MR. EPTING: That's true.

THE COURT: Let me hear from --

MR. EPTING: Judge, can I give you the 201?

THE COURT: Oh, certainly. I trust you that's in there.

MR. EPTING: I marked it for you.

THE COURT: Thank you.

MR. DAIGLE: Your Honor, I don't have much more to say other than Mr. Epting admitted they haven't complied with the notice part of the Right to Cure Statute and the Right to Cure Statute specifically says in 40-59-830 that an action, a civil lawsuit or arbitration proceeding shall be stayed. The definition of the -- that compliance --

THE COURT: What happens procedurally, though, y'all say they can't possibly comply with

it. They have attempted to at this point, but you say hey, they can't really comply with this. So the whole -- do you take the position they would never be able to sue you for any construction defects if this thing happens after the house has been used for many, many years and they have a calamity that they have got to repair, but they have got to go back and give you a right to cure after they have repaired?

MR. DAIGLE: Your Honor, if they can comply with the statute then I am all for it. But the fact is they haven't even tried yet and that's why I made the point earlier that that may be an argument for another day. If they can comply with the statute, then this case should be allowed to proceed. But until they have, this proceeding must be stayed.

THE COURT: And what kind of time frame do you see as the statute anticipating for the notice and your attempt to remedy the defects?

MR. DAIGLE: The statute if you add all the days that are specified in the statute comes to I think about 55 days. But realistically, in order to -- with everyone's schedule in getting inspection done, I think 90 days would be a more

appropriate stay in this case to give everyone the opportunity to comply with the statute.

THE COURT: What do you see as the application of the Grazia case to this matter?

MR. DAIGLE: The Grazia case I actually cited in my --

THE COURT: Yes.

MR. DAIGLE: The difference in that case, that was a class action case. What the court was trying to do was marry the Rule 23 class action notice with the Right to Cure Statute because they are in opposite. The Court did a good job doing that saying that they can work in harmony and then laid out the argument for that.

So, and Mr. Epting is right that the circuit court was found in error when the court struck the class action allegations in the complaint. That that wasn't appropriate. So as far as the motion to dismiss goes, it doesn't really apply in this case. This isn't a class action. That's what the Grazia case was talking about.

But what Grazia does a really good job is is going into the rights that the Right to Cure Statute infers on the builders and on the claimant

or Plaintiff in this case. And that is the proposition that we're standing on.

THE COURT: Now, how do you see arbitration playing into this? Why isn't he right that this is an arbitrable contract and the first thing that ought to be done is arbitrate?

MR. DAIGLE: Because the --

THE COURT: Does that stay statute talk about arbitration?

MR. DAIGLE: Yes, ma'am, it does. It says that the Right to Cure Statute stays all proceedings including arbitration. That's in the statute.

THE COURT: Um-hmm. But in practical terms how do you see this thing as playing out? It can't be a situation where he can't pursue any claim against your client simply because a lot of time has passed. Let's say he does give you a complete list of everything that's wrong with the house. You are not going to be able to cure it in 90 days. So where does it go from there?

MR. DAIGLE: From there if you walk through the statute we would have the right to ask for clarification on those issues. We have a right to inspect those issues and then we have a right to

offer to cure. And whether the Plaintiff takes that offer or not is up to them. If they take the offer then I think that we would be in agreement and we could agree to continue to stay the case pending the resolution of those defects.

But if we go through the statutory requirements of notice of clarification, inspection offer and then acceptance or rejection, then we have complied with -- the statute has been complied with and the stay would be lifted at that point.

THE COURT: And then what are you going to do? Insist to be arbitrated?

MR. DAIGLE: We are arguing against arbitration, Your Honor.

THE COURT: Why? I mean let's say they comply and then the next stage is reached and the suit had been filed. Stay is now lifted. You are going to continue to oppose arbitration?

MR. DAIGLE: Yes, ma'am.

THE COURT: Why?

MR. DAIGLE: If you look at the arbitration agreement we think they have waived it.

THE COURT: How have they waived it?

MR. DAIGLE: I can go into our whole argument at this point if you like.

THE COURT: Yes, I would.

MR. DAIGLE: Your Honor, if I can hand up our -- if I can approach.

THE COURT: Um-hmm.

MR. DAIGLE: This is our motion -- not our motion. This is our memorandum in opposition to arbitration and from a -- to answer Your Honor's question, your first question why do we not want to arbitrate? Because we are the only ones on the contract. The arbitration would be solely against SeaQuest and there are 15 or so other parties named in the lawsuit that would not be subject to arbitration.

THE COURT: All right, sir. And so?

MR. DAIGLE: So in order to fully litigate this case and get a proper result we think all those other parties need to be part of this case. That their presence is mandatory and necessary in order to properly litigate this case.

THE COURT: Why so?

MR. DAIGLE: Because SeaQuest didn't perform any of the work. We were acting solely as general contractor.

THE COURT: That doesn't absolve you from contractual responsibilities you have.

MR. DAIGLE: Certainly not, but if you look at the complaint we weren't sued under breach of contract. We were sued for negligence. We were sued for breach of warranty claims. We are not even sued for breach of contract.

THE COURT: We have got a long tradition beginning with Lane v. Trenholm Builders, Kennedy v. Columbia Lumbar Company, et cetera, et cetera, that well after and long after construction has been done, particularly residential construction, that general contractors continue to have responsibility even when the matter -- when the residence has been sold.

MR. DAIGLE: I agree.

THE COURT: For what some people call a contort. A contractual obligation for having built and a responsibility for negligence, et cetera, et cetera. So that's the kind of action they have brought.

MR. DAIGLE: It is -- I'm not arguing otherwise. I'm not saying they couldn't have sued us for contract. But they haven't and that's why -- and all these other Defendants weren't part of that contract anyway. They sued under tort warranty. And in order to fully litigate this case

and get the proper result for all parties, I think we need to do -- all those parties need to be present. Arbitration solely against the general contractor, we have to go through this whole process and then we would still have to litigate this case because the Plaintiff has claims against all these other Defendants and we have -- we being SeaQuest have cross-claims against all Defendants as our subs and material men as well as third-party claims against two other subcontractors.

THE COURT: Let me ask you this: If your contractual obligation is not what is at play here, then what impact does that have on the Right to Cure Statute?

MR. DAIGLE: I don't think it does.

THE COURT: The Right to Cure Statute anticipates both suits and contract against a contractor as well as suits in tort?

MR. DAIGLE: Yes, ma'am. It says any action.

THE COURT: Um-hmm. So let's say the Right to Cure Act is engaged in. Then your contemplation is that the lawsuit would be tried as a -- the lack of a better term, a Ryders v. Cypress Trim Builders, et cetera, type lawsuit.

MR. DAIGLE: Once the stay is lifted from the right to cure then the litigation would proceed normally. And if the Plaintiffs want to move for arbitration against SeaQuest so be it. That does not stop the case itself because they still got claims against these other parties.

THE COURT: All right. And you say -- you argue that it's a waiver matter.

MR. DAIGLE: Yes, ma'am.

THE COURT: But the lawsuit that they brought you say does not sue you for breach of contract.

MR. DAIGLE: Does not.

THE COURT: Is that a necessary prerequisite to enforcing their right to arbitration in your view?

MR. DAIGLE: If I am understanding you correctly, are you asking me?

THE COURT: Can a party demand arbitration under a contract without suing the other contracting party if it has disagreements?

MR. DAIGLE: They can, but there's a test for it and we believe they fail that test.

THE COURT: What is that test? Are you talking about the three part test you are

discussing in waiver terms? Basically you argue waived because of delay.

MR. DAIGLE: Correct. And then if the --

THE COURT: Then you argue contractually barred because of --

MR. DAIGLE: The test is actually outlined in Section 2 on page 6. It's the Zabinski case.

THE COURT: Um-hmm.

MR. DAIGLE: It says our Supreme Court has noted the following test has been used to determine whether a particular tort claim falls within an agreement or contract to arbitrate. The test is based on a determination whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven both are arbitrable. On the other hand, if the tort is completely independent of the contract and can be maintained without reference to the contract the tort is not arbitrable.

That's the test. And clearly these -- Mr. Epting felt so highly of his tort and warranty claims that he didn't even bothering filing breach

of contract claims. He doesn't need it. These tort and warranty claims stand on their own and his well drafted complaint shows that.

THE COURT: Mr. Epting -- excuse me. Yes, sir.

MR. LACOUR: If the Court please, Your Honor, Andy Lacour. I represent one of the subcontractors. If Your Honor intends to reach an arbitration issue I would like to be heard either now or after Mr. Epting. We are a tier below the parties to the agreement.

THE COURT: Well, it's all on the table right now because that's the nature of these motions that are pending. So, yes, you may be heard. Your name is?

MR. LACOUR: Andy Lacour. I represent one of the subcontractors, Your Honor who is --

THE COURT: Which one?

MR. LACOUR: -- the installer of the fireplaces and chimney flues. Not the chase, not the structure, but the metal flue that connects the fireplace inside the house with the sparker at the top of the chase. But it's not clear, Your Honor, at this point exactly the breadth of the Plaintiffs motion to compel. It doesn't -- the motion that

they filed says -- asks the Court to enforce the agreement between the parties according to its terms. My client as a subcontractor is not a party to that agreement, is not a party to any agreement to arbitrate. So while there may be an agreement between the owners and the contractor SeaQuest that incorporates the AIA 201 and contains an arbitration agreement in those general conditions, we will leave the enforceability to them to argue; we are not a party to that agreement.

We are not bound by that agreement in any way. And the last time I was before Your Honor was April 16th, '13 and the Supreme Court on a case called Cape Romain Contractors v. Wando E. And what we are about to figure out is whether I learned anything as a result of Your Honor's ruling in that case. But I have handed up --

THE COURT: Certainly.

MR. LACOUR: -- three things. I have got a copy of that case. I have got one provision from -- if I may approach.

THE COURT: Please.

MR. LACOUR: One provision from that general conditions document. And one copy of a portion of our state act. Your Honor touched on

all three so far, but not to the depth we need to look for the subcontractors. The first thing is that in the Cape Romain case what was said was three key things. First, arbitration is contractual in its nature. Secondly, it is available only when the parties have agreed to arbitrate. And third, the courts must enforce the agreement according to its terms including with whom a party has agreed to arbitrate a dispute and the rules to be applicable whatever they have agreed to.

The fourth thing they said citing Bolt Information Services, a U.S. Supreme Court case, Your Honor, y'all pointed out to me at that time that the FAA confers that no right to arbitrate. Federal act does not contain a right to arbitrate. It only gives a party to a contract to right the seek the assistance of the courts for an order to proceed in accordance with the agreement.

So that brings us down to the second thing. If you will turn in the document I handed up behind the Cape Romain case, there is a single page at the bottom, is page 23, of that AIA 201. Paragraph 4.6.4 and its entitled limitation on consolidation or joinder. And you have to read

this paragraph very carefully because the architects cover a lot of ground in these general conditions, most of which is for their protection and not ours. The first paragraph addresses the joinder with the owner and the architect and the architect's subconsultants and employees. And that first sentence only addressed those parties and that's not applicable here.

The second sentence talks about other persons substantially involved in common questions of fact or law. Which sounds like it might apply. But its presence is required to afford a complete relief.

Well, in this case, Your Honor, first of all, there's not any reason why complete relief cannot be afforded to the Plaintiffs against SeaQuest. In other words, there's no compulsory counterclaim that has to require the Defendant to join another Plaintiff, another person on the Plaintiffs side in this case. Cross-claims are always permissive. And so you have to read a little further down. You find out that other person has to consent to the arbitration as to the claims to be arbitrated and as to the entities with whom they have agreed to arbitrate.

And then the final sentence in paragraph 4.6.4 makes it clear that other agreements to arbitrate with an additional person or entity duly consented to by the parties to the agreement shall be specifically enforceable. There's nothing in this paragraph that says parties who have not agreed to arbitrate somewhere can be joined. That's why it starts out and called it a limitation on consolidation of joinder.

So I am saying if properly read and properly applied, no subcontractor who has not agreed someplace somewhere to arbitrate can be forced to join this arbitration. Because 4.6.4 only says people that have agreed and consented to join. So no agreement can be forced.

In other words, specific performance can only be had for those who signed on. You can't specifically enforce a contract against somebody who is not a party to it. As far as the state statute, that's the third document in the package I handed up which is the joinder provision of the statute. The state statute, so assuming we are not under the FAA, assuming we are under the state action, and all those issues that I'm really not a party to, the question is can you join somebody who

has not agreed to arbitrate under the state act? The answer we believe is no.

Because first of all, you have got to be an entity subject to service of process. Well, my client would be so that's not going to bar it. The next one would be complete relief cannot be afforded to those already parties to that agreement to arbitrate. And again as I said already, Plaintiff can have complete relief against SeaQuest without the subcontractors.

And SeaQuest can have complete relief and air all its defenses without the subcontractors. If it wants later an indemnitory contribution of the subcontractors it can do it later. It doesn't have to happen all in one arbitration. So we are not required there.

And then the third point is or the entity claims an interest in the subject of the action. Well, we don't. We are just the sub that worked on it. We don't claim like a mortgage holder or a partial owner or a member of an LLC to have any rights. So even under the state statute I don't believe joinder would be appropriate. That might be an issue that really gets addressed by the arbitrator, not by this court, but the reason I

didn't want to miss my chance to speak is if you are going to go there, Your Honor, I don't believe your order should include the subcontractors for those reasons. Thank you.

MR. DAIGLE: Your Honor, I think I misspoke earlier. I misunderstood a question you asked. You asked if the failure to bring breach of contract claim prevented you from compelling arbitration. I believe it does because the Court enforces arbitration provisions like any other contract. And I believe that's addressed in the Zabinski case. If there is no contract before the Court there's nothing for the Court to enforce.

So I think that suing under the breach of contract which includes the arbitration clause is a condition precedent to demanding arbitration once the lawsuit has been filed.

THE COURT: Well, that wasn't exactly my question. My question was if you have got a contract party and it has an arbitration clause in it, you can demand arbitration, can you not?

MR. DAIGLE: You can.

THE COURT: And I assume that's what's been done here.

MR. DAIGLE: No arbitration has

demanded, Your Honor.

THE COURT: Well, they brought a lawsuit asking that arbitration be compelled.

MR. DAIGLE: The lawsuit doesn't mention arbitration. What they did is they moved -- after they filed their lawsuit they waited four months or three months or however long it was, and then filed a motion with this court to compel arbitration. They never gave us notice of arbitration, never demanded from us. They demanded arbitration from the court. There is not a contract before the Court. There is contract before the Court for the Court to enforce an arbitration provision.

THE COURT: Where does this -- I will get to you in a second. Where does this matter stand between the two of y'all as far as the contract is concerned with respect to the statute of limitations?

MR. DAIGLE: We haven't done any discovery in this case, Your Honor, so I can't answer that.

THE COURT: Mr. Epting.

MR. EPTING: Judge, you are doing a very good job of pulling back all the layers here.

There probably wouldn't be a statute of limitations problem if this was dismissed, but it will be a statute of repose problem.

The second thing that is going on is the Defendants want to get this in some sort of position in which something is appealable. And while that may exist no matter what the Court does, that's another level that's going on.

One of the questions that you asked is okay, so you're saying that since this poor fella when you wouldn't fix this house went out and fixed his house that he now can never ever sue you because you don't have the right to cure that you wouldn't work with him to start with.

And so what I think the proper analysis, Judge, would be you would ultimately end up in some sort of spoliation analysis, was that really the party's intentions or does this person --

THE COURT: Why didn't you sue them in contract?

MR. EPTING: Your Honor, probably an oversight. No other reason and I would move at this time to allege a breach of contract action, but I don't think Your Honor has anything to do

with the place we find ourselves in arbitration. Doesn't have a thing to do with that. And so as I am thinking this thing through, Judge, I agree with Mr. Lacour, we are not trying to enforce arbitration as to any of the subs.

But what I would say, Judge, for your edification, there are likely very good arguments that the general contractor is going to have as to many of the subcontractors because while we don't have these subcontractors, if the subcontracts incorporate the terms of the general contract then there's going to be an arbitration provision and no doubt that will be some argument that will be made at some other date.

But we simply because of the cost and the expense thought we don't need anybody but the general and let's go forward with the general. And let's ask the Court as to us to stay the litigation with the subs. I really do think --

THE COURT: But there are a whole lot more Defendants listed in here than just SeaQuest. Has that been done by a third-party complaint?

MR. EPTING: No, ma'am.

THE COURT: You sued all the subs as well.

MR. EPTING: We had to, Judge, because of the statute of repose. The intent of this statute, Judge, was I think the court in Grazia says intent is to promote settlement. It has created a host of problems. This being one of them. But one of the questions that's never been answered. I still come back, Judge, under Primer Paint, Moses H. Cone and Dean Witter, this Court's obligation is purely to determine is there an arbitration provision. And if there is, to move it to arbitration. And every other thing, procedural questions of arbitrability, compliance with statutes, is for the arbitrators.

THE COURT: Well, they say your right to do that is completely dependent on whether or not you sue them in contract. And if you do not sue them in contract then the contractual provision requiring the matter to be arbitrated doesn't apply. That's what we are trying to argue.

MR. EPTING: I think I can, Judge, with a little research, I think I can pretty well --

THE COURT: Well, there is one thing for sure. None of the nursing homes suits would ever be arbitrated if that were the case because most of them are not suits on the contract. They

are tort suits against the nursing home. That's one very deviling area where now Congress has stepped in and taken a different approach to the arbitrability of the courts in the nursing home area. Since it's saying that you can't contract away certain rights and particularly vulnerable people. I don't know how that would play out in this context. We have got some cases including some that have very recently been published where certain writers have taken the position that the tort, Kennedy v. Columbia Lumbar Company type cases if they are outrageous enough trump the arbitration provisions.

So the Court is still looking at arbitration as a pretty strongly enforced right no matter whether the suit that arises from it is a suit in tort or suit in contract. I don't know what the answer to that is.

MR. EPTING: Well, I think, Judge, I can certainly provide you with cases, but you can see with collective bargaining agreements where there is a provision to arbitrate with suits that have nothing to do at times with the contract having --

THE COURT: Well, I believe you are

going to have to get a little more focused into residential construction.

MR. EPTING: All right. I think I can do that. But at the end of the day, Judge, we are looking at trying to find a solution that doesn't break my client. He had to pay to fix all this. He had a statute of repose. I didn't want to add all these people. But had I not then there would be the argument that well, these are the people who are really responsible, not the general. I don't believe that. And so then those people go by the wayside.

THE COURT: Do you think there's a way to protect -- the argument seems to come, and I won't speak for Mr. Daigle, so if I am not reciting your position correctly, I want you to correct me, Mr. Daigle. But I get the impression that they're not taking the position that somehow participation in the right to cure provisions and a stay in that regard is going to affect your -- affect by itself a waiver of your arbitration rights. They argue waiver for different reasons, but the participation in the provisions of the Right to Cure Statute is not going to in and of itself deprive you of your right to insist if you have a right to insist on

arbitration. Am I right about that?

MR. DAIGLE: Yes, ma'am. We are not going to use the compliance with the Right to Cure Statute as any waiver argument.

THE COURT: Right. I sure got to go back and study the Right to Cure Statute, but if it applies then that's just a hurtle to be jumped over with a small period of time involved. From your standpoint it may seem like a big delaying tactic on the part of the Defendant. But my bet is that no circuit judge, myself or anyone else, would tolerate any lengthy period of trying to delay this whole thing. The right to cure is pretty thinly appropriate for something where you have got construction long ago, a completely independent act that brought all the problems out in the open, but if the statute nevertheless requires that hurtle to be jumped, I don't see that as having any long-standing effect on your ability to litigate these properly.

MR. EPTING: Judge, I don't think it has a thin meaning. My objection is not to another 30 or 60 days of delay. Never has been. It was just I was sure -- in this case, Judge, we sued in April. Because of everybody, many of these

companies are out of business, we didn't get service on everybody until the end of June. We filed our motion, we took no other action in this litigation. We filed our motion right after.

THE COURT: I understand they are simple placeholders and although Mr. Lacour and I think others will make some argument on behalf of subs, your main battle is SeaQuest and you want to get this thing postured in such a way that you can have your day in court, some court, either an arbitration panel or the circuit court, to discuss whether they are to be held accountable for what you allege are construction defects.

MR. EPTING: Judge, again, trying to say the practical thing, I absolutely do not mind sending out this notice and they can come over next week if they want and look and everything. I would ask that this Court take -- continue its jurisdiction over the issues that are pending before you. And if we get back here I still want to try to convince you. I may have done that voluntarily. I really do think, Judge, under the supremacy clause if there is an arbitration provision and the FAA applies, this Court's jurisdiction really would be limited to there is an

arbitration provision, you go sort this out. Because what I don't want to do, Judge, and where my head is in all of this, is get back here and all of a sudden we have gone from the statute to spoliation issues and now we are in substantive affirmative arguments that should be in front of a panel.

THE COURT: I understand. Now, before I come back for some remarks by Mr. Daigle I notice there are some other attorneys present and I assume that all of you are representing subcontractors, am I right?

MR. WATKINS: Yes, ma'am. Tre Watkins here on of behalf Jerry's Tiles and Marble. And there are a number of other folks in the room.

THE COURT: How about we recite who else is here and who they represent?

MS. NETTLES: I am Sam Nettles, I am here for New South Construction Supply.

MR. JOHNSON: Matt Johnson. I am here for third party Defendant Sealtight of South Carolina.

UNKNOWN SPEAKER: I am here on behalf of Benzenberg Custom Cabinets.

MS. DYER: Davi Dyer, I am here on

behalf of the termite control company.

THE COURT: All right.

MS. STEPHENS: Shanna Stephens, here on behalf of Coastal Plumbing and Gas.

THE COURT: So you have got a number of subcontractors here and basically the battle is joined at this time on an issue Mr. Lacour has well outlined. Your contention is that you are not involved in any arbitration battle. And whatever battle you have will be a battle fought at a later time either by cross-claims against you by the general contractor as well as claims in what I call contort negligence claims against you by the Plaintiff; is that right, Mr. Lacour?

MR. LACOUR: Yes, ma'am. I would think Your Honor could stay those claims pending whatever happens, however the other parts of this case go forward.

THE COURT: That's what I would be inclined to do.

MR. EPTING: That's the motion I filed, Judge.

THE COURT: Ordinarily you wouldn't do that because finances of subcontractors take all kind of twists and turns if you don't move on with

adjudicating their liability. This construction is so old relative that I don't know that stay is going to make it more or less likely, but either of the main parties can successfully pursue claims. So I think for all of the subcontractors one thing that ought to be done is to stay matters regarding your liability until this first battle is adjudicated which is A, what the forum is and B, what kind of rights are had under the statute to begin the proceedings with the right to cure.

So I can assure you that in the midst of all this we will do something that suits all of the subs in that way. Do I hear any objection to proceeding in that way?

MR. LACOUR: No.

THE COURT: We will be sure that's done. And, Mr. Lacour, thank you for articulating the subs position and we will try to be sure that that is taken care of in any order this court passes.

MR. LACOUR: Thank you, Your Honor.

THE COURT: Mr. Daigle, certainly I want you to have the chance to make any concluding remarks you want to with respect to Mr. Epting. But one thing that I hope you might cover is how

this thing can practically proceed. One of the things motion judges are supposed to do is tee this thing up that so whoever tries it can proceed in an orderly way. You are insisting on right to cure and I have obviously got to study that statute a little bit to decide its applicability in this situation. But Mr. Epting hasn't really advanced many arguments about the right to cure. He simply says arbitration trumps everything. And you have taken the position that is -- the statute covers everything including arbitration if it should be available, but you have further taken the position that arbitration is not available because they aren't suing in a breach of contract and I find that unusual in that so many arbitratable matters involve not a suit on the contract itself, but a claim against the party who contracted to resolve all claims by means of arbitration. So as you sum up, how about cover those issues that I have outlined.

MR. DAIGLE: Yes, ma'am. One thing I did want to address real quickly. Mr. Epting said they were looking for a solution that won't break the bank here. That's exactly what the purpose of the Right to Cure Statue is. That is set forth in

our motion. That gives everyone an opportunity to look at problems and make offers.

THE COURT: Well, ordinarily that would give me great comfort. I am a little discomforted and maybe this is simply a matter you had to do it in the pleadings, but won't necessarily govern your clients conduct. But you took a pretty strong position in your papers that right to cure can never even get off the ground because this is such an old construction, that they have already made so many repairs you could never get back to square one to figure out what are construction defects. I mean is that going to be what you say?

MR. DAIGLE: I made that out of an abundance of caution. The reason I did is because we have done zero discovery in this case. I don't know what pictures, videos, anything that they have retained concerning these defects.

THE COURT: This stay would be a stay of discovery as well. You wouldn't be resolving this matter by using discovery.

MR. DAIGLE: That's correct.

THE COURT: The decision is that the Right to Cure Statute is where we are right now. You won't be spinning your wheels with a whole

bunch of expensive discovery and that kind of thing. You will be getting together and giving after Plaintiff gives you the outline that the statute anticipates, am I right?

MR. DAIGLE: You are absolutely right, Your Honor. There will be no depositions, but what we can ask for pursuant to that statute is clarification. I was hoping Mr. Epting would provide pictures, reports.

THE COURT: I'm sure to the extent he has it, that's what he will do, but keep in mind that what you don't have you can't give.

MR. DAIGLE: No question.

THE COURT: And what I don't want to see is to have all my friends in the Charleston bench and the clerk's office have this thing linger around and say you have to go back and jump on this again. It's all falling apart. So I would hope there would be some spirit trying to see whether this Right to Cure Statute is the vehicle and if it is not, then is the vehicle arbitration, some vehicle here, unless the whole suit can be dismissed for some other reason that you all have not propounded at this time.

MR. DAIGLE: I agree with that.

THE COURT: Okay. Now, with those as preliminary remarks do you have anything else you would like to say in summary?

MR. DAIGLE: Not in summary, Your Honor. I believe you asked me how practically this case would proceed. Again, my hope is that we could agree through the right to cure process 60, 90 days, whatever it is, and get an understanding what these issues are and my client may be in a position to want to with wrap this thing up if both sides are reasonable. I don't know the answer to that question yet. That's the point of the right the cure, to go through the process. Like you said, there is not going to be any discovery. It's going to be relatively quick.

THE COURT: Very good.

MR. DAIGLE: After that my understanding is that that complies with -- the right to cure stays everything else. I have no problem with Mr. Epting's proposal this Court retain jurisdiction over the other outstanding motions in this case pending the stay. After the stay then we would be in -- this Court would still have jurisdiction over those pending motions. Moving forward, though, we believe the vehicle for

this case is through the circuit court, not through arbitration. We made some arguments that I can walk you through if you would like to about why we don't think arbitration in this case is applicable. Specifically they haven't even demanded it yet. And there's some time restrictions in the contract that specifically talk about when arbitration can be demanded and all those time limits have expired. They can no longer demand arbitration pursuant to the contract because the contract itself says it's too late. So that would be another argument.

And so like with any other construction case I think that this case should go through the circuit system and the majority of these get settled in mediation anyway.

THE COURT: Counsel, here is what I will do. I will look at this and either I or my law clerk will be in touch with all of you that I have got contact information for to let you know first of all, what the determination is about the right to sue -- I mean the right the cure. That really is where you start. And then whether I can now also make a determination about the right to insist on arbitration by Plaintiff. And I will look at those two things and then the rest of these

motions.

If I -- one of the options available if the right to cure is determined to be applicable is to simply hold jurisdiction and recess on the rest of these motions until some type of cure has been reached and I might well set a time for that in the order. Which would be subject of course to revision and expansion if the parties are making progress, et cetera.

So I'm going to look at all that. I will let you know quickly. Here is what I would like counsel who have attended to do. Would you be so kind as to circulate amongst you a note pad that gives your name, your e-mail and the party you represent so that I can be sure that all of you receive notification. Some of these parties that are named have never been served and so forth.

MR. DAIGLE: I have an easier way to do that, Your Honor. I have an got e-mail distribution list in my office.

THE COURT: If you would send that to JToal@sccourts.org with a copy to Awearing@sccourts.org. And to CC Leonard, our deputy clerk who takes care of the motion roster.

MR. DAIGLE: Your clerk is

A-W-A-R-I-N-G.

THE COURT: Waring like you Charlestonians say. Very well. I think that concludes what I can do today. Thank you very much.

MR. EPTING: Judge, would you give me -- I have not seen this waiver brief. Would you give me a few days to respond to the brief?

THE COURT: SeaQuest?

MR. EPTING: The SeaQuest brief.

THE COURT: Let's say this. I will give both sides until next -- subs, you don't need to worry about it since we got a battle going on between the principals right now. But each side will have until next Wednesday to submit any further written material you would like to submit about the matter. I am not going to go through a whole bunch of received, reply and so forth, but just each side submit anything you think is pertinent further than what has been submitted.

MR. DAIGLE: Yes, Your Honor.

THE COURT: Then I will delay telling you what I am going to do until I receive that. I will let you know before next week is out what the Court's decision is going to be. Very good.

(These proceedings were concluded at 11:31 a.m., October 13, 2016, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 13th day of January, 2017 at Charleston, Charleston County, South Carolina.



Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA | COURT OF COMMON PLEAS

COUNTY OF CHARLESTON | 2016-CP-10-01833

Andrew McIntire,
Plaintiff
-vs-
Seaquest Development Co., Inc.
Defendant

TRANSCRIPT OF RECORD

April 22, 2021

Charleston, South Carolina (Via WebEx)

B E F O R E:

The Honorable Jennifer B. McCoy, Judge

A P P E A R A N C E S:

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Reported By:

Yvestre Torres, OCR
Circuit Court Reporter for the
First Judicial Circuit

THE COURT: This is McIntire v. Seaquest. All right. Who -- let's just get started with some introductions. There's so many people here that if you're not actually going to argue today, I'm going to ask that -- so we don't take up time introducing -- I think we're all recorded so, you know, for purposes of -- we're all being recorded, so for purposes of making a mere appearance on behalf of your client noting your presence, I think we can waive all that today. Who's actually arguing today?

MR. DAIGLE: Your Honor, I'll be arguing on behalf of Seaquest. I think Mr. Rannik will be arguing on behalf of the Plaintiff, and I'm not sure who's going to be arguing on behalf of the subcontractors.

THE COURT: Okay.

MR. DODDS: Good morning, Your Honor, and may it please the Court. I'm John Dodds. I represent Defendant Jerry's Tile and Marble. Andy Lacour and some of the attorneys for the subcontractors may chime in from time to time. But for the Court's convenience, I'll be arguing on behalf of the subcontractors in opposition of the motion.

THE COURT: Okay. All right. So who's -- let's see.

MR. DAIGLE: Your Honor, it's my ---

THE COURT: It's your motion, right?

MR. DAIGLE: Yes, Your Honor. Jason Daigle for Seaquest. Seaquest and the Plaintiffs filed a joint motion. And so we -- at the request of Judge Young, and so I think that we should probably go first.

THE COURT: Yeah, go ahead.

MR. DAIGLE: And, Your Honor, just by way of background, Jason Daigle. I represent Seaquest, who is the general contractor on a single family residence construction project. The McIntires owned that project, and are represented by Mr. Rannik.

What happened in this case is that they filed -- the Plaintiffs filed a construction defect claim against Seaquest as the general contractor and then all of their subcontractors, and then Seaquest filed cross-claims against all those subcontractors.

Very early in the litigation, we filed a motion to stay and/or dismiss, pursuant to the Right to Cure Act. The Plaintiffs then filed a motion to compel arbitration. And the only other motion that was filed was by Red Bay Contractors, who filed the same motion to stay or motion to dismiss that I did.

All of those motions were heard at one time by Justice Toal back in 2017, I believe, when she was sitting in circuit court. We argued those motions,

and Justice Toal granted my motion to dismiss the case. She denied the Plaintiffs' motion to compel arbitration, and she rendered Red Bay's motion moot. And the reason she did that is because in her order she dismissed the entire case. And if you look at her order -- that's one of the exhibits to our motion.

THE COURT: All right. Let me stop you right there.

MR. DAIGLE: Sure.

THE COURT: All right. So you are seeking to have me clarify an order that Chief Justice Toal entered sometime ago?

MR. DAIGLE: No.

THE COURT: Okay.

MR. DAIGLE: So when, you know -- if you want I can ---

THE COURT: I'm just stating my concern. Go ahead.

MR. DAIGLE: No, no, no, it's not that. So we know what that motion says. And, in fact, the Supreme Court -- not the Supreme Court, I'm sorry -- the Court of Appeals reversed that. So what -- procedurally, why we're here is the Plaintiffs appealed the granting of that order, which dismissed the case, and denied their motion to compel arbitration, okay?

The Supreme Court -- the Court of Appeals reversed and remanded it. The reason we're here is because all the subcontractors think they're out of the case.

So this case was remanded back to the circuit court, and so what we're asking is for, Your Honor, the circuit court to effectively interpret the reversal and remanding of the case to circuit court.

Seaquest and the Plaintiffs do not believe that any of the subcontractors are out of this case. All the subcontractors believe they are out of the case, and so that's what we're asking. This is not a Rule 59(e) motion; this is not a Rule 60 motion.

This is a motion that we filed after we had a status conference with Judge Young, and no one could agree on anything, so he said, you guys file a motion and let the actual -- the sitting judge for the circuit court decide it. So, that's why we're here, to determine whether the reversal of Justice Toal's order by the Court of Appeals keeps all of the subcontractors in the case.

And let me tell you how we get here. So when Justice Toal filed this order, she stated in the order that Seaquest's motion to dismiss, okay -- the only one that she ruled on was my motion and granting that, and then denying the Plaintiff's motion

to compel arbitration. So, she said Seaquest's motion to dismiss, which calls for a complete dismissal of the case, is granted, okay?

She then goes on to say that this case is dismissed in its entirety. That was the only thing that was granted; that was the only motion that was granted in this case. And also in that order she denies the Plaintiffs' motion to compel arbitration, and she rules that Red Bay's motion is moot, okay?

The Plaintiffs then appealed that. They appealed and the -- their appeal is attached as an exhibit to our motion also. In that notice of appeal, which was timely filed, it says Plaintiffs appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017. So, they appealed that order, which dismissed the whole case, right?

So, this case went through the appellate process, and it turns out that the Court of Appeals sided with the Plaintiffs on the matter. And what they did is they reversed Justice Toal's order and remanded it to the state court -- I'm sorry, to the circuit court, and in doing so, granted the Plaintiffs' motion to compel arbitration, okay?

So the Plaintiffs -- I'm sorry -- the subcontractors, everyone except for Seaquest, believes

that that order was not appealed as to them. So they believe that since the Plaintiffs failed to appeal the order as to them, they are out of the case, and they have been out of the case since 31 days after the order -- Justice Toal's order was entered.

We believe that is incorrect; the Plaintiffs believe that is incorrect. And the reason why is because the only order that was granted was appealed. All the subcontractors believe they got out of this case on that order because, in fact, Justice Toal said the case is dismissed in its entirety, which they believe included them, the subcontractors.

The Plaintiffs then appealed that order. And so what they appealed was the dismissal of the entire case. But somehow the subcontractor believed the reference to the entire case in that context doesn't apply to them. They want to have it both ways.

Either the appeal -- either the dismissal of the entire case initially applies to them. And if that's the case, the appeal of the entire -- dismissal of the entire case necessarily has to apply to them. They don't get to say that they're included in the dismissal but not included in the appeal, okay?

There's not -- that is a completely contradictory argument and goes against all common sense

to say that the entire case applies to them on one hand, but the entire case doesn't apply to them on the other hand. The appeal, in fact, was -- the other argument that Plaintiffs had -- I'm sorry, the subcontractors have is that the appeal was not served on them. So the appeal was actually served on them. And if you -- this may be something Mr. Rannik can address better than I can.

But if you look at Exhibits D and E of our reply memorandum, there's an e-mail from Mr. Rannik's legal assistant, Angela Gross, serving the notice of appeal on all of the Defendants and asking them if they would like a copy via U.S. mail, and she would be happy to do that. There's also a notice -- I'm sorry, a proof of service also filed by Ms. Gross that says that she certifies that she served the Appellants notice of the record -- the Appellants notice of appeal on counsel of record for the Defendants.

The Defendants in this case are all of the subcontractors. The appeal was -- it included all of the Defendants. It was served on counsel of record for all of the Defendants two different ways. And the idea that they didn't have notice of this is also just not proper.

In going through the hearings on this,

specifically, the one with Judge Young, when we had a status conference to see if we could figure out where this was going, he replied to all of us, and that e-mail is also attached to our motion. He specifically says that he contacted Justice Toal about this to get her thoughts on how this should play out.

She said -- she looked at the *Moore v. North American Van Lines* case, which said, "Generally, a reversal of the judgment on appeal had the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered." Judge Young then goes on to say, in my opinion, that leaves any claims against the subcontractors alive.

This is where the sticking point, I think, is going to be, is that there's no question the Court of Appeals reversed Justice Toal's order. The very first thing they did in their opinion is reverse that order. Once that order is reversed, the case is effectively un-dismissed. The order said the entire case is dismissed. Once they reverse that, the entire case is no longer dismissed, and that includes the subcontractors, all right.

The other thing they did was remand it to circuit court, granting the order to compel arbitration. But that order was just -- the arbitration was just

between Seaquest and the Plaintiffs. There's no arbitration clause with the subcontractors, so we're not making an argument on that.

Where the issue is, is the subcontractors, for some reason, believe that the order was not appealed as to them. The Plaintiffs appealed the only order that was issued in circuit court, in the lower court. They appealed -- the court dismissed the case in their entirety, the Plaintiffs appealed that order, which necessarily appealed the dismissal of the entire case.

There was no mechanism whatsoever for them to appeal as to each individual subcontractor, or individual Defendant, because the only motion that was granted was Seaquest's motion, was my motion, and so that was the only mechanism. The only order that could be appealed was appealed.

There's -- you can't go and make an appeal for all these other -- there's really no necessity of making an appeal to all these individual subcontractors when the only order that was entered was appealed in its entirety.

THE COURT: Let me, you know -- just keeping in mind, you know, we have a time slot, and it's 11:00. And all of your memoranda and everything, exhibits attached, are fully incorporated for purposes of the

record. I would like to personally hear, sort of, from the subs. I'm curious if they have some arguments they would like to make to really drive it home.

Obviously, their memorandum as well is fully incorporated, you know, and reviewed those. But anybody really want to tell me what they're relying on? Sort of, you know, the absence of specificity. I mean, tell me what's the argument here?

MR. DODDS: Thank you, Judge. Again, John Dodds on behalf of Jerry's Tile and Marble. Your Honor, Judge Toal's May 2017 order dismissed this case in its entirety. That dismissal encompassed all claims being asserted in the lawsuit, which included the Plaintiffs' direct claims and Seaquest's cross-claims against the subcontractors.

Plaintiffs filed a notice of appeal, but they only named Seaquest as a respondent to the appeal. The Subcontractor Defendants were never named as respondents, they're not listed as respondents in the caption, they were never served with the notice of appeal within the deadline, nor were they served with any appellate briefs. The Subcontractor Defendants did not participate in the appeal.

In the very first page of Seaquest's appellate brief states, "On April 8, 2016, the McIntires

commenced this action against Seaquest as well as a number of subcontractors and material suppliers, none of whom, however, were made respondents to this appeal."

The issues framed on appeal only dealt with the enforcement of the arbitration provision in the Plaintiffs and Seaquest contract and the arbitrability of the South Carolina Right to Cure Act in the circuit court.

It was never argued on appeal that the trial court erred in dismissing the Subcontractor Defendants, nor is the dismissal of the claims against the subcontractors even addressed at all. The un-appealed ruling dismissing the claims against the Subcontractor Defendants became a final order and is now the law of the case.

The Supreme Court held in *Atlantic Coast Builders v. Lewis* that an un-appealed ruling, whether right or wrong, is the law of the case. Whether Judge Toal was correct or incorrect in dismissing the claims against the subs is of no consequence. The only relevant inquiry here is whether or not Judge Toal's ruling dismissing the claims against the Subcontractor Defendants was appealed.

And for the reasons previously stated, no appeal was taken with respect to the dismissal

of the subs. And, accordingly, the order dismissing those claims became the law of the case.

And as the South Carolina Supreme Court held in *C.I.T Corp. v. Corley*, after an un-appealed ruling becomes the law of the case, the trial court is thereafter "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same."

Inadvertently, Plaintiffs and Seaquest relied upon those two cases cited by Mr. Daigle; the *Brown v. Brown* case and the *Moore v. North American Van Lines* case. And it should be noted that it's easy to pick out a single sentence in those two cases and make the argument that this order was vacated, as if it were never rendered at all.

But you need to look at the actual factual scenarios of those two cases. And the Court will see that those cases involve completely different factual scenarios, which make them distinguishable from and irrelevant to this case. Those cases both dealt with monetary judgments awarded at the trial court level that was subsequently reversed on appeal.

When the remainders were issued for those appeals, the trial courts thereafter ruled in each case that the party who received payment under those judgments, that were subsequently reversed on appeal,

must restore those payments to the other party.

In other words, the party that received payment, pursuant to the judgment, had to pay back the money because those judgments were reversed. Those trial courts -- those trial court rulings were then appealed again for a second time. And the appellate courts on the second appeal each held that reversal of the original monetary judgments on the first appeals have the effects of vacating those judgments and leaving the case as if no judgments had ever been rendered.

And, logically, Your Honor, that makes sense because a single issue was decided by the trial court, a single issue was appealed, and a single issue was thereafter reversed, and there were no parties in the lawsuit that were not included as parties to those -- the appeals. In other words, there were no un-appealed portions of the lower court's rulings in the Brown case and in the Moore case.

Here, there were parties who were dismissed from this action, and that ruling was never appealed. Plaintiffs' and Seaquest's argument that the reversal of Judge Toal's order somehow allows them to relitigate claims that were dismissed, and for which no appeal was taken, is directly contrary to well-established

law that an un-appealed portion of a judgment, whether right or wrong, is the law of the case.

In sum, the dismissal of the subcontractors was never appealed, and it became a final judgment, and that's irrespective of the Court of Appeals ruling two and a half years later. And pursuant to the Supreme Court's holding in C.I.T Corp, the trial court is now, respectfully, without power or jurisdiction to revoke, vacate, overrule or reverse Judge Toal's order dismissing the subcontractors.

Plaintiffs and Seaquest also argue that Rule 241(a) of the appellate court rules state the ruling as to the subcontractors. This argument is completely misguided. Rule 241(a) provides that upon service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal.

Rule 241(a) specifically states that the lower court retains jurisdiction over matters not affected by the appeal, including the authority to enforce any matters not stayed by the appeal. Again, Plaintiffs appealed the rulings dismissing ---

THE COURT: Let me stop you right there. I mean, I appreciate -- I am going to read your memo, so you don't have to read it to me or anything. But let

me stop you right there. So, I'm looking at the appeal document. I've got the notice of appeal pulled up, or I had it pulled up. And, I mean, it just says notice of appeal. Plaintiffs appealed the order of the Honorable Jean Hoefer Toal. And so you're basically saying the order only dealt with the dismissal of the GC. So does that apply to you?

MR. DODDS: Well, the order was never appealed as to -- the subcontractors were never named as respondents as to the appeal. It's clear from Judge Toal's order. And Mr. Daigle said it earlier that the entire case was dismissed. That includes claims against the subcontractors.

THE COURT: Right.

MR. DODDS: The subcontractors were never named on appeal. You can't ---

THE COURT: That's the stronger argument. So tell me about that. You were never served with a notice of appeal, or anything like that?

MR. DODDS: That's correct, and I'm happy to explain that.

THE COURT: Because he said you were, so tell me about that.

MR. DODDS: Sure. So Rule ---

MR. LACOUR: I'm sorry, Your Honor.

Andy Lacour. The question you're asking kind of got a what happened and how these issues developed. And, while Mr. Dodds is a very smart young lawyer, he wasn't there, and I was present at the hearing. And those two things you asked about are what was the posture of this thing in the court -- in the trial level, and what about that notice of appeal?

Now, there was -- in the records that they have provided to you, there are two separate notices of appeal, and you're going to have to find one of them in Exhibit A to their motion, another one in Exhibit D to their reply memo, and they're different. And there's an e-mail with the second one.

So what happened is they served the -- the general contractor, and I want to talk about owner -- general contractor. The owner served the notice on the general contractor on May the 30th, which was within 30 days required by the rules. They sent something to the subs, a copy of a notice of appeal, on June the 2nd, which is beyond the 30 days allowed by the appellate court rules.

And the e-mail that we got said clearly in it that we have already served the respondents to this appeal three days before. If you look in Exhibit E to their reply memo, that's the e-mail that says here's

a courtesy copy for y'all. We've already served the respondents three days ago.

So, they did send us one. They did not send it within the 30 days, which is required by 203(b), and there's no rule that says they can't send us a courtesy copy, which they did. And that's fine, and that was appreciated, but that did not make us parties to the appeal.

The other issue raised is, basically, how did this happen in court? And as briefly as I can say, give me about three or four minutes. The owner and GC presented their arguments on their motion. I found a break, and I stood up, and I presented the subs' position, that all they're arguing about is arbitration and notice -- a right to cure between themselves, and that we are not parties to the arbitration agreements, so that didn't involve us in discussion, and it's at Pages 43 and 44 of the transcript of the hearing.

The judge said, "What I'll do is I'll stay all the claims that are against the subs to be litigated after the arbitration." And she said at Page 44 -- she told flat out, we will see that that's taken care of, that is the stay. We will see that the order provides for a stay. But when we got the order six and a half

months later, there was no mention of the stay as to subs. The claims against us were not stayed; they were dismissed.

Now, we note two things -- three things. Number one, we know that the statements by the judge, sitting in court, when she's already said she's got to take it under advisement, they're not binding. No party can tell the judge, oh, no, you've got to decide it that way, because when the Court takes it under consideration and studies it further, the Court's thoughts may change. We all get that.

But those statements by the Court were a good reason, good and sufficient reason, for anybody that got an order back six months later, that didn't have the stay that she said she was going to grant in it. That's the reason that you would then file a Rule 59(e) motion. You have only ten days under our rules to say, Judge, I think you left something out here. Here's the transcript. You said you were going to stay, you didn't. Please put it back in, or put it in. That Rule 59(e) is your first part. Nobody filed any such motion under 59(e), or for reconsider, or anything you want to call it that.

Secondly, with a court record like this, you could appeal it, but nobody raised that issue

in their briefs. Nobody framed -- when you look at the issues on appeal, nothing about the subcontractors not being stayed, nothing framed about the subcontractors shouldn't have been dismissed. That issue didn't exist at either the appellant's or respondent's briefs.

So where do we end up? *Judy v. Martin* is cited in our memo at Page 5. *Judy v. Martin* says issues that were not raised on appeal, but should have been, become the law of the case. Simple as that. It really -- I hope that gives you some better framework for understanding what's really being argued about here.

It wasn't that they did or didn't appeal it. Sure, they appealed it. What they didn't do was preserve the issue with regard to the subs not being stayed. They just -- and I could see why the general contractor didn't. He was lobbying to get the whole case thrown out, that he won it. So, he didn't want to bring it up.

The person -- the appellant, on the other hand, if the appellant didn't want its direct claims dismissed, the appellant should have brought it up one way or the other. If the GC didn't want their cross-claims dismissed, they could have brought it up one way or the other. They both had two bites at it. They didn't do it. That's essentially how we get there.

Thank you.

THE COURT: Okay. Thank you.

MR. JOHNSON: Your Honor. Judge McCoy, very briefly. Matt Johnson on behalf of third-party Defendant Sealtight. And I just want to make clear for the record that we're not an actual defendant in the case. We're not named in the appellate caption at all, frankly. We're merely a third-party defendant that the general contractor brought in. So, I just wanted to make that point clear, that we're -- we are a subcontractor, but we are, unlike all the other subs, not defendants to this case at all. Plaintiffs never sued us.

MR. NEWTON: Tim Newton for New South. I also wanted to make one other point. I looked at this pretty extensively, and I have to agree it's kind of a head scratcher. But the point I think is worth making is that I think there's two questions here; one, it involves jurisdiction and the other involves the law of the case.

You know, I understand that once an order reversed, this Court may -- you may have jurisdiction, but the thing is what can you really rule because, as you pointed out, you would be questioning what another judge has already ruled, the former chief

justice, and that's going to be the law the case.

So even if you have jurisdiction, Your Honor, I believe that you're bound by that ruling. As Andy pointed out, and as John pointed out, it wasn't appealed, and the whole arbitration issue has nothing to do with the subcontractors. We often cite cases saying reversed on other grounds, but the point that -- if that was not part of the reversal, it's still good law. Thank you.

THE COURT: Okay. Mr. Rannik, do you want to chime in a little?

MR. RANNIK: Thank you, Judge. And ---

THE COURT: Let me let you get something out before we wrap up.

MR. RANNIK: Thank you. And, Judge, I believe the Court is well oriented here, so let me try and be very brief. First, Justice Toal agreed with us that vacating the trial order meant that the case goes back to the posture that it was in right before the order entered. The posture it was in right before the order was entered was everyone is in the case. So, the subcontractors are still in the case. That makes sense.

Now, there are other reasons. First, it's simply incorrect to say that the subcontractors

were never dismissed from this case. The case was dismissed. We appealed that decision, and it was vacated. So now neither the subcontractors, nor the case, have been dismissed.

Secondly, the act of appealing the order itself, just bringing a notice of appeal, has the effect of staying the order. So even if that order did specifically dismiss the subcontractors, which it didn't, the effect of our serving that notice upon Seaquest stayed the effect of that order pending the outcome of the appeal. And, again, the outcome of the appeal was vacating the order.

Third, the subs contend they were never served with the appeal, and so that frees them from being bound by the result for the reasons they just said. We think that's incorrect. Thirdly, we put the proof in that they were served.

Now, they're correct that they were not named as respondents, and I want to address why that is. As Mr. Daigle pointed out, the basis for the trial court's order was that they had granted Seaquest's motion to dismiss the case. That's it. The subcontractors did not join in that motion; they were not parties to that motion. The only subcontractor that did file a motion, that motion was never reached.

So what we have is an order dismissing the case on the basis of Seaquest's motion, and the subcontractors would not have been proper respondents to an appeal of that decision because it wasn't their motion, and their motion wasn't reached. The Court of Appeals really didn't need 20 respondents in this case to weigh in on a motion that they hadn't joined in. But that doesn't mean that their fate was not tied up to the fate of the appeal.

Mr. Lacour said that there should have been a 59(e) motion back in 2018, and the absence of that is somehow significant. Well, first, we received Judge Toal's -- Justice Toal's ruling in 2018. We got an e-mail from her clerk saying Judge Toal is going to side with Seaquest, and asked for Seaquest to send an order, which they did.

We then filed a Rule 59(e) motion in the form of an objection to that proposed order. But more significantly, Justice Toal never ruled the case was stayed as to the subs. She never did that; she dismissed the case. So, there was no un-appealed ruling that the case is stayed as to the subcontractors ---

THE COURT: Let me kind of stop you. So, I think I've identified a little bit of a wrinkle, but I want you to tell me if I'm looking at it the wrong

way, and this kind of goes to everybody because I'm -- y'all are really familiar with this, and I've known about this for the last 20 minutes. Okay. So, the order that Justice Toal issued, essentially, does it -- the wrinkle is dismissing the case verses dismissing the GC, okay? Therein lies sort of the issue. Okay.

So, you know, the subs are arguing, well, she dismissed the case, then naturally we are part of the case, and we should have all been named respondents and served as such and participated in the appeal. The Plaintiffs and GC is arguing, well, no, you know, naturally, you know, the matters are stayed, and really the appeal was only dealing with, you know, the GC's claim, the GC's motion to dismiss the case, and everything was sort of just put on hold pending the appeal of that.

Am I reciting that relatively correctly? I mean, there is a big distinction in dismissing the case versus moving to dismiss only your client.

At the time that Justice Toal heard these motions, were there direct claims against the subs from the Plaintiffs, or were there only these -- party claims from the GC? I mean, who -- explain that all -- that out for me a little bit more.

MR. RANNIK: Of course, Judge. The were

direct claims from the Plaintiffs, and the reason there was -- it's unusual that we would have done it that way, but we were coming up against the statute of repose. We didn't have all the parts -- claims against the subs, so it named everybody, and then Seaquest cross-claimed against the subs.

THE COURT: Okay. All right. Yep, that's a wrinkle. She's coming back in June. I don't know why we didn't just put this back in front of her. And here's the thing, I won't kick the can down the road. I don't know. All right. That's interesting. Who else wants to tell me anything? Eight minutes past your allotted time. You've got people ---

MR. DODDS: Your Honor ---

THE COURT: You've got people sitting behind you in the courtroom, waiting to argue their motion. Anybody else want to get anything in before I read about all this?

MR. DODDS: Your Honor, if I may, just very briefly in closing. I would respectfully have to disagree with what Mr. Newton said earlier. I don't think this case is a head scratcher at all. There's really only two questions that Your Honor needs to ask in ruling on this motion.

Number one, did the order dismiss the claims

against the subcontractors? The answer to that is yes. All parties agree. Number two, was the order dismissing the claims against the subcontractors appealed? The answer to that is no. The subcontractors were never named as respondents to the appeal. They never appealed that ruling.

If you took the law, as the Plaintiffs and Seaquest are arguing, then no un-appealed portion of a judgment could ever become the law of the case because those un-appealed portions would simply have been stayed, and they would never become final. However, that is not the law in South Carolina.

Our courts are clear that an un-appealed portion of a ruling -- whether it's incorrect, whether it's correct, an un-appealed portion of a ruling is the law of the case. And I appreciate the Court's time today.

THE COURT: Sure. All right. Anybody else want to chime in?

MR. LACOUR: Judge, there were just two things to respond to, that I heard. First was there was an argument made that none of the subcontractors moved for dismissal. And the Fryer case, Page 8 of our memo, if the Court grants relief not requested, or rules on an issue not raised, the way to -- is a Rule 59(e)

motion. So you're right back to what the other case said.

And the second was the concept of things being stayed on appeal is just a misunderstanding of what the appellate Rule 241(a) says. 241(a) simply says that the circuit court, the trial court, has to hold still. It limits the jurisdiction temporarily during the pendency of the appeal. It's just a limitation on the trial court's ability to continue doing anything on the case as to matters that were appealed, to set a limitation on the jurisdiction of the Court.

It doesn't stay proceedings in the case substantively. It just says the trial court has got to hold still until the appellate court is done, and that's the Stokes-Craven case, 460 -- excuse me, 416 S.C. 517, at 532, 533. The courts already explained that. Thank you.

THE COURT: Okay. Well, I'm sure either way I will -- it will be straightened out, maybe by the same appellate judge that issued the order in the first place. So, all right, I appreciate everybody's time today. I'm going to tell everybody good-bye. I've got my 11:30 people who are waiting patiently, and I hope everybody has a great day. Thank you very much.

(End of Transcript of Record)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Charleston)

I, the undersigned, Yvestre Torres, Circuit Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 22nd of April, 2021.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 5, 2021



Yvestre Torres
Circuit Court Reporter

Jaan Rannik

From: Waring, Amelia <awaring@sccourts.org>
Sent: Wednesday, January 4, 2017 15:57
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Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Counsel,

Thank you for your patience on this. Here is Justice Toal's ruling:

(1) Plaintiffs' Motions to Stay and Compel Arbitration are denied. Plaintiffs have waived their right to demand arbitration per the arbitration agreement for the reasons stated in section I of Defendant Seaquest's Memorandum in Opposition to the Motion to Stay and Compel Arbitration (waiver) and for the reasons contained in section III of Seaquest's memorandum in Opposition (contractually barred). However, Justice Toal does not base her ruling on the Seaquest's argument that section 15-48-10(a) is inapplicable to the claims here (*see* Seaquest's Memorandum in Opposition section II).

(2) Defendant Seaquest's Motion to Dismiss is granted because Plaintiffs have failed to comply with the S.C. Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. 40-59-810, et seq.

(3) The remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed.

Counsel for Defendant Seaquest should draft a proposed order and e-mail it to me awaring@sccourts.org by the end of next week.

Thanks,

Amelia

Amelia Waring Walker
Law Clerk to the Honorable Jean H. Toal
South Carolina Supreme Court
(803)734-1584
awaring@sccourts.org

From: Daigle, Jason [mailto:jdaigle@ycrlaw.com]
Sent: Wednesday, January 04, 2017 11:45 AM
To: Angela Gross; Toal, Jean; Waring, Amelia; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

It has come to my attention that this case has an ADR deadline of February 5, 2017. Caroline Leonard suggested that I contact you directly so the parties don't run afoul of the ADR deadline. We are still awaiting you ruling on the motions that were heard on October 13 after you stayed the case as to all parties except for Plaintiffs and Seaquest. Is there anything else you need from or Plaintiffs' counsel on these motions?

Thank you,
Jason

Jason A. Daigle, Esq.
Young Clement Rivers, LLP
Phone: (843) 724-6609
Fax: (843) 579-1324
jdaigle@ycrlaw.com



From: Daigle, Jason
Sent: Wednesday, October 19, 2016 5:08 PM
To: 'Angela Gross'; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Defendant Seaquest Development's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Stay and to Compel Arbitration which was filed with the clerk today.

Jason

Jason A. Daigle, Esq.
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Fax: (843) 579-1324
jdaigle@ycrlaw.com



From: Angela Gross [mailto:agg@epting-law.com]
Sent: Wednesday, October 19, 2016 4:35 PM
To: Daigle, Jason; jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc: Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your instruction, attached please find Plaintiffs' Reply in Support of Their Motion to Stay and Compel Arbitration in the above-referenced matter.

Angela

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
And Michelle N. Endemann, Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
Telephone: (843) 377-1871
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agg@epting-law.com

From: Daigle, Jason [mailto:jdaigle@ycrlaw.com]
Sent: Thursday, October 13, 2016 2:15 PM
To: jtoal@sccourts.org; awaring@sccourts.org; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)' <ccleonard@charlestoncounty.org>

Cc: Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; Angela Gross <agg@epting-law.com>; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; XIngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject: McIntire v. Seaquest, et al. - 2016-CP-10-1833

Chief Justice Toal,

Per your request, I have copied on this email the distribution list for the above-referenced case.
Please let me know if you need any additional information.

Thank you,
Jason

Jason A. Daigle, Esq.
Young Clement Rivers, LLP
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Attachments larger than 40MB may be rejected by the firm's server. If you are sending an attachment of this size or larger, please contact the

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Jaan Rannik

From:	Angela Gross
Sent:	Friday, January 20, 2017 15:16
To:	Daigle, Jason; Waring, Amelia; Toal, Jean; 'Caroline Crisler. Leonard (ccleonard@charlestoncounty.org)'
Cc:	Andrew K. Epting; Michelle Endemann; jelliott@richardsonplowden.com; snettles@richardsonplowden.com; cmajure@murphygrantland.com; Trey.Watkins@WallTempleton.com; ddyer@kernodlelaw.com; mjustman@kernodlelaw.com; Danielle.payne@mgclaw.com; PReconnu@murphygrantland.com; JGoodman@murphygrantland.com; ErinDean@tgdpa.com; Xlngram@tgdpa.com; sstephens@arslawsc.com; tdrazan@arslawsc.com; lphillips@arslawsc.com; smontague@gwblawfirm.com; ljones@gwblawfirm.com; alacour@clawsonandstaubes.com; mandi@chandlerdudgeon.com; matt@chandlerdudgeon.com; hsharkey@clawsonandstaubes.com; shatch@clawsonandstaubes.com; bawilson@murphygrantland.com; sandra.schultz@walltempleton.com; pbd@aikenbridges.com; ice@aikenbridges.com; mbarfield@barnwell-whaley.com; sclarke@barnwell-whaley.com; jsegell@barnwell-whaley.com; shatch@barnwell-whaley.com; murch@gwblawfirm.com
Subject:	RE: McIntire v. Seaquest, et al. - 2016-CP-10-1833
Attachments:	2017 01 20 - Ltr to Justice Toal re Objections to proposed Order.pdf

Madam Chief Justice,

Attached please find Plaintiffs' objections to the proposed Order in the above-referenced matter. The original will follow by regular U.S. Mail.

Angela

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
And Michelle N. Endemann, Esquire
Andrew K. Epting, Jr., LLC
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ANDREW K. EPTING, JR., LLC
ATTORNEYS AT LAW

January 20, 2017

The Honorable Jean H. Toal
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

RE: McIntire v. Seaquest, et al
Case No.: 2016-CP-10-1833

Dear Madame Chief Justice:

Thank you for giving me the opportunity to review and respond to the proposed order sent to you by counsel for SeaQuest Development Company ("SeaQuest") on January 13, 2017. The proposed order concerns the following motions: (1) SeaQuest's Motion to Dismiss or Stay Proceedings made pursuant to 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")[1]; (2) Plaintiffs Andrew and Kimberly McIntire's Motion to Stay and to Compel Arbitration; and (3) the McIntires' Motion for Protective Order. Each of these motions was heard by Your Honor on October 13, 2016. A copy of the transcript of the proceedings is attached for your convenience.

The Right to Cure Act:

There are two main holdings in the proposed order. The first finds that compliance with the Right to Cure Act is a mandatory precondition to filing a residential construction defect claim and that the McIntires' complaint is dismissed because they: (1) failed to comply with the Act; and (2) are unable to comply with the Act because repairs to the home have been substantially completed. With regard to this holding in the proposed order, the McIntires raise the following objections:

1) There is no provision of the Right to cure act that authorizes the dismissal of a lawsuit for the failure to comply with the Act. The Act authorizes only a stay of proceedings. Further, no decision construing the Act has authorized a dismissal. In fact, the Supreme Court in *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010) refused to strike class action allegations in a complaint on the basis of the Act.

[1] Red Bay Constructors Corp. ("Red Bay") filed a motion on the same grounds, which was also heard and is resolved by the proposed order.

ANDREW K. EPTING, JR. · AKE@EPTING-LAW.COM
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2) There is nothing in the record that supports the finding that the McIntires have not complied with the Act.

3) A dismissal of this claim at this point in the litigation is unwarranted, as there is no basis for holding that the McIntires will be unable to comply with the Act.

4) The McIntires believe this dispute is subject to arbitration pursuant to the Federal Arbitration Act and therefore, the only issue before the Court concerns arbitrability. All other issues, including compliance with the Right to Cure Act, are properly decided in arbitration.

Waiver of the McIntires' Right to Arbitration

The second holding in the proposed order finds the McIntires have waived their right to arbitration. This ruling is based on two grounds: (1) that the McIntires have engaged in "extensive discovery" and retained "forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home"; and (2) the McIntires failed to comply with the arbitration provision in the contract. With regard to the holding that the McIntires have waived their right to arbitration by engaging in "extensive discovery," the McIntires raise the following objections:

1) This holding is factually inaccurate and contradicted by the record. First, The McIntires, specifically preserving their arbitration rights, have not participated in any discovery at all. They have not served discovery. They have not answered discovery. One of the motions that was before this Court at the October 13, 2016 hearing was the McIntires' motion for protective order which was made on the grounds that the McIntires had an arbitration provision and that they could not respond to discovery because responding could jeopardize its arbitration rights. Second, as the McIntires never answered discovery, there is no basis for the Defendants to claim that the McIntires retained "forensic and construction liability and repair experts." Further, hiring a contractor to make repairs is not inconsistent with arbitration.

With regard to the finding that the McIntires have failed to comply with the arbitration provision in the construction contract, the McIntires raise the following objections:

1) The proposed order finds that the construction contract requires arbitration to be demanded "within a reasonable time after the claim has arisen" and that the McIntires did not comply with this provision. The proposed order acknowledges that we are only at the pleading stage, without the benefit of discovery and that typically questions concerning "reasonableness" are for the trier of fact. Nonetheless, the order finds the McIntires did not demand arbitration in a reasonable time despite the fact that McIntires only discovered the defects in their home after it was struck by lightning

during a storm, that the McIntires filed suit as soon as they were able to discover the defects and identify the Defendants,[2] and demanded arbitration as soon as the Defendants were served. This finding is without any evidentiary support and contrary to the facts.

2) The proposed order finds the construction contract stipulates that "in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations" and further finds the statute of limitations as articulated by S.C. Code Ann. § 15-3-510 has run. Therefore, the proposed order states, the McIntires' arbitration demand was contrary to the arbitration provision in the contract. The Order suggests that the statute of limitations would have begun to run when the Certificate of Occupancy was issued or sometime even before that date. (See Proposed Order, p. 11, Fn. 11). First, this argument was not made at the hearing. Second, finding that the statute of limitations runs from the issuance of the Certificate of Occupancy is contrary to the discovery rule. Third, there is not one fact in the record that supports a finding that the statute of limitations has run. Fourth, the Defendants have never argued that the statute has run and have never moved to dismiss the suit on this basis. Therefore, as the "applicable statute of limitations" has not and did not run before the arbitration demand was made, the demand is not contrary to the arbitration provision in the contract. Accordingly, as this Court expressed no doubts concerning the scope of the arbitration provision or that the McIntires' claims are encompassed by the broadly worded provision, arbitration should be ordered and all matters, including compliance with the Right to Cure Act, decided in arbitration.

With kind regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.

AKE/agg

cc: Counsel of Record

[2] The McIntires acted expediently and were required to as the statute of repose was becoming an issue.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Jean Hoefer Toal, Circuit Court Judge

RECEIVED
JUN 02 2017
SC Court of Appeals

Case No.: 2016-CP-10-1833

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

RECEIVED
JUN 07 2017
By

v.

RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC.....Defendants,

---

NOTICE OF APPEAL

Plaintiffs Andrew and Kimberly McIntire appeal the order of the Honorable Jean Hoefer Toal, dated January 17, 2017 (Exhibit A). Appellants received written notice of entry of Judge Toal's order on May 2, 2017. Appellants are in receipt of the transcript of record.

May 30, 2017

ANDREW K. EPTING, JR., LLC

By _____
Andrew K. Epting, Jr.
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310
ake@epting-law.com
jgr@epting-law.com

Attorneys For Appellants

Counsel of Record for Respondents:
Edward D. Buckley, Jr., Esquire
Jason A. Daigle, Esquire

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1833

FILED
2017 MAY -1 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT

RECEIVED
JUN 02 2017
SC Court of Appeals

Andrew and Kimberly McIntire,

PLAINTIFF(S)

Seaquest Development Company, Inc.; Red Bay Constructors, Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork — Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

DEFENDANT(S)

Submitted by: Jean H. Toal	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☒ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : Order attached Dismissing Entire action

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2758 **Judge Code**	1-17-17 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

ANDREW and KIMBERLY McINTIRE,)
)
Plaintiffs,)
)
v.)
)
SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC,)
)
Defendants.)

SEAQUEST DEVELOPMENT COMPANY, INC.,)
)
Third-Party Plaintiff,)
)
v.)
)
ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; SEALTIGHT OF SOUTH CAROLINA, LLC,)
)
Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-1833

FILED
2017 MAY -1 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER OF DISMISSAL

RECEIVED
JUN 02 2017
SC Court of Appeals

#1

This residential construction-defect case is before the Court on the following four motions, all of them heard October 13, 2016:

(1) Seaquest's[1] **Motion to Dismiss or Stay Proceedings** filed June 17, 2016 ("Seaquest's Motion to Dismiss");

(2) Red Bay's[2] **Motion to Dismiss or for Stay of Proceedings** filed June 23, 2016 ("Red Bay's Motion to Dismiss");

(3) The McIntires'[3] **Motion to Stay and to Compel Arbitration** filed July 27, 2016 (the "Motion to Compel Arbitration"); and

(4) The McIntires' **Motion for Protective Order as to Requests for Admissions of Seaquest Development Company** filed August 15, 2016 (the "Motion for Protective Order").

For the reasons below, Seaquest's Motion to Dismiss, which calls for a complete dismissal of the case, is GRANTED; the Motion to Compel Arbitration is DENIED; and the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety.

BACKGROUND

In August of 2007, the McIntires entered into a written contract with general contractor Seaquest for the construction of a home in Mount Pleasant. The work was performed by various subcontractors (the majority of whom are defendants or third-party defendants), and a certificate of occupancy was issued on September 25, 2008.

On April 8, 2016, the McIntires filed this lawsuit alleging defects in the home's construction and asserting the following causes of action against Seaquest: Negligence/Gross Negligence, Breach of Warranty of Habitability, Negligent Misrepresentation and Constructive

[1] "Seaquest" refers to Defendant Seaquest Development Company, Inc.

[2] "Red Bay" refers to Defendant Red Bay Constructors Corp.

[3] The "McIntires" refers to Plaintiffs Andrew and Kimberly McIntire.

Fraud, and Breach of Warranty of Good and Workmanlike Work. Though their contract with Seaquest contains an arbitration clause, the McIntires have not asserted a cause of action for breach of contract.

Prior to filing this suit, the McIntires had discovered a number of alleged construction defects in the home and, without notifying Seaquest, had hired experts and begun repairs. The repairs had been substantially completed before suit was filed, or were so soon thereafter.

DISCUSSION

I. Seaquest's Motion to Dismiss

Seaquest contends this case should be dismissed because the McIntires filed this action before first complying with the requirements of 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"), and under the circumstances, it is not possible for the McIntires to comply with the requirements of the Right to Cure Act, nor is it possible for Seaquest to be afforded its rights thereunder. The Court agrees.

#3

The Right to Cure Act grants contractors like Seaquest (as well as subcontractors) the right to notice of, and an opportunity to inspect and cure, alleged "construction defect[s]"[4] in a

[4] As used in the Right to Cure Act,

> "Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:
>
> (a) defective material, products, or components used in the construction of residential improvements;
>
> (b) violation of the applicable codes in effect at the time of construction of residential improvements;
>
> (c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of

"dwelling."[5] It requires a "claimant"[6] to "serve"[7], no less than ninety days before filing an "action"[8] against a contractor or subcontractor arising out of the construction of a dwelling, "a written notice of claim on the contractor" containing certain required information about the

---

> governmental approval of the design of residential improvements; or
>
> (d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

§ 40-59-820(3).

[5] As used in the Right to Cure Act,

> "Dwelling" means a single-family house or duplex or a multifamily unit not to exceed sixteen units and not to exceed three stories in height, and which is intended for residential use. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction.

§ 40-59-820(4).

[6] As used in the Right to Cure Act,

> "Claimant" means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling.

§ 40-59-820(2).

[7] As used in the Act, "'Serve or 'service' means personal service or delivery by certified mail to the last known address of the addressee." § 40-59-820(5).

[8] As used in the Right to Cure Act,

> "Action" means *any* civil lawsuit or action *or arbitration proceeding* for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling or a remodel of a dwelling.

§ 40-59-820(1) (emphasis added).

claim. § 40-59-840(A); see also § 40-59-840(B) (providing, "The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification."). It also establishes a mandatory pre-suit inspection/opportunity-to-cure procedure and the related rights/obligations of the respective parties. See § 40-59-850; see also § 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); § 40-59-830 ("If the claimant files an action in court before first complying with the requirements of this article, 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).

Our Supreme Court was called upon to construe the Right to Cure Act in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In so doing, the Court endorsed the view that § 40-59-840 "encompasses civil lawsuits filed against a contractor or subcontractor," "imposes an absolute condition precedent to the filing of lawsuits that qualify under the Right to Cure Act[,]" and "*requires* the claimant to serve written notice no later than ninety days before filing the action." Id. at 570, 703 S.E.2d 200-01 (emphasis in original). Further, regarding the legislative intent underlying the Right to Cure Act, the Court stated as follows:

> The Right to Cure Act has an express public policy intent of: (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. The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to *require compliance* with the Right to Cure Act's notice provisions.

Id. at 572-73, 703 S.E.2d at 202 (emphasis in original) (internal citation omitted).

Without question, the Right to Cure Act applies here; the McIntires filed this action before first complying with its requirements; and under the circumstances, it is not possible for the McIntires to comply with its requirements, nor indeed is it possible for Seaquest to be afforded its rights thereunder. Wherefore, consistent with the Court's directive to ascertain and effectuate the intention of the legislature,[9] based on the statutory language and in view of Grazia, I find that this case should be dismissed.

While, as referenced above, the Right to Cure Act expressly calls for a "stay" when a claimant files an action before compliance, it also expressly calls for the stay to remain in effect "*until* the claimant has complied . . . ." § 40-59-830 (emphasis added). Moreover, as also referenced above, the language of the Right to Cure 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). Here, the McIntires have made compliance with the Right to Cure Act impossible. They have substantially repaired and remodeled their home, in the process

[9] "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).

#6

destroying the alleged defects without giving Seaquest any notice of those alleged defects and without giving Seaquest an opportunity to inspect/cure them. Because the McIntires have not complied with the Right to Cure Act, the act plainly requires a stay; because they foreclosed even the possibility of compliance with the Right to Cure Act, the stay must be permanent; as a practical matter, a permanent stay is a dismissal, which this Court now orders.

II. The Motion to Compel Arbitration

The McIntires contend the case should be stayed and the dispute compelled to arbitration. The Court disagrees, concluding that the McIntires are barred from arbitrating this dispute due to waiver as well as by the terms of their contract.

Whether a claim is subject to arbitration is a matter for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Like other contracts, arbitration clauses are to be enforced in accordance with their terms. Zabinski, 346 S.C. at 592.

The McIntires have waived any right they may have had to demand arbitration. Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. Rhodes v. Benson Chrysler–Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)

(quoting Hyload, Inc. v. Pre–Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)). Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

"To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" Id. at 127, 647 S.E.2d at 251 (quoting Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). "Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts." Id., 647 S.E.2d at 251-52 (internal citation omitted). The particular and peculiar facts of this case lead the Court to the inescapable conclusion that the McIntires waived any right to arbitrate.

Prior to filing the Motion to Compel Arbitration, the McIntires engaged in extensive discovery in that they retained forensic and construction liability and repair experts to investigate, document, and repair the alleged defects at their home. They undertook these actions related to litigation without demanding arbitration and, as noted above, without complying with the Right to Cure Act. The repairs to the home were substantially completed prior to the filing of the Motion to Compel Arbitration. The resulting material prejudice to Seaquest is clear and irreparable.

A substantial amount of time transpired between the time the McIntires engaged their experts and the time they moved to compel arbitration. By the time of the Motion to Compel Arbitration, the repairs to the alleged defects were substantially completed, the alleged defective conditions eliminated, precluding Seaquest from investigating, inspecting, and/or challenging the McIntires' claims. In a residential construction case, the most important evidence may in fact be the home itself. Here, the home Seaquest constructed, in its allegedly defective condition, no longer exists, with Seaquest left to rely on the McIntires' inspections and investigations and the evidence they chose to preserve.

Had the McIntires demanded arbitration when they first discovered the alleged defects, or when they first engaged liability or construction experts to perform their investigation, or at any time prior to repairing them, Seaquest would have had the opportunity to inspect, investigate, and/or test the alleged defects. Their delay in demanding arbitration does not constitute a mere inconvenience; rather, it amounts to a denial of Seaquest's right to fairly defend itself.

Additionally, the McIntires are contractually barred from demanding arbitration. The McIntires are attempting to invoke provisions in their contract[10] with Seaquest to compel arbitration. Specifically, they claim that Section 4.6 of that contract requires arbitration.

The interpretation of a written contract is a matter of law to be decided by the court. Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (providing, "As a general rule, written contracts are to be construed by the Court" except where a contract is ambiguous or capable of more than one construction.). The McIntires have failed to demand arbitration in accordance with the very section they are attempting to enforce. Paragraph 4.6.2 states that a

[10] The contract is a standard form AIA Document A101-1997, including AIA Document A201-1997 – General Conditions of the Contract for Construction. The Court has noted that the Plaintiffs have not sued for breach of contract, the very contract which Plaintiffs now contend requires arbitration of this dispute.

demand for arbitration must be filed in writing with the opposing party and with the American Arbitration Association. The McIntires have not done so; indeed, though they would like it stayed in favor in arbitration, they filed this lawsuit.

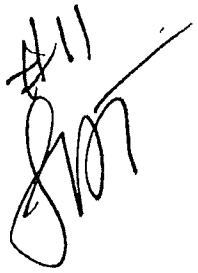
Paragraph 4.6.3 of the contract states that a "demand for arbitration shall be made . . . within a reasonable time after the claim has arisen . . . ." As previously stated, the McIntires have not made a demand for arbitration pursuant to the contract. They could not possibly comply with the "reasonable time" requirement in their contract. Having discovered alleged defects that would have given rise to a "Claim," they investigated that claim, retained counsel, retained experts, and substantially repaired and eliminated the alleged defects underlying the claim they wish to arbitrate. Accordingly, they are barred from demanding arbitration. The determination of a "reasonable time" for performance of one's obligations under a contract must be determined upon examination of the facts and circumstances of each particular case. And while generally the question of "reasonable time" would be one of fact for a jury, this case is different. As a matter of law, I find that an attempt to compel arbitration (without any prior demand therefor and, indeed, in the context of court proceedings that the moving parties themselves commenced) after the party seeking arbitration destroyed all or most of the physical evidence to support or refute the claim is manifestly unreasonable. Cf. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) ("If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted.").

#10

Paragraph 4.6.3 of the contract goes on to reference statutes of limitations for demanding arbitration. Specifically, Paragraph 4.6.3 states that "in no event shall [an arbitration demand] be made after the date when the institution of legal or equitable proceedings based on such Claim

would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." The applicable statute of limitations for the claims brought by the McIntires is three years as set forth in S.C. Code Ann. § 15-3-510, *et seq.* Paragraph 13.7.1.3 states, "As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued . . . ." Accordingly, the McIntires' demand for arbitration had to have been made sometime prior to 2012.[11] The statute of limitations to demand arbitration, as calculated by the contract and by the arbitration clause contained therein, has run.

Wherefore, I find the Motion to Compel Arbitration should be denied.



[11] The Certificate of Occupancy was issued on September 25, 2008 and it is doubtless that the final Certificate of Payment was issued soon thereafter. Therefore, the statute of limitations would have run during 2009, 2010, and 2011

CONCLUSION

NOW, THEREFORE, for the foregoing reasons, it is hereby

ORDERED, ADJUDGED AND DECREED that Seaquest's Motion to Dismiss is GRANTED; it is

ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is DENIED; it is

ORDERED, ADJUDGED AND DECREED that all remaining motions in this case are MOOT; and it is

FURTHER ORDERED that this case shall be and is hereby DISMISSED.

AND IT IS SO ORDERED.

Jean Hoefer Toal
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina

Jan. 17, 2017

#12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-10-1833

RECEIVED
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SC Court of Appeals

ANDREW MCINTIRE AND KIMBERLY MCINTIRE,.....Plaintiffs/ Appellants,

v.

SEAQUEST DEVELOPMENT COMPANY, INC. .....Defendant/Respondents.

v.

RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK – OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a CASTEEN CUSTOM CABINETS; QUALITY CEDAR PRODUCTS, INC. OF MICHIGAN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO. INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; NEW SOUTH CONSTRUCTION SUPPLY, LLC.....Defendants,

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PROOF OF SERVICE

I certify that I have served the Appellants' Notice of Appeal by depositing a copy in the United States Mail, Postage prepaid, on May 30, 2017, addressed to Respondent's attorneys of record as follows:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire..... Appellants,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC;
of which Seaquest Development Company, Inc. is.....Respondent

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INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO ORDER THE DISPUTE TO ARBITRATION WHEN THE PARTIES' CONTRACT CONTAINS A VALID ARBITRATION CLAUSE?

2. DID THE TRIAL COURT ERR IN ADDRESSING ISSUES OF STATUTE OF LIMITATIONS, RIGHT TO CURE, AND WAIVER WHEN THE COURT'S SOLE JURISDICTION WAS TO DECIDE THE QUESTION OF ARBITRABILITY?

3. DID THE TRIAL COURT ERR IN DISMISSING THE CASE FOR FAILURE TO COMPLY WITH THE RIGHT TO CURE ACT WHEN THE RECORD WAS DEVOID OF EVIDENCE THAT APPELLANT HAD NOT COMPLIED AND NO PROVISION OF THE ACT AUTHORIZES DISMISSAL OF AN ACTION FOR ANY FAILURE TO COMPLY?

STATEMENT OF THE CASE

Andrew and Kimberly McIntire ("Appellants" or "the McIntires") filed suit against the Respondents on April 8, 2016, bringing claims relating to significant construction defects in their home (**Exh. A**). The last defendant was served on July 20, 2016 (**Exh. B**), and the McIntires filed a motion to compel arbitration on July 27, 2016 (**Exh. C**). They later filed a motion for a protective order on August 15, 2016 (**Exh. D**), protecting the McIntires from participating in discovery pending their motion to compel arbitration. The McIntires never engaged in discovery and did not use any of the judicial machinery except to ask the Court to compel arbitration of the dispute.

Respondent Seaquest Development Company, Inc. ("Seaquest") moved to dismiss or stay proceedings on June 17, 2016 (**Exh. E**), alleging that Appellants had failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. S.C. Code Ann. § 40-59-810 *et seq.* (hereinafter the "Right to Cure Act"). A hearing was held on

October 13, 2016 encompassing the Seaquest's motion to dismiss, the McIntires' motion to compel arbitration, and various motions by subcontractors (transcript at **Exh. F**).

On January 4, 2017, Justice Toal requested that Seaquest provide the Court with an order (**Exh. G**), which was circulated to the Court and counsel of record on January 13, 2017 (**Exh. H**). The McIntires requested an opportunity to object to the proposed order on January 17, 2017 (**Exh. I**), and Justice Toal granted the request and gave the McIntires until January 20, 2017 to lodge their objections (**Exh. J**), which were lodged on January 20, 2017 by letter to Justice Toal with counsel of record copied (**Exh. K**).

On May 1, 2017, the instant order—unchanged from Respondent's proposed order—was filed dismissing the case, denying the McIntires' motion to compel arbitration, and denying the subcontractors' motions as moot (**Exh. L**); however, the order had been signed by Justice Toal on January 17, 2017 — three days before the Court received the McIntires' objections that Justice Toal had authorized.

STATEMENT OF THE FACTS

In 2007, the McIntires contracted with Respondents for the construction of a residence in Mount Pleasant, South Carolina. Seaquest was the general contractor for the project, which was completed and a certificate of occupancy issued in September 2008.

In September of 2013, the McIntires' residence was struck by lightning, blasting a hole in the roof and causing substantial fire damage. In the course of inspecting the damage caused by the lightning strike, the McIntires discovered—for the first time—numerous and significant construction defects. The McIntires notified Seaquest and at least one subcontractor of the defects they had discovered, but received no response. Accordingly, the McIntires hired another

contractor to repair the roof, which was a matter of some urgency to prevent further damage to the structure.

In the course of the repairs, defect after defect was discovered and addressed by the second contractor, including water and plumbing problems and major termite infestations. The McIntires filed suit against Seaquest and the various subcontractors in April 2016 — within the three-year statute of limitations.

ARGUMENT

I. Standard of Review

This Court reviews the dismissal of a case under Rule 12(b), SCRCP[1]—like all questions of law—*de novo*. *See, e.g.*, *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) ("Questions of law are reviewed *de novo*."); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.").

II. The Court's Function Is Solely to Determine Arbitrability

When a party moves to stay litigation and compel arbitration under the Federal Arbitration Act ("FAA"), the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85.

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[1] Seaquest's motion does not refer to Rule 12(b), SCRCP (**Exh. E**), but the trial court's Form 4 Judgment reflects that the case was dismissed pursuant to that Rule. (**Exh. L** at 1).

The contract between the Parties is governed by the FAA and requires arbitration of disputes; the dispute is arbitrable. This Court should vacate the trial court's order and direct the parties to engage in arbitration.

A. The Parties' Contract Requires Arbitration of Disputes

There is no dispute that the Parties have a valid contract or that the contract contains a notice that states: "**WARNING: THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET SEQ.)**." (**Exh. M**). The notice is in bold, underlined text, displayed prominently on the first page of the contract as required by S.C. Code Ann. § 15-48-10.

Additionally, the contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which requires "[a]ny claim arising out of or related to the Contract . . . be subject to arbitration." (**Exh. N**). The contract thus requires disputes to be resolved via mandatory, binding arbitration.

B. The Dispute is Governed by the FAA

The South Carolina Supreme Court has long recognized that construction contracts evidencing transactions in interstate commerce are governed by the FAA. *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977). In *Episcopal Housing*, the South Carolina Supreme Court explained that if a contract "references . . . equipment and materials to be furnished from outside South Carolina," it "evidence[s] commerce" and implicates the FAA. *Id.* at 639–40, 651–52.

The contract between Appellant and Respondent is sufficient to "put [Respondent] on notice that materials and equipment from outside South Carolina would be used in the

construction of the [Appellant's] house." *Id.* at 640. For example, Exhibit B to the contract notes that the gas range/hood will be provided by "Wolf or French equivalent." (**Exh. M** at Exh. B, p. 2). Wolf is a subsidiary of the Sub-Zero Group, whose corporate headquarters are located in Madison, Wisconsin. Exhibit B to the contract also specifies that "Advantech" sheathing would be used in the framing of the house; "Advantech" is owned by Huber, a North Carolina company.

Moreover, "[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that *in fact* involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (emphasis added). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski Bright Acres Assoc.*, 346 S.C 580, 594, 553 S.E.2d 110, 117 (2001). At least one of the subcontractors hired by Seaquest, Quality Cedar Products, Inc. of Michigan, is an out-of-state business, so there can be no question but that the contract involved interstate commerce.

In short, the FAA applies to the dispute pursuant to *Episcopal Housing* and *Munoz*.

C. The FAA Requires Arbitration When Contractually Agreed Upon, Consistent With a National Policy Favoring Arbitration

The language of the FAA makes clear that arbitration is mandatory when, as here, the parties have a valid agreement to arbitrate. The FAA states:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The United States Supreme Court has interpreted the language of the FAA as "embod[ying] a national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1208 (2006). In *Southland Corp. v. Keating*, the Supreme Court stated further that the FAA not only "declared a national policy favoring arbitration," but actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 465 U.S. 1, 10 (1984).

D. Once Arbitrability Is Established, All Other Issues Are to be Resolved In the First Instance by the Arbitrator(s)

The United States Supreme Court has explained that the "gateway dispute about whether the parties are bound by a given arbitration clause" is for the court, but "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide."[2] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–84 (2002) (emphasis in original, quotation marks and citation omitted). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85; *see also Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 272–74 (4th Cir. 2011) (discussing the difference between questions of procedure and questions of arbitrability).

The trial court therefore improperly resolved procedural matters in finding that the McIntires (i) waived their arbitration right by engaging in extensive discovery, (ii) did not

---

[2] The South Carolina Uniform Arbitration Act requires the same: "On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court *shall* order the parties to proceed with arbitration . . . ." S.C. Code Ann. § 15-48-20 (emphasis added).

comply with the contractual requirement that arbitration be demanded "within a reasonable time," and (iii) filed suit outside the statute of limitations. These issues were not properly before the trial court. *See, e.g.*, *Howsam*, 537 U.S. at 83–85 (procedural issues are to be decided in the first instance by the arbitrator); *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220 (10th Cir. 2005) ("We do not address waiver in this appeal. It is presumed that the arbitrator will address any allegations concerning waiver.").

Moreover, these findings by the trial court were in error as they were not supported by any evidence in the record[3].

i. The McIntires Have Not Waived Their Right to Arbitrate

The trial court, faced with a motion to dismiss,[4] erred in finding that the McIntires waived their arbitration right. Nothing in the record supports a finding of waiver. The McIntires' complaint (**Exh. A**) does not. Nor were any exhibits submitted by Seaquest along with its motion to dismiss or stay that support the finding, despite Seaquest bearing the burden of proof as to waiver. *See In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981) (the party opposing arbitration "bears the heavy burden of proving waiver").

The McIntires have not participated in discovery at all, and certainly have not engaged in "extensive discovery" or retained "forensic and construction liability and repair experts" as the trial court found. *See* Order at 8. Rather, two days[5] after they received notice that the last defendant had been served with the complaint, they moved to compel arbitration. (*See* **Exhs. B**

---

[3] The findings were also inconsistent with the trial court's comments during oral argument.

[4] *See supra* note 1.

[5] The last defendant was served on July 20, 2016. The McIntires received confirmation of the service on July 25, 2016, and filed their motion to compel arbitration on July 27, 2016. (**Exh. B** & **C**).

& C). In addition, they filed for a protective order seeking protection from participating in discovery, precisely so as not to waive their contractual right to arbitration. (**Exh. D**).

Nor does hiring a contractor to inspect and repair issues with their residence amount to engaging in discovery, especially since this repair began because of a lightning strike and led to the discovery of the construction defects that form the basis of this suit.

Nothing in the record before the trial court supports the notion that the McIntires waived their arbitration right. Accordingly, it would be improper to find waiver of the right at the motion to dismiss stage, even ignoring the McIntires' actions to preserve that right.

ii. The Demand for Arbitration Was Timely

One factor in determining whether a party has waived its arbitration right is "whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Again, as a procedural matter separate from the question of arbitrability, this question was not properly before the trial court. And, in the absence of evidence in the record supporting the contention that the arbitration demand was untimely, the trial court had no basis to make such a finding and grant a motion to dismiss.

The trial court's discussion of this question focuses not on the amount of time between the filing of the suit and the filing of the motion, but rather the time between when "the McIntires engaged their experts"[6] and the filing of the motion. *See* Order at 9. This is not the test as set forth in *Rhodes*, which focuses on the amount of time between filing the complaint and

[6] A subject about which the record contains no evidence. Nor could it, as the McIntires have not engaged an expert at this time.

moving to compel arbitration. *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251. And, as discussed above, the McIntires have not yet engaged expert witnesses in this case and certainly had not done so prior to filing suit.

The suit was filed on April 8, 2016 and the motion to compel arbitration on July 27, 2016, two days after the McIntires received confirmation that all defendants had been served with the complaint. (*See* **Exhs. B & C**). The finding that the demand for arbitration was not made within a reasonable time is erroneous.

iii. The Statute of Limitations Has Not Expired

Likewise, the trial court erred in finding that the statute of limitations expired,[7] especially based on the evidence in the record before it at the motion to dismiss stage. *See* Order at 10–11.

The parties' contract specified that arbitration under the contract must be demanded within the applicable statute of limitations. (**Exh. N** at ¶ 4.6.3). In South Carolina, the statute of limitations for suits based in contract is three years. S.C. Code Ann. § 15-3-530. South Carolina courts apply the discovery rule, which states that the statute of limitations begins to run only "when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

The McIntires discovered the defects only after their home was struck by lightning in September 2013, and Seaquest submitted no evidence to the contrary. The McIntires filed suit in April 2016, well within the three-year statute of limitations. Thus, there was no basis on the record before the trial court for the matter to be dismissed under Rule 12(b), SCRCP, even if the question had been properly before the court.

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[7] This issue was not raised by Seaquest at oral argument.

III. The Court Erred in Dismissing the Case

As a procedural question, rather than a question of arbitrability, the issue of compliance with the Right to Cure Act was not properly before the trial court for the reasons discussed above. However, even if the issue were properly before it, the trial court erred in finding noncompliance and dismissing the case.

The trial court's decision is based upon its finding—despite the record being devoid of evidence on the question at the motion to dismiss stage—that compliance with the Act is not possible in this case, and that therefore any stay of proceedings pursuant to the Act would be a permanent stay, which is equivalent to a dismissal. For the following reasons, the McIntires contend this decision was in error.

A. The Act Does Not Authorize Dismissal

No provision of the Right to Cure Act authorizes dismissal of a lawsuit for failure to comply with the Act. *See* S.C. Code Ann. § 40-59-810 *et seq*. Rather, Section 40-59-830 of the Act, entitled "Stay of the action upon non-compliance with article," states: "If the claimant files an action in court before first complying with the requirements of this article, 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." S.C. Code Ann. § 40-59-830.

Nor is there any prior reported court decision in this state authorizing dismissal of a suit for failure to comply with the Act.

B. Compliance With the Act Is Not Impossible

The McIntires dispute the trial court's finding that compliance has been rendered impossible.

i. The Right to "Cure" Under the Act Includes Right to "Remedy" or "Settle" Claims

The term "cure" is not defined in the Right to Cure Act. However, the language of the Act evidences legislative intent that "cure" not be limited to meaning "repair." Section 40-59-850 of the Act notes that a contractor may elect to "offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850. Thus, the Act contemplates that a contractor can "cure" the defect by settling the claim. That option remains available to Seaquest.

ii. The Term "Inspect" is Not Defined in the Act

Section 40-59-850 of the Act also gives contractors the right to "inspect" the defect. The term "inspect" is not defined in the Act either, but nothing in the Act functions to limit the term to meaning a physical inspection of the defect. The defects discovered in the McIntire home were well documented and photographed; these records are more than sufficient to allow Seaquest to determine whether it wishes to deny or settle the claim. Thus, Seaquest has not been denied the right to inspect.

C. Seaquest Is Not Prejudiced by Any Non-Compliance with the Act

As noted by the South Carolina Supreme Court, "the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010). Because the McIntires would not be required to accept any offer by Seaquest to repair the defective work at their home, something a homeowner who has suffered from a contractor's negligence is

unlikely to do anyway, Seaquest cannot demonstrate prejudice from any failure to comply with the Act.

D. Public Policy Does Not Support the Trial Court's Interpretation of the Act

Under the trial court's interpretation of the Right to Cure Act, a homeowner would be powerless to prevent a contractor that has performed grossly substandard work from returning to perform more work on the residence. Rather, the homeowner would be forced to give the negligent contractor a right to repair the damage. The contractor may negligently damage another part of the dwelling while trying repair the original defect, and the homeowner may not discover the new damage for years. Would the homeowner then be forced again to give the contractor an opportunity to repair the new damage?

The trial court's decision implies that contractors have an inviolable right to physically repair any defects in their work (and presumably to also remediate consequential damage stemming from the defective work), and the homeowner has no right to hire a different, more competent contractor repair the defective work. Such an interpretation is inconsistent with public policy.

CONCLUSION

The trial Court went far beyond its authority to determine arbitrability, decided matters reserved for the arbitrator, and—most surprisingly—also decided issues of waiver, statute of limitations, and notice under the Right to Cure Act without any supporting documentation. Not one exhibit was introduced. The record was devoid of support for finding that the statute of limitations had run, that no notice had been sent of a right to cure, or that the McIntires engaged in discovery.

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to arbitrate the dispute.

Respectfully submitted,

July 31, 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

Jean Hoefer Toal, Circuit Court Judge

Appellate Case No.: 2017-001270
Case No.: 2016-CP-10-1833

Andrew and Kimberly McIntire,..... APPELLANTS,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp,; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants, of which Seaquest Development Company, Inc. is the RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter by depositing a copy in the United States Mail, Postage prepaid, on July 31, 2017, addressed to Respondent's attorneys of record as follows:

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July 31, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: *Andrew McIntire and Kimberly McIntire v. Seaquest Development Company, et al.*
Case No. 2016-CP-10-1833
Appellate Case No.: 2017-001270

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above-referenced matter.

I would greatly appreciate your filing the originals and returning a file-stamped copy to me in the self-addressed, stamped envelope provided.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Andrew K. Epting, Jr., Esquire
and Jaan G. Rannik, Esquire

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Enclosures – as stated
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2016-CP-10-1833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire..... Appellants,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a/ Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a/ Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants,

Of which Seaquest Development Company, Inc. .....Respondent.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO ORDER THE DISPUTE TO ARBITRATION WHEN THE PARTIES' CONTRACT CONTAINS A VALID ARBITRATION CLAUSE?

2. DID THE TRIAL COURT ERR IN ADDRESSING ISSUES OF STATUTE OF LIMITATIONS, RIGHT TO CURE, AND WAIVER WHEN THE COURT'S SOLE JURISDICTION WAS TO DECIDE THE QUESTION OF ARBITRABILITY?

3. DID THE TRIAL COURT ERR IN DISMISSING THE CASE FOR FAILURE TO COMPLY WITH THE RIGHT TO CURE ACT WHEN THE RECORD WAS DEVOID OF EVIDENCE THAT APPELLANT HAD NOT COMPLIED AND NO PROVISION OF THE ACT AUTHORIZES DISMISSAL OF AN ACTION FOR ANY FAILURE TO COMPLY?

STATEMENT OF THE CASE

Andrew and Kimberly McIntire ("Appellants" or "the McIntires") filed suit against the Respondents on April 8, 2016, bringing claims relating to significant construction defects in their home (Summons & Complaint, **R. pp. 015-29**). The last defendant was served on July 20, 2016 (Affidavit of Service, **R. p. 030**), and the McIntires filed a motion to compel arbitration on July 27, 2016 (**R. pp. 036-59**). They later filed a motion for a protective order on August 15, 2016 (**R. pp. 060-63**), protecting the McIntires from participating in discovery pending their motion to compel arbitration. The McIntires never engaged in discovery and did not use any of the judicial machinery except to ask the Court to compel arbitration of the dispute.

Respondent Seaquest Development Company, Inc. ("Seaquest") moved to dismiss or stay proceedings on June 17, 2016 (**R. pp. 031-35**), alleging that Appellants had failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. S.C. Code Ann. § 40-59-810 *et seq.* (hereinafter the "Right to Cure Act"). A hearing was held

on October 13, 2016 encompassing the Seaquest's motion to dismiss, the McIntires' motion to compel arbitration, and various motions by subcontractors (Transcript of October 13, 2016 Hearing, **R. pp. 064-116**).

On January 4, 2017, Justice Toal requested that Seaquest provide the Court with an order (Email of January 4, 2017 from Amelia Waring to counsel of record regarding Justice Toal's ruling, **R. pp. 117-21**), which was circulated to the Court and counsel of record on January 13, 2017 (Email of January 13, 2017 from Jason Daigle, Esq. to Amelia Waring with attached Proposed Order, **R. pp. 122-39**). The McIntires requested an opportunity to object to the proposed order on January 17, 2017 (Email of January 17, 2017 from Michelle Endemann, Esq. to Justice Toal and counsel of record requesting opportunity to object to Proposed Order, **R. pp. 140-46**), and Justice Toal granted the request and gave the McIntires until January 20, 2017 to lodge their objections (Email of January 17, 2017 from Amelia Waring granting Michelle Endemann's request to object to Proposed Order, **R. pp. 147-53**), which were lodged on January 20, 2017 by letter to Justice Toal with counsel of record copied (Email of January 20, 2017 from Angela Gross to Justice Toal and counsel of record attaching the McIntires' Objections to Proposed Order, **R. pp. 154-57**).

On May 1, 2017, the instant order—unchanged from Respondent's proposed order—was filed dismissing the case, denying the McIntires' motion to compel arbitration, and denying the subcontractors' motions as moot (**R. pp. 001-14**); however, the order had been signed by Justice Toal on January 17, 2017 — three days before the Court received the McIntires' objections that Justice Toal had authorized.

STATEMENT OF THE FACTS

In 2007, the McIntires contracted with Respondents for the construction of a residence in Mount Pleasant, South Carolina. Seaquest was the general contractor for the project, which was completed and a certificate of occupancy issued in September 2008.

In September of 2013, the McIntires' residence was struck by lightning, blasting a hole in the roof and causing substantial fire damage. In the course of inspecting the damage caused by the lightning strike, the McIntires discovered—for the first time—numerous and significant construction defects. The McIntires notified Seaquest and at least one subcontractor of the defects they had discovered, but received no response. Accordingly, the McIntires hired another contractor to repair the roof, which was a matter of some urgency to prevent further damage to the structure.

In the course of the repairs, defect after defect was discovered and addressed by the second contractor, including water and plumbing problems and major termite infestations. The McIntires filed suit against Seaquest and the various subcontractors in April 2016 — within the three-year statute of limitations.

ARGUMENT

I. Standard of Review

This Court reviews the dismissal of a case under Rule 12(b), SCRCP[1]—like all questions of law—*de novo*. *See, e.g.*, *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) ("Questions of law are reviewed *de novo*."); *Doe v. Marion*, 373 S.C. 390, 395, 645

[1] Seaquest's motion does not refer to Rule 12(b), SCRCP (*see* **R. pp. 031-35**), but the trial court's Form 4 Judgment reflects that the case was dismissed pursuant to that Rule. (**R. p. 001**).

S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.").

II. The Court's Function Is Solely to Determine Arbitrability

When a party moves to stay litigation and compel arbitration under the Federal Arbitration Act ("FAA"), the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85.

The contract between the Parties is governed by the FAA and requires arbitration of disputes; the dispute is arbitrable. This Court should vacate the trial court's order and direct the parties to engage in arbitration.

A. The Parties' Contract Requires Arbitration of Disputes

There is no dispute that the Parties have a valid contract or that the contract contains a notice that states: "**WARNING: THIS AGREEMENT SUBJECT TO BINDING ARBITRATION IN THE STATE OF SOUTH CAROLINA, CITY OF CHARLESTON, UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (CODE SEC. 15-48-10, ET SEQ.)**." (Contract – AIA Document A101-1997, dated August 22, 2007, signed by Andrew McIntire and Craig Hines, **R. pp. 158-79**). The notice is in bold, underlined text, displayed prominently on the first page of the contract as required by S.C. Code Ann. § 15-48-10.

Additionally, the contract is a standard form AIA Document A101-1997 that incorporates A201-1997, section 4.6 of which requires that "[a]ny claim arising out of or related to the

Contract . . . be subject to arbitration." (Contract Addendum – AIA Document A201-1997, **ROA 180-216** at **199**). The contract thus requires disputes to be resolved via mandatory, binding arbitration.

B. The Dispute Is Governed by the FAA

The South Carolina Supreme Court has long recognized that construction contracts evidencing transactions in interstate commerce are governed by the FAA. *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977). In *Episcopal Housing*, the South Carolina Supreme Court explained that if a contract "references . . . equipment and materials to be furnished from outside South Carolina," it "evidence[s] commerce" and implicates the FAA. *Id.* at 639–40, 651–52.

The contract between Appellant and Respondent is sufficient to "put [Respondent] on notice that materials and equipment from outside South Carolina would be used in the construction of the [Appellant's] house." *Id.* at 640. For example, Exhibit B to the contract notes that the gas range/hood will be provided by "Wolf or French equivalent." **(R. p. 169)**. Wolf is a subsidiary of the Sub-Zero Group, whose corporate headquarters are located in Madison, Wisconsin. Exhibit B to the contract also specifies that "Advantech" sheathing would be used in the framing of the house; "Advantech" is owned by Huber, a North Carolina company. **(R. p. 173)**.

Moreover, "[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that *in fact* involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (emphasis added). "To ascertain whether a transaction involves commerce within the meaning

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In short, the FAA applies to the dispute pursuant to *Episcopal Housing* and *Munoz*.

C. The FAA Requires Arbitration When Contractually Agreed Upon, Consistent With a National Policy Favoring Arbitration

The language of the FAA makes clear that arbitration is mandatory when, as here, the parties have a valid agreement to arbitrate. The FAA states:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The United States Supreme Court has interpreted the language of the FAA as "embod[ying] a national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). In *Southland Corp. v. Keating*, the Supreme Court stated further that the FAA not only "declared a national policy favoring arbitration," but actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 465 U.S. 1, 10 (1984).

D. Once Arbitrability Is Established, All Other Issues Are to be Resolved in the First Instance by the Arbitrator(s)

The United States Supreme Court has explained that the "gateway dispute about whether the parties are bound by a given arbitration clause" is for the court, but "procedural questions

which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide."[2] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–84 (2002) (emphasis in original, quotation marks and citation omitted). "Procedural" questions, including "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met," are for the arbitrator to decide in the first instance, not the court. *Id.* at 85; *see also Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 272–74 (4th Cir. 2011) (discussing the difference between questions of procedure and questions of arbitrability).

The trial court therefore improperly resolved procedural matters in finding that the McIntires (i) waived their arbitration right by engaging in extensive discovery, (ii) did not comply with the contractual requirement that arbitration be demanded "within a reasonable time," and (iii) filed suit outside the statute of limitations. These issues were not properly before the trial court. *See, e.g.*, *Howsam*, 537 U.S. at 83–85 (procedural issues are to be decided in the first instance by the arbitrator); *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220 (10th Cir. 2005) ("We do not address waiver in this appeal. It is presumed that the arbitrator will address any allegations concerning waiver.").

Moreover, these findings by the trial court were in error as they were not supported by any evidence in the record.[3]

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[2] The South Carolina Uniform Arbitration Act requires the same: "On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court *shall* order the parties to proceed with arbitration . . . ." S.C. Code Ann. § 15-48-20 (emphasis added).

[3] The findings were also inconsistent with the trial court's comments during oral argument.

i. The McIntires Have Not Waived Their Right to Arbitrate

The trial court, faced with a motion to dismiss,[4] erred in finding that the McIntires waived their arbitration right. Nothing in the record supports a finding of waiver. The McIntires' complaint (**R. pp. 019-29**) does not. Nor were any exhibits submitted by Seaquest along with its motion to dismiss or stay that support the finding, despite Seaquest bearing the burden of proof as to waiver. *See In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981) (the party opposing arbitration "bears the heavy burden of proving waiver").

The McIntires have not participated in discovery at all, and certainly have not engaged in "extensive discovery" or retained "forensic and construction liability and repair experts" as the trial court found. (**R. p. 010**). Rather, two days[5] after they received notice that the last defendant had been served with the complaint, they moved to compel arbitration. (**R. pp. 030**; **036-59**). In addition, they filed for a protective order seeking protection from participating in discovery, precisely so as not to waive their contractual right to arbitration. (**R. pp. 060-63**).

Nor does hiring a contractor to inspect and repair issues with their residence amount to engaging in discovery, especially since this repair began because of a lightning strike and led to the discovery of the construction defects that form the basis of this suit.

Nothing in the record before the trial court supports the notion that the McIntires waived their arbitration right. Accordingly, it would be improper to find waiver of the right at the motion to dismiss stage, even ignoring the McIntires' actions to preserve that right.

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[4] *See supra* note 1.

[5] The last defendant was served on July 20, 2016. The McIntires received confirmation of the service on July 25, 2016 and filed their motion to compel arbitration on July 27, 2016. (**R. pp. 030; 036-59**).

ii. The Demand for Arbitration Was Timely

One factor in determining whether a party has waived its arbitration right is "whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Again, as a procedural matter separate from the question of arbitrability, this question was not properly before the trial court. And, in the absence of evidence in the record supporting the contention that the arbitration demand was untimely, the trial court had no basis to make such a finding and grant a motion to dismiss.

The trial court's discussion of this question focuses not on the amount of time between the filing of the suit and the filing of the motion, but rather the time between when "the McIntires engaged their experts"[6] and the filing of the motion. (**R. pp. 011**). This is not the test as set forth in *Rhodes*, which focuses on the amount of time between filing the complaint and moving to compel arbitration. *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251. And, as discussed above, the McIntires have not yet engaged expert witnesses in this case and certainly had not done so prior to filing suit.

The suit was filed on April 8, 2016 and the motion to compel arbitration on July 27, 2016, two days after the McIntires received confirmation that all defendants had been served with the complaint. (**R. pp. 030**; **036-59**). The finding that the demand for arbitration was not made within a reasonable time is erroneous.

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[6] A subject about which the record contains no evidence. Nor could it, as the McIntires have not engaged an expert at this time.

iii. The Statute of Limitations Has Not Expired

Likewise, the trial court erred in finding that the statute of limitations expired,[7] especially based on the evidence in the record before it at the motion to dismiss stage. (**R. pp. 012-13**).

The parties' contract specified that arbitration under the contract must be demanded within the applicable statute of limitations. (**R. p. 199** at ¶ 4.6.3). In South Carolina, the statute of limitations for suits based in contract is three years. S.C. Code Ann. § 15-3-530. South Carolina courts apply the discovery rule, which states that the statute of limitations begins to run only "when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

The McIntires discovered the defects only after their home was struck by lightning in September 2013, and Seaquest submitted no evidence to the contrary. The McIntires filed suit in April 2016, well within the three-year statute of limitations. Thus, there was no basis on the record before the trial court for the matter to be dismissed under Rule 12(b), SCRCP, even if the question had been properly before the court.

III. The Court Erred in Dismissing the Case

As a procedural question, rather than a question of arbitrability, the issue of compliance with the Right to Cure Act was not properly before the trial court for the reasons discussed above. However, even if the issue were properly before it, the trial court erred in finding noncompliance and dismissing the case.

The trial court's decision is based upon its finding—despite the record being devoid of evidence on the question at the motion to dismiss stage—that compliance with the Act is not

[7] This issue was not raised by Seaquest at oral argument.

possible in this case, and that therefore any stay of proceedings pursuant to the Act would be a permanent stay, which is equivalent to a dismissal. For the following reasons, the McIntires contend this decision was in error.

A. The Act Does Not Authorize Dismissal

No provision of the Right to Cure Act authorizes dismissal of a lawsuit for failure to comply with the Act. *See* S.C. Code Ann. § 40-59-810 *et seq*. Rather, Section 40-59-830 of the Act, entitled "Stay of the action upon non-compliance with article," states: "If the claimant files an action in court before first complying with the requirements of this article, 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." S.C. Code Ann. § 40-59-830.

Nor is there any prior reported court decision in this state authorizing dismissal of a suit for failure to comply with the Act.

B. Compliance With the Act Is Not Impossible

The McIntires dispute the trial court's finding that compliance has been rendered impossible.

i. The Right to "Cure" Under the Act Includes Right to "Remedy" or "Settle" Claims

The term "cure" is not defined in the Right to Cure Act. However, the language of the Act evidences legislative intent that "cure" not be limited to meaning "repair." Section 40-59-850 of the Act notes that a contractor may elect to "offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850. Thus, the Act contemplates that a contractor can "cure" the defect by settling the claim. That option remains available to Seaquest.

ii. The Term "Inspect" is Not Defined in the Act

Section 40-59-850 of the Act also gives contractors the right to "inspect" the defect. The term "inspect" is not defined in the Act either, but nothing in the Act functions to limit the term to meaning a physical inspection of the defect. The defects discovered in the McIntire home were well documented and photographed; these records are more than sufficient to allow Seaquest to determine whether it wishes to deny or settle the claim. Thus, Seaquest has not been denied the right to inspect.

C. Seaquest Is Not Prejudiced by Any Non-Compliance with the Act

As noted by the South Carolina Supreme Court, "the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010). Because the McIntires would not be required to accept any offer by Seaquest to repair the defective work at their home, something a homeowner who has suffered from a contractor's negligence is unlikely to do anyway, Seaquest cannot demonstrate prejudice from any failure to comply with the Act.

D. Public Policy Does Not Support the Trial Court's Interpretation of the Act

Under the trial court's interpretation of the Right to Cure Act, a homeowner would be powerless to prevent a contractor that has performed grossly substandard work from returning to perform more work on the residence. Rather, the homeowner would be forced to give the negligent contractor a right to repair the damage. The contractor may negligently damage

another part of the dwelling while trying repair the original defect, and the homeowner may not discover the new damage for years. Would the homeowner then be forced again to give the contractor an opportunity to repair the new damage?

The trial court's decision implies that contractors have an inviolable right to physically repair any defects in their work (and presumably to also remediate consequential damage stemming from the defective work), and the homeowner has no right to hire a different, more competent contractor repair the defective work. Such an interpretation is inconsistent with public policy.

CONCLUSION

The trial Court went far beyond its authority to determine arbitrability, decided matters reserved for the arbitrator, and—most surprisingly—also decided issues of waiver, statute of limitations, and notice under the Right to Cure Act without any supporting documentation. Not one exhibit was introduced. The record was devoid of support for finding that the statute of limitations had run, that no notice had been sent of a right to cure, or that the McIntires engaged in discovery.

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to arbitrate the dispute.

Respectfully submitted,

January 8, 2018

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2016-CP-10-01833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire,

Appellants,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

Defendants,

Of whom Seaquest Development Company, Inc., is the

Respondent.

FINAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 4

I. The trial court did not err in denying the McIntires' motion to compel arbitration and granting Seaquest's competing motion; it properly dismissed the case on the grounds that the McIntires had not only filed the suit without first complying with the requirements of the Right to Cure Act (thus requiring, per the Act's mandatory language, the court to stay it until they had complied) but also, by their own actions, had foreclosed even the possibility of compliance (thus foreclosing even the possibility that the Act's required stay could ever be lifted, i.e., requiring that the required stay be permanent, as a practical matter, a dismissal). 4

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. **In this residential construction defect case (brought by homeowners the McIntires[1] against general contractor Seaquest[2]), did the trial court err in denying the McIntires' motion to stay the case (their own case) and compel their own claims to arbitration and granting Seaquest's competing motion to dismiss pursuant to the Right to Cure Act,[3] the trial court dismissing the case on the grounds that the McIntires had not only filed the suit without first complying with the requirements of the Act (thus requiring, per the Act's mandatory language, the court to stay it until they had complied) but also, by their own actions, had foreclosed even the possibility of compliance (thus foreclosing even the possibility that the Act's required stay could ever be lifted, i.e., requiring that the required stay be permanent, as a practical matter, a dismissal)?**

COUNTER-STATEMENT OF THE CASE

In 2007, the McIntires entered into a contract with Seaquest, a general contractor, for the construction of a home in Mount Pleasant. (*See generally* R. pp. 38-59.) A certificate of occupancy was issued for the completed project in September of 2008. (Supp. R. p. 11.)

On April 8, 2016, the McIntires commenced this action against Seaquest (as well as a number of subcontractors and materials suppliers, none of whom,

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[1] The "McIntires" are Plaintiffs/Appellants Andrew and Kimberly McIntire.

[2] "Seaquest" is Defendant/Respondent Seaquest Development Company, Inc.

[3] 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.

however, were made respondents to this appeal) for damages caused by alleged defects relating to their home's construction. (*See generally* R. pp. 19-29.)

Seaquest timely answered and also moved for the case to be dismissed or, alternatively, stayed because of the McIntires' failure to comply with the Right to Cure Act, contending that the McIntires had not served it with the written notice of claim required by § 40-59-840,[4] in turn denying its accompanying rights under the Act to request clarification of the alleged defects (pursuant to § 40-59-840), to access and inspect the alleged defects (pursuant to § 40-59-850), and to make an offer to cure or settle (also pursuant to § 40-59-850). (*See generally* R. pp. 31-33; Supp. R. pp. 69-74.) Pointing to the mandatory stay language in § 40-59-830 (providing, "If the claimant files an action in court before first complying with the requirements of this article, 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)), Seaquest argued that the trial court was required to stay the action unless and until the McIntires complied with the Act and, indeed, that it was no longer possible form them to comply because they had already remodeled and repaired their home. (Supp. R. p. 73.)

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[4] The McIntires concede that they did not serve Seaquest with a written notice of claim. (R. pp. 79:13-80:8.)

The McIntires then followed Seaquest's motion with one of their own, moving to stay the case and compel arbitration, contending arbitration was "contractually required by their Agreement" with Seaquest. (*See generally* R. pp. 36-59.) They also made a related motion for a protective order, taking the position that, because the matter was subject to arbitration (as claimed in their pending motion to compel arbitration), they should not have to respond to the requests for admissions that Seaquest had served on them. (*See generally* R. pp. 60-63.)[5]

The trial court heard the motions on October 13, 2016, the Honorable Jean Hoefer Toal presiding,[6] and, at or about that time, received various legal memoranda from the parties. (*See generally* Supp. R. pp. 2-74.)

On January 4, 2017, the presiding judge's law clerk emailed all counsel announcing the trial court's ruling on the motions—the McIntires' motion to compel arbitration was denied, Seaquest's motion to dismiss was granted on account of the McIntires' noncompliance with the Right to Cure Act, and the McIntires' motion for a protective order (as well as the other motions, irrelevant to this appeal, that had been made by other defendants) was moot in light of the

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[5] Seaquest notes that the McIntires never actually responded to its requests for admissions. Though not necessary to the decision of this appeal, Seaquest's counsel asks that the Court consider taking this opportunity to provide guidance to the bench and bar by advising whether the McIntires' mere making of their motion for a protective order stayed their obligation to respond to Seaquest's requests for admissions.

[6] (*See generally* R. pp. 64-116.)

case's dismissal—asking Seaquest's counsel to submit a proposed order to that effect. (R. pp. 117-121.) As instructed, Seaquest's counsel submitted a proposed order to the trial court on January 13, 2017. (R. pp. 122-139.) Thereafter, on January 20, 2017, the McIntires' counsel wrote the trial court raising objections to the proposed order. (R. pp. 154-157.) Ultimately, the trial court's order was filed/entered on May 1, 2017. (*See generally* R. pp. 1-14; Supp. R. p. 1.)

Noticed May 30, 2017, this appeal follows.

ARGUMENT

I. The trial court did not err in denying the McIntires' motion to compel arbitration and granting Seaquest's competing motion; it properly dismissed the case on the grounds that the McIntires had not only filed the suit without first complying with the requirements of the Right to Cure Act (thus requiring, per the Act's mandatory language, the court to stay it until they had complied) but also, by their own actions, had foreclosed even the possibility of compliance (thus foreclosing even the possibility that the Act's required stay could ever be lifted, i.e., requiring that the required stay be permanent, as a practical matter, a dismissal).

First off, regarding whether the McIntires did, or possibly could, comply with the Right to Cure Act—they did not and cannot. As noted above, the McIntires concede that they did not serve Seaquest with a written notice of claim,[7] without question a failure to comply with the Act mandating a stay "until" there has been compliance. § 40-59-840(A) ("In an action brought against a contractor

[7] (R. pp. 79:13-80:8.)

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.") (emphasis added); § 40-59-830 ("If the claimant files an action in court before first complying with the requirements of this article, 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)). Moreover, by arguing, as the McIntires do to this Court, that future compliance with the Act is not impossible,[8] they necessarily concede that they have not yet complied with it.

Regarding the possibility of future compliance, by necessary implication, the very substance of the McIntires' arguments against impossibility is itself proof positive of impossibility. The McIntires only raise questions of statutory construction (none of which, it should be noted, were properly raised to and ruled on below to preserve them for review in any event (*see generally* R. pp. 3-14, 155-157)[9]), contending that, under the Act, "cure" is not limited to "repair" and that Seaquest could still "'cure' the defect by settling the claim" and that the right to "inspect" does not necessarily mean "a physical inspection of the defect," such that providing a contractor with photos the claimant had taken could suffice. (Apps'

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[8] (*See* Apps' Br. pp. 10-11.)

[9] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

Br. p. 11.) Of course, these arguments necessarily concede that there is, in fact, nothing left to offer to "repair," nothing physically to "inspect," thus confirming the impossibility of compliance because, beyond their implicit factual concessions, the arguments are unavailing on the merits, too.

The Act expressly grants a contractor "thirty days from service of the notice [of claim]" not just to offer to settle but "to inspect" and to offer "to remedy" and, further, requires the claimant to "allow inspection of *the* construction defect at an agreeable time to both parties" and to "give the contractor . . . reasonable *access to the dwelling for inspection* . . . ." § 40-59-850(A) (emphasis added). The McIntires' statutory-construction arguments are clearly untenable in the face of this clear statutory language.

These statutory-construction arguments also cut against the McIntires' other arguments about a lack of prejudice to Seaquest[10] and the trial court's construction of the Act being contrary to public policy[11]—neither of which, it should be noted, is preserved for review in any event, having not been properly raised and ruled on below. (S*ee generally* R. pp. 3-14, 155-157); *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80. As the statutory-construction arguments highlight, where, as here, a claimant repairs the alleged defects and then seeks to recover the cost of repairs

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[10] (*See* Apps' Br. p. 11.)

[11] (*See* Apps' Br. p. 12.)

from a contractor, not only has the contractor been denied the right to make an offer to repair but the contractor is also, in regard to attempting a resolution with a claimant (not to mention actually defending against the claim), clearly placed at a disadvantage by being denied the right to actually access and inspect the alleged defects and, instead, having to rely solely on whatever photographs (potentially some or all of them of the self-serving variety) the claimant decided to take. Noncompliance with the Act necessarily prejudices a contractor, like Seaquest, by denying its rights under the Act, and at the same time, thwarts the policy objectives that prompted the legislature to pass the Act to begin with. The Act's only teeth are in the form of the condition precedent it requires to be met before an action proceeds—a fairly small bite except for where, as here, its requirements are wholly disregarded. *See* § 40-59-830 (providing that "the court *shall stay* [any] action [filed without first complying with the Act] *until* the claimant has complied with the requirements of [the Act]") (emphasis added); *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 570, 703 S.E.2d 197, 200-01 (2010) ("The circuit court also found that section 40-59-840 imposes an *absolute condition precedent* to the filing of lawsuits that qualify under the Right to Cure Act. . . . We find no error in the circuit court's analysis regarding the Right to Cure Act's notice provisions . . . .") (emphasis added). Lest it be rendered completely toothless—and claimants left

free to deny rights thereunder with impunity—the Act must be enforced according to its plain terms, as the trial court did.

Regarding the McIntires' issues/arguments about the supposedly impermissible scope of the trial court's ruling (i.e., that the court was constrained such that its sole function was to determine arbitrability and it improperly exceeded these bounds), they are not preserved for appellate review, the trial court not having ruled on them. (*See generally* R. pp. 3-14); *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80.[12]

Perhaps anticipating a preservation challenge in this regard, in their statement of the case, the McIntires note that the trial court's order of dismissal, though not filed until May 1, 2017, was in a form unchanged from the proposed

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[12] Seaquest focuses its issue/argument preservation challenge on the lack of a ruling by the trial court, believing it (the lack of such a ruling) is readily apparent, making it unnecessary to trace the subject issues/arguments farther back into the procedural past. That said, Seaquest does not concede that these issues/arguments, which the McIntires now raise on appeal, were sufficiently presented to the trial court in the first instance, *see Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (instructing that, to be preserved for review, an issue/argument must be "sufficiently specific to inform the trial court of the point being urged . . ."), nor does Seaquest concede that these issues/arguments (now raised) are sufficiently consistent with those they raised below. *See, e.g., State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 60, 777 S.E.2d 176, 190 (2015) ("Thus, even generously construing Janssen's pre-trial objection as sufficient to preserve the objection, Janssen's claim is nonetheless procedurally barred from appellate review because Janssen argues a different basis on appeal than was argued at trial.") (citing *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.")).

order Seaquest had submitted on January 13, 2017, and that the trial court had signed the order on January 17, 2017, three days before they submitted their objections to Seaquest's proposed order. But this is of no moment. To begin with, "[a]n order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, *the judge retains control of the case.*" *Upchurch v. Upchurch*, 367 S.C. 16, 23, 624 S.E.2d 643, 646 (2006) (emphasis added); *see also id.* ("[T]he effective date of an order is not when it is signed by the judge, but when it is entered by the clerk of court."). Notwithstanding the date the order was signed, the trial court had control over the case until entry of the order on May 1, 2017,[13] and, thus, had ample time to consider the McIntires' objections and, were it so inclined, to revise the order. Moreover, to the extent any issue/argument was raised to the trial court but not ruled on, it was incumbent upon the McIntires to seek a ruling thereon via a timely motion under Rule 59(e), SCRCP. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file . . . a [Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). They made no such motion.

In any event, however, the trial court did not err in this regard. "The question whether the parties have submitted a particular dispute to arbitration, i.e.,

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[13] (Supp. R. p. 1; *see also* R. pp. 1-14.)

the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). While it is true that, in this context, a "question of arbitrability" is not so broad in scope as to include "any potentially dispositive gateway question," the phrase is "applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. Compliance with the Right to Cure Act is such a question.

The question of compliance with the Right to Cure Act is not one of those mere "'procedural' questions which grow[s] out of the dispute and bear[s] on its final disposition," of the sort which are "presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (emphasis in original) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Rather, where it is applicable (and, without question, it is here), the Right to Cure Act "imposes an absolute condition precedent"[14] to even filing an "action," which is a statutorily defined term that

[14] *See Grazia*, 390 S.C. at 570, 703 S.E.2d at 200-01.

includes both lawsuits and arbitration proceedings. *See* § 40-59-820 ("'Action' means any civil lawsuit or action or *arbitration proceeding* . . . .) (emphasis added). While (in the litigation context, at least) they are not "new" substantive rights—because they are consistent with substantive discovery rights already accorded to a defendant in litigation—rights under the Right to Cure Act are implicated even *before* an "action" (be it a civil suit or arbitration proceeding) is even commenced. *Grazia*, 390 S.C. at 572-73, 703 S.E.2d at 202. And, though not expressly addressed by the *Grazia* Court (which was not presented with any issue about arbitration), its reasoning implies that, since, in the context of arbitration (as opposed to litigation), there are no existing substantive discovery rights, the Right to Cure Act does, in fact, create new substantive rights. Operation of the Right to Cure Act is a proper "question of arbitration" for *judicial* determination—which the trial court properly determined here.

Also, it should be remembered that it was the McIntires themselves who commenced this *court* case before moving to stay it (*their own* suit) and compel arbitration of *their own* claims. This sequence of events alone supports the trial court's finding of waiver. Indeed, the McIntires' motion to compel arbitration itself bolsters this conclusion. Even though they brought this lawsuit, they moved to compel on the basis that their contract with Seaquest made arbitration *mandatory*. (R. p. 36 ("The [McIntires] . . . hereby move this Honorable Court for

an order staying this matter and compelling mediation and, if necessary, arbitration by the parties to proceed *as contractually required* by their Agreement.") (emphasis added); R. p. 37, ¶ 2 ("The Agreement contains a provision *requiring* submission of any claim arising out of or related to the agreement to mediation.") (emphasis added); R. p. 37, ¶ 3 ("[A]ny claim not resolved by mediation *shall* be resolved by binding arbitration.") (emphasis added).) Waiver is the voluntarily and intentional relinquishment of a known right. *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). Clearly, the McIntires knew about the contract and its arbitration provision and, nonetheless, voluntarily invoked the machinery of the court by filing this suit—and, for that matter, by thereafter asking the court for protection from responding to discovery served on them in the litigation they had commenced—indeed, themselves breaching the very contract they would later say *mandated* arbitration.

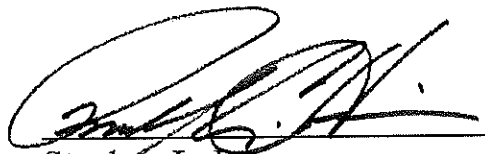
CONCLUSION

For the foregoing reasons, as well as upon any other sustaining ground appearing in the record (including, without limitation, the reasons set forth in the appealed order itself), Seaquest asks this Honorable Court to affirm the result below.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)
Edward D. Buckley, Jr. (SC Bar No. 994)
Jason A. Daigle (SC Bar No. 73308)
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Post Office Box 993
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Counsel for Respondent

Charleston, South Carolina

Dated: 1/8/18

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2016-CP-10-01833
Appellate Case No. 2017-001270

Andrew and Kimberly McIntire,

Appellants,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC,

Defendants,

Of whom Seaquest Development Company, Inc., is the

Respondent.

RESPONDENT'S CERTIFICATION FOR FINAL BRIEF

YOUNG CLEMENT RIVERS, LLP
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Edward D. Buckley, Jr. (SC Bar No. 994)
Jason A. Daigle (SC Bar No. 73308)
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Counsel for Respondent

I, Russell G. Hines, do hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

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Dated: 1/5/18

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
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Case No. 2016-CP-10-01833
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Defendants,

Of whom Seaquest Development Company, Inc., is the

Respondent.

PROOF OF SERVICE

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Counsel for Respondent

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the **FINAL BRIEF OF RESPONDENT** and **RESPONDENT'S CERTIFICATION FOR FINAL BRIEF** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on January 8, 2018, properly posted for delivery to the following addressees:

ANDREW K. EPTING, JR., LLC
Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
46A State Street
Charleston, South Carolina 29401

Counsel for Appellants

Russell G. Hines

Charleston, South Carolina

Dated: 1/8/18

Andy Lacour

From:	Andy Lacour
Sent:	February 19, 2021 10:50 AM
To:	'Young, Roger Law Clerk (Michael Monastra)'; Jaan Rannik
Cc:	sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross; Brent M. Boyd; mandi@chandlerdudgeon.com; Sherry Santana; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins; Daigle, Jason; ebuckley@ycrlaw.com; Andrew K. Epting; Barbara A. Wilson; kmixson@ycrlaw.com; Lisa E. Chapman; John Rogers; Chad Graham; Regina Ray
Subject:	RE: 2016CP101833: McIntire v. Seaquest

Judge Young,

Now that we have a motion pending, I, for one, plan to research the matter further and file a Return to the Motion. With respect, to both you and Justice Toal. I do not think the case referenced in your email addresses the precise issues raised here. My research may prove me wrong.

I cannot speak for any other defendant subcontractor, but the courtesy of an actual hearing on the matters raised by the Motion and the anticipated Return, in order to create a proper record, would be appreciated.

Thanks!

Andy

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From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: February 19, 2021 9:29 AM
To: Jaan Rannik <jgr@epting-law.com>

Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross <agg@epting-law.com>; Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; Sherry Santana <SSantana@wardfirm.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: 2016CP101833: McIntire v. Seaquest

All,

Per our status conference of 2/16/21, I contacted Jean Toal about her thoughts on the status of the claims against the subcontractors. She graciously did a little research and sent me the attached South Carolina Supreme Court case of Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995) which contains the following language and supporting citation: "Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered." Brown v. Brown, 286 S.C. 56, 331 S.E.2d 793 (Ct.App.1985)." Applying that principle to this case, after the Court of Appeal's decision, her order became of no effect and is no longer in existence.

In my opinion, that leaves any claims against the subcontractors alive. While the case of the owner versus the general contractor is being arbitrated, there is nothing that prevents discovery in the remaining case except, of course, time and money. My suggestion would be that the arbitration go forward, and the subcontractor claims be stayed, unless there is a need for discovery incidental to the arbitration. In that event, I suppose it would make sense to have everyone participate in it so that it doesn't have to be re-done later. By the same token, I would expect there would be some benefit to have the subcontractors informally "participate" in some fashion in the arbitration process in hopes that the bigger the pot of money, the more likely the case might be resolved.

Please let me know if this informal "ruling" needs to be reduced to writing for appellate purposes, or if you can think of anything else that I could do to assist you in moving this matter along towards resolution.

Judge Roger M. Young, Sr.

From: Young, Roger Law Clerk (Michael Monastra)
Sent: Wednesday, February 17, 2021 9:41 AM
To: 'Jaan Rannik' <jgr@epting-law.com>
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Subject: RE: 2016CP101833: McIntire v. Seaquest

Thank you, Mr. Rannik.

Michael A. Monastra
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100 Broad Street

Charleston, South Carolina 29401
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Email: RYounglc@sccourts.org

From: Jaan Rannik <jgr@epting-law.com>
Sent: Tuesday, February 16, 2021 4:54 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross <agg@epting-law.com>; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; Sherry Santana <SSantana@wardfirm.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
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Dear Mr. Monastra,

Attached, please find a courtesy copy of the joint motion for clarification filed this afternoon with Judge Young's guidance.

With thanks and best regards,
Jaan

Jaan G. Rannik, Esq.
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Sent: Tuesday, February 16, 2021 08:17
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Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>;

ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: 2016CP101833: McIntire v. Seaquest

Good Morning,

The videoconference hearing in the above referenced matter is scheduled for Tuesday, February 16, 2021 at 2:30 pm via WebEx Events virtual courtroom. Click the link listed below to access the hearing. You will be prompted to enter your first name, last name and email address. Once the information is entered, the microphone will be muted and you will enter the videoconference. If you would like to appear on screen and/or participate, click the Participants icon at the bottom of your screen. Then click the hand icon at the bottom right to "Raise" or "Lower" your hand. This will notify the court you wish to appear on screen. The courtroom will be open thirty minutes before the hearing. If you have questions and/or issues accessing the virtual courtroom please contact Cisco WebEx support: 1-866-229-3239.

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From: Sherry Santana <SSantana@wardfirm.com>
Sent: Wednesday, February 10, 2021 10:40 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; jgr@epting-law.com; agg@epting-law.com; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; ake@epting-law.com; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest

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Mr. Monastra,

Attorney Chad Graham of our firm will be attending the WebEx hearing on February 16th, at 2:30 p.m. on behalf of our client, Southcoast Exteriors.

I have copied Mr. Graham and his paralegal, Regina, on this email.

Thank you,

Sherry

Sherry Santana
Paralegal to John E. Rogers, II
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In light of the April 3, 2020 Order of the South Carolina Supreme Court (Order 2020-04-03-01), we will be serving discovery and motions via email only. If you would like a hard copy, please let us know.

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From: John Rogers <JRogers@wardfirm.com>
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To: Kirby Parham <kparham@wardfirm.com>; Sherry Santana <SSantana@wardfirm.com>
Subject: FW: 2016CP101833: McIntire v. Seaquest

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Subject: 2016CP101833: McIntire v. Seaquest

Good Morning,

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From: John Rogers <JRogers@wardfirm.com>
Sent: Tuesday, February 9, 2021 11:28 AM
To: Suzanne Ulmer <sulmer@kernodlelaw.com>; Shelley Montague <smontague@gwblawfirm.com>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
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Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

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Best,
John

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Sent: Tuesday, February 9, 2021 9:13 AM
To: Shelley Montague <smontague@gwblawfirm.com>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

I am available for Carolina Pest.

Thank you,
Suzanne Ulmer

Suzanne C. Ulmer, Esquire
Kernodle Coleman
914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
(843) 795-7800
(843) 795-3032 fax

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From: Shelley Montague <smontague@gwblawfirm.com>
Sent: Monday, February 8, 2021 7:34 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

We are available Feb. 16th at 2:30.

Thank you,
Shelley Montague

GALLIVAN WHITE BOYD
Complex experience for complex matters

Shelley Sunderman Montague
Partner
smontague@GWBlawfirm.com

Gallivan, White & Boyd P.A.
Office 1201 Main Street | Suite 1200 | Columbia SC 29201
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From: Young, Roger Law Clerk (Michael Monastra) [mailto:ryounglc@sccourts.org]
Sent: Monday, February 8, 2021 4:23 PM
To: Jaan Rannik; Angela Gross
Cc: Andy Lacour; Brent Boyd; Amanda K. Dudgeon; Shelley Montague; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin; James Elliott; Danielle.payne@mgclaw.com; John Rogers; Preston Dawkins; 'SULMER@KERNODLELAW.COM'; Daigle, Jason; Buckley, Edward D. (Ed); Andrew K. Epting; Barbara A. Wilson
Subject: 2016CP101833: McIntire v. Seaquest

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Thank you all for your response.

I am providing another date, to allow all parties an opportunity to attend the virtual status conference. Judge Young is also available for a status conference via WebEx Tuesday, February 16, 2021 at 2:30 pm. Which date do the parties prefer?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Jaan Rannik <jgr@epting-law.com>
Sent: Friday, February 5, 2021 11:03 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Lisa E. Chapman <LChapman@charlestoncounty.org>
Subject: RE: 2016CP101833: McIntire v. Seaquest

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Mr. Monastra,

That time works well for Mr. Epting and me. Thank you kindly!
Jaan

Jaan G. Rannik, Esq.
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
jgr@epting-law.com

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From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Thursday, February 4, 2021 14:30
To: Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com;

sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Jaan Rannik <jgr@epting-law.com>; Lisa E. Chapman <LChapman@charlestoncounty.org>
Subject: 2016CP101833: McIntire v. Seaquest

Good Afternoon Mr. Epting,

Judge Young is available for a status conference via WebEx Wednesday, February 10, 2021 at 2:00 pm. Does that work for all parties?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Angela Gross <agg@epting-law.com>
Sent: Thursday, February 4, 2021 2:23 PM
To: Young, Roger Secretary (Robyn R. Hills) <ryoungsc@sccourts.org>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Jaan Rannik <jgr@epting-law.com>
Subject: McIntire v. Seaquest / Case No. 2016-CP-10-1833

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Dear Judge Young,

Brief story, I represent the Plaintiffs, homeowners. I moved for arbitration pursuant to the contract with the general contractor. Having sued the subcontractors with whom we did not have a contract and therefore no arbitration provision, we moved to stay this part of the case. Judge Toal dismissed the entire case; the appellate court agreed with our position and reversed her. There seems to be some difference of opinion as to the status of the claims against the subcontractors.

I am commencing with the arbitration against the general contractor. There is no dispute with this by the general contractor. Several subcontractors have voiced an interest in participating in the arbitration. The position of the remaining subcontractors is unclear. Jason Daigle and Ed Buckley represent the general contractor and have had the contact with counsel for the subs and I invite them to respond. Note, I have copied counsel for the subs on this email. Perhaps a status conference would be helpful. I would be happy to serve as the catalyst to arrange the conference.

I hope the new year finds you well. I just finished reading The **Splendid and the Vile** which is about the bombing of London in 1940-41 and the stewardship of the British prime minister of the health, well-being, and spirit of the British people. Ah, leadership.

With kindest regards,

Drew

Andrew K. Epting, Jr., Esquire
EPTING & RANNIK, LLC
46A State Street
Charleston, SC 29401
Telephone: (843) 377-1871
Facsimile: (843) 377-1310
ake@epting-law.com

cc: Jason Daigle, Esq. (Attorney for Seaquest Development Company, Inc.)
Ed Buckley, Esq. (Attorney for Seaquest Development Company, Inc.)
Andy Lacour, Esq. ALacour@clawsonandstaubes.com (Attorney for Lowcountry Fireplaces, Inc.)
Brent Boyd, Esq. (bboyd@murphygrantland.com); Attorney for New South Construction Supply LLC
Amanda K. Dudgeon, Esq. (mandi@chandlerdudgeon.com); Attorneys for Sealtight of South Carolina, LLC
Shelley Montague, Esq. smontague@gwblawfirm.com (Attorney for Benzenberg Custom Cabinets, Inc.)
Summers Clarke, Esq. sclarke@barnwell-whaley.com (Attorneys for Foam Insulation Co., Inc.)
Shanna M. Stephens, Esq. sstephens@arslawsc.com (Attorneys for Coastal Plumbing & Gas LLC)
Trey Watkins, Esq. Trey.Watkins@walltempleton.com (Attorney for Jerry Comer d/b/a Jerrys Tile & Marble LLC)
Erin Dean, Esq. ErinDean@tgdcpa.com (Attorney for Jonathan Marshall Construction)
James Elliott, Esq. JElliott@richardsonplowden.com> (Attorney for New South Construction Supply LLC)
Danielle Payne, Esq. Danielle.payne@mgclaw.com (Attorney for Red Bay Constructors Corp.
John Rogers <JRogers@wardfirm.com (Attorneys for Southcoast Exteriors Inc)
Preston Dawkins, Esq. pbd@aikenbridges.com (Attorneys for Coastal Plumbing & Gas LLC)
Suzanne C. Ulmer, Esq. SULMER@KERNODLELAW.COM (Attorney for Carolina Pest Solutions Inc.)

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Angela Gross

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Friday, February 19, 2021 9:29 AM
To: Jaan Rannik
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross; alacour@clawsonandstaubes.com; Brent M. Boyd; mandi@chandlerdudgeon.com; Sherry Santana; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins; Daigle, Jason; ebuckley@ycrlaw.com; Andrew K. Epting; Barbara A. Wilson; kmixson@ycrlaw.com; Lisa E. Chapman; John Rogers; Chad Graham; Regina Ray
Subject: 2016CP101833: McIntire v. Seaquest
Attachments: We sent you safe versions of your files; Moore v North American Van Lines.pdf

Mimecast Attachment Protection has deemed this file to be safe, but always exercise caution when opening files.

All,

Per our status conference of 2/16/21, I contacted Jean Toal about her thoughts on the status of the claims against the subcontractors. She graciously did a little research and sent me the attached South Carolina Supreme Court case of Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995) which contains the following language and supporting citation: "Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered." Brown v. Brown, 286 S.C. 56, 331 S.E.2d 793 (Ct.App.1985)." Applying that principle to this case, after the Court of Appeal's decision, her order became of no effect and is no longer in existence.

In my opinion, that leaves any claims against the subcontractors alive. While the case of the owner versus the general contractor is being arbitrated, there is nothing that prevents discovery in the remaining case except, of course, time and money. My suggestion would be that the arbitration go forward, and the subcontractor claims be stayed, unless there is a need for discovery incidental to the arbitration. In that event, I suppose it would make sense to have everyone participate in it so that it doesn't have to be re-done later. By the same token, I would expect there would be some benefit to have the subcontractors informally "participate" in some fashion in the arbitration process in hopes that the bigger the pot of money, the more likely the case might be resolved.

Please let me know if this informal "ruling" needs to be reduced to writing for appellate purposes, or if you can think of anything else that I could do to assist you in moving this matter along towards resolution.

Judge Roger M. Young, Sr.

From: Young, Roger Law Clerk (Michael Monastra)
Sent: Wednesday, February 17, 2021 9:41 AM
To: 'Jaan Rannik' <jgr@epting-law.com>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross <agg@epting-law.com>; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; Sherry Santana <SSantana@wardfirm.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John

Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest

Thank you, Mr. Rannik.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Jaan Rannik <jgr@epting-law.com>
Sent: Tuesday, February 16, 2021 4:54 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Angela Gross <agg@epting-law.com>; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; Sherry Santana <SSantana@wardfirm.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest

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Dear Mr. Monastra,

Attached, please find a courtesy copy of the joint motion for clarification filed this afternoon with Judge Young's guidance.

With thanks and best regards,
Jaan

Jaan G. Rannik, Esq.
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
jgr@epting-law.com

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From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Tuesday, February 16, 2021 08:17
To: Sherry Santana <SSantana@wardfirm.com>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: 2016CP101833: McIntire v. Seaquest

Good Morning,

The videoconference hearing in the above referenced matter is scheduled for Tuesday, February 16, 2021 at 2:30 pm via WebEx Events virtual courtroom. Click the link listed below to access the hearing. You will be prompted to enter your first name, last name and email address. Once the information is entered, the microphone will be muted and you will enter the videoconference. If you would like to appear on screen and/or participate, click the Participants icon at the bottom of your screen. Then click the hand icon at the bottom right to "Raise" or "Lower" your hand. This will notify the court you wish to appear on screen. The courtroom will be open thirty minutes before the hearing. If you have questions and/or issues accessing the virtual courtroom please contact Cisco WebEx support: 1-866-229-3239.

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The link may be found on the court's website https://sccourts.org/calendar/.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Sherry Santana <SSantana@wardfirm.com>
Sent: Wednesday, February 10, 2021 10:40 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: sulmer@kernodlelaw.com; smontague@gwblawfirm.com; jgr@epting-law.com; agg@epting-law.com; alacour@clawsonandstaubes.com; Brent M. Boyd <bboyd@murphygrantland.com>; mandi@chandlerdudgeon.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; JElliott@RichardsonPlowden.com; danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; Daigle, Jason <jdaigle@ycrlaw.com>; ebuckley@ycrlaw.com; ake@epting-law.com; Barbara A. Wilson <bawilson@murphygrantland.com>; kmixson@ycrlaw.com; Lisa E. Chapman <lchapman@charlestoncounty.org>; John Rogers <JRogers@wardfirm.com>; Chad Graham <CGraham@wardfirm.com>; Regina Ray <RRay@wardfirm.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest

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-M#K#FGS#NE#GD#%OQH#Ã#ª—#B QCDQ#NE#GD#/NTSG# @QNK#M@#/TOQDL D# NTQS#Ü3 QCDQ#ª—ª—²—Ø²—Ł²—ÆŽ
V D#V HK#AD#RDQUH#MF#CHRBNUDQX#@MC#L NSHNMR#IK@#DL @H#NMKXG##E#KNT#V NTKC#KUD#@#G@QC#BNOXÃ#OKO@RD#
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From: John Rogers <JRogers@wardfirm.com>
Sent: Wednesday, February 10, 2021 9:40 AM
To: Kirby Parham <kparham@wardfirm.com>; Sherry Santana <SSantana@wardfirm.com>
Subject: FW: 2016CP101833: McIntire v. Seaquest

John E. Rogers, II
The Ward Law Firm, P.A.
233 South Pine Street
Spartanburg, SC 29302
(864) 591-2366
(864) 585-3090 (fax)

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Sent: Wednesday, February 10, 2021 9:38 AM
To: John Rogers <JRogers@wardfirm.com>; Suzanne Ulmer <sulmer@kernodlelaw.com>; Shelley Montague <smontague@gwblawfirm.com>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>; Mixson, Kathryn <kmixson@ycrlaw.com>; Lisa E. Chapman <LChapman@charlestoncounty.org>
Subject: 2016CP101833: McIntire v. Seaquest

Good Morning,

The videoconference hearing in the above referenced matter is scheduled for Tuesday, February 16, 2021 at 2:30 pm via WebEx Events virtual courtroom. Click the link listed below to access the hearing. You will be prompted to enter your first name, last name and email address. Once the information is entered, the microphone will be muted and you will enter the videoconference. If you would like to appear on screen and/or participate, click the Participants icon at the bottom of your screen. Then click the hand icon at the bottom right to "Raise" or "Lower" your hand. This will notify the court you wish to appear on screen. The courtroom will be open thirty minutes before the hearing. If you have questions and/or issues accessing the virtual courtroom please contact Cisco WebEx support: 1-866-229-3239.

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SCJB Virtual Court User Guides: Attorney Guide **and** General Public Guide

The link may be found on the court's website https://sccourts.org/calendar/.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: John Rogers <JRogers@wardfirm.com>
Sent: Tuesday, February 9, 2021 11:28 AM
To: Suzanne Ulmer <sulmer@kernodlelaw.com>; Shelley Montague <smontague@gwblawfirm.com>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

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This date works for us.

Best,
John

John E. Rogers, II
The Ward Law Firm, P.A.
233 South Pine Street
Spartanburg, SC 29302
(864) 591-2366
(864) 585-3090 (fax)

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From: Suzanne Ulmer <sulmer@kernodlelaw.com>
Sent: Tuesday, February 9, 2021 9:13 AM
To: Shelley Montague <smontague@gwblawfirm.com>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

I am available for Carolina Pest.

Thank you,
Suzanne Ulmer

Suzanne C. Ulmer, Esquire
Kernodle Coleman
914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
(843) 795-7800
(843) 795-3032 fax

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From: Shelley Montague <smontague@gwblawfirm.com>
Sent: Monday, February 8, 2021 7:34 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent M. Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara A. Wilson <bawilson@murphygrantland.com>
Subject: RE: 2016CP101833: McIntire v. Seaquest [GWB-IMANMAIN.FID44990]

We are available Feb. 16th at 2:30.

Thank you,
Shelley Montague



Shelley Sunderman Montague
Partner
smontague@GWBlawfirm.com

Gallivan, White & Boyd P.A.
Office 1201 Main Street | Suite 1200 | Columbia SC 29201
803 724 1818 Direct | 803 779 1833 Main | 803 779 1767 Fax
Mailing Post Office Box 7368 | Columbia SC 29202

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From: Young, Roger Law Clerk (Michael Monastra) [mailto:ryounglc@sccourts.org]
Sent: Monday, February 8, 2021 4:23 PM
To: Jaan Rannik; Angela Gross

Cc: Andy Lacour; Brent Boyd; Amanda K. Dudgeon; Shelley Montague; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin; James Elliott; Danielle.payne@mgclaw.com; John Rogers; Preston Dawkins; 'SULMER@KERNODLELAW.COM'; Daigle, Jason; Buckley, Edward D. (Ed); Andrew K. Epting; Barbara A. Wilson
Subject: 2016CP101833: McIntire v. Seaquest

Warning – This email originated outside the GWB email system!

Thank you all for your response.

I am providing another date, to allow all parties an opportunity to attend the virtual status conference. Judge Young is also available for a status conference via WebEx Tuesday, February 16, 2021 at 2:30 pm. Which date do the parties prefer?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Jaan Rannik <jgr@epting-law.com>
Sent: Friday, February 5, 2021 11:03 AM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Lisa E. Chapman <LChapman@charlestoncounty.org>
Subject: RE: 2016CP101833: McIntire v. Seaquest

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Mr. Monastra,

That time works well for Mr. Epting and me. Thank you kindly!
Jaan

Jaan G. Rannik, Esq.
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
jgr@epting-law.com

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From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Thursday, February 4, 2021 14:30
To: Angela Gross <agg@epting-law.com>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Jaan Rannik <jgr@epting-law.com>; Lisa E. Chapman <LChapman@charlestoncounty.org>
Subject: 2016CP101833: McIntire v. Seaquest

Good Afternoon Mr. Epting,

Judge Young is available for a status conference via WebEx Wednesday, February 10, 2021 at 2:00 pm. Does that work for all parties?

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: Angela Gross <agg@epting-law.com>
Sent: Thursday, February 4, 2021 2:23 PM
To: Young, Roger Secretary (Robyn R. Hills) <ryoungsc@sccourts.org>; Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Cc: Andy Lacour <ALacour@clawsonandstaubes.com>; Brent Boyd <bboyd@murphygrantland.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; smontague@gwblawfirm.com; sclarke@barnwell-whaley.com; sstephens@arslawsc.com; Trey.Watkins@walltempleton.com; Dean, Erin <erindean@tgdcpa.com>; James Elliott <JElliott@richardsonplowden.com>; Danielle.payne@mgclaw.com; John Rogers <JRogers@wardfirm.com>; Preston Dawkins <pbd@aikenbridges.com>; 'SULMER@KERNODLELAW.COM'; Daigle, Jason <jdaigle@ycrlaw.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Jaan Rannik <jgr@epting-law.com>
Subject: McIntire v. Seaquest / Case No. 2016-CP-10-1833

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Dear Judge Young,

Brief story, I represent the Plaintiffs, homeowners. I moved for arbitration pursuant to the contract with the general contractor. Having sued the subcontractors with whom we did not have a contract and therefore no arbitration provision, we moved to stay this part of the case. Judge Toal dismissed the entire case; the appellate

court agreed with our position and reversed her. There seems to be some difference of opinion as to the status of the claims against the subcontractors.

I am commencing with the arbitration against the general contractor. There is no dispute with this by the general contractor. Several subcontractors have voiced an interest in participating in the arbitration. The position of the remaining subcontractors is unclear. Jason Daigle and Ed Buckley represent the general contractor and have had the contact with counsel for the subs and I invite them to respond. Note, I have copied counsel for the subs on this email. Perhaps a status conference would be helpful. I would be happy to serve as the catalyst to arrange the conference.

I hope the new year finds you well. I just finished reading The **Splendid and the Vile** which is about the bombing of London in 1940-41 and the stewardship of the British prime minister of the health, well-being, and spirit of the British people. Ah, leadership.

With kindest regards,

Drew

Andrew K. Epting, Jr., Esquire
EPTING & RANNIK, LLC
46A State Street
Charleston, SC 29401
Telephone: (843) 377-1871
Facsimile: (843) 377-1310
ake@epting-law.com

cc: Jason Daigle, Esq. (Attorney for Seaquest Development Company, Inc.)
Ed Buckley, Esq. (Attorney for Seaquest Development Company, Inc.)
Andy Lacour, Esq. ALacour@clawsonandstaubes.com (Attorney for Lowcountry Fireplaces, Inc.)
Brent Boyd, Esq. (bboyd@murphygrantland.com); Attorney for New South Construction Supply LLC
Amanda K. Dudgeon, Esq. (mandi@chandlerdudgeon.com); Attorneys for Sealtight of South Carolina, LLC
Shelley Montague, Esq. smontague@gwblawfirm.com (Attorney for Benzenberg Custom Cabinets, Inc.)
Summers Clarke, Esq. sclarke@barnwell-whaley.com (Attorneys for Foam Insulation Co., Inc.)
Shanna M. Stephens, Esq. sstephens@arslawsc.com (Attorneys for Coastal Plumbing & Gas LLC)
Trey Watkins, Esq. Trey.Watkins@walltempleton.com (Attorney for Jerry Comer d/b/a Jerrys Tile & Marble LLC)
Erin Dean, Esq. ErinDean@tgdcpa.com (Attorney for Jonathan Marshall Construction)
James Elliott, Esq. JElliott@richardsonplowden.com> (Attorney for New South Construction Supply LLC)
Danielle Payne, Esq. Danielle.payne@mgclaw.com (Attorney for Red Bay Constructors Corp.
John Rogers <JRogers@wardfirm.com (Attorneys for Southcoast Exteriors Inc)
Preston Dawkins, Esq. pbd@aikenbridges.com (Attorneys for Coastal Plumbing & Gas LLC)
Suzanne C. Ulmer, Esq. SULMER@KERNODLELAW.COM (Attorney for Carolina Pest Solutions Inc.)

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Angela Gross

From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Tuesday, May 4, 2021 1:36 PM
To: John Dodds; Jaan Rannik; Daigle, Jason; Sandra Schultz
Cc: Shelley S. Montague; 'Brent Boyd'; Albert A. Lacour III (alacour@clawsonandstaubes.com); Suzanne C. Ulmer; Angela Gross; Amanda K. Dudgeon; Sherry Santana; Summers Clarke; Shanna Stephens; Trey Watkins; Dean, Erin; James H. Elliott ; 'Danielle F. Payne'; 'Preston Dawkins'; Buckley, Edward D. (Ed); Andrew K. Epting; Barbara P. Wilson; Mixson, Kathryn; John Rogers; Chad M. Graham; rray@wardfirm.com; Lchapman@charlestoncounty.org; McCoy, Jennifer Law Clerk (Joseph Grooms); McCoy, Jennifer B. Secretary (Kathryn B. Stone)
Subject: 2016-CP-10-1833: McIntire v. Seaquest

Good Afternoon,

Judge Young did not realize the Clerk of Court had set this matter before Judge McCoy. Since the motion got set before Judge McCoy and Judge McCoy has it under advisement, Judge Young does not have jurisdiction so he will withdraw his proposed ruling. Judge McCoy will rule on it in due course.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.
100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org

From: John Dodds <John.Dodds@WallTempleton.com>
Sent: Monday, May 3, 2021 2:32 PM
To: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>; Jaan Rannik <jgr@epting-law.com>; Daigle, Jason <jdaigle@ycrlaw.com>; Sandra Schultz <Sandra.Schultz@WallTempleton.com>
Cc: Shelley S. Montague <smontague@gwblawfirm.com>; 'Brent Boyd' <bboyd@murphygrantland.com>; Albert A. Lacour III (alacour@clawsonandstaubes.com) <alacour@clawsonandstaubes.com>; Suzanne C. Ulmer <sulmer@kernodlelaw.com>; Angela Gross <agg@epting-law.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; Sherry Santana <SSantana@wardfirm.com>; Summers Clarke <sclarke@barnwell-whaley.com>; Shanna Stephens <sstephens@arslawsc.com>; Trey Watkins <Trey.Watkins@WallTempleton.com>; Dean, Erin <erindean@tgdcpa.com>; James H. Elliott <JElliott@RichardsonPlowden.com>; 'Danielle F. Payne' <danielle.payne@mgclaw.com>; 'Preston Dawkins' <pbd@aikenbridges.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara P. Wilson <bawilson@murphygrantland.com>; Mixson, Kathryn <kmixson@ycrlaw.com>; John Rogers <jrogers@wardfirm.com>; Chad M. Graham <cgraham@wardfirm.com>; rray@wardfirm.com; Lchapman@charlestoncounty.org; McCoy, Jennifer Law Clerk (Joseph Grooms) <jmccoylc@sccourts.org>; McCoy, Jennifer B. Secretary (Kathryn B. Stone) <jmccoysc@sccourts.org>
Subject: RE: 2016-CP-10-1833: McIntire v. Seaquest

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Dear Michael,

In accordance with your email request, attached please find a proposed order denying Plaintiffs' and Seaquest's joint motion for clarification. Just to ensure the Court is aware, the clerk's office scheduled a hearing on the motion before Judge McCoy. Judge McCoy heard oral argument on April 22nd but has not issued a ruling. It is our understanding that Judge Young retained jurisdiction over the motion and has now issued his ruling. I have copied Judge McCoy's law clerk so that he is aware. Please do not hesitate to contact me should you need anything else.

Sincerely,
John

John J. Dodds, IV
Attorney

Telephone: (843) 329-9500
Facsimile: (843) 329-9501

Wall Templeton & Haldrup, P.A.
145 King Street, Suite 300 (29401)
Post Office Box 1200
Charleston, South Carolina 29402
www.WallTempleton.com

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From: Young, Roger Law Clerk (Michael Monastra) <ryounglc@sccourts.org>
Sent: Monday, May 3, 2021 11:54 AM
To: Jaan Rannik <jgr@epting-law.com>; Daigle, Jason <jdaigle@ycrlaw.com>; Sandra Schultz <Sandra.Schultz@WallTempleton.com>
Cc: Shelley S. Montague <smontague@gwblawfirm.com>; 'Brent Boyd' <bboyd@murphygrantland.com>; Albert A. Lacour III (alacour@clawsonandstaubes.com) <alacour@clawsonandstaubes.com>; Suzanne C. Ulmer <sulmer@kernodlelaw.com>; Angela Gross <agg@epting-law.com>; Amanda K. Dudgeon <mandi@chandlerdudgeon.com>; Sherry Santana <SSantana@wardfirm.com>; Summers Clarke <sclarke@barnwell-whaley.com>; Shanna Stephens <sstephens@arslawsc.com>; Trey Watkins <Trey.Watkins@WallTempleton.com>; John Dodds <John.Dodds@WallTempleton.com>; Dean, Erin <erindean@tgdcpa.com>; James H. Elliott <JElliott@RichardsonPlowden.com>; 'Danielle F. Payne' <danielle.payne@mgclaw.com>; 'Preston Dawkins' <pbd@aikenbridges.com>; Buckley, Edward D. (Ed) <ebuckley@ycrlaw.com>; Andrew K. Epting <ake@epting-law.com>; Barbara P. Wilson <bawilson@murphygrantland.com>; Mixson, Kathryn <kmixson@ycrlaw.com>; John Rogers <jrogers@wardfirm.com>; Chad M. Graham <cgraham@wardfirm.com>; rray@wardfirm.com; Lchapman@charlestoncounty.org
Subject: 2016-CP-10-1833: McIntire v. Seaquest

Good Morning Counsel,

Judge Young denies Plaintiffs' and Seaquest Development Company, Inc.'s Joint Motion for Clarification. Please submit a proposed order, Mr. Dodds.

Michael A. Monastra
Law Clerk to The Honorable Roger M. Young, Sr.

100 Broad Street
Charleston, South Carolina 29401
Office: (843) 958-2015
Email: RYounglc@sccourts.org
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston County
Court of Common Pleas for the Ninth Circuit

The Hon. Jennifer B. McCoy, Circuit Court Judge

Case No.: 2016-CP-10-01833

Andrew and Kimberly McIntire,…….....*APPELLANTS*,
v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Defendants, Of which Seaquest Development Company, Inc.,

Of which all except Seaquest Development Company, Inc. are.....RESPONDENTS.

NOTICE OF APPEAL

Plaintiffs Andrew and Kimberly McIntire ("the McIntires," "Appellants") appeal the Order of the Honorable Jennifer B. McCoy dated August 23, 2021 (**Exh. A**), denying a joint motion of the McIntires and Defendant Seaquest Development Company and thereby ending this matter as to the Subcontractors, all of whom are the Respondents to this Appeal. Notice of this order was received by Appellants on August 23, 2021, Appellants have requested the transcript of record.

[signature on following page]

This 20th day of September, 2021
Charleston, South Carolina

Respectfully submitted:

EPTING & RANNIK, LLC

/s/ Jaan Rannik
Jaan G. Rannik
46A State Street
Charleston, SC 29401
Phone: 843-377-1871
Fax: 843-377-1310
jgr@epting-law.com

ATTORNEYS FOR PLAINTIFFS/APPELLANTS

Respondents' counsel of record is as follows:

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Attorney for New South Construction Supply, LLC

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bboyd@murphygrantland.com
Attorney for New South Construction Supply, LLLC

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-and

Preston B. Dawkins, Jr.
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Attorneys for Coastal Plumbing & Gas, LLC

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mandi@chandlerdudgeon.com
J. Matthew Johnson
CHANDLER & DUDGEON LLC
P.O. Box 547
Charleston, SC 29402
Attorneys Sealtight of South Carolina, LLC

No counsel of record has appeared on behalf of Respondents below:

Carolina Window & Millwork, LLC
Coastal Window & Door Center of Charleston, LLC
Michigan Prestain Co.
Quality Cedar Products Inc. of Michigan
Casteen Custom Cabinets
Michael Casteen
Carolina Window & Millwork Omni Glass Industries, LLC
Architectural Products of Charleston, LLC

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1001833

Andrew Mcintire et al
PLAINTIFF(S)

Seaquest Development Company Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Plaintiffs' and Seaquest's joint motion for clarification is hereby denied. Defendants requested to submit one proposed formal order for the court's review within 10 days.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/18/2021 .

Carolina Window & Millwork LLC
Coastal Window & Door Center of Charleston LLC
Michigan Prestain Co
Quality Cedar Products Inc of Michigan
Casteen Custom Cabinets
Michael Casteen
Carolina Window & Millwork Omni Glass Industries LLC
Architectural Products of Charleston LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

ELECTRONICALLY FILED - 2021 Aug 19 9:51 AM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

Charleston Common Pleas

Case Caption:	Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al
Case Number:	2016CP1001833
Type:	Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

ELECTRONICALLY FILED - 2021 Aug 23 4:23 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1001833

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2016-CP-10-01833
ANDREW and KIMBERLY MCINTIRE, Plaintiffs, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK-OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO., INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; and NEW SOUTH CONSTRUCTION SUPPLY, LLC, Defendants.	**ORDER DENYING PLAINTIFFS' AND SEAQUEST DEVELOPMENT COMPANY, INC.'S JOINT MOTION FOR CLARIFICATION**
SEAQUEST DEVELOPMENT COMPANY, INC., Third-Party Plaintiff, v. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; and SEALTIGHT OF SOUTH CAROLINA, LLC, Third-Party Defendants.	

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This matter came before the Court upon Plaintiffs' and Seaquest Development Company, Inc.'s ("Seaquest") joint motion for clarification. For the reasons set forth below, the Court DENIES the joint motion for clarification.

Factual Background & Procedural History

Plaintiffs commenced this construction defect action against the general contractor, Seaquest, and fourteen other subcontractors (collectively, the "Subcontractor Defendants") on or about April 8, 2016. Plaintiffs' complaint contained causes of action against Seaquest and the Subcontractor Defendant for (1) negligence/gross negligence, (2) negligent misrepresentation, (3) constructive fraud, and (4) breach of the implied warranty of workmanship. Seaquest answered and asserted cross-claims against the Subcontractor Defendants for (1) equitable indemnity, (2) contribution, (3) breach of contract, (4) negligence, and (5) breach of express and implied warranties. Seaquest also asserted a third-party complaint against Architectural Products of Charleston, LLC and Sealtight of Charleston, LLC (also referred to collectively herein as "Subcontractor Defendants").[1] The Subcontractor Defendants who appeared in this action each separately filed an answer denying all liability and raising various affirmative defenses.

In conjunction with Seaquest's answer, it also filed a contemporaneous motion to dismiss or, alternatively, to stay proceedings on the basis that Plaintiffs failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, codified at S.C. Code Ann. § 40–59–810, et seq. (the "Right to Cure Act"). Plaintiffs filed a cross-motion to refer the case to arbitration. Importantly, the Right to Cure Act issue is dispositive as to all defendants, whereas the arbitration issue only affects Seaquest.

[1] "Subcontractor Defendants" therefore includes all named defendants (other than Seaquest) and third-party defendants.

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Both motions were heard by Chief Justice Toal on October 13, 2016. Chief Justice Toal ruled in favor of Seaquest on both motions. In her Order January 17, 2017 and filed May 1, 2017 (the "Order"), Chief Justice Toal stated that "this case is DISMISSED in its entirety" and that "this case shall be and hereby is DISMISSED." See Order Grant. Mot. to Dismiss at 2 & 12. The Order also provides "the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety." See id. at 2 . The Form 4 filed with Order also stated that the Order ended the case and was "dismissing this action." See Form 4 to Order Grant. Mot. to Dismiss at 1. The Plaintiffs and Seaquest concede in the joint motion for clarification that Chief Justice Toal's Order did dismiss the entire case. See Pls.' & Seaquest's Joint Mot. for Clarification at 2.

No party filed a motion to alter or amend or otherwise sought clarification of the Order. Plaintiffs ultimately filed a notice of appeal from the Order naming Seaquest as the only respondent and chose not to join any other party to the appeal. Seaquest did not cross-appeal the Order dismissing its claims against the Subcontractor Defendants. The Subcontractor Defendants did not participate in the appeal in any manner, and no issue framed by Plaintiff or Seaquest addressed the dismissal of the claims against the Subcontractor Defendants. Rather, the only issues framed and argued related to the arbitrability of the issues surrounding the application of the Right to Cure Act and the proper application of those provisions where Plaintiffs had already made repairs prior to bringing suit.[2] No issues decided by the Court of Appeals addressed dismissal of the claims against the Subcontractor Defendants. The Court did not list the Subcontractor Defendants on the docket,

[2] It should be noted that the Subcontractor Defendants are not subject to arbitration as the contracts between Seaquest and the respective Subcontractor Defendants do not contain arbitration provisions. As such, arguments related to arbitrability are and were at all times inconsequential to the Subcontractor Defendants.

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provide the notices or letters, or in any other way treat the Subcontractor Defendants as Respondents.

On December 31, 2019, the Court of Appeals issued a per curiam opinion reversing the Order and remanding the case back to the trial court to require arbitration between Plaintiffs and Seaquest. The opinion does not reference the Subcontractor Defendants at all. In the opinion, the Court of Appeals held that "a substantial length of time did not occur between the commencement of the action and the commencement of the motion to compel arbitration," and, therefore, Plaintiffs had not "waived their arbitration right." See Dec. 31, 2019 Ct. App. Order at 5. With respect to the application of the Right to Cure Act, the Court of Appeals held that "[b]ecause we have already determined the trial court erred in finding [Plaintiffs] waived their arbitration right and remand for arbitration, we need not address these issues." Id. at 6. The remittitur from the Court of Appeals was filed on December 17, 2020.

On or about February 16, 2021, Plaintiffs and Seaquest filed the instant joint motion for clarification and seeking the Court "to rule whether the Subcontractors remain parties to this action." See Pls.' & Seaquest's Joint Mot. for Clarification at 2. The motion was fully briefed by the parties, the motion is ripe for the Court's ruling. For the reasons set forth below, this Court finds that the Order dismissing the claims against the Subcontractor Defendants was an unappealed order and, therefore, became the law of the case and foreclosed Plaintiffs' and Seaquest's ability to relitigate these claims. Therefore, the joint motion for clarification is denied.

Applicable Law

I. Law of the Case:

"[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 730 S.E.2d 282, 285 (S.C. 2012).; see also Rumpf v. Mass. Mut. Life

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Ins. Co., 593 S.E.2d 183, 189 (S.C. Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). "Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 674 S.E.2d 151, 153 (S.C. 2009).

Chief Justice Toal dismissed the case in its entirety. The propriety of her decision is not at issue; our law is clear that an unappealed decision, "right or wrong," is the law of the case. See Atl. Coast, 730 S.E.2d at 285. Neither Plaintiffs nor Seaquest appealed the dismissal of the claims against the Subcontractor Defendants—none of the Subcontractor Defendants was included as a respondent to the appeal;[3] neither Plaintiffs nor Seaquest served a notice of appeal upon the

[3] Rule 202(a), SCACR, provides that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." See also Rule 203(c), SCACR ("A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties . . . ."). Looking to the Court of Appeals' order reversing and remanding the Order, the caption speaks for itself:

> Andrew and Kimberly McIntire, Appellants,
> v.
> Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co., Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Custom Supply, LLC, Defendants,
> ***Of which Seaquest Development Company, Inc. is the Respondent.***

See Dec. 31, 2019 Ct. App. Order at 1. (emphasis added).

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Subcontractor Defendants;[4] the Subcontractor Defendants did not participate in the appeal in any manner whatsoever;[5] and the only issues framed and argued on appeal by Plaintiffs and Seaquest related to the claims by and/or between them and not the claims related to the Subcontractor Defendants. No appeal was taken with respect to the dismissal of the Subcontractor Defendants and, accordingly, the Order dismissing such claims became a final order. See C.I.T. Corp. v. Corley, 13 S.E.2d 440, 441–42 (S.C. 1941) (the trial court's order that a third party should not be made a party to the action became law of the case after no appeal from the order was taken and the trial court was thereafter "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same.").

It has been suggested that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered. See Brown v. Brown, 331 S.E.2d 793, 793–94 (S.C. Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."); see also Moore v. N. Am. Van Lines, 462 S.E.2d 275. However, the Brown and Moore cases involve completely different factual scenarios which make them distinguishable from and irrelevant to this case. The Brown and Moore cases both dealt with monetary judgments

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[4] See Rule 203(a), SCACR ("A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262. See Rule 203(b), SCACR (A notice of appeal shall be served on all respondents within (30) days after receipt of written notice of entry of the order or judgment.); see also Rule 262(b), SCACR ("Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court."). The Notice of Appeal states the plaintiffs received the Order on May 2, 2017. The Notice of Appeal had to be served on all Respondents by June 1, 2017. No such service was ever effected by Plaintiffs or Seaquest and the deadline can never be extended. See Notice of Appeal and Proof of Service.

[5] No briefs were ever served or filed by the Subcontractor Defendants. See Rule 208(a), SCACR ("Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal . . . ."); see also Rule 209(a), SCACR ("At the same time a party serves his initial brief(s) under Rule 208 . . . he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . . ."); see also Rule 211(a), SCACR ("Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of his final brief(s) on every other party to the appeal . . . .")

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awarded at the trial court level that were subsequently reversed on appeal. When the remittiturs were issued for those appeals, the trial courts thereafter ruled in each case that the party who received payment under the judgments that were subsequently reversed must restore those payments to the other party. Those trial court rulings were then appealed again for a second time, and the appellate courts on the second appeal each held that reversal of the original monetary judgments on the first appeals had the effect of vacating those monetary judgments and leaving the case standing as if no judgments had been rendered. Id.

The proposition that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered is correct as applied to the Brown and Moore cases where there were no unappealed issues in the cases. In Brown and Moore, a single issue was decided by the trial courts, was appealed, and was thereafter reversed. Further, there were no parties to the lawsuit in each case that were not included as parties to the appeal. In other words, there were no "unappealed portions" of the lower court's rulings. However, to apply this principle to a case where there were unappealed issues, such as the instant case, is directly contrary to well-established law which states that an unappealed portion of a judgment, whether right or wrong, is the law of the case. See Atl. Coast, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."; see also Rumpf, 593 S.E.2d at 189 ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, 743 S.E.2d at 785 ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). The important distinction in this case is that there were portions of the Order that were never appealed (i.e., the order dismissing the claims against the Subcontractor Defendants).

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Finally, the suggestion in the joint motion for clarification that the Subcontractor Defendants are not entitled to dismissal because the Subcontractor Defendants did not seek dismissal does not prevent the application of the law of the case doctrine. The Order, as Plaintiffs and Seaquest recognize, clearly dismissed all Subcontractor Defendants from the case. That the dismissal may not have been requested is of no consequence. "A [Rule 59(e)] motion must be made when the trial court either grants relief not requested or rules on an issue not raised [below]." Fryer v. South Carolina Law Enforcement Div., 631 S.E.2d 918, 920 (S.C. Ct. App. 2006). No Rule 59(e) motion was filed, and the dismissal of the Subcontractor Defendants became the law of the case regardless of whether such relief was sought or not. See id. (finding that defendant failed to preserve for appellate review argument that the trial court erred in granting mandamus to the plaintiff even though the plaintiff had not requested such relief because the defendant did not file a post-trial motion on the issue).

Plaintiffs and Seaquest failed to appeal the Order dismissing their respective claims against the Subcontractor Defendants. As such, this unappealed ruling has become the law of the case and Plaintiffs and Seaquest are barred from relitigating these extinct claims.

II. Motion for Clarification:

As an additional ground for denial, this Court finds that there is no procedural mechanism which affords Plaintiffs and Seaquest the right to request clarification of an order almost four years after it was issued. Rule 59(e) of the South Carolina Rules of Civil Procedure is the mechanism for a party to ask the court to issue a ruling on issues raised but not ruled upon, state findings of fact or conclusions of law underpinning the order, address possible misapprehension of an earlier argument, or revisit a previously raised argument. See, e.g., Elam v. S.C. Dep't of Transp., 602 S.E.2d 772, 777 (S.C. 2004). Pursuant to Rule 59(e), SCRCP, "[a] motion to alter or amend a

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judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Id.

Here, Plaintiffs and Seaquest jointly sought clarification of the Order to determine whether the Subcontractor Defendants remain as parties to this action. The Order dismissed the entire case, including those claims asserted by Plaintiffs and Seaquest against the Subcontractor Defendants. To the extent Plaintiffs or Seaquest believed Chief Justice Toal misapprehended arguments of counsel or mistakenly dismissed certain claims, then the parties were required to file a Rule 59(e) motion within ten days of written notice of entry of the judgment. Plaintiffs and Seaquest did not meet the ten-day deadline provided by Rule 59(e) and, therefore, the joint "motion for clarification" is improper. See Leviner v. Sonoco Prods. Co., 530 S.E.2d 127 (S.C. 2000) (holding where neither party filed a Rule 59(e) motion within the ten day time period asking for clarification of the circuit court's order, the circuit court lost jurisdiction to enter any further orders on the matter); see also In re Beard, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file [Rule 59(e) motions] has elapsed.").

Rule 60(a) of the South Carolina Rules of Civil Procedure also does not provide an avenue for the Court to clarify the Order. Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. "Generally, a clerical error is defined as a mistake in writing or copying." Dion v. Ravenel, Eiserhardt Assocs., 449 S.E.2d 251, 253 (S.C. Ct. App. 1994) (citing *Black's Law Dictionary* 252 (6th ed. 1990)). "As applied to judgments and decrees, it is a mistake or omission by a clerk,

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counsel, judge or printer which is not the result of exercise of judicial function." Id. "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, ***it cannot change the scope of the judgment***." Id. at 253–54 (emphasis added); see also Brown v. Brown, 709 S.E.2d 679, 683 (S.C. Ct. App. 2011) (holding that the trial judge's modification of an award "did not amount to correction of a clerical error such as misspelling, a misplaced decimal, or a miscalculation" but rather recharacterized the award and imposed additional terms upon the parties that did not exist at the time the order was entered). "Except to correct such clerical errors, a trial judge loses jurisdiction to modify an order at the end of the term during which it is issued." Michel v. Michel, 345 S.E.2d 730, 732 (S.C. Ct. App. 1986). "Therefore, the order is no longer subject to any modification which involves the exercise of judgment or discretion on the merits of the action." Id.

Here, Chief Justice Toal unambiguously dismissed the entire case, and her intent is clear from the multitude of references to same in the Order and accompanying Form 4. See Order at 2 ("this case is DISMISSED in its entirety"); see also id. at 12 ("this case shall be and hereby is DISMISSED."); see also Form 4 at 1 (stating that the Order ended the case and was "dismissing this action"). A request for a further order stating that the Subcontractor Defendants remain as defendants in the within action not only purports to seek clarification of an unambiguous directive by Chief Justice Toal, but its very essence asks the court to change the scope of the judgment from a dismissal of all claims to a dismissal of only some claims. Our case law is clear that Rule 60(a), SCRCP, is an improper vehicle for such a modification. Rather, to the extent such a modification was, in fact, warranted, it should have been requested through a Rule 59(e) order within ten days

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after written notice of the entry of judgment. Plaintiffs and Seaquest are therefore prohibited from seeking clarification of the Order pursuant to either Rule 59(e) or Rule 60(a)[6].

Furthermore, this Court lost jurisdiction following the appeal to presently rule that the Subcontractor Defendants remain parties to the suit notwithstanding their prior dismissal. "After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." Ackerman v, McMillan, 477 S.E.2d 267, 268 (S.C. Ct. App. 1996). "[A] trial court has no authority to exceed the mandate of the appellate court on remand. . . . . The mandate of the appellate court is jurisdictional. . . . The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Mem'l Hosp., 709 S.E.2d 122, 125 (S.C. Ct. App. 2011) (internal citations omitted). Therefore, "[w]hen [the appellate court] remand[s] a case, the trial court has only the jurisdiction and authority mandated by th[e] court." Id. The Court of Appeals only remanded this case to require arbitration between Plaintiffs and Seaquest. It gave no other instructions in its opinion and did not alter any unappealed rulings, specifically the unchallenged dismissal of the Subcontractor Defendants. This Court no longer has any jurisdiction to alter, revisit, or revoke the rulings in Chief Justice Toal's Order which were unappealed and constitute the law of the case.

Conclusion

NOW, THEREFORE, for the foregoing reasons, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiffs' and Seaquest's joint motion for clarification is DENIED.

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[6] Plaintiffs and Seaquest are also prohibited from seeking any relief under Rule 60(b)(1), SCRCP for "mistake, inadvertence, surprise, or excusable neglect" because a motion under Rule 60(b)(1) must be made "not more than one year after the judgment, order or proceeding was entered or taken." In addition, a party cannot seek relief under Rule 60(b) where it could have pursued the issue on appeal. Relief from a judgment is not a substitute for an appeal. Tench v. South Carolina Dep't of Educ., 553 S.E.2d 451, 453 (S.C. 2001). Plaintiffs and/or Seaquest could have filed a Rule 59(e) motion and then subsequently appealed the dismissal of the Subcontractor Defendants but chose not to do so. Rule 60 cannot now be used as a backdoor to challenge the dismissal of these defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Red Bay Constructors Corp.; Defendant Benzenburg Custom Cabinets, Inc.; Defendant Jonathan Marshall Construction; Defendant Southcoast Exteriors, Inc.; Defendant Coastal Plumbing & Gas, LLC; Defendant Foam Insulation Co., Inc.; Defendant Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Defendant Lowcountry Fireplaces, Inc.; Defendant Carolina Pest Solutions, Inc.; Defendant New South Construction Supply, LLC; Third-Party Defendant Architectural Products of Charleston, LLC; and Third-Party Defendant Sealtight of South Carolina, LLC are not parties to the within action and that this case is ended with respect to these Defendants/Third-Party Defendants.

AND IT IS SO ORDERED.

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Charleston Common Pleas

Case Caption: Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al

Case Number: 2016CP1001833

Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-01833

RECEIVED
Sep 22 2021
SC Court of Appeals

Andrew and Kimberly McIntire,

Plaintiffs,

v.

Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; and New South Construction Supply, LLC,

Defendants.

Seaquest Development Company, Inc.,

Third-Party Plaintiff,

v.

Architectural Products of Charleston, LLC, and Sealtight of South Carolina, LLC,

Third-Party Defendants.

Of whom Andrew and Kimberly McIntire and Seaquest Development Company, Inc., are

Appellants,[1]

---

[1] This appeal follows the trial court's Order Denying Plaintiffs' and Seaquest Development Company, Inc.'s Joint Motion for Clarification, filed August 23, 2021. The instant notice of appeal is filed/served on behalf of Seaquest

And Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co. Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Construction Supply, LLC, Architectural Products of Charleston, LLC; and Sealtight of South Carolina, LLC, are

Respondents.

NOTICE OF APPEAL

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Seaquest Development Company, Inc.

Development Company, Inc. Plaintiffs are also identified as Appellants herein because they have already filed/served their notice of appeal.

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Named Respondents Who Have Not Appeared in the Action:

Coastal Window & Door Center of Charleston, LLC

Carolina Window & Millwork, LLC, n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC

Michael Casteen d/b/a Casteen Custom Cabinets

Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.

Architectural Products of Charleston, LLC

Seaquest Development Company, Inc. ("Seaquest"), hereby appeals the following orders of the Honorable Jennifer B. McCoy, Circuit Court Judge:

- **Form 4 Order Denying Joint Motion for Clarification**, filed August 19, 2021, and

- **[Formal] Order Denying Plaintiffs' and Seaquest Development Company, Inc.'s Joint Motion for Clarification**, filed August 23, 2021.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Seaquest received written notice of entry of the most recent order on August 23, 2021.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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Attorneys for Appellant
Seaquest Development Company, Inc.

Charleston, South Carolina

September 21, 2021

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1001833

Andrew Mcintire et al
PLAINTIFF(S)

Seaquest Development Company Inc et al
DEFENDANT(S)

RECEIVED
Sep 22 2021
SC Court of Appeals

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DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiffs' and Seaquest's joint motion for clarification is hereby denied. Defendants requested to submit one proposed formal order for the court's review within 10 days.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/18/2021 .

Carolina Window & Millwork LLC
Coastal Window & Door Center of Charleston LLC
Michigan Prestain Co
Quality Cedar Products Inc of Michigan
Casteen Custom Cabinets
Michael Casteen
Carolina Window & Millwork Omni Glass Industries LLC
Architectural Products of Charleston LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Charleston Common Pleas

Case Caption: Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al

Case Number: 2016CP1001833

Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2016-CP-10-01833
ANDREW and KIMBERLY MCINTIRE, Plaintiffs, vs. SEAQUEST DEVELOPMENT COMPANY, INC.; RED BAY CONSTRUCTORS CORP.; BENZENBERG CUSTOM CABINETS, INC.; JONATHAN MARSHALL CONSTRUCTION; COASTAL WINDOW & DOOR CENTER OF CHARLESTON, LLC; CAROLINA WINDOW & MILLWORK, LLC n/k/a CAROLINA WINDOW & MILLWORK-OMNI GLASS INDUSTRIES, LLC; SOUTHCOAST EXTERIORS, INC.; MICHAEL CASTEEN d/b/a MICHIGAN PRESTAIN CO.; COASTAL PLUMBING & GAS, LLC; FOAM INSULATION CO., INC.; JERRY COMER d/b/a JERRY'S TILE & MARBLE, LLC; LOWCOUNTRY FIREPLACES, INC.; CAROLINA PEST SOLUTIONS, INC.; and NEW SOUTH CONSTRUCTION SUPPLY, LLC, Defendants.	**ORDER DENYING PLAINTIFFS' AND SEAQUEST DEVELOPMENT COMPANY, INC.'S JOINT MOTION FOR CLARIFICATION**
SEAQUEST DEVELOPMENT COMPANY, INC., Third-Party Plaintiff, v. ARCHITECTURAL PRODUCTS OF CHARLESTON, LLC; and SEALTIGHT OF SOUTH CAROLINA, LLC, Third-Party Defendants.	

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This matter came before the Court upon Plaintiffs' and Seaquest Development Company, Inc.'s ("Seaquest") joint motion for clarification. For the reasons set forth below, the Court DENIES the joint motion for clarification.

Factual Background & Procedural History

Plaintiffs commenced this construction defect action against the general contractor, Seaquest, and fourteen other subcontractors (collectively, the "Subcontractor Defendants") on or about April 8, 2016. Plaintiffs' complaint contained causes of action against Seaquest and the Subcontractor Defendant for (1) negligence/gross negligence, (2) negligent misrepresentation, (3) constructive fraud, and (4) breach of the implied warranty of workmanship. Seaquest answered and asserted cross-claims against the Subcontractor Defendants for (1) equitable indemnity, (2) contribution, (3) breach of contract, (4) negligence, and (5) breach of express and implied warranties. Seaquest also asserted a third-party complaint against Architectural Products of Charleston, LLC and Sealtight of Charleston, LLC (also referred to collectively herein as "Subcontractor Defendants").[1] The Subcontractor Defendants who appeared in this action each separately filed an answer denying all liability and raising various affirmative defenses.

In conjunction with Seaquest's answer, it also filed a contemporaneous motion to dismiss or, alternatively, to stay proceedings on the basis that Plaintiffs failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, codified at S.C. Code Ann. § 40–59–810, et seq. (the "Right to Cure Act"). Plaintiffs filed a cross-motion to refer the case to arbitration. Importantly, the Right to Cure Act issue is dispositive as to all defendants, whereas the arbitration issue only affects Seaquest.

[1] "Subcontractor Defendants" therefore includes all named defendants (other than Seaquest) and third-party defendants.

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Both motions were heard by Chief Justice Toal on October 13, 2016. Chief Justice Toal ruled in favor of Seaquest on both motions. In her Order January 17, 2017 and filed May 1, 2017 (the "Order"), Chief Justice Toal stated that "this case is DISMISSED in its entirety" and that "this case shall be and hereby is DISMISSED." See Order Grant. Mot. to Dismiss at 2 & 12. The Order also provides "the remaining motions (Red Bay's Motion to Dismiss and the McIntires' Motion for Protective Order) are MOOT as this case is DISMISSED in its entirety." See id. at 2 . The Form 4 filed with Order also stated that the Order ended the case and was "dismissing this action." See Form 4 to Order Grant. Mot. to Dismiss at 1. The Plaintiffs and Seaquest concede in the joint motion for clarification that Chief Justice Toal's Order did dismiss the entire case. See Pls.' & Seaquest's Joint Mot. for Clarification at 2.

No party filed a motion to alter or amend or otherwise sought clarification of the Order. Plaintiffs ultimately filed a notice of appeal from the Order naming Seaquest as the only respondent and chose not to join any other party to the appeal. Seaquest did not cross-appeal the Order dismissing its claims against the Subcontractor Defendants. The Subcontractor Defendants did not participate in the appeal in any manner, and no issue framed by Plaintiff or Seaquest addressed the dismissal of the claims against the Subcontractor Defendants. Rather, the only issues framed and argued related to the arbitrability of the issues surrounding the application of the Right to Cure Act and the proper application of those provisions where Plaintiffs had already made repairs prior to bringing suit.[2] No issues decided by the Court of Appeals addressed dismissal of the claims against the Subcontractor Defendants. The Court did not list the Subcontractor Defendants on the docket,

[2] It should be noted that the Subcontractor Defendants are not subject to arbitration as the contracts between Seaquest and the respective Subcontractor Defendants do not contain arbitration provisions. As such, arguments related to arbitrability are and were at all times inconsequential to the Subcontractor Defendants.

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provide the notices or letters, or in any other way treat the Subcontractor Defendants as Respondents.

On December 31, 2019, the Court of Appeals issued a per curiam opinion reversing the Order and remanding the case back to the trial court to require arbitration between Plaintiffs and Seaquest. The opinion does not reference the Subcontractor Defendants at all. In the opinion, the Court of Appeals held that "a substantial length of time did not occur between the commencement of the action and the commencement of the motion to compel arbitration," and, therefore, Plaintiffs had not "waived their arbitration right." See Dec. 31, 2019 Ct. App. Order at 5. With respect to the application of the Right to Cure Act, the Court of Appeals held that "[b]ecause we have already determined the trial court erred in finding [Plaintiffs] waived their arbitration right and remand for arbitration, we need not address these issues." Id. at 6. The remittitur from the Court of Appeals was filed on December 17, 2020.

On or about February 16, 2021, Plaintiffs and Seaquest filed the instant joint motion for clarification and seeking the Court "to rule whether the Subcontractors remain parties to this action." See Pls.' & Seaquest's Joint Mot. for Clarification at 2. The motion was fully briefed by the parties, the motion is ripe for the Court's ruling. For the reasons set forth below, this Court finds that the Order dismissing the claims against the Subcontractor Defendants was an unappealed order and, therefore, became the law of the case and foreclosed Plaintiffs' and Seaquest's ability to relitigate these claims. Therefore, the joint motion for clarification is denied.

Applicable Law

I. Law of the Case:

"[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 730 S.E.2d 282, 285 (S.C. 2012).; see also Rumpf v. Mass. Mut. Life

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Ins. Co., 593 S.E.2d 183, 189 (S.C. Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). "Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 674 S.E.2d 151, 153 (S.C. 2009).

Chief Justice Toal dismissed the case in its entirety. The propriety of her decision is not at issue; our law is clear that an unappealed decision, "right or wrong," is the law of the case. See Atl. Coast, 730 S.E.2d at 285. Neither Plaintiffs nor Seaquest appealed the dismissal of the claims against the Subcontractor Defendants—none of the Subcontractor Defendants was included as a respondent to the appeal;[3] neither Plaintiffs nor Seaquest served a notice of appeal upon the

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[3] Rule 202(a), SCACR, provides that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent." See also Rule 203(c), SCACR ("A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties . . . ."). Looking to the Court of Appeals' order reversing and remanding the Order, the caption speaks for itself:

> Andrew and Kimberly McIntire, Appellants,
> v.
> Seaquest Development Company, Inc.; Red Bay Constructors Corp.; Benzenberg Custom Cabinets, Inc.; Jonathan Marshall Construction; Coastal Window & Door Center of Charleston, LLC; Carolina Window & Millwork, LLC n/k/a Carolina Window & Millwork-Omni Glass Industries, LLC; Southcoast Exteriors, Inc.; Michael Casteen d/b/a Casteen Custom Cabinets; Quality Cedar Products, Inc. of Michigan d/b/a Michigan Prestain Co.; Coastal Plumbing & Gas, LLC; Foam Insulation Co., Inc.; Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Lowcountry Fireplaces, Inc.; Carolina Pest Solutions, Inc.; New South Custom Supply, LLC, Defendants,
> ***Of which Seaquest Development Company, Inc. is the Respondent.***

See Dec. 31, 2019 Ct. App. Order at 1. (emphasis added).

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Subcontractor Defendants;[4] the Subcontractor Defendants did not participate in the appeal in any manner whatsoever;[5] and the only issues framed and argued on appeal by Plaintiffs and Seaquest related to the claims by and/or between them and not the claims related to the Subcontractor Defendants. No appeal was taken with respect to the dismissal of the Subcontractor Defendants and, accordingly, the Order dismissing such claims became a final order. See C.I.T. Corp. v. Corley, 13 S.E.2d 440, 441–42 (S.C. 1941) (the trial court's order that a third party should not be made a party to the action became law of the case after no appeal from the order was taken and the trial court was thereafter "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same.").

It has been suggested that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered. See Brown v. Brown, 331 S.E.2d 793, 793–94 (S.C. Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."); see also Moore v. N. Am. Van Lines, 462 S.E.2d 275. However, the Brown and Moore cases involve completely different factual scenarios which make them distinguishable from and irrelevant to this case. The Brown and Moore cases both dealt with monetary judgments

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[4] See Rule 203(a), SCACR ("A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262. See Rule 203(b), SCACR (A notice of appeal shall be served on all respondents within (30) days after receipt of written notice of entry of the order or judgment.); see also Rule 262(b), SCACR ("Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court."). The Notice of Appeal states the plaintiffs received the Order on May 2, 2017. The Notice of Appeal had to be served on all Respondents by June 1, 2017. No such service was ever effected by Plaintiffs or Seaquest and the deadline can never be extended. See Notice of Appeal and Proof of Service.

[5] No briefs were ever served or filed by the Subcontractor Defendants. See Rule 208(a), SCACR ("Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal . . . ."); see also Rule 209(a), SCACR ("At the same time a party serves his initial brief(s) under Rule 208 . . . he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . . ."); see also Rule 211(a), SCACR ("Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of his final brief(s) on every other party to the appeal . . . .")

awarded at the trial court level that were subsequently reversed on appeal. When the remittiturs were issued for those appeals, the trial courts thereafter ruled in each case that the party who received payment under the judgments that were subsequently reversed must restore those payments to the other party. Those trial court rulings were then appealed again for a second time, and the appellate courts on the second appeal each held that reversal of the original monetary judgments on the first appeals had the effect of vacating those monetary judgments and leaving the case standing as if no judgments had been rendered. Id.

The proposition that the reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered is correct as applied to the Brown and Moore cases where there were no unappealed issues in the cases. In Brown and Moore, a single issue was decided by the trial courts, was appealed, and was thereafter reversed. Further, there were no parties to the lawsuit in each case that were not included as parties to the appeal. In other words, there were no "unappealed portions" of the lower court's rulings. However, to apply this principle to a case where there were unappealed issues, such as the instant case, is directly contrary to well-established law which states that an unappealed portion of a judgment, whether right or wrong, is the law of the case. See Atl. Coast, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."; see also Rumpf, 593 S.E.2d at 189 ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); see also Shirley's Iron Works, 743 S.E.2d at 785 ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."). The important distinction in this case is that there were portions of the Order that were never appealed (i.e., the order dismissing the claims against the Subcontractor Defendants).

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Finally, the suggestion in the joint motion for clarification that the Subcontractor Defendants are not entitled to dismissal because the Subcontractor Defendants did not seek dismissal does not prevent the application of the law of the case doctrine. The Order, as Plaintiffs and Seaquest recognize, clearly dismissed all Subcontractor Defendants from the case. That the dismissal may not have been requested is of no consequence. "A [Rule 59(e)] motion must be made when the trial court either grants relief not requested or rules on an issue not raised [below]." Fryer v. South Carolina Law Enforcement Div., 631 S.E.2d 918, 920 (S.C. Ct. App. 2006). No Rule 59(e) motion was filed, and the dismissal of the Subcontractor Defendants became the law of the case regardless of whether such relief was sought or not. See id. (finding that defendant failed to preserve for appellate review argument that the trial court erred in granting mandamus to the plaintiff even though the plaintiff had not requested such relief because the defendant did not file a post-trial motion on the issue).

Plaintiffs and Seaquest failed to appeal the Order dismissing their respective claims against the Subcontractor Defendants. As such, this unappealed ruling has become the law of the case and Plaintiffs and Seaquest are barred from relitigating these extinct claims.

II. Motion for Clarification:

As an additional ground for denial, this Court finds that there is no procedural mechanism which affords Plaintiffs and Seaquest the right to request clarification of an order almost four years after it was issued. Rule 59(e) of the South Carolina Rules of Civil Procedure is the mechanism for a party to ask the court to issue a ruling on issues raised but not ruled upon, state findings of fact or conclusions of law underpinning the order, address possible misapprehension of an earlier argument, or revisit a previously raised argument. See, e.g., Elam v. S.C. Dep't of Transp., 602 S.E.2d 772, 777 (S.C. 2004). Pursuant to Rule 59(e), SCRCP, "[a] motion to alter or amend a

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judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Id.

Here, Plaintiffs and Seaquest jointly sought clarification of the Order to determine whether the Subcontractor Defendants remain as parties to this action. The Order dismissed the entire case, including those claims asserted by Plaintiffs and Seaquest against the Subcontractor Defendants. To the extent Plaintiffs or Seaquest believed Chief Justice Toal misapprehended arguments of counsel or mistakenly dismissed certain claims, then the parties were required to file a Rule 59(e) motion within ten days of written notice of entry of the judgment. Plaintiffs and Seaquest did not meet the ten-day deadline provided by Rule 59(e) and, therefore, the joint "motion for clarification" is improper. See Leviner v. Sonoco Prods. Co., 530 S.E.2d 127 (S.C. 2000) (holding where neither party filed a Rule 59(e) motion within the ten day time period asking for clarification of the circuit court's order, the circuit court lost jurisdiction to enter any further orders on the matter); see also In re Beard, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file [Rule 59(e) motions] has elapsed.").

Rule 60(a) of the South Carolina Rules of Civil Procedure also does not provide an avenue for the Court to clarify the Order. Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. "Generally, a clerical error is defined as a mistake in writing or copying." Dion v. Ravenel, Eiserhardt Assocs., 449 S.E.2d 251, 253 (S.C. Ct. App. 1994) (citing *Black's Law Dictionary* 252 (6th ed. 1990)). "As applied to judgments and decrees, it is a mistake or omission by a clerk,

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counsel, judge or printer which is not the result of exercise of judicial function." Id. "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, ***it cannot change the scope of the judgment***." Id. at 253–54 (emphasis added); see also Brown v. Brown, 709 S.E.2d 679, 683 (S.C. Ct. App. 2011) (holding that the trial judge's modification of an award "did not amount to correction of a clerical error such as misspelling, a misplaced decimal, or a miscalculation" but rather recharacterized the award and imposed additional terms upon the parties that did not exist at the time the order was entered). "Except to correct such clerical errors, a trial judge loses jurisdiction to modify an order at the end of the term during which it is issued." Michel v. Michel, 345 S.E.2d 730, 732 (S.C. Ct. App. 1986). "Therefore, the order is no longer subject to any modification which involves the exercise of judgment or discretion on the merits of the action." Id.

Here, Chief Justice Toal unambiguously dismissed the entire case, and her intent is clear from the multitude of references to same in the Order and accompanying Form 4. See Order at 2 ("this case is DISMISSED in its entirety"); see also id. at 12 ("this case shall be and hereby is DISMISSED."); see also Form 4 at 1 (stating that the Order ended the case and was "dismissing this action"). A request for a further order stating that the Subcontractor Defendants remain as defendants in the within action not only purports to seek clarification of an unambiguous directive by Chief Justice Toal, but its very essence asks the court to change the scope of the judgment from a dismissal of all claims to a dismissal of only some claims. Our case law is clear that Rule 60(a), SCRCP, is an improper vehicle for such a modification. Rather, to the extent such a modification was, in fact, warranted, it should have been requested through a Rule 59(e) order within ten days

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after written notice of the entry of judgment. Plaintiffs and Seaquest are therefore prohibited from seeking clarification of the Order pursuant to either Rule 59(e) or Rule 60(a)[6].

Furthermore, this Court lost jurisdiction following the appeal to presently rule that the Subcontractor Defendants remain parties to the suit notwithstanding their prior dismissal. "After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." Ackerman v, McMillan, 477 S.E.2d 267, 268 (S.C. Ct. App. 1996). "[A] trial court has no authority to exceed the mandate of the appellate court on remand. . . . . The mandate of the appellate court is jurisdictional. . . . The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Mem'l Hosp., 709 S.E.2d 122, 125 (S.C. Ct. App. 2011) (internal citations omitted). Therefore, "[w]hen [the appellate court] remand[s] a case, the trial court has only the jurisdiction and authority mandated by th[e] court." Id. The Court of Appeals only remanded this case to require arbitration between Plaintiffs and Seaquest. It gave no other instructions in its opinion and did not alter any unappealed rulings, specifically the unchallenged dismissal of the Subcontractor Defendants. This Court no longer has any jurisdiction to alter, revisit, or revoke the rulings in Chief Justice Toal's Order which were unappealed and constitute the law of the case.

Conclusion

NOW, THEREFORE, for the foregoing reasons, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiffs' and Seaquest's joint motion for clarification is DENIED.

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[6] Plaintiffs and Seaquest are also prohibited from seeking any relief under Rule 60(b)(1), SCRCP for "mistake, inadvertence, surprise, or excusable neglect" because a motion under Rule 60(b)(1) must be made "not more than one year after the judgment, order or proceeding was entered or taken." In addition, a party cannot seek relief under Rule 60(b) where it could have pursued the issue on appeal. Relief from a judgment is not a substitute for an appeal. Tench v. South Carolina Dep't of Educ., 553 S.E.2d 451, 453 (S.C. 2001). Plaintiffs and/or Seaquest could have filed a Rule 59(e) motion and then subsequently appealed the dismissal of the Subcontractor Defendants but chose not to do so. Rule 60 cannot now be used as a backdoor to challenge the dismissal of these defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Red Bay Constructors Corp.; Defendant Benzenburg Custom Cabinets, Inc.; Defendant Jonathan Marshall Construction; Defendant Southcoast Exteriors, Inc.; Defendant Coastal Plumbing & Gas, LLC; Defendant Foam Insulation Co., Inc.; Defendant Jerry Comer d/b/a Jerry's Tile & Marble, LLC; Defendant Lowcountry Fireplaces, Inc.; Defendant Carolina Pest Solutions, Inc.; Defendant New South Construction Supply, LLC; Third-Party Defendant Architectural Products of Charleston, LLC; and Third-Party Defendant Sealtight of South Carolina, LLC are not parties to the within action and that this case is ended with respect to these Defendants/Third-Party Defendants.

AND IT IS SO ORDERED.

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Charleston Common Pleas

Case Caption: Andrew Mcintire , plaintiff, et al VS Seaquest Development Company Inc , defendant, et al

Case Number: 2016CP1001833

Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764