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
Appellate Case No. 2021-001055

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 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,

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, 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 are

Respondents.

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May 31, 2022

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STATEMENT OF THE CASE

This is the second appeal in this case involving an Order of Former Chief Justice Jean Hoefer Toal while she was sitting as the Presiding Judge for the Ninth Judicial Circuit. The first appeal concerned only the general contractor in this construction defect litigation, Appellant Seaquest Development Company, Inc. (hereinafter "Seaquest"). McIntire v. Seaquest Dev. Co., Inc., Op. No. 2019-UP-413 (Ct. App. filed Dec. 31, 2019) (unpublished disposition). This appeal concerns the effect of Former Chief Justice Toal's Order, upon remand, on the status of other parties to this case (hereinafter "Subcontractor Defendants").

Plaintiff / Appellants Andrew and Kimberly McIntire filed their Complaint on April 8, 2016. (R. pp. 42-56.) The McIntires generally alleged that their residence in Mount Pleasant was defectively constructed. The Complaint asserts claims against both Appellant Seaquest and the Subcontractor Defendants / Respondents.

Seaquest filed an Answer, Cross-claims, and Third-Party Complaint on June 17, 2016. (R. pp. 57-84.)[1] That same day, Seaquest filed a Motion to Dismiss or Stay Proceedings pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. § 40-59-810, *et seq.* (hereinafter "Right to Cure Act"). (R. pp. 85-89.) Seaquest contended that the McIntires failed to serve written notice of the claim on Seaquest as required by Section 40-59-840 of the South Carolina Code prior to bringing this action. (Id.)

One of the subcontractors, Red Bay Constructors, Corp. (hereinafter "Red Bay"), filed a motion to dismiss on June 23, 2016. (R. pp. 90-93.) Red Bay's motion was also based upon the Right to Cure Act. (Id.)

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[1] Sealtight of South Carolina, LLC is a third-party defendant, but not a direct defendant.

The McIntires moved to stay, but for a different reason. They sought to compel arbitration against Seaquest. (R. pp. 98-121.) The McIntires' Motion was filed on July 27, 2016. It is undisputed that the only parties to the arbitration agreement are the McIntires and Seaquest. (See R. p. 31 n.2.)

Former Chief Justice Toal heard the three above-referenced motions, along with a related discovery motion, on October 13, 2016. (R. p. 4.) At the hearing, Seaquest argued that the McIntires admitted they failed to comply with the Right to Cure Act. (R. p. 370.) Seaquest further contended that the Right to Cure Act stays all proceedings, including arbitration, and that the right to arbitrate was waived. (R. pp. 373-74.) The McIntires' primary argument was that the Right to Cure Act issues should be stayed along with all other issues if there is an enforceable arbitration provision. (R. pp. 390, 398.)

During the hearing, counsel for one of the subcontractors, Lowcountry Fireplaces, Inc., asked to be heard. (R. p. 380.) The court granted that request, commenting that "it's all on the table right now." (Id.) Counsel then pointed out that the Subcontractor Defendants cannot be forced into arbitration because the McIntire-Seaquest arbitration agreement does not apply to the subcontractors. (R. pp. 380-86.) Counsel contended that any order referring the case to arbitration should not include the Subcontractor Defendants. (R. pp. 385-86.) The McIntires agreed they are not seeking to enforce arbitration against the Subcontractor Defendants. (R. p. 389.) The court expressed recognition of the Subcontractor Defendants' position that if arbitration was ordered, the claims against the Subcontractor Defendants would need to be stayed. (R. pp. 395-97.)

By e-mail dated January 4, 2017, Former Chief Justice Toal requested that Seaquest draft a proposed order. (R. p. 436.) The e-mail outlines her ruling, which was (1) to deny

the McIntires' Motion to Stay and Compel Arbitration, (2) to grant Seaquest's Motion to Dismiss due to failure to comply with the Right to Cure Act, and (3) "[t]he remaining motions for protective order and dealing with the co-defendants are moot because the action is being dismissed." (Id.) Part (3) directly references the Subcontractor Defendants.

Counsel for the McIntires objected to Seaquest's proposed order by letter dated January 20, 2017. (R. pp. 441-44.) The Former Chief Justice did not issue her ruling until several months later.

The trial court's "Order of Dismissal" was filed on May 1, 2017. (R. pp. 3-14.) Seaquest's Motion to Dismiss was granted. The trial court ruled that the McIntires failed to comply with the Right to Cure Act. (R. pp. 5-9.) The court denied the McIntires' motion to compel arbitration, ruling that their right to demand arbitration and their contractual limitations period had expired. (R. pp. 9-13.) The Order dismissed the case in its entirety. (R. p. 4.) The Order states that the remaining motions, including Red Bay's motion to dismiss, are moot. (Id.)

Reconsideration of the Order of Dismissal was not sought by any party. The deadline for filing such motions expired on May 12, 2017. Rule 59(e), SCRCP.

The McIntires' Notice of Appeal is dated May 30, 2017. (R. pp. 445-46.) The caption identifies Seaquest as the only Respondent; the Subcontractor Defendants are listed as "Defendants." (R. p. 445.) Third-Party Defendant Sealtight of South Carolina, LLC (hereinafter "Sealtight") was not included on the caption at all. (Id.) The Notice of Appeal recites May 2, 2017 as the date when notice of entry of the trial court Order was received. (Id.) The Proof of Service for the Notice of Appeal indicates that it was served on only one Respondent, Seaquest. (R. p. 462.)

On June 2, 2017, counsel for the McIntires e-mailed a courtesy copy of the Notice of Appeal to the other defendants in the case. (R. pp. 349, 351.) The cover e-mail states that "[a] hard copy was mailed via regular U.S. Mail to *counsel for Respondents only* on May 30, 2017. (R. p. 349 (emphasis added).) That e-mail had a separate Proof of Service evidencing service on "Defendants" on June 2, 2017. (R. pp. 351-52.) At the time, electronic service did not qualify as effective service of a Notice of Appeal. Rules 203(a) and (b)(1), 262(b), SCACR (2017).

The Subcontractor Defendants were not made parties and they did not participate in the appeal. (R. pp. 504-05.) In briefing the first appeal, the McIntires sought reversal of the trial court order based upon the Right to Cure Act as well as the arbitration issue. (R. p. 468.) The effect of former Chief Justice Toal's Order on parties other than Seaquest was not raised in the briefing.

On December 31, 2019, this Court filed its Opinion in the first appeal. McIntire, Op. No. 2019-UP-413 (R. pp. 15-20). This Court reversed on the arbitration issue, finding insufficient evidence that the McIntires waived their right to arbitrate. This Court therefore "remand[ed] the case for arbitration." (R. p. 19.) This Court declined to rule on the Right to Cure Act issue, finding its ruling on the arbitration issue was dispositive. (R. p. 20.)

This Court denied Seaquest's Petition for Rehearing on March 27, 2020. The Supreme Court denied Seaquest's Petition for a Writ of *Certiorari* on December 11, 2020. The trial court received the Remittitur of the first appeal on December 17, 2020.

The McIntires and Seaquest filed a Joint Motion for Clarification on February 16, 2021. (R. pp. 247-91.) Appellants contend they filed their Joint Motion for Clarification after a status conference. This Motion, which was not based upon Rules 59(e) or 60,

SCRCP, sought a ruling as to whether the Subcontractor Defendants remain parties to this case. (R. pp. 248, 411.) Judge Roger M. Young, Sr. opined informally via e-mail that reversal generally vacates an appealed order. (R. p. 532.)

However, counsel for one of the Subcontractor Defendants expressed intent to oppose the Joint Motion for Clarification and requested a hearing. (R. p. 521.) The Subcontractor Defendants filed a joint Memorandum in Opposition on March 3, 2021. (R. pp. 292-304.) Sealtight filed a separate opposing memorandum on March 4, 2021. (R. pp. 305-06.)

On May 3, 2021, Judge Young announced he would deny the Joint Motion for Clarification. (R. p. 544.) However, he withdrew this ruling after learning the motion was heard by Judge McCoy. (R. p. 543.)

The Honorable Jennifer B. McCoy heard the Motion for Clarification on April 22, 2021. On August 19, 2021, Judge McCoy issued a Form 4 Order denying the Joint Motion for Clarification and requesting proposed orders. (R. pp. 26-28.) Her formal Order was filed August 23, 2021. (R. pp. 29-41.) Judge McCoy ruled that because the effect of the dismissal on the claims against the Subcontractor Defendants was not raised in the first appeal, Former Chief Justice Toal's ruling on that issue became law of the case. (R. pp. 32-36.) Judge McCoy's Order also held that the Joint Motion for Clarification was untimely, and no procedural mechanism exists for entertaining the request at this stage. (R. pp. 36-39.) This appeal follows.

STANDARD OF REVIEW

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). However, the trial judge's factual findings

are reviewed under an "any evidence" standard. "In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings." Fesmire v. Digh, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009).

This case is in the posture of a request for reconsideration or clarification. The standard of review for a Rule 59(e) motion is abuse of discretion. Pacific Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 402 (4th Cir. 1998). A trial court abuses its discretion when it commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

ARGUMENT

Two key facts control the disposition of this appeal. First, the trial court dismissed the entire case. Second, the prior appeal only addressed the McIntires' claims against one party to this case—Seaquest. Because neither the trial court nor this appellate Court retained jurisdiction over the Subcontractor Defendants after June 1, 2017 and/or after the issues in the first appeal were specified, Judge McCoy's ruling must be affirmed.

The trial court dismissed the entire case. (R. pp. 4, 14.) No motion seeking reconsideration of that ruling was filed.

On appeal, this Court held that it did not need to address the Right to Cure Act because its arbitration ruling was dispositive. McIntire, Op. No. 2019-UP-413, p. 6. This Court could not have reached that conclusion if the effect of Former Chief Justice Toal's ruling on the Subcontractor Defendants had been raised on appeal because the Subcontractor Defendants are not subject to arbitration in this matter. (R. p. 31 n.2.) The

Subcontractor Defendants cannot be compelled to arbitrate matters they did not contractually agree to arbitrate. Berry v. Spang, 433 S.C. 1, 11-12, 855 S.E.2d 309, 315 (Ct. App. 2021).

Even if the content of the McIntires' Notice of Appeal sought to transfer jurisdiction of the entire case to this Court, their arguments concerning the Subcontractor Defendants were subsequently waived or abandoned. This is so for two reasons.

First, the McIntires did not timely and properly serve their Notice of Appeal on the Subcontractor Defendants. See Rule 203(b), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of the entry of the order or judgment."). This requirement is jurisdictional—this Court has no authority to cure the defect. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); USAA Prop. and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). The McIntires did not name the Subcontractor Defendants as respondents or serve the Notice of Appeal on the Subcontractor Defendants by mail or delivery within the 30-day window. See Rules 203(a) and (b)(1), 262(b), SCACR (2017). Sealtight was not even listed on the caption. Neither the trial court nor any appellate court retained jurisdiction after June 1, 2017. The dismissal thereby became final, and this Court never acquired jurisdiction over the Subcontractor Defendants in the first appeal.

Moreover, the McIntires did not appeal the effect of the trial court's ruling on the Subcontractor Defendants. Under the two-issue rule, unappealed rulings become law of the case and must be affirmed. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012); Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004). Points not raised in the statement of issues on

appeal are not preserved. Brown v. Odom, 425 S.C. 420, 436 n.5, 823 S.E.2d 183, 191 n.5 (Ct. App. 2019); Rule 208(b)(1)(B), SCACR. Failure to appeal an alternative ground will result in affirmance on that issue. Sloan v. Dep't of Transp., 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005). These rules cannot be circumvented merely by filing a subsequent appeal.

The law-of-the-case doctrine precludes parties from raising not only issues that were raised and rejected in a prior final order, but also issues that were not raised, but could have been. Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009). Once the ruling as to the Subcontractor Defendants became law of the case, jurisdiction is lacking to revoke, vacate, overrule, or reverse it. C.I.T. Corp. v. Corley, 196 S.C. 339, 13 S.E.2d 440, 442 (1941). This Court has no jurisdiction to modify the Order of Dismissal as concerning the claims against the Subcontractor Defendants in this second appeal.

Furthermore, the McIntires' arguments fail on the merits. The Former Chief Justice ruled that the McIntires' claims were barred by failure to comply with the Right to Cure Act. (R. pp. 8-9.) That ruling has not been overturned. Having failed to comply with the Right to Cure Act and the Appellate Court Rules, the McIntires cannot resurrect their claims against the Subcontractor Defendants through a "motion for clarification." Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009) (holding that a party may not use a Rule 59(e) motion to raise an issue that should have been raised prior to judgment).

Seaquest had the opportunity to object to the first appeal on the ground that necessary parties were not joined. All parties to an action whose interests may be adversely affected by the decision of the appellate court are necessary parties to an appeal. 15 S.C. Jur. Appeal and Error § 31 (Feb. 2022 Update) (citing Spanish Wells Prop. Owners Ass'n,

Inc. v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988)). A party is necessary to an appeal if that party would be affected by further proceedings in the trial court if the judgment on appeal were reversed. Watkins v. Fannin, 278 S.W.3d 637, 640 (Ky. Ct. App. 2009).

Because Former Chief Justice Toal dismissed the entire case, the Subcontractor Defendants' interests stood to be adversely affected by reversal of that ruling. This is confirmed by the fact that the Subcontractor Defendants are respondents to this appeal. The Subcontractor Defendants were therefore necessary parties to the first appeal.

An appeal will be dismissed if all necessary parties were not joined in the appeal. Id.; 4 C.J.S. Appeal and Error § 355 (Mar. 2022 Update); see also Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of the Town of Hilton Head Island, 292 S.C. 542, 357 S.E.2d 487 (Ct. App. 1987), rev'd, 295 S.C. 67, 367 S.E.2d 160 (1988) (noting that the circuit court granted the motion to dismiss the appeal because a necessary party—as ultimately determined by the Supreme Court—was not joined). However, defects or objections as to parties that do not entirely defeat the jurisdiction of the appellate court may be waived by a general appearance coupled with the failure to make an objection. 4 C.J.S. Appeal and Error § 358 (Mar. 2022 Update).

Seaquest appeared and briefed the first appeal. In its brief, Seaquest noted that the Subcontractor Defendants were not made parties to the appeal. (R. pp. 504-05.) The issue of whether complete relief could be granted in the absence of the Subcontractor Defendants evidently was not brought to this Court's attention because it found the arbitration issue to be dispositive of the appeal. McIntire, Op. No. 2019-UP-413, p. 6.

Accordingly, Appellants' claims against the Subcontractor Defendants did not survive the first appeal. Judge McCoy's denial of Appellants' Joint Motion for Clarification should be affirmed.

I. The automatic stay does not preserve arguments that were not raised on appeal.

Turning to the McIntires' arguments, the service of a notice of appeal generally automatically stays matters decided in the order on appeal. Rule 241(b), SCACR. But here the Subcontractor Defendants were not timely served with a notice of appeal.

Judge McCoy found that the Subcontractor Defendants were not timely served with the notice of appeal from the Order of Dismissal. (R pp. 33-34 n.4.) Appellate courts reverse a trial court's factual findings only if no evidence supports them. Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 328, 781 S.E.2d 737, 741 (Ct. App. 2015). Judge McCoy's factual finding is supported by evidence.

The McIntires' Notice of Appeal dated May 30, 2017 names only Seaquest as a Respondent. (R. p. 266; see also R. pp. 464, 468.) The Notice of Appeal recites receipt of the Order on May 2, 2017. (R. p. 266.) The Proof of Service for this document states it was served on "Respondent's attorneys of record." (R. pp. 283, 423.)

On June 2, 2017, after the thirty-day deadline had expired, counsel for the McIntires e-mailed a courtesy copy of the Notice of Appeal to the Subcontractor Defendants. (R. pp. 326, 423.) That same day, the McIntires filed a Proof of Service in this Court certifying that they served the Notice of Appeal on the "Defendants" via e-mail on June 2, 2017. (R. p. 328.) This electronic notice was neither timely nor effective. Rules 203(a) and (b)(1), 262(b), SCACR (2017).

It is undisputed that the Subcontractor Defendants did not participate in the appeal. This Court's December 31, 2019 memorandum opinion did not contemplate outstanding claims against the Subcontractor Defendants. (R. p. 20.)

Appellants failed to meet their burden of demonstrating entitlement to reversal of Judge McCoy's ruling. The McIntires' position that they appealed the Order of Dismissal in its entirety is not supported by the evidence. The record reflects that they appealed a portion of the adverse ruling—that concerning their claims against Seaquest. Nevertheless, even if the automatic stay extended to the entire case, it did not determine the trial court's jurisdiction after the appeal. The mandate controls, as discussed in further detail below.

II. The effect of the reversal of the Order of Dismissal is determined by this Court's mandate.

An appellate court's on-point reversal vacates a trial court order. Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995); Brown v. Brown, 286 S.C. 56, 57, 331 S.E.2d 793, 793-94 (Ct. App. 1985). These cases are not controlling because they do not address the effect of reversal on issues not raised in the appeal.

Moore was a workers' compensation case in which an employee was paid benefits under South Carolina law. 319 S.C. at 447, 462 S.E.2d at 275. The benefits award was reversed on appeal because the employee was not hired in South Carolina. Id. at 447, 462 S.E.2d at 275-76. After the appeal, the workers' compensation carrier sought restitution for benefits paid. Id. at 448, 462 S.E.2d at 276. The order granting that motion was appealed. Id. Rejecting a challenge to the order requiring restitution, the Supreme Court held that the original benefits award was vacated in the first appeal. Id. Moore is not controlling because the appellate court ruling in the first appeal operated directly upon the lower court ruling at issue, *i.e.*, the benefits award.

Brown involved alimony payments under a divorce decree. 286 S.C. at 56-57, 331 S.E.2d at 793. The family court reduced the alimony amount, but the Supreme Court subsequently reversed the modification. Id. at 57, 331 S.E.2d at 793. The question was whether the husband owed the arrearage due to his payments in the lower amount during the pendency of the appeal. Id. The Supreme Court held that its ruling in the first appeal vacated the family court's modification order and required the husband to pay the arrearage. Id. at 57-58, 331 S.E.2d at 793-94.

In both Moore and Brown, the parties to the first and second appeal were the same. In neither case did the parties raise questions as to portions of the vacated order that were not raised in the first appeal. When that occurs, "two-issue rule" controls.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Atlantic Coast Builders, 398 S.C. at 328, 730 S.E.2d at 284. "Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed." Rumpf, 357 S.C. at 398, 593 S.E.2d at 189. The doctrine of law of the case applies to an order that finally determines a substantial right. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The Order of Dismissal finally determined a substantial right by (a) finding that the McIntires failed to comply with the Right to Cure Act and (b) dismissing the case. (R. pp. 8-9, 14.) As to Seaquest only, the Order of Dismissal denied the McIntires' motion to compel arbitration. (R. pp. 13-14, 99 (citing an arbitration agreement with only Seaquest).)

This Court's mandate after the first appeal was to "remand the case for arbitration." (R. p. 20.) This mandate cannot be applied to the Subcontractor Defendants because no arbitration agreement exists between them and either Appellant.

This Court has plainly spoken on the effect of the remittitur and mandate:

> 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. Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form. The decision of the appellate court is final as to all questions decided. It is the duty of the trial court to follow the decision of the appellate court.

Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996).

The history of the Prince v. Beaufort Memorial Hospital case provides guidance. A hospital patient claimed injuries suffered from jumping out a window after he experienced a hallucination. Prince, Op. No. 2008-UP-139, 2008 WL 9837313 at *1 (Ct. App. filed Mar. 3, 2008). The hospital obtained a defense verdict after the trial court denied Prince's motion to compel a quality assurance (QA) file. Prince, 392 S.C. 599, 602, 709 S.E.2d 122, 123-24 (Ct. App. 2011). This Court reversed the denial of Prince's motion for a new trial in the first appeal and remanded for an *in camera* review of the hospital QA file. Id. at 602, 709 S.E.2d at 124 (citing Prince, Op. No. 05-UP-602 (Ct. App. filed Apr. 11, 2006)). The *in camera* review was limited to a determination of whether the file was privileged. Prince, 2008 WL 9837313 at *1.

On remand, the trial court conducted the *in camera* review and found that the hospital had waived the privilege by including summaries of witness statements in the QA file to respond to discovery requests. Prince, 392 S.C. at 603, 709 S.E.2d at 124. The trial court ordered the hospital's entire file to be produced. Id. The hospital's motion for

reconsideration on the ground that Prince did not raise waiver in the first appeal was denied. Prince, 2008 WL 9837313 at *1.

In the second appeal, this Court found that Prince raised the issue of waiver to the trial court but failed to include it in his statement of issues on appeal. Prince, 2008 WL 9837313 at *2-*3. Accordingly, this Court held that Prince abandoned his waiver argument on appeal. Id. at *3. This Court also held that the trial court exceeded the scope of its mandate following the first appeal. Id. at *3-*4. This Court again remanded the case to the trial court. Prince, 392 S.C. at 603, 709 S.E.2d at 124. This time, the mandate required the trial court to specify which portions of the file were confidential and which were discoverable. Id.

In the second *in camera* review, the trial court was troubled by a conflict between a witness' deposition and trial testimony. Prince, 392 S.C. at 603-04, 709 S.E.2d 124-25. The trial court ordered most of the file to be produced. Id. at 604, 709 S.E.2d at 125. The hospital filed another appeal contending that the trial court misinterpreted its mandate. Id.

This Court agreed with the hospital and provided the following directives. "A trial court has no authority to exceed the mandate of the appellate court on remand." Prince, 392 S.C. at 605, 709 S.E.2d at 125. "The mandate of the appellate court is jurisdictional." Id. "The trial court has a duty to follow the appellate court's directions." Id.

The McIntires' contention that this Court's reversal of the Order of Dismissal restored this case to its original posture cannot stand in light of Ackerman and Prince. The effect of this Court's prior ruling depends on this Court's mandate, not upon the general principle that a reversal vacates an order. This Court's mandate was to submit the case to arbitration. (R. p. 19.) That limited mandate cannot apply to the Subcontractor Defendants

because they never agreed to arbitrate. The trial court thus lacked jurisdiction to reinstate the Subcontractor Defendants as parties to this case.

III. Regardless of the scope of the Notice of Appeal, jurisdiction over Appellants' claims against the Subcontractor Defendants has not been preserved.

The McIntires next contend that the scope of their first appeal encompassed the entire Order of Dismissal. The record suggests otherwise.

A review of the transcript of the October 2016 hearing demonstrates that the Former Chief Justice was fully aware of the issues involving the Subcontractor Defendants and the need to address them in her ruling. One Subcontractor Defendant filed a formal motion to dismiss (R. pp. 357 ll. 7-10), counsel for another spoke at the hearing on behalf of the Subcontractor Defendants (R. pp. 380-86, 396-97.), and counsel for several others were recognized during the hearing (R. pp. 395-96.). Former Chief Justice Toal summarized the Subcontractor Defendants' position and expressed her view that if the McIntires' claim against Seaquest were submitted to arbitration, the claims against the subcontractors would need to be stayed. (R. pp. 394-97.)

However, the former Chief Justice ultimately ruled that the McIntires failed to comply with the Right to Cure Act. (R. p. 9.) Recognizing that the Right to Cure defense applied to all defendants, she dismissed the entire case. (Id.) Whether or not formal motions were filed, her Order finally determined the fate of the claims against the Subcontractor Defendants.

The effect of the Right to Cure Act is different as between Seaquest and the other Subcontractor Defendants because the latter are not subject to an arbitration agreement. Under the Federal Arbitration Act, questions involving the final disposition are for the arbitrator, not civil courts. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123

S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002). The arbitration ruling only concerns Seaquest. The McIntires have no argument that the trial court lacked jurisdiction to rule on the effect of the Right to Cure Act as to the Subcontractors Defendants.

Appellants' assertion that the McIntires appealed the entire Order of Dismissal is belied by the fact that they did not appeal the ruling concerning Red Bay. The McIntires' interpretation that Red Bay's Motion to Dismiss was "denied" as moot is inaccurate. If the ruling on Seaquest's motion was not intended to apply in favor of Red Bay, what else could have mooted Red Bay's motion? A denial of Red Bay's motion would require separate analysis. The court effectively *granted* Red Bay's motion by granting Seaquest's motion.

The Former Chief Justice's ruling as to Red Bay extends to the other Subcontractor Defendants. Although formal motions were not filed, the trial court heard them and considered the effect of her ruling as to them. The fact that the Order of Dismissal considered Red Bay's motion moot, coupled with the dismissal of the entire case, demonstrates the court's intent that the granting of Seaquest's motion was to be applied broadly to all defendants.

Therefore, an appeal of the entire Order would have required at least three key issues to have been raised:

(a) the enforceability of the McIntires' arbitration agreement with Seaquest;

(b) the effect of the Right to Cure Act as to Seaquest; and

(c) the effect of the Right to Cure Act as to Red Bay and the other Subcontractor Defendants.

Neither the McIntires nor Seaquest timely sought clarification pursuant to Rule 59(e); nor did they raise the third issue in the first appeal. Thus, the McIntires did not raise all adverse rulings in the Order of Dismissal in the first appeal. They raised both the statutory notice

and arbitration issues as to Seaquest only. They did not raise the statutory notice issue or the effect of the dismissal on their claims against the Subcontractor Defendants.

IV. The lack of a separate ruling concerning the Subcontractor Defendants does not change the result.

The McIntires' argument that there was no separate holding concerning the Subcontractor Defendants in the Order of Dismissal is without merit. In the first place, the argument is short, conclusory, and without supporting authority, and therefore should be deemed abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding that mere allegations of error without arguments and supporting authority are insufficient to support an appeal); Cole v. S.C. Elec. & Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003), aff'd as modified, 362 S.C. 445, 608 S.E.2d 859 (2005) ("Short, conclusory arguments unsupported by authority are deemed abandoned."). Furthermore, the Order of Dismissal reflects the Former Chief Justice's considered decision to dismiss the Subcontractor Defendants pursuant to the Right to Cure Act along with Seaquest. (R. p. 436, part (3).) To preserve an argument that the relief exceeded what was requested, reconsideration or clarification should have been sought by a timely motion. Fryer v. S.C. L. Enf't Div., 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006).

V. The argument that Seaquest was the only proper respondent to the first appeal lacks merit.

The McIntires' contention that Seaquest was the only proper respondent to the first appeal is also short, conclusory, and without supporting authority. It should also be deemed abandoned. First Sav. Bank, 314 S.C. at 363, 444 S.E.2d at 514. Cole, 355 S.C. at 196, 584 S.E.2d at 412. Furthermore, this argument is inconsistent with the law and with common sense. All parties to an action whose interests may be adversely affected by the decision of the appellate court are necessary parties to an appeal. Watkins, 278 S.W.3d at

640; 15 S.C. Jur. Appeal and Error § 31; Spanish Wells Prop. Owners Ass'n, 295 S.C. 67, 367 S.E.2d 160 (1988).

VI. The Subcontractor Defendants were not timely served with the Notice of Appeal.

As discussed above, the McIntires' Notice of Appeal dated May 30, 2017 names only Seaquest as a Respondent. (R. p. 266, 464, 468.) It was not served on the Subcontractor Defendants. (R. pp. 266-67, 464, 468, 423.)

After the thirty-day deadline had expired, counsel for the McIntires e-mailed a copy of the Notice of Appeal to the Subcontractor Defendants. (R. pp. 423, 349.) The McIntires' Proof of Service certified that they served the Notice of Appeal on the Defendants on June 2, 2017. (R. p. 351.)

The rules in effect at the time required service of the notice of appeal by delivery or mailing within 30 days of receipt of written notice of the entry of the order on appeal. Rules 203(a) and (b)(1), 262(b), SCACR (2017). The June 2, 2017 e-mail was outside the 30-day window. See Rule 203(b)(1), SCACR (2017). Furthermore, electronic service of a notice of appeal was not permitted at the time. Rule 203(a) and 262(b), SCACR (2017).

Service of the Notice of Appeal was not effective under Rule 203(b), SCACR. Because Rule 203(b) is jurisdictional, the Subcontractor Defendants never became parties to the first appeal. Elam, 361 S.C. at 14-15, 602 S.E.2d at 775.

VII. The trial court correctly held that no procedural mechanism exists for the Joint Motion for Clarification.

The trial court's ruling that no procedural mechanism afforded Appellants the right to seek clarification after the appeal is supported by ample authority and sound reasoning. This argument has been addressed above. No timely Rule 59(e) motions were filed seeking reconsideration or clarification of the Order of Dismissal. Neither party to the first appeal

sought clarification as to the status of the Subcontractor Defendants or argued that necessary parties were not joined. The only procedural mechanism for seeking clarification elapsed on May 12, 2017—ten days after receipt of the Former Chief Justice's Order. Rule 59(e), SCRCP. (R. p. 445.)

This Court's mandate limited the trial court's authority, as discussed above. Nothing in the mandate granted the trial court jurisdiction to entertain Appellants' motion to reinstate the Subcontractor Defendants as parties.

The fact that a judge directed or encouraged Appellants to file the motion has no bearing on this appeal. Appellants fail to point out that the judge in question subsequently requested a proposed order denying the Joint Motion for Clarification. (R. p. 532.) Judge Young withdrew his ruling after finding Judge McCoy had the motion under advisement. (R. p. 543.)

The acts of a court without jurisdiction are void. Katzburg v. Katzburg, 410 S.C. 184, 187-88, 764 S.E.2d 3, 5 (Ct. App. 2014). Unpublished rulings have no precedential effect. Rule 268(d)(3), SCACR. Judge Young's correspondence is not controlling.

Furthermore, the issue is not Appellants' general right to seek clarification, but the timing of that request. The Joint Motion for Clarification was filed long after the Rule 59(e) deadline expired.

VIII. The trial court did not recover jurisdiction over the Subcontractor Defendants following this Court's remittitur.

The McIntires' argument that the trial court recovered jurisdiction after the remittitur is conclusory and without supporting authority, and thus subject to being deemed abandoned. First Sav. Bank, 314 S.C. at 363, 444 S.E.2d at 514. Cole, 355 S.C. at 196, 584 S.E.2d at 412. The argument is speculative at best and contrary to settled law.

Former Chief Justice Toal considered the claims against all defendants before dismissing the entire case pursuant to the Right to Cure Act. (R. pp. 357, lines 7-10, pp. 380-86, 394-97.) Her ruling is now law of the case. Atlantic Coast Builders, 398 S.C. at 328, 730 S.E.2d at 284; Rumpf, 357 S.C. at 398, 593 S.E.2d at 189.

"A trial court has no authority to exceed the mandate of the appellate court on remand." Prince, 392 S.C. at 605, 709 S.E.2d at 125. "The mandate of the appellate court is jurisdictional." Id. The trial court must follow the appellate court's directions. Id.

As the McIntires candidly admit, the trial court's sole mandate upon remand was to refer the case to arbitration. This mandate presupposes that the claims against the Subcontractor Defendants are no longer in the case because they are not subject to arbitration. Nothing in this Court's mandate granted the trial court jurisdiction to stay the claims against the Subcontractor Defendants pending arbitration.

IX. Seaquest's arguments are unavailing.

Seaquest's arguments focus on a single paragraph in Judge McCoy's Order summarizing her ruling on the effect of the law of the case doctrine. (R. p. 36.) Seaquest quibbles with the phrase "fail to appeal" and the word "relitigation." These arguments are not preserved for appeal.

Appellants did not file a Rule 59(e) motion raising these concerns to Judge McCoy and giving her the opportunity to address them. "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Because the trial court was not provided the opportunity to resolve these issues before they were presented to this appellate Court, these issues are not preserved.

Moreover, Seaquest's arguments fail on the merits. Seaquest improperly attempts to inject the elements of collateral estoppel into the law-of-the-case doctrine. Law of the case and collateral estoppel are separate doctrines and, although their public policy aims are similar, their applicability is different. 46 Am Jur. 2d Judgments § 448 (Feb. 2022 Update). Law of the case prevents the same issues from being raised within successive stages of the same suit, whereas collateral estoppel prevents relitigation of issues in successive lawsuits. Matter of Ramage, 53 Kan. App. 2d 209, 212-13, 387 P.3d 853, 857 (Kan. Ct. App. 2016).

The elements of the two doctrines are not the same. Seaquest correctly points out that collateral estoppel applies only if the issue was actually litigated and directly determined in the prior action. Pye v. Aycock, 325 S.C. 426, 436, 480 S.E.2d 455, 459 (Ct. App. 1997). However, no authority is cited as to why these elements must be met for the doctrine of law of the case to apply.

Under South Carolina law, an unappealed ruling becomes law of the case. Atlantic Coast Builders, 398 S.C. at 328, 730 S.E.2d at 284; Rumpf, 357 S.C. at 398, 593 S.E.2d at 189. The law-of-the-case doctrine applies here because the trial court's dismissal of the entire case—including the claims of both the McIntires and Seaquest against the Subcontractor Defendants—was not appealed. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

Furthermore, collateral estoppel would not be necessary in any subsequent suit between Seaquest and the Subcontractor Defendants. The "actually litigated and decided" requirements for collateral estoppel are needed because nonmutual collateral estoppel can be asserted by a person who was not a party to the first action. S.C. Prop. and Cas. Ins.

Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 214, 403 S.E.2d 625, 627 (1991). At issue here is the same claim between the same parties.

Another doctrine, *res judicata*, "bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). The doctrine of *res judicata* not only prohibits litigants from raising issues that were adjudicated in a former suit, but also issues that could have been raised. Id.

Seaquest suggests the Order of Dismissal was not final because it did not reach the merits. Although the Order did not reach the merits of the McIntires' construction defect claim, it did address the merits of a defense raised by all defendants. As Seaquest acknowledges, Former Chief Justice Toal ruled the action could never proceed because the statutory precondition could not be met. (Seaquest Init. Br., p. 10.) This precluded all claims in the suit and resulted in a dismissal of the entire case. The Order of Dismissal was a final adjudication on the merits.

Although Seaquest may not have been aggrieved by the dismissal of the case, Seaquest *is* aggrieved by the continuation of the McIntires' claims against it after the claims against the Subcontractor Defendants were dismissed. The Subcontractor Defendants' position is succinctly encapsulated in the words of counsel for one of them, Andy Lacour, at the hearing: "If the GC didn't want their cross-claims dismissed, they could have brought it up one way or the other." (R. p. 426.)

As discussed above, Seaquest had at least two options. First, Seaquest could have sought reconsideration or clarification of the Order of Dismissal. At the hearing, Former

Chief Justice Toal indicated she was inclined to stay the claims against the Subcontractor Defendants. (R. pp. 395-96.) Months elapsed after the Former Chief Justice announced her ruling before the Order of Dismissal was filed. (Compare R. p. 3 with 436.) Reconsideration was not sought.

Seaquest could also have brought to this Court's attention during the first appeal that the Subcontractor Defendants were necessary parties that were not joined. In Spanish Wells, the Supreme Court reversed this Court and reinstated a lower court ruling dismissing the appeal because a necessary party was not joined. 295 S.C. at 68-69, 367 S.E.2d at 161-62. At a minimum, Seaquest could have sought clarification from this Court during the pendency of that appeal. (See Seaquest Init. Br., pp. 11-12 (string-citing authorities for the proposition that all courts have inherent authority to manage and conduct proceedings before them and to do all things reasonably necessary to ensure just results).)

The Subcontractor Defendants do not contest the general proposition that a court may clarify a prior ruling. Instead, the Subcontractor Defendants challenge the *timing* of the request for clarification—it was made after the horse had left the barn.

The Joint Motion for Clarification asked the trial court to clarify this Court's mandate after the first appeal. This the trial court could not do because its sole mandate was to refer the case for arbitration. (R. p. 19.) On remand, a trial court's jurisdiction is limited to the appellate court's directions in the mandate. Prince, 392 S.C. at 605, 709 S.E.2d at 125.

Judge McCoy correctly decided her jurisdiction on remand was limited to the scope of this Court's directives in the mandate. (R. p. 39.) Because the relief Appellants sought

was beyond the scope of that mandate, she lacked jurisdiction to grant that relief and her Order should be affirmed.

CONCLUSION

The effect of the Order of Dismissal on the claims against the Subcontractor Defendants was not raised—although it could have been—via timely motion for reconsideration or appeal. After the trial court dismissed the case, this Court never acquired jurisdiction over the Subcontractor Defendants because the 2017 Notice of Appeal was not properly and timely served on them. This Court's mandate that the case be submitted to arbitration demonstrates that the claims against the Subcontractor Defendants did not survive the first appeal because the Subcontractor Defendants are not subject to arbitration. In light of the limited mandate on remand, Judge McCoy correctly ruled that she lacked jurisdiction to reinstate the Subcontractor Defendants as parties.

Respondents request that the Court affirm for the reasons set forth above, and for any ground appearing in the Record pursuant to Rule 220(c), SCACR. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000).

Respectfully submitted,

May 31, 2022

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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

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-01833
Appellate Case No. 2021-001055

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 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,

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, 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 are

Respondents.

CERTIFICATE OF COUNSEL

In accordance with Rule 211(b), SCACR, the undersigned certifies that the Respondents' Final Brief complies with the Supreme Court Order of April 15, 2014.

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