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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 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.

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

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.

PETITIONER'S REPLY
TO RESPONDENTS' RETURN
TO PETITION FOR REHEARING

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In further support of its petition for rehearing, Seaquest makes the following points in reply to Respondents' return to thereto.[1]

ARGUMENT IN REPLY

1. Seaquest's argument that no claims were "litigated" previously and it had nothing to appeal is preserved for review.

Seaquest argued to the circuit court that the only motion that was granted by the Dismissal Order was Seaquest's own motion to require the McIntires to comply with the Right to Cure Act, the grant of which motion resulted in the dismissal of the action solely on statutory procedural grounds (not in any dismissal of Respondents', or of any claims against them, in particular), because Chief Justice Toal agreed with Seaquest that the McIntires had not complied with, and, indeed, could not possibly comply with, the requirements of the Act and that, pursuant to the express terms of the Act, this left Chief Justice Toal no choice but to stay the action pending the occurrence of something that would never occur, in other words, to stay the action in perpetuity, i.e., permanently, which, in practical terms, translated to dismissal of the action. (R. pp. 247–249, 307–301, 330–332.) Seaquest expressly argued that, given that the only motion that was granted by the Dismissal Order was its own motion (the grant of which Seaquest was, of course, not aggrieved by), "[t]he only order that could be appealed was appealed." (R. p. 416:15–16.) And the circuit court rejected the

[1] Shorthand references already defined in Seaquest's petition are continued in this reply.

argument, expressly finding that, since "Seaquest failed to appeal the [Dismissal Order] . . . , this unappealed ruling ha[d] become the law of the case and . . . Seaquest [is] barred from relitigating these extinct claims." (R. p. 36.)

"Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). "Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *Id.* at 502, 697 S.E.2d at 595–96; *cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result) ("In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.").

Seaquest's argument that no claims were "litigated" previously and it had nothing to appeal was duly raised to and ruled on by the circuit court and is thus preserved for review.

2. Respondents are wrong in asserting, "Seaquest was an aggrieved party for purposes of its contingent claims when the McIntires filed their appeal."[2]

As Seaquest has already explained, it was not aggrieved by the Dismissal Order, as the Dismissal Order *granted* Seaquest's motion and dismissed the action

[2] (Return p. 7.)

based on Chief Justice Toal's *agreement with Seaquest* that the action could never proceed because the McIntires could never comply with the Right to Cure Act. Thus, the Dismissal Order was a complete and total victory for Seaquest, who had neither any reason nor even the ability to appeal it. Rule 201, SCACR ("*Only* a party *aggrieved* by an order, judgment, sentence or decision may appeal.") (emphasis added); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ."). Consequently, Seaquest cannot be faulted for "failing to appeal" an order it could not appeal.

The cases Respondents cite to the effect that "a defendant may appeal the dismissal of a co-defendant when the dismissal of the co-defendant would affect the appealing defendant's liability exposure"[3] are plainly inapplicable here, as this is not a case where the subject order, i.e., the Dismissal Order, dismissed claims against other potentially liable parties while leaving Seaquest in the case to face increased liability exposure. Rather, the Dismissal Order dismissed the entire action, thereby terminating Seaquest's liability exposure.

As Respondents themselves observe, "Seaquest's cross-claims and third-party claims against Respondents are *derivative* of the McIntires' claims against

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[3] (Return p. 6 (citing *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2s 530 (Ct. App. 2002), *Benton Inv. Co., Inc. v. Wal-Mart Stores, Inc.*, 704 So.2d 130 (Fla. Dist. Ct. App. 1997), and *Comanche Constr. Inc. of Ga. v. Dep't of Transp.*, 272 Ga. App. 766, 613 S.E.2d 158 (Ct. App. 2005).)

Seaquest." (Return p. 6 (emphasis added).) When Respondents assert, "Seaquest was an aggrieved party for purposes of its *contingent* claims when the McIntires filed their appeal,"[4] they fail to appreciate the fact that, with its dismissal of the entire action, the Dismissal Order had the effect of preventing the contingency underlying the referenced "contingent claims" from ever coming to pass.

Lastly, Respondents' reliance on *Spanish Wells Property Owners Association, Inc. v. Board of Adjustment of the Town of Hilton Head*, 295 S.C. 67, 367 S.E.2d 160 (1988), is misplaced. In *Spanish Wells*, our Supreme Court "h[e]ld that a development permittee is a necessary party to an appeal of its permit." 295 S.C. at 69, 367 S.E.2d at 161; *see also id.* at 68, 367 S.E.2d at 161 ("The sole question we address here is whether a permittee is a necessary party to an action to revoke a development permit."). Accordingly, the Court found that the trial court had correctly dismissed an appeal of a development permit where the *appellant* had failed to include the permittee as a party to the appeal. But nothing in *Spanish Wells* supports Respondents' effort to impose a burden on the *respondent* to an appeal (here, Seaquest in the prior appeal) to ensure that any other party is joined to the appeal.

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[4] (Return p. 7 (emphasis added).)

CONCLUSION

For the foregoing additional reasons, along with any other or further reason(s) set forth in its appellate briefs already on file, the entirety of which it hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof, Seaquest asks this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the circuit court's ruling on the motion for clarification and confirms that Seaquest's claims remain pending against Respondents.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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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

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant Seaquest Development Company, Inc., hereby certify that the **PETITIONER'S REPLY TO RESPNDENTS' RETURN TO PETITION FOR REHEARING** in the above-captioned case were served on all parties to this matter (who have appeared in the action) on August 21, 2023, by emailing (see attached) a copy of the same to their respective counsel of record:

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August 21, 2023

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Date: Monday, August 21, 2023 11:17:00 PM
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Attached please find **Petitioner’s Reply to Respondents’ Return to Petition for Rehearing** in the above-referenced case.

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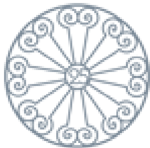

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