THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Beaufort County
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2019-CP-07-00223

Court of Appeals Case No. 2020-001659

Supreme Court Case No. 2024-000088

Tracey Lee Lunenburg, Respondent,

v.

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

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

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

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

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners make the following points in reply to Plaintiff's return.[1]

ARGUMENT IN REPLY

1. Plaintiff admits the following:

(a) the Right to Cure Act applies to her claims against both Petitioners, i.e., it applies not only to her claims against Aiello but also to her claims against Atlantic Heritage;

(b) she filed this action before first complying with the requirements of the Act, in particular, she filed it without having provided Petitioners the notice of claim required by the Act;

(c) § 40-59-830 mandated that the action be stayed until she complied with the requirements of the Act, and Judge Jefferson stayed it accordingly; and

(d) "if she wanted to proceed with the lawsuit," i.e., for the stay to be lifted, Plaintiff "was obligated to provide" Petitioners the notice of claim required by the Act.

(*See* Return p. 6 ("Section 40-59-830 states that '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.' Judge Jefferson's order clearly addressed Plaintiff's failure to provide notice by staying the case, and ordering that Plaintiff provide notice before the case could proceed. Plaintiff corrected her error and provided notice under the applicable statute. Any issues addressed by Petitioners which occurred prior to Judge Jefferson's order are irrelevant as Judge Jefferson's order properly addressed those issues. The focus of this appeal is Judge Mullen's Order lifting the stay imposed by Judge Jefferson's

[1] Shorthand references already defined in the petition for a writ of certiorari are continued in this reply (e.g., "Petitioners" refers to Defendants/Appellants, Vincent J. Aiello, Jr. ("Aiello"), and Atlantic Heritage Builders, Inc. ("Atlantic Heritage"), collectively; "Plaintiff" is Plaintiff/Respondent, Tracey Lee Lunenburg; 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).

order. After Judge Jefferson issued her Order, Plaintiff was obligated to provide Defendants notice under the statute if she wanted to proceed with the lawsuit."); *id.* at p. 2 ("Plaintiff, attempting to comply with Judge Jefferson's Order, drafted a Notice and Right to Cure letter dated June 18, 2020. Plaintiff sent the right to cure letter via certified mail to Defendants Vincent J. Aiello and Atlantic Heritage Builders . . . ."); *see also id.* at p. 1 ("This appeal arises out of a construction defect lawsuit involving a single family residential dwelling located on Hilton Head Island. The Defendant, Atlantic Heritage Builders was the general contractor that constructed the residence and the Defendant Vincent J. Aiello was the license holder for Atlantic Heritage Builders. As such they were both responsible for the construction of the subject residence.").)

2. To be clear, neither the Act nor Judge Jefferson's order imposing the stay mandated by the Act conditions lifting the stay on Plaintiff merely providing Petitioners the notice of claim required by the Act; rather, lifting the stay is conditioned on compliance with all the Act's requirements, including, but not limited to, Plaintiff providing Petitioners the required notice of claim.

See § 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); (R. p. 2 (staying action "pursuant to S.C. Code Ann. 40-59-830").)

3. By the time Plaintiff attempted to provide Petitioners the notice of claim required by the Act—in other words, by the time Plaintiff first attempted to comply with the requirements of the Act—it was no longer possible for Plaintiff to comply with the requirements of the Act.

Plaintiff first attempted to comply with the requirements of the Act via the purported notice of claim letter dated June 18, 2020. (*See* R. pp. 93–96.) As explained in Petitioners' petition, more than a year earlier, on May 8, 2019, Petitioners had been permitted to inspect the subject residence

pursuant to Rule 34(a)(2), SCRCP,[2] and Petitioners' liability expert, forensic engineer Robert Kenney, P.E., was present at the inspection. As Mr. Kenney attested in his affidavit, it was clear that Plaintiff had been effecting repairs and modifications, significant construction activities were already ongoing, and the majority of Petitioners' allegedly deficient work (i.e., the claimed construction defects of which Plaintiff was supposed to give Petitioners prior notice pursuant to the Act) had been removed and destroyed, such that the work no longer existed, and thus no longer possible to inspect, some of it even already completely repaired, and thus not only impossible to inspect but also impossible to offer to cure. (*See* R. pp. 61–62.) Indeed, even in the purported notice of claim letter itself, Plaintiff admitted that "some repairs have already been made" and that "[t]he completion of these repairs might affect your ability to examine the evidence of original construction." (*See* R. pp. 93–96.)

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

Properly reading and construing the Act as a whole, it is clear that to provide the notice of claim required by the Act, the notice must be given in respect of claimed *existing* defects, i.e., defects

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[2] In this regard, Petitioners would note that the legislature intended the Act to provide contractors the right to entry onto and inspection of the claimant's dwelling pre-suit. *See Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 571, 573, 703 S.E.2d 197, 202 (2010) ("These rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of sections 40–59–840 and 850, as opposed to during an action's normal discovery period.").

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

4. Even assuming, *arguendo*, it were possible for Plaintiff to comply with the requirements of the Act, Plaintiff did not properly effect service of the required notice of claim on Petitioners.

Under 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). As explained in Petitioners' petition, Plaintiff did not effect proper service of the purported notice of claim. Indeed, even assuming, *arguendo*, Plaintiff effected proper service on Aiello, via the mailing signed for by *his* purported agent at the address for A&S Sales of Virginia, Plaintiff still failed to effect proper service on Atlantic Services.

5. Like the Court of Appeals itself, Plaintiff overlooks the fact that the authority the Court of Appeals cited in dismissing this appeal involved *discretionary* stays, rather than the *statutorily mandated stay* required by the Right to Cure Act.

As explained in Petitioners' petition, to determine, as the Court of Appeals has via the Subject Order, that the circuit court's error in lifting the stay under the Right to Cure Act is not immediately appealable is essentially to determine that such error is never subject to meaningful review, and in making this determination, the Court of Appeals cited only case law (namely, *Carolina Water Serv. Inc. v. Lexington Cnty. Joint Mun. Water. & Sewer Comm'n*, 373 S.C. 96, 644 S.E.2d 681 (2007) and *Edwards v. SunCom, Inc.*, 369 S.C. 91, 631 S.E.2d 529 (2006)) involving *discretionary* stays, not a *statutorily mandated stay* like the stay required by the Right to Cure Act, the imposition of which stay is expressly *not* a matter of the circuit court's discretion. § 40-59-830 ("If the claimant files an action in court before first complying with the requirements of [the Act], on motion of a party to the action, the court *shall* stay the action *until the claimant has complied* with the requirements of [the Act].") (emphasis added). Nowhere in Plaintiff's reply is this addressed.

CONCLUSION

For the foregoing additional reasons, Petitioners ask this Honorable Court to grant the instant petition, reverse the Subject Order, direct the Court of Appeals to reinstate this appeal (or, alternatively, directly order that the appeal be reinstated), and direct the Court of Appeals to decide the appeal on the merits (or, alternatively, directly decide the appeal on the merits via an opinion that reverses the circuit court and, as mandated by § 40-59-830, stays this action unless and until Plaintiff complies with the Right to Cure Act (or, alternatively, an opinion that remands the case to the circuit court with instructions that it stay this action unless and until Plaintiff complies with the Right to Cure Act, as mandated by § 40-59-830)).

Respectfully Submitted,

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