

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Charleston County  
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

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JAN 10 2018

SC Court of Appeals

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.

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**FINAL BRIEF OF RESPONDENT**

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## COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. In this residential construction defect case (brought by homeowners the McIntires<sup>1</sup> against general contractor Seaquest<sup>2</sup>), 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,<sup>3</sup> 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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<sup>1</sup> The "McIntires" are Plaintiffs/Appellants Andrew and Kimberly McIntire.

<sup>2</sup> "Seaquest" is Defendant/Respondent Seaquest Development Company, Inc.

<sup>3</sup> 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,<sup>4</sup> 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 for them to comply because they had already remodeled and repaired their home. (Supp. R. p. 73.)

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<sup>4</sup> 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.)<sup>5</sup>

The trial court heard the motions on October 13, 2016, the Honorable Jean Hoefler Toal presiding,<sup>6</sup> 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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<sup>5</sup> 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.

<sup>6</sup> (*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,<sup>7</sup> 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

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<sup>7</sup> (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,<sup>8</sup> 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)<sup>9</sup>), 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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<sup>8</sup> (See Apps’ Br. pp. 10-11.)

<sup>9</sup> *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<sup>10</sup> and the trial court’s construction of the Act being contrary to public policy<sup>11</sup>—neither of which, it should be noted, is preserved for review in any event, having not been properly raised and ruled on below. (See 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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<sup>10</sup> (See Apps’ Br. p. 11.)

<sup>11</sup> (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.<sup>12</sup>

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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<sup>12</sup> 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,<sup>13</sup> 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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<sup>13</sup> (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”<sup>14</sup> to even filing an “action,” which is a statutorily defined term that

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<sup>14</sup> 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,

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