**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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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.

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# RESPONDENT'S PETITION FOR REHEARING

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YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Edward D. Buckley, Jr. (SC Bar No. 994)
Jason A. Daigle (SC Bar No. 73308)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*Counsel for Respondent*

NOW COMES Seaquest,[1] by and through its undersigned counsel, pursuant to Rule 221(a), SCACR, and hereby petitions this Honorable Court for rehearing of this appeal, which it decided via unpublished opinion filed December 31, 2019 (the "Subject Decision").

## MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

### I. The Subject Decision does not comply with Rule 220, SCACR.

#### A. It is not proper for the Subject Decision to be unpublished.

Rule 220(a) requires appellate court decisions to be made by one of only two types of written opinions: "published" opinions and unpublished "memorandum" opinions:

> **(a) Opinions.** *The appellate court shall make its decisions in writing by published opinions or memorandum opinions*, with any concurring or dissenting opinions attached. *Published opinions shall appear in the Official Reports* of the Supreme Court and the Court of Appeals; *memorandum opinions shall not be published in the official reports* and shall be of no precedential value. . . .

(emphasis added).

Rule 220(b) establishes the general rule that appellate court opinions must expressly state not only the court's decision but also *the reasoning underlying the*

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[1] Shorthand references already defined in Seaquest's brief (e.g., referring to Defendant-Appellant, Seaquest Development Company, Inc., as "Seaquest") are continued in this petition.

*court's ruling* as to *every* distinct point fairly arising upon the record that is necessary to the decision of the appeal:

> **(b) Decision by the Court.** In *every* decision rendered by an appellate court, *every* point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court *must* be stated in writing and *must, with the reason for the court's decision*, be preserved in the record of the case.

(emphasis added).

There are two exceptions to the general rule in Rule 220(b). One applies exclusively to the Supreme Court, the other exclusively to this Court. They are set forth in Rule 220(b)(1) and (2), respectively:

> **(b) Decision by the Court.** . . . This rule does *not* apply to the following:
>
> (1) The *Supreme Court may file a memorandum opinion* dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the *Supreme Court* determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.
>
> (2) The *Court of Appeals* need not address a point

which is manifestly without merit.

(emphasis added).

Rule 220(b)(1) does not apply to this Court at all. It only authorizes the *Supreme Court* to file unpublished "memorandum" opinions, and only in certain, specifically identified circumstances. It is Rule 220(b)(2) that apples to *this Court*, and it does not grant the Court authority to file unpublished "memorandum" opinions; nor does it in any way otherwise empower the Court to render an *entire opinion* without precedential value. It only authorizes the Court to deviate from the general rule in Rule 220(b)—which, again, requires the appellate court to address every distinct point fairly arising upon the record that is necessary to the decision of the appeal—with respect to *individual points* that are "manifestly without merit."

Most respectfully, issuance of the Subject Decision as an unpublished decision is improper under Rule 220.

**B. Even assuming, *arguendo*, issuance of the Subject Decision as an unpublished decision is proper under Rule 220, the Subject Decision nonetheless fails to comply with Rule 220(b) because it does not expressly rule, and provide the Court's underlying reasoning, on every distinct point fairly arising upon the record that is necessary to the decision of the appeal.**

As explained above, the Court is only permitted to deviate from the general rule in Rule 220(b) with respect to points that are "*manifestly* without merit." Rule 220(b)(2) (emphasis added). The Subject Decision does not contain a ruling on a number of points (none of them "manifestly without merit") that were properly

before the Court and necessary to the decision on the appeal. The Subject Decision fails to comply with Rule 220(b) because it does not rule on these points. Seaquest is entitled to a ruling on them and asks the Court to correct this error and rule on them now.

(1) **The Court reversed the trial court solely on the basis of its finding that the trial court erred in finding the McIntires waived their arbitration right. The Court never addressed the Right to Cure Act's impact on arbitrability and whether, even assuming, *arguendo*, the McIntires did not waive their right to arbitration, the trial court was nonetheless correct in denying the McIntires' motion to compel arbitration and dismissing the case because of the McIntires' failure to comply with the Act. The Court expressly stated that it was declining to address the Right to Cure Act because it believed its determination of the waiver issue was dispositive of the appeal. Respectfully, the Court is incorrect; its determination of the waiver issue is not dispositive of the appeal. The McIntires' noncompliance with the Right to Cure Act is a separate and independent basis for the trial court's holding, and this Court cannot properly decide this appeal without addressing (a) whether the Right to Cure Act impacted arbitrability, as the trial court found it did, and (b) whether the McIntires' complied with the Right to Cure Act, which the trial court found they did not. The Court should address these points now,[2] and it should conclude that the trial court was correct on both counts.**

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[2] The Court also did not address Seaquest's points regarding issue/argument preservation. These points are addressed herein in the context of other points that are addressed to the merits. The Court now should address these issue preservation points, too, and affirm the trial court for the additional reason that the McIntires did not present argument sufficient to reverse it in any event.

### (a) The question of compliance with the Right to Cure Act is a question of arbitrability for judicial determination, as the trial court properly found.

Even assuming, *arguendo*, that the McIntires did not waive their right to arbitration, there remains the question of whether a challenge to their compliance with the Right to Cure Act (as Seaquest made here) presents an obstacle to their motion to compel arbitration. In other words, who is to decide whether the McIntires complied with the Right to Cure Act: the trial court or an arbitrator? Seaquest contends it is the *trial court*—but at a minimum, this appeal cannot be properly decided unless and until this Court answers the question.[3]

As explained in Seaquest's brief, "The question whether the parties have submitted a particular dispute to arbitration, i.e., 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

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[3] If the Court agrees with Seabrook that the trial court decides, it will also have to answer the question of whether the trial correct was correct in denying the McIntires' motion to compel arbitration and dismissing this case because of the McIntires' failure to comply with the Right to Cure Act.

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, and in any event, the Act itself mandates that it is an issue for the *court.*

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,*"[4] 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*"[5] to even *filing* an "action,"[6] action being a statutorily defined term that

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[4] *Id.* at 84 (emphasis added).

[5] *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).

[6] The question of compliance with the Right to Cure Act does not merely "bear on [the] final disposition" of the dispute: it bears on whether there can even be an action in which to dispose of the dispute. While (in the *litigation* context, at least) rights under the Right to Cure Act are not "new" substantive rights—because they are consistent with substantive discovery rights already accorded to a defendant in litigation—they 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.

includes both lawsuits and *arbitration* proceedings. *See* § 40-59-820 ("'Action' means any civil lawsuit or action or *arbitration proceeding* . . . .) (emphasis added). And its plain—and mandatory—language expressly directs 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]." § 40-59-830 (emphasis added).

The Court's adoption of the McIntires' view—that the trial court had no choice but to send the dispute to arbitration—means defying the unequivocal statutory language that says just the opposite: that *the trial court had no choice but to the stay the action* (again, a statutorily defined to be inclusive of both civil lawsuits and arbitration proceedings) pending compliance with the Right to Cure Act. The Court's adoption of such a view would also mean defying logic. Given that compliance with the Right to Cure Act is as an "absolute condition precedent" to even commencing an action and that the trial court is required to "stay [any] action [filed without first complying with the Act] until the claimant has complied with the requirements of [the Act]," it would be absurd to adopt the view that the McIntires are entitled to relief from a court that they should not be in in the first place (for their

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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*—wherein the substantive discovery rights accorded a defendant in *litigation* are *not* present—the Right to Cure Act does, in fact, create new substantive rights.

noncompliance with the Right to Cure Act) while the court itself is powerless to do anything about their noncompliance with the Right to Cure Act.

**(b) The McIntires did not—and made it so that they could not—comply with the Right to Cure Act, as the trial court correctly found in denying their motion to compel arbitration and dismissing this case.**

The uncontroverted record establishes that the McIntires filed suit without complying with the Right to Cure Act. The Subject Decision itself recognizes that "[p]rior to bringing the action, the McIntires had discovered a number of alleged construction defects in their home and hired experts and began repairs *without notifying Seaquest.*" (emphasis added.) The McIntires themselves concede that they did not serve Seaquest with a written notice of claim,[7] thus conceding their noncompliance with the Act. *See* § 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.*") (emphasis added) Moreover, by arguing, as they did in their principal appellate brief, that *future* compliance with the Act is not impossible,[8] the McIntires necessarily concede that they have *not yet* complied with it.

The Act unequivocally *mandates* that, where, as here, a claimant files a lawsuit without complying with the Right to Cure Act, a stay *must* be imposed if

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

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

requested, and the stay must remain in place "*until* the claimant *has complied*" with the Act. § 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)).[9]

The trial court correctly found that the repairs to the alleged defects were completed by the time suit was filed or shortly thereafter, as this Court itself recognized in the Subject Decision, stating, "The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter." The court also correctly found that, in consequence of the McIntires having already substantially completed the repairs to the alleged defects, they had not only failed to comply with the Right to Cure Act but also rendered compliance with the Act impossible, forever denying Seaquest its rights under § 40-59-850(A) ("The

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[9] Without question, Seaquest timely moved to enforce compliance with the Act—it has never even been suggested otherwise. As explained in Seaquest's brief, contemporaneous with its timely answer to the McIntires' complaint, Seaquest moved for the case to be dismissed or, alternatively, stayed, pursuant to § 40-59-830, because of the McIntires' failure to comply with the Right to Cure Act, contending the McIntires had not served it with the written notice of claim required by § 40-59-840 (as, again, the McIntires concede the7 did not, R. pp. 79:13-80:8), 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.) It was not until *after* Seaquest moved to enforce compliance with the Act that the McIntires moved to compel arbitration.

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 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).

The McIntires' arguments against this impossibility are self-defeating, in fact *proving* the point—that it is no longer possible for them to comply with the Act—they attempt to disprove. The McIntires raise only 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)[10]), 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' Br. p. 11.) Of course, these arguments necessarily concede the fact that there is nothing left to offer to "repair," nothing physically to "inspect." And as a legal matter, they

[10] *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.").

are clearly misguided in view of the clear statutory language, which 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).

These statutory construction arguments also cut against the McIntires' arguments about a lack of prejudice to Seaquest[11] and about the trial court's construction of the Act being contrary to public policy[12]—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. Where, as here, a claimant repairs the alleged defects and then seeks to recover the cost of repairs from a contractor, not only has the contractor been denied the right to make an offer to repair but also, in regard to attempting a resolution with a claimant (not to mention actually defending against the claim), the contractor has been 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

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

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. *See Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 271, 802 S.E.2d 794, 797 (2017) ("Determinations of public policy . . . are chiefly within the province of the *legislature*, whose authority on these matters we must respect.") (emphasis added). The Act's only teeth are in the form of the condition precedent it requires to be met before an action proceeds—a 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*, 390 S.C. at 570, 703 S.E.2d at 200-01 ("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 properly did. *See Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *In*

*re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.") (citations omitted); *id.* at 233, 509 S.E.2d at 262 ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.").

Without question, and even though they would later claim a right to arbitrate, it was the McIntires themselves who brought this action in court without first complying with the Right to Cure Act. In clear and unmistakable terms, the Act instructs the *court* what it *must* do in this circumstance—and at the same time makes it impossible for the McIntires' to keep the court from doing so by contending that the matter is to be decided in arbitration. § 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).

The trial court correctly followed the statute and recognized that a stay was mandatory. The trial court correctly followed the statute and recognized that the

mandatory stay would have to remain in place unless and until the McIntires complied with the Act. The trial court correctly followed the statute and the uncontroverted record in recognizing that the McIntires had rendered their compliance with the Act impossible and thus rendered the mandatory stay incapable of being lifted. The trial court adhered to the logical consequences of the statutory language and honored the legislative intent in equating a permeant stay with a dismissal. The trial court should be affirmed, or, in the alternative, the case should be remanded to the trial court to stay the case until and unless the McIntires comply with the Act.

## II. The Court erred in determining that the trial court erred in finding the McIntires waived their right to arbitration.

The Subject Decision does not consider the fact (and should now do so) 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

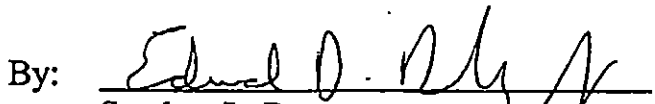
requiring submission of any claim arising out of or related to the agreement to mediation.") (emphasis added); R. p. 37, ¶ 3 ("[A]ny claim not resolved by mediation shall be resolved by binding arbitration.") (emphasis added).) Waiver is the voluntarily and intentional relinquishment of a known right. *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 reasons set forth herein, along with any other or further reason(s) which may be contained in Seaquest's brief already on file or in the appealed order itself, the entirety of which it hereby incorporates herein by reference and requests this Honorable Court to reconsider, Seaquest asks the Court to grant the instant petition; to rehear this matter; and to withdraw the Subject Decision and decide this appeal anew via an opinion that fully complies with Rule 220 and addresses all of its appellate arguments on the merits in reasonably substantive detail, filing in place of the Subject Decision a new or materially revised opinion that affirms the result

below or, in the alternative, remanding the case to the trial court to impose a stay until and unless the McIntires comply with the Act.

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)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
*Counsel for Respondent*

Charleston, South Carolina
Dated: February 13, 2020

**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
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Andrew and Kimberly McIntire,

Appellants,

v.

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Defendants,

Of which Seaquest Development Company, Inc., is the

Respondent.

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## PROOF OF SERVICE

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YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Edward D. Buckley, Jr. (SC Bar No. 994)
Jason A. Daigle (SC Bar No. 73308)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*Counsel for Respondent*

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the foregoing **RESPONDENT'S PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on February 13, 2020, 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: February 13, 2020

YCRLAW

Kathleen B. Barnes
Secretary

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1369
E-mail: kbarnes@ycrlaw.com

February 13, 2020

**VIA FED EX OVERNIGHT, US MAIL AND FASCIMILE**
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Andrew and Kimberly McIntire v. SeaQuest Development Company, Inc., et al
Appellate Case No. 2017 001270
Case No.: 2016 CP 10 1833
Date of Loss: 7/24/2008
YCR File: 9795 20160374



Dear Ms. Kitchings:

Enclosed via Fed Ex please find the original and seven (7) copies of Respondent's Petition for Rehearing, the original and one (1) copy of the Proof of Service of same and our firm's check in the amount of $50.00 representing the filing fee. Please file the originals and return court stamped copies to me in the enclosed envelope.

Please note that copies will follow via US Mail.

With best wishes and kindest regards, I am

Sincerely,

YCRLAW, LLP

Kathleen B. Barnes
Secretary

Enclosures
(via US Mail and email)
cc: Jaan G. Rannik, Esq., Andrew K. Epting, Jr., LLC
Andrew K. Epting, Jr., Esquire, Andrew K. Epting, Jr., LLC

YCRLAW
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
P.O. Box 993
Charleston, SC 29402

SLB
9795-20160374



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