

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 2019-UP-413 (S.C. Ct. App. filed December 31, 2019)

Andrew and Kimberly McIntire,

Respondents,

v.

Sequest 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 Sequest Development Company, Inc., is the

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Seaquest's¹ counsel certifies that the Court of Appeals filed its opinion in this matter on December 31, 2019 (the "Subject Decision"), and denied Seaquest's timely petition for rehearing by order filed March 27, 2020.

INTRODUCTION

This is a residential construction defect lawsuit by homeowners the McIntires² against general contractor Seaquest.³ The McIntires are "claimants"⁴ and this lawsuit is an "action"⁵ under, and thus subject to, the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860 (the "Opportunity to Cure Act" or the "Act").

The Act requires that, no later than 90 days before filing an action against a contractor arising out of the construction of a dwelling, the claimant must serve a written notice of claim on the contractor. S.C. Code Ann. § 40-59-840(A). The contractor has 30 days from service of the notice "to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann.

¹ "Seaquest" is Defendant/Petitioner, Seaquest Development Company, Inc.

² The "McIntires" are Plaintiffs/Respondents, Andrew and Kimberly McIntire.

³ As reflected in the above caption, the McIntires sued a number of other defendants besides Seaquest, but Seaquest is the only respondent the McIntires (the appellants) named to their appeal.

⁴ See S.C. Code Ann. § 40-59-820(2) (defining "Claimant").

⁵ See S.C. Code Ann. § 40-59-820(1) (defining "Action").

§ 40-59-850(A). At the contractor's election, the claimant must give the contractor reasonable access to the dwelling and allow the contractor to inspect the alleged defect at a mutually agreeable time. *See Id.* If the contractor timely responds to the notice of claim with an offer to remedy the alleged defect or settle,⁶ the claimant has 10 days to serve a response. § 40-59-850(B).

Compliance with the Act's requirements is a prerequisite for the claimant to "proceed with a civil action or other remedy provided by contract or by law." § 40-59-850(C). "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]." S.C. Code Ann. § 40-59-830.

Upon being served with this lawsuit, Seaquest promptly moved to stay the McIntires' action until they complied with the Act. Without question, the McIntires had filed their action without having done so. Not only that, because they had already substantially completed repairs of the alleged defects without notifying Seaquest,⁷ the McIntires could not possibly comply with the requirements of the Act.

⁶ If the contractor does not respond within 30 days it is deemed a denial of the claim. § 40-59-850(A).

⁷ This fact is expressly acknowledged in Subject Decision: "Prior 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. The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter."

By proceeding with and completing repairs, the McIntires permanently deprived Seaquest of its statutory rights including the right to inspect the property in its allegedly defective condition.

Having no viable argument against Seaquest's motion, the McIntires tried to stop the trial court from ruling on it. Citing an arbitration provision in their contract with Seaquest—a provision they had themselves contravened by filing this lawsuit and invoking the judicial process—the McIntires moved to compel to arbitration and argued that the issue raised by Seaquest's motion was no longer a matter for judicial determination.

Correctly, the trial court disagreed with the McIntires and granted Seaquest's motion, dismissing the McIntires' lawsuit—dismissal being the practical equivalent of the permanent stay that was required because of the impossibility of the McIntires complying with the Act. The trial court also denied the McIntires' motion to compel arbitration, finding they had waived the right to arbitrate.

Based solely on its finding that the trial court had erred in finding that the McIntires had waived their right to arbitrate, the Court of Appeals erroneously reversed the trial court and remanded the case for arbitration. They did so without ever actually addressing the substance of the Opportunity to Cure Act and the paramount question of whether Seaquest's motion was a matter for judicial determination that prevented the trial court from granting any relief to the McIntires

as the statute mandates that the case be stayed, pending their compliance with the Act. They have made no effort to comply with the Act, so the stay must be imposed. The Court of Appeals disregarded the Act's mandatory stay until compliance with the Act is achieved. What's more, the Court of Appeals did so in an opinion that does not comply with Rule 220, SCACR.

The McIntires' motion to compel arbitration was essentially a red herring. The Opportunity to Cure Act plainly prohibited the trial court from allowing the McIntires' action to proceed—in either a judicial or arbitral forum—unless and until they complied with its requirements and, indeed, prohibited the trial court from compelling the matter to arbitration, expressly requiring “the court” itself to stay the action pending the McIntires' compliance. *See* S.C. Code Ann. § 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); § 40-59-850(C) (“*If the parties cannot settle the dispute pursuant to this [procedure], the claimant may proceed with a civil action or other remedy provided by contract or by law.*”) (emphasis added); § 40-59-820(1) (“‘Action’ means any civil lawsuit or action *or arbitration proceeding . . .*”) (emphasis added).

When the McIntires brought this suit without complying with the Act and Seaquest timely moved to compel their compliance, the die was cast. Pursuant to

the Act's express and unequivocal language, there was only one thing for the trial court to do: to stay the action for as long as the McIntires did not comply with the Act, which, under the circumstances, meant forever. Any error by the trial court in *denying* the McIntires' motion to compel arbitration is beside the point, because it could not have *granted* their motion in any event. It could only stay the action until the McIntires complied. Most respectfully, the Subject Decision is erroneous, and this Court should issue a writ of certiorari to review it.

QUESTIONS PRESENTED

- I. Does the Subject Decision comply with Rule 220?**
- A. It is not proper for the Subject Decision to be unpublished.**
- B. Even assuming, *arguendo*, issuance of the Subject Decision as an unpublished decision is proper under Rule 220, the Subject Decision nevertheless fails to comply with Rule 220(b) because it does not expressly rule, and provide the Court of Appeals underlying reasoning on the effect of the mandatory stay imposed by the Opportunity to Cure Act.**
- (1) The Subject Decision fails to address and rule upon the effect of the Opportunity to Cure Act's mandatory stay where the plaintiff repairs his allegedly defective home, then files a civil action, without complying with the Act.⁸**
- (2) The Subject Decision fails to recognize that the Act mandates**

⁸ The Court of Appeals also failed to address Seaquest's points regarding issue/argument preservation. These points are addressed in the context of Seaquest's argument on this question. Accordingly, this question is intended to include the question of whether this Court should now address these points, too, and find them to be additional bases on which to reverse the Court of Appeals/affirm the trial court or, alternatively, remand the case to the Court of Appeals to address them?

a stay of the action until the plaintiff complies with the Act.

- (3) The Subject Decision fails to recognize that where, as here, a plaintiff repairs his allegedly defective home without first complying with the Act, the stay must be permanent, because the plaintiff has, by his actions, made compliance impossible.**

II. Did the Court of Appeals err in determining that the trial court erred in finding the McIntires waived their right to arbitration?

- A. The Court of Appeals erred in ordering this case to arbitration, because arbitration is not proper where the mandatory stay is invoked after the plaintiffs filed a civil action without complying with the Opportunity to Cure Act.**

STATEMENT OF THE CASE

In 2007, the McIntires entered into a contract with Seaquest for the construction of a single-family home in Mount Pleasant. (*See generally* R. pp. 38–59.) A certificate of occupancy was issued for the home in September 2008. (Supp. R. p. 11.)

The McIntires commenced this action on April 8, 2016, in Charleston County (Court of Common Pleas), against Seaquest (and a number of subcontractors and material suppliers also named as defendants but, again, not named as respondents to this appeal) arising out of alleged defects in their home’s construction. (*See generally* R. pp. 19–29.) Seaquest promptly moved to dismiss or, alternatively, stay the case because of the McIntires’ failure to comply with the Opportunity to Cure Act. (R. pp. 31–35.)

The Act provides that “[i]n an action⁹] brought against a contractor . . . arising out of the construction of a dwelling¹⁰], the claimant¹¹] must, no later than ninety days before filing the action, serve¹²] a written notice of claim on the contractor[,]” which must contain “(1) a statement that the claimant asserts a construction defect¹³]; (2) a description of the claim or claims in reasonable detail

⁹ “‘Action’ means any civil lawsuit or action or arbitration proceeding for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling” § 40-59-820(1).

¹⁰ “‘Dwelling’ means a single-family house” § 40-59-820(4).

¹¹ “‘Claimant’ means a homeowner . . . who asserts a claim against a contractor . . . concerning a defect in the design, construction, condition, or sale of a dwelling” § 40-59-820(2).

¹² “‘Serve’ or ‘service’ means personal service or delivery by certified mail to the last known address of the addressee.” § 40-59-820(5).

¹³ The Act defines “construction defect” as follows:

[A] deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:

(a) defective material, products, or components used in the construction of residential improvements;

(b) violation of the applicable codes in effect at the time of construction of residential improvements;

(c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of governmental approval of the design of residential improvements; or

sufficient to determine the general nature of the construction defect; and (3) a description of any results of the defect, if known.” § 40-59-840(A). “The contractor . . . 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.” § 40-59-850(A). The claimant is required to “allow inspection of the construction defect at an agreeable time to both parties . . .” and to “give the contractor and any subcontractors reasonable access to the dwelling for inspection . . .” *Id.* It is only “[i]f the parties cannot settle the dispute pursuant to [the process set forth in the Act] . . . [that] the claimant may [then] proceed with a civil action or other remedy provided by contract or by law.” § 40-59-850(C). “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].” § 40-59-830.

(d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

§ 40-59-820(3).

The McIntires had not served Seaquest with a written notice of claim as required by § 40-59-840(A),¹⁴ in turn denying Seaquest its rights under the Act to request clarification of the alleged defects (§ 40-59-840), to access and inspect the alleged defects (§ 40-59-850(A)), and to make an offer to remedy or settle (§ 40-59-850(A)). (See generally R. pp. 31–33; Supp. R. pp. 69–74.) Pointing to the mandatory stay language in § 40-59-830, 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 the McIntires’ to comply because they had already remodeled and repaired their home. (Supp. R. p. 73.)

With Seaquest’s motion pending, the McIntires moved to stay their own lawsuit and compel arbitration, contending arbitration was “contractually required by their Agreement” with Seaquest. (See generally R. pp. 36–59.)¹⁵

The trial court heard the motions on October 13, 2016, the Honorable Jean Hoefler Toal presiding. (See generally R. pp. 64–116; Supp. R. pp. 2–74.)

¹⁴ The McIntires concede that they did not serve Seaquest with a written notice of claim. (R. pp. 79:13–80:8.)

¹⁵ The McIntires also made a related motion for a protective order, taking the position that, because the matter was subject to arbitration, they should not have to respond to Seaquest’s requests for admissions. (See generally R. pp. 60–63.) 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 the Court to consider taking this opportunity to provide guidance to the bench and bar by advising whether the mere making of a motion for a protective order stayed the McIntires’ obligation to respond to Seaquest’s requests for admissions.

On January 4, 2017, the judge’s law clerk emailed all counsel announcing the trial court’s ruling—the McIntires’ motion to compel arbitration was denied, the court finding they had waived their right to arbitration; Seaquest’s motion to dismiss was granted, the court finding the McIntires had not only failed to comply with the Act but rendered their compliance impossible; and the McIntires’ motion for a protective order (along with certain other motions by other defendants irrelevant to this appeal) was moot in light of the case’s dismissal—and 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.) On January 20, 2017, the McIntires’ counsel wrote the trial court, raising objections to Seaquest’s proposed order. (R. pp. 154–157.) Ultimately, the trial court’s order (which adopted Seaquest’s proposed order verbatim) was filed/entered on May 1, 2017. (*See generally* R. pp. 1–14; Supp. R. p. 1.)¹⁶ This appeal followed.

The Court of Appeals decided the matter via the Subject Decision, an unpublished opinion filed December 31, 2019. Based solely on its finding that the trial court had erred in finding that the McIntires had waived their right to arbitrate, the Court of Appeals reversed the trial court and remanded the case for arbitration. The Subject Decision does not actually address the substance of the Opportunity to

¹⁶ The McIntires did not make a Rule 59(e) motion.

Cure Act and the paramount question of whether Seaquest’s motion was a matter for judicial determination that required a stay of the action until the McIntires complied with the Act, thereby preventing the trial court from granting the McIntires’ motion to compel arbitration. The Court of Appeals thereafter denied Seaquest’s petition for rehearing by order filed March 27, 2020. This petition for a writ of certiorari timely follows.

ARGUMENT

I. The Subject Decision does not comply with Rule 220.

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).

Tracking the language of S.C. Code Ann. § 14-8-250, 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 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 Court of Appeals, 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); *see also* § 14-8-250 (“[T]he Court [of Appeals] need not address a point which is manifestly without merit.”).

Rule 220(b)(1) does not apply to the Court of Appeals at all. It only authorizes *this Court* to file unpublished “memorandum” opinions, and only in certain, specifically identified circumstances. It is Rule 220(b)(2) that applies to the *Court of Appeals*, and it does not grant that court the authority to file unpublished “memorandum” opinions; nor does it in any way otherwise empower the Court of Appeals to render an opinion without precedential value. It only authorizes the Court of Appeals to deviate from the general rule in Rule 220(b) with respect to *individual points* that are “manifestly without merit.” The effect of Plaintiffs’ failure to comply with the Opportunity to Cure Act is not a point without merit. Rather, it is the very heart of this case.

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

- B. Even assuming, *arguendo*, issuance of the Subject Decision as an unpublished decision is proper under Rule 220, the Subject Decision nevertheless fails to comply with Rule 220(b) because it does not expressly rule, and provide the Court of Appeals underlying reasoning on the effect of the mandatory stay imposed by the Opportunity to Cure Act.**

As explained above, the Court of Appeals 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 of Appeals 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 was entitled to a ruling on them in the Court of Appeals and asks this Court to correct this error and rule on them now or, alternatively, remand this case to the Court of Appeals for it to rule on them.

- (1) **The Subject Decision fails to address and rule upon the effect of the Opportunity to Cure Act’s mandatory stay where the plaintiff repairs his allegedly defective home, then files a civil action, without complying with the Act.¹⁷**

Even assuming, *arguendo*, that the McIntires did not waive their right to arbitration, there remains the question of whether a challenge to their non-compliance with the Opportunity 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 Act: the trial court or an arbitrator? Seaquest contends it is the *trial court*—but at a minimum, this appeal cannot be

¹⁷ As noted above, the Court of Appeals also failed to address Seaquest’s points regarding issue/argument preservation. These points are addressed in the context of Seaquest’s argument on this question. This Court should now address these points, too, and find them to be additional bases on which to reverse the Court of Appeals/affirm the trial court or, alternatively, remand the case to the Court of Appeals to address them.

properly decided unless and until this essential question is answered.¹⁸

“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 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 Opportunity to Cure Act is such a question, *and in any event, the Act itself mandates that it is an issue for the court.*

- (2) **The Subject Decision fails to recognize that the Act mandates a stay of the action until the plaintiff complies with the Act.**

¹⁸ If Sequest is correct that the trial court decides, it will require an answer to the question of whether the trial court was correct in denying the McIntires’ motion to compel arbitration and dismissing this case because of the McIntires’ failure to comply with the Act, which, of course, Sequest contends it was.

The question of compliance with the Act is not one of those mere “‘procedural’ questions which grow[s] out of the dispute and *bear[s] on its final disposition,*”¹⁹ of a 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 Act “imposes an *absolute condition precedent*”²⁰ to even *filing* an “action,”²¹ which term is expressly defined to include both lawsuits and *arbitration* proceedings. *See* § 40-59-820 (“‘Action’ means any civil lawsuit or action or *arbitration proceeding*”) (emphasis added). In plain—and mandatory—language, the Act expressly directs that “the *court shall stay* [any]

¹⁹ *Id.* at 84 (emphasis added).

²⁰ *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).

²¹ The question of compliance with the 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 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 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*—wherein the substantive discovery rights accorded a defendant in *litigation* are *not* the same—the Act does, in fact, create new substantive rights.

action [filed without first complying with the Act] until the claimant has complied with the requirements of [the Act].” § 40-59-830 (emphasis added).

To adopt the view that the trial court could not rule on Seaquest’s motion to compel compliance with the Act would disregard the unequivocal statutory language that says just the opposite: that *the trial court had no choice but to the stay the “action”* pending compliance with the Act. Adoption of such a view would also defy logic. Given that compliance with the Act is as an “absolute condition precedent” to even commencing an action and that the trial court itself 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 obtain relief from a court in which they should not even be to begin with because of their noncompliance with the Act while the court itself is powerless to do anything about that noncompliance. The Act is clear and straightforward. The Court was required to stay the action until the McIntires complied. They never did, nor can they now.

- (3) **The Subject Decision fails to recognize that where, as here, a plaintiff repairs his allegedly defective home without first complying with the Act, the stay must be permanent, because the plaintiff has, by his actions, made compliance impossible.**

The uncontroverted record establishes that the McIntires filed suit without complying with the 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,²² thus conceding their noncompliance with the Act. *See* § 40-59-840(A). Moreover, by arguing, as they did in their principal brief to the Court of Appeals, that *future* compliance with the Act is not impossible,²³ the McIntires necessarily concede they are yet to comply.

The Act unequivocally *mandates* that, where, as here, a claimant files a lawsuit without complying with the Act, a stay *must* be imposed by *the court* if requested, and the stay must remain in place “*until the claimant has complied*” with the Act. § 40-59-830.²⁴

The trial court correctly found that the repairs to the alleged defects were completed by the time suit was filed or shortly thereafter, as the Court of Appeals itself recognized in the Subject Decision, stating, “The repairs were substantially completed before the lawsuit was filed or were completed soon thereafter.” The trial 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

²² (R. pp. 79:13-80:8.)

²³ (*See* Apps’ Br. pp. 10-11.)

²⁴ Without question, Seaquest timely moved to enforce compliance with the Act—it has never even been suggested otherwise.

comply with the Act but also rendered compliance with the Act impossible, forever denying Seaquest its rights under § 40-59-850(A).

The McIntires' arguments (raised in briefing to the Court of Appeals) against this impossibility are self-defeating, in fact *proving* the very point they attempt to disprove—it is no longer possible for them to comply with the Act. 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)²⁵), 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 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

²⁵ *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.”).

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 Seaquest²⁶ and about the trial court’s construction of the Act being contrary to public policy²⁷—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, 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. See *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 271, 802 S.E.2d 794, 797 (2017)

²⁶ (See Apps’ Br. p. 11.)

²⁷ (See Apps’ Br. p. 12.)

“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. 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 Act. In clear and unmistakable terms, the Act instructs the *court* what it *must* do in this circumstance. § 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 Act and recognized that a stay was mandatory. The trial court correctly followed the Act and recognized that the mandatory stay would have to remain in place unless and until the McIntires complied. The trial court correctly followed the Act and the uncontroverted record in recognizing that the McIntires had rendered their compliance impossible and thus rendered the mandatory stay incapable of ever being lifted. The trial court adhered to the logical consequences of the statutory language and honored the legislative intent in equating a permanent stay with a dismissal. The Court of Appeals entirely disregarded the mandatory stay and its impact upon this case until and unless the McIntires complied with the Act. Whether by this Court now or the Court of Appeals on remand, the trial court should be affirmed, or, at worst, the case should be remanded to the trial court to “stay” the case (as opposed to “dismissing” it) unless and until the McIntires comply with the Act, which, of course, they will never be able to do.

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

A. The Court of Appeals erred in ordering this case to arbitration, because arbitration is not proper where the mandatory stay is invoked after the Plaintiffs filed a civil action.

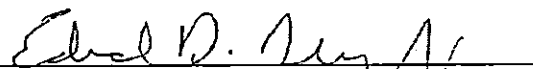
The Subject Decision does not consider the fact that it was the McIntires themselves who commenced this court case before moving to stay it (their own suit) and compel arbitration. Their motion was filed after Seaquest moved to stay under the Act. This sequence of events alone supports the trial court's finding of waiver. Indeed, the McIntires' motion to compel arbitration itself bolsters this conclusion. Even though they brought this lawsuit, they moved to compel arbitration 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 judicial process by filing this suit—and, for that matter, by thereafter asking the court for protection from responding to Requests for

Admissions served on them in the litigation they had commenced—breaching the very contract they would later say mandated arbitration.

CONCLUSION

For the reasons set forth herein, Seaquest asks the Court to grant the instant petition, reverse the Subject Decision, and render its own decision, affirming the result in the trial court below or, in the alternative, remanding the case to the trial court to impose a “stay” unless and until the McIntires comply with the Act or, alternatively, to grant the instant petition, reverse the Subject Decision, and remand this case to the Court of Appeals for it 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.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 
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Counsel for Respondent

Charleston, South Carolina

Dated: June 8, 2020

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

RECEIVED

JUN 11 2020

SC Court of Appeals

Opinion No. 2019-UP-413 (S.C. Ct. App. filed December 31, 2019)

Andrew and Kimberly McIntire,

Respondents,

v.

Sequest 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 Sequest Development Company, Inc., is the

Petitioner.

PROOF OF SERVICE

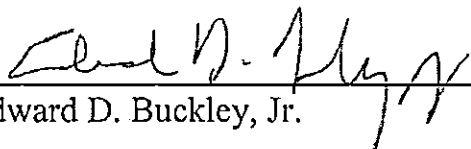
YOUNG CLEMENT RIVERS, LLP
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Counsel for Petitioner

I, Edward D. Buckley, Jr., of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the foregoing **PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on June 8, 2020, properly posted for delivery to the following addressees:

Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
Counsel for Respondents

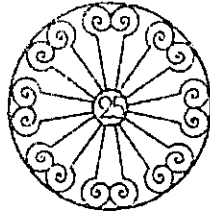
I also certify that, on this date, June 8, 2020, the foregoing **PETITION FOR A WRIT OF CERTIORARI** was filed with the South Carolina Court of Appeals by depositing a copy of the same in the U.S. Mail properly addressed to that court at P.O. Box 11629, Columbia, SC 29211.



Edward D. Buckley, Jr.

Charleston, South Carolina

Dated: June 8, 2020



YCR LAW

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June 8, 2020

RECEIVED

JUN 11 2020

SC Court of Appeals

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: Andrew and Kimberly McIntire v. SeaQuest Development Company, Inc, et al.
Appellate Case No. 2017-001270
Case No.: 2016-CP-10-1833
Claim No.: 100-00-002622
Date of Loss: 7/24/2008
YCR File: 9795-20160374

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced matter, please find the original and one (1) copy of the Petition for Writ of Certiorari, the original and one (1) copy of the Proof of Service regarding the same, as well as our firm's check in the amount of \$250.00. It is our understanding that there is no need to send additional copies of the Petition, or to prepare an Appendix in light of the Amended Order re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020). If this is incorrect, please let me know and we will make any corrections needed.

Kindly file the originals and return a court-stamped copy to me using the pre-stamped envelope provided. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Aimee M. Justman
Legal Assistant

/amj

Enclosures

cc: Jenny Abbott Kitchings, Clerk of Court, South Carolina Court of Appeals
Andrew K. Epting, Jr., Esquire, Andrew K. Epting, Jr., LLC
Jaan G. Rannik, Esquire, Andrew K. Epting, Jr., LLC

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SC Court of Appeals

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