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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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.

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

Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Seaquest[1] makes the following points in reply to the McIntires' return to its petition for a writ of certiorari.

ARGUMENT IN REPLY

1. The Court of Appeals' improper issuance of the Subject Decision as an unpublished opinion is a substantial error, not, as the McIntires characterize it, a matter of "[f]orm."[2]

There are only two types of opinions under the South Carolina Appellate Court Rules: "published" opinions and "memorandum" opinions. Rule 220(a), SCACR ("The appellate court shall make its decisions in writing by *published* opinions or *memorandum* opinions . . . .") (emphasis added). As the name implies, "published" opinions are published, i.e., they appear in the official reports of our state's appellate courts. *Id.* ("Published opinions shall appear in the Official Reports of the Supreme Court and the Court of Appeals[.]"). "Memorandum" opinions, however, are not published, and they are of *no precedential value.* *Id.* ("[M]emorandum opinions shall not be published in the official reports and shall be of no precedential value."); Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in

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[1] Shorthand references already defined in Seaquest's petition (e.g., "Seaquest" is Defendant/Petitioner, Seaquest Development Company, Inc., and the "McIntires" are Plaintiffs/Respondents, Andrew and Kimberly McIntire) are continued in this reply.

[2] (Return p. 3 ("Petitioner's Contentions Regarding the *Form* of the Subject [Decision] Are Without Merit") (emphasis added) (bold print and underline in original omitted).)

proceedings in which they are directly involved."). Accordingly, of the two types of opinions under the South Carolina Appellate Court Rules, only "published" opinions have precedential value.

It is vital to the integrity of our judicial system that there are safeguards governing when an opinion may be issued unpublished, and thus cordoned off as non-precedential. This goes directly to the fundamental principle of equal justice under the law and the constitutional guarantees of due process and equal protection. *See* Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L. J. 621, 622–23 (2009) ("Precedent . . . includes the legal rules articulated in a case; these rules may not be binding in all future contexts with similar facts, but the doctrine of precedent requires that those prior cases and legal rules be addressed and distinguished, or overruled if they are on point. This is necessary for a properly functioning judiciary. . . . [T]he use of unpublished opinions allows judges to disregard the proper precedential effect of prior cases, and furthermore, it allows them to pick and choose which cases will receive binding precedential effect and which will not."); *Anastasoff v. United States*, 223 F.3d 898, 899–900 (8th Cir. 2000) (explaining that "[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law[,]" that "[t]his declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties[,]" and that "[t]hese

principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded" and are intended to serve as a fundamental limitation on judicial power), *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc); *id.* at 904 ("At bottom, rules [exempting unpublished appellate decisions from precedential effect] assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.' . . . [S]uch a statement exceeds the judicial power, which is based on reason, not *fiat*.") (italics in original); *cf. Weaver v. S.C. Coastal Council*, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992) ("While the three permits issued during the period immediately preceding respondent's application may have been granted in error, absent a showing in the record that Council had taken appropriate remedial action and given due notice thereof, the respondent was entitled to be treated in the same manner as other applicants. We conclude that Council violated the equal protection and due process provisions of the state and federal constitutions in treating the respondent in a manner different from Beckmann, Cope and Crowley, thereby denying her a benefit granted to others similarly situated.").

Indeed, the need for safeguards on the use of "memorandum" opinions is reflected in Rule 220 itself. Even as it authorizes this Court—and, to be clear, *only this Court*—to issue "memorandum" opinions, it establishes express criteria limiting when it may do so:

> The Supreme Court *may* file a memorandum opinion . . . *when* [(i.e., only 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.

Rule 220(b)(1) (emphasis added).

2. Contrary to the McIntires' contention,[3] Rule 220 does not authorize the Court of Appeals to issue unpublished opinions.

Rules of court are interpreted using the same rules of construction used in interpreting statutes. *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). Thus, the cardinal rule is to ascertain and effectuate the intent of the rule maker. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "Words must be given their plain and ordinary meaning

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[3] (*See* Return p. 3.)

without resort to subtle or forced construction to limit or expand the [rule's] operation." *Id.* at 499, 640 S.E.2d at 459. Rules should be read "as a whole," without "concentrat[ing] on isolated phrases within the [rule]." *CFRE, L.L.C. v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 880, 881 (2011). It must be assumed that the rule maker did not intend to do a futile act, i.e., that the rule maker meant to accomplish something by promulgating the rule,[4] and the "[rule] should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

Citing language in Rule 220(a) that "[t]he appellate court shall make its decision in writing by published opinions or memorandum opinions . . . ," the McIntires contend that, "[o]n its very face, . . . Rule [220] authorizes the appellate courts, including the Court of Appeals, to issue unpublished opinions." (Return p. 3.) Respectfully, they are mistaken. The language they quote from Rule 220(a) is taken out of context, and they do not account for the language of Rule 220(b)—or, for that matter, Rule 268(d)(1) and (2).

Rule 220(a) does not speak in terms of "published" opinions and "unpublished" opinions, but rather in terms of two—and *only two*—types of

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[4] *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006).

opinions: "published" opinions, which are, of course, published and have precedential value, and "memorandum" opinions, which are not published and do not have precedential value. Rule 220(a) (quoted, *supra*). The same verbiage ("published" opinions and "memorandum" opinions) is in Rule 268(d)(1) and (2), addressing citation of South Carolina appellate court decisions, with Rule 268(d)(1) referring to "published opinions or orders" and Rule 268(d)(2) to "memorandum opinions and unpublished orders." Notice that Rule 268(d)(2), in contrast to how it refers to *orders* that are not published as "unpublished" orders, refers to *opinions* that are not published as "memorandum" opinions, *not* "unpublished" opinions. In other words, notice that Rule 268(d)(2) uses "memorandum" as a term of art to refer to the only type of opinion that is not published—which is likewise the only type of opinion that is of no precedential value.

Also, while Rule 220(a) *acknowledges* (indeed, it mandates) that "memorandum" opinions are one of only two types of opinions under the South Carolina Appellate Court Rules—and, again, the only type that are not published and thus of no precedential value—it does not actually *authorize* their issuance. That is the province of Rule 220(b).

Rule 220(b) begins by establishing the broad general rule that, but for two expressly stated and narrowly confined exceptions, "[i]n 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." The two exceptions are found in Rule 220(b)(1) and (2). One of them, Rule 220(b)(1), applies only to this Court, while the other, Rule 220(b)(2), applies only to the Court of Appeals. Of the two, it is only the one that applies to this Supreme Court, Rule 220(b)(1), that authorizes "memorandum" opinions, and again, it expressly requires the Court to make certain determinations as procedural safeguards before it issues such opinions. Rule 220(b)(1) ("The *Supreme Court* may file a memorandum opinion . . . when [(i.e., only 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 . . . .") (emphasis added). Meanwhile, the exception that applies expressly and exclusively to the Court of Appeals, Rule 220(b)(2), says only that the Court of Appeals "need not address *a point* which is manifestly without merit,"[5] and nothing whatsoever about the Court of Appeals being authorized to issue "memorandum" opinions or to in any way otherwise issue opinions that are without precedential value.

For the McIntires' argument to prevail, it would require disregarding the expressly different treatment Rule 220(b) gives to this Court and the Court of

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[5] (emphasis added).

Appeals and interpreting the rule as allowing the Court of Appeals to issue memorandum decisions without any of the procedural safeguards that circumscribe this Court's issuance of such opinions. Respectfully, such an interpretation would be absurd and irreconcilable with the letter and the spirit of the applicable rules of construction.

3. Contrary to the McIntires' contention,[6] it was, at a minimum, "necessary to the decision of the appeal"[7] for the Court of Appeals to expressly determine the proper forum (i.e., arbitral or judicial) for decision of Seaquest's motion to compel compliance with the Opportunity to Cure Act.[8]

Based solely on its reversal of the trial court's denial of the McIntires' motion to compel arbitration, the Court of Appeals simply remanded the case directly to arbitration,[9] implicitly reversing the trial court's grant of Seaquest's motion to

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[6] (*See* Return p. 4.)

[7] Rule 220(b).

[8] Of course, had the Court of Appeals determined that Seaquest's motion to compel compliance with the Opportunity to Cure Act was for the trial court to decide—as Seaquest contends it should have—the Court of Appeals then would have had to address the trial court's ruling on the merits—as Seaquest also contends it should have. Seaquest contends the trial court correctly found that the McIntires had not complied with the Act and, further, could not comply with the Act and thus properly dismissed their case, recognizing dismissal as the functional equivalent of a permanent stay. To be clear, however, even assuming, *arguendo*, the trial court erred in *dismissing* the case, as opposed to *staying* it pending compliance with the Act, the trial court's correct finding of the McIntires' noncompliance should be affirmed, such that, even if the *dismissal* is reversed, the result should be a *stay* of the action unless and until the McIntires comply with the Act.

[9] (*See* Subject Decision at § I ("Accordingly, *we reverse on this issue* [(i.e., the propriety of the trial court's denial of the McIntires' motion to compel arbitration)] *and remand the case for arbitration.*") (emphasis added).) The Subject

compel compliance with the Opportunity to Cure Act on the basis that, because of its reversal on the arbitration issue, Seaquest's motion was a matter for the arbitrator, not the trial court, but never actually explaining why this is so.[10] At a minimum, an express ruling from the Court of Appeals on this point is necessary to the decision of this appeal.

The Subject Decision explains only the Court of Appeals' reversal of the trial court's ruling on the McIntires' motion to compel arbitration, without explaining why, in the Court of Appeals' view, that reversal triggered a domino effect whereby the trial court's ruling on Seaquest's motion to compel compliance with the Opportunity to Cure Act is also reversed and, indeed, Seaquest's motion is taken out of the trial court's hands entirely, with the whole of the dispute between the McIntires and Seaquest sent directly to arbitration. Even assuming, *arguendo*, this were the correct result (which, respectfully, it is not), every step of the way from the reversal of the trial court's denial of the McIntires' motion to compel arbitration to the reversal of the trial court's dismissal for the McIntires' failure/inability to comply with the Opportunity to Cure Act, to include, at a minimum, the Court of Appeals'

Decision leaves nothing for the trial court to do on remand but perhaps enter an order (consistent with the Subject Decision) compelling the matter to arbitration.

[10] (*See* Subject Decision at § II ("The McIntires argue the trial court erred in addressing the . . . Right to Cure Act . . . [and] in dismissing the case for failure to comply with the Right to Cure Act. *Because we already determined the trial court erred in finding the McIntires waived their arbitration right and remand for arbitration, we need not address these issues.*") (emphasis added).

reasoning as to why Seaquest's motion to compel compliance with the Act is a matter for the arbitrator, not the trial court, is, by definition, "necessary to the decision of the appeal and fairly arising upon the record of the court [and] must be stated in writing and must, with the reasons for the court's decision, be preserved in the record of the case." Rule 220(b).

It is "essential" that the Court of Appeals' opinions "make[] *clear* what disposition has been made of the case, and the *reasons* for its action." *See In re Memorandum Decisions by the Court of Appeals*, 323 S.C. 53, 55, 471 S.E.2d 456, 457 n.1 (1993) ("If the Court makes it *clear* what disposition has been made of the case, and the *reasons* for its action, nothing more is *essential.*") (emphasis added) (quoting *Miller v. Atlantic Coast Line Railroad Co.*, 140 S.C. 123, 224, 138 S.E. 675, 708 (1926), *cert. denied*, 275 U.S. 556, 48 S.Ct. 117, 72 L.Ed. 424 (1927)). The Court of Appeals erred by not doing so here.

4. The McIntires ignore the plain language in the Opportunity to Cure Act that expressly requires "the court" to stay the action pending their compliance with the Act.

As explained in Seaquest's petition,[11] 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 the Act's requirements and, indeed, prohibited the trial court from compelling the matter to

[11] (*See* Pet. pp. 4–5, 15–17.)

arbitration, expressly requiring "the court" 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). Nowhere in their return do the McIntires recognize this point, much less refute it. (*See generally* Return.)

5. The McIntires have not made the argument that the Opportunity to Cure Act violates the FAA, but even assuming, *arguendo*, the argument was made, it is without merit.

The McIntires argue that, once arbitrability is established, all other matters are for the arbitrators. (*See* Return p. 7.) They, however, do not address the plain language in the Opportunity to Cure Act (*see* point No. 4 above) directing "the court" to impose a stay when an action is filed before compliance with the Act. (*See generally* Return.) Nor do they argue that the Opportunity to Cure Act violates the FAA—and, indeed, they would be mistaken were they to try.

The FAA simply requires that courts place arbitration agreements on equal footing with other contracts. *See AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S.

333, 339 (2011). This means that, while a court may set aside an arbitration agreement by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* The Opportunity to Cure Act does not violate this rule.

First off, the Act does not set aside or otherwise render invalid any arbitration agreement. Arbitration agreements remain enforceable under the Act. It is just that, sequentially, the matter of their enforceability comes after the matter of compliance with the Act. So long as there is compliance with the Act, an arbitration agreement is as enforceable as it ever was. Moreover, this rule (i.e., the Act's requirement for compliance before proceeding with an "action," whether in court or in arbitration) is a rule of general applicability. It does not single out arbitration agreements for disparate treatment. By requiring the opportunity-to-cure process to take place before an "action" proceeds, the Act does not create a defense that applies only to arbitration or derives its meaning from the fact that an agreement to arbitrate is at issue.

To illustrate this point, imagine a general contractor contracts to build two houses: one for Owner A, one for Owner B. Imagine further that Owner A's contract with the general contractor is substantially the same as Owner B's, except Owner A's includes an arbitration clause but Owner B's does not. Now imagine that both

Owner A and Owner B file lawsuits against the general contractor for breach of their respective construction contracts before complying with the Opportunity to Cure Act. When both actions are stayed pending compliance with the Act, there is no disparate treatment in terms of the enforcement of Owner A's contract and Owner B's contract. And once they have complied with the Act and the stays of their respective actions have been duly lifted, Owner A can enforce her/his contract rights against the general contractor, including her/his right to arbitration, just as Owner B can enforce hers/his.

6. **Contrary to the McIntires' contentions,[12] compliance with the Opportunity to Cure Act is no longer possible, and although the Act does not expressly call for "dismissal," the trial court correctly determined that dismissal was the functional equivalent of the permanent stay that was required, given the impossibility of the McIntires' compliance with the Act. But in any event, even if the trial court erred in dismissing the McIntires' action, instead of staying it, the result should be a remand to the trial court to stay the action unless and until the McIntires comply with the Act.**

These contentions by the McIntires are amply refuted in Seaquest's petition. (*See* Pet. pp. 17–22.)

CONCLUSION

For the reasons set forth herein, along with those already set forth in its petition for a writ of certiorari, Seaquest asks the Court to grant the instant petition, reverse the Subject Decision, and render its own decision, affirming the result in the

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[12] (*See* Return pp. 8–10.)

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,
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Dated: 8/12/20