

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Case No. 2016-CP-10-1143  
[Appellate Case No. 2016-002308]

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**RECEIVED**

JUN 12 2017

SC Court of Appeals

Palmetto Construction Group, Respondent,

v.

Restoration Specialists, LLC, Appellants.  
Reuben Mark Ward, and  
Lynnette Pennington Ward

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**APPELLANTS' REPLY TO RESPONDENT'S OPPOSITION TO  
APPELLANTS' MOTION TO EXCLUDE AND STRIKE**

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Pursuant to Rules 208, 209, 210 and 240, SCACR, the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, hereby file their Reply to Respondent's Opposition to Appellants' Motion to Exclude and Strike.

**FACTS/PROCEDURAL HISTORY**

The Appellants commenced the instant appeal on November 14, 2016, appealing the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28,

2016. On December 2, 2016, the Respondent filed a Motion to Dismiss Appeal. On February 1, 2017, the Court of Appeals issued an order denying Respondent's Motion to Dismiss Appeal and directing Appellants to file their initial brief and designation of matter.

On March 3, 2017, the Appellants served and filed their Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal. On April 18, 2017, the Respondent served and filed its Initial Brief of Respondent and Respondent's Designation of Matter on Appeal. After receipt of Respondent's Initial Brief and Designation of Matter, Appellants filed a Motion to Strike and Exclude pursuant to SCACR 208(b)(4), SCACR 209(b), SCACR 210(c) and SCACR 240. ("Appellants' Motion"). Appellants' Motion requests that all documents listed in the Designation of Matter that were not presented to the lower court be stricken, and all references to these documents in Respondent's Initial Brief be excluded. Most of the documents in question are contained in an exhibit notebook which was not presented to the lower court in the proceedings below.<sup>1</sup> Two of the documents in question, specifically, the VA Contract and the Final pay application, do not appear in the exhibit notebook or anywhere in the record of the lower court. *Affidavit of A. Bright Ariail, Esq. dated June 9, 2017.*

Rather than allow the Court of Appeals to decide Appellants' Motion after receipt of Respondent's Return and Appellants' Reply, the Respondent, through its counsel, contacted the Master in Equity requesting permission to file the disputed exhibit notebook and documents contained therein with the lower court. *Letters of Andrew K. Epting, Jr., Esq., dated May 16 and May 17, 2017.* Respondent's request to the lower court was made prior to the filing of its Opposition to Appellants' Motion and despite the fact that this case is on appeal with jurisdiction vested in the Court of Appeals. Appellants objected to Respondent's request to the lower court. *Letter of A. Bright Ariail, Esq., dated May 16,*

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<sup>1</sup> The Respondent asserts that "[T]he records [Appellants] seek to exclude are in large part their own documents." *Respondent's Opposition to Appellants' Motion to Strike*, p. 8, Line 7. Respondent's assertion is both irrelevant and incorrect. First, the sole issue before this Court is not whose documents these are, but rather whether the documents were presented to the lower court prior to the appeal. Second, of the documents in question (see, *Appellants' Motion to Strike and Exclude*, pgs. 3-4), only 5 of these documents are Appellants' documents. *Affidavit of A. Bright Ariail, Esq. dated June 9, 2017.*

2017.

The Master entertained Respondent's request, over Appellants' objection, and issued the opinion that the documents in the disputed notebook were a part of the Respondent's proffer of damages made at the hearing before the court on October 4, 2016. *Email of The Honorable Mikell R. Scarborough, dated May 18, 2017.*

### LAW/ANALYSIS

**A. The Respondent's Designation Of Matter On Appeal Contains Documents Which Were Not Presented To The Lower Court And The Initial Brief of Respondent Contains Numerous References To These Documents. The Inclusion Of These Documents and References Thereto Violates Rules 208, 209 And 210, SCACR Requiring Exclusion And Striking Of The Documents And References.**

SCACR 209(b) requires that the Designation of Matter to be Included in the Record on Appeal *may only propose* to include portions of the transcript, pleadings, orders, exhibits, or other materials *which may be properly* included in the Record on Appeal. (Emphasis added).

SCACR 210(c) mandates that the Record on Appeal **shall not include matter which was not presented to the lower court or tribunal.** (Emphasis added).

As a corollary to these Rules, SCACR 208(b)(4) requires that the parties' briefs shall contain only references to the transcript, pleadings, orders, exhibits, or other materials *which may be properly* included in the Record on Appeal to support the salient facts alleged. (Emphasis added).

The Respondent contends that the official transcript of the October 4, 2016 hearing demonstrates that the notebook was presented to the lower court as part of the proffer of its damages requested by the Master. In support of this argument, the Respondent references a portion of an excerpt from the October 4, 2016 transcript. Specifically, Respondent cites a portion of the discussion between the Master and Appellants' counsel, Ms. Ariail, wherein Ms. Ariail disagrees with Respondent's counsel's oral summary of Respondent's alleged damages.<sup>2</sup> However, Respondent does not consider the entire

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<sup>2</sup> Respondent's Opposition to Appellants' Motion to Strike, p. 4 Lines 15-21 and p. 5 Lines 1-4.

transcript, which provides, *inter alia*, the Master's statement below concerning the purpose of the hearing:

10 THE COURT: What I'm going to do is I'm going  
11 to have them proffer what their damages are, and I'm  
12 going to have you proffer what you consider your  
13 59(e) to be, and I'm going to let you'all take that  
14 up there. I'm just going to do it as a proffer. I'm  
15 not going to take testimony. They're going to tell  
16 me how much their damages are so it's in the record.  
17 You are going to tell me why I should overturn my  
18 underlying order, and then you-all can go forward  
19 from there, Okay?

*(October 4, 2016 Transcript, p. 10 Lines 10-19).*

Nor does Respondent include the full body of Appellants' counsel's statements within the excerpt selected from the October 4, 2016 transcript. Appellants' counsel's statements dispute certain substantive elements of Respondent's counsel's oral summary of Respondent's alleged damages. Appellants' statements were made in light of the Master's cancellation of the damages hearing and in the absence of the entry of duly proffered exhibits into the record. Appellants' counsel's remaining statements on this issue at the October 4 hearing are as follows:

14 MS. ARIAIL: I've got problems with a lot of  
15 the documents that are contained herein. Her  
16 representation that Mr. Ward has admitted – they  
17 they admitted that. I object to that. I object to the  
18 amount that she says is receivable due to PCG. I  
19 object to the profit sharing.

*(October 4, 2016 Transcript, p. 29 Lines 14-19).*

In its Opposition, Respondent has not addressed two specific disputed documents cited in its Initial Brief, nor has it addressed Item 3 of its Designation of Matter which consists of Appellants' document productions dated July 6, 11 and 13, 2106. While these two specific disputed documents, the VA contract and the Final pay application, are comprised of the combination of several documents provided in Appellants' document production, they do not appear in the exhibit notebook nor are they contained in the record of the lower court. *Affidavit of A. Bright Ariail, Esq. of June 9, 2017.*

Aside from the documents contained in the exhibit notebook, Item 4 of its Designation of Matter, Respondent has assert no arguments in its Opposition that any of the other documents produced in Appellants' production are contained in the record of the lower court. In short, none of those documents are contained in the record of the lower court. *Affidavit of A. Bright Ariail, Esq. of April 28, 2017.* Accordingly, Item 3 of Respondent's Designation of Matter, including those two specific documents, should be excluded from the Initial Brief of Respondent and all references thereto should be stricken.

Item 2 of Respondent's Designation of Matter consists solely of Appellant's Discovery Responses – Appellants' answers to interrogatories and responses to requests for production. Inasmuch as these two items are also contained within the exhibit notebook, Item 4 of Respondent's Designation of Matter, listing Appellants' Discovery Responses as a separate item in the Designation of Matter is redundant and should be stricken.

After addressing Items 2 and 3 of Respondent's Designation of Matter and those two specific documents contained within Item 3, the sole question remaining before this Court on Appellants' Motion is whether or not Item 4 of Respondent's Designation of

Matter, consisting of the exhibit notebook<sup>3</sup>, and documents contained therein<sup>4</sup>, were presented to the lower court prior to the appeal. See, SCACR 208(b)(4), 209(b) and 210(c). The following facts established by the record in this case are dispositive of this question:

(1): The exhibit notebook and referenced documents are not a part of any pleading, motion, legal memoranda, order, exhibit or other filings with the lower court.<sup>5</sup> *Affidavit of A. Bright Ariail, Esq., dated April 28, 2017.*

(2): The exhibit notebook and referenced documents were never marked or entered into evidence nor were they ever entered into or made a part of the record at the June 6, 2016 or July 14, 2016 hearings before the lower court. *Affidavit of A. Bright Ariail, Esq., dated April 28, 2017; June 6, 2016 Transcript; July 14, 2016 Transcript.*

(3): The exhibit notebook and referenced documents were never marked or entered into evidence nor were they ever entered into or made a part of the record at the October 4, 2016 hearing. *Affidavit of A. Bright Ariail, Esq., dated April 28, 2017; October 4, 2016 Transcript.*

(4): The exhibit notebook and referenced documents were never distributed to or handed up to the Master at the October 4, 2016 hearing. Also, the Master did not accept, review nor ever take possession of the exhibit notebook and referenced documents at any time during the October 4, 2016 hearing. Finally, the Master did not take, keep or retain possession of the exhibit notebook and referenced documents upon conclusion of the October 4, 2016 hearing.<sup>6</sup> *October 4, 2016 Transcript.*

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<sup>3</sup> By Appellants' Motion to Strike and to Exclude, it has requested that Item 2, 3 and 4 of Respondent's Designation of Matter be excluded and all references to those documents stricken. Items 2 and 3 are addressed immediately above. Item 4 is Respondent's exhibit notebook in support of its proffer of damages, which is the subject of Respondent's Opposition to the Motion to Exclude and Strike.

<sup>4</sup> Which includes Item 2 of Respondent's Designation of Matter.

<sup>5</sup> The Respondent asserts that "many of these documents are attached to Appellants' various memoranda filed before the lower court and appearing on Appellants' own Designation of Matter..." *Respondent's Opposition to Appellants' Motion to Strike, p. 3, lines 8-10.* Respondent's assertion is incorrect as none of these documents were attached to the Appellants' memoranda filed in the lower court or Appellants' Designation of Matter filed with the Initial Brief of Appellants. A review of Appellants' memoranda and Designation of Matter establishes this fact.

<sup>6</sup> Respondent asserts that the documents Appellants seek to exclude and strike from the

(5): Respondent states that the exhibit notebook was prepared for use at a damages hearing and was to be entered into the record at that hearing by way of testimony of Mr. John Kendle. However, Respondent acknowledges that the damages hearing did not occur and the exhibit notebook was not entered in the record as Mr. Kendle did not testify. *Respondent's Opposition to Appellants' Motion to Strike, p. 4. Lines 3-9.*

(6): While Respondent's counsel proffered oral statements summarizing Respondent's alleged damages, said counsel did not proffer the exhibit notebook itself, nor the documents contained therein. *October 4, 2016 Transcript.*

(7): The exhibit notebook and referenced documents were never marked or entered into evidence nor were they ever entered into or made a part of the record of the lower court prior to the appeal. As part and parcel thereof, the exhibit notebook and documents contained therein were never filed with the lower court prior to the appeal. *Affidavit of A. Bright Ariail, Esq., dated April 28, 2017.*

(8): The orders of the Master which are on appeal do not cite or reference in any way the exhibit notebook and documents contained therein. Likewise, these orders do not cite or reference any of these materials as a basis for the lower court's decision. In fact, the exhibit notebook and documents contained therein were not even a part of the Master's file at the time these orders were issued. *Appellants' Notice of Appeal, dated November 14, 2016 (with the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016 attached).*

(9): Respondent felt compelled and sought leave to file the exhibit notebook and referenced documents with the lower court **only after** Appellants filed their Motion to Strike and Exclude in this appeal. If the Respondent was convinced that the exhibit notebook and referenced documents had been presented to the lower court before appeal, why did Respondent feel it necessary to file these materials with the lower court **after** Appellants' Motion?

(10): At the end of the hearing on October 4, 2016, the Master clearly stated that

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record were "before the Master..." Respondent's assertion is incorrect as established by Sub-paragraphs 1-10 above.

the proffer consisted of Respondent's counsel's oral summary of the amount of Respondent's alleged damages. The Master made no reference to the exhibit notebook or the documents as being part of the proffer. The colloquy between the Master and Respondent's counsel in regard to this proffer is as follows:

10 THE COURT: Give me the full amount of your  
11 damages again? I'm sorry, Ms. Endemann.  
12 \$1.4 million or something?  
13 MS. ENDEMANN: \$1,681,100, Your Honor...  
14 THE COURT: 681, okay. Thank you. That's the  
15 1.186 -- the 221, was it?  
16 MS. ENDEMANN: I'll give you the exact  
17 figures. The receivables due to the construction are  
18 \$184,858.69. The profit share is \$221,730.46, and  
19 due to Hanover is \$1,230,888.71 for a total of  
20 \$1,681,864.86.  
21 THE COURT: Okay. I've got it.  
22 MS. ENDEMANN: Thank you.  
23 THE COURT: I'm just going to take that as the proffer,  
24 but again, just so you-all have it in the  
25 record and the Court understands what this case is  
1 about.

*(October 4, 2016 Transcript, p. 31, Lines 10-25 and p. 32, Line 1).*

Accordingly, the paramount question here is how can anything that has not been filed with the lower court, or in the possession of the lower court, be part of the court record?

Based on the above facts, the Appellants respectfully submit that the exhibit notebook and documents contained therein were not presented to the lower court.

Therefore, Appellants respectfully request that Items 2, 3 and 4 of Respondent's

Designation of Matter, including Appellants' Answers to interrogatories and requests for production (Item 2), Appellants' document productions dated July 6, 11, and 13, 2016 (Item 3), and Respondent's exhibit notebook in support of its proffer of damages (Item 4) and the documents included therein be excluded from Respondent's Designation of Matter and all references to them in the Initial Brief of Respondent be stricken.<sup>7</sup>

### CONCLUSION

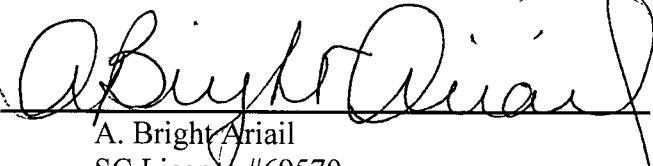
Based on the foregoing, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an Order:

(1): Excluding and striking the documents listed as Items 2., 3. and 4. in the Respondent's Designation of Matter on Appeal; and

(2): Excluding and striking all references to these documents contained in the Initial Brief of Respondent.

For these reasons, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Exclude and Strike be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



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ATTORNEY FOR APPELLANTS

June 9, 2017  
Charleston, South Carolina

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<sup>7</sup> The references to the exhibit notebook and documents contained in Respondent's Initial Brief are identified in *Appellants' Motion to Exclude and Strike*, p. 4-7.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Case No. 2016-CP-10-1143  
[Appellate Case No. 2016-002308]

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Palmetto Construction Group, LLC                      Respondent

v.

Restoration Specialists, LLC,                      Appellants  
Reuben Mark Ward, and  
Lynnette Pennington Ward

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AFFIDAVIT OF A. BRIGHT ARIAIL, ESQ.

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PERSONALLY APPEARED BEFORE ME, A. Bright Ariail, Esq., who  
having been first duly sworn deposed, states as follows:

1. I am a licensed attorney in South Carolina, SC Bar No. 69570.
2. I represent the Appellants, Restoration Specialists, Reuben Mark Ward, and Lynnette Pennington Ward in the above-referenced matter.

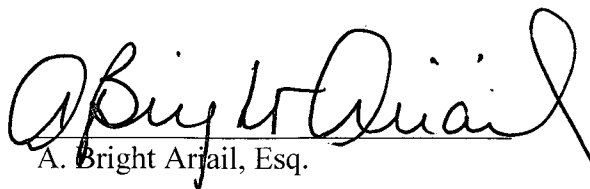
3. I have performed a complete review of the documents contained within Respondent's exhibit notebook which it prepared for a damages hearing (which has not been held to date) in this case in the lower court.
4. I have also performed a complete review of documents produced to Respondent by Appellant to date. Those documents include two documents (consisting of five pages) that were not bates numbered by Appellants, and documents bates numbered RS00001 through RS01141.
5. Respondent's exhibit notebook consists of eighteen documents totaling eighty-eight (88) pages. *See Exhibit A.*
6. A total of five of the documents cited in Respondent's Initial Brief were produced to Respondent by Appellants.
7. Two of those five documents, specifically, the VA Contract and the Final pay application, do not appear in Respondent's exhibit notebook and are not found anywhere in the record of the lower court. Further, neither document, as described by Respondent, is contained as a stand-alone document within Appellant's document production. Rather, each requires a combination of several documents, as well as the exclusion of some pages of those several documents. Those two documents (made by combining four documents without excluding certain irrelevant pages) consist of 69 pages.

8. Only three of the eighteen documents contained within Respondent's exhibit notebook were produced to Respondent by Appellants and include:
- a) Appellants' Discovery Responses<sup>1</sup> (15 pages)
  - b) Subcontract Log dated 6/10/16 (3 pages)
  - c) Estimate of VA Monthly Expenses dated 6/10/16 (2 pages)
9. Accordingly, the following documents cited in Respondent's Initial Brief were not produced to Respondent by Appellants:
- (1): Subcontract, Attachment 1;
  - (2): Indemnity Agreement;
  - (3): PCG letter;
  - (4): Hanover demand;
  - (5): job cost billing detail;
  - (6): AR history report;
  - (7): Subcontract, Attachment;
  - (8): Subcontract Breakdown;
  - (9): PCG Subcontract Breakdown;
  - (10): Ward email dated January 11, 2016;
  - (11): Proof of Profitability Breakdown.

FURTHER DEPONENT SAYETH NAUGHT.

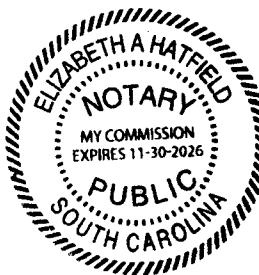
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<sup>1</sup> Appellant's Discovery Responses consist of Defendants' Answers to Plaintiff Palmetto Construction Group's First Set of Interrogatories to Defendants and Defendants' Responses to Plaintiff Palmetto Construction Group's First Set of Requests for Production to Defendants. No documents are attached thereto.

  
A. Bright Arjail, Esq.

Sworn to before me  
This 9 th day of June, 2017.

  
Notary Public for the State of South Carolina  
My Commission Expires: 11-30-2026



**Index of Documents in PCG Notebook**

<b><u>TAB</u></b>	<b><u>Description of Document(s)</u></b>	<b><u># of Pages</u></b>
1	Teaming Agreement w/Ex A & B	6
	Subcontract w/Attachment 1	16
2	Indemnity Agreement	10
	Performance Bond	4
	Payment Bond	2
3	Ltr Handegan to Ward	1
4	Email string 1/11/16	3
5	Defendants' Discovery responses	15
6	PCG Damages Summary	1
7	PCG Proof of Profitability	1
	Contract Log dated 6/10/16	3
	Estimate of VA Monthly Expenses dated 6/10/16	2
8	Untitled	1
	PCG A/R History Report of 9/28/16	2
	PCG Job Cost & Billing Detail of 9/28/16	13
	PCG Pay Application Summary	2
9	Hanover claims/payment summary	1
	Hanover letter of 9/30/16 with claims catalog	<u>5</u>
		88

**EXHIBIT A**

ANDREW K. EPTING, JR., L.L.C.  
ATTORNEYS AT LAW

May 16, 2017

The Honorable Mikell R. Scarbrough  
Master In Equity  
100 Broad Street, Suite 266  
Charleston, SC 29401

RE: *Palmetto Construction Group, LLC v. Restoration Specialist, LLC et al*  
Case No.: 2016-CP-10-1143

Dear Judge Scarborough,

As you are aware, the above referenced case is on appeal. The procedural posture of the case is quite unusual. The parties were scheduled to appear before you on October 4, 2016 for a default damages hearing. The day before the hearing, we were served by Ms. Ariail with a notice of appeal. However, the notice was well past the deadline to appeal Your Honor's July 14, 2016 Order, and no other order had been entered. We moved to dismiss the appeal, and our motion was ultimately granted by the Court of Appeals; unfortunately not soon enough as the defective notice prevented us from going forward with the damages hearing on October 4. Instead of having a damages hearing, Your Honor sought a proffer of damages in order to make a record for the Court of Appeals and heard Ms. Ariail's motion to reconsider. Palmetto was prepared to go forward with the damages hearing, and came to court with Mr. John Kendle to testify to Palmetto's damages and exhibit notebooks which we intended to enter into the record by way of Mr. Kendle's testimony. The exhibit notebook was not formally entered in the record as Mr. Kendle did not testify; however, the notebooks were disbursed and the exhibits were discussed with the Court and objected to by Ms. Ariail – all of which appears from the transcript. After the hearing, Your Honor entered an order denying Ms. Ariail's motion to reconsider and a second appeal was noticed. As part of the second appeal, Ms. Ariail has moved to exclude from the record on appeal and from Respondent's brief, any mention of the exhibits provided by Palmetto in support of its proffer of damages given to the Court on October 4, claiming that the exhibits were not before this court. The following exchange between the Court and Ms. Ariail demonstrates the Court's intent that

Andrew K. Epting, Jr. · [ake@epting-law.com](mailto:ake@epting-law.com)  
Michelle N. Endemann (*Special Counsel*) · [mne@epting-law.com](mailto:mne@epting-law.com)  
Jaan G. Rannik\* · [jgr@epting-law.com](mailto:jgr@epting-law.com)  
46A State Street · Charleston · South Carolina · 29401.  
Phone: (843) 377-1871 · Fax: (843) 377-1310

\*Currently Admitted Only in Maryland

Palmetto's damages be put in the record as well as Ms. Arial's object to the very documents she now claims were not part of the proceeding:

2 MS. ARIAIL: Your Honor, I'm going to object  
3 to any of this information being put in the record.  
4 Again, this is essentially the damages hearing as  
5 going forward. I've essentially got Counsel for the  
6 Plaintiff testifying with no --

7 THE COURT: Well, I asked for a proffer and  
8 that's just what I got. That's what I was wanting.  
9 Okay? I want that to be on the record when you-all  
10 take that up there.

11 MS. ARIAIL: Well, I don't agree with anything  
12 that she said.

13 THE COURT: You don't have to.

14 MS. ARIAIL: I've got problems with a lot of  
15 the documents that are contained herein.

(October 4, 2016 Transcript, p. 31 line 2-15).

We write today to ask Your Honor's permission to file the exhibit notebook that was provided as part of the proffer of damages taken on October 4, 2016. We asked for a status conference to discuss this issue, and Ms. Beck provided us with a time and date. However, Ms. Ariail has indicated that she will not appear before this Court without an order instructing her to do so from the Court of Appeals. We are not seeking to have the

The Mikell R. Scarborough  
May 16, 2017  
Page 3 of 3

Court weigh in on the motion pending before the Court of Appeals, we are simply seeking permission to file the notebook rather than file on our own to avoid the allegation that we are trying to slip something in the record that was not before this Court or that we were acting without this Court's approval or knowledge.

We appreciate your consideration of this request

ANDREW K. EPTING, JR., LLC

s/Drew

Andrew K. Epting, Jr.

AKE,Jr./agg

Enclosure

cc: Bright Ariail, Esquire

ANDREW K. EPTING, JR., L.L.C.

ATTORNEYS AT LAW

May 17, 2017

The Honorable Mikell R. Scarborough  
Master In Equity  
100 Broad Street, Suite 266  
Charleston, SC 29401

RE: *Palmetto Construction Group, LLC v. Restoration Specialist, LLC et al*  
Case No.: 2016-CP-10-1143

Dear Judge Scarborough,

We are not asking to reopen the record or to include something that was not previously before you. We came to Court in October hoping to go forward with the damages hearing. We prepared notebooks for the Court, our witness and for Ms. Ariail. She clearly has her copy as she objected to the documents. In hindsight, we should have marked the notebook for identification at the hearing, but did not know what to expect given the odd procedural posture, nor did we expect that Ms. Ariail would try to exclude the documents that were provided and discussed in offering the proffer. We do not claim the documents were admitted as evidence or that they are admissible; just that the documents and more importantly the facts contained in them were before you. We simply ask that we be allowed to file them as this seems to be Ms. Ariail's chief complaint

ANDREW K. EPTING, JR., LLC

s/Drew

Andrew K. Epting, Jr.

AKE,Jr./agg

cc: Bright Ariail, Esquire

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\*Currently Admitted Only in Maryland

# Law Office of A. Bright Ariail, LLC

May 16, 2017

**VIA EMAIL AND US MAIL**

The Honorable Mikell R. Scarborough  
Charleston County Judicial Center  
100 Broad Street, Suite 266  
Charleston, SC 29401

Re: ***Palmetto Construction Group, LLC v. Restoration Specialists, LLC et al.***  
Civil Action 2016-CP-10-1143  
Appellate Case 2016-002308

Dear Judge Scarborough:

I am in receipt of Mr. Epting's letter of this date requesting that Palmetto Construction Group, LLC ("PCG" or "Respondent") now be allowed to file documents in the above referenced case, which is currently under appeal. I vehemently object to Mr. Epting's request.

This appeal is currently in the initial briefing status, as noted by the Court of Appeals. After receipt of Respondent's Initial Brief and Designation of Matter, Appellants filed a Motion to Strike Exclude and Strike pursuant to SCACR 209(b) and SCACR 210(c) requesting that all documents listed in the Designation of Matter that were not contained in the record in the lower court be stricken, and all references to them in Respondent's Initial Brief be excluded. These documents are all contained in an exhibit notebook that was prepared by Respondent's counsel for use at a damage's hearing and was not entered into the record at the October 4, 2016 hearing before this court.

In response to Appellant's Motion, Mr. Epting initially requested a ten day extension to submit Respondent's Return to this Motion, which was granted by the Court of Appeals; the Return is currently due on May 18, 2017. Now, however, rather than allow the Court of Appeals to decide this motion after receipt of Respondent's Return and Appellants' Reply, he has requested that you reopen the record and allow Respondent to file documents that are clearly not in the record with the lower court, all despite the fact that the case is on appeal and jurisdiction is with the Court of Appeals.

While SCACR 212(b) allows a party to supplement the record on appeal under certain circumstances through a motion to the Court of Appeals, it still "must, of course, be read in conjunction with Rules 209(c) and 210 (c), SCACR, which states that the record cannot include matter that was not presented to the lower court . . ."

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Mr. Epting has included an excerpt of the transcript from the October 4, 2016 hearing to support his request. However, he has not considered the entire transcript, which provides, *inter alia*, your statement concerning the purpose of the hearing:

10 THE COURT: What I'm going to do is I'm going  
11 to have them proffer what their damages are, and I'm  
12 going to have you proffer what you consider your  
13 59(e) to be, and I'm going to let you'all take that  
14 up there. I'm just going to do it as a proffer. I'm  
15 not going to take testimony. They're going to tell  
16 me how much their damages are so it's in the record.  
17 You are going to tell me why I should overturn my  
18 underlying order, and then you-all can go forward  
19 from there, Okay?

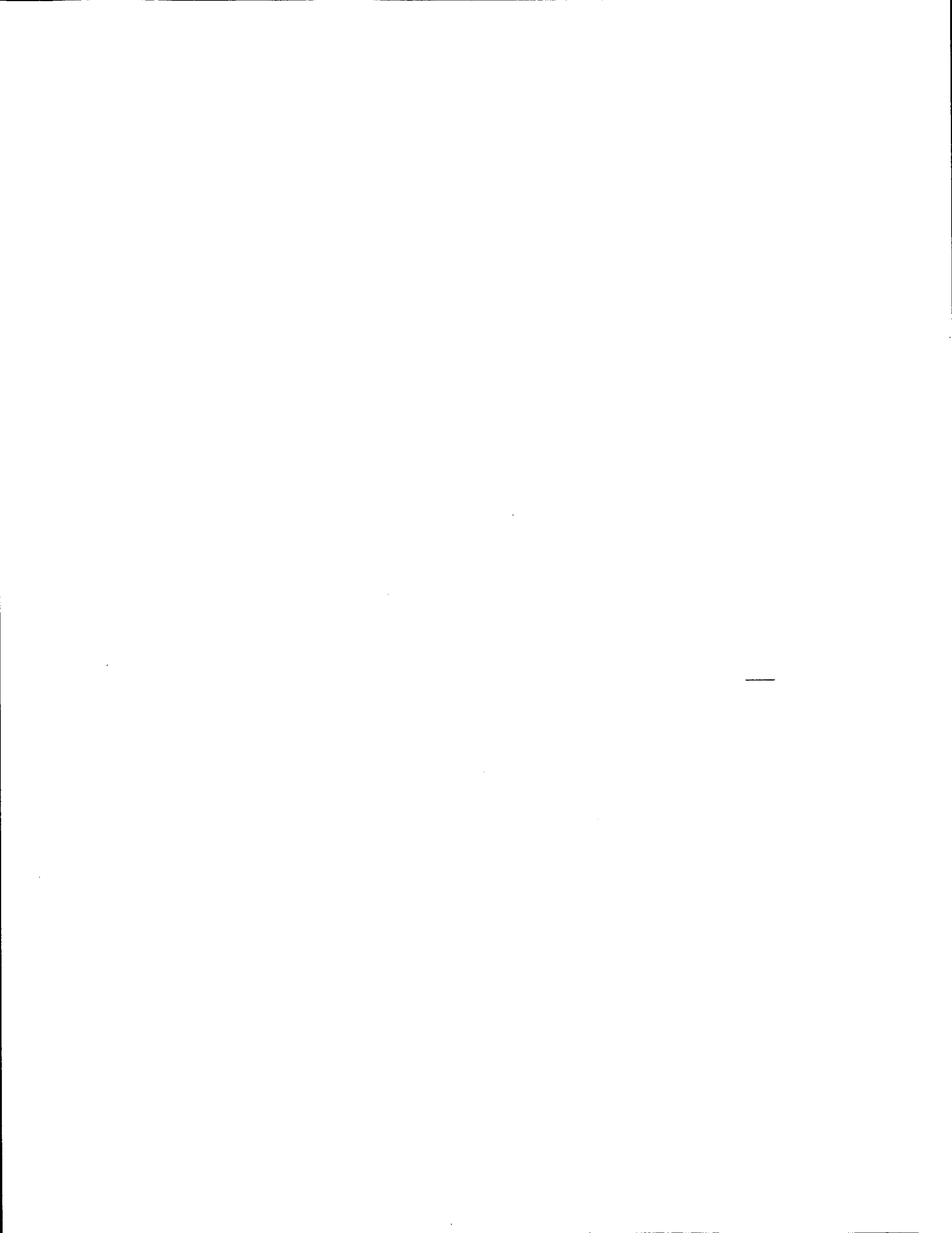
(October 4, 2016 Transcript, p. 10 line 10-19).

Nor did Mr. Epting include the remainder of my statements related to my objections as follows:

14 MS. ARIAIL: I've got problems with a lot of  
15 the documents that are contained herein. Her  
16 representation that Mr. Ward has admitted – they  
17 admitted that. I object to that. I object to the  
18 amount that she says is receivable due to PCG. I  
19 object to the profit sharing.

(October 4, 2016 Transcript, p. 29 line 14-19).

Although Ms. Endemann mentioned an exhibit notebook during that hearing, at no time did the court accept that notebook into evidence or make it a part of the record at the hearing. Moreover, at no time after the hearing, even during the period after the first appeal was dismissed and before the second appeal was filed, did Respondent file that exhibit notebook with the lower Court.



At the end of the hearing, you made it clear that the proffer consisted of Respondent's counsel's oral summary of the amount of damages claimed by the Plaintiff:

10 THE COURT: Give me the full amount of your  
11 damages again? I'm sorry, Ms. Endemann.  
12 \$1.4 million or something?  
13 Ms. ENDEMANN: \$1,681,000, Your Honor. . . .  
14 THE COURT: 681, okay. Thank you. That's the  
15 1.186 -- the 221, was it?  
16 MS. ENDEMANN: I'll give you the exact  
17 figures. The receivables due to the construction are  
18 \$184,858.69. The profit share is \$221,730.46, and  
19 due to Hanover is \$1,230,888.71 for a total of  
20 \$1,681,864.86.  
21 THE COURT: Okay. I've got it.  
22 MS. ENDEMANN: Thank you.  
23 THE COURT: I'm just going to take that as the proffer,  
24 but again, just so you-all have it in the  
25 record and the Court understands what this case is  
1 about.

(October 4, 2016 Transcript, p. 31, line 10-25 and p. 32, line 1.)

In the transcript excerpt cited in Mr. Epting's letter, you indicate that you asked for a proffer on Respondent's alleged damages and that's what you got. That proffer consisted of Respondent's counsel's oral summary of alleged damages and did not include admission of the exhibit notebook that Respondent is now requesting be added to the record. Mr. Epting also states that "[w]e are not seeking to have the Court weigh in on the motion pending before the Court of Appeals. . .". To the contrary, I would respectfully submit that that is exactly what Respondent's counsel is asking the court to do. Accordingly, I'd request that Mr. Epting's request be denied and that the appeal be allowed to properly run its course as deemed appropriate by and under the jurisdiction of the Court of Appeals.

Finally, while I was not copied on any request made to Ms. Beck for a status conference, I was asked by email of May 15, 2017 by staff for Respondent's counsel if I was available to attend a status conference this Thursday afternoon in light of my current motion in the Court of Appeals. Unaware of

how this status conference had come about, I replied to that staff member stating "I know of no directive from the Court of Appeals, where jurisdiction lies in this case, directing the parties to attend a status conference. Accordingly, I must decline unless so directed by the Court of Appeals." See attached.

Thank you in advance for your consideration in this matter.

With kindest regards, I am

Sincerely yours,  
  
A. Bright Ariail

cc: All Counsel (via email only)

---

<sup>1</sup> Jean Hoefer Toal et al., Appellate Practice in South Carolina 370 (2016).

## Bright Ariail

---

**From:** Bright Ariail  
**Sent:** Monday, May 15, 2017 4:47 PM  
**To:** Angela Gross  
**Cc:** Laura Dukes Beck; Michelle Endemann  
**Subject:** RE: Ward

Angela – I know of no directive from the Court of Appeals, where jurisdiction lies in this case, directing the parties to attend a status conference. Accordingly, I must decline unless so directed by the Court of Appeals.

VR, Bright Ariail

Law Office of A. Bright Ariail, LLC  
125E Wappoo Creek Drive  
Suite 202  
Charleston, SC 29412

[bright@brightariailaw.com](mailto:bright@brightariailaw.com)  
843/814-8805

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---

**From:** Angela Gross [mailto:agg@epting-law.com]  
**Sent:** Monday, May 15, 2017 9:56 AM  
**To:** Bright Ariail <bright@BRIGHTARIAILLAW.COM>  
**Cc:** Laura Dukes Beck <LBeck@charlestoncounty.org>; Michelle Endemann <mne@epting-law.com>  
**Subject:** Ward

Ms. Ariail,

In light of your current motion, are you available for a status conference on Thursday at 2 p.m. before Judge Scarborough?

*Angela*

Angela Gross  
Legal Assistant to Andrew K. Epting, Jr., Esquire  
And Michelle N. Endemann, Esquire  
Andrew K. Epting, Jr., LLC  
46A State Street  
Charleston, SC 29401  
Telephone: (843) 377-1871  
Facsimile: (843) 377-1310  
[agg@epting-law.com](mailto:agg@epting-law.com)

## Bright Ariail

---

**From:** Mikell Scarborough <master@charlestoncounty.org>  
**Sent:** Thursday, May 18, 2017 3:47 PM  
**To:** Bright Ariail  
**Cc:** Andrew K. Epting; Michelle Endemann; Barnwell Fishburne; Laura Dukes Beck  
**Subject:** RE: Appellate Case 2016-002308/Civil Action 2016-CP-10-1143

**Importance:** High

Counsel,

I have been provided your emails and have gone back to review the record as well as searched my memory about this. This issue came up in an unusual context (as I recall) because the matter was set for a default damages hearing that was returned from appeal of an interlocutory order.

Ms. Ariail has filed an appeal of the denial of her motion to reconsider which is where I understand this matter now rests with the Court of Appeals.

At the scheduled damages hearing, we did not go forth with a full hearing on damages; however, due to the unusual posture of the case, I allowed the Plaintiffs to Proffer their damages into the record. My review is that the figure is \$1.6 Million. The support for that figure was found in the documents presented in the notebook presented by counsel for the Plaintiffs. I am well aware that the amount of damages as well as the supporting documentation for the damages was objected to at the time.

My review of Rule 103, SCRE sets for the effect of Rulings on Evidence. Section b gives the court latitude to set forth the terms of the offer of proof – the reason for the proffer. I allowed the Plaintiff to state the amount of the damages and this was based upon the documentation contained within the notebook. Accordingly, I am of the opinion that the notebook was part of the proffer. It does not constitute admitted evidence because the court never got to the merits of the hearing. It is an offer of proof as to what the Plaintiff seeks to prove whenever the hearing on Damages is finally heard. Ms. Ariail did not agree to the evidence contained within the documents and, as I told her then, she did not have to. Tr. 29. L11-13.

I am aware of this dispute. I asked for the proffer to establish a record for the appellate court as they will decide the issues currently on appeal.

Thanks & I'm hopeful this helps to resolve the record on appeal.

Mikell R. Scarborough  
Charleston County Master-in-Equity  
100 Broad St, Ste. 266  
Charleston, SC 29401  
843 958-5070

---

**From:** Bright Ariail [mailto:bright@BRIGHTARIAILLAW.COM]  
**Sent:** Tuesday, May 16, 2017 6:04 PM  
**To:** Mikell Scarborough <master@charlestoncounty.org>  
**Cc:** Andrew K. Epting <ake@epting-law.com>; Michelle Endemann <mne@epting-law.com>; Barnwell Fishburne <JFishburne@charlestoncounty.org>; Laura Dukes Beck <LBeck@charlestoncounty.org>  
**Subject:** Appellate Case 2016-002308/Civil Action 2016-CP-10-1143

Dear Judge Scarborough,

Attached, please see my letter of May 16, 2017 regarding Mr. Epting's letter of this date related to the above referenced matter. The original will be placed in the mail tomorrow.

VR, Bright Ariail

Law Office of A. Bright Ariail, LLC  
125E Wappoo Creek Drive  
Suite 202  
Charleston, SC 29412

[bright@brightariailaw.com](mailto:bright@brightariailaw.com)  
843/814-8805

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1 STATE OF SOUTH CAROLINA  
 2 COURT OF COMMON PLEAS  
 3 COUNTY OF CHARLESTON  
 4 Palmetto Construction Group,  
 5 Plaintiff,  
 6 vs. CASE NO. 2016-CP-10-1143  
 7 Restoration Specialists, LLC,  
 8 Ruben Mark Ward, and Lynette  
 9 Pennington Ward,  
 10 Defendants.  
 11  
 12  
 13 Hearing before the Honorable Mikell R.  
 14 Scarborough, reported by Christine A. Smith, Court  
 15 Reporter and Notary Public, at 10:57 a.m. on October  
 16 4, 2016 at 109 Broad Street, Charleston,  
 17 South Carolina.  
 18  
 19  
 20  
 21 Christine A. Smith, Court Reporter  
 22 Name-MS-05019  
 23 P# 105-0020  
 24 Charleston, South Carolina 29407  
 25 (843) 729-5271  
 csmith@charlestoncourts.org

1 PROCEEDINGS

2  
 3 THE COURT: We're back on the record. This is  
 4 the case that is captioned Palmetto Construction  
 5 Group versus Restoration Specialists, LLC, and Ruben  
 6 and Lynette Ward. The case number is  
 7 2016-CP-10-1143.

8 The case is in a bit of an unusual posture,  
 9 and that's really why I got you-all here today. We  
 10 had it scheduled for a damages hearing. I know  
 11 there's a motion outstanding for a Rule 59 Motion, I  
 12 think it was, that Ms. Ariail had sent.

13 Then I was informed yesterday, I believe it  
 14 was, that the case was on appeal. Ms. Ariail, let me  
 15 start with you on the Defense side, and then I'll  
 16 come to the Plaintiff's side and just figure out  
 17 where we are. Okay?

18 MS. ARIAIL: Yes, sir, Your Honor.  
 19 Bright Ariail for the Defendants. Quite frankly,  
 20 based on the scheduling of the damages hearing and  
 21 the hearing for the Motion to Alter or Amend, I filed  
 22 a Notice of Appeal basically taking the position that  
 23 the failure of the Court to rule on that motion prior  
 24 to the damages hearing was essentially a denial.  
 25 Case law supports that.

1 APPEARANCES OF COUNSEL:  
 2 ATTORNEYS FOR THE PLAINTIFF:  
 3 Andrew K. Epting, Jr., Esq.  
 4 Michelle Endemann, Esq.  
 5 Andrew K. Epting, Jr., LLC  
 6 46A State Street  
 7 Charleston, SC 29401  
 8 (843) 377-1871  
 9 Ake@epting-law.com  
 10 Mne@epting-law.com  
 11  
 12 ATTORNEYS FOR THE DEFENDANT:  
 13 A. Bright Ariail, Esq.  
 14 Law Office of A. Bright Ariail, LLC  
 15 125-E Wappoo Creek Drive  
 16 Suite 202  
 17 Charleston, SC 29412  
 18 (843) 814-8805  
 19 Bright@brightariailaw.com

1 THE COURT: What case do you have for that?  
 2 MS. ARIAIL: There are so many issues,  
 3 Your Honor. I have things everywhere.

4 THE COURT: Mainly we need to talk about the  
 5 procedural aspect of where we are. Okay?

6 MS. ARIAIL: Okay.

7 THE COURT: Let me do this while you look for  
 8 that case. Let me just sort of make sure I get -- I  
 9 want to do the timeline down here. I think one of  
 10 the questions is, where's jurisdiction? I fully  
 11 understand that the filing of a Notice of Appeal is  
 12 designed to divest the Court of jurisdiction. I'm  
 13 just trying to figure out what is being appealed. So  
 14 we had a hearing on the 6th of June, our first  
 15 hearing. From that an order was issued on the 14th  
 16 of July. Notice appears to have been sent and  
 17 received on July 18th.

18 MS. ARIAIL: Yes, sir.

19 THE COURT: And that order set the damages  
 20 hearing for today.

21 MS. ARIAIL: Yes, sir.

22 THE COURT: And then a 59(e) Motion appears to  
 23 have been timely filed on July 27th. That's within  
 24 ten days. That hearing was then scheduled by my  
 25 office for a week from today, October 11th. Then we

1 went back and forth the week of September 7th.  
 2 Defendant requests that the 59(e) come before the  
 3 damages hearing.  
 4 Plaintiff's objected, and I kept the schedule  
 5 the same, and then apparently an appeal was filed on  
 6 September 30th, which would have been last Friday.  
 7 Today is Tuesday, the 4th of October. I'm trying to  
 8 figure out what it is you're appealing because  
 9 clearly the order of July 14th is well past the 30  
 10 days.  
 11 I'm not familiar with any law which says that  
 12 the failure to obtain a motion in a timely fashion  
 13 would total the time to appeal, so that's what I'm  
 14 trying to get at.  
 15 MS. ARIAIL: All right.  
 16 THE COURT: My initial reaction is that you're  
 17 too late on the appeal, but you're not too late on a  
 18 59(e). The Court is not entertaining a 59(e). So we  
 19 have the cart before the horse on one, and we have it  
 20 after the fact.  
 21 MS. ARIAIL: The issue is this: There is a  
 22 three-prong test whereby my clients can waive their  
 23 right to arbitration. One of those includes  
 24 proceeding with litigation, and this hearing, this  
 25 damages hearing, is a potential item that may end up

1 waiving my client's rights for an arbitration.  
 2 THE COURT: Wouldn't default do that as well?  
 3 MS. ARIAIL: Your Honor --  
 4 THE COURT: Wouldn't that be the principal  
 5 test? You have to demand it, and then you have to do  
 6 it in a timely fashion.  
 7 MS. ARIAIL: The decision that the right for  
 8 arbitration or the Motion for Arbitration was denied  
 9 to stay the case and send it to arbitration was  
 10 denied was based on -- according to your order, the  
 11 Defendant's being in default, that is not one of the  
 12 standards for not allowing arbitration to go forward.  
 13 There are other prongs. There are other tests. It's  
 14 the length of time between the initiation of the  
 15 lawsuit and the Motion to Compel Arbitration which  
 16 was very short in this case. It's whether or not  
 17 there has been any litigation, anything has gone  
 18 forward.  
 19 Our position is at this point, no, but I have  
 20 to preserve my client's rights for arbitration, and  
 21 that's why I'm concerned that they would be  
 22 prejudiced if we went through with this -- went  
 23 forward with this damages hearing. And the third one  
 24 is whether or not the Plaintiff has been prejudiced  
 25 because of some delay.

1 If this had been a lawsuit that had been  
 2 answered and taking the normal course of litigation,  
 3 we would just barely be in the discovery phase. So  
 4 the point is that the wrong standard was used to deny  
 5 the Motion to Compel Arbitration, and that by going  
 6 forward today we are potentially -- we are in danger  
 7 of waiving the Defendant's right.  
 8 THE COURT: But you still have your 59(e)  
 9 outstanding. Doesn't that protect you?  
 10 MS. ARIAIL: If the 59(e) had been heard  
 11 before this damages hearing, but potentially not.  
 12 That's why I asked to have them switched.  
 13 THE COURT: All right. Let me hear from  
 14 Ms. Endemann.  
 15 MS. ENDEMANN: Thank you, Judge. I think  
 16 you've sort of hit the nail right on the head. Her  
 17 objections are preserved under the 59(e) Motion. The  
 18 Notice of Appeal is -- according to the Rules on its  
 19 face defective, because it's supposed to include the  
 20 order appealed from. There is no order subject to  
 21 appeal at this point in the case.  
 22 As you indicated the first order -- first,  
 23 Judge, it's interlocutory because it's denying a  
 24 motion to lift the defaults and the associated  
 25 affirmative defense that they tried to raise, which I

1 think Your Honor, it's clear in the transcript said  
 2 you weren't really ruling on the merits of that.  
 3 What you were saying is that they had to be out of  
 4 default in order to bring it. So the order denies me  
 5 from default. That is not immediately appealable  
 6 until after final judgment and there is black letter  
 7 South Carolina law on that point.  
 8 Number two, the 59(e) Motion that she's trying  
 9 to appeal from remains outstanding before you. There  
 10 is no order entered on that issue, and so this  
 11 argument about waiver and arbitration -- there are  
 12 cases, Your Honor, that I'm happy to provide the  
 13 Court that state that arbitration is an affirmative  
 14 defense, and if you're in default and you failed to  
 15 raise that affirmative defense you can't bring it  
 16 until you're in default just like you ruled.  
 17 There is no ruling. The point is there is no  
 18 ruling yet to be appealed. This notice is defective  
 19 on its face because it doesn't attach an order  
 20 pursuant to the rule, and there's nothing to appeal  
 21 from.  
 22 THE COURT: I'm just not sure it's final yet,  
 23 Ms. Ariail. I understand your concern and your  
 24 desire to preserve your clients' rights, and you seek  
 25 arbitration. I fully understand that. I just don't

1 see where the -- other than the default I don't see  
 2 where your clients have waived it. I don't see where  
 3 you've waived it at all. We covered that back in  
 4 June, as I recall, about the default and what  
 5 happened there. I fully understand that. My  
 6 recollection is that you acted timely. I'm not sure  
 7 that your clients did, but I think you did. I think  
 8 that's to your credit, but that doesn't get us to a  
 9 final -- my opinion is it doesn't get us to a final  
 10 order. Unless you can show me something that says  
 11 that having a damages hearing before having a 59(e)  
 12 hearing results in finality and no written order has  
 13 been issued, I'm not sure I really fully understand.  
 14 I'm going to defer to the Rules because you  
 15 have a Notice of an Intent to Appeal out there, but I  
 16 need you all to sort of make a record because I think  
 17 that's what you-all need to take up to the Appellate  
 18 Court because they're not going to have an  
 19 evidentiary hearing. Okay?  
 20 You-all need to be able to argue this by  
 21 motion to the Appeals Court as to whether or not, in  
 22 fact, there is jurisdiction or there's a technical  
 23 violation of it or whatever if the order is not  
 24 attached. All that stuff is within their purview.  
 25 This notice was filed at 2:40 on Friday afternoon,

1 and like I said, I just got wind of it yesterday.  
 2 Ms. Ariail?  
 3 MS. ARIAIL: Your Honor, as I understand  
 4 you're going to allow us to continue with the appeal  
 5 at this point?  
 6 THE COURT: That's not within my purview.  
 7 That's within the purview of the Court of Appeals.  
 8 MS. ARIAIL: And there will not be a damages  
 9 hearing today?  
 10 THE COURT: What I'm going to do is I'm going  
 11 to have them proffer what their damages are, and I'm  
 12 going to have you proffer what you consider your  
 13 59(e) to be, and I'm going to let you-all take that  
 14 up there. I'm just going to do it as a proffer. I'm  
 15 not going to take testimony. They're going to tell  
 16 me how much their damages are so it's in the record.  
 17 You are going to tell me why I should overturn my  
 18 underlying order, and then you-all can go forward  
 19 from there. Okay?  
 20 MS. ARIAIL: Yes, sir.  
 21 THE COURT: And if they decide they don't have  
 22 jurisdiction and they want to send it back to me,  
 23 we'll have a full-blown hearing. If they decide it's  
 24 proper for appeal then they can hear it. All right?  
 25 I'm just making them a record because otherwise what

1 they're going to do is they're going to send it right  
 2 back here, and we're going to do it again. All  
 3 right?  
 4 So you went into your argument. Let me do  
 5 that. You went into your argument about the 59(e).  
 6 Go ahead and tell me why the 59(e) should be granted?  
 7 MS. ARIAIL: I have a memorandum prepared that  
 8 I would like to pass up.  
 9 THE COURT: All right.  
 10 MS. ARIAIL: Your Honor, I have five different  
 11 arguments to make on this point. Honestly the one  
 12 that I mentioned prior is probably the most important  
 13 which is the one that is actually listed as Item 5 in  
 14 my memorandum, and that is that the wrong -- the test  
 15 for whether or not this case should have gone to  
 16 arbitration the wrong standard was applied.  
 17 Specifically the Court applied a standard that --  
 18 because the Defendants were in default that they  
 19 could not compel arbitration.  
 20 Case law gives you in South Carolina -- both  
 21 the Federal the State Courts mirror each other  
 22 somewhat. I mention the three standards. One is  
 23 that a substantial length of time did not transpire  
 24 between commencement of the action and commencement  
 25 of the Motion to Compel Arbitration; two, the

1 Defendants did not engage in extensive discovery or  
 2 litigation; three, the Plaintiff has not been  
 3 prejudiced through an undue burden caused by any  
 4 delays seeking arbitration.  
 5 So those are the three standards that the  
 6 Court should have applied to determine whether or not  
 7 arbitration was proper rather than the fact that the  
 8 Defendants at that point were in default in this  
 9 case.  
 10 THE COURT: Do any of the cases you've cited,  
 11 Toler's Cove, Carlson, or General Equipment deal with  
 12 default matters?  
 13 MS. ARIAIL: No, sir. Well, actually the case  
 14 that I have that deals with the default matter is  
 15 actually a case out of another jurisdiction.  
 16 THE COURT: Okay.  
 17 MS. ARIAIL: If you look on -- unfortunately  
 18 my memo is not numbered, but if you look at the  
 19 paragraph just before the conclusion, it's the Cedar  
 20 Surgery Center versus Bonelli case out of Utah. Why  
 21 that's important to us is they essentially have the  
 22 same three-prong test, or their test is very similar  
 23 to that test in South Carolina case law.  
 24 In that case, not only did the -- in our case  
 25 an entry of default has been entered, but in that

1 case they actually went through the entry of default  
2 damages hearing all the way to default judgment, and  
3 when the Defendants filed a motion to send it to  
4 arbitration, the Court found that arbitration was  
5 proper even though they went through all of these  
6 steps.

7 THE COURT: Okay.

8 MS. ARIAL: Other arguments that I have --

9 THE COURT: So in that case, I don't know if  
10 you have a copy of that, but in that case what you're  
11 telling me is the Defendant was in default. They had  
12 the damages hearing. Instead of an order of default  
13 they had the damages hearing subsequent to that, and  
14 then the demand for arbitration was made?

15 MS. ARIAIL: Yes, sir. In fact, the Defendant  
16 didn't show up through any of the Court hearings.

17 THE COURT: Was a judgment issued prior to?

18 THE WITNESS: They had a judgment issued  
19 against them, and then after that judgment had been  
20 entered against them they filed an arbitration, and  
21 the Court held that it was proper.

22 THE COURT: And that was under Utah state law?

23 MS. ARIAIL: Yes, sir. And again, their test  
24 is very similar to our test.

25 THE COURT: Okay.

1 MS. ARIAIL: My other argument -- again,  
2 that's the -- in my opinion that's the most  
3 significant issue that's before us.

4 Also, I believe that we showed good cause that  
5 the entry of default should be lifted because we did  
6 assert our right to mandatory mediation and  
7 arbitration. It is a contract requirement. It's  
8 very specific in the contract. It's not, as it's  
9 been suggested, just a form contract. It's one where  
10 you actually have to check the box and select the  
11 dispute resolution procedures that you're going to  
12 use.

13 In addition to that, not only was  
14 arbitration -- mandatory mediation and arbitration  
15 selected, but the contract also calls for it to be --  
16 any mediation, any alternative dispute resolution  
17 take place in the state where the project occurred  
18 which is the State of Georgia and not the State of  
19 South Carolina.

20 THE COURT: All right.

21 MS. ARIAIL: There is a question -- once a  
22 case has been submitted to an arbitrator or a  
23 mediator under both federal and state law, then the  
24 State Court no longer has jurisdiction over this  
25 proceeding.

1 Interestingly, not only did the Defendants in  
2 this case file a Motion to Compel Arbitration, but  
3 the Plaintiff actually filed it, contemporaneously  
4 with their Complaint. Now, in an earlier hearing  
5 Your Honor found that because the Clerk of Court  
6 basically -- once the entry of default was submitted  
7 or filed, that the Clerk of Court essentially just  
8 took that motion out of the case records, and it was  
9 never heard.

10 Obviously, by submitting that to the Court in  
11 the first place the Plaintiffs acknowledged that  
12 there was a requirement for mandatory mediation and  
13 arbitration, and it was something that was put before  
14 the Court. It's not something that the Clerk can  
15 just merely remove from the docket because an entry  
16 of default has been entered. I think the language  
17 that came out of the transcript was that the Clerk of  
18 Court closed it out.

19 THE COURT: Okay. I'm reviewing the June 6th  
20 transcript. Is it alternative mandatory mediation  
21 prior to arbitration, or are they both obligatory  
22 under the contract? Which are you telling me?

23 MS. ARIAIL: Let me pull it. The contract  
24 says -- this is Article 6 -- this is a standard AIA  
25 subcontract document, but there are certain things,

1 as I said, that you have go in and select for your  
2 particular contract. You have the name of the  
3 project, who the parties are, what have you.

4 In Article 6, the first paragraph addresses  
5 mediation. It says, Any claim arising out of or  
6 related to the subcontract except those waived in the  
7 subcontract shall be subject to mediation as a  
8 condition precedent to binding dispute resolution.  
9 Also, it basically says that they will use the AAA,  
10 be administered by AAA, and they will use the  
11 construction industry rules of AAA.

12 As I've mentioned before it says, Mediation  
13 shall be held in the place where the project is  
14 located unless another location is mutually agreed  
15 upon. The next paragraph is binding dispute  
16 resolution, and it says, For any claim subject to but  
17 not resolved by mediation pursuant to Section 6.1,  
18 the method of bonding dispute resolution shall be as  
19 follows. That's where it gives you various choices.

20 The first one is arbitration pursuant to  
21 Section 6.3 of this agreement. That's the one that  
22 was selected. The other two are litigation, and then  
23 it's got just an other, and it lets you fill in the  
24 blank. If you go to --

25 THE COURT: So the other was not filled out

1 either, so it's arbitration --

2 MS. ARIAIL: The only thing that's been

3 checked -- and the subcontract is actually attached

4 to the Complaint.

5 THE COURT: Okay.

6 MS. ARIAIL: The only thing that's been --

7 there's a big "X" in the block by arbitration

8 pursuant to Section 6.3 of this agreement. 6.3 says,

9 If the contractor and subcontractor have selected

10 arbitration as a method of binding dispute resolution

11 in Section 6.2, any claims subject to but not

12 resolved by mediation shall be subject to arbitration

13 which, unless the parties agree otherwise, shall be

14 administered by AAA. It goes on and talks about the

15 procedure itself.

16 THE COURT: The preceding paragraph said,

17 Except as waived. Is there a definition of what

18 waiver is constituted in there?

19 MS. ARIAIL: Say that again? I'm sorry.

20 THE COURT: The paragraph just prior to that,

21 when you get into the -- it said, Except as waived.

22 Is there a provision in the contract that talks about

23 a waiver?

24 MS. ARIAIL: There is a paragraph that talks

25 about Waiver of Subrogation.

1 THE COURT: Waiver of subrogation?

2 MS. ARIAIL: Yes, sir. So what the

3 paragraph -- the site to waiver that you asked me

4 about, when it says, Any claim arising out of or

5 relating to the subcontract except as waived in the

6 subcontract. So it's the Waiver of Subrogation.

7 That appears in Paragraph 13.9 of the subcontract,

8 and again, Article 6 is Mediation and Binding Dispute

9 Resolution.

10 THE COURT: Take me back. Which paragraphs

11 are you reading from?

12 MS. ARIAIL: Article 6, which appears on

13 Page 8 of the subcontract as Attachment A to the

14 Complaint.

15 THE COURT: I've got it.

16 MS. ARIAIL: Page 8, if you look at the top,

17 it's Article 6, Mediation and Binding Dispute

18 Resolution.

19 THE COURT: I've got it.

20 MS. ARIAIL: 6.1 addresses the mediation. 6.2

21 is where they determine which method of dispute

22 resolution will be used after mediation. Then below

23 is where it describes the arbitration process.

24 THE COURT: I've got you. And you said waiver

25 was found in Section 13?

1 MS. ARIAIL: Waiver is -- yes, sir, 13.9 which

2 is on Page 14.

3 THE COURT: Anything further on that?

4 MS. ARIAIL: Your Honor, I would like to

5 clarify one thing while we're looking at the

6 subcontract. On Page 1 it does say that Restoration

7 Specialists is a South Carolina corporation. That is

8 not correct. That is a typo. They do have a local

9 field office, but they are actually a Georgia

10 corporation.

11 THE COURT: Page 1 of the subcontract you

12 said?

13 MS. ARIAIL: Sir?

14 THE COURT: Of the subcontract?

15 MS. ARIAIL: Yes, sir. The first page of the

16 subcontract. I'm not sure -- why it reads that way,

17 but the reality is that they are a Georgia

18 corporation.

19 THE COURT: Okay.

20 MS. ARIAIL: I have a stack of cases that are

21 cited in my memo, which I'm happy to share with all.

22 THE COURT: Very good.

23 MS. ARIAIL: I don't believe they're in the

24 order that they appear in the memo, but the Cedar

25 Surgery Center, which is the Utah case that I

1 mentioned that deals with the default, is on the top.

2 THE COURT: Thank you. That would be great.

3 All right. Ms. Endemann, let me hear from

4 you. Let's first talk about where we are

5 procedurally, and then we'll go into the damages

6 question. Okay?

7 MS. ENDEMANN: Thank you, Your Honor. Let me

8 just respond to Ms. Ariail. I apologize. I don't

9 have a memorandum with me. We just received hers

10 now, and I wasn't prepared to go forward on this

11 today, so I'm happy to provide the cases to Your

12 Honor in a reply memorandum if you would like.

13 I am not aware of the Utah case. I've just

14 been handed a copy that Ms. Ariail is referring to,

15 but there are cases in other jurisdictions -- I have

16 found several -- that state that affirmative defenses

17 are waived by default, and that arbitration is an

18 affirmative defense. It's true that the Plaintiffs

19 with their Complaint did, in fact, move to compel

20 arbitration. That motion was withdrawn when no

21 answer was received.

22 We served notice of everything including the

23 arbitration demand. Obviously it was with the

24 Complaint. Mr. Ward never made any appearance. Once

25 no appearance was made default was entered. We asked

1 the Circuit Court, Judge Young, to send it here for a  
2 damages hearing and withdrew our Motion to Compel  
3 Arbitration.

4 Our position, Judge, without getting into the  
5 specific defenses is simply that, it's an affirmative  
6 defense. They can't raise it. They're in default.  
7 I think that's what your original order said. We  
8 don't even reach the merits of the arbitration  
9 argument. It's simply that they are in default.  
10 There was no good cause why the default should be  
11 lifted, which is what Your Honor found in your  
12 discretion in the first order, and that we never  
13 reached this question.

14 The motion is not properly brought. If they  
15 were going to answer, go into arbitration, we would  
16 have done that. We have been unduly prejudiced even  
17 under this test. A long substantial period of time  
18 has not eclipsed. We served discovery with the  
19 pleadings. We served our motion with the pleadings.  
20 We did everything we could because this is such a  
21 time sensitive case.

22 In this specific case though there wasn't a  
23 great lapse of time. The time that has lapsed has  
24 caused substantial harm to my client who was going to  
25 get ready to testify to that before Your Honor today.

1 So there has been prejudice even under the waiver  
2 test, not even considering the default question, But  
3 Your Honor, it's not properly before you. They're in  
4 default. It's been waived.

5 THE COURT: Thank you. So what I'll do is  
6 I'll give you -- what would you like? Ten days? Is  
7 ten days sufficient time to get me some sort of  
8 responsive memo?

9 MS. ENDEMANN: Yes, Your Honor.

10 THE COURT: Let's just do that. I'm worried  
11 about the courthouse closing at the end of this week,  
12 by the way, and we all may have to leave town, so  
13 maybe 14 or 15 days. Mr. Epting?

14 MR. EPTING: Judge, just a couple of practical  
15 observations. One of the nice things about having  
16 done this for now almost 40 years I feel comfortable  
17 standing up here and having a conversation with you  
18 and just saying, in essence, have you thought about  
19 this? In that category have you thought about this?  
20 We'd move to dismiss this appeal.

21 THE COURT: Has that already been filed up  
22 there?

23 MR. EPTING: Yes.

24 THE COURT: Okay.

25 MR. EPTING: And the probabilities are high,

1 Judge -- high, high, high -- that this is coming back  
2 to you. Number one, I'm hoping that what we do here  
3 today, if that is what happens, that in essence this  
4 Court can move forward and decide the merits of this  
5 damage hearing on the record that is before you.

6 Secondly, Judge, and I don't know if this  
7 works or not, but if of course, this notice is  
8 defective for failure to appeal from an order because  
9 that's what the Rule says, Judge. It has to be an  
10 order. The only order was an interlocutory one and  
11 the 30 days has run. If the notice is defective this  
12 Court has jurisdiction, and this Court could proceed,  
13 and this Court could rule.

14 Now, here's the piece, Judge that, I'm not  
15 able to conceptualize down the road, but if this  
16 Court were to enter an order that said, If I had  
17 jurisdiction then this would be my ruling. Maybe the  
18 whole thing could simply go and be decided in this  
19 one appeal, because I think, Judge, what you were  
20 trying to do is to make a record here so that  
21 hopefully this could be all done at one time somehow,  
22 some way. I'm simply observing to you without some  
23 sort of rule -- it won't be possible because there  
24 will have been no ruling by the lower Court for the  
25 Appellate Court to address the merits.

1 I don't know, Judge. In the back of my head  
2 something tells me that the contingency of a ruling  
3 perhaps doesn't work, but I may be confusing it with  
4 something else because if the Court does have  
5 jurisdiction, and you say if I was not divested of  
6 jurisdiction and having everything before me my  
7 ruling would be thus and so.

8 Then one of two things happens. Either they  
9 send it back and it's before you, or they can say,  
10 this is enough. We'll just go forward. I'm not  
11 making a legal argument, Judge. You've been doing  
12 this for quite a while yourself. It didn't occur to  
13 me until I was sitting here listening to other  
14 lawyers talk that that might be of some interest to  
15 the Court and for that reason I mention it.

16 THE COURT: Thank you, Mr. Epting.

17 MR. EPTING: Thank you, sir.

18 THE COURT: I'll tell you, the main reason I  
19 wanted to go forward today was because I'm well aware  
20 that the Appellate Courts are not going to have an  
21 evidentiary hearing. They're going to get it on  
22 whatever record there is. From my perspective it  
23 doesn't look like there's any kind of record, so  
24 that's the problem that we've got going forward here.  
25 They get to make that call. I've had them send me

1 stuff and say, Make me a record, and then it turns  
2 around and goes right back up there. I'm trying to  
3 avoid that. So to the extend you-all can get a  
4 transcript out of today's hearing when you go up  
5 there and argue that point, then at least you can  
6 have something to argue upon.

7 What I did, once I got notice of this  
8 yesterday, I just went back through the record and  
9 procedurally created my own timeline, which is where  
10 I started out in my production today. I sort of was  
11 scratching my head as to where we got on that  
12 particular matter.

13 So what I'll do is I'm going to give you-all a  
14 chance to read these, and give myself a chance to  
15 read these cases. I'm happy to read the one from  
16 Utah and see how it is, but just in going back  
17 through the record here, it looks like this case was  
18 filed March 7th, I think it was. Service of process  
19 was perfected some time in March, and then default  
20 was in April, and then it got sent over here, I  
21 believe, in early May.

22 The Motion to Refer was the 18th of April, and  
23 then we had our first hearing the 6th of June, and  
24 then July 11th was the date that the Motion to Stay  
25 and Compel Arbitration was filed. Then we had our

1 hearing on the 14th of July. That's what the order  
2 came from essentially was at that time and on that  
3 date. That's what's got us here. As I said before,  
4 it was timely. The 59(e) Motion was timely filed. I  
5 don't have any question about that. That issue came  
6 up this morning. This one was clearly timely filed.

7 That's sort of what I was waiting to see, and  
8 this one just sort of surprised me as to where we  
9 were and how it got on appeal as quickly as it did.  
10 I understand Ms. Ariail wanted to protect her  
11 client's interest in that regard.

12 The Motion to Compel Arbitration filed by the  
13 Plaintiff was withdrawn at the time the matter there  
14 was referred here; is that my understanding,  
15 Ms. Endemann?

16 MS. ENDEMANN: That's correct, Your Honor.

17 THE COURT: Very good. Let me hear about your  
18 damages. What do you-all contend your damages are  
19 first off? Give me a figure and how you calculated  
20 them. We can either take testimony or not. I want  
21 to get that figure. I'm not going to rule on that  
22 today. I just want you to know I'm not going to rule  
23 on any of this, but I'll take this under advisement  
24 for ten days or so.

25 MS. ENDEMANN: Yes, Your Honor. We've

1 prepared some Exhibit notebooks if you would like me  
2 to hand one up to you so you can have it in front of  
3 you. I'm happy to go over it. Our damages being  
4 claimed today -- our actual damages being claimed are  
5 \$1.681 million. The figures are hard. They are  
6 comprised of three components. The first are  
7 receivables that are due to Palmetto Construction  
8 pursuant to the subcontract, so that includes  
9 actually a subcontract of theirs for some work that  
10 was performed and some costs that have not been  
11 reimbursed.

12 The figures match up to Mr. Ward's documents,  
13 so it doesn't appear that there will be any question  
14 there. The next, Your Honor, is the current due to  
15 Hanover. That's the surety that you recall has made  
16 demand upon all the indemnitors for all of these  
17 claims of subcontractors and suppliers that  
18 Restoration did not pay even though they were paid by  
19 the Federal government for the projects. So the  
20 demand that has been made is \$1.4 million.

21 THE COURT: That's from the --

22 MS. ENDEMANN: The surety has made demand on  
23 the indemnitors for the full amount, \$1.4 million.

24 Yes, Your Honor, there are two open claims that total  
25 about \$44,000, but the surety has actually

1 paid \$1,186,501.71 in claims. In our Exhibit  
2 notebook we've got the check numbers that they used.  
3 That's money that's actually been paid. Then there  
4 are some outstanding claims actually paid which make  
5 up the \$1.4 million, the difference. That demand was  
6 recently reiterated by the surety on the 30th of  
7 September.

8 THE COURT: Is that Hanover?

9 MS. ENDEMANN: Yes, that's Hanover. The final  
10 element of our damages, Your Honor, is the 50/50  
11 profit split under the teaming agreement that was  
12 entered into between our clients. It was agreed that  
13 50 percent of the proceeds would be split. There  
14 should have, under Mr. Ward's own documents, been a  
15 profit of \$221,000. We have some dispute with that  
16 figure. There is some overhead and some inflated  
17 costs in there that we have adjusted somewhat.

18 Even under his own math we are owed a  
19 significant amount of money. We are actually  
20 claiming under the 50/50 profit split \$221,730.46.  
21 Our total damages are made up of those three. We've  
22 got -- if you would like me to hand up the Exhibit  
23 notebook I'm happy to do so. Mr. Kindle (phonetic)  
24 is here and can provide some testimony if Your Honor  
25 would like.

1 THE COURT: Ms. Ariail?  
 2 MS. ARIAIL: Your Honor, I'm going to object  
 3 to any of this information being put in the record.  
 4 Again, this is essentially the damages hearing as  
 5 going forward. I've essentially got Counsel for the  
 6 Plaintiff testifying with no --

7 THE COURT: Well, I asked for a proffer and  
 8 that's just what I got. That's what I was wanting.  
 9 Okay? I want that to be on the record when you-all  
 10 take that up there.

11 MS. ARIAIL: Well, I don't agree with anything  
 12 that she said.

13 THE COURT: You don't have to.

14 MS. ARIAIL: I've got problems with a lot of  
 15 the documents that are contained herein. Her  
 16 representation that Mr. Ward has admitted -- they  
 17 admitted that. I object to that. I object to the  
 18 amount that she says is receivable due to PCG. I  
 19 object to the profit sharing.

20 THE COURT: Is the teaming agreement the basis  
 21 for the profit share? Is that what that is?

22 MS. ARIAIL: The teaming agreement expressly  
 23 says there is no profit sharing. That is in dispute.  
 24 There is no profit sharing. The teaming agreement  
 25 specifically says --

1 THE COURT: That's all. You don't have to  
 2 agree. And there's an indemnification agreement here  
 3 as well?

4 MS. ARIAIL: Actually, the indemnification is  
 5 with Hanover, who was the bonding company. There is  
 6 a line in there that says that the parties can't even  
 7 seek contribution against each other until they've  
 8 satisfied the bonding company, so all of this is  
 9 premature.

10 THE COURT: Is your client getting notices  
 11 from the sureties as well?

12 MS. ARIAIL: No, Your Honor. He's gotten one  
 13 Affidavit of Claim. He's gotten one. The majority  
 14 of this has been negotiated by Palmetto. My client  
 15 has not had the opportunity to review these claims.  
 16 Some of them that -- Hanover has shared some  
 17 information by e-mail with Mr. Ward, and he has  
 18 disputed some of these claims. Regardless of his  
 19 disputes with these amounts owed Hanover has gone  
 20 ahead and made some of these payments as late as the  
 21 summer. Restoration Specialists has been back on the  
 22 project repairing work that was performed improperly  
 23 by Palmetto. They've incurred expenses with that.

24 They've incurred a lot of expenses related to  
 25 the elevator. They've had to actually hire another

1 company. They've had entrapments. I think that's a  
 2 nightmare, some of the things that they've done  
 3 trying to -- you know, they got a good report from  
 4 the VA, so they have gone over and above to make sure  
 5 that the VA's happy with his work, and it includes  
 6 taking care of some defective work.

7 THE COURT: Is the project complete at this  
 8 time or not?

9 MS. ARIAIL: Yes, sir. Yes, sir.

10 THE COURT: Give me the full amount of your  
 11 damages again? I'm sorry, Ms. Endemann.  
 12 \$1.4 million or something?

13 MS. ENDEMANN: \$1,681,000, Your Honor.

14 THE COURT: 681, okay. Thank you. That's the  
 15 1.186 -- the 221, was it?

16 MS. ENDEMANN: I'll give you the exact  
 17 figures. The receivables due to the construction are  
 18 \$184,858.69. The profit share is \$221,730.46, and  
 19 due to Hanover is \$1,230,888.71 for a total of  
 20 \$1,681,864.86.

21 THE COURT: Okay. I've got it.

22 MS. ENDEMANN: Thank you.

23 THE COURT: I'm just going to take that as the  
 24 proffer, but again, just so you-all have it in the  
 25 record and the Court understands what this case is

1 about. Okay? So what I'm going to do is I'm just  
 2 going to take it under advisement. I'm going to ask  
 3 that they give a responsive memorandum within ten  
 4 days. Ms. Ariail, if you want to respond to that you  
 5 can within five. Okay?

6 MS. ARIAIL: Yes, Your Honor.

7 THE COURT: I don't know when or how long they  
 8 will take to make a decision on this thing. I would  
 9 think it will be relatively quickly, and we may well  
 10 be back here for this damages hearing. They're  
 11 entitled to cross-examine the witness, and that's  
 12 what they're going to do. I'm just trying to give  
 13 them a picture because otherwise they won't have any  
 14 idea what's going on.

15 The question as I see it is whether or not the  
 16 question for the appeal is procedural, whether or not  
 17 there's a final order from which you can appeal. I  
 18 think that's number one. The second thing has to do  
 19 with whether or not there's finality to that, and I  
 20 don't think there's finality until a determination of  
 21 damages has been held.

22 Ms. Ariail is concerned about waiver of the  
 23 right to arbitration or mediation, and I understand  
 24 that. Okay? I'm going to do that and we'll go from  
 25 there.

1 MS. ARIAIL: Your Honor, one housekeeping  
2 thing. We do have a motion hearing next Tuesday.  
3 I'm assuming that that is not going forward?

4 THE COURT: We're to going to need to go  
5 forward on that one.

6 MS. ARIAIL: Thank you. I just wanted to  
7 confirm that.

8 THE COURT: Unless you-all get a remittor down  
9 here that quick, but I can't imagine that's going to  
10 happen.

11 MR. EPTING: And Judge, it probably will be  
12 six months. The Court of Appeals regrettably on  
13 these Motions to Dismiss, they're way backed up.

14 THE COURT: I understand. I understand. I'm  
15 concerned about that. I just think they will want  
16 something to look at. You will have a transcript,  
17 and you can go from there, so you can provide them  
18 with something, but my understanding is it's a motion  
19 practice at this point in time with the Appellate  
20 Court. I'm well aware of that. Okay?

21 (The proceedings were concluded at 3:03 p.m.)  
22  
23  
24  
25

1 State of South Carolina)  
 )  
2 County of Charleston ) C E R T I F I C A T E

3  
4 I, Christine A. Smith, Court Reporter and  
5 Notary Public for the State of South Carolina at  
6 Large, do hereby certify that the foregoing  
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to  
9 nor counsel for any party to the cause pending or  
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my  
12 official seal this 24th day of October, 2016 at  
13 Charleston, Charleston County, South Carolina.  
14  
15  
16  
17

\_\_\_\_\_  
Christine A. Smith  
Notary Public  
My Commission Expires  
May 12, 2021

<b>\$</b>	<b>4</b>	18:20	23:25, 24:20, 33:19	<b>Attachment</b> [1] - 18:13
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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas**

**Mikell R. Scarborough, Master in Equity**

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**Case No. 2016-CP-10-1143  
[Appellate Case No. 2016-002308]**

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**Palmetto Construction Group, LLC                      Respondent**

**v.**

**Restoration Specialists, LLC,                      Appellants  
Reuben Mark Ward, and  
Lynnette Pennington Ward**

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**AFFIDAVIT OF A. BRIGHT ARIAIL, ESQ.**

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**PERSONALLY APPEARED BEFORE ME, A. Bright Ariail, Esq., who  
having been first duly sworn deposed, states as follows:**

- 1. I am a licensed attorney in South Carolina, SC Bar No. 69570.**
- 2. I represent the Appellants, Restoration Specialists, Reuben Mark  
Ward, and Lynnette Pennington Ward in the above-referenced  
matter.**

3. Respondent filed and served its Initial Brief and Designation of Matter on April 18, 2017.
4. There are documents included in Respondent's Designation of Matter that were not presented to the lower court including:
  - 1) Item 2 – Appellants' Answers to interrogatories and requests for production
  - 2) Item 3 – Appellants' document productions dated July 6, 11 and 13, 2106
  - 3) Item 4 – Respondent's exhibit notebook in support of its proffer of damages.
5. I have performed a complete review of all documents filed with the Charleston County Clerk of Court that appear on the Clerk's Public Index and none of the documents listed in 4. a., b. or c. were part of any pleading, motion, legal memoranda, order, exhibit or other filings with the lower court.
6. I have performed a complete review of the transcripts for the three hearings held in front of the Master in Equity, and none of the documents listed in 4. a., b. or c. were a part of the record at any of the hearings before the lower court in this matter.
7. Accordingly, the following documents cited in Respondent's Initial Brief are not in the record:
  - (1): VA Contract;
  - (2): Subcontract, Attachment 1;
  - (3): Indemnity Agreement;
  - (4): PCG letter;

- (5): Hanover demand;**
  - (6): Final pay application;**
  - (7): Appellants' answers to discovery;**
  - (8): job cost billing detail;**
  - (9): AR history report;**
  - (10): Subcontract, Attachment;**
  - (11): Subcontract Breakdown;**
  - (12): PCG Subcontract Breakdown;**
  - (13): Ward email dated January 11, 2016;**
  - (14): Appellants Answers to Interrogatories;**
  - (15): Restoration Specialists' contract log;**
  - (16): Restoration Specialists' monthly expenses spreadsheet;**
  - (17): Restoration Specialists' subcontract log;**
  - (18): Proof of Profitability Breakdown.**
- 8. There are numerous references made to those documents and allegations of facts that those documents purportedly contain within Respondent's Initial Brief.**
- 9. Furthermore, the Respondent references these documents as authority for certain legal conclusions argued in its Initial Brief.**

**FURTHER DEPONENT SAYETH NAUGHT.**

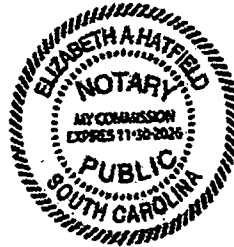
**- SIGNATURE PAGE FOLLOWS -**

*A. Bright Arjail*  
A. Bright Arjail, Esq.

Sworn to before me  
This 28<sup>th</sup> day of April, 2017.

*Elaine A. Hatfield*  
Notary Public for the State of South Carolina

My Commission Expires: 11-30-2026



PROCEEDINGS

1 STATE OF SOUTH CAROLINA  
 2 COURT OF COMMON PLEAS  
 3 COUNTY OF CHARLESTON  
 4 Palmetto Construction Group,  
 5 Plaintiff,  
 6 vs. CASE NO. 2016-CP-10-1143  
 7 Restoration Specialists, LLC,  
 8 Reuben Mark Ward, and Lynnette  
 9 Pennington Ward,  
 10 Defendants.

---

11  
 12 Hearing before the Honorable Mikell R.  
 13 Scarborough, reported by Christine A. Smith, Court  
 14 Reporter and Notary Public, at 11:29 a.m. on  
 15 June 6, 2016 at 100 Broad Street, Charleston,  
 16 South Carolina.

17  
 18  
 19  
 20  
 21 Christine A. Smith, Court Reporter  
 22 Missouri-Style  
 P.O. Box 10420  
 Charleston, South Carolina 29417  
 (843) 734-5471  
 csmith@charlestoncra.org

23  
 24  
 25

1  
 2  
 3 THE COURT: This matter is captioned Palmetto  
 4 Construction Group, LLC versus Restoration  
 5 Specialists, LLC, Reuben Mark Ward, and Lynnette  
 6 Pennington Ward. The case number is 2016-CP-10-1143.  
 7 The matter is set today as a default damages  
 8 hearing, and the matter was referred to the Court on  
 9 April 18th, and entry of default was entered on that  
 10 same date. It appears that service process was  
 11 performed on Reuben Ward on or about March 14th, the  
 12 case having been filed on March 7th, and also on  
 13 Lynnette Ward on that same date it appears.  
 14 I believe Mr. Ward was served as the agent for  
 15 the corporation, Restoration Specialists, LLC. This  
 16 Court set it for a hearing in April on damages. I  
 17 did receive, and I don't know -- have you got that --  
 18 MR. FISHBURNE: That is it.  
 19 THE COURT: Late last week from the Law Office  
 20 of A. Bright Ariail a Motion to Set Aside the Entry  
 21 of Default and also for continuance. Have you-all  
 22 been provided with that as well?  
 23 MS. ENDEMANN: Yes, Judge, we were served on  
 24 Friday afternoon.  
 25 THE COURT: Do you want to be heard first on

1 APPEARANCES OF COUNSEL:  
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19  
 20  
 21  
 22  
 23  
 24  
 25

1 the motion before we get to the subset of the aspect  
 2 of it, or where do we stand on that?  
 3 MS. ENDEMANN: Well, Judge, we were served  
 4 late Friday, and we are amenable to try to come to  
 5 some resolution of these motions. If I could give  
 6 you a little bit of context and background for the  
 7 case?  
 8 THE COURT: Sure.  
 9 MS. ENDEMANN: It's a case that arises out of  
 10 a project for the VA. It was completing a hospital  
 11 parking deck in Georgia. So Restoration Specialists  
 12 was the general contractor on the project with the  
 13 Department of Veteran's Affairs. My client, Palmetto  
 14 Construction Group -- I have Mr. Kendle with me here  
 15 today -- was approached by Restoration.  
 16 This was a large project for them. They  
 17 needed some help getting a bond in place. In order  
 18 to complete the job they needed help managing the  
 19 project. They needed help completing the project.  
 20 So they came to my client, Palmetto Construction  
 21 Group, and asked for assistance.  
 22 A teaming agreement was entered into. So  
 23 under this agreement Palmetto would manage the  
 24 project, they would do other certain  
 25 responsibilities, and Restoration would stay as the

1 general contractor. There would be a profit split as  
2 a result of this agreement. The project started --  
3 seemingly it was going pretty well.

4 Towards the end of the project, we started to  
5 get some red flags. We started to get notices that  
6 some of the subcontractors, some of the suppliers,  
7 are not being paid by Restoration. Unfortunately, as  
8 part of this agreement with Restoration, Palmetto got  
9 their bonding company to write this bond. Palmetto  
10 is liable on the bond with Mr. Ward and Restoration  
11 and Ms. Ward. Mr. Kendle personally is liable on the  
12 bond. Mr. Handegan, another primary principal at  
13 Palmetto is obligated on the bond and so is his wife.

14 So when all of these claims start coming in  
15 from these subcontractors who say they're not getting  
16 paid from Restoration, it becomes our problem in a  
17 very large way. Hanover, the bonding company, turns  
18 to us and says, You need to pay for this. You're  
19 obligors on the bond. Now we have approximately  
20 \$1.4 million dollars in claims on this bond for  
21 subcontractors and suppliers that have not been paid,  
22 and Hanover is looking to us to pay it.

23 It's impacting other jobs because obviously  
24 they have this issue with the bonding company,  
25 getting other bonds is becoming a problem. So

1 there's some real urgency on our clients' part to get  
2 this worked out as fast as we possibly can.

3 Mr. Ward had been making some overtures.  
4 Ms. Ariail was retained, and she filed the motions  
5 that you discussed earlier on Friday. If we could  
6 get some agreement, Judge? We need the file. We  
7 need the financials. We need the bank accounts. We  
8 need to get these documents in place, and we would  
9 like to ask him some questions about, where are these  
10 funds? You are receiving payments from the Federal  
11 Government. Where is the money going because Hanover  
12 is coming to us saying we need to pay it. We did our  
13 part but we're going to end up in a really tough spot  
14 here. So the urgency is really what we're impressing  
15 here.

16 We're amenable to trying to work something out  
17 on these motions, but we really need to have an  
18 agreement and exchange so that we can have these  
19 documents. We actually served the discovery with the  
20 Complaint, so it's already pretty well overdue. I  
21 actually today just served some deposition notices on  
22 Ms. Ariail. Of course she's just getting involved in  
23 the case.

24 We are looking to get these records as soon as  
25 possible. That's a little bit about potential

1 accounting that would be great. If that can't be  
2 done in the short term we would like the file. We  
3 would like the file anyway, but we would like that at  
4 least in the next seven or so days. If we can take a  
5 deposition in the next 14 days I think Ms. Ariail  
6 might have some issues with the date but as soon as  
7 possible, and maybe even get a hearing in front of  
8 Your Honor in case any other issues come up with the  
9 discovery or if we need to go to mediation. If there  
10 is any kind of order that we would like the Court's  
11 help with we could come back to you in order to work  
12 this out as quickly as we possibly can.

13 THE COURT: Ms. Ariail?

14 MS. ARIAIL: Your Honor, I learned of this  
15 matter Thursday night of last week. I have  
16 represented Restoration Specialists in other matters,  
17 so I am, unfortunately very new to this issue. I do  
18 understand from Mr. Ward, who is the managing member  
19 of Restoration Specialists, that he has been in  
20 contact with the attorney -- I guess it's an in-house  
21 attorney with the bonding company, and he has made  
22 some payments on some of these claims that are  
23 considered valid reaching back into the March  
24 timeframe of this year.

25 I know that he is eager to get this issue

1 resolved and behind him also. I've spoken to him  
2 after speaking with Palmetto's counsel on Friday, and  
3 he is willing to provide the documentation and  
4 absolutely would be willing to mediate this case. I  
5 believe there were -- per the contractors there was a  
6 mediation and then mandatory mediation as condition  
7 precedent to arbitration. So we would like to do  
8 that.

9 Unfortunately it's compounded by -- I'm  
10 actually leaving the country on Saturday for  
11 two weeks. I had not asked for an order of  
12 protection in this Court because I didn't have  
13 anything active in this Court. So that unfortunately  
14 is going to impact the time. I'm willing to do what  
15 I need to do to try to facilitate the exchange of  
16 information and move forward with this.

17 THE COURT: I think June 10th through the 24th  
18 were the dates you were requesting that you would be  
19 out?

20 MS. ARIAIL: Yes, sir.

21 THE COURT: Do you have information? Do you  
22 have documentation from your client based on your  
23 conversation you must have had last week with them?  
24 Have you gotten any of this stuff? Do you have it in  
25 hand I guess is my question?

1 MS. ARIAIL: I do not. The only thing I have  
2 are a couple of affidavits that are specific to the  
3 subject of the motions that I had filed.

4 THE COURT: I haven't seen any affidavits.

5 MS. ARIAIL: I just filed them this morning,  
6 Your Honor. He's out of state, so I had to have them  
7 overnighted to me on Saturday.

8 THE COURT: Sure.

9 MS. ARIAIL: I'll be happy to pass a copy up  
10 to you.

11 THE COURT: Okay.

12 MS. ARIAIL: Again, I had filed a Motion for  
13 Continuance and Protection. This is just dealing  
14 with this schedule to try to give me some time to  
15 figure out what's going on here and -- and then the  
16 Motion to Set Aside the Default. So there's two  
17 affidavits.

18 THE COURT: Okay. You have two affidavits  
19 from Mr. Ward: One explaining what was going on  
20 relative to the bond, and acknowledging receipt of  
21 the Summons and Complaint on or about March 14th; the  
22 other stating he's the managing member and just got  
23 notice of this hearing on June 2, which would have  
24 been last Thursday night at 6:30.

25 Ms. Endemann?

1 MS. ENDEMANN: Thank, you, Judge. I'm going  
2 to object to these just because I haven't seen them  
3 before now. One of the things I would like to point  
4 out -- we did serve Mr. Ward pursuant to the Rule  
5 last week with the notice of this hearing, and then  
6 ever since then there's sort of been a flurry of  
7 e-mail correspondence with the bonding company, and  
8 there have been some payments, but my understanding  
9 is that it's right near \$20,000 on the \$1.4 million  
10 that's outstanding.

11 So while he's making overtures, respectfully,  
12 we really need to push forward with the discovery  
13 because obviously that's not even putting a dent into  
14 what's owed. We're copied on most of this  
15 correspondence with the bonding company since they're  
16 coming to us weekly, if not daily, to get updates and  
17 try to get their money.

18 THE COURT: Are you-all already out the 1.4 or  
19 is that the amount of the claim.

20 MS. ENDEMANN: That's the amount of the  
21 claims. The bonding company has been making demand  
22 on this because they have been starting to pay these  
23 claims, and so our time is running very short. Then  
24 Ms. Ariail is going on vacation. I understand that.  
25 We can maybe work with her on the deposition dates.

1 I think we noticed it on the 20th. She will be back  
2 on the 26th. We can certainly move it until when she  
3 gets back, but Your Honor, I would really, really  
4 request that we can get these documents produced and  
5 the bank account information produced in advance of  
6 her going on her trip.

7 THE COURT: Ms. Arial, is that possible?

8 MS. ARIAIL: Your Honor, I will speak to my  
9 client. I can't represent to you when I can do it.  
10 I know he's out of the state today. He's in  
11 Oklahoma. I'm not sure when he's coming back, but I  
12 will absolutely do my best to make that happen.

13 THE COURT: All right. Here's what I'm going  
14 to do. I'm going to see if -- you-all need to get on  
15 a short timetable to see if you-all can't get a  
16 little scheduling order worked out over the next  
17 60 days. I'm going to bring you-all back in here.  
18 I'm going to hold both of these motions under -- I'm  
19 going to essentially grant your Motion to Continue  
20 the Matter. Okay? Your Motion for Relief from the  
21 Entry of Default I'm not going to rule on yet.  
22 There's not much I saw in that affidavit that would  
23 give me indication that I would grant that motion. I  
24 can tell you that right now. Okay?

25 I will give you-all some time to see what

1 you-all can do to work out in the meanwhile, but it  
2 sounds like it needs to happen sooner than later.  
3 Okay? So I'll hold the Motion to Reopen the Entry of  
4 Default in abeyance.

5 As it stands now, the Defendants are in  
6 default. I'm going to give you some time because you  
7 are going on vacation, but it sounds to me like your  
8 client needs to come up with some information pretty  
9 darn quick. Okay? Let's see if you-all can't get  
10 this thing resolved. You indicated there was -- I  
11 think I read that in your correspondence. There was  
12 some sort of mandatory mediation prior to arbitration  
13 was you-all's contractual arrangement; is that what  
14 it was?

15 MS. ARIAIL: Yes, sir.

16 THE COURT: Well, we'll cross that bridge when  
17 we get to it. Okay? I would see if you-all can't  
18 set that up and get some information and get rolling  
19 with this. I'm going to bring you-all back in here.  
20 Let's get a date.

21 MS. BECK: We have some time July 14th.

22 THE COURT: Do you want to get a status about  
23 that time? July 14th? Does that give you enough  
24 time? You're going to be gone until the 24th, so  
25 back in the office -- that would be -- we ought to

1 find out where we're going at that time? Why don't  
2 you-all give me a response -- what does that day look  
3 like? Is it wide open?

4 MS. BECK: The 14th?

5 THE COURT: Yes.

6 MS. BECK: We have one at 11:00.

7 THE COURT: I'll put you-all down for 11:00

8 a.m. on the 14th of July. We'll reconvene at that

9 time. See what you-all can resolve.

10 MS. ENDEMANN: Thank you, Judge.

11 (The proceedings were concluded at 11:43 a.m.)

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1 State of South Carolina;  
2 County of Charleston ) C E R T I F I C A T E

3  
4 I, Christine A. Smith, Court Reporter and  
5 Notary Public for the State of South Carolina at  
6 Large, do hereby certify that the foregoing  
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to  
9 nor counsel for any party to the cause pending or  
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my  
12 official seal this 26th day of July, 2016 at  
13 Charleston, Charleston County, South Carolina.

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Christine A. Smith  
Notary Public  
My Commission Expires  
May 17, 2021

1 STATE OF SOUTH CAROLINA  
 2 COURT OF COMMON PLEAS  
 3 COUNTY OF CHARLESTON  
 4 Palmetto Construction Group,  
 5 Plaintiff,  
 6 vs. CASE NO. 2016-CP-10-1143  
 7 Restoration Specialists, LLC,  
 8 Robben Mark Ward, and Lyonn ette  
 9 Pennington Ward,  
 10 Defendants.

11  
 12 Hearing before the Honorable Mikell K.  
 13 Scarborough, reported by Christine A. Smith, Court  
 14 Reporter and Notary Public, at 10:57 a.m. on July  
 15 14, 2016 at 190 Broad Street, Charleston,  
 16 South Carolina.

17  
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 20  
 21 Christine A. Smith, Court Reporter  
 22 Master-In-Equity  
 23 P.O. Box 10220  
 24 Charleston, South Carolina, 29417  
 25 (843) 796-6791  
 csmith@charlestonscra.org

PROCEEDINGS

1  
 2  
 3 THE COURT: Palmetto Construction Group versus  
 4 Restoration Specialists, LLC. For the Plaintiffs is  
 5 Mr. Drew Epting and Ms. Michelle Endemann. For the  
 6 Defendants is Ms. Bright Ariail. Good morning,  
 7 Ms. Ariail. I believe we are here on your motion,  
 8 are we? Is that what got us here?

9 MS. ENDEMANN: Judge, I think we are here on a  
 10 couple of different things that were noticed. I  
 11 think you set it for sort of a general status after  
 12 we were here before you about a month ago. Also,  
 13 there is a Motion to be Relieved from Default that  
 14 Ms. Ariail has filed, as well as a Motion to Compel  
 15 Arbitration.

16 I can give you a little bit of an overview of  
 17 sort of where we are from last time. I think it  
 18 would be helpful.

19 THE COURT: Sure.

20 MS. ENDEMANN: If you recall, Judge, this is a  
 21 case where my client, Palmetto Construction has sued  
 22 a business associate of theirs on a project for the  
 23 V.A. The agreement between Restoration Specialist  
 24 and the other Defendants which are the principals of  
 25 that company and Palmetto was essentially that they

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF:

3 Andrew K. Epting, Jr., Esq.  
 4 Michelle Endemann, Esq.  
 5 Andrew K. Epting, Jr., LLC  
 6 46A State Street  
 7 Charleston, SC 29401  
 8 (843) 377-1871  
 9 Ake@epting-law.com  
 10 Mne@epting-law.com

11 ATTORNEYS FOR THE DEFENDANT:

12 A. Bright Ariail, Esq.  
 13 Law Office of A. Bright Ariail, LLC  
 14 125-E Wappoo Creek Drive  
 15 Suite 202  
 16 Charleston, SC 29412  
 17 (843) 814-8805  
 18 Bright@brightariailaw.com

1 would work together on a job with the V.A.  
 2 Restoration was to be the general contractor.  
 3 Palmetto was to aid Restoration in this job, provide  
 4 their expertise on a job of this size, provide the  
 5 bonds that were required in order to complete the  
 6 project. There would be a split of the profits, and  
 7 Mr. Ward was the one who had the contracts with the  
 8 V.A., and then all the subcontractors below.

9 Unfortunately what happened is Mr. Ward  
 10 stopped paying his subcontractors. He stopped paying  
 11 them it looks like all together. We started  
 12 receiving bond claims coming in toward the end of the  
 13 job. We didn't know what was going on because we  
 14 weren't a party to those agreements. We weren't the  
 15 ones that were paying them. We weren't the ones that  
 16 were receiving money from the V.A.

17 So Mr. Ward is getting money from the V.A.  
 18 He's diverting the funds. His subcontractors filed  
 19 claims on the bond for which Palmetto was liable, and  
 20 personally liable, all of its principals, their  
 21 wives, and now Hanover, the bonding company with  
 22 surety is looking to us to pay over a million dollars  
 23 in bond claims.

24 We were here before you last time for a  
 25 damages hearing because we had served discovery with

1 our Complaint and the Complaint went unanswered.  
2 We're here for a damages hearing. We served Mr. Ward  
3 with notice of that hearing pursuant to the Rules,  
4 and it was then that he had hired Ms. Ariail.

5 She came and actually had a vacation planned,  
6 so we kind of came to an agreement. She was able to  
7 get us some of the documents that were owed. The  
8 discovery is not complete. In particular we're  
9 missing some pretty important things like the  
10 payments from the V.A. to Mr. Ward and then where  
11 that money went.

12 From the documents that we have received it  
13 appears that the project was pretty profitable with  
14 all the subcontractors being paid, and then still  
15 some hundreds of thousands of dollars in profit. So  
16 we're left looking at records that show there should  
17 be a surplus of funds.

18 Instead we're faced with the surety coming to  
19 us and saying, Hey, you owe us over a million  
20 dollars. The other problem that my client has is  
21 they do a lot of bonded work. They have a surety  
22 that says, You owe us over a million dollars. Nobody  
23 wants to bond any projects. So time is really,  
24 really of the essence here because we can't get work.  
25 If we can't get work our business goes under, and all

1 of our people don't have jobs, so we're really sort  
2 of in dire straits here.

3 THE COURT: Okay.

4 MS. ENDEMANN: We were served with this Motion  
5 to Compel Arbitration this week, and Your Honor has  
6 set it probably for expediency today. We don't  
7 think, Your Honor, that we can go forward on that  
8 motion. First, we don't think that he can bring the  
9 motion, period, because he's in default; and second,  
10 it's not properly before this Court as we only got  
11 notice of it a couple of days ago.

12 We think that the tapat here might be to try  
13 to get relief from default, get this motion heard,  
14 and get it appealed if Your Honor does not rule in  
15 their favor and ties this up for several years. If  
16 that happens, again, my client's out of business.

17 What we would like to see happen here today is  
18 have a damages hearing set because Mr. Ward is in  
19 default. He's not provided the Court with any  
20 reasonable explanation for being in default and is  
21 not entitled to make this Motion for Arbitration  
22 since he is in default. Thank you, Your Honor.

23 THE COURT: Ms. Ariail, let me hear from you  
24 on that one.

25 MS. ARIAIL: Your Honor, I don't totally agree

1 with the facts, but I think the thing that disturbs  
2 me the most is the statement that we haven't provided  
3 payments from the V.A. We have provided  
4 documentation of the amount of payments that have  
5 been made.

6 When we were in front of you a month or so ago  
7 there was a -- and there still is a standing Motion  
8 for Compelling Arbitration by the Plaintiff. They  
9 actually filed that. The contract requires it, and  
10 there is a motion that has not been heard that was  
11 filed by the Plaintiff for compelling arbitration.

12 In the meantime, despite the requirement for  
13 mediation and arbitration, and based on direction  
14 from the Court at the last hearing, we have complied  
15 with discovery. We have answered discovery. We have  
16 been continuously providing documents as we've  
17 compiled them, and at my direction my client has  
18 concentrated on the financial records rather than the  
19 voluminous information that is compiled on a  
20 two-or-three-year construction project.

21 That being said, I think it's proper to hear  
22 the Motion to Compel Mediation and Arbitration today.  
23 We merely joined what the Plaintiff's have already  
24 filed. For that reason I would ask that you go ahead  
25 and hear that motion.

1 THE COURT: You want to get out of Default  
2 first, don't you? I didn't rule on that last time I  
3 don't think?

4 MS. ARIAIL: You did not.

5 THE COURT: You're right. Mr. Epting and  
6 Ms. Endemann, it looks like there was a motion filed  
7 back in March to Compel. Is it mediation or  
8 arbitration? Is it contract specific?

9 MS. ENDEMANN: Your Honor, it's a standard  
10 Form AIA contract, so there is a provision in there  
11 having to do with mediation and arbitration. We did  
12 file that motion assuming that we were going to get a  
13 responsive pleading and that we would send it to  
14 arbitration. That's not what happened in this case.  
15 Instead we set aside that motion and asked for an  
16 order referring this case to you for a damages  
17 hearing which was granted by the Circuit Court.

18 THE COURT: I've got it. This was filed  
19 March 7th. That motion was with those -- that was as  
20 a result of the matter to referral. Mr. Ward was  
21 served on the 14th of March. The Motion to Set Aside  
22 the Entry was there. I recall we had a quick meeting  
23 and then you-all did some discovery and I haven't  
24 been able to resolve anything. Basically, it's a  
25 Motion for a Continuance which we granted. And then

1 Mr. Ward's affidavit. All right. That rings a bell.  
 2 Well, Ms. Ariail, I think the first thing you  
 3 have to do is get out of default before you can bring  
 4 affirmative relief. It does appear that the matter  
 5 was referred over here. I think that took care of  
 6 the -- the clerk closed out the Motion to Compel the  
 7 Arbitration because of the fact that it was referred  
 8 over here. So that based some adjudication on that  
 9 motion is how the Court considers that.

10 I think what we were wrestling with last time  
 11 was whether or not you-all could resolve it. That  
 12 doesn't look like it's been done. I find that  
 13 because it was not shown by Mr. Ward in his  
 14 affidavits that that supported why he was in default  
 15 I find the Defendant in default and I so order.

16 So this will be a question of a damages  
 17 hearing to be set. How much time do you-all want?

18 MS. ENDEMANN: Your Honor, we probably need  
 19 about an hour to two hours for the hearing, and we  
 20 can hear it whenever the Court is available.

21 THE COURT: Okay.

22 MS. ARIAIL: Your Honor, I would ask since I  
 23 have in good faith participated in discovery that I  
 24 at least be allowed to serve some form of discovery  
 25 related to damages so that I can prepare properly for

1 the damages hearing.

2 THE COURT: Ms. Endemann?

3 MS. ENDEMANN: I don't think we're in a  
 4 position, Your Honor, to consent to that. Ms. Ariail  
 5 can certainly Cross the Plaintiff on any damages that  
 6 we present at the hearing as is allowed by the Rules,  
 7 but she isn't allowed to present her own evidence in  
 8 any event.

9 We're happy to try to -- most of the documents  
 10 that we would use in support of our case are her  
 11 clients and also Hanover's, which are the bond claims  
 12 spreadsheets and everything, which Hanover is sending  
 13 directly to her client and which we're happy to  
 14 provide if that's not happening. I think she has  
 15 everything that she would need. It would just be the  
 16 testimony, and of course, she's entitled to Cross  
 17 under the Rules.

18 THE COURT: All right. I think that's the  
 19 case. All right? I'm assuming you've got what  
 20 you've got. You're entitled to participate in a  
 21 damages hearing. There's no doubt about that by  
 22 Cross-Examination but not by putting forth in  
 23 evidence.

24 MS. ARIAIL: Right, Your Honor, but to  
 25 properly prepare to Cross-Examine their witnesses,

1 I've seen nothing they have. They have discussed an  
 2 indemnity agreement in the Complaint. I don't have  
 3 that. My client doesn't have that.

4 THE COURT: Well, it may expedite the matter  
 5 to move forward so everybody's talking with the same  
 6 thing. We don't have to read documents when we're  
 7 here. I would ask that you-all share what you can in  
 8 that regard. I'm not going to mandate it because I  
 9 don't think that's proper. If we don't get it worked  
 10 out we'll have a hearing in the next, what, 60 days  
 11 or so?

12 MS. BECK: I didn't know if this might be  
 13 something you might want to put on the trial term as  
 14 a possibility. If not, we've got some time the first  
 15 week in October.

16 THE COURT: I can bring you-all back -- I've  
 17 got some trials coming up. I've been squeezing stuff  
 18 in there. I've got a trial term in August and one in  
 19 September. The last week of September?

20 MS. BECK: Yes, sir, or if they prefer a date  
 21 certain we can do the first week of October.

22 MS. ARIAIL: Your Honor, I have a  
 23 Court-ordered mediation the last week of September,  
 24 so if we could move it to the first week of October  
 25 that would be helpful.

1 THE COURT: Okay.

2 MS. BECK: The afternoon of the 5th, after  
 3 those allocation hearings that you set, we can do the  
 4 rest in the afternoon.

5 THE COURT: What's going on on the 4th?

6 MS. BECK: Nothing. That would be fine, too.

7 THE COURT: Why don't we set this for October  
 8 4th at 2:00 p.m. Let's just set it up. That's a  
 9 Tuesday afternoon the first week of October. Okay?

10 MS. ENDEMANN: Thank you, Judge.

11 MR. EPTING: Thank you, Judge.

12 THE COURT: Very good. I'm just going to do a  
 13 Form 4, and I'll put that in there. If you-all want  
 14 to follow up with an order you can. 2:00 p.m.

15 MS. ENDEMANN: Thank you.

16 (The proceedings were concluded at 11:11 a.m.)  
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1 State of South Carolina)  
2 County of Charleston ) C E R T I F I C A T E

3  
4 I, Christine A. Smith, Court Reporter and  
5 Notary Public for the State of South Carolina at  
6 Large, do hereby certify that the foregoing  
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to  
9 nor counsel for any party to the cause pending or  
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my  
12 official seal this 26th day of July, 2016 at  
13 Charleston, Charleston County, South Carolina.

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Christine A. Smith  
Notary Public  
My Commission Expires  
May 12, 2021

# Law Office of A. Bright Ariail, LLC

November 14, 2016

Andrew K. Epting, Esquire  
Michelle N. Endemann, Esquire  
46A State Street  
Charleston, SC 29401

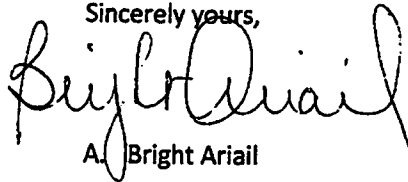
RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*  
C/A No. 2016-CP-10-1143

Dear Drew and Michelle;

Enclosed for service, please find Defendants' Notice of Appeal dated November 14, 2016.

With kindest regards, I am

Sincerely yours,



A. Bright Ariail

Enclosures

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

---

Case No. 2016-CP-10-1143

---

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,  
Reuben Mark Ward, and  
Lynnette Pennington Ward

Appellants.

---

NOTICE OF APPEAL

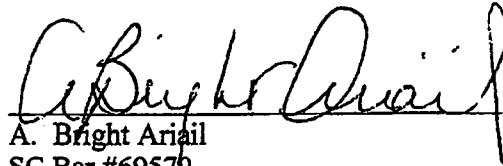
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Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward appeal the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016.

The Order dated July 14, 2016 (Exhibit A): (a) Denied Appellant's Motion to Lift Entry of Default for lack of good cause; (b) Denied Appellant's Motion to Stay and Compel Arbitration on the basis of default; and (c) Set a damages hearing for October 4, 2105. Appellants received written notice of entry of this order on July 18, 2016. The parties timely filed cross-motions to reconsider the Court's July 14, 2016 Order pursuant to Rule 59, SCRCP.

The Order dated October 28, 2016 (Exhibit B), in response to the parties' cross-motions to reconsider pursuant to Rule 59, SCRCP: (a) Denied Defendants' Motion to Amend on the basis that Defendants have not shown good cause to lift the default, and (b) Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. Appellants received written notice of entry of this order on November 2, 2016.

November 14, 2016



A. Bright Ariail  
SC Bar #69570  
Law Office of A. Bright Ariail, LLC  
125 Wappoo Creek Drive  
Building E, Suite 202  
Charleston, SC 29412  
(843) 814-8805  
Attorney for Appellants

Other Counsel of Record:

Andrew K. Epting, Jr.  
Michelle N. Endemann  
Andrew K. Epting, LLC  
46A State Street  
Charleston, SC 29401  
(843) 377-1871  
Attorneys for Respondent

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS )  
FOR THE NINTH JUDICIAL CIRCUIT )

PALMETTO CONSTRUCTION GROUP, )  
LLC )

CASE NO. 2016-CP-10-1143

Plaintiff,

vs.

RESTORATION SPECIALISTS, LLC, )  
REUBEN MARK WARD, and LYNNETTE )  
PENNINGTON WARD )

Defendants.

ORDER

FILED  
2016 JUL 20 PM 12:02  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

THIS MATTER CAME BEFORE ME on Defendants' motion to be relieved from default;

WHEREAS based on the record and the affidavits before me, Defendants failed to show good cause such that they should be relieved from default;

WHEREAS Defendants filed, on July 11, 2016, a motion to stay and to compel arbitration;

IT IS ORDERED THAT:

- 1) Defendants' motion to be relieved from default is DENIED;
- 2) A damages hearing is set for October 4, 2016 at 2:00pm; and
- 3) ~~No ruling is made~~ on Defendants' motion to stay and to compel arbitration

*is denied RS  
as Δ is in default.*

*[Signature]*  
The Honorable Mikell R. Scarborough  
Master in Equity, Charleston County

On this 14 day of July 2016  
Charleston, SC

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-1143

Palmetto Construction Group LLC

Restoration Specialists, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for :  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT CLERK AND APPELLATE ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: This matter came before the court for argument on October 11, 2016 on Cross-Motions to Reconsider pursuant to Rule 59, SCRPC. After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) Defendants' Motion to Amend is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

ORDER INFORMATION

This order  ends  does not end the case.  
 Additional Information for the Clerk :

*ARK*

FILED  
 2016 NOV -2 PM 12:58  
 JULIE J. ARISTON  
 CLERK OF COURT

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA	NA	\$NA
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amount or additional taxable costs not available at the time the form and final order are submitted to clerk. Note: Title abstractors and researchers should refer to the official court order for ju

Circuit Court Judge

*[Handwritten Signature]*

3062  
Judge Code

Date

*10/28/16*

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_

\_\_\_\_\_

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_

\_\_\_\_\_

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**CLERK OF COURT**

**Court Reporter:**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

---

Case No. 2016-CP-10-1143

---

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,  
Reuben Mark Ward, and  
Lynnette Pennington Ward

Appellants.

---

PROOF OF SERVICE

---

I certify that I have served the Notice of Appeal on Palmetto Construction Group by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2016, addressed to Palmetto Construction Group's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401 and by delivering a copy of it to Palmetto Construction Group's attorneys of record, Andrew k. Epting, Jr. and Michelle N. Endemann, at their office at 46A State Street, Charleston, South Carolina, 29401, on November 14, 2016.

November 14, 2016



A. Bright Ariail  
SC Bar #69570

Law Office of A. Bright Ariail, LLC  
125 Wappoo Creek Drive  
Building E, Suite 202  
Charleston, SC 29412  
(843) 814-8805  
Attorney for Appellants

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**RECEIVED**

JUN 12 2017

Mikell R. Scarborough, Master in Equity

**SC Court of Appeals**

---

Case No. 2016-CP-10-1143  
[Appellate Case No. 2016-002308]

---

Palmetto Construction Group, LLC

Respondent

v.

Restoration Specialists, LLC,  
Reuben Mark Ward, and  
Lynnette Pennington Ward

Appellants

---

PROOF OF SERVICE

---

I certify that I have served Appellants' Reply to Respondent's Opposition to Appellants' Motion to Exclude and Strike and Affidavit of A. Bright Ariail, Esq. [dated June 9, 2017] on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on June 9, 2017, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401.

June 9, 2017

A handwritten signature in black ink, reading "A. Bright Ariail". The signature is written in a cursive style with a large, looping initial "A".

A. Bright Ariail

SC License #69570

Law Office of A. Bright Ariail, LLC

125E Wappoo Creek Drive, Suite 202

Charleston, SC 29412

843/814-8805

Attorney for Appellants

# Law Office of A. Bright Ariail, LLC

June 9, 2017

**VIA PRIORITY MAIL**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

**RECEIVED**

JUN 12 2017

**SC Court of Appeals**

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*  
Appellate Case No. 2016-002308

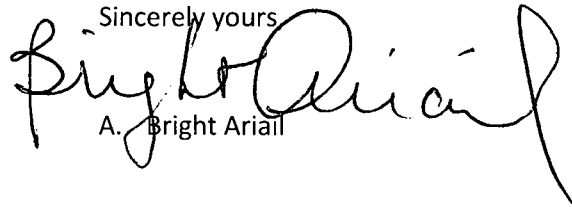
Dear Ms. Kitchings;

Enclosed, please find for filing the original and seven copies of Appellants' Reply to Respondent's Opposition to Appellants' Motion to Exclude and Strike with Affidavit of A. Bright Ariail, Esq. and Proof of Service of same in the appeal reference above which are hereby provided to you for filing. I'd request that you return a stamped copy to me in the enclosed SASE.

By copy of this letter, I am serving opposing counsel with a copy of same.

With kindest regards, I am

Sincerely yours

  
A. Bright Ariail

Enclosures as stated

cc: Andrew Epting, Esquire  
Michelle Endemann, Esquire

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