

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM AMERICAN ARBITRATION ASSOCIATION  
Commercial Tribunal, Atlanta, Georgia

John Sherrill, Arbitrator

AAA Case No. 01-17-0005-1287

**RECEIVED**  
JUL 02 2018  
SC Court of Appeals

Madison Cone, individually and on behalf of Tower Street Capital Management, Inc.  
.....Claimants

Atlantic Intermediaries, LLC, Allstar Financial Group, Inc., and Tower Street Capital  
Management, Inc. .... Respondents

Of Respondents, Atlantic Intermediaries, LLC and Allstar Financial Group, Inc., .....  
.....Appellants

Of Claimant, Madison Cone, individually and on behalf of Tower Street Capital Management,  
Inc., ..... Respondents

**RESPONSE TO MOTION FOR SANCTIONS**

When the Appellants moved The Honorable Robert E. Hood for an order in the underlying case to stay the ongoing arbitration proceeding, Judge Hood did not believe that the Appellants' request was frivolous. To the contrary, he granted the relief through a Form 4 order which contemplated a more formal order to follow. Respectfully, this Court did not have the benefit of Judge Hood's reasoned order when it determined that the matter raised by the Appellants was not immediately appealable. Following the dismissal of this appeal, Judge Hood entered the more formal order which had been foreshadowed by his Form 4 order. There is nothing frivolous or sanctionable about asking this Court to revisit its decision now that a more complete record exists and now that this Court can have for the first time the benefit of the analysis that persuaded Judge

Hood to rule that the rights and issues raised by the Appellants are in fact substantial and immediately appealable. Despite the volume of their protest, the Respondent points to no sanctionable conduct.

## **1. RELEVANT PROCEDURAL HISTORY**

This matter is before this Court because a Special Arbitrator entered an order under the “crime fraud” exception to the attorney client privilege which invaded the privilege in violation of the substantial rights of the Appellants. The Petitioner correctly states that it was the Appellants who moved to compel the underlying matter into arbitration. The Appellants did not, however, cede their substantial rights to be violated through a perverse process without the possibility of recourse or relief, nor did they check the rights afforded by South Carolina law to seek appellate relief at the proverbial door. The Respondent correctly recites that Special Arbitrator Gray issued his order on May 8, 2018, approximately one month prior to the arbitration hearing which was scheduled to take place on June 11, 2018. The Respondent correctly recalls that instead of complying with the May 8, 2018 order, the Appellants petitioned the circuit court to intervene and to stay the arbitration so that the Appellants could pursue their appellate rights. The Respondent recognizes that Judge Hood thereafter granted the relief requested, although he would contend that Judge Hood erred in doing so. This Court dismissed the appeal, finding that the matters on appeal were not immediately appealable. However, at the time of the dismissal, this Court did not have the benefit of Judge Hood’s reasoned order. Petitioners’ Motion to Reconsider the dismissal of the appeal is presently before the Court.<sup>1</sup>

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<sup>1</sup> The Petitioner herein separately filed a Writ of Mandamus with the South Carolina Supreme Court. The Writ has been opposed by both the Appellants herein and by Judge Hood who is represented by the South Carolina Attorney General’s Office. In the Writ, the Petitioner has requested that the Supreme Court direct Judge Hood to withdraw his stay and to compel the proceedings back to arbitration. As of the filing of this memorandum, the matter remains pending before the South Carolina Supreme Court.

## **II. THE UNDERLYING MATTER IS NOT “JUST” A DISCOVERY ORDER**

There is no need to recite the string cases to support the proposition that a discovery order is an interlocutory order not immediately appealable. But Special Arbitrator Gray’s order isn’t “just” a discovery order. The order entered by the Special Arbitrator (and the process the led up to the entry of the order) is an order which impacts both the attorney client privilege and the right of a client to choose counsel of their own selection. It is unquestionably an order impacting substantial rights which would have been immediately appealable had the matter arisen in circuit court. Despite his present position before this Court, this is a proposition with which even Mr. Sowell agreed in the arguments that took place before Judge Hood:

**THE COURT:** I'm with you. I'm with you. But Mr. Sowell, I guess, one of my questions for you is, I mean, where does this -- so if the arbitrator had said Mr. Bland, Mr. Richter and Mr. Brett, you know, turn over these documents and then one or all three of them had said not no, but hell no?

**MR. SOWELL:** That is what they've said.

**THE COURT:** You know, hold us in contempt if you want to hold us in contempt. And if the arbitrator had held them in contempt and sanctioned them, they got an appeal at that point, right?

**MR. SOWELL:** I doubt it. Well, first of all – and I'm going to tell you what I think.

**THE COURT:** I mean, let's apply that to normal circuit court. Take the arbitrator out.

**MR. SOWELL:** Well, they do have an appeal to circuit court.

**THE COURT:** No, I'm just saying take it out of arbitration just a moment. We're in a normal hearing.

**MR. SOWELL:** Right.

**THE COURT:** I do the hearing, we do this and I say Atlantic has to turn over these -- I'm making this up, these 300 documents. And the attorneys say we're not doing it. We've advised our client not to do it. I say you either do it or we're going to have a contempt hearing. We have a contempt hearing. I sanction them or whatever it is you do in contempt hearings. And at that point, there is no doubt that under the South Carolina Rules of Appellate Procedure, they have a right to appeal the contempt hearing.

**MR. SOWELL:** I believe that is correct.

*Hearing Transcript, p.41-42.*

(A copy of the Hearing Transcript is attached hereto as **Exhibit A**).

An order invading attorney client privilege and impacting a client's unfettered access to counsel of their own selection is more and different than a discovery order. It is intellectually dishonest to discount Special Arbitrator Gray's order as something that occurs in the ordinary course of litigation and/or to suggest that it is on par with an order compelling answers to interrogatories. The order relies on the crime fraud exception as the vehicle to pierce the attorney client privilege and is so extraordinary that the Appellants are unaware of any South Carolina precedent addressing the subject matter. Appellants urge this Court that guidance is required in order to establish the process in South Carolina through which the crime fraud analysis is to apply and, intending no disrespect, that it is simply too important a matter to entrust to an arbitrator.

**III. THE MOTION TO RECONSIDER WAS NOT TAKEN FOR THE PURPOSE OF DELAY.**

In his Motion for Sanctions, the Petitioner cites an email from Eric Bland to Arbitrator Sherrill in which the Appellants state an intent to seek reconsideration from this Court and to pursue this issue further to the SC Supreme Court and beyond. In response, the Appellants confirm that they absolutely stated their intent to seek appellate relief on this issue, not simply in the email cited by the Petitioner, but in many other communications. As a result of these communications, the Petitioner would ask this Court to conclude that the Appellants are motivated by an intent and desire "solely to delay" these proceedings, such that the act of asking for reconsideration is sanctionable. If there is frivolity to be found in these proceedings, it is with the Petitioner's present request for sanctions and in the fact that they ignore many other communications in which the Appellants expressed a willingness to proceed to arbitration as scheduled on June 11, 2018, if and

only if – the Petitioner abandoned their ill-advised efforts to pierce privilege. In fact, the offer to go forward with the arbitration hearing was even made during the arguments before Judge Hood:

**MR. RICHTER:** Your Honor, on a parting shot, we're not seeking to avoid arbitration. Don't drink of that Kool-Aid at all. When the appeal gets done, whatever the Court of Appeal says, we're going right back to the same arbitration proceedings. It's not as if they don't have agency over here. They've persisted in pursuing this evidence, which I think is wholly unimpressive. **We've asked them more ways than we know how to. Why don't you just relent? Let's go to June and we'll try the case. You have everything you need.** But no, if you want this and you're going to invade a substantial right of our client, then yes, we're going to fight it. We're going to fight it as far and as high as we need to fight it.

*Hearing Transcript, p. 41. ll. 4-16. [Emphasis Added].*

All protests aside, the Petitioner can point to no prejudice other than the passage of time. To that point, it is the Petitioner himself who has elected to spend time in pursuit of information which he has been told repeatedly to be sacrosanct to the Appellants, not so much for its content, but because it involves the invasion of the privilege between an attorney and his client. As the Petitioner recited to this Court, the order of the Special Arbitrator issued approximately thirty (30) days before the scheduled arbitration. Obviously, it was not information that the Petitioner had relied upon in bringing his claim, nor was it information that was necessary for the hearing. It is disingenuous at best that the Petitioner complains now about delay when the Petitioner himself is the agent of the very same delay. The offer remains open – if and when the Petitioner wants to abandon his efforts to invade the privilege and restrict the Appellants' unfettered right to choose counsel, the Appellants are prepared to return to the arbitration proceedings as expeditiously as possible.


## CONCLUSION

The dismissal of the appeal in this case was understandable. At the time of the dismissal, there was really no record before the Court other than a Form 4 order referencing a separate order that had been entered in an arbitration proceeding. Since the time of the dismissal of the appeal,

Judge Hood has supplemented the record with a reasoned order which sets forth how and why he concluded that order entered in arbitration impacted the substantial rights of the Appellants such that it was immediately appealable. There is simply nothing sanctionable about asking this Court to revisit its dismissal of the appeal now that the Court has the benefit of the analysis that led to Judge Hood's order. The Petitioner cites the Appellants' "threats" to appeal and colors these communications as evidence of a desire to delay the arbitration, yet he conveniently omits to report communications through which the Appellants offered to proceed with the arbitration as scheduled if the Petitioner simply relented in his efforts to invade the attorney client privilege. The Appellant elects to waste time pursuing evidence that is unnecessary to the underlying proceedings and then points to the passage of time as the prejudice which he suffers. No sanctionable conduct has occurred through a simple request for reconsideration. The Appellants respectfully request that the relief sought by the Petitioner be denied.

June 29, 2018

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**RESPONSE TO MOTION FOR SANCTIONS**  
**EXHIBIT A**

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STATE OF SOUTH CAROLINA )  
 )  
County of Richland )  
 )  
 )

COURT OF COMMON PLEAS  
2016-CP-40-7402

MADISON CONE, INDIVIDUALLY AND )  
ON BEHALF OF TOWER STREET )  
CAPITAL MANAGEMENT, INC., )

PLAINTIFF, )

vs. )

ALLSTAR FINANCIAL GROUP, INC. )  
AND TOWER STREET CAPITAL )  
MANAGEMENT, INC., )

DEFENDANT, )

TRANSCRIPT OF RECORD

May 23, 2018  
Columbia, South Carolina

BEFORE:

THE HONORABLE ROBERT E. HOOD, JUDGE.

APPEARANCES:

THORNWELL SOWELL, ESQ.  
Attorney for the Plaintiff

ERIC S. BLAND, ESQ.  
LARRY RICHTER, ESQ.  
Attorney for the Defendant

KAREN AMBROZIAK  
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: All right. How is everybody?

2 So we're on the record in 2016-CP-40-7402. This is  
3 Madison Cone -- is this the right one? Madison Cone and  
4 others vs. Allstar Financial Group, Atlantic  
5 Intermediaries and others. Mr. Sowell, Biff Sowell --

6 MR. SOWELL: Yes.

7 THE COURT: And Ms. Durant --

8 MS. DURANT: Correct.

9 THE COURT: -- are here on behalf of the plaintiffs.  
10 And Mr. Bland and Mr. Richter are here on behalf of the  
11 Defendants.

12 You got everybody, Karen?

13 THE COURT REPORTER: I don't have a first name.

14 THE COURT: Okay.

15 MR. WATKINS: Kirk Watkins, I'm here from Atlanta.

16 THE COURT: Okay, Mr. Watkins. It's a pleasure to  
17 have you with us.

18 MR. WATKINS: It's a pleasure to be here.

19 MS. DURANT: I'm Bess Durant.

20 MS. HILL: Your Honor, I'm here, as well.

21 THE COURT: Hi, Ms. Hill.

22 MS. HILL: I do not really have a motion in front of  
23 you today. I'm just a party to the case.

24 THE COURT: You're just coming to watch.

25 Okay. All right. So who's starting?

1 MR. BLAND: It is the defendant's motion, Your Honor.  
2 The defendants, Allstar Financial Group and Atlantic  
3 Street Capital Management.

4 As Your Honor recalled, you heard a motion to compel  
5 arbitration last year that was made by my clients pursuant  
6 to a January 30th, 2014, consulting agreement that had an  
7 arbitration clause.

8 The plaintiffs, within their right, had challenged  
9 the enforceability of the arbitration clause. Your Honor  
10 issued an order on August 2nd, wherein you stayed the  
11 current matter and you referred it to arbitration. And  
12 you did refer it to arbitration with finality.

13 We spent the better part of a couple of months trying  
14 to select arbitrators and we -- I think it was like late  
15 fall, October, and we selected an arbitrator named John  
16 Cheryl with AAA. We were off to the races, basically, in  
17 November of 2017. There is an arbitration hearing set for  
18 June 11th.

19 I think I can safely say we probably have had, as far  
20 as this type of commercial litigation goes, little  
21 disagreement in discovery. You know, we've had our little  
22 brush fires, but it's been pretty amicable in how we have  
23 proceeded in discovery until late. The temperature has  
24 risen because, as Mr. Richter is going to get into, there  
25 is an attorney/client issue, privilege issue that the

1 arbitrator has dealt with through a special referee that  
2 we take umbrage to.

3 As Your Honor is aware, the Citadel of the -- our  
4 profession is the attorney/client privilege. And what  
5 seems to have happened is the attorney/client privilege  
6 has been pierced based on a finding by the arbitration  
7 panel that the fraud exception applies, not the crime  
8 fraud exception. For about five months, there was  
9 accusations that myself and David Brett were part of a  
10 criminal scheme to bribe Ms. Hill's client, Curtis  
11 Stewart.

12 And then, finally, the arbitrator after about four  
13 months of that said we're not going to be talking about  
14 crimes anymore, we'll talk about fraud. And based on the  
15 fraud exception, ordered a number of documents,  
16 approximately 110 to be submitted to a special referee  
17 that he appointed that would review those documents and  
18 then determine if the attorney/client privilege should be  
19 pierced.

20 What has happened is that the special referee only on  
21 submissions, no oral arguments entered a ruling on May 3rd  
22 where he determined that a number of documents should be  
23 turned over based on the fraud exception to the  
24 attorney/client privilege. He did not give a reasoned  
25 order, so he didn't give a factual basis as to why he

1 found the fraud exception would apply. He didn't say  
2 well, it applies to these documents, but doesn't apply to  
3 these documents and here's the reason why.

4 And the real problem is, he acknowledged that some  
5 documents are privileged and shouldn't be turned over, but  
6 yet, they were embedded later on in succeeding dates in  
7 other e-mails where he turned those e-mails over. So on  
8 one hand, he said these documents should never be turned  
9 over. They're privilege communications, most of them,  
10 between David Brett and myself, and then some under  
11 anticipation of litigation of which I was not either an  
12 author or recipient. And then he said he didn't realize  
13 they were embedded in e-mails, and so he said they are  
14 discoverable.

15 So what has happened is that the attorney/client  
16 privilege that we enjoy with our client has now been  
17 pierced. And we believe -- Mr. Richter is going to give  
18 you the legal arguments as to why we think that there is a  
19 right to appeal under South Carolina law because it's a  
20 decree as opposed to a final award and that the statute  
21 separately distinct awards from decrees and judgments. It  
22 actually has three different distinctions.

23 The arbitration is scheduled to go forward on  
24 June 11th. The reason that we've come before you is not  
25 for you to dig deep into the weeds as to what is

1 attorney/client privilege, as to why -- should the special  
2 referee have done a recent order, should he have corrected  
3 his order to realize that he had ordered some documents  
4 protected, then later on, they were -- he didn't realize  
5 that he ordered them discoverable.

6 The real problem is the arbitrator has said that  
7 unless we get an injunction, he's going to circumvent Mr.  
8 Richter and myself and he's going to turn over those  
9 documents to the plaintiffs. And when Mr. Richter gets  
10 into the law, we have a right to be held in contempt for  
11 violating an attorney/client privilege. It's a  
12 substantial right if somebody decides to pierce it. And  
13 we have the right to either comply with the court order or  
14 not comply, and then my client is subject to contempt  
15 proceedings.

16 The reason we filed for this injunction is because  
17 the arbitrator just said I'm just going to circumvent you,  
18 Bland and Richter. I'm going to order that the special  
19 referee automatically turn over the documents not only to  
20 the arbitration panel, but to the claimants themselves.  
21 And once you let the tube -- or the toothpaste out of the  
22 tube and these attorney/client documents are disclosed to  
23 the other side and if we go and appeal this and we  
24 actually win and there really wasn't a basis to pierce the  
25 attorney/client privilege, there's no opportunity to put

1 the tube back in.

2 One of the things that has troubled us -- I'll sit  
3 down in a minute -- is there's this allegation or  
4 assertion that because we're fighting to preserve the  
5 attorney/client privilege, we must have something to hide.  
6 Mr. Watkins, who has been a trumpeter of crime and fraud  
7 and a whole bunch of other stuff that we take umbrage to  
8 has said well, if you have nothing to hide, you should  
9 turn it all over.

10 Well, that's not how lawyers proceed. I mean, I  
11 wouldn't be the commercial lawyer that I am if I just laid  
12 down on attorney/client privilege for my client.

13 So it's not that we're -- yes, we are concerned that  
14 communications where my client engaged me and gave me his  
15 strategy and asked for my strategy and how dealing with  
16 this matter is disclosed, but the fact that attorneys  
17 stand up for the attorney/client privilege shouldn't be  
18 used as a sword against them to say well, geez, you must  
19 have something to hide if you're fighting so hard to  
20 preserve it.

21 So we believe the stakes are -- they go to who we are  
22 as lawyers, the attorney/client privilege. We wish it  
23 never came to this point.

24 And with that, I'll give the floor to Mr. Richter.

25 THE COURT: All right. So let me make sure, I'm

1 going to kind of repeat what I think I hear you saying so  
2 if I -- to make sure I'm processing it correctly. So if I  
3 say something wrong --

4 MR. BLAND: Sure.

5 THE COURT: -- then say no, you just missed it. So I  
6 signed whatever orders I signed last fall. Y'all settled  
7 on an arbitrator. This issue of these attorney/client  
8 documents come up. The arbitrator says I'm going to give  
9 these to a special referee.

10 MR. BLAND: He actually did it because I said it  
11 would be inappropriate for you because you're both the  
12 fact finder --

13 THE COURT: Right. Okay.

14 MR. BLAND: It's not like I can give them to Judge  
15 Hood and then a jury hears it later.

16 THE COURT: Right. So he appoints a special referee.  
17 The special referee looks at them and says I think some of  
18 them are discoverable and some of them aren't in some form  
19 of an order. And then -- but the some are and some aren't  
20 isn't completely right because some are embedded in other  
21 -- some things that he says are not discoverable are in  
22 e-mails that he says are discoverable.

23 MR. BLAND: And the most important matter is, under  
24 Marshal vs. Marshal, you can't have a partial waiver of  
25 the attorney/client privilege on a subject matter. It's

1 either a complete waiver or a partial waiver. And he  
2 doesn't indicate in his order what is the subject matter  
3 that he's deeming has been waived. Is it the entire  
4 attorney/client privilege?

5 Because at that point, can Mr. Sowell depose me and  
6 say here, Mr. Bland, here's your email from when Mr. Brett  
7 retained you on October 13th, 2014. I get to take your  
8 deposition, and now there's a complete waiver.

9 Is there a complete waiver? Because he tried to do a  
10 partial waiver. You cannot do a partial waiver under  
11 South Carolina law. You have to do a full waiver on a  
12 subject matter. But again, because he didn't do a  
13 reasoned order, we don't know which subject matter he  
14 deemed waived.

15 So we're walking into an arbitration two weeks from  
16 now with a potential waiver of the attorney/client  
17 privilege. Mr. Sowell's going to get up and say oh, just  
18 go try the case. We can get all these documents and then  
19 after the award, you get to appeal.

20 Well, at that point, the privilege has already been  
21 invaded. He's already gotten the documents. I go to the  
22 Court of Appeals and the Court of Appeals then says to me,  
23 Mr. Bland, you're right, that should have never been  
24 invaded. Well, how do we go back and how do I unring his  
25 bell on what he knows?

1 The Supreme Court of the United States --

2 THE COURT: Hold on. I'm speaking on the facts.

3 Give me just a minute.

4 MR. BLAND: Okay.

5 THE COURT: So at this point, the special referee has  
6 said I'm going to give them to the other side?

7 MR. BLAND: No, the arbitrator.

8 THE COURT: The arbitrator is saying I'm going to  
9 remove y'all from doing the order, if I'm following the  
10 court order or not following the court order, I'm not  
11 going to remove Mr. Brett from following the court order,  
12 not following it. I'm going to give it to the arbitration  
13 panel myself.

14 MR. BLAND: No, Mr. Arbitrator is saying I'm going to  
15 order the special referee to give them to me, and I'm  
16 going to give them to Mr. Sowell.

17 THE COURT: Okay. All right. That's what -- I'm  
18 with you, and I didn't mean to cut you off.

19 MR. BLAND: No, you got it.

20 THE COURT: I wanted to track through in my mind what  
21 I was hearing you say.

22 All right, Mr. Richter.

23 MR. RICHTER: Your Honor, may it please the Court?

24 THE COURT: Yes, sir.

25 MR. RICHTER: Yes, sir. So specifically, what we're

1 asking of you today, we're asking that you impose an  
2 injunction to stop the arbitration proceedings from going  
3 forward until such time as we can perfect an appeal on  
4 what we believe to be a substantial right. And I'll get  
5 to the legal authority that kind of takes you from here to  
6 there, that gives you the support and comfort that you can  
7 do what we're asking you to do.

8 And really, to set the stage further, there's two  
9 things that have come from the arbitrator that concern us  
10 and why we're asking you for an injunction. If you  
11 recall, this case was initiated here. The case is not  
12 dismissed. There's a pending action here. It's simply  
13 stayed and referred to the arbitration.

14 We think the arbitration's jurisdiction flows through  
15 this Court and upon the filing of Notice of Appeal, we  
16 divest this Court and the arbitration of jurisdiction  
17 during the appeal. That's the subject matter on which  
18 we've agreed to disagree with the arbitrator.

19 So two things that come from the arbitrator that  
20 caused us to come to you. One is an indication that we'll  
21 just end run you and we'll provide the privileged  
22 documents directly, because at this point, the special  
23 referee is in possession of them and we're not. The  
24 second is we'll just go forward with or without you when  
25 the arbitration is called on June 11th.

1           That was another communication we got from the  
2 arbitrator, was like hey, you guys want to appeal, God  
3 bless, go appeal. We're just going to go forward without  
4 you, which is highly improper. And really, the reason  
5 we're here today is to ask you to please stop that so we  
6 can perfect our appeal.

7           And this is the basis of the appeal. We believe the  
8 entire process involving the invasion of the  
9 attorney/client privilege in this setting has been  
10 perverted and that it affects substantial rights of our  
11 client for which an immediate appeal is available.

12           All right. So how do we get to an immediate appeal?  
13 You start with the uniform arbitration act in section  
14 15-48-200, which addresses appeals. And I have copies of  
15 all this for Your Honor, as well, okay?

16           15-48-200 says that an appeal can be taken from, and  
17 then it gives a grocery list of the different types of  
18 things you can appeal from in arbitration. Obviously, you  
19 can take an appeal from an award. And that's one of the  
20 words that's used in the appeal statute. It also says you  
21 can take an appeal from a judgment or decree entered  
22 pursuant to the arbitration chapter. All right. So  
23 obviously, a judgment or a decree is something different  
24 than the award. The language is not superfluous, so at  
25 this point, the statute authorizes appeals from awards,

1 judgments and decrees.

2 The statute goes further to say this, this is  
3 15-48-200(b), the appeal shall be taken in the manner and  
4 to the same extent as from orders or judgments in a civil  
5 action. So the question becomes, had we been before you  
6 in a civil case and the same order issued, would the order  
7 be immediately appealable?

8 And, Your Honor, I remember from my law school days,  
9 generally interlocutory, you can't appeal final judgments.  
10 You can appeal -- the appellate statute is 14-3-330. And  
11 in addressing the appellate jurisdiction of our courts in  
12 South Carolina, what 14-3-330 says, in part, and this is  
13 section three, is that you can take an appeal from a final  
14 order affecting a substantial right made in any special  
15 proceedings or upon a summary application in any action  
16 after judgment.

17 All right. So then we looked at case law to find out  
18 what is a substantial right. It's our contention there  
19 are two substantial rights that are impacted by this  
20 order. One is the right of choice of your own counsel.

21 Now, in their responsive brief, the claimants have  
22 been kind of clever to say hey, we're not seeking to  
23 disqualify you guys, right, so that right's not really  
24 impacted. But that's not true. Because if that order  
25 stands and there's an invasion of the attorney/client

1 privilege, our client is then faced with the quandary of  
2 do we continue with Eric Bland, who by affidavit David  
3 Brett said I want as my chosen counsel. Now, do we  
4 continue with Eric Bland knowing the privilege has been  
5 waived or do we --

6 MR. BLAND: Invaded.

7 MR. RICHTER: Invaded. Or do we decide that we have  
8 to use Eric now as a witness and we can't use him anymore  
9 as our chosen counsel?

10 So in order to impact a substantial right, you don't  
11 have to take the right away entirely. There's no question  
12 that invading the privilege that Mr. Bland enjoined with  
13 Atlantic is an invasion of the substantial right of  
14 Atlantic to choose counsel of its own selection.

15 Now, the other substantial right that we say is  
16 impacted is the attorney/client privilege itself. So  
17 those are the two --

18 MR. BLAND: Ronnie, I don't mean to interrupt, but  
19 you should tell him that I was named, actually, as a  
20 witness --

21 MR. RICHTER: I'm going --

22 MR. BLAND: All right. Thank you.

23 MR. RICHTER: All right. So on the -- on the first  
24 substantial right, we say the right to choose counsel of  
25 your own selection. We have a Supreme Court case in South

1 Carolina, Haygood vs. Summerville. Again, I have copies  
2 for Your Honor. This was an appeal taken from an order  
3 seeking to disqualify counsel. So this was a full  
4 disqualification.

5 An immediate appeal was taken from an order  
6 disqualifying counsel. The issue before the court was,  
7 under 14-3-330, is that a substantial right that can be  
8 immediately appealable or not. And the court in Haygood  
9 said yes, it is. That the right of counsel of your own  
10 selection is a substantial right, that an order impacting  
11 that right is an order not only that is appealable, but  
12 that must be appealed, such that if you did not appeal it,  
13 you would waive your right to appeal it. That's what  
14 Haygood says.

15 This is from Haygood, I'll just read briefly. We  
16 find persuasive the arguments of petitioner and the  
17 reasoning expressed by other jurisdictions which allow  
18 immediate appeal of such orders. We conclude an order  
19 granting a motion to disqualify a party's attorney in a  
20 civil action affects a substantial right and may be  
21 immediately appealed under section 14-3-332. It goes on  
22 from there. So clearly, orders impacting a client's right  
23 to choose counsel of their own selection is an immediately  
24 appealability order.

25 Now again, returning to their position, which would

1 be hey, we're not seeking to disqualify you. No, but this  
2 is what happened factually. Early in the case, they named  
3 Eric as a witness. They said he was a witness to bribery,  
4 to conspiracy. I don't know what all they said about  
5 Eric. We objected. They withdrew his name as a witness.

6 Subsequently, they persisted with efforts to pierce  
7 the attorney/client privilege, which they now appear to  
8 have been successful in doing. So even not naming him as  
9 a witness, they have now put that ball back in play.

10 What do we do with Eric now? How do we go forward in  
11 defending action and not have Eric as a witness to explain  
12 his side of those varied communications that they seek to  
13 view having invaded the attorney/client privilege?

14 It's the same right, whether it's a full  
15 disqualification or not because you've placed the client  
16 in that untenable position of can I go forward with Eric  
17 or not, and is it invading my right to have my choice of  
18 counsel.

19 So the other substantial right that we say is  
20 impacted and which is immediately appealable is the  
21 invasion of the attorney/client privilege itself. So in  
22 their responsive brief, they cite a case called Wieters  
23 vs. Bon Secours-St. Francis Hospital, a South Carolina  
24 Supreme Court case. I have a copy for Your Honor. This  
25 is the Wieters two, right? I'm going to come back to what

1 the Supreme Court said, but I want to go back to Wieters  
2 one, which was a Court of Appeals decision. This is a  
3 very lengthy opinion from the Court of Appeals. Tommy  
4 Wieters was a doctor at St. Frances Hospital who sued  
5 after his privileges were suspended. He sued to get  
6 M.E.C. peer review privilege material from the hospital.  
7 That was the issue in Wieters one, not the attorney/client  
8 privilege, had nothing to do with Wieters one, never  
9 appears in the decision.

10 So Wieters one, the court said this is the issue as  
11 defined in the opinion. Do the deposition questions  
12 unanswered by Drs. Deal and Pocock pertain to confidential  
13 committee proceedings protected by the peer review statute  
14 40-71-20? That was the issue in the Wieters case. So a  
15 deposition was taken and the witness was told don't answer  
16 that because that's seeking peer review, which is  
17 protected by statute. And so an immediate appeal was  
18 taken of an order compelling the witness to answer those  
19 questions. So that goes to the Supreme Court on immediate  
20 appeal. The court -- I'm sorry, Court of Appeals.

21 The Court of Appeals looks at it to resolve the  
22 question, is this immediately appealable or not? And the  
23 Court of Appeals says yes, that is immediately appealed.

24 They issue an order that relied in part upon another  
25 case called McGee vs. Bruce Hospital System, which was yet

1 another statutory peer review case, not an attorney/client  
2 privilege case. So the hospital not liking the result of  
3 the Court of Appeals decision petitions the court for a  
4 cert. And going back to the first Wieters opinion that I  
5 showed you, the Supreme Court opinion, the opinion says  
6 before the court is a petition for writ to review the  
7 Court of Appeals decision in Wieters one. The petition  
8 for writ is denied because the order on appeal is not  
9 immediately appealable. So that's it. That's the whole  
10 opinion.

11 They say as authority see Tucker vs. Honda. And  
12 parenthetically, the note says holding an order compelling  
13 discovery is not immediately appealable even if it is  
14 challenged as violating the attorney/client privilege.

15 So following their directive, we did see Tucker.  
16 That language appears nowhere in Tucker, all right.  
17 Tucker was a case where a deponent appears for a  
18 deposition, being asked questions and he's instructed not  
19 to answer because of attorney/client privilege. That did  
20 happen.

21 The parties went to court, sought an order  
22 compelling. The trial judge issues an order compelling  
23 the witness to answer questions with certain conditions,  
24 seal the record, give it to me, the judge, I'll look at  
25 it, I'll determine whether the attorney/client privilege

1 is violated. And those will be the safeguards that we're  
2 going to put in place.

3 So the order that was appealed was not an order  
4 directing the invasion of the attorney/client privilege.  
5 It was an order directing a witness to appear and be  
6 deposed. That was the order. And it's from that order  
7 that the court looked at it and said, wait a minute, an  
8 order compelling someone to sit for a deposition is not  
9 immediately appealable, even though in this case, it would  
10 involve being asked questions of the attorney/client  
11 privilege. We haven't gotten to the point of determining  
12 whether to invade the privilege or not. We're just trying  
13 to build the record so the judge can look at it and  
14 determine whether there's a waiver of a privilege, right?

15 So in looking at the Tucker situation, Pee Dee was  
16 the responding party. They advanced several arguments,  
17 and one of the arguments was look, this affects the  
18 attorney/client privilege; and therefore, it affects the  
19 merits of the case, it's substantial and it's immediately  
20 appealable.

21 The court in Tucker said this about that position, in  
22 addressing Tucker's first contention, we note an order  
23 compelling discovery does not ordinarily involve the  
24 merits of the case and may not be appealed. Since a  
25 contempt order is final in nature, an order compelling

1 discovery may be appealed only after the trial court holds  
2 a party in contempt. Thus, a party may comply with the  
3 order and waive any right to challenge it on appeal or  
4 refuse to comply with the order, be cited for contempt and  
5 appeal. So that's the procedural safeguard that's put in  
6 place by Tucker.

7 If this was simply an arbitrator saying I order you,  
8 Eric, to give to the other side those documents that I  
9 have deemed waived, we would have the right and the agency  
10 to say no, we're not going to do it. We could then decide  
11 if we chose to to suffer the sanction and immediately  
12 appeal that. And it's crystal clear that the authority  
13 exists that that's immediately appealable.

14 Now, Your Honor, that dovetails also with a United  
15 States Supreme Court opinion called Mohawk. That is a  
16 2009 opinion, Mohawk vs. Carpenter.

17 In Mohawk, the issue before the court was this very  
18 issue. Is an order directing the invasion of the  
19 attorney/client privilege immediately appealable? That  
20 was the issue before the United States Supreme Court. And  
21 the court said no, it's not, right. But here's why it's  
22 not, because they recognized that there were several  
23 procedural safeguards in place, including the ability to  
24 seek an appeal under a federal statute 1292(b) where you  
25 would ask the court to certify the question and that way

1 you could get to the next level. So that would be one way  
2 that you could protect your client. We don't have that,  
3 obviously, here.

4 The other way, interestingly enough, is exactly what  
5 our court said in Tucker. Another option is for the party  
6 to defy a disclosure order and incur court imposed  
7 sanctions. Alternatively, when circumstances warrant, the  
8 district court may issue a contempt order against a  
9 noncompliant party who can then appeal directly from that  
10 ruling.

11 So looking at the balance of the rights here, the  
12 U.S. Supreme Court said, look, there are other ways to get  
13 this thing teed up, so we're not going to say that order  
14 is immediately appealable, but all you have to do is say  
15 no, take the sanction and then you can appeal the  
16 sanction.

17 What the arbitrator's procedure has deprived us of  
18 is, frankly, the right to say no in order to protect  
19 communications that we've had with our client. So we take  
20 exception to the entire way the process was handled. A  
21 further perversion of the process, and this comes from  
22 Tucker. Tucker cites a case called State vs. Dosser.  
23 This is what State vs. Dosser says you're supposed to do  
24 before you can enter an order invading the attorney/client  
25 privilege.

1           The court found a trial court should not require the  
2 disclosure of attorney/client communications to other  
3 parties without first determining whether communications  
4 are privileged by inquiring into all of the facts and  
5 circumstances of the communications.

6           Now, we have asked in this process, let's have a  
7 hearing. Even in the arbitration, let's discuss all of  
8 the facts and circumstances so that you don't just have  
9 these communications that are out of context. And you've  
10 got a special referee who is looking at an email without  
11 much context at all to determine how it fits in the  
12 overall picture to determine whether a crime fraud  
13 exception exist to the attorney/client privilege so as to  
14 invade that privilege. We take exception to that, too.  
15 This is not the way these matters are handled.

16           So to not gave full hearing on the subject matter, to  
17 threaten that we're just going to bypass us, to not give  
18 us the agency to say no to your order compelling  
19 production and then to threaten us, frankly, that look,  
20 guys, you can appeal if you want to, we're just going to  
21 go forward without you. Those are the reasons we're  
22 asking you to lift the stay, to enter an injunction and  
23 let us appeal the matter. The Court of Appeals will tell  
24 us yes or no, it's either immediately appealable or it's  
25 not. We think that it is.

1           There's no prejudice here. The only prejudice they  
2 can possibly point to is the passage of time. Who cares?  
3 The great oak tree is not going to get cut down on the  
4 corner.

5           So, Your Honor, we ask you respectfully to lift the  
6 stay solely for the purpose of imposing an injunction to  
7 prevent the proceeding from going forward while we perfect  
8 our rights to appeal the substantial issue.

9           THE COURT: All right.

10          MR. RICHTER: And I have copies of all of the  
11 authorities I cited.

12          THE COURT: Thank you very much.

13          MR. BLAND: And our time period, Your Honor, runs on  
14 June 3rd to file that appeal with the Court of Appeals.

15          THE COURT: Okay. Thank you.

16          All right, Mr. Sowell.

17          MR. SOWELL: May it please the Court?

18          THE COURT: Of course.

19          MR. SOWELL: Your Honor, I know this is overly  
20 irrelevant, but in my 42 years at the bar, this is the  
21 most contrived argument that's ever been presented to me.  
22 Now, you may have seen more, but I'll explain to you  
23 rather than just simply making that hyperbolic statement  
24 why it's true.

25          This is the consulting agreement that is one of the

1 subjects of this litigation. It was admittedly drawn by  
2 Eric Bland on behalf of Atlanta Intermediaries.

3 MR. BLAND: I object to that. There is no evidence  
4 that I drafted that agreement. I was a participant in  
5 that agreement. And I want to make sure that the record  
6 is clear.

7 MR. SOWELL: Well, Scott himself testified in the  
8 first deposition in the case. Mr. Bland drafted it, so  
9 there's the evidence, and we can present that to the Court  
10 if the Court wishes us to.

11 THE COURT: Okay. Go ahead. I'm fine. Go ahead.

12 MR. SOWELL: Footnote one says, excluding injunctive  
13 relief, all disputes concerning this agreement, the  
14 relationship between the parties or disputes of any other  
15 kinds are subject to final and binding arbitration to the  
16 provisions and rulings then in effect with the American  
17 Arbitration Association.

18 Keep in mind that this was the mantra of the  
19 respondents up until this sub-arbitrator, we call him a  
20 special referee, ruled on the crime fraud exception to the  
21 attorney/client privilege that they were entitled to a  
22 finding of binding arbitration.

23 That's document number one. If you look at Paragraph  
24 14 of that document on Page 9, which is the arbitration  
25 paragraph, it states, Except those matters relating to a

1 party's right to obtain injunctive relief, all claims,  
2 demands, disputes, controversies, differences or  
3 misunderstandings between the parties shall be settled by  
4 arbitration. Any determination rendered in such  
5 proceeding shall be binding and conclusive upon the  
6 parties hereto.

7 On Page 10, that paragraph carries forward, gives the  
8 parties, if you look, one, two, three, four, five lines  
9 down the right to enforce the right to obtain discovery.  
10 And then in the final sentence in Paragraph 14, it says  
11 again the arbitration must be commenced and completed to  
12 finality, which is true under the rules of the American  
13 Arbitration Association and the Federal Arbitration Act.

14 There is a remedy here for Atlantic and Allstar, and  
15 that is to make a motion after the arbitration is over to  
16 vacate the award for some specified reasons. There is no  
17 provision in either the F.A.A. or in the rules of the  
18 American Arbitration Association that provide for any kind  
19 of interlocutory appeal. And the reason is, is that this  
20 arbitration is final and binding.

21 It's final and binding by agreement, and it's also  
22 final and binding pursuant to the orders of this Court.  
23 Originally, we were in this same courtroom. I think we  
24 were arguing about whether the arbitration was compellable  
25 or not. And it was a close question, and the Court took

1 proposed orderers and ruled for arbitration. That is, you  
2 know, pretty much the law in South Carolina.

3 If it's a close question, you decide it in favor of  
4 arbitration. That's the public policy of this state.  
5 That's not only provided in the opinions of our court, but  
6 also provided in the opinions of the United States Supreme  
7 Court. The most recent of which was on Monday when Judge  
8 Gorsuch in a 504 opinion concluded under federal law  
9 favoring arbitration, that is the Federal Arbitration Act  
10 and the court's precedence, the virtues that congress  
11 originally sought in arbitration, its speed, simplicity  
12 and inexpensiveness would be shorn away and arbitration  
13 would wind up looking like the litigation it was meant to  
14 displace.

15 Now, this is the opinion that Justice Ginsburg  
16 dissented from orally from the bench on Monday. It was a  
17 five to four opinion. This is from the State newspaper on  
18 Monday. But it emphasizes how our State Courts and the  
19 United States Supreme Court view the remedy of  
20 arbitration.

21 In this court's order on August the 1st, 2017, in the  
22 final paragraph, which is denominated D, the court rules,  
23 quote, once again, I hereby find an order that plaintiff's  
24 claims asserted in the complaint against Allstar and  
25 Atlantic must be arbitrated to finality and be binding on

1 the parties in accordance with the terms set forth in the  
2 arbitration provision contained in the January 31, 2014,  
3 consulting agreement, which has already been handed up,  
4 and as such, the within action is stayed pending the final  
5 arbitration decision, period, end quote.

6 Now, I don't know what we would call that. We can  
7 call that law of the case. We can call it judicial  
8 estoppel. We can call it regular estoppel. But Allstar  
9 and Atlantic Intermediaries are estopped, whether it's by  
10 judicial estoppel or law of the case doctrine or by just  
11 the regular common law notion of estoppel from moving to  
12 withdraw the stay. Because the order says that as such,  
13 in accordance with the agreement that we can prove  
14 Mr. Bland drafted it, that within action is stayed pending  
15 the final arbitration decision.

16 There's been no final arbitration decision pursuant  
17 to the court's order. There can be no motion to stay. If  
18 the Court -- with all due respect to the Court, the Court  
19 has no jurisdiction to hear this motion. The jurisdiction  
20 is in the AAA, the American Arbitration Association,  
21 because the Court sent it there.

22 Now, in the transcript of record that was typed by  
23 Ms. Ambroziak from the April 27th, 2017, hearing,  
24 Mr. Bland says -- this is on Page 10, that there is a  
25 bullet proof enforceable arbitration clause, bullet proof.

1           So it has got, I suppose, the equivalent of bullet  
2 proof glass around it. It cannot be invaded. He's  
3 correct, it cannot be invaded at this stage of the  
4 proceeding. Now, that is not to say it cannot be invaded  
5 after there's a final award in arbitration because all of  
6 the rules, the Federal Arbitration Act, the AAA rules, all  
7 of them provide for a motion to vacate in the event  
8 there's been some sort of extraordinary unfairness, but  
9 you, one cannot do it in the middle of the case.

10           THE COURT: So is there never a scenario under what  
11 you're arguing to me that the circuit court can have  
12 jurisdiction to deal with an issue in that arbitration  
13 situation?

14           MR. SOWELL: One scenario. That is where the  
15 arbitrator attempts to adjudicate matters outside his or  
16 her delegation of authority. In other words, I say he's  
17 been delegated the construction of this consulting  
18 agreement.

19           He decides that he's going to arbitrate an  
20 intersection collision between the parties, and it was not  
21 submitted to arbitration because it did not fall within  
22 that consulting agreement. And therefore, it's just  
23 totally outside the purview of the arbitrator. He has no  
24 authority, or she does, no authority to decide that  
25 particular matter. That is not an issue in this case.

1           Everything in this case pursuant to the consulting  
2 agreement, pursuant to the Court's original order  
3 compelling arbitration, pursuant to the court's subsequent  
4 order denying our Rule 59(e) motion has decided this is a  
5 matter that is, quote, stayed pending the final  
6 arbitration decision, end quote, which is totally, totally  
7 appropriate. That's the way the whole structure is laid  
8 out and set up.

9           And Mr. Bland and Mr. Richter, and I understand why  
10 they want it. I mean, we fought them. They wanted it,  
11 they got it. They got arbitration. And now, they're  
12 stuck with it. They're stuck with that clause in the  
13 consulting agreement and they're stuck with the Court's  
14 order that they obtained.

15           I mean, under judicial estoppel, you can't come to  
16 court and obtain an order on one theory and then come back  
17 later and switch horses in the middle of the Kentucky  
18 Derby. You've got to ride the same horse you were riding  
19 before, and their horse was this is a matter in which all  
20 disputes, number one, go to arbitration; and number two,  
21 the matter is stayed until there is a final and binding  
22 award in the arbitration.

23           THE COURT: Well, what about the paragraph in the  
24 consulting agreement that starts with, you know, except  
25 for injunctive relief?

1 MR. SOWELL: That's not a reference to this  
2 particular circumstance. That's a reference to -- it's in  
3 almost all arbitration agreements. It's a reference to if  
4 you've got to get injunctive relief, typically, the  
5 arbitrators don't have any authority to do it, so you've  
6 got to go to circuit court where you started the action to  
7 seek the injunctive relief.

8 THE COURT: Okay.

9 MR. SOWELL: It doesn't have any sensical -- or  
10 sensible is the right word. It does not have any sensible  
11 application to this case. But you find it in almost all  
12 arbitration agreements because I don't know whether the  
13 AAA gives any authority to render injunctive relief, but I  
14 think it does not. I'm not sure about that.

15 The other things very briefly, in their motion for  
16 arbitration, the counsel for Allstar and for Atlantic  
17 makes note on Page 8 that the Federal Arbitration Act's  
18 basic purpose is to promote speedy disposition of disputes  
19 without expense and delay of extended court proceedings.  
20 And they cite an Eastern district of Pennsylvania case.

21 Well, there's the most recent case right there, the  
22 one in the State newspaper on Monday where Justice Gorsuch  
23 said the very same thing. Justice Ginsburg dissented  
24 along with three others, but that's the rule. That's been  
25 the rule now for about the last 20 years or so. And the

1 brief says both Allstar and the overworked, underfunded  
2 South Carolina court system have the same goal of a speedy  
3 resolution to this litigation and arbitration, assist that  
4 goal based on the federal and state public policy, this  
5 Court should require the parties to arbitrate.

6 There's no question, but that there is a very  
7 definitive state policy in favor of arbitration in South  
8 Carolina. There is one that even trumps it, which is the  
9 United States Supreme Court's favoring arbitration under  
10 the Federal Arbitration Act, which they would have the  
11 ultimate say about since it's a federal piece of  
12 legislation.

13 They say, conversely, Allstar understood and  
14 bargained for the fact that any and all disputes -- any  
15 and all disputes and, specifically, in Paragraph 14 refers  
16 to discovery disputes, related in any way to the  
17 consulting agreement would be handled via arbitration.  
18 Based on this strong legal history, any other future  
19 arguments against mandatory arbitration in this matter  
20 should fail. That's what they're arguing for now.

21 When they were here before, they said that any such  
22 arguments against mandatory arbitration should fail.

23 Well, I agree with them, it should fail.

24 This thing about taking an appeal, they don't have an  
25 appeal. I mean, my first argument is that there is no

1 jurisdiction for the Court to decide this issue that  
2 arbitration cannot be invaded because it's been ordered  
3 with finality and that they have waived their right to say  
4 otherwise. But if you were to get into the question of,  
5 you know, they set this up, more or less, as an endeavor  
6 to take an appeal with the Court of Appeals, they don't  
7 have an appeal to the Court of Appeals. This is an  
8 interlocutory discovery order. Everybody knows, you know,  
9 with some very, very minor exceptions that interlocutory  
10 discovery orders are not appealable.

11 In fact, Mr. Richter has cited law, I think the  
12 Wieters case and some other cases that support that very  
13 proposition. Now, they tried to turn it into an  
14 injunction because they think that will give them some  
15 special platform for an appeal. This is not an  
16 injunction. This is a motion, in effect, to lift the  
17 stay.

18 This is a case we just found a little bit ago,  
19 actually. What it says, essentially -- the Court can read  
20 it, but what it says when you get down to the essence of  
21 it is that you can't call a petition on appeal something  
22 for -- you know, from injunctive relief when it's really  
23 not an injunction.

24 You can't just call it an injunction. You can't come  
25 to court with smoke and mirrors and say we seek an

1 injunction. There's no injunction available. The only  
2 thing that's available here, if they wanted it, would be a  
3 lift of the motion to stay, but the Court doesn't have any  
4 jurisdiction to entertain a motion to stay because the  
5 Court has ordered that this be arbitrated to finality.  
6 Now, you may have that jurisdiction after the award is  
7 entered if they present an appropriate ground for  
8 overturning it, but you would not have it now.

9       It's not a final order in any event, it's an  
10 interlocutory discovery order, which we know from reams  
11 and reams of cases in South Carolina and, virtually,  
12 everyone else in the world are not discoverable -- I mean,  
13 are not appealable. Discovery orders are not appealable.  
14 This is a discovery order that was issued by the  
15 arbitrator that Allstar and Atlantic Intermediaries chose.

16       Now, addressing a few of the things that Mr. Richter  
17 brought up, this thing about a waiver, they don't waive  
18 anything because waiver has got to be voluntary. They  
19 have to voluntarily waive the attorney/client privilege.  
20 It's not waived because some judge says that five out of  
21 ten of these documents are not privileged. The other five  
22 retain their privilege because they've not been  
23 voluntarily waived.

24       Now, if they were to come forward and say we  
25 voluntarily waive privilege with respect to those, then

1 they could waive. They haven't waived anything. In fact,  
2 they have fought tooth and nail with the arbitrators, Mr.  
3 Cheryl and Mr. Gray, to give up nothing.

4 And now, that they have not succeeded, they've come  
5 back here in sort of a desperate attempt to craft up some  
6 sort of convoluted motion that the Court doesn't have  
7 jurisdiction over so they can delay the arbitration, which  
8 is set for June 11th.

9 As we made plain in our memorandum, we do not seek to  
10 disqualify Eric Bland. Now, if Eric wants to testify,  
11 that's his decision. He has to look at the Rules of  
12 Professional Conduct and decide what to do, but if he did,  
13 I mean, he still has got -- according to the Rules of  
14 Professional Conduct, he still has Ronnie Richter, who has  
15 been to virtually every proceeding in this case and Scott  
16 Mongillo, his associate. They can try the case if Eric  
17 feels he is not in a proper place to do it, but we have  
18 not moved to disqualify him.

19 We do not move to and do not seek to disqualify Eric  
20 Bland, period, the end. So it's not the equivalent of a  
21 disqualification of counsel because we have not sought his  
22 disqualification.

23 Thank you.

24 THE COURT: You're welcome.

25 MR. RICHTER: Your Honor, may I reply?

1 THE COURT: Sure.

2 MR. RICHTER: Well, first, I'm honored to impress  
3 Biff with the most contrived argument that he's ever heard  
4 in 40 years before. I'm sure that's no small feat on my  
5 behalf.

6 MR. SOWELL: No, no.

7 MR. RICHTER: But, Your Honor, I didn't contrive  
8 14-3-330, which is the arbitration act in South Carolina  
9 that confines when and how you can appeal. That didn't  
10 come from Ronnie Richter. And the language in the act,  
11 just applying normal rules of statutory construction, were  
12 not -- we're assuming these words aren't superfluous, but  
13 they talk about awards, judgments, decrees. And it says  
14 that appeals are to be taken in the same manner and to the  
15 same extent as appeals from orders or judgments in a civil  
16 case. That's what the arbitration act says in South  
17 Carolina.

18 So the simple question is had this order issued in a  
19 circuit court in South Carolina, would it be immediately  
20 appealable or not? I think I've demonstrated to you  
21 through the authority that it's clearly immediately  
22 appealable.

23 This issue of jurisdiction, this case lives here.  
24 There's an order compelling it into arbitration. There's  
25 an active number here. If there's jurisdiction anywhere,

1 it's in this court. The arbitration is not a  
2 jurisdictional body. The proceedings have been ordered to  
3 that for final determination, but nothing prevents us from  
4 coming back here to say we're asking you to lift the stay  
5 for an injunction so we can perfect an appeal. I know the  
6 difference between an injunction and appeal. We're going  
7 to appeal. We're going to appeal.

8 So what's the point of injunction? The point of the  
9 injunction is we've got an arbitrator that says appeal it  
10 if you want to, we're going on without you. What an  
11 incredible waste of time and resources that would be.

12 If there's anything compelling I heard Biff saying --  
13 and there were slights, I mean, I'm a fan of the game. He  
14 makes a good argument, but the need for speed and judicial  
15 resource and those types of things aren't compelling in  
16 arbitration. I get that.

17 But it's not to say you leave all your rights at the  
18 door. That's not the way it works. What a -- what a  
19 monumental waste of time it would be that we would go try  
20 a week long arbitration with an appeal pending before the  
21 South Carolina Court of Appeals. How ridiculous.

22 So yes, we are here before you to say even pursuant  
23 to the very language of the agreement that sent us here,  
24 except those matters relating to a party's to obtain  
25 injunctive relief. We're asking you for injunctive relief

1 to stop the nonsensical result because a substantial right  
2 of ours has been invaded.

3 Now, I'm flattered that Biff would put me on par with  
4 Eric, my partner, but I'm not Eric. And my client's right  
5 to choose counsel is not to choose me. I'm co-counsel in  
6 the case, there's no question about it, but there's lots  
7 of talented lawyers at Biff's office. I respect all of  
8 them. I may say I don't want Bess. I just like her  
9 better than Biff. That would be my right. And it's no  
10 answer for somebody to say, well, just take Biff. He's  
11 fine. That's invading the client's right to select  
12 counsel of his own choosing. That's clearly a substantial  
13 right. There's South Carolina Supreme Court authority on  
14 point saying not only may you appeal that, you must appeal  
15 that. So that part is crystal clear.

16 The gray, if there's gray here at all, is on the  
17 attorney/client privilege. Is it a substantial right in  
18 and of itself? And both our Supreme Court and the US  
19 Supreme Court says it becomes one when you say no, I'm not  
20 going to produce.

21 THE COURT: I mean, here's my question, and I track  
22 with what you're saying right now, but I mean, the idea  
23 that Mr. Bland is potentially a witness in this case was  
24 not lost on me in hearing number one.

25 I mean, I don't know how that has come as a surprise

1 or a shock to anybody in the room or anyone involved in  
2 the case. I mean, just based upon what I heard in the  
3 original hearing, I was thinking to myself, you know,  
4 Mr. Bland is probably a witness in this thing. He, you  
5 know, was a corporation's lawyer and was putting all these  
6 documents together. And so, I just don't know how that  
7 comes as a shock --

8 MR. RICHTER: Your Honor --

9 THE COURT: -- in the process.

10 MR. RICHTER: Well, I can answer that in two ways.

11 THE COURT: Okay.

12 MR. RICHTER: A, not a shock. B, when they first  
13 designated him as a witness and we objected early in the  
14 proceedings, they withdrew him and the proceedings have  
15 rocked on ever since.

16 And there's nothing about -- there's a difference  
17 between a witness and a necessary witness.

18 THE COURT: Right.

19 MR. RICHTER: He doesn't become a necessary witness  
20 until there's some issue in controversy of which no one  
21 else can testify. That's the position they're trying to  
22 put him in now. There's nothing wrong with Eric Bland  
23 having participated --

24 THE COURT: I wasn't saying that he did anything  
25 wrong.

1 MR. RICHTER: No, sir.

2 THE COURT: I wasn't trying to imply that he did  
3 anything wrong or that he did anything improper.

4 MR. BLAND: Now, they've alleged that I'm part of a  
5 criminal activity with Mr. Brett in bribery and  
6 conspiracy.

7 THE COURT: Right.

8 MR. BLAND: And the one argument that has not been  
9 addressed by the other side is how do you put the  
10 toothpaste back in the tube? So we go forward in 13 days  
11 and try this. The attorney/client privilege is revealed.  
12 We take our appeal. How is it that my client's rights not  
13 to have that invaded, if the Court of Appeals rules in  
14 their favor, how is that ever remedied? How do we go back  
15 and try the case? They have attorney/client privilege  
16 information that they should have never gotten.

17 THE COURT: You've already shown it to the jury at  
18 that point. I'm with you on that.

19 MR. BLAND: And they know it.

20 THE COURT: I meant that was a --

21 MR. BLAND: Yeah.

22 THE COURT: What am I trying to say?

23 MR. BLAND: You said it right.

24 THE COURT: That was one of those fancy English terms  
25 that I always get wrong. That was an example, not that

1 there's actually a jury, but you've already shown the  
2 picture that I said was excluded to the jury before I ever  
3 admitted it kind of thing.

4 MR. RICHTER: Your Honor, on a parting shot, we're  
5 not seeking to avoid arbitration. Don't drink of that  
6 Kool-Aid at all. When the appeal gets done, whatever the  
7 Court of Appeal says, we're going right back to the same  
8 arbitration proceedings. It's not as if they don't have  
9 agency over here. They've persisted in pursuing this  
10 evidence, which I think is wholly unimpressive. We've  
11 asked them more ways than we know how to. Why don't you  
12 just relent? Let's go to June and we'll try the case.  
13 You have everything you need. But no, if you want this  
14 and you're going to invade a substantial right of our  
15 client, then yes, we're going to fight it. We're going to  
16 fight it as far and as high as we need to fight it.

17 MR. BLAND: We're saying we're willing to go if you  
18 let us.

19 THE COURT: I'm with you. I'm with you.

20 But Mr. Sowell, I guess, one of my questions for you  
21 is, I mean, where does this -- so if the arbitrator had  
22 said Mr. Bland, Mr. Richter and Mr. Brett, you know, turn  
23 over these documents and then one or all three of them had  
24 said not no, but hell no?

25 MR. SOWELL: That is what they've said.

1 THE COURT: You know, hold us in contempt if you want  
2 to hold us in contempt. And if the arbitrator had held  
3 them in contempt and sanctioned them, they got an appeal  
4 at that point, right?

5 MR. SOWELL: I doubt it. Well, first of all -- and  
6 I'm going to tell you what I think.

7 THE COURT: I mean, let's apply that to normal  
8 circuit court. Take the arbitrator out.

9 MR. SOWELL: Well, they do have an appeal to circuit  
10 court.

11 THE COURT: No, I'm just saying take it out of  
12 arbitration just a moment. We're in a normal hearing.

13 MR. SOWELL: Right.

14 THE COURT: I do the hearing, we do this and I  
15 say Atlantic has to turn over these -- I'm making this up,  
16 these 300 documents. And the attorneys say we're not  
17 doing it. We've advised our client not to do it. I say  
18 you either do it or we're going to have a contempt  
19 hearing. We have a contempt hearing. I sanction them or  
20 whatever it is you do in contempt hearings. And at that  
21 point, there is no doubt that under the South Carolina  
22 Rules of Appellate Procedure, they have a right to appeal  
23 the contempt hearing.

24 MR. SOWELL: I believe that is correct.

25 THE COURT: So if the arbitrator had done it that

1 way, how would they not have a right to appeal then?

2 MR. SOWELL: Well, because it's in arbitration. You  
3 know, I don't -- first of all, I'm not sure the arbitrator  
4 has the contempt power. I don't know.

5 THE COURT: I don't know the answer to that either.

6 MR. SOWELL: Mr. Watkins, if he knows, I invite him  
7 to stand up.

8 Do you know?

9 MR. WATKINS: I believe they do, Your Honor.

10 THE COURT: I would hope -- they've got to be able to  
11 enforce things, otherwise, they really can't get much  
12 done.

13 MR. WATKINS: But I would observe that these  
14 documents have already been voluntarily turned over to  
15 Arbitrator Gray.

16 THE COURT: Is that the special referee?

17 MR. WATKINS: Yes, it is.

18 THE COURT: Okay.

19 MR. WATKINS: So he has them, and that's what their  
20 problem is. And contrary to Mr. Bland's recollection --

21 MR. BLAND: Your Honor, he's not an attorney in our  
22 court. He has not been moved in pro hac vice, and I take  
23 great umbrage to what he has said about my firm and my  
24 client before the arbitration panel.

25 THE COURT: Okay.

1 MR. BLAND: If you want to make him an attorney in  
2 this state, and he's subject to the rules of court of  
3 candor, I'll -- I'll certainly consent to it, but he's  
4 not.

5 THE COURT: All right. I'm good, Mr. Watkins. You  
6 can take a seat. It's okay.

7 Go ahead, Mr. Sowell.

8 MR. SOWELL: You asked the best -- judges always ask  
9 the best questions. But in this case, you really asked a  
10 good question. Ronnie is wrong about what happened when  
11 they raised sand about our listing Eric as a witness.

12 There were some language that was put in the answers  
13 to interrogatories -- this was the first answers to  
14 interrogatories that we responded to in the arbitration  
15 where -- and I think our client probably put it in there.  
16 And basically, it said that Eric had facilitated a  
17 bribery. It didn't say he had done it. It said he  
18 facilitated it as a lawyer.

19 Ronnie Richter wrote me a letter -- and we also  
20 listed him as a witness -- taking umbrage. And I  
21 understood as a matter of professional courtesy, I don't  
22 always get along with Eric and Ronnie, but I think all  
23 lawyers are entitled to a certain amount of courtesy. We  
24 deleted that part about the facilitated bribery. We just  
25 took it out because they asked us to then. We did not

1 withdraw him as a witness. He is still a witness. He's  
2 been listed as a witness since the first answers to  
3 interrogatories were responded to.

4 Now, I would ask you to pay careful attention and  
5 your law clerk to Page 6 of our memorandum where we have  
6 cited a case called Strategic Resource Company vs. Blue  
7 Cross Life Insurance Company, where it stated that there's  
8 an adequate remedy of law to appeal the final results of  
9 arbitration; and therefore, there is no interlocutory  
10 appeal or the right -- if you want to call it an  
11 injunction. I don't think it is an injunction, but if you  
12 want to call it that, there is no right to take an appeal.  
13 Now, they have no right to take an appeal. This has all  
14 been created to try to keep us away from those documents.

15 Now, in the discussion of those documents, for  
16 whatever reason, I guess it's Donald Trump and Paul  
17 Manafort and Cohen and I'm not sure who all else, but the  
18 crime fraud exception to the attorney/client privilege has  
19 been discussed at great, great length on MSNBC, CNN and  
20 Fox News for the last month or two. Just about everybody  
21 who watches any kind of political show now knows what the  
22 crime fraud exception to the attorney/client privilege is.  
23 In fact, Donald Trump took great umbrage and, I think,  
24 sent out a tweet in some form of what has happened to the  
25 attorney/client privilege.

1 Well, it's always been subject to the crime fraud  
2 exception. We have never asserted that Eric or anybody  
3 else in his firm was engaged in criminal activity. We've  
4 never said that. And the arbitrator came out at some  
5 point and said, you know, to the extent anybody has ever  
6 said that, we take that off the table. We're only talking  
7 about the second part, the fraud exception. And that's  
8 what sub-arbitrator referee Gray ruled on.

9 And my last thing is this, this thing about decrees  
10 and orders, it's final decrees and final orders.

11 MR. RICHTER: Your Honor, that's not what the statute  
12 says. I apologize. The statute says what it says.

13 I apologize, Biff.

14 MR. SOWELL: I accept his apology. He can't help it,  
15 I understand. But decrees and orders, those are final  
16 decrees and orders. That is the general rule. It is the  
17 rule here.

18 And according to this case that I cited, Strategic  
19 Resource Company vs. BCS Life Insurance Company, there's  
20 an equitable remedy of law to appeal the final results of  
21 this arbitration, which is the way arbitrations are set up  
22 under the FAA and the AAA. Thank you.

23 THE COURT: Thank you.

24 Anything else, Mr. Richter?

25 MR. RICHTER: Judge, this is not your typical

1 interlocutory appeal. The appellate statute 330 talks  
2 about substantial rights as being immediately appealable.  
3 That's the authority under which we say this issue is  
4 immediately appealable.

5 THE COURT: Okay.

6 MR. BLAND: Again, for me, for my client, this is my  
7 client's right for the attorney/client privilege. I just  
8 don't know how you go forward and try the case. The  
9 documents are revealed. And if we have appellate rights  
10 at the end and the Court of Appeals says you are right,  
11 how do you remedy that? How do you take that knowledge  
12 away from them? Just like you said, the inflammatory  
13 photo from the jury at that point? It's not like I can  
14 just make a motion to disqualify the arbitrator and  
15 there's got to be a new arbitrator with ears that wasn't  
16 infected by that. The actual claimants are infected by  
17 the revelation of the attorney/client privilege, which is  
18 that sacrosanct privilege.

19 MR. SOWELL: The last thing I'd like to say on the  
20 subject is, is that should have been thought out when it  
21 was so adamantly sought that this case be moved to  
22 arbitration. That's where it is and that's where the  
23 rulings are made now until there is a final order. Thank  
24 you.

25 THE COURT: All right. Anybody else want to say

1 anything else?

2 MR. RICHTER: No, sir.

3 THE COURT: I'll let y'all know by the end of the day  
4 tomorrow. I need a couple hours to process through these  
5 cases. I've got some hearings in the morning, then I'll  
6 be able to do that tomorrow morning.

7 MR. BLAND: We thank you for scheduling us.

8 THE COURT: And I'll let you know. We'll -- I know  
9 you're on a time deadline, so we're not going to delay it.  
10 Okay.

11 MR. SOWELL: May I pass up a proposed order?

12 THE COURT: Yes, sir. Make sure you give Mr. Richter  
13 a copy.

14 MR. RICHTER: Yes. Thank you, Judge.

15 MR. SOWELL: Thank you.

16 MR. BLAND: Thanks for making yourself available.

17 THE COURT: You're very welcome.

18 (Whereupon, the proceedings were concluded.)  
19  
20  
21  
22  
23  
24  
25



IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AMERICAN ARBITRATION ASSOCIATION  
Commercial Tribunal, Atlanta, Georgia

John Sherrill, Arbitrator

---

AAA Case No. 01-17-0005-1287

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Madison Cone, individually and on behalf of Tower Street Capital Management, Inc.  
.....Claimants

Atlantic Intermediaries, LLC, Allstar Financial Group, Inc., and Tower Street Capital  
Management, Inc. .... Respondents

Of Respondents, Atlantic Intermediaries, LLC and Allstar Financial Group, Inc., .....  
.....Appellants

Of Claimant, Madison Cone, individually and on behalf of Tower Street Capital Management,  
Inc., ..... Respondents

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**PROOF OF SERVICE**

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I certify that I have served upon Respondents via Counsel of Record and American  
Arbitration Association via Arbitrator the Response to Motion for Sanctions by depositing copies  
of it in the U.S. Mail, postage prepaid, on June 29, 2018.

June 29, 2018

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**RE: Madison Cone, individually and on behalf of Tower Street Capital Management, Inc. vs. Atlantic Intermediaries, LLC, and Allstar Financial Group, Inc.  
Case No. 2016-CP-40-78402  
AAA Case No. 01-17-0005-1287**

Dear Clerk:

Enclosed for filing are the original and seven (7) copies of following documents:

- a. Response to Motion for Sanctions; and
- b. Proof of Service of the Response to Motion for Sanctions upon the Respondents and American Arbitration Association.

Please return a clocked copy to me in the enclosed self-addressed stamped envelope.

Thanking you for your assistance in this regard, I am

Very Truly Yours,

  
Ronald L. Richter, Jr.

RLR/lml  
Enclosures

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