THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal, Atlanta, Georgia

John Sherrill, Arbitrator

AAA Case No. 01-17-0005-1287
Appellate Case No. 2018-001594

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

v.

Curtis C. Stewart, Atlantic Intermediaries, LLC, Allstar Financial Group, Inc., and Tower Street Capital Management, Inc., Defendants,

Of Whom Atlantic Intermediaries, LLC and Allstar Financial Group, Inc., are the Petitioners.

PETITION FOR WRIT OF CERTIORARI

Petitioners Atlantic Intermediaries, LLC, ("Atlantic") and Allstar Financial Group, Inc. ("Allstar") hereby move the South Carolina Supreme Court for a Writ of Certiorari to review the Order dismissing the Petitioners' appeal which was entered by the South Carolina Court of Appeals on June 8, 2018, a petition for rehearing of which was subsequently denied by Order of the South Carolina Court of Appeals on August 3, 2018.

Certification of Counsel

The undersigned hereby certifies that a petition for rehearing on this matter was made to the Court of Appeals and has been finally ruled upon.

Questions Presented for Review

1. Is an order in arbitration directing the invasion of the attorney client privilege immediately appealable?

Statement of the Case

This underlying action which gives rise to this appeal flows from the former business relationship between Atlantic and Tower Street Capital Management, Inc. ("Tower") and the principals for these entities. Atlantic is a wholly owned subsidiary of Allstar. Tower is a South Carolina limited liability company in which Cone has a membership interest. Curtis Stewart ("Stewart") is also a member of Tower and served as its General Counsel. Atlantic and Allstar are brokers for reinsurers and insurers. Tower was also engaged in the insurance industry as an insurance intermediary. On December 11, 2012, Atlantic entered into a written "Finder's Fee Agreement" with Tower. (APP. 032).

Through their business relationship, Tower was engaged pursuant to the Finder's Fee Agreement for the purpose of locating reinsurance carriers who were willing to cover certain lines of insurance which were being sold by Atlantic and underwritten by Allstar. The Finder's Fee Agreement was succeeded by a Consulting Agreement which is nominally between Tower and Atlantic and is dated January 31, 2014 ("Consulting Agreement"), (APP. 034-050).

Substantial monies were paid to Tower on a monthly basis under both the Finder's Fee Agreement and Consulting Agreement. By virtue of their ownership, Cone and Stewart benefitted from both agreements. In or about July 2016, the ownership structure of Atlantic changed and the new owners of Atlantic began negotiations with Tower to alter the Consulting Agreement and its financial terms. At the time it was communicated to Tower that the Consulting Agreement was terminated effective July 1, 2016 because of the change of Atlantic's ownership. On or about

January 13, 2017, Atlantic confirmed once again in writing the July 2016 termination of the Consulting Agreement to Tower.

Thereafter, Tower and the new owners of Atlantic began to negotiate the terms of a new Consulting Agreement. However, some time during the fall of 2016, the negotiations between Tower and the new owners of Atlantic broke down. Subsequently, Cone filed an action asserting a number of causes of action flowing from the dissolution of the business relationship between Atlantic and Tower. (Complaint, at APP. 052 – 087). In short, Cone alleges that Stewart breached his fiduciary duties to Tower by agreeing to replace the original Finder's Fee Agreement with the subsequent Consulting Agreement. Cone further alleges that Atlantic and/or Allstar aided and abetted the breach of fiduciary duty and/or conspired to harm Tower. Atlantic and Allstar have denied all allegations of wrongdoing.

Procedural Setting

After being served with the Complaint in the underlying action, Atlantic and Allstar filed a Motion to Stay and to Compel Arbitration in reliance on the arbitration provision contained in the Consulting Agreement. (Motion to Stay, at APP. 089 – 123) On July 11, 2017, this Court entered an Order Staying This Action and Compelling Arbitration in Part ("Order Compelling Arbitration") (APP. 125 – 132). Per the Order Compelling Arbitration, the underlying action was not dismissed, but was instead stayed such that an active case remained of record in the Richland County Court of Common Pleas. Cone and Tower sought reconsideration of the order and on August 2, 2017, Judge Hood denied the Motion for Reconsideration.

Following the Order Compelling Arbitration, AAA arbitration was commenced and was assigned to Arbitrator John Sherrill under AAA Case No: 01-17-0005-1287. In the course of discovery through the arbitration, Cone sought to compel production of 110 otherwise privileged

attorney-client communications between Atlantic and its legal counsel, Eric S. Bland ("Bland"), many of which involve the contracts which are the subject matter of the arbitration. Cone contended that the communications were discoverable under the crime / fraud exception to the attorney client privilege, even if Bland were an unwitting participant in the alleged fraudulent or criminal conduct by his clients.

The Motion to Compel was addressed to Arbitrator Sherrill. By Order dated April 16, 2018, Arbitrator Sherrill clarified that he was not considering any crime component of the crime / fraud exception to the attorney client privilege by stating in part: "... I have made the point that we are not looking at a potential crime in this situation." Through the same Order, Arbitrator Sherrill appointed a Special Referee, Hal Gray, to conduct an in-camera review of the 110 privileged documents for the purpose of determining whether they were discoverable.[1]

Allstar and Atlantic requested a full evidentiary hearing in order to present all of the facts and circumstances of the communications such that a proper context could be afforded for purposes of the review, but the request for a full hearing and/or oral argument before the Special Referee was denied. On May 3, 2018, in an unreasoned two-page decree,[2] Special Referee Gray ordered the invasion Allstar's and Atlantic's attorney client privilege and directed the production of numerous attorney-client privileged documents to the Plaintiff. The decree contained

[1] Prior to Arbitrator Sherrill's ruling, the Respondents requested that he wait to decide the issue of whether the attorney client privileged documents should be produced until there was a complete merits hearing with both sides having an opportunity to present their evidence. Respondents argued that making a preliminary finding of fraud without a full evidentiary presentation would be prejudicial to the Respondents even before the arbitration commenced. Respondents argued that the arbitrator who was both the finder of fact and finder of law would be unduly prejudiced by any finding prior to the arbitration that fraud was present. The arbitrator denied this request.

[2] Special Referee Gray failed to identify the subject matter(s) at issue which he deemed to implicate the fraud exception to the attorney client privilege. Is it to the entire action or only part, certain claims and not others?

inconsistencies with regard to the matters which were deemed privileged and those for which the privilege was deemed waived.

On May 7, 2018, Bland emailed Arbitrator Sherrill as follows:

> ... the Respondents will be taking a direct appeal from Special Referee Gray's May 3, 2018 order regarding the privileged documents at issue to the circuit court which on August 1, 2017 stayed the matter and compelled it into arbitration. Mr. Gray's order is deficient in a number of material respects which affects the substantial rights of the Respondents ...

On May 8, 2018, Arbitrator Sherrill responded to Bland's email in part as follows:

> ... As you know, in accordance with the arbitration agreement between the parties that "all claims, demands, disputes, controversies, differences or misunderstandings between the parties...shall be settled by arbitration," Judge Hood of the Circuit Court granted your clients' Motion and ordered this case to arbitration on July 10, 2017. **Therefore, until the court's referral order is rescinded or modified, this arbitration will proceed as set forth in the current Scheduling Order, including the final evidentiary hearing on June 11-15, with or without the participation of your clients**... [Emphasis Added].

On May 8, Sherrill went further and stated:

> ...if Defendants do not get relief from the stay by Wednesday May 16, 2008 "**I will order them produced as set forth in Mr. Gray's order (on Wednesday May 16th)**." [Emphasis Added].

After being informed of Allstar's and Atlantic's motion seeking a stay of the arbitration, however, Arbitrator Sherrill indicated that he would wait and see whether a hearing on the injunction is scheduled before proceeding further. Thereafter, Atlantic and Allstar filed a Motion to Lift Stay and to Stay Arbitration with the Richland County Clerk of Court. (Motion to Lift Stay, APP. 134 – 142). In their Motion to Lift Stay and Stay Arbitration, Atlantic and Allstar contended that the method by which the attorney client privilege was invaded through the arbitration was improper and that it impacted their substantial rights in a number of aspects such that an immediate appeal was available. In light of the indication from Arbitrator Sherrill that the arbitration would

proceed regardless of Atlantic and Allstar's intent to file an immediate appeal, Atlantic and Allstar also moved the Circuit Court to stay the arbitration pending the outcome of the appellate process.

On Wednesday, May 23, 2018, a hearing was conducted before the Honorable Robert E. Hood on the Motion to Lift Stay and Stay Arbitration. On Thursday, May 25, 2018, Judge Hood entered a Form 4 Order granting the relief requested and staying the arbitration. Per the Form 4 Order, a more formal order was to follow. (Form 4 Order APP. 144 – 146). Following the entry of the Form 4 Order, Atlantic and Allstar filed their Notice of Appeal, seeking to appeal the matters ruled upon in arbitration which impact both their attorney client privilege and their right to counsel of their own selection. In response to Judge Hood's Order, the Respondent filed a Petition for Writ of Mandamus with the South Carolina Supreme Court requesting an order directing Judge Hood to withdraw his Form 4 Order and further directing Judge Hood to deny the relief requested by Atlantic and Allstar. On June 11, 2018, the Respondents received a copy of the order entered by the South Carolina Court of Appeals dated June 8, 2018, Atlantic and Allstar's appeal on the grounds that the matter was not immediately appealable. On June 12, 2018, Judge Hood entered a formal Order Lifting Stay and Staying Arbitration. (Order Lifting Stay and Staying Arbitration, APP. 148 – 157).

Argument

The decree entered by Special Referee Gray on May 3, 2018, directing the invasion of the attorney client privilege is immediately appealable. In accordance with Section 15-48-200 of the South Carolina Uniform Arbitration Act, appeals may be taken not simply from "awards," but also from any "judgment or decree" entered in arbitration. If the legislature had intended in the adoption of the South Carolina Uniform Arbitration Act to limit appeals to "final awards" entered in arbitration, it would have said so. Instead, the Act refers to appellate rights arising out of

"awards" and "decrees" and judgments." The same code section makes it clear that such appeals are to be taken "**in the manner and to the same extent as from orders or judgments in a civil action**." [Emphasis Added].

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Miller v. Aiken,* 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); *Carolina Power & Light Co. v. City of Bennettsville,* 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); *Jones v. State Farm Mut. Auto. Ins. Co.,* 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct.App.2005). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.,* 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm'n,* 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *see also City of Camden v. Brassell,* 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Bayle v. S.C. Dep't of Transp.,* 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct.App.2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Durham v. United Cos. Fin. Corp.,* 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.,* 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep't of Health & Envtl. Control,* 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct.App.2002); *see also Timmons v. S.C. Tricentennial Comm'n,* 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language).

Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Vaughn v. Bernhardt,* 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001); *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *Bayle,* 344 S.C. at 122, 542 S.E.2d at 739. *See also Shealy v. Doe,* 370 S.C. 194, 199–200, 634 S.E.2d 45, 48 (Ct.App.2006).

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. *Morgan,* 352 S.C. at 367, 574 S.E.2d at 207; *see also Wade v. Berkeley County,* 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; *Brassell,* 326 S.C. at 561, 486 S.E.2d at 495; *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck,* 330 S.C. 371, 376, 498 S.E.2d 894, 896 (Ct.App.1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins,* 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); *Adams v. Texfi Indus.,* 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); *Brassell,* 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund,* 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct.App.2005); *see also Georgia–Carolina Bail Bonds,* 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the **statute**."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended

by the legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt,* 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Kiriakides v. United Artist Commc'ns, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. *See Liberty Mut. Ins. Co.,* 363 S.C. at 622, 611 S.E.2d at 302; *see also Mid–State Auto Auction v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

When interpreting a statute, courts must presume the legislature did not intend to do a futile act. *Proctor v. Dep't of Health and Envtl. Control,* 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct.App.2006). The legislature is presumed to intend that its statutes accomplish something. *State v. Long,* 363 S.C. 360, 364, 610 S.E.2d 809, 812 (2005). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." *Matter of Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. ***Statutes*** § 346). *See also Pike v. S.C. Dep't of Transp.,* 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct.App.1998), *aff'd as modified,* 343 S.C. 224, 540 S.E.2d 87 (2000).

Applying these fundamental rules of construction, it is very apparent from the plain language of the statute that the South Carolina Uniform Arbitration Act does not limit the right of appeal to final awards or final judgments. Furthermore, the Act does not grant license to arbitrators to violate fundamental rights and/or to ignore the due process to which litigants are entitled and to do so without any means of recourse to the participants. To find that it does is to render superfluous the language that makes it clear that appeals are to be taken "in the manner and to the same extent as from orders or judgments in a civil action." Therefore, the issue for Judge Hood's consideration

in issuing his Order Lifting Stay and Staying Arbitration was whether the Special Referee's decree would be immediately appealable had it been entered in a civil action. Based on solid law, Judge Hood found that it would be immediately appealable and he was right.

Pursuant to South Carolina Code Section 14-3-330(3), the Supreme Court has appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal "a final order affecting a substantial right made in any special proceedings." In Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005), our Court held that an order granting a motion to disqualify a party's attorney in a civil action affects a substantial right and is immediately appealable. While the Petitioner here contends that he does not seek to disqualify Bland, the issue was whether an order invading the privilege enjoyed between Bland, Allstar and Atlantic "affects" a substantial right of Allstar and Atlantic. Allstar and Atlantic's right to be represented by their preferred counsel, Bland, is a substantial right and that right was clearly impacted by a decision to invade the privilege. Will Allstar and Atlantic be forced to call Bland as a witness? Will Bland's ability to represent be curtailed or limited if he is forced to become a witness? Has the invasion of the privilege made Bland a necessary witness to the proceedings? None of these considerations were present before the arbitration order invading privilege. All of these considerations were present afterwards and each has the potential to impact the right of Allstar and Atlantic to choose its preferred legal counsel. It is not necessary that the Respondent seek to disqualify Bland in order for the Special Referee's decree to have "affected" the right of Allstar and Atlantic to select counsel of their choosing. Clearly, the right was affected.

Allstar and Atlantic further argued to Judge Hood (and he apparently agreed) that the attorney client privilege itself is a substantial right and that the invasion of that right is immediately appealable in the present case because the method used in the arbitration to invade the privilege

denied Allstar and Atlantic of certain procedural safeguards to which they were entitled. In Tucker v. Honda of South Carolina Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003), an appeal was taken from an order compelling a witness to answer questions which may involve the attorney client privilege. The appellant contended in part that the order was immediately appealable because it affected the attorney client privilege and thereby must also impact the merits of the case. In rejecting the argument, the Court held:

> In addressing the Tuckers' first contention, we note an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. *See Ex parte Whetstone,* 289 S.C. 580, 347 S.E.2d 881 (1986). Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a ****407** party in contempt. *See Hooper v. Rockwell,* 334 S.C. 281, 513 S.E.2d 358 (1999). Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal. *See Ex parte Whetstone, supra.*
>
> Pee Dee has not refused to comply with the order but appeals the mere issuance of the order. Pee Dee's appeal is interlocutory

Thus, in Tucker the procedural safeguard was the ability of the party being compelled to reveal allegedly privileged communication to refuse to comply and to allow the matter to mature to a finding of contempt which would then become immediately appealable. The Tucker decision is in accord with the United States Supreme Court in Mohawk Industries v. Carpenter, 130 S.Ct. 599 (2009). In addressing the issue of whether an order invading the attorney client privilege represents a substantial right so as to be immediately appealable, the Supreme Court held in part that the matter is not immediately appealable given the other procedural safeguards that are available:

> Moreover, litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of immediate review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal involving "a controlling question of law" the prompt resolution of which "may materially advance the ultimate termination of the litigation." § 1292(b). Second, in extraordinary circumstances where a disclosure order works a manifest injustice, a party may petition the court of appeals for a writ of mandamus. *Cheney v. United States Dist. Court for D. C.,* 542 U.S.

> 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459. Another option is for a party to defy a disclosure order and incur court-imposed sanctions that, *e.g.*, "direc[t] that the matters embraced in the order or other designated facts be taken as established," "prohibi[t] the disobedient party from supporting or opposing designated claims or defenses," or "strik[e] pleadings in whole or in part." Fed. Rule Civ. Proc. 37(b)(2). Alternatively, when the circumstances warrant, a district court may issue a contempt order against a noncomplying party, who can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment. See, *e.g., Church of Scientology of Cal. v. United States,* 506 U.S. 9, 18, n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313. These established appellate review mechanisms not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship.

No such safeguards are available to Allstar and Atlantic given the manner in which the privilege was invaded in the present case. Given the lack of procedural safeguards and the expressed intention to proceed with the arbitration, the imposition of an injunction in order to permit Allstar and Atlantic to appeal the decree of the Special Referee was the only appropriate means of protecting the interests of all parties pending the outcome of the appellate process. The decision to invade privilege clearly impacted substantial rights of the Appellants. The matter is immediately appealable.

Conclusion

Orders directing the invasion of the attorney client privilege affect substantial rights and are immediately appealable. The South Carolina Uniform Arbitration Act makes orders entered in arbitration appealable "**in the manner and to the same extent as from orders or judgments in a civil action**." As such, an order entered in arbitration which directs the invasion of the attorney client privilege is immediately appealable.

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{SIGNATURE PAGE TO FOLLOW}

September 10, 2018

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal, Atlanta, Georgia

John Sherrill, Arbitrator

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Of Whom Atlantic Intermediaries, LLC and Allstar Financial Group, Inc., are the Petitioners.

PROOF OF SERVICE

I certify that I have served upon Respondents via Counsel of Record and American Arbitration Association via Arbitrator the Petition for Writ of Certiorari and Appendix by depositing copies of it in the U.S. Mail, postage prepaid, on September 10, 2018.

September 10, 2018

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September 10, 2018

VIA FEDERAL EXPRESS
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
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Columbia, SC 29201

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

Dear Ms. Kitchings:

Enclosed for filing is an original and two (2) copies of a revised Petition for Writ of Certiorari being simultaneously filed with the Supreme Court in connection with the above-referenced matter. Please file the documents and return a clocked copy to me.

Thanking you for your assistance with this matter, I am

Very truly yours,

s/ Ronald Richter

Ronald L. Richer, Jr.

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