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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal, Atlanta, Georgia

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

Madison Cone, individually and on behalf of 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

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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Introduction

This dispute is about a discovery order, which requires Petitioners Atlantic Intermediaries, LLC and Allstar Financial Group, Inc ("Petitioners") to turn over emails (for which they claim privilege) that a special arbitrator found were not protected by the attorney-client privilege, in part due to the crime-fraud exception. Petitioners seek review of the Court of Appeals' decision that a discovery order, even one implicating the attorney client privilege, is not immediately appealable. This issue does not merit review by this Court. *See* Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). There is no novel question of law; the decision in the Court of Appeals was unanimous; there is no conflict with any of this Court's decisions with respect to the issues raised by Petitioners; and there are no substantial constitutional issues or federal questions. *See id.*

The Court of Appeals relied on well-established South Carolina law to conclude that a discovery order is not immediately appealable. It summarily denied Petitioners' appeal and their petition for rehearing. The law in this State is clear on the fact that discovery orders are not immediately appealable. Also, the law in the State is clear that arbitration of disputes is highly favored and that courts are not to be used to relitigate arbitration disputes. This matter should never have been brought out of arbitration. It is a simple discovery order. Petitioners are not deserving of this Court's review. *See* Rule 242(b), SCACR. Therefore, the Petition for Writ of Certiorari should be denied.

Counter-Statement of Questions Presented

I. **Did the Court of Appeals correctly rely on well-established law to dismiss Petitioners' appeal because discovery orders, even those implicating the attorney-client privilege, are not immediately appealable?**

Counter-Statement of the Case

This matter is before this Court because the Petitioners are faced with having to produce purportedly privileged documents because a special arbitrator found these documents to be discoverable either under the crime-fraud exception or simply because certain documents were not privileged documents. (App. 171-178; *see also* App. 180-188.) In the Report and Order, the special arbitrator ordered that the documents be produced to Respondent within five days – May 8, 2018, which was approximately one month before the arbitration hearing, scheduled to begin on June 11, 2018. (*Id.; see also* App. 190-196.) Instead of producing the documents, Petitioners ran to the circuit court to seek refuge.

This tactic was extraordinary because it was Petitioners, who forced Respondent out of the circuit court. Over the vociferous objection of Respondent, the circuit court compelled Respondent's claims against Petitioners to arbitration. (*See* App. 198-205 & 207-211.) In the circuit court's Order denying the Rule 59(e) motion, the circuit court held as follows:

> I find and conclude that as a matter of law, South Carolina has a strong public policy which favors arbitration. See Bazzel v. Green Tree Financial Corp., 351 S.C. 244, 569 S.E.2d 349 (2002) and ***the arbitration provision at issue in this matter is comprehensive in its language*** and properly encompasses all disputes concerning the relationship of the parties or any other kind and ***most specifically applies to the disputes that are at issue in this matter.***
>
> ***
>
> Once again, I hereby find and order that Plaintiff's claims asserted in the Complaint against Allstar and Atlantic ***must be arbitrated to finality*** and be binding on the parties in accordance with the terms set forth in the arbitration provision contained in the January 31, 2014 Consulting Agreement and as such ***the within action is stayed pending the final arbitration decision***.

(App. 210-211 (emphasis added).)

Despite the circuit court's holding, Petitioners filed with the circuit court a motion to lift the stay and for injunctive relief on May 14, 2018 – 6 days after they were to produce the privileged material. (App. 213-267.) Petitioners used this motion as an avenue to appeal the special arbitrator's order, requiring them to produce the privileged material.[1] The circuit court erroneously granted Petitioners' motion. (App. 278-279 & 282-291.) Respondent has petitioned the South Carolina Supreme Court to issue a writ of mandamus to the circuit court requiring it to vacate these its Form 4 and written order because they are clearly erroneous. (App. 293-379.)

Recognizing that the special arbitrator's order is nothing more than a discovery order, Petitioners contend that his order involves a substantial right because it involves the attorney client privilege. (Pet. at 10-12.) Petitioners make this illogical leap by concluding that an order disqualifying a party's attorney involves a substantial right, and that because the attorney-client privilege may be invaded, disqualification may be an issue.[2] (*Id.*) However, Respondent has

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[1] Petitioners portray the arbitrator and the special arbitrator as flawed, unsophisticated arbitrators. (Pet. at 3-6.) This is far from the truth. Arbitrator John Sherrill has served as an arbitrator in over 200 cases since 1986 and was selected to serve on AAA Panel of Arbitrators for the U.S. Olympic Committee athlete disputes for Nagano Olympic Games in 1998 and Atlanta, Sydney, and Athens Summer Games for 1996, 2000, and 2004. (App. 269-271.) Similarly, Special Arbitrator Herbert Gray has a substantial resume, noting his service as an arbitrator in over 200 arbitrations and chair of the State Bar of Georgia's Dispute Resolution Section. (App. 273-276.) These gentlemen are not strangers to arbitration or litigation.

[2] Petitioners claim the special arbitrator's order caused their right to select counsel of their choosing to be challenged. This is patently incorrect. Petitioners state "[i]t 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." (Pet. at 10.) The "right" was not "affected" for first time by Special Arbitrator Gray's order; it was "affected" when Petitioners retained their corporate counsel – Eric Bland – to defend them in the present matter. Moreover, the circuit court acknowledged that Mr. Bland had this issue from the beginning of the case. At the hearing on the motion to lift the stay, the circuit court stated as follows:

maintained that he is not going to seek the disqualification of Petitioners' counsel. No matter how Petitioners try to dress the special arbitrator's order, it is a discovery order. A rose is a rose is a rose.

Argument

I. DISCOVERY ORDERS ARE NOT IMMEDIATELY APPEALABLE.

Petitioners are trying to appeal a discovery order that forces them to produce materials which they claim are privileged. This discovery order is not immediately appealable. Section 14-3-330 of the South Carolina Code sets forth the scope of this Court's appellate jurisdiction which does not include "[d]iscovery orders [because they] are interlocutory and are not immediately appealable." *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *see also Lowndes Prods., Inc. v. Brower*, 262 S.C. 431, 433, 205 S.E.2d 184, 184-85 (1974) (holding a discovery order was not directly appealable because it is an intermediate or interlocutory decision not appealable before a final judgment). This is true even when the discovery order directly involves the attorney-client privilege. "An order compelling discovery is not immediately appealable even if it is challenged as violating the attorney-client privilege." *Wieters v. Bon Secours-St. Francis Xavier Hosp., Inc.*, 381 S.C. 332, 333, 673 S.E.2d 417, 418 (2009). If there is not an appeal from a circuit court order compelling discovery, there is clearly no appeal from a

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> [T]he idea that Mr. Bland is potentially a witness in this case was not lost on me in hearing number one [hearing on motion to compel arbitration]. I mean, I don't know how that has come as a surprise or a shock to anybody in the room or anyone involved in the case. I mean, just based upon what I heard in the original hearing, I was thinking to myself, you know, Mr. Bland is probably a witness in this thing. He, you know, was a corporation's lawyer and was putting all these documents together. And so, I just don't know how that comes as a shock . . . .

(App. 431:22 – 432:7.) Petitioners cannot say that their "right" to have Eric Bland represent them in this matter was first impacted by Gray's order.

similar order by an arbitrator after the circuit court divested itself of jurisdiction by compelling arbitration and issuing a stay "***pending the final arbitration decision***." (App. 211 (emphasis added).)

Petitioners argue this Court should ignore this well-established precedent because the discovery order affects their purported substantial right to have counsel of their own choosing[3] and the order invades their attorney-client privilege. As discussed above, *Wieters* guts this argument. However, Petitioners persist with their illogical argument by saying they are being denied procedural safeguards outlined in *Tucker v. Honda of South Carolina Manufacturing, Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003). (Pet. at 10-11.) Petitioners claim they are denied the ability to be cited for contempt for failing to comply with the discovery order and then having an avenue to appeal the contempt order. They also cite to *Mohawk Industries v. Carpenter*, 130 S. Ct. 599 (2009) to claim they should have the same procedural safeguards afforded to those in the court system. (*Id.* at 11-12.)

But Petitioners forget they are not in the court system. They are in arbitration, which has no right to an appeal. They voluntarily relinquished the safeguards discussed in *Tucker* and *Mohawk Industries*. They drafted the Consulting Agreement with the arbitration provision. They sought the arbitration to finality, over the objection of Respondent. They voluntarily complied with and did not otherwise challenge Arbitrator Sherrill's ruling that they turn over documents (over which they asserted the attorney-client privilege and work product doctrine) to Special

[3] Petitioners are correct that an order granting a motion to disqualify counsel is immediately appealable under *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). But there will be no such order in this case, as Respondent has stated and represented to the court that he will not seek to disqualify Eric Bland. Petitioners' argument about disqualification of counsel is a red herring. Moreover, the potential for Mr. Bland to be a possible witness has been present since the first day of this case.

Arbitrator Gray for an *in camera* inspection. When Special Arbitrator Gray found the crime-fraud exception applied, Petitioners sought to have the issue revisited by requesting the circuit court enjoin the arbitration to allow them to appeal Gray's discovery order. Petitioners seek to challenge the merits of Special Arbitrator Gray's interlocutory ruling without providing the circuit court, the Court of Appeals, or this Court with the very documents which were reviewed and led to the ruling. They seek a second bite at the apple, while handcuffing the decision-maker by withholding the evidence of their alleged fraud. Regardless, Petitioners cannot appeal a discovery order, no matter how they dress it up.

II. PETITIONERS CANNOT USE THE COURT SYSTEM TO AVOID THE DISCOVERY ORDER AND ARBITRATION.

South Carolina's well-established law provides that a discovery order is not immediately appealable. Petitioners must know this tenet. They cannot avoid *Wieters*' holding that a discovery order that purportedly violates or implicates that attorney-client privilege is not immediately appealable. In fact, they concede that *Tucker v. Honda of South Carolina Manufacturing Inc.* – the lynchpin of their argument – also explicitly rejected the argument that a discovery order was immediately appealable because it affected the attorney-client privilege. (Pet. at 11.) The *Tucker* Court did hold that parties can refuse to comply with the discovery order, be held in contempt, and then appeal the contempt order, but the Petitioners have waived any right to appeal by enforcing the arbitration provision they drafted.

This appeal is nothing more than an effort to delay the arbitration that was proceeding efficiently. After the Court of Appeals dismissed Petitioners' appeal, Petitioners informed the arbitrator they are going to seek reconsideration, and "[i]f that fails, ***[Petitioners] will seek a writ of certiorari with the SC Supreme Court and beyond*** . . . ." (App. 219 (emphasis added).) Petitioners have declared they will fight this discovery issue presumably to the United States

Supreme Court in total disregard of the deference of South Carolina and the federal courts to the objectives of arbitration. Petitioners have declared they will not proceed with the arbitration unless ordered to do so, despite comprehensive orders from the circuit court that all claims, including any discovery issues, must be arbitrated to finality.

Last month, the Court of Appeals warned of this behavior in *Group III Management Inc. v. Suncrete of Carolina, Inc.*, No. 2015-002584, 2018 WL 4472652 (S.C. Ct. App. Sept. 19, 2018). Noting that "this policy favoring the arbitration of disputes is . . . well established in South Carolina" and federal law, the Court of Appeals stated "[t]he fundamental premise upon which this policy is grounded is the laudable goal of providing 'a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.'" *Group III Mgmt. Inc.* at *2 (quoting *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985)). Importantly, "'[t]he primary function of arbitration is to serve as a substitute for and not a prelude to litigation.'" *Id.*

The Court of Appeals continues with providing "'the scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . . .'" *Id.* (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007)). "'The widely recognized policy to encourage the use of arbitration requires this limited scope of judicial review.'" *Id.* (quoting *UBS Fin. Servs., Inc. v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016)). "'A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation.'" *Id.* (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994)). "'Indeed, '[b]road judicial review on the merits would render resort to arbitration wasteful and superfluous . . . .'" *Id.* (quoting *Trident Tech. Coll.*, 286 S.C. at 105, 333 S.E.2d at 785 (alterations

in original)). "'***[C]ourts defer to the arbitral panel*** both on the merits of the final decision and ***on procedural questions*** that 'grow out of the dispute,' even where those questions 'bear on its final disposition." *Id.* at *3 (quoting *UBS Fin. Servs., Inc.*, 842 F.3d at 339 (emphasis added) (alterations in original)). "'Otherwise, an arbitration award would signify 'the *commencement*, not the end, of litigation." *Id.* (quoting *Trident Tech Coll.*, 286 S.C. at 111, 333 S.E.2d at 789 (emphasis in original)).

Petitioners are engaging in this course that *Group III Management Inc.* preaches against. Petitioners were ordered to produce the emails to Respondent on May 8, 2018, and the parties were to arbitrate the case on June 11, 2018. (App. 171-178 & 190-196.) It has been nearly five months since Petitioners should have produced the withheld documents and four months since the parties were scheduled to arbitrate this matter. Rather, Petitioners have subjected the parties to "prolonged litigation" – the very situation the Court of Appeals cautioned against. This is true even when the judicial scope of review of an arbitrator's decision is "among the narrowest known at law[.]" *Group III Mgmt. Inc.* at *2. Arbitration is being frustrated in direct contravention of the federal and state policies favoring it.

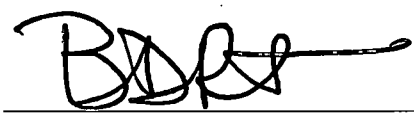
Conclusion.

Petitioners do not want to produce the ordered emails and documents, and they are improperly using the court system as a shield to protect them. They forced the parties into arbitration, and now they are scurrying to get out of it. Respectfully, this behavior should not receive this Court's imprimatur. Similarly, the circuit court's order allowing the Petitioners back into the state court system should not receive this Court's imprimatur.

The Court of Appeals decided Petitioners' appeal on well-established principles of South Carolina law. No novel questions of law, federal questions, or substantial constitutional questions

are involved, and there is no decision of the Court of Appeals in conflict with a prior decision of this Court. On the other hand, the circuit court issued its order without any support in federal or state law and in direct contravention of its previous order, requiring the parties to arbitrate to finality. For these reasons and the reasons set forth herein and in the Petition for Writ of Mandamus, this Court should deny the Petition for Writ of Certiorari and grant the Petition for Writ of Mandamus.

SOWELL & DuRANT, LLC

By: 

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PROOF OF SERVICE

I certify that I have caused the service of the **Return To Petition For Writ Of Certiorari** on the Petitioners and additional interested parties by depositing a copy of it in the United States Mail, postage prepaid, on October 1, 2018, addressed as follows:

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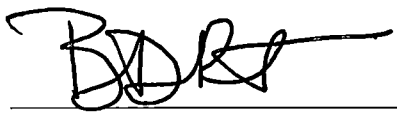

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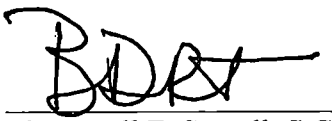

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