THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2018-000171

Cleo Sanders .....Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson, and Patrick Bachrodt, Jr. .....Defendants

Of whom,
Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the ..... Appellants

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BRIEF OF RESPONDENT

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2. A judge who has orally ruled on one issue before an Order on a different issue is appealed does not lose jurisdiction to perform the ministerial act of filing a written order regarding his oral ruling. Judge Nicholson orally ruled on Sanders' motion to compel discovery responses. Appellants appealed Judge Nicholson's Order denying their arbitration motion before he filed his formal Order regarding Sanders' motion. Did Judge Nicholson lose jurisdiction to file his discovery Order?

3. Discovery orders are interlocutory and not immediately appealable. Sanders' case has not concluded. Is Appellants' appeal of Judge Nicholson's discovery Order ripe?

4. An appellant must raise and receive a ruling on an issue before that issue may be presented to the appellate court. Appellants did not raise and obtain rulings on a number of issues discussed in their appeal. Should Appellants be allowed to present their unpreserved claims to the appellate court?

PRELIMINARY STATEMENT

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram is a new and used car dealership that does business in Charleston, SC selling thousands of cars each year. Savannah Highway also extends credit to consumers so consumers can buy the cars on its lot. As part of this process, Savannah Highway uses a credit application to obtain a consumer's credit report. The information on the credit application is supposed to be supplied by the consumer; however, the form is completed by a Savannah Highway employee. The credit application is shared with other financial institutions. Based on the information supplied, these other financial institutions decide whether to purchase the contract, which includes a retail installment sales contract (RISC), from Savannah Highway.

Savannah Highway sold a 2012 Dodge Charger RT to Cleo Sanders for approximately $30,000. Sanders told Savannah Highway's employee that he had been hurt and was making less money than normal. Savannah Highway's employee, nonetheless, stated on the credit application that Sanders' income was greater than he was actually making. Santander, based on the information from Savannah Highway, agreed to buy Savannah Highway's interest in the contract. Savannah Highway then sold and assigned all of its rights in the contract to Santander. Sanders began paying Santander.

Sanders could not afford the car which has been repossessed by Santander.

Sanders brought suit against Savannah Highway. Savannah Highway sought to impose an obligation to arbitrate disputes upon Sanders even though Savannah Highway had sold all of its interest in the Parties' contract to Santander. The Honorable J. C. Nicholson, Jr. ruled that a contract to arbitrate did not exist between Sanders and Savannah Highway as Savannah Highway had assigned those rights to Santander.

Therefore, Savannah Highway could not compel Sanders to arbitrate this dispute.

Before he issued his formal arbitration Order, Judge Nicholson heard Sanders' Motion to Compel discovery responses. Judge Nicholson orally ordered Savannah Highway to respond to Sanders' discovery. Before Judge Nicholson could file his formal Order regarding discovery, Savannah Highway and White appealed Judge Nicholson's arbitration Order. Appellants then appealed Judge Nicholson's written discovery Order filed after this appeal began.

This appeal deals with three very basic rules of contract, judicial administration, and discovery.

The main issue is whether a contractual right to compel arbitration existed after Appellants voluntarily and unconditionally assigned all of their contract rights to a third party, Santander. Sanders contended an agreement to arbitrate did not exist between the Parties since Appellants assigned those rights to Santander. Thus, without a written agreement to arbitrate, Appellants do not have the right to require Sanders to arbitrate disputes between them. Judge Nicholson agreed.

A secondary issue is whether Judge Nicholson retained jurisdiction to perform the ministerial act of filing a formal Order after Appellants appealed. Judge Nicholson orally ordered Appellants to respond to Sanders' discovery. Before he could submit his written Order, Appellants appealed his arbitration Order. Judge Nicholson should be allowed to perform the ministerial act of filing his Order even though Appellants had appealed a different Order.

Appellants' third issue claims Judge Nicholson's discovery Order contains errors of law. The appeal of his discovery Order is interlocutory and, therefore, not ripe.

Appellants also argue issues that were not preserved.

STATEMENT OF THE CASE

This appeal involves two Circuit Court orders. The first Order denied Appellants'[1] motion to compel arbitration finding Appellants assigned all of their rights to compel arbitration to Santander[2]. The second Order orders Appellants to respond to Sanders' discovery.

On May 1, 2017, Sanders filed his complaint. (R. p. 38)[3] On May 10, 2017, Appellants and Santander Consumer USA Holdings, Inc. were served with the Summons and Complaint. Appellants requested and were granted an extension of time to file their answer pursuant to Rule 6 SCRCP. (R. p. 122) On July 12, 2017, Appellants filed their answer. (R. p. 54) Santander, represented by McGuire Woods LLP, filed its Answer July 20, 2017. (R. p. 66)

On July 21, 2017, Sanders served discovery on Appellants. (R. pp. 155-171) On August 16, 2017, Appellants requested a 30 day extension to respond to Sanders' discovery, again pursuant to Rule 6 SCRCP. (R. p. 173) Appellants' counsel agreed to respond to Sanders' discovery by September 8. (R. p. 172) On September 7, 2017, Appellants filed their motion to compel arbitration. (R. p. 91)

On November 16, 2017, the Honorable J.C. Nicholson heard Appellants' motion to

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[1] Sanders refers to Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram as Savannah Highway. Appellants refer to the same entity as Rick Hendrick.

[2] Santander Consumer USA Holdings, Inc. was a named Defendant. It is actually a holding company that does not finance automobile loans such at the one in this litigation. Santander Consumer USA, Inc. buys such loans and would have been the correct Defendant. (R. p. 66) Chrysler Capital is a program of Chrysler Group LLC and Santander Consumer USA - a unit of Banco Santander.

[3] All record references are to the Amended Record on Appeal filed February 14, 2019.

compel arbitration. (R. pp. 3-23.) Savannah Highway, however, had not filed the required affidavit authenticating the contract. At the conclusion of the hearing, the Court allowed Savannah Highway to "prepare an affidavit regarding the authenticity of the retail sales agreement and Plaintiff may address the case law presented at the hearing and any applicable exceptions to compelling arbitration". (R. p. 23:11-24; . R. p. 78) Nothing else was permitted by Judge Nicholson.

On December 4, 2017, Sanders filed his supplemental memorandum opposing Appellants' motion to compel arbitration. (R. pp. 142-149) and Appellants filed their supplemental memorandum. (R. pp. 124-138)

On January 9, 2018, Gallivan, White & Boyd, Appellants' counsel, took over the defense of Santander. (R. p. 75) Also on January 9, Judge Nicholson heard and ruled on Sanders' motion to compel discovery. Judge Nicholson orally ordered Appellants to respond to Sanders' discovery within thirty days. (R. p. 29:20) Judge Nicholson also granted Sanders' oral motion to dismiss Santander Consumer USA Holdings, Inc. as a defendant. (R. pp. 32:25-33:2.) Judge Nicholson instructed Appellants' counsel to draft an Order regarding his ruling compelling Appellants to respond to Sanders' discovery. (R. p. 29:20-24.)

On January 10, Judge Nicholson filed his formal Order denying Appellants' Motion to Compel Arbitration. (R. pp. 84-86) His denial was based on Appellants' assignment of all their contractual interests, including the right to compel arbitration, to Santander.

On January 18, Judge Nicholson's Form 4 Order was filed dismissing Santander as a party. (R. p. 79) Appellants did not file a Motion for Reconsideration under Rule 59 SCRCP.

On February 6, 2018, Appellants filed their Notice of Appeal regarding Judge Nicholson's January 10 Order. (R. pp. 178-182)

On February 20, 2018, the Clerk of Court filed Judge Nicholson's formal Order recording his January 9 ruling ordering Appellants to respond to Sanders' discovery. (R. pp. 88-89)

On March 21, 2018, Appellants filed their Notice of Appeal regarding Judge Nicholson's February 20 Order compelling discovery. (R. pp. 186-190)

STATEMENT OF THE FACTS

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram sells cars in Charleston. (R. p. 39). As part of the sale, Savannah Highway extends credit to car buyers. Savannah Highway then sells the contract to financial institutions such as Santander Consumer USA, Inc. (R. pp. 44-45 ¶¶ 43-46.)

Around 2012, Appellant Savannah Highway and its employees were recognized by Chrysler as being one of Chrysler's top dealerships in the country. (R. p. 40 ¶9). As a result of Savannah Highway's status, Chrysler Capital offered Savannah Highway incentive money should Savannah Highway meet certain sales quotas. (R. p. 41 ¶11). Savannah Highway's employees devised a scheme to meet Chrysler Capital's sales quotas by falsifying information in purchasers' contracts, such as cars being traded in, the values of traded in vehicles, and consumer's income. (R. p. 41 ¶¶ 12, 13, 14). Savannah Highway's management knew about and sanctioned this scheme. (R. pp. 41-42 ¶¶ 15 and 16). Sanders was one of the consumers caught up in this scheme. (R. pp. 44-45). Sanders informed Appellants he was on disability and his income was reduced. Appellants nonetheless put his pre-injury income on the credit application so Santander would purchase the contract. (R. p. 43 ¶¶ 26-27) Because of Savannah Highway's misrepresentation of Sanders' income, Sanders was sold a vehicle which he could not afford. The car was repossessed by Santander in January 2017. (R. p. 45 ¶46-52)

As is typical in a car sale at a dealership, the contract prepared by Savannah Highway included multiple documents. (R. p. 44 ¶ 42.) One of the documents in the Parties' contract is identified as the retail installment sales contract (RISC). (R. p. 44 ¶¶

39 and 40.) The RISC is on the front and back of an abnormally long piece of paper. On the front of the RISC, just below the Parties' signature lines, is an assignment agreement which states "Seller assigns its interest in this contract to Santander Consumer USA (Assignee) under the terms of Seller's agreement(s) with Assignee". Below that agreement is a box marked "Assigned without recourse" and Savannah Highway's employee's signature. (R. pp. 109; 136) The arbitration clause in this contract is in small font on the backside and at the bottom of the RISC. (R. pp. 112; 138)

SUMMARY OF ARGUMENT

The United States Supreme Court has ruled that whether a contract to arbitrate exists is determined by State contract law, that it is for the Court to decide if an agreement to arbitrate exists, and that the Court decides if the issues are within the scope of the arbitration clause. Judge Nicholson correctly ruled that Appellants assigned their rights as permitted under the contract. He further found Appellants did not retain any rights under the contract. Appellants have admitted same. Judge Nicholson correctly ruled that a contract to arbitrate does not exist between Sanders and Appellants. Thus, Sanders cannot be compelled to arbitrate the issues in this case.

Before Judge Nicholson filed his formal arbitration Order, he heard Sanders' motion to compel discovery responses. From the bench, he ordered Appellants to respond to Sanders' discovery within 30 days. Shortly thereafter, Appellants filed their appeal of his arbitration Order. Judge Nicholson then submitted his discovery Order to the Clerk of Court who completed the ministerial act of filing the formal discovery Order. Appellants then appealed the discovery Order. Appellants have not provided any discovery responses ordered to be produced nor has Sanders moved to enforce Judge Nicholson's Order. Allowing the Order to be filed is appropriate as it allows the court to resolve issues and maintain control of the Court's file and docket. Otherwise, large amounts of time could pass without resolution of the issues, judges could forget their decisions, judges could no longer be on the bench causing motions to have to be reheard, wasting the Court's resources, and clerks would have to keep motions on their books open giving the impression that matters are not being timely resolved.

The appeal of an interlocutory discovery Order should be dismissed as not ripe. "An

appeal ordinarily may be pursued only after a party has obtained a final judgment." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); S.C. Code Ann. § 14-3-330 (1976). A discovery Order does not normally end a case. Therefore, it is not immediately, appealable. The discovery Order in this case does not resolve the issues between the Parties. Thus, Appellants' appeal of the discovery Order is premature and should be dismissed.

"An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 300 S.C. 71, 76, 497S.E.2d 731, 733 (1998). Appellants raise a number of issues which they did not raise or upon which Judge Nicholson did not rule. These issues include, but are not limited to, whether 1) "standing" is a contractual defense that may invalidate an otherwise valid arbitration agreement, 2) standing and jurisdictional issues are questions of scope that must be arbitrated, 3) arbitrating arbitrability requires this matter to be sent to an arbitrator, 4) the arbitration clause is ambiguous requiring the issue to be decided by an arbitrator, and 5) the court had jurisdiction to issue its Order regarding Sanders' motion to compel discovery responses. These issues should be ignored by the appellate court.

ARGUMENT

1. Once a party voluntarily and unconditionally assigns its contract rights to another, that party loses its right to enforce the assigned terms. Savannah Highway voluntarily and unconditionally assigned all of its contract rights with Sanders to Santander. Can Appellants now enforce against Sanders contractual rights they no longer have?

A. Standard of Review

An action to construe a contract is an action at law. Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an

action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." Stanley v. Atl. Title Ins. Co., 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008). Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009). However, "[a] reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004). Silver v. Aabstract Pools & Spas, Inc., 658 S.E.2d 539, 376 S.C. 585 (Ct. App. 2008).

B. Basic South Carolina law regarding contract construction.

Judge Nicholson ruled the Federal Arbitration Act (FAA) applied to this dispute. (R. p. 6:24-25.) The FAA instructs courts to refer to principles of applicable state law when determining the existence of an agreement to arbitrate. See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 475, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); First Options of Chicago v. Kaplan, 514 U.S. 938, 943 (1995) (State law governing the formation of contracts, not the F.A.A., determines whether a valid arbitration agreement exists between parties); Munoz v. Green Tree Fin. Corp., 343 SC 531, 542 SE2d 360 (2001) (General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause).

The Parties are bound by the four corners of their contract. Courts must give effect to the intent of the parties. Silver v. Aabstract Pools & Spas, Inc., 658 S.E.2d 539, 376 S.C. 585 (Ct. App. 2008). "The intention of the parties and the meaning, which are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that

expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945); see also ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ('It is not the function of the court to rewrite contracts for parties.'). 'Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.' Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)." Park Regency, LLC v. R&D Dev. of the Carolinas, LLC, 402 S.C. 401, 741 S.E.2d 528 (Ct. App. 2012).

Where documents are unambiguous, the court should not entertain any statements regarding the terms of those documents which vary their otherwise clear meaning nor should it concern itself with the fairness of the result required by the terms of the contract. The Callawassie Island Members Club, Inc. v. Dennis, Opinion No. 27835 (S.C. Sup. Ct. filed August 29, 2018).

"It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

"An assignment is the act of transferring to another all or part of one's property, interest, or rights. Black's Law Dictionary 119 (6th ed. 1992). It includes transfers of all kinds of property, including negotiable instruments. Id. The assignment of an account involves the transfer to the assignee the right to have money, when collected, applied to the payment of his debt. Id. The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights

to causes of action. 5 S.C. Jur. Assignments § 2 (2006)." Moore v. Weinberg, 644 S.E.2d 740, 373 S.C. 209 (Ct. App. 2007).

"An assignment of a contract consists of three elements: (1) an assignor, (2) an assignee, and (3) transfer of control of the thing assigned from the assignor to the assignee. Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (N.Y.1994); see also Restatement (Second) of Contracts § 317(1) (1981) ('An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.')." Donahue v. Multimedia, Inc., 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005).

South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. Slater Corp. v. S.C. Tax Comm'n, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct. App. 1984) (citing Forrest v. Warrington, 2 S.C.Eq. (2 Des.) 254 (1804)); see also 5 S.C. Jur. Assignments § 19 (2006) ("A chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action. . . . In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable."). An assignee stands in the shoes of its assignor. Moore v. Weinberg, 644 S.E.2d 740, 373 S.C. 209 (Ct. App. 2007).

C. Law Surrounding the Federal Arbitration Act.

The party asserting arbitration has the burden of proof as to whether a valid contract for arbitration exists between the parties. Without a valid agreement to arbitrate between the Parties, the Court cannot compel arbitration. Zabinski v. Bright Acres Associates, 346

S.C. 580, 553 S.E.2d 110 (2001); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007); 9 U.S.C. § 4.

Section 2 of the FAA declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. Volt Information Sciences, Inc v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The United States Supreme Court has held that this means the FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220, 105 S.Ct. 1238 1241-1242, 84 L.Ed.2d 158 (1985) and to place such agreements "'upon the same footing as other contracts,'" Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 94 S.Ct. 2449 2453, 41 L.Ed.2d 270 (1974) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991), the Supreme Court reiterated that arbitration clauses are only equal to other contract provisions, not superior to other provisions, when it stated the purpose of the F.A.A. is to "place arbitration agreements upon the same footing as other contracts."

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles v. United HealthCare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."); Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 270 (1995)("arbitration under the

[Federal Arbitration Act] is a matter of consent, not coercion").

Where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007); MBNA v. America Bank, N.A. v. Christianson, 659 S.E.2d 209, 377 S.C. 210 (Ct. App. 2008)(If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists.). See 9 U.S.C. § 4; Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847, 561 U.S. 287 (2010); AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986); First Options Chicago v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); John Wiley Sons, Inc v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964); Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); Equal Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). Arbitration will be denied if a court determines no agreement to arbitrate exists. Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847, 561 U.S. 287 (2010); S.C. Code Ann. § 15-48-20(a).

For purposes of determining arbitrability, when a contract is formed can be as critical as whether it was formed. Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847, 561 U.S. 287 (2010).

D. Appellants admit a written agreement with Sanders to arbitrate claims does not exist.

Appellants' motion provided part of the arbitration clause upon which they relied, but they failed to include proof of agreement between the Parties, such as the Parties' signatures or the contract itself. (R. pp. 91-94) Appellants did not even provide an affidavit

required by Rule 6(d) SCRCP authenticating the clause. Appellants' initial memorandum, filed November 15, 2017, also failed to include an authenticated contract. (R. p. 97-112) The contract provided was of such poor quality, the hand written information was basically illegible. (R. p. 107-112) Judge Nicholson then permitted Appellants to submit after the arbitration hearing an affidavit authenticating the Parties' contract. Even though Appellants filed an affidavit allegedly authenticating it, the contract attached to the affidavit was still nearly impossible to read. (R. pp. 135-138)

Judge Nicholson then made four rulings. First, he found that Exhibit A to Appellants' December 4, 2017 Supplemental Memorandum constituted the contract between the Parties. (R. p. 85) Second, looking only within the four corners of the Parties' contract, Judge Nicholson found that Savannah Highway assigned its rights in the contract to Santander. He supported his conclusion by quoting Savannah Highway's contract assignment agreement: "Seller assigns its interest in this contract to Santander Consumer USA (Assignee) under the terms of Seller's agreement(s) with assignee." (R. p. 86; 109) Third, he concluded Savannah Highway did not reserve any rights in the contract or the arbitration clause, specifically. Fourth, he ruled that Appellants' "right to compel arbitration was extinguished when contract was assigned to Santander". (R. p. 86) Appellants did not appeal these findings.

Judge Nicholson gave Appellants every opportunity to prove that an arbitration agreement exists between them and Sanders. They failed to do so. Instead, Appellants have consistently admitted that an agreement does not exist. See:

1. Complaint paragraph 46 (R. p. 45): That upon information and belief, Defendant Rick Hendrick sold and assigned the RISC with Mr. Sanders to Defendant Santander;

2. Appellants' Answer paragraph 34 (R. p. 57): Defendants admit the allegations of paragraph 46;

3. Santander's Answer paragraph 46 (R. p. 67): Santander admits the allegations of Paragraph 46;

4. Appellants' Motion to Compel Arbitration (R. p. 93) - "Additionally, because the Arbitration Clauses expressly apply to claims against Hendrick's "assigns", it necessarily would include Defendant Santander Consumer USA, the assignee of the contract.";

5. Savannah Highway's Memorandum in Support of Motion to Compel Arbitration (R. pp. 97-112)

   a. Page 97 - "Despite the fact that the contract between Hendrick (assigned to Defendant Santander Consumer USA Holdings, Inc. ("Santander")) and Plaintiff (the "Retail Installment Sales Contract" or the "Agreement"), the very document that underlines Plaintiff's claims against Defendants, contains a mandatory arbitration clause ("the Arbitration Clause"), Plaintiff filed this present Action."

   b. Page 105, footnote 2 - "Additionally, because the Arbitration Clause expressly apply to claims against Hendrick's "assigns", the claims asserted against Santander, the assignee of Retail Installment Sales Contract at issue in this case, should also be referred to arbitration."

   c. Page 109 Exhibit A - "Seller assigns its interest in this contract to Santander Consumer USA (Assignee) under the terms of Seller's agreement(s) with assignee.";

6. Motion to Compel Arbitration Transcript (R. p. 18:17-21)
17 THE COURT: I understand the contract, but does the
18 contract reserve a right for you to enforce arbitration once
19 you've assigned it all to the lending institution?
20 MR. LAY: It is fully assigned once it goes to the
21 lending institution.

7. Appellants' Supplemental Memorandum - Contract attached to Affidavit of Brandon Hackloer filed December 4, 2017 (R. p. 136)- "Seller assigns its interest in this contract to Santander Consumer USA (Assignee) under the terms of Seller's agreement(s) with assignee."

8. Motion to Compel Discovery Transcript (R. pp. 28:24-29:8)
24 THE COURT: That is the case where they assigned the
25 contract to someone else and I ruled that when they assigned
1 it they lost everything, didn't have the right to proceed

2 under it.
3 MS. ADAMS: That is correct. I understand that is what
4 Your Honor's ruling will be. We have not seen that order.
5 But Santander which is the party who received the assignment
6 that is whose motion has been filed also to compel
7 arbitration and set aside -- I mean to compel arbitration
8 and to —

At the Motion to Compel Arbitration hearing, Judge Nicholson astutely struck at the heart of the issue asking if Appellants retained any rights in the assigned contract. After Appellants acknowledged the contract was "fully assigned" to Santander, Judge Nicholson pressed the question.

Motion to Compel Arbitration Transcript (R. p. 18:22-24)
22 THE COURT: That's correct. So the contract itself has
23 to give you certain rights after the assignment, does it
24 not, and does it do that?

Mr. Lay did not answer the question as there is only one answer, Appellant did not retain any rights in the contract. Since, Savannah Highway sold *all* of its contract rights to Santander, there is no doubt Savannah Highway does not have any rights under the contract to compel arbitration, including the right to arbitrate arbitrability. In other words, after the assignment, an arbitration agreement between Appellants and Sanders did not exist[4]. Appellants have not retracted any of the admissions above nor appealed any of the findings based on these admissions. Since it can be said with positive assurance that an agreement to arbitrate does not exist, Judge Nicholson's Order should be affirmed.

E. Appellants' ignore the assignment issue and argue seven irrelevant points.

In their appeal brief, Appellants, for the most part, ignore the assignment issue. They

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[4] In Granite Rock Co. v. Teamsters, 561 U.S. 287 (2010), the Supreme Court dealt with *when* a contract came into being and whether an arbitration agreement *existed* covering the dispute. This dispute deals with when obligations under a contract *end* and whether the arbitration agreement *existed* between the parties after an assignment of the contract obligations.

have not provided one case that says once a contract has been voluntarily and unconditionally assigned, the assignor retains its rights to compel arbitration. Instead, Appellants begin by arguing that arbitration agreements are presumed valid. (Appellants' Brief pp. 7-9.) "Validity" is not the issue. First, Judge Nicholson did not rule on whether the arbitration agreement was valid. He merely ruled the contract was the contract between the Parties[5], the Federal Arbitration Act applied to the dispute because it involved interstate commerce (R. p. 6:24-25; 15:7-13), Appellants had assigned all their rights to Santander[6], and Appellants did not retain any contract rights[7]. Appellants did not appeal these rulings.

Second, Sanders has never asserted that assignment of the contract invalidates the arbitration clause. Sanders' position is that Appellants simply cannot enforce the arbitration clause because Appellants' rights under the contract have been extinguished.

Appellants' also argue six other unsuccessful and irrelevant points in their Brief. First, Appellants argue that the "strong policy favoring arbitration" requires this dispute be sent to arbitration. The U.S. Supreme Court has resolved this issue in favor of Sanders. In Granite Rock v Teamsters, 130 S. Ct. 2847, 561 U.S. 287 (2010), the Ninth Circuit followed Appellants' argument that the "'national policy favoring arbitration' required that any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability". at 296. The Supreme Court rejected this position and reaffirmed that "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of

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5 "Despite portions appearing illegible, this Court finds that the contract attached to the affidavit is an accurate copy of the one signed by Plaintiff." (R. p. 85)

6 "In this case, Rick Hendrick purported to assign all of its interests in the retail installment sales contract to Santander." (R. p. 86)

7 "It also does not appear that Defendant retained any rights under the retail installment sales contract or the arbitration clause, specifically." (R. p. 86)

consent'." at 299. It further held, "Applying this principle, our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement." at 299-300. The Court also held, "we have never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes ... that the parties have agreed to submit.'" at 302. "Nor have we held that courts may use policy considerations as a substitute for party agreement." at 303. "We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute." at 303.

Granite Rock is in line with the Court's prior decisions which held that "[A]rbitrability is at bottom a question of contract interpretation[8]; a party cannot be required to arbitrate a dispute if it has not contractually agreed to do so." Sierra Roach v. Navient Solutions, Inc., 165 F. Supp. 3d 343, 346, 2015 WL 8479195, at *3 (D. Md. Dec. 10, 2015). Therefore, "[w]hile ambiguities in the language of [an] agreement should be resolved in favor of arbitration, Volt [v. Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1980)], [the Court does] not override the clear intent of the

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[8] Appellants concede this point in their citations to Oakwood Acceptance Corp. v. Hobbs, 789 So. 2d 847, 852 (Ala 2001) and Volt v. Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1980).

parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. Arbitration under the [FAA] is a matter of consent, not coercion." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

Appellants may not compel arbitration just because an arbitration clause is in a contract signed by Sanders. Appellants bear the burden of proving they are Parties to the contract and that the agreement exists between them. They cannot meet their burden. Appellants chose to assign their rights, including the right to arbitrate arbitrability, to Santander. That was Appellants' intent as stated in their adhesion contract. They cannot now demand arbitration rights they no longer have.

Second, Appellants argue that standing cannot be used to invalidate an arbitration agreement. (Appellants' Brief p. 9.). Sanders never argued and Judge Nicholson never ruled that Appellants' assignment of its contract rights invalidated the arbitration clause. Sanders' argument is that Appellants were not in privity of contract with Sanders. (R. pp. 13:23-14:4) Therefore, Appellants do not have standing to enforce the arbitration agreement in that contract. Judge Nicholson understood the argument as such. (R. p. 16:4-6 and 23:18-22.)

Judge Nicholson rightly followed In re Wholesale Grocery Prods. Antitrust Litig., 97 F. Supp. 3d 1101 (D. Minn. 2015) where the Court determined the arbitration agreement was assigned, not invalidated. The issue is not whether the arbitration clause is stricken or invalidated, but rather who is entitled to compel arbitration. The court stated, "'[a]n assignment generally operates to transfer all rights possessed by the assignor and the assignor retains no interest in the right transferred.' Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 13 (Minn. 2002). Consistent with this principle, where a party assigns

agreements that include an arbitration clause, the assignor's "right to compel arbitration under those agreements 'is extinguished.'" HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc., 590 F. Supp.2d 677, 684–85 (D.N.J. 2008) (quoting Restatement (Second) of Contracts § 317(1) (1981)). Thus, the nonsignatory Defendants are not entitled to assert rights under arbitration agreements that they voluntarily and unconditionally transferred." The Minnesota Court was unable to find any law "for the proposition that a predecessor-in-interest's assignment of rights creates a 'close relationship' with its assignee that warrants allowing the predecessor-in-interest to assert the rights that it unconditionally assigned and voluntarily relinquished."

This position is echoed in the Federal Third Circuit. In HT of Highlands Ranch v. Hollywood Tanning Systems, 590 F. Supp. 2d 677 (D. N.J., 2008), the Court stated, "In light of the fact that, prior to the commencement of this action, Defendant HTS assigned its rights and obligations under the franchising agreements to Defendant HT Franchising, (Am. Compl. ¶ 18), the Court cannot, at this stage, conclude that 'a valid agreement to arbitrate [presently] exists' between HTS and Plaintiffs. Trippe[9], 401 F.3d at 532. As the Court of Appeals explained in Trippe, 'when an assignee assumes the liabilities of an assignor, it is bound by an arbitration clause in the underlying contract.' Id. (citation omitted). Because 'an assignment cannot alter a contract's bargained-for remedial measures,' id. at 533 (citation omitted), a corollary to the principle that an assignee is bound by the arbitration clause in an assigned contract is that 'an assignment ordinarily extinguishes the right [of the assignor] to compel arbitration.' Affymax, Inc. v. Johnson & Johnson, 420 F. Supp. 2d 876, 879 (N.D. Ill. 2006); see also Restatement (Second) of

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[9] Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529 (3rd Cir. 2005).

Contracts § 317(1) (1979) ('An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance'); Robert Lamb Hart Planners and Architects v. Evergreen, Ltd., 787 F. Supp. 753, 757 (S.D. Ohio 1992) ('A valid assignment transfers a right from the assignor to the assignee.')."

Third, Appellants argue that if the subject matter is "arguably arbitrable", the matter must go to arbitration. (Appellants' Brief p. 10.) Whether the subject matter is within the scope of the arbitration agreement is irrelevant as Savannah Highway assigned it rights under the contract to Santander. It no longer has any right to compel arbitration. Appellants admit this. Even when Judge Nicholson gave Appellants the opportunity to show they retained any rights in the arbitration clause, they failed to do so. (R. p. 18:17-24.)

Fourth, Appellants argue that the Parties agreed to arbitrate arbitrability. (Appellants' Brief p 13.) The real issue is the existence of an arbitration agreement between the Parties at the time of the motion hearing not whether there was an initial agreement to arbitrate the validity, scope, or interpretation of the arbitration clause. As Appellants' counsel stated at the arbitration motion hearing, the Parties' contract was fully assigned once it went to Santander. (R. p. 18:17-21) Appellants assignment of all of their rights to Santander included the right to arbitrate arbitrability. Appellants did not state in their motion, at the arbitration hearing, in their post hearing brief, or in their appellate brief that they retained any rights in the contract or the right to arbitrate arbitrability. Thus, when Appellants assigned all of their rights to Santander, they also assigned their right to arbitrate arbitrability and retained nothing under the Parties' contract.

Fifth, Appellants argue FAA §4 permits Appellants to request an Order to arbitrate.

(Appellants' Brief p 13 fn 4.) To obtain an Order compelling arbitration under FAA §4, a Party must show the Court "a written agreement for arbitration" binding the parties. Appellants have not done so. Furthermore, before issuing an Order, the court must hear the parties and be satisfied that the making of the agreement for arbitration is not in issue. Finding Savannah Highway assigned all of its rights, Judge Nicholson was not satisfied that there was an agreement between the Parties much less that Sanders' failed to comply with that agreement. Thus, Appellants are not entitled to any relief under 9 U.S.C. §4.

Sixth, Appellants argue that Sanders' arguments and Judge Nicholson's citation of two cases create an ambiguity in the interpretation of the arbitration clause[10]. Thus, the matter must go to an arbitrator. (Appellants' Brief p. 14-15.) Sanders' arguments and the Court's Order are irrelevant in determining whether the contract is ambiguous. In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: "[O]ne may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that

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[10] Appellants have not claimed the assignment clause is ambiguous.

expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008). See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App.1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business."). *Appellants have not shown any part of the contract to be ambiguous.*

Even if there was an ambiguity in a contract, it is construed against its maker. C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n, 357 S.E. 2d 714, 292 S.C. 556 (Ct. App. 1987). This rule applies with particular force in cases involving a contract of adhesion. Southern Atlantic Financial v. Middleton, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002). Contracts used by car dealers are contracts of adhesion. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

Furthermore, Judge Nicholson did not "interpret" the arbitration clause drafted by Savannah Highway in its adhesion contract. He determined Savannah Highway's endorsement of the assignment clause transferred all arbitration rights, including arbitrating arbitrability, to Santander. His ruling on the assignment of the contract does not create an ambiguity in the arbitration clause.

Appellants also make this argument while having previously argued that the arbitration clause is clear and that "a party who signed a contract is deemed to have read and understood 'the effect' of the contract". (R. p. 100)

The clear intent in Appellants' contract is that Appellants had arbitration rights, they

could, and did, assign them to Santander, and now they no longer have any rights to compel arbitration under the contract.

F. Appellants' position on standing relies on three inapplicable cases.

Appellants allege that, under Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 860 F.2d 1420 (7th Cir. 1988)(Appellants' Brief pp. 9-10), this case has to be sent to arbitration because of "procedural arbitrability" issues. Chicago Typographical does not help Appellants who continue to miss the point that the court determines the *existence* of an arbitration agreement between the Parties, not an arbitrator. See Granite Rock Co. v. International Brotherhood of Teamsters, 561 U.S. 287 (2010); AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986); First Options Chicago v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); John Wiley Sons, Inc v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964); Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); Equal Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). The Chicago Typographical court refused to hear the case since it determined that a live "controversy" did not exist. The Supreme Court also held "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"[11] and the court determines if an arbitration agreement exits. If an agreement exits, the arbitrator may have to deal with procedural issues. Sanders' case does not involve "questions of procedural arbitrability".

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[11] Appellants' footnote regarding John Wiley Sons, Inc v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964) cuts against Appellants. The Court stated the Court has to determine the parties contracted to arbitrate before procedural issues have to be submitted to the arbitrator. Judge Nicholson determined the parties do not have a contract to participate in arbitration as Appellants assigned their rights to Santander. Thus, neither John Wiley nor Chicago Typographical support Appellants' position.

Judge Nicholson ruled on whether an agreement to arbitrate between Sanders and Appellants existed not on whether the Parties had complied with terms such as time limits, conditions precedent to arbitration, or proper notice. Such an agreement does not exist as Appellants have assigned all of their rights under the contract to Santander, including the right to arbitrate procedural or substantive arbitrability. Thus, Chicago Typographical is inapplicable to compel arbitration.

In AT&T v United Computer Systems, No. 94-56755, No. 95-55015, 1996 U.S. App. LEXIS 28484 (Appellants' Brief pp. 10-11), the Parties agreed they had a contract which contained an arbitration agreement. The Ninth Circuit stated the question before it was whether the matter of the assignment was within the scope of the arbitration agreement.[12] In this case, a contract does not exist between the Parties as it has been assigned. Appellants do not contest they voluntarily and unconditionally assigned the contract to Santander. Since an arbitration agreement does not exist between Appellants and Sanders, AT&T's "scope" issue does not apply.

Appellants then argue that an arbitrator must hear any "gateway" issues regarding arbitration. First, this issue was not presented to Judge Nicholson. Second, determining the existence of an arbitration agreement is for the court. Third, Appellants' reliance on Oakwood Acceptance Corp. v. Hobbs, 789 So. 2d 847 (Ala. 2001)(Appellants' Brief pp. 11-13) is unfounded. First, in Oakwood, the Court dealt with the factual issue of whether a contract had actually been assigned to the alleged assignee and whether the dispute fell

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[12] CVD Equip. Corp. Dev. Specialists, Inc., Civil Action No. 11062-VCG, 2015 Del. Ch LEXIS 193 at *5 (Ch. July 23, 2015) is also inapplicable as that case focuses on an assignee's right to enforce an arbitration agreement against the seller, a current party to the contract. Appellants, as assignors, are not current Parties to the contract.

within the scope of the arbitration clause. The trial court determined an arbitration contract existed between the parties, but denied Oakwood's motion to compel arbitration finding that the dispute fell within an exception in the agreement. The Alabama Supreme Court reversed finding that since the parties had a binding arbitration agreement, the scope of the enforceability of that agreement was for an arbitrator to decide. Here, there is no dispute whatsoever that Savannah Highway assigned all of its interest in the contract to Santander and that it did not retain any arbitration rights or rights to arbitrate arbitrability. Without an arbitration agreement, the court does not need to reach the issue of the scope of the agreement.

Additionally, the Oakwood opinion seems to skip a step in its analysis. The standing issue was presented as "The plaintiffs contend that Oakwood Acceptance presented no evidence indicating that it had been assigned the purchase contract and arbitration agreement between the plaintiffs and Oakwood Homes. Oakwood Acceptance contends that this Court should not address the merits of this argument because the plaintiffs did not present it to the trial court." Part II A. Immediately, after determining it could hear the argument, the Court held, "The efficacy of that contention depends on the language of the agreement. 'Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, ... so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." The Court never addressed plaintiffs' contention that the contracts had not been properly assigned nor did it expressly state that the parties had an arbitration agreement. It simply made a conclusory statement that "the arbitration agreement clearly provides that '[a]ny challenges to the validity or enforceability of this Agreement shall be determined by the arbitrator(s).'" The Court then sent the matter to arbitration. In essence, Alabama holds that "third-party

standing to enforce the arbitration agreement is a question to be decided by the arbitrator". See Justice See's dissent in Ex parte Webb, 855 So.2d 1031 (Ala., 2003). This directly contravenes United States Supreme Court precedent that courts must first determine if a written arbitration agreement exists before compelling arbitration. 9 U.S.C. § 2; Granite Rock Co. v. International Brotherhood of Teamsters, 561 U.S. 287 (2010) Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). Thus, Oakwood is inapposite.

To compel arbitration pursuant to a written arbitration agreement without determining whether the Parties are actually Parties to the agreement improperly elevates arbitration agreements above other contractual provisions, a result the U.S. Supreme Court has disavowed. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 94 S.Ct. 2449 2453, 41 L.Ed.2d 270 (1974); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Furthermore, the Court's ruling encourages lax lawyering by not requiring a Party to produce evidence of his position to the court. Alabama's ruling also encourages fraud. If the court does not decide the existence of a written arbitration agreement and it does not require evidence of that agreement, what is to stop a Party from forging a person's signature to a contract with an arbitration agreement that requires arbitration to take place outside of the State? An injured person compelled to arbitrate in another State because of a forgery will think long and hard before pursuing a claim. If the same happens to many people who decide the effort to recover their damages is too great or the recovery insufficient, the fraudster/forger is encouraged to continue cheating people. Injured consumers will also have less money to spend with honest merchants and everyone will have less confidence in our economy.

As Appellants noted on page 12 of their brief, the Oakwood Court held "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Here, Appellants have not shown and cannot show that Sanders and Appellants intended to arbitrate claims after the contract was assigned to Santander. In fact, Appellants have admitted they do not have an arbitration agreement with Sanders as it has been assigned to Santander. Since Appellants have not provided "clear and unmistakable" evidence that a contract to arbitrate or a contract to arbitrate arbitrability exists, Judge Nicholson's Order should be affirmed.

Here, Savannah Highway, the assignor, is seeking to arbitrate based on rights it sold. South Carolina law states that once you sell your rights in a contract, you do not have rights in that contract. There is an immutable law of physics that water only flows downstream. An immutable law of contract is that when you voluntarily and unconditionally assign your contract rights, those rights do not flow back up stream.

Maybe Appellants' Reply Brief will shed light on the written agreement to arbitrate they claim they still have with Sanders. If they had that evidence, it should have been presented to Judge Nicholson. The undisputed facts are that Appellants voluntarily and unconditionally assigned their rights to Santander, including the right to arbitrate arbitrability. Appellants have not appealed Judge Nicholson's findings that they sold their rights under the contract and that they did not retain any rights under the contract. They cannot now enforce against Sanders contractual rights they no longer have. Appellants have not provided any facts or authority to the contrary. Judge Nicholson's Order should be affirmed.

2. A judge who has orally ruled on one issue before an Order on a different issue is appealed does not lose jurisdiction to perform the ministerial act of filing

a written order regarding his oral ruling. Judge Nicholson orally ruled on Sanders' motion to compel discovery responses. Appellants appealed Judge Nicholson's Order denying their arbitration motion before he filed his formal Order regarding Sanders' motion. Did Judge Nicholson lose jurisdiction to file his discovery Order?

A. Appellate Court Rules regarding jurisdiction.

Rule 203(b)(1), SCACR, governs the time for service of a notice of appeal from the Court of Common Pleas:

> "When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment."

While Rule 205 SCACR conveys exclusive jurisdiction over the appeal to the appellate court, "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Questions of compliance with appellate rules, regulations, and statutes relate to appellate jurisdiction, not subject matter jurisdiction. Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011).

Under Rule 241(a) SCACR, "[t]he lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal". The purpose of the stay under Rule 241 is to determine whether the appealed order may be carried out or enforced, not to determine whether the action may proceed while the appeal is pending. Tillman v Oakes, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012).

B. The Appellate Court Rules do not prevent the lower court from completing the ministerial act of filing an Order.

A trial court does not lose jurisdiction to file a written order where the trial judge orally ruled and directed a party to prepare a formal order, but a party appealed before the

trial judge signed the order. Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996), *rev'd on other grounds*, Doe v. Berkeley Publishers, 496 S.E.2d 636, 329 S.C. 412 (1997); Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina*, 339 (3rd ed. 2016). The direction of a judge to an attorney to prepare an order is as much an order of the judge as the order itself and the two must be taken together. Thornton v. Atl. Coast Line R. Co, 13 S.E.2d 442, 196 S.C. 316 (1941). "The clerk is the officer of the court, and any mere ministerial act he does by the order of the court is the act of the court itself." Thornton v. Atl. Coast Line R. Co, 13 S.E.2d 442, 196 S.C. 316 (1941); McCants v. West Virginia Pulp & Paper Co., 76 S.E.2d 614, 223 S.C. 467 (1953) (Entry of a judgment is merely a ministerial act and for the purposes of notice, lien, and enforcement.); Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 748 S.E.2d 221 (2013) (filing of Court Order confirming an arbitration award is a ministerial act).

In Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 748 S.E.2d 221 (2013), the Court held that the filing of an Order confirming an arbitration award was a ministerial act, part of the arbitration process. The mere filing of a discovery order is the same, part of the litigation process.

The Court, through Rule 203(b)(1) SCACR, recognizes that there may be a delay between a ruling and the filing of the formal Order. This rule carves out an exception to Rule 205 SCACR's exclusive jurisdiction provision allowing the lower court to retain jurisdiction to conduct the ministerial act of filing its Order. Once the Order is filed, assuming the issues are "affected by the appeal", jurisdiction becomes exclusive to the appellate court. Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996).

Rule 205 SCACR does not apply. In Tillman v Oakes, 398 S.C. 245, 728 S.E.2d 45

(Ct. App. 2012), the Court looked at two situations, 1) the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and 2) the effect of an appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. Regarding question 1, the Court said "an appealed order may not be carried out or enforced during the pendency of the appeal". Regarding question 2, the Court held "the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter[ ] affected by the appeal' under Rules 205 and 241(a)". Judge Nicholson's discovery Order falls under question 2. His Order could be filed because the "filing" of the Order is not an "issue sought to be litigated". It is simply a ministerial act. Whether it can be enforced after the resolution of the arbitration Order appeal is not an issue.

C. Appellants' arguments are unavailing.

Appellants have appealed Judge Nicholson's "issuance" of his Order compelling Appellants' discovery responses. Appellants seek to equate "issuance" with the "filing" of his written Order. This is incorrect as Judge Nicholson "issued" his ruling on the motion to compel discovery on January 9, 2018, twenty-eight days before Appellants filed their notice of appeal of the arbitration Order. (R. p. 29:20; 33:3) Thus, Judge Nicholson's Order was "issued" while he unquestionably had jurisdiction over the discovery issues.

Furthermore, Appellants have not alleged Sanders is seeking to enforce the discovery Order or that the litigation involving the discovery is ongoing. Instead, Appellants assert the ministerial function of filing an Order may not occur after the filing of a notice of appeal of a different Order regardless of whether the Order is "affected by the appeal". Appellants' position presents practical problems for the Court. If the Court has issued one Order and a party can rush to the appellate court before the signing of a second Order,

what is the trial judge to do with his decision? If it is not filed, the Court may have to wait years for the conclusion of the appeal simply to file the Order. This gives the Court's docket the appearance that it is not being managed properly. Additionally, if the judge retires or dies, another hearing will have to occur depleting more of the Court's and the parties' resources. The better course is to allow the filing of the second Order. If necessary, that Order can then be appealed with the first order saving the Parties' time and money and the Court's resources. If the appeal settles the issues with the second Order, the issue is resolved. As for ongoing litigation, if the appeal "affects" the second Order, but the second Order is not appealed, then the trial court can refuse to enforce the second Order until the appeal is completed. If the appeal does not affect the second Order, the case can move forward toward a resolution.

Appellants' reliance on Arnal v Fraser, 641 S.E.2d 419, 371 S.C. 512 (2007) is misplaced as the Parties there already had an appeal in process when the family court conducted additional hearings and made additional rulings and orders in the case. Some of those orders were affected by the first appeal, some were not. Sanders' case is different as Judge Nicholson heard and ruled on the discovery motion before Appellants appealed the arbitration Order. All that was left to do was to file the discovery Order. Furthermore, the lower court has not proceeded with the enforcement of its Order, it has not dealt with any issues related to discovery since the filing of the discovery Order, Sanders has not made any efforts to enforce the discovery Order, and Appellants have not complied with the Order.

Sanders objects to Appellants' inclusion of the Consumer Rules of the American Arbitration Association (AAA) in their brief. Sanders moves the Court strike or ignore Appellants' arguments on this point. These rules were never authenticated, never

presented to Judge Nicholson, never discussed at any of the hearings, nor made a part of the record in any manner. There is no evidence that these are even the "rules" that would apply to an arbitration between these Parties were an arbitration agreement to exist between them. Under Rule 210(h) SCACR[13], the Court should ignore Appellants' argument regarding the AAA's "rules". If the rules were important to the underlying motion, they should have been included in the record and not raised for the first time on appeal.

Even if the "rules" had been included in the record, the rule cited does not clearly indicate that "discovery" in"arbitration is vastly different from formal discovery in the South Carolina Court of Common Pleas". R-22(c) states "no other exchange of information beyond what is provided for in section (a) above is contemplated under these rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process". (Emphasis added.) Because an arbitrator can allow for the additional exchange of information to ensure a fundamentally fair process, the arbitrator could allow for the same discovery as in the Court of Common Pleas or even greater discovery if needed. The difference being in court, the discovery is uniform across all cases while in arbitration discovery may vary from case to case.

Regardless of whether the rules are the same or different, the fact remains that Judge Nicholson ruled on the discovery motion before Appellants appealed, the ministerial act of filing the discovery Order is not "affected by the appeal" of the assignment/arbitration issue, and the Appellate Court Rules carve out an exception to allow for this ministerial act to occur. Therefore, the discovery Order should remain an Order of the Court.

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[13] **(h) Review Limited to Record on Appeal.** Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.

3. Discovery orders are interlocutory and not immediately appealable. Sanders' case has not concluded. Is Appellants' appeal of Judge Nicholson's discovery Order ripe?

A. Standard of Review

In most cases, an order compelling or denying discovery is not immediately, appealable. Lowndes Products, Inc. v. Brower, 205 S.E.2d 184, 262 S.C. 431 (1974). "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.... An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001) (internal citations omitted). Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

B. The Discovery Order is not appealable.

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, (2006); S.C. Code Ann. § 14-3-330 (1976); Rule 72, SCRCP; Rule 201(a), SCACR. "Any intermediate judgment, order or decree in a law case involving the merits" may be appealed. S.C. Code Ann. § 14-3-330 (1976). The phrase "involving the merits" means the order "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

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); Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); Tucker

v. Honda of South Carolina Mfg., 354 S.C. 574, 582 S.E.2d 405 (2003).

Discovery orders can be appealed in two circumstances, 1) "after the trial court holds a party in contempt" Tucker v. Honda of South Carolina Mfg., 354 S.C. at 577, 582 S.E.2d at 406-07 (2003) or 2) when the order affects "substantial rights which 'in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinues the action'". S.C. Code §14-3-330(2)(a).

Judge Nicholson's Order simply directs Appellants to respond to Sanders' discovery. As in Tucker, Appellants have "not refused to comply with the order" and been "cited for contempt". Instead, they appealed the mere filing of the order.

Appellants are likely to argue that the Order affects their "substantial rights" or the merits of the case. Appellants will have to show that once the information was produced there would be no more need for the action. See, e.g., Knight Pub. Co. v. Univ. of South Carolina, 295 S.C. 31, 32, 367 S.E.2d 20, 21 (1988) ("The appealed order allows discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions. This order is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976) because it in effect determines the action and prevents an appealable judgment."), overruled on other grounds, Simpson v. Sanders, 314 S.C. 413, 445 S.E.2d 93 (1994). That is not the case here. Even if Appellants provide Sanders with the proverbial "smoking gun", Sanders would have to use that information in a motion or a trial to finally determine his claims. Appellants would then have the right to appeal that judgment without worrying that the rights they seek to protect could never be vindicated.

Lastly, the discovery Order specifically allows Savannah Highway to raise "appropriate objections to specific discovery requests as permitted by law and the South Carolina Rules of Civil Procedure". (R. p. 89) Thus, Savannah Highway can seek a court

order for any information it believes is outside the scope of discovery. If it refuses to turn over information it deems protected, it will also have an opportunity to show cause at a contempt hearing.

Since the Order is interlocutory, Appellants have not been held in contempt, and the discovery ordered does not affect the merits, Appellants' appeal is not ripe.

C. Savannah Highway does not have an interest in the waiver issue.

Even if the Court were to review the discovery Order[14], it should be affirmed.

The contested language from the Order states,

> "Further, Defendants, except Rick Hendrick, shall not waive its position regarding its right to compel and/or participate in arbitration by responding to said discovery".[15]

Appellants' argument is confusing. Appellants argue that Judge Nicholson made an error of law by finding that Appellants previously waived their arbitration rights by responding to discovery. (Appellants' Brief p. 20, first paragraph.) Even if this was his ruling and even if it was an error, it was a harmless error as he found Appellants had assigned their rights to Santander. Thus, there was nothing for Appellants to waive by responding to discovery before January 9, 2018.

Appellants' Brief's next sentence then claims "the Circuit Court compelled initial discovery responses while simultaneously penalizing the party for responding to said

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[14] As stated in Appellants' Brief on page 20, Judge Nicholson tasked Appellants' counsel with writing an Order that included Appellants' requested language. (R. p. 29:21-23.) Appellants' counsel chose not to write an Order leaving the task to Sanders' counsel. Appellants did not like Sanders' proposed Order (R. pp. 80-81), so Appellants' counsel finally wrote a proposed Order. (R. pp. 82-83) Judge Nicholson then wrote his own Order. Thus, "the Order which was filed erroneously, in contradiction to the Court's oral instructions" as Appellants allege was of Judge Nicholson's own creation. (Appellants' Brief p. 21.)

[15] At the motion to compel discovery hearing, Appellants' counsel was representing Savannah Highway, Santander and White. (R. p. 27:3-5.) It appears Judge Nicholson is referring to Santander by using "it". Appellants should have filed a Rule 59 motion if clarification was needed.

discovery". This statement does not apply as Appellants never responded to discovery. Appellant then claims Sanders "did not argue Appellant should be found to have waived its right to arbitrate if it responds to discovery requests". These sentences seem to indicate Appellant is arguing that Judge Nicholson was saying waiver will occur if Appellants respond to discovery in the future.

Savannah Highway misreads the contested sentence. It simply shows Judge Nicholson took into consideration his prior finding that Savannah Highway had assigned its contractual arbitration rights. Thus, the waiver language only relates to Santander. This position is supported by two points. First, Judge Nicholson's order states, "this Court previously denied Hendrick's motion to compel arbitration". (R. p. 88) He then states, "Further, Defendants, except Rick Hendrick, shall not waive its position regarding its right to compel and/or participate in arbitration by responding to said discovery". Reading and considering his discovery Order as a whole, it is clear he took the position Savannah Highway no longer had the right to arbitration, having assigned its rights to Santander. Therefore, there was nothing to waive by participating in discovery.

Second, Judge Nicholson made this point to Savannah Highway's counsel during the hearing. (R. pp. 28:24-29:4)

24 THE COURT: That is the case where they assigned the
25 contract to someone else and I ruled that when they assigned
1 it they lost everything, didn't have the right to proceed
2 under it.
3 MS. ADAMS: That is correct. I understand that is what
4 Your Honor's ruling will be.

Since Savannah Highway did not have any right to compel arbitration, Judge Nicholson was correct in stating in his Order that it was in a different position regarding waiver than Santander, its assignee.

D. Savannah Highway's waiver of any remaining arbitration rights.

The issue of waiver is moot since Savannah Highway assigned its rights. Furthermore, Judge Nicholson, neither during the two motion hearings nor in his Order, ever ruled on whether Savannah Highway waived any arbitration rights by participating in discovery[16]. Judge Nicholson simply relied on his prior decision that Savannah Highway's assignment of its contract extinguished all of its rights to compel arbitration. Nonetheless, if Savannah Highway is able to show that it retained any right to compel arbitration, it waived those rights.

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

Here, Appellants were served on May 10, 2017. They then requested, and were granted, an extension of time to answer the Complaint pursuant to Rule 6(b) SCRCP. Their Answers were filed July 12. Sanders served discovery on Savannah Highway on July 21. Appellants again requested under Rule 6(b) SCRCP, and were granted, an extension of time until September 8 to answer Sanders' discovery requests. (R. pp. 172-173) On September 7, Appellants filed their Motion to Compel Arbitration.

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[16] Judge Nicholson did not rule on the waiver issue raised by Appellants during the motion to compel arbitration hearing. (R. pp. 8:25-9:10R. p. 84-86)

Appellants' Answer does mention arbitration as an affirmative defense[17]. Nonetheless, they did not immediately request arbitration. Instead, they stretched out the time to answer the Complaint. After receiving discovery requests, Appellants again did not move to compel arbitration. Instead, they made it appear they would respond to discovery. They even asked for more time to respond, stretching out the case further. (R. pp. 172-173) At the last moment before the agreed upon time to respond, Appellants filed their motion. Based on their track record, Appellants would have continued to stretch out this case apparently to wear done Sanders so he would go away and they would not be held responsible for their fraud. Appellants have continued their litigation strategy to delay this matter and cost Sanders money by filing these appeals.

Appellants have all the information in this case. They have refused to produce any information in any form, except for a ten page Dealers Agreement Savannah Highway has with Santander. (R. p. 148[18].) Five pages deal with contact information. Five pages deal with the actual agreement. Sanders had requested the Dealers Agreement to support his claim that Savannah Highway had assigned all its rights to Santander. Savannah Highway would only produce this document so long as it was not used to support Sanders' waiver argument. Sanders agreed not to use it for that purpose. Sanders stands by that agreement. The document that was produced, though, was so small and illegible as to be useless for the arbitration motion. Thus, Savannah Highway remains in control of all the

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[17] Rule 8(c) identifies "arbitration and award" as an affirmative defense. Both must be present. Arbitration itself is not an affirmative defense as it does not conditionally admit the allegations of the complaint, but assert new matter to bar the action. FMI, Inc. v. RMAX, Inc., 333 S.E.2d 360, 286 S.C. 343 (Ct. App. 1985).

[18] One page of the Dealer Agreement was filed with the Court to show how illegible the document was. The page appears as it was produced to Sanders' counsel.

information in this matter. As a result, evidence is disappearing, especially the memories of the wrongdoers, whose whereabouts are only known by Appellants. This prejudices Sanders' case. Appellants' actions constitute waiver of any remaining arbitration rights which they may, for the first time, show the Court.

The discovery Order does not "determine some substantial matter forming the whole or a part of some cause of action or defense". Judge Nicholson did not find Savannah Highway waived its right to arbitration by participating in discovery in the past or in the future. He simply recognized Appellant did not have any arbitration rights to assert. Appellants' appeal of Judge Nicholson's interlocutory discovery Order should be dismissed. Appellants' delay in moving this case forward has prejudiced Sanders' case. Wavier should be found.

4. An appellant must raise and receive a ruling on an issue before that issue may be presented to the appellate court. Appellants did not raise and obtain rulings on a number of issues discussed in their appeal. Should Appellants be allowed to present their unpreserved claims to the appellate court?

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 300 S.C. 71, 76, 497S.E.2d 731, 733 (1998).

Appellants' September 5, 2017 arbitration motion states that there was an arbitration agreement between Appellants and Sanders and, therefore, the court should dismiss or stay the case until arbitration was conducted. (R. pp. 91-94) Neither their motion nor their memorandum filed November 15, 2017 raised any issues regarding discovery, interpretation of the arbitration clause, or the arbitrability of a claim. (R. pp. 97-105)

At the November 16, 2017 motion hearing, Appellants argued that an arbitration agreement existed and complied with the FAA, thus requiring the matter to be sent to

arbitration. In support of their position, Appellants argued four points: 1) that the FAA applied and not the South Carolina Arbitration Act (R. p. 6:20-23); 2) Appellants had standing because the assignee was bound to the arbitration agreement (R. p. 7:1-9); 3) Appellants did not waive arbitration due to participation in discovery (R. pp. 8:25-9:9); and 4) the contract did not need to be authenticated (R. pp. 9:11-10:10).

Judge Nicholson resolved issue one by stating the FAA applied to the clause. (R. p. 6:24-25) He took the standing issue under advisement. (R. p. 23:22-24) He did not rule on the waiver issue. He allowed Appellants to obtain an affidavit authenticating the contract. (R. p. 78) Again, Appellants did not raise any issues regarding conducting discovery, the interpretation of the arbitration clause, or the arbitrability of the claim.

On November 20, 2017, Judge Nicholson filed a Form 4 Order permitting two actions: 1) "Defendant may prepare an affidavit regarding the authenticity of the retail sales agreement" and 2) "Plaintiff may address the case law presented at the hearing and any applicable exceptions to compelling arbitration". (R. p. 78) This Order has not been appealed. Appellants did not receive permission from the Court to file any additional briefs, exhibits, or other material.

On December 4, 2017, Appellants filed a supplemental memorandum in support of their motion to compel arbitration. (R. pp. 124-138) Appellants first tried to preempt arguments from Sanders regarding unconscionability, fraud, and duress arguments. They then addressed "standing". Without leave of the court to amend its motion, Appellants, for the first time, asserted that the standing issue was an attempt to invalidate the arbitration clause in violation of the FAA. They further argued that such an attempt raised an issue of "arbitrability" which necessitated the case be sent to an arbitrator for a decision on the

"standing/assignment" issue.

The January 10, 2018 Order ruled that the RISC containing the subject arbitration clause was signed by Sanders and valid. The court then ruled that Savannah Highway assigned all of its interests in the retail installment sales contract to Santander and that Savannah Highway did not retain any rights under the RISC or the arbitration clause, specifically. (R. pp. 84-86)

Appellants did not file a motion for reconsideration under Rule 59 SCRCP. Instead they appealed the following issues: 1) that "standing" is not a contractual defense that may invalidate an otherwise valid arbitration agreement, 2) that standing and jurisdictional issues are questions of scope that must be arbitrated, 3) that arbitrating arbitrability requires this matter to be sent to an arbitrator, 4) that the arbitration clause is ambiguous requiring the issue to be decided by an arbitrator, 5) that the court did not have jurisdiction to issue its Order regarding Sanders' motion to compel discovery responses, 6) that Savannah Highway cannot be found to have waived its arbitration rights based on participating in discovery, and 7) that Judge Nicholson's Discovery Order was based on error of law.

Appellants did not raise issues one through five to Judge Nicholson. Even if they were raised, they were not raised with sufficient specificity as they were not ruled on by Judge Nicholson. Wilder Corp. v. Wilke, 300 S.C. 71, 76, 497S.E.2d 731, 733 (1998)(an objection must be sufficiently specific to inform the court of the point urged.) Even if Appellants argue the issues of standing and the question of the scope of issues that must be arbitrated may have been raised to Judge Nicholson, Appellants never received a ruling on those issues in the Orders at issue nor did they move under Rule 59 SCRCP, requesting

Judge Nicholson so rule. As for the waiver issue, Appellants expressly state in their Appeal Brief that they did not raise the issue to Judge Nicholson. (Appellants' Brief page 20.) They are bound by that admission. Furthermore, they did not move under Rule 59 SCRCP for Judge Nicholson to explain, to correct, or to modify his Order regarding discovery or Appellant's waiver of its arbitration rights. Since Appellants failed to raise to Judge Nicholson and/or obtain a ruling from him regarding the issues on appeal, they have failed to preserve these issues for appellate review. Accordingly, Appellants' appeal should be summarily dismissed.

5. CONCLUSION

Judge Nicholson's Order denying Appellants' motion to compel arbitration should be affirmed as Appellants, by their own admission and by operation of law, assigned their rights to compel arbitration when Savannah Highway assigned its interest in the contract to Santander. Appellants failed to appeal Judge Nicholson's ruling that the contract was the contract between the Parties, that the contract contained a valid assignment clause, that a valid assignment occurred, that all Appellants' rights under the contract, including arbitrating arbitrability, were assigned to Santander, and that Appellants did not retain any rights under the contract. Additionally, a plain reading of Savannah Highway's adhesion contract shows the Parties did not agree to use arbitration after Savannah Highway assigned the contract. Without a showing of a contractual right to arbitrate, Judge Nicholson's Order should be affirmed.

Judge Nicholson ruled on Sanders' motion to compel discovery prior to Appellants filing their notice of appeal. Therefore, Judge Nicholson did not lose jurisdiction to file the formal order, a ministerial act.

formal order, a ministerial act.

Judge Nicholson's discovery Order properly stated Savannah Highway had assigned its arbitration rights and, therefore, did not have any rights to waive by participating in discovery. Additionally, since the discovery Order is an interlocutory Order, it cannot be appealed at this time.

Appellants failed to preserve the issues upon which they now appeal. Furthermore,

Sanders requests that Judge Nicholson's Orders be affirmed for the reasons above or upon any ground appearing in the Record on Appeal pursuant to Rule 220 SCACR and that the case remitted to the trial court for further proceedings, including trial.

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