THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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

RECEIVED
JUL 10 2019
SC Court of Appeals

Palmetto Construction Group, LLC — Respondent,

v.

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

APPELLANTS' PETITION FOR REHEARING *EN BANC*

NOW COME the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, who respectfully petition this Court pursuant to Rules 219 and 221 of the South Carolina Appellate Court Rules to rehear this case *en banc* and reconsider its opinion issued on June 26, 2019 due to this Court's failure to address and misapprehension of the legal authorities and points discussed below as they relate to this case.

In support of this petition, the Appellants, Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward submit the following:

INTRODUCTION

The Appellants have appealed the Orders of the Honorable Mikell R. Scarborough (the "Master"), dated July 14, 2016 and October 28, 2016.[1]

The Master's July 14, 2016 Order orders as follows:

(1) Defendants' motion to be relieved from default is DENIED;

(2) A damages hearing is set for October 4, 2016 at 2:00 pm; and

(3) Defendants' motion to stay and compel arbitration is denied as Defendant is in Default.[2]

The Master's October 28, 2016 Order orders as follows:

(1) Defendants' Motion to Amend is respectfully DENIED, insomuch as Defendants have not shown good cause to lift the default; and

(2) The affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made.

LAW/ANALYSIS

I. APPEALABILITY

This Court should grant rehearing *en banc* as consideration by the full court is necessary herein to secure or maintain uniformity of its decisions regarding the appealability of orders affecting a party's substantial right to arbitration.

On appeal, the Appellants assert that both of the Master's Orders, dated July 14, 2016

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[1] This Court's opinion issued June 26, 2019 states in the recitation of Facts that the Appellants did not file their September 30, 2016 Notice of Appeal with the Court of Appeals until November 18, 2016. However, the Record on Appeal establishes that the Appellants originally filed their September 30, 2016 Notice of Appeal with the Clerk of the Court of Appeals ("Clerk") on October 5, 2016and then refiled said Notice with the Clerk on October 6, 2016. (R. pp. 512-532).

[2] When issuing the July 14, 2016 Order, the Master struck through the portion of proposed language stating "*No ruling is made on*" Defendant's motion to stay and to compel arbitration and held by inserting a handwritten notation that Appellant's motion to stay and compel arbitration "*is denied as Defendant is in Default*".

Court of Appeals Order Dated February 1, 2017

Judge Williams was not a sitting member of the three-judge panel that issued the Court of Appeals opinion, dated June 26, 2019.

In this Court's opinion rendered on June 26, 2019, the panel dismissed the appeal as interlocutory. Furthermore, although dismissing the appeal as interlocutory, the panel issued a substantive ruling finding that Appellants had waived their right to arbitration due to the entry of default.

Appellants respectfully submit that the above rulings of this Court are inconsistent and conflicting with one another as they relate to the dismissal of the appeal of the Master's Orders denying Appellants' right to arbitration as interlocutory.

Furthermore, it appears the Panel did not address the Appellants' argument allowing for the immediate appeal of the Master's Orders regarding the Appellants' substantial right to arbitration. Accordingly, the Appellants respectfully petition this Court for rehearing *en banc* on these issues and respectfully submit that reconsideration by the full court is necessary herein to secure or maintain uniformity of its decisions regarding the appealability of orders affecting a party's substantial right to arbitration.

II. WAIVER

This Court should grant rehearing *en banc* to answer a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina: Whether a party waives its right to arbitration solely by virtue of an entry of default against that party.

This Court held in the instant case that because Appellants were in default, they waived their right to arbitration. It would appear the question of whether a party waives its right to arbitration solely by virtue of the entry of default against that party is a matter of first impression in South Carolina.

The right to arbitration is a substantial right. The arbitration jurisprudence of South Carolina and the federal arbitration jurisprudence under the Federal Arbitration Act

profoundly impacts myriad and wide ranging contracts, projects and transactions across the State of South Carolina. These contracts, projects and transactions which involve the arbitration clauses and arbitration rights thereunder are engaged in by individuals, small businesses, large commercial corporations and ventures and government institutions throughout the state. These contracts, projects and transactions impact local, regional and intrastate commerce as well as interstate commerce involving South Carolina under the Federal Arbitration Act. As such, the proceeding before this Court involves a matter of first impression concerning a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina.

A. The Legal Authorities Cited In Support Of The Panel's Ruling That The Appellants Waived Their Right To Arbitration Are Inapposite To The Arbitration Issues Before This Court.

This Court cites one South Carolina case and several additional cases from other jurisdictions in support of its ruling that the Appellants waived their right to arbitration. However, the Appellants respectfully submit that these cases are factually inapposite to the arbitration issues before this Court. Furthermore, Appellants respectfully submit that the application of the legal standards applied in these cases and the legal conclusions drawn therefrom were misapprehended by the Court with respect to the arbitration issues involved in the present case.

South Carolina Legal Authorities

The South Carolina case cited by this Court is *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989). In *Wham*, the defendants sought to set aside an entry of default or in the alternative, to stay the proceedings and compel arbitration. *Id.* The *Wham* Court specifically stated that its opinion addressed only the questions relating to the standard for granting relief from an entry of default under Rule 55(c) of the South Carolina Rules of Civil Procedure. *Id.* at 463, 381 S.E. 2d at 500. Concerning the motion to stay and compel arbitration, the *Wham* Court stated:

> "Because we vacate the order denying the motion by Shearson Lehman for relief from entry of default and remand the issue raised by the motion, we need not address the

> master's denial of its alternative motion to stay the proceedings and compel arbitration. *See, however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E. 2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556-57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer)."

Id. at 466, 381 S.E.2d at 502.

The language in *Wham* was mere *dicta*. The *Wham* Court expressly stated that it "need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration." *Id.* Furthermore, the *Wham* opinion is completely silent as to the basis of the master's denial of the motion to stay and compel arbitration and/or the standard invoked by the master in denying the motion. In short, the *Wham* opinion does reach the issue of a waiver of a party's right to arbitration in South Carolina.

In addition to lacking precedential value, the *dicta* portion of the *Wham* decision is not instructive in the instant case. The *dicta* portion of the *Wham* case includes the court's express acknowledgement that it did not address the motion to compel arbitration followed by citations to: (a) *Miller v. British America Assurance* Co., 238 S.C. 94, 119 S.E.2d 527 (1961) and (b) 5 Am.Jur.2d *Arbitration and Award* § 51 at 556-57 (1962). These two cited authorities are inapposite and factually distinguishable from the instant case.

The *Miller* case and any procedural issues therein were governed by the code pleading statutes contained in the Code of Laws of South Carolina (1952). These code pleading statutes were repealed and superseded by the adoption of the South Carolina Rules of Civil Procedure in 1985. Accordingly, the *Miller* case does not provide any precedent or guidance regarding the effect of pleading rules under South Carolina Rules of Civil Procedure (or the Federal Rules of Civil Procedure upon which they are based), upon the right to arbitration. This includes a lack of precedent or guidance regarding pleading arbitration as an affirmative defense under Rule 8(c), SCRCP.

Furthermore, the *Miller* case involved the question of whether the defendant insurance company's demand for appraisal/arbitration as a condition precedent to the right of the insured to maintain a legal action on the insurance policy had been made on a timely basis (i.e., within sixty (60) days after receipt of proof of loss and disagreement as to the

amount of loss) under the terms of the subject insurance policy.

The pleading of a condition precedent to the commencement of litigation is not an affirmative defense under the South Carolina Rules of Civil Procedure. Instead, it constitutes the pleading of a special matter under Rule 9, SCRCP. None of the parties to this appeal have raised the condition precedent defense in this action.

Finally, the defendant was not in default in the *Miller* case and the case does not involve the question of whether a defendant had waived its right to arbitration solely by the rendering of an entry of default against it.

Likewise, the citation to 5 Am.Jur.2d *Arbitration and Award* § 51 in the *Wham* case is neither binding nor authoritative precedent under the facts of this case. First, the cited second edition of *American Jurisprudence* is an encyclopedia of the United States law and the particular referenced section does not cite to any South Carolina legal authorities.

Second, the defense of "arbitration and award" is expressly enumerated in Rule 8(c) of both the South Carolina and Federal Rules of Civil Procedure. It is the only arbitration defense *specifically defined* in Rule 8(c). The defense of "arbitration and award" is an affirmative defense asserting that the subject matter of the action has already been settled in arbitration. *Black's Law Dictionary* 120 (9th ed. 2009). Thus, the specified "arbitration and award" defense is limited to the situation where a dispute already has been arbitrated and an award has been obtained. *Id.*; *Lee v. Grandcor Medical Systems, Inc.*, 702 F. Supp. 252 (D. Colo. 1988). Neither of these events have occurred in this case.

Third, the explanatory parenthetical contained in the *Wham* citation to 5 Am.Jur.2d. *Arbitration and Award* § 51 does not speak in terms of a mandatory and automatic waiver of a right to arbitration. Instead, it merely states that "one's right to arbitrate given by contract **may** be waived by failing to raise the right in an answer." (emphasis added). *Id.*

The remaining cases cited from jurisdictions other than South Carolina are equally distinguishable and inapposite to the arbitration issues before this Court. First, as a general matter, none of these cases involve interstate commerce and arbitration rights governed by the Federal Arbitration Act ("FAA"). As such, with the exception of *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W. Va. 2000) (which applies a mix of West Virginia

law and several federal court opinions) these cases do not consider, evaluate or apply the federal law standard of waiver.

Second, none of these cases involve a situation where, as in the present case, the defendant had joined in and consented to a motion filed by plaintiff to stay and compel arbitration.

Legal Authorities From Jurisdictions Outside of South Carolina

The cases cited from jurisdictions outside of South Carolina are as follows:

(1): *Tri-State Delta Chemicals, Inc. v. Crow*, 61 S.W.3d 172 (Ark. 2001) – This is an Arkansas case which holds as a matter of first impression in Arkansas that a defaulting defendant waived its right to compel arbitration when it failed to timely assert arbitration as a defense to the suit. The timing of the defendant's delay in making its initial appearance and asserting its arbitration rights in the *Tri-State* case was considered by the court and was twice that of the Appellants in in the present case. The *Tri-State* Court did not define the waiver of arbitration standard traditionally applied in Arkansas, but instead looked to other jurisdictions for guidance on the issue before the Court.

Specifically, the Court looked to and found the holdings in *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S2d 860 (N.Y. Sup. Ct. 2000) and *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d 936 (1994) as persuasive authority on the issue presented in the case.

The *Charming Shoppes* Court, however, found both the defendant's default and its use of the judicial proceedings as the basis of waiver. Also, the *Charming Shoppes* case is further distinguished below from the present case before this Court.

The *Woodruff* Court did not make a ruling on the issue of whether the defendant waived his right to arbitration. Furthermore, the *Woodruff* case is distinguished in Sub-paragraph 3 below from the present case before this Court.

(2): *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S. 2d 860 (N.Y. Sup. Ct. 2000) – This is a New York case applying a broad New York waiver of arbitration standard stated as follows: "[a] defendant may waive any right to submit issues to arbitration by his actions." *Id.* at 296. This New York standard is certainly broader than the either of

the longstanding waiver standards under South Carolina law or federal law under the Federal Arbitration Act ("FAA"). *See Brief of Appellants, Section II. E. 2.* In particular, the New York standard fails to require a showing of substantial delay in asserting the right to arbitration, substantial participation in the lawsuit and/or use of the litigation machinery and prejudice.

The *Charming Shoppes* Court found a procedural waiver under the New York standard by virtue of the entry of default against the defendant. However, the Court did not stand on this finding alone. Instead, the Court felt compelled to also consider and analyze whether defendant's use of the judicial proceedings constituted a waiver of the right to arbitration. The Court concluded the defendant's active participation regarding the lawsuit in the judicial forum constituted a waiver.

Therefore, based upon the finding of **both** a procedural waiver by default and waiver by use of the judicial proceedings, the Court found defendant had waived **any** right to arbitration and denied its motion to compel arbitration.

(3): *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d936 (1994) – This is a case from the State of Washington, in which the Court did not actually reach a determination as to whether the defendant waived his right to arbitration. Instead, the Court remanded the case for an evidentiary hearing and framed the issue as "[w]hether [the defendant] knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to the entry of default judgment [in which Plaintiff was awarded his full requested damages and court costs]." *Id.* at 211.

The *Woodruff* case is distinguishable from the present case before this Court for the following reasons: (1) The *Woodruff* Court articulates the Washington waiver of arbitration standard as follows: "Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored." This standard is significantly different than the South Carolina standard or federal standard under the FAA. Specifically, the Washington standard as articulated by the *Woodruff* Court does not require findings of substantial delay in seeking arbitration, substantial participation in litigation or prejudice; and (2) The *Woodruff* plaintiff

had obtained a default judgment for his full requested damages as compared with PCG's entry of default obtained when the present litigation was in its infancy.

(4): *Interconex, Inc. v. Ugarov*, 224 S.W. 3d 523 (Tex. Ct. App. 2007) – This is a Texas case which applies the Texas waiver of arbitration standard, a standard similar to both the South Carolina and federal standards of waiver. Recognizing that "public policy favors arbitration", the *Interconex* Court stated that "there is a strong presumption against finding a waiver of the right to arbitration, and any doubts regarding waiver are resolved in favor of arbitration." *Id.* at 533. Thus, the Court stated that waiver would be found "**only** when (1) the party seeking arbitration has substantially invoked the judicial process and (2) the party opposing arbitration suffers actual prejudice as a result." (emphasis added) *Id.*

In regard to whether Appellant Interconex waived its right to arbitration, the Court first looked to the issue of Interconex's substantial invocation of the judicial process. The Court found: (1) Interconex was served with the lawsuit on January 7, 2004 and failed to answer; (2) the trial court entered a partial default judgment "as to liability" against Interconex on March 3, 2004; (3) Interconex did not file its motion to set aside default judgment until June 2, 2004; (4) Interconex did not set a hearing or file its amended motion to set aside default judgment, which included more extensive allegations, until October 15, 2004; (5) the trial court reset the damages from October 25, 2004 to December 13, 2004 hearing pursuant to Interconex's request for a jury trial on damages; (6) Interconex waited until December 1, 2004, ten days prior to the damages trial which Interconex had specifically requested, to file its motion to compel arbitration, asserting for the first time that the case should be sent to arbitration. Based on these facts, the Court found that Interconex had substantially invoked the judicial process before it moved to compel arbitration.

The *Interconex* Court next looked at the issue of prejudice and concluded that the Appellee demonstrated that Interconex's invocation of the judicial process caused him to suffer actual prejudice.

Based on the above findings, the Court held that Interconex waived any right to arbitration it may have had. Therefore, while the entry of default was a factor in the Court's decision, it was not the sole dispositive factor. Instead, the Court looked at all the facts

before it as is the requirement under SC and 4th Circuit Federal law and determined that the two prong test of waiver had been met before concluding Interconex had waived any right to arbitration.

(5): *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 91 A.3d 364 (Vt. 2013) – This is a Vermont case in which the defendant failed to answer and plaintiff obtained a default judgment in the amount of $69,024.90, against defendant, in addition to interest and costs. The *LaFrance* Court found that the defendant waited more than nine months after being properly served before participating in the case. In fact, defendant did not respond at all until after plaintiff commenced an action to domesticate the default judgment in New York.

The *LaFrance* Court set forth the Vermont waiver of arbitration standard as follows:

> "In determining whether there was waiver, several factors should be considered, including: the timing of the request, the extent that the party seeking arbitration has participated in litigation, and 'whether the party opposing arbitration has suffered prejudice through the incursion of litigation time, costs, and expenses.' *Lamell[Lumber Corp. v. Newstress Int'l, Inc.]*, 2007 VT 83, ¶ 11, 182 Vt. 282, 938 A.2d 1215. This inquiry must take into account the 'entire course of conduct' of the moving party. *Menorah [Ins. Co. v. INX Reins. Corp.*], 72 F.3d[218] at 221."

Id. at 372.

The Vermont standard of waiver is similar to the South Carolina and federal standards. However, the application of this standard to the facts found by the *LaFrance* Court are much different than those in the present action.

Applying the Vermont waiver standard to the facts before it, the *LaFrance* Court found that there was both delay and prejudice. Based on the findings of delay and prejudice, the Court ruled that defendant had waived its right to arbitration.

Therefore, even the singular fact of the default judgment (as opposed to a mere entry of default) was not dispositive of the waiver question. Instead, the *LaFrance* Court looked at the "entire course of conduct" of the defendant and required a finding of both delay and prejudice to invoke a finding of waiver.

(6): *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W. Va. 2000) – The Brief of Appellants and Reply Brief of Appellants specifically address the *Barden*

opinion and the legal authorities on which it relies, including *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996), *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D.Conn.1985) and Civil Procedure Rule 8(c). Appellants submit that the *Barden* case and supporting legal authorities are distinguishable for the reasons stated therein. *See Brief of Appellants, Section II. (E) (1) Pgs. 27-28, 31-35 and Section II. (E) (4) Pgs. 40-44; Reply Brief of Appellants, Section II. (B) (1) Pg. 16.*

In addition, the *Barden* case is further distinguishable in that the *Barden* Court's decision relied on both W.Va. R. Civ. P. 8(c) and 9(c). However, the pleading of the special matter of a condition precedent under Rule 9 of the South Carolina or Federal Rules of Civil Procedure is not at issue in the present case.

B. It Appears The Panel Did Not Consider The Well-Reasoned Opinion Of Cedar Surgery Center v. Bonelli, 96 P.3d 911, 2004 UT 58 (Utah 2004), In Which The Supreme Court Of Utah Employed Arbitration Waiver Standards Similar To The South Carolina State Law Standard And The District Of South Carolina/Fourth Circuit Federal Law Standard In A Default Situation.

The Appellants cited the case of *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (Utah 2004) in support of its argument that the Entry of Default in the present case does not constitute a default or waiver of Appellants' right to mandatory mediation/arbitration.

The *Cedar* case applies the Utah standard of waiver of the right to arbitration. Utah shares the basic framework of South Carolina law and 4th Circuit federal law for deciding whether a party has waived a contractual right to arbitration. Specifically, the Supreme Court of Utah articulated the Utah waiver standard as follows:

> "This court has recognized the important policy behind enforcing arbitration agreements as an "'approved, practical, and inexpensive means of settling disputes and easing court congestion."' *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356, 358 (Utah 1992) (quoting *Robinson & Wells, P.C. v. Warren*, 669 P.2d 844, 846 (Utah 1983). In light of this policy, we have also acknowledged that there is "a strong presumption against waiver of the right to arbitrate." *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 24, 40 P.3d 599. Consistent with our general waiver jurisprudence, *see Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d

> 935, 939-40 (Utah 1993) (defining waiver as "the intentional relinquishment of a known right' (quotation omitted)), we have held that a "waiver of the right to arbitrate must be intentional," and a court may infer waiver "only if the facts demonstrate that the party seeking to enforce arbitration intended to disregard its right to arbitrate." *Cent. Fla.*, 2002 UT 3 at ¶24, 40 P.3d 599. Hence, for a court to find that a party has waived its arbitration right, the party alleging waiver must demonstrate (1) that the party seeking arbitration substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party. *Chandler*, 833 P.2d at 360; *Cent. Fla.,* 2002 UT 3 at ¶¶ 22, 24, 40 P.3d 599. "Whether a party has waived the right to arbitrate is a factually intensive determination," and we "infer the original intent of the party asking for arbitration on a case-by-case basis." *Cent. Fla.*, 2002 UT at ¶ 23, 40 P.3d 599."

Id. at 914.

The *Cedar* Court framed the issue before it as whether defendants waived their contractual right to arbitration when they declined to participate in the underlying litigation and filed a motion to compel arbitration only after default judgment had been entered against them.

In *Cedar* case, when the defendants failed to answer or file a responsive pleading to the complaint, the court entered a default judgment against them. When the defendants also failed to respond to the court's notice of a hearing to determine damages, the court entered a judgment for damages in the amount of $381,370 against the defendants.

Following the entry of judgment for damages, the defendants made their first appearance in the case by filing a Rule 60(b) motion for relief from default judgment and a motion to compel arbitration based on the arbitration clause in the parties' contract. In analyzing the defendants' motion, the *Cedar* court employed the above-stated Utah waiver standard, which standard is extremely similar to the South Carolina and 4th Circuit federal law waiver standards.

Applying this standard to the facts of the case, the *Cedar* Court stated that "[i]deally, the [defendants] would have raised the contractual arbitration clause in an answer to [plaintiff's] complaint and then brought a motion to compel arbitration, rather than simply ignoring the district court proceedings altogether. However, we do not find that such failure evidences an intent on the part of the [defendants] to waive their right to arbitration and

pursue redress through litigation." *Id.* at 915.

The *Cedar* Court expressly acknowledged "that adherence to [the Utah waiver] standard may reward litigants who fail to respond to a complaint or district court proceeding." *Id.* at 915. However, the Court stated that "[w]hile we regret this result, we nevertheless believe that such a standard is entirely appropriate in cases such as this." *Id.*

Accordingly, upon applying the Utah waiver standard to the facts before it, the *Cedar* Court found that the defendants' failure to participated in the underlying litigation and the entry of default judgment resulting therefrom **did not** constitute a waiver of their right to arbitration. (emphasis added) *Id.* The *Cedar* Court, therefore, held that the lower court did not abuse its discretion in setting aside the default judgment and compelling arbitration. *Id.*

C. It Appears The Panel Did Not Consider The Issue Of Whether PCG's Motion To Stay and Compel Arbitration, Which Motion The Appellants Joined In And Consented To, Was Properly Adjudicated And Whether The Relief Requested Therein Should Have Been Granted.

PCG filed and served a Motion to Stay and Compel mandatory mediation/arbitration contemporaneously with the commencement of this action. The Appellants joined in and consented to this motion as part of their Motion to Stay and Compel filed on July 11, 2016, thus rendering PCG's motion a joint motion for all parties to the case.

The Clerk of Court "closed out" this motion due to the referral of the case to the Master. (R. p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Appellants' formal joinder in the motion. The Master issued a bench ruling, finding that the Clerk's action constituted an adjudication of this motion. (R. p. 467, TR. p. 9, lines 5-9). The Master's ruling became final in his written order denying Appellants' Motion to Stay and Compel dated July 14, 2016. The summary closure of this joint motion as an administrative matter and the Master's "adjudication" of this motion on that basis does not constitute a proper adjudication of this motion nor a valid basis for waiver of Appellants' arbitration rights. *See General Equipment v. Keller Rigging*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding that the referral of a case to the Master-in-Equity does not constitute

a waiver of the right to arbitration).

For this reason, and based on all controlling authorities cited in the Brief of Appellants and Reply Brief of Appellants, the Appellants respectfully submit that the joint motion should have been properly adjudicated and a judicial decision rendered by the Master granting the motion and submitting the matter to mandatory mediation/arbitration.

CONCLUSION

For all the foregoing reasons, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that this Court grant the petition for rehearing *en banc* in this matter.

Respectfully submitted this the 9th day of July, 2019.

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July 9, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC — Respondent

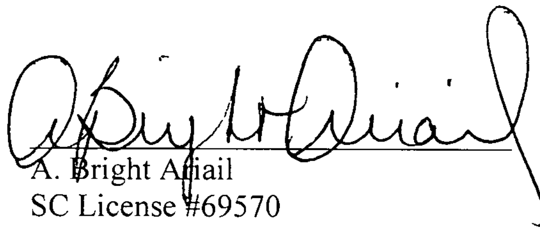
v.

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

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing *En Banc* on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 9, 2019, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr. and Jann Gunnar Rannik, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401 and Michelle Endemann of Clarkson, Walsh & Coulter, P.A., PO Box 2219, Mt. Pleasant, SC, 29465.

July 9, 2019



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Attorney for Appellants

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July 9, 2019

VIA FACSIMILE AND EXPRESS MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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

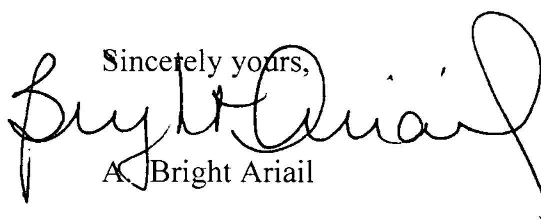
Dear Ms. Kitchings;

Enclosed, please find the original and six copies of the Appellants' Petition for Rehearing *En Banc* and Proof of Service in the above referenced appellate case. In addition, for my records, I've included an additional copy of all for you to file stamp and return to me in the self-addressed stamped envelope. I've also included the filing fee of $25.00 for same.

By copy of this letter, I am serving the Appellants' Petition for Rehearing *En Banc* and Proof of Service on counsel for Respondents.

With kindest regards, I am

Sincerely yours,



A. Bright Ariail

Enclosures

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SC Court of Appeals

cc: Andrew Epting, Esquire
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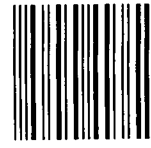

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- ☐ Sunday/Holiday Delivery Required (additional fee, where available*)
- ☐ 10:30 AM Delivery Required (additional fee, where available*)

*Refer to USPS.com® or local Post Office™ for availability.

TO: (PLEASE PRINT) PHONE ( )

[illegible]

ZIP + 4® (U.S. ADDRESSES ONLY)

- For pickup or USPS Tracking™, visit USPS.com or call 800-222-1811.
- $100.00 insurance included.

ORIGIN (POSTAL SERVICE USE ONLY)

☒ 1-Day ☐ 2-Day ☐ Military ☐ DPO

PO ZIP Code	Scheduled Delivery Date (MM/DD/YY)	Postage	
29412	7-10-19	$ 25.70	
Date Accepted (MM/DD/YY)	Scheduled Delivery Time	Insurance Fee	COD Fee
7-9-19	☐ 10:30 AM ☐ 3:00 PM ☒ 12 NOON	$	$
Time Accepted	10:30 AM Delivery Fee	Return Receipt Fee	Live Animal Transportation Fee
1:34 ☐ AM ☒ PM	$	$	$
Special Handling/Fragile	Sunday/Holiday Premium Fee	Total Postage & Fees	
$	$		
Weight ☐ Flat Rate	Acceptance Employee Initials		
1 lbs. 12 ozs.	[illegible]	$ 25.70	

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (MM/DD/YY)	Time	Employee Signature
	☐ AM ☐ PM	
7/10	627 ☒ AM ☐ PM	CS

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JUL 10 2019
SC Court of Appeals

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