

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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

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Palmetto Construction Group, LLC Respondent,

v.

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

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SC Court of Appeals

**APPELLANTS' REPLY TO RESPONDENT'S RETURN TO  
APPELLANTS' PETITION FOR REHEARING *EN BANC***

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NOW COME the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, who hereby reply to to Respondent's Return to Appellants' Petition for Rehearing *En Banc* pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules.

In support of this reply, 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.

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.

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.

On June 26, 2019, the Panel issued an opinion dismissing the appeal as interlocutory and finding, that because Appellants were in default, they waived their right to assert arbitration as a defense.

The Appellants filed a Petition for Rehearing *En Banc* on July 10, 2019. The Respondent filed a Return to Appellants’ Petition for Rehearing *En Banc* (“Return”) on August 2, 2019. The Appellants file this Reply to Respondent’s Return herein.

## LAW/ANALYSIS

### I. APPEALABILITY

#### A. The Appellants Respectfully Submit It Appears The Panel Overlooked The “Substantial Ground” For Immediate Appeal of the Master’s Orders Refusing to Compel Arbitration.

On appeal, the Appellants’ assert the following four grounds in support of their argument that the Master’s rulings denying the Appellants the right to arbitration were immediately appealable:

- (1): Under federal law, an order that refuses to compel arbitration is immediately

appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Armtex, Inc.*, 947 F.2d 727 (4<sup>th</sup> Cir. 1991);

(2): Under South Carolina law an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-48-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC*, 405 S.C. 115, 747 S.E. 2d 461 (2013); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999).

(3): Under South Carolina law, an order finding that a party waived its right to compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E. 2d 749 (Ct. Appl 1999);

(4): Under South Carolina law, an order affecting a substantial right of a party, including a party's mode of trial to which he is entitled is immediately appealable. S.C. Code Ann. §14-3-330 (2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E. 2d 240 (1997); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E. 2d 333 (Ct. App. 2005). In fact, such orders **must** be appealed immediately and cannot be challenged in an appeal from final judgment. (emphasis added). *Id.*

While the Panel did address grounds (1) through (3) above in various parts of its Opinion, dated June 26, 2019 ("Opinion"), the Appellants' respectfully submit that it appears the Panel overlooked ground (4), the "substantial right" ground for immediate appeal of the Master's Order refusing to compel arbitration.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of appealability.

**B. The Appellants Respectfully Submit It Appears The Panel Misapprehended The Interplay Of Appellants' Arguments Regarding Appealability and Waiver Of Arbitration In This Matter.**

In its Opinion, the Panel dismissed the appeal as interlocutory. This included the appeal from the Master's rulings refusing to compel arbitration. Although dismissing the appeal from the Master's refusal to compel arbitration as interlocutory, the Panel issued a substantive ruling finding that Appellants had waived their right to arbitration due to the

entry of default.

The Appellants submit that in light of the Panel's rejection of Appellants' grounds for immediate appeal of the Master's rulings refusing to compel arbitration there should have been no substantive ruling on the issue of waiver. Stated differently, if the Master's rulings denying arbitration were interlocutory, and not immediately appealable, then a ruling on the merits of the waiver question would seem inviolate of the Panel's ruling on appealability.

The Appellants arguments are premised on the previously stated legal precedent that orders finding a waiver of arbitration and/or refusing to compel arbitration are immediately appealable. The appellants further submit that under such precedent an appellate court must either: (a) find that such an order is interlocutory, and not immediately appealable, and refrain from any substantive ruling on the issue of waiver or (b) find that such an order is immediately appealable and then issue a substantive ruling on the issue of waiver. However, it does not seem that the appellate court can find that the order is interlocutory, and not immediately appealable and, thereafter, issue a ruling on the merits of the waiver issue.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of appealability.

**C. The Panel, In Dismissing the Appeal As Interlocutory Did Not Issue A Substantive Ruling On The Master's Denial Of Appellants' Motion To Set Aside The Entry Of Default.**

The Respondent, in addressing the issue of appealability, asserts that "this Court concluded that Appellants were properly in default.." *Return at 4*. The Respondent further asserts that "...without first considering the merits (whether the Master abused his discretion in declining to lift the default), this Court could not have determined whether it had jurisdiction over the appeal." *Id. at 4*. Finally, the Respondent asserts that the Panel found that the "[b]ecause [the Appellants] were unable to demonstrate good cause to lift the default, the motion to compel arbitration was a nullity and was properly denied as such..." *Id at 1*.

It would appear from the Respondent's assertions above, that the Respondent claims the Panel's Opinion included a substantive non-interlocutory finding that the Master did not

abuse his discretion in finding a lack of “good cause” to lift the entry of default and denying the Appellants’ motion for such relief.

However, the opinion of the Panel does not contain any of the Respondent’s assertions. Contrary to these assertions, the Panel made no rulings or findings in its Opinion as to the propriety of the Master’s denial of Appellants’ motion to set aside the entry of default or the Appellants’ appeal therefrom. The Panel did not discuss the Rule 55 (a), SCRCF “good cause” standard for lifting an entry of default. Likewise, the Panel did not discuss the “abuse of discretion” standard of review for orders denying a motion to lift entry of default. Finally, the Panel made no finding as whether the Master did or did not abuse his discretion in denying Appellants’ motion to set aside the entry of default. Indeed, if the Panel had affirmatively ruled on this issue and found there was no abuse of discretion, it would not have dismissed the appeal as interlocutory.

Instead, the Panel, cites *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987) and states that “the denial of a motion to set aside an entry of default is not appealable until after final judgment.” *Opinion at 3*. Thereafter, the Panel states and finds as follows:

“Appellants appeal from a motion to set aside an entry of default. Furthermore, the parties have not participated in a damages hearing and the master has not entered a default judgment against Appellants. Accordingly, both the master’s July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable.”

*Id. at 3-4.*

For the foregoing reasons, the Respondent’s apparent claim that the Panel issued a substantive ruling on the Master’s Denial of Appellants’ Motion to Set Aside the Entry of Default and the Appellants’ Appeal therefrom lacks merit.

## II. WAIVER

### A. The Appellants Respectfully Submit It Appears the Panel Misapprehended The Application Of The Proper Legal Standard And Authorities To The Full Facts And Circumstances Of The Case In Ruling That The Appellants Waived Their Right To Arbitration.

The Respondent asserts that the Court properly held that the arbitration right of the

Appellants had been waived. *Return at 5*. Respondent argues the following in support of this assertion:

(1): Appellants' admission by default of the allegation in the Complaint that jurisdiction was vested in the trial court and venue was proper there constitutes an "emphatic repudiation" of the right to compel arbitration. *Return at 5*.

(2): Arbitration is an affirmative defense that is waived if not pled. *Return at 5*.

(3): A party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration. *Return at 6*.

The Respondent's first argument fails to recognize that under both federal and South Carolina law, the court is divested of jurisdiction only when the case is submitted to arbitration. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708 (D.S.C.); *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.C. 172 (Ct. App. 2009); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E. 2d 300 (2004). Even then, while the court action is required to be stayed, the court's jurisdiction is only temporarily divested. The Court regains jurisdiction over the matter at such time as the arbitration proceeding is completed for purposes of confirmation/approval of the arbitration and/or for appeals to be taken therefrom. Indeed, the Respondent acknowledged as much in the filing of its own Motion to Compel and Stay contemporaneous with its Complaint.

Therefore, the Appellants' admission by default of the jurisdictional and venue allegations do not constitute a repudiation of their right to compel arbitration.

In response to the Respondent's second and third arguments, the Appellants submit that the question before this Court is whether the Appellants have waived or defaulted upon their rights to arbitration **based on the application of the proper legal standard and authorities to all of the facts and circumstances of this case.**

The proper legal standard and authorities are set forth and briefed in detail in the Brief of Appellants, Section II. (E)(2) – (4). Also, with the exception of *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978) and *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013), the cases cited by the Respondent in support of its second and third arguments have been fully briefed and distinguished in the Brief of Appellants and Reply Brief of Appellants. The *Howard* case and *Limehouse* case do not involve arbitration

agreements or the question of whether a party has waived its right to arbitration.

However, the application of the proper legal standard and authorities to the full facts and circumstances of this case establishes that the Appellants have not defaulted upon nor waived their right to mandatory mediation/arbitration in this matter. *See* Brief of Appellants, Section II. (E)(2)-(4).

For the foregoing reasons, and for those set forth in the Appellants' Petition, the Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

**B. 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 and Appellants Respectfully Submit The Panel Misapprehended The Precedential Value And Applicability Of These Legal Authorities To The Arbitration Issues Herein.**

The Respondent makes the general statement that the "cases cited by the Court stand for the propositions that the right to arbitrate can be waived in South Carolina, and that courts have previously found that a defaulting party has waived the right to arbitrate." *Return at 7*. This is a general statement that does not consider the material distinctions in the precedential value and the legal standards and particular facts set forth in those cases supporting a finding of waiver as compared to those in the present case. The Appellants specifically address these distinctions in their Petition for Rehearing *En Banc*. *Petition at 5-11*.

The Panel 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 of first impression in South Carolina 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. *See Petition at 5-11*.

For the foregoing reasons, and for those set forth in the Appellants' Petition, the

Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

**C. It Appears The Panel Overlooked 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.

A review of the *Cedar* case and Appellants' arguments in support of its applicability to the present case are set forth in Appellants' Petition for Rehearing *En Banc*. See *Petition at 12-14*.

Respondent asserts that Appellants' argument that the Panel overlooked the *Cedar* case precedent is not supportable, "given the Court's thorough review of case law from other jurisdictions." *Return at 6*. Respondent's assertion ignores the fact that the referenced case law from other jurisdictions did not include the *Cedar* case.

Respondent further asserts that the *Cedar* case is distinguishable for several reasons from the present case.

First, Respondent asserts that the basis for finding non-waiver in *Cedar* was that the defaulting party's first action in the case included raising its arbitration right. Respondent then attempts to distinguish the present case by stating: (a) arbitration was not mentioned in either Appellants' motion to lift entry of default or Appellants' supporting affidavit and (b) Appellants' motion to compel arbitration was filed over a month after Appellants' motion to lift entry of default and after the Master indicated Appellants' motion was unlikely to succeed.

However, as the Record on Appeal reflects, Appellants' first action in the present case was to file a Motion for Continuance of the damages hearing and a Motion to Set Aside

Entry of Default on June 3, 2016 (the day after Appellants first learned of the entry of default and the pending damages hearing set for June 6, 2016) citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Appellants' grounds for relief. (R.pp. 77-81; R.pp. 82-87). The Appellants understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (R.p. 79, line 18 – p. 80, line 2).

The Appellants, through their undersigned legal counsel, next raised and again put the lower court on notice of the application contractual mandatory mediation/arbitration provisions at the June 6, 2016 court hearing. (R.p. 465, Tr.p. 8, lines 4-8). The Master expressly acknowledged Appellants' counsel's comments and the existence of the mandatory mediation/arbitration provision. (R.p. 466, Tr.p. 12, lines 10-17). In fact, Respondent's counsel even acknowledged the mediation requirement and requested the Court's assistance during that hearing, "if we need to go to mediation." (R.p. 465, Tr.p. 7, lines 4-9).

Thereafter, the Appellants again asserted their right to arbitration and expressly joined in and consented to Respondent's Motion to Stay and Compel by virtue of Appellants' Motion to Stay and Compel mediation/arbitration filed July 11, 2016. (R.pp. 88-93).

The parties reconvened before the Master on July 14, 2016. Appellants also filed a memorandum in support of Appellants' Motion to Lift Entry of Default on July 14, 2016. (R.pp. 94-124). Appellants' supporting memorandum included their continuing invocation of the right to arbitration, coupled with their demand to stay this action and submission of the matter to mandatory mediation/arbitration. (R.p. 97, lines 15-20; R.pp. 94-124).

Finally, the Appellants timely filed a Motion to Alter and Amend the Master's orders pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (R.pp. 125-129)

The Appellants' actions above show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration from the date they first appeared in the action and, thereafter, often and continuously throughout the proceedings in the lower court below.

The Respondent next attempts to distinguish the *Cedar* opinion by alleging that the *Cedar Surgery* court and this Court each reviewed their respective lower court's decision on

whether the default should be lifted under the “abuse of discretion” standard and found no abuse of discretion.

However, as set forth in Section I. C. of this Reply, the Panel did not issue a substantive ruling on whether the default should be lifted under the “abuse of discretion” standard. The Panel did not rule on the propriety of the Master’s decision not to lift the entry of default for “good cause” under Rule 55(a), SCRCR nor did it rule on the merits of the Appellants’ appeal therefrom.

For the foregoing reasons, and for those set forth in the Appellants’ Petition, the Appellants respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

**D. 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 Respondent acknowledges in its assertions regarding the Respondent’s Motion to Stay and Compel mandatory mediation/arbitration that the Panel did not find waiver or make any other findings with regard to the impact of Appellants’ joinder in Respondent’s Motion to Stay and Compel Arbitration, or the lower court’s disposition of that motion.

The Respondent’s acknowledgment is consistent with the Appellants assertion that the Panel appears not to have considered the issue of whether the Respondent’s Motion to Stay and Compel Arbitration, which motion the Appellants joined in and consented to, was properly adjudicated and whether Appellants were entitled to mediation/arbitration thereunder.

The Appellants’ full argument on this issue is set forth in Appellants’ Brief and Section I.2.C. of Appellants’ Petition for Rehearing *En Banc*.

For the foregoing reasons, and for those set forth in the Appellants’ Petition, the

Appellants' respectfully petition this Court pursuant to Rule 221, SCACR for a rehearing on the issue of waiver.

### **III. REHEARING *EN BANC***

#### **Appellants' Request For Rehearing *En Banc* Is Proper.**

Respondent argues that Appellants' request for rehearing *en banc* conflates the standard for rehearing with the *en banc* rehearing standard. Respondent's argument lacks merit.

The grounds for rehearing pursuant to Rule 221, SCACR are properly made and set forth in Appellants' Petition for Rehearing and this Reply to Respondent's Return to Appellants' Petition for Rehearing.

The Appellants' request for a rehearing *en banc* on these grounds addresses the mechanics and proper constitution of the Court (i.e., rehearing by the full court instead of the three-judge panel) for purposes of rehearing the matter. The Appellants' request for an *en banc* rehearing is properly made pursuant to Rule 219, SCACR for the following reasons:

(1): This Court should grant the 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. The supporting arguments for this request for a rehearing *en banc* are set forth in Section I. of Appellants' Petition for Rehearing *En Banc*.

(2): This Court should grant the 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. The supporting arguments for this request for a rehearing *en banc* are set forth in Section II. of Appellants' Petition for Rehearing *En Banc*.

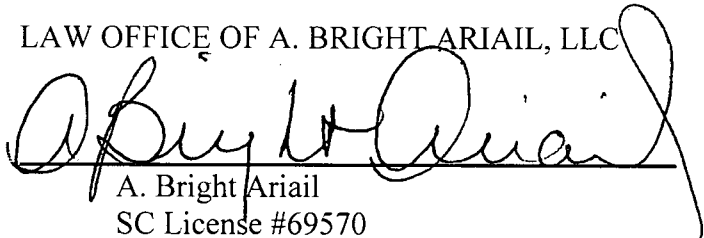
### **CONCLUSION**

For the foregoing reasons as well as the reasons set forth in Appellants' Petition for Rehearing *En Banc*, 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 August, 2019.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

A handwritten signature in black ink, appearing to read "A. Bright Ariail", written over a horizontal line.

A. Bright Ariail  
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ATTORNEY FOR APPELLANTS

August 9, 2019  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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**SC Court of Appeals**

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

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v.

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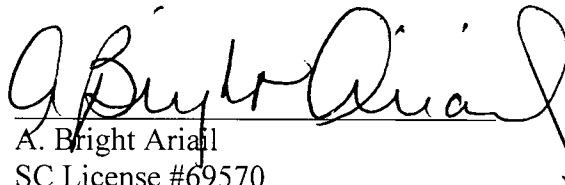
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PROOF OF SERVICE

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I certify that I have served the Appellants' Reply to Respondent's Return to 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 August 9, 2019, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr and Jann Rannik, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401. and Michelle N. Endemann, Clarkson, Walsh & Coulter, PA, P O Box 2219, M. Pleasant, SC 29465.

August 9, 2019

A handwritten signature in cursive script, reading "A. Bright Ariail". The signature is written in black ink and is positioned above a horizontal line.

A. Bright Ariail

SC License #69570

Law Office of A. Bright Ariail, LLC

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843/814-8805

Attorney for Appellants

# Law Office of A. Bright Ariail, LLC

August 9, 2019

**VIA EXPRESS MAIL**

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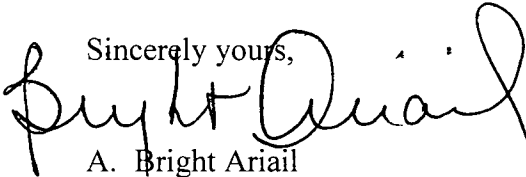
RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*  
Appellate Case No. 2016-002308

Dear Ms. Kitchings;

Enclosed, please find the original and six copies of Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing *En Banc* and Proof of Service for filing. 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 included.

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

With kindest regards, I am

Sincerely yours,  
  
A. Bright Ariail

Enclosures

cc: Andrew Epting, Esquire  
Jann Gunnar Rannik, Esquire  
Michelle Endemann, Esquire

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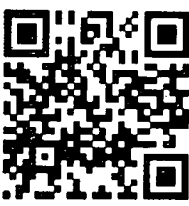
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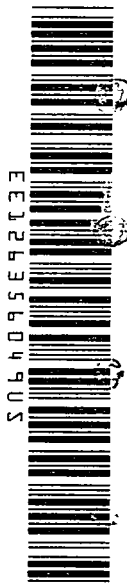


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