THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2018-000171

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Civil Action No. 2017-CP-10-02148
J. C. Nicholson, Jr., Circuit Court Judge

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Other

ARGUMENT

In reply to the Brief of Respondent Cleo Sanders, and in further support of the Brief of Appellant Savannah Highway Automotive Co., d/b/a Rick Hendrick Dodge Chrysler Jeep Ram ("Rick Hendrick" or "Appellant"), Appellant offers the following arguments, incorporating by reference the background facts and arguments stated in its prior Brief.[1]

I. The Circuit Court Erred in Denying Appellant's Motion to Compel Arbitration

Respondent makes several unavailing arguments in his brief in an effort to distract from the true issue at hand with respect to Appellant's motion to compel arbitration. First, Respondent argues that Appellant did not appeal four separate rulings of the Circuit Court's Order denying Appellant's motion to compel arbitration. What Respondent appears to suggest is that Appellant was required to specifically appeal each sentence of the finding/conclusions paragraph of a two-and-a-half page Order. This argument is simply without merit, as Appellant clearly appealed the Circuit Court's Order in its entirety.

Additionally, Respondent continuously asserts that a contract did not exist. Respondent's assertion is incorrect and attempts to misconstrue the record and confuse the issues before the Court. Clearly, a written agreement with Respondent to arbitrate claims existed. The question is, and the question presented to this Court by Appellant, was whether the interpretation and scope of the arbitration clause within that written agreement, including the effect of the assignment, is to be decided by an arbitrator.

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[1] Initially, Appellant notes that much of Respondent's "Preliminary Statement" contains facts not in the record and is largely improper. Moreover, Respondent's Brief appears to exceed the allowed length pursuant to Rule 208(b)(5), SCACR.

Respondent's oft-repeated fallacy that no contract exists is a disingenuous attempt to avoid the broad language of the arbitration clause in the RISC. First, the Circuit Court's order does not hint at a ruling that a contract does not exist. Whether a contract was assigned versus whether a contract exists are two very different questions. Thus, the majority of Respondent's brief on the issue misses the mark and focuses on foundational misrepresentation.

However, analyzing the proper issue, i.e., whether the effect of the assignment on the ability to arbitrate is within the scope of the arbitration clause and thus for the arbitrator to decide, does not inure in Respondent's favor. It is the exact question the Ninth Circuit Court of Appeals addressed in *AT&T v. United Computer Systems*, No. 94-56755, No. 95-55015, 1996 U.S. App. LEXIS 28484, at *6-7 (9th Cir. Oct. 30, 1996):

> We reject AT&T's contention that the issue of [defendant's] standing to compel arbitration is not subject to arbitration. Paragraph 33 of the licensing agreement provides: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration[.]" This expansive language requires AT&T to submit to arbitration any dispute concerning the substantive provisions of the agreement, including a dispute regarding an assignment under Paragraph 13 of the agreement.
>
> AT&T argues that the issue on appeal is about who should decide whether the assignment was valid-- the courts or the arbitrators. However, the actual question here is not *who* decides the assignment issue, but whether the matter of assignment is within the scope of the arbitration agreement. As the Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1990) notes, when the question is whether the arbitration agreement includes a particular merits-related dispute, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 115 S. Ct. at 1924 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). *Here Paragraph 33's broad and expansive language requires AT&T to submit the assignment issue to arbitration and the court did not err in remanding this issue to arbitration.*

Id. (emphasis added).[2] This law is not new, nor does it contravene any other law or jurisprudence, despite Respondent's assertions to the contrary.

Likewise, in *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 209 (2d Cir. 2005), the Second Circuit Court of Appeals noted that there is a general presumption that the issue of arbitrability should be resolved by the courts, unless "there is *clear and unmistakable evidence* from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Id.* at 208. (emphasis in original). This is in line with South Carolina's jurisprudence. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."). The *Contec* court stated that "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Id.*

In *Contec*, a signatory to an arbitration agreement sought to avoid arbitration because the contract was assigned to the non-signatory party seeking to compel arbitration. The court stated that whether there was a valid assignment "is an issue that pertains directly to the continued 'existence, scope or validity' of the [arbitration a]greement." The court then held that the signatory plaintiff "agreed to be bound" by provisions that "clearly and unmistakably allow the arbitrator to determine its own jurisdiction" over an agreement to arbitrate "whose continued existence and validity is

[2] *See also CVD Equip. Corp. v. Dev. Specialists, Inc.*, Civil Action No. 11062-VCG, 2015 Del. Ch. LEXIS 193, at *5 (Ch. July 23, 2015) (holding that standing and jurisdictional questions are questions of scope, and that questions of scope, including whether the arbitration provision was drafted broadly enough to include disputes arising from the contract brought not by a signatory to that contract, but by an assignee of that signatory pursuant to an assignment for the benefit of creditors, are questions of substantive arbitrability which were agreed upon to be decided by the arbitrator).

being questioned," and therefore, "it is the province of the arbitrator to "decide whether a valid arbitration agreement exists." *Id.*[3] (holding that as a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, the plaintiff cannot disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability).

As cited in Appellant's Brief, the Alabama Supreme Court also addressed this precise issue in *Oakwood Acceptance Corp. v. Hobbs*, 789 So. 2d 847, 851-52 (Ala. 2001): "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." (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).[4] In *Oakwood*, the plaintiffs contended that the defendant, the financer, did not have standing to compel arbitration because it did not present any evidence that it had been assigned the rights to the sales contract.

The *Oakwood* court noted that "when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts" and that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear

[3] The Second Circuit also held that the signatory to an arbitration agreement "is estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Contec*, 398 F.3d at 208 (internal quotations and citations omitted).

[4] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) is a United States Supreme Court case and remains good law. In *Kaplan*, the United States Supreme Court acknowledges the presumption in favor of arbitration, but notes that when the issue of actual arbitrability is at issue, courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so." Id. at 944. If this is not a case of "clear and unmistakable" evidence of an agreement to arbitrate arbitrability, no case exists.

and unmistakable' evidence that they did so." *Id.* at 852 (citing *Kaplan*, 514 U.S. at 944) The *Oakwood* court analyzed the arbitration agreements at issue and stated:

> In each of the two cases now before us, the arbitration agreement clearly provides that 'any challenges to the validity or enforceability of this Agreement shall be determined by the arbitrator(s).' Therefore, whether Oakwood Acceptance has standing to enforce the arbitration agreement between Oakwood Homes and the plaintiffs is a question that must be decided by the arbitrator.

Id. at 852.

Here, just as in *Oakwood*, and *Contec*, and *AT&T*, and in conjunction with *Kaplan*'s framework, the parties clearly agreed to arbitrate arbitrability. The agreement states, in pertinent part:

> Any claim or dispute, whether in contract, tort, statute or otherwise (*including the interpretation and scope of this Arbitration Clause, and the arbitrability of this claim or dispute*) between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, *at your or our election, be resolved by neutral, binding arbitration and not by a court action.*

(emphasis added). Here, there is "clear and unmistakable" evidence that the parties agreed to arbitrate the issue of arbitrability. There can be no other conclusion. Respondent's repeated contention that there is no contract simply misses the mark. Rather, the cases cited herein squarely dealt with assigned contracts yet still concluded that the effect of the same, or in other words, the arbitrability and efficacy of the clause, is a question for the arbitrator where the parties clearly consented to arbitrating those issues. Thus, the arbitrability of this action, including the issues related to Appellant's standing and arbitrability, is a decision to be decided in arbitration, by an arbitrator, pursuant to the valid Arbitration Clause.

II. The Circuit Court was Without Jurisdiction to Issue its Second Order

In his brief, Respondent argues that the Circuit Court's Order compelling discovery is not a matter affected by the appeal of the Order denying Appellant's motion to compel arbitration.[5] In this regard, Respondent contends that the Circuit Court's entry of the discovery order was merely a ministerial act. However, it was far more than that and the Circuit Court was without subject matter jurisdiction pursuant to Rules 205 and 241, SCACR, for several different reasons.

First, the issuance of a more thorough, written order is not merely a ministerial act and in fact, Respondent has failed to cite any case law to support such an assertion.[6] Indeed, Respondent's reliance on *Doe v. Berkeley Publishers*, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996), *rev'd on other grounds*, 329 S.C. 412, 496 S.E.2d 636 (1998) is misplaced. In that case, Doe filed a notice of appeal after an oral ruling but before the more thorough written order. Here, two orders are at issue. Appellants properly waited until after the issuance of the written Order denying the motion to compel arbitration to file their notice of appeal. However, after the Notice of Appeal was filed, the thorough written Order regarding the motion to compel discovery, *and changing the oral ruling,* was filed. Indeed, if *Doe* stands for anything, it stands for the proposition that until the more formal, written Order is filed when requested from the bench, an oral ruling from the bench may not be the actual order.

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[5] For ease, the Circuit Court granted Respondent's Motion to Compel Discovery Requests in its February 20, 2018 Order. This Order was filed nearly two weeks after Appellants' February 6, 2018 Notice of Appeal was filed with respect to the Circuit Court's January 10, 2018 Order denying Appellants' Motion to Compel Arbitration. The hearing on the Motion to Compel Discovery Requests occurred on January 9, 2018.

[6] Respondent's hypothetical concerns of an appellant "rush[ing]" to the appellate court before the signing of a second order and a trial judge retires or dies is not only hyperbole, it is also irrelevant to the situation at hand.

Further, as noted in Appellant's Brief, the development and exchange information and "discovery" in arbitration is vastly different from formal discovery in the South Carolina court of common pleas. The arbitration rules,[7] and many other differences in the exchange and use of documents and information, necessarily affirm that an order compelling discovery is a matter "affected by the appeal" of the motion to compel arbitration.

Most importantly, in his attempt to distinguish the "issuance" of an order versus the "filing" of an order, Respondent fails to appreciate one crucial fact: the Circuit Court categorically changed its oral ruling in the written Order and removed any doubt that it did not have subject matter jurisdiction to issue the order.

At the hearing on the discovery motion, the Circuit Court specifically stated "[p]ut in the order that you are not waiving your argument for – any arguments that you may have for arbitration, okay." (R. p. 29). Despite this oral ruling, the Order which was filed stated "Defendants, except Rick Hendrick, shall not waive its position regarding the right to compel and/or participate in discovery by responding to said discovery." (R. p. 89).[8]

This was not merely a filing of the previous oral ruling. Nor was it simply a ministerial act by the clerk's office or court. Rather, it was a fundamental shift in the agreed upon ruling and requested proposed order. And importantly, the written Order

[7] Respondent objects to Appellant's citation to the Consumer Rules of the American Arbitration Association ("AAA") in Appellant's Brief. Respectfully, the AAA rules were cited not as part of the record below but as an exemplar, just as judicial decisions and treatises are routinely cited as persuasive material. Moreover, the AAA is clearly cited in the arbitration clause and reference to these rules was not improper.

[8] Appellant takes issue with Respondent's footnote 13, wherein Respondent's counsel mischaracterizes the events that led to the proposed orders and ultimate written order. There were extensive communications among the parties and Circuit Court which led to the written order, none of which is in the record before this Court. Thus, Appellant asserts it Respondent's footnote 13 is improper and in any event, does not change the fundamental difference between the oral ruling and the written order.

which represented a fundamental deviation from the oral ruling, was filed after the Notice of Appeal and expressly affected Appellant's right to arbitration. The Circuit Court's Order revoked Appellant's ability to seek arbitration after a Notice of Appeal was filed on the issue of compelling arbitration. Pursuant to Rules 205 and 241, SCACR, the Circuit Court did not have the power to issue the order intruding on the very issue on appeal—Appellant's right to seek or participate in arbitration. This cannot stand and this Court should find the Order void for lack of subject matter jurisdiction. *See Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, our supreme court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).

III. The Circuit Court Erred in Issuing its Order Granting Respondent's Motion to Compel Discovery, Wherein it Expressly Found that Appellant Waived its Right to Seek and/or Participate in Arbitration by Responding to Discovery

Assuming the Circuit Court had the power to issue its second Order in this matter after Appellants filed the Notice of Appeal, which is denied, the Order granting Respondent's Motion to Compel Discovery is still controlled by an error of law and should be reversed.

Appellant acknowledges that normally, discovery orders are interlocutory orders and cannot be appealed. Nevertheless, the Circuit Court's discovery Order is not only a discovery order. The Order categorically affects a substantial right of Appellant, holding that Appellant waived its position regarding its right to compel and/or participate in arbitration by responding to discovery.[9] In so doing, the Circuit Court compelled initial

[9] It also is a matter affected by the appeal of the Order denying Appellant's motion to compel for the reasons previously stated herein, *infra*.

discovery responses while simultaneously penalizing the party for responding to said discovery—this cannot stand in light of the presumption in favor of arbitration and the case law regarding waiver of the right to seek the same.

Respondent claims to find Appellant's argument confusing, but it is not. Rather, it is quite simple. The Circuit Court's Order retroactively affected an issue on appeal and prospectively affected Appellant's rights to seek arbitration in the future under the RSIC, any other contract, document, statute or the common law. If Respondent is confused, such confusion only further enforces Appellant's argument that the Circuit Court was without subject matter jurisdiction to issue such an order because it clearly affected the very issue on appeal. Moreover, Respondent's statement that "Judge Nicholson did not find that Savannah Highway waived its right to arbitration by participating in discovery in the past or in the future" is perplexing because that is the very thing the Circuit Court stated, albeit with slightly different syntax.

The substantive error of the Circuit Court's Order compelling discovery responses, while also indicating Appellant waives its position regarding the right to compel arbitration (now and in the future) by responding to said discovery not only places Appellant in a proverbial "Catch-22," but is also contrary to the relevant jurisprudence. As thoroughly discussed in Appellant's Brief, South Carolina law with respect to participation in discovery's effect on waiver of the right to arbitrate is fact intensive.

A party may waive its right to insist on arbitration if the party "*so substantially utilizes the litigation machinery* that to subsequently permit arbitration would prejudice the party opposing the stay." *Fraser v. Merrill Lynch Pierce, Femner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (emphasis added). But even in cases when the party seeking arbitration has invoked the "litigation machinery" to some degree, "the

dispositive question is whether the party objecting to arbitration has suffered actual prejudice." *Id.* "Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration." *Id.* (citation omitted).

Despite Respondent's conspiracy theory to the contrary, Appellant's invocation of the arbitration clause was neither untimely nor done with delay.[10] Nor did Appellant waive its right to seek arbitration by filing an Answer in this matter, and in fact, the arbitration clause was enumerated as a specific defense to the Action by Appellants. Moreover, nothing in the *record* suggests that Respondent has suffered actual prejudice sufficient to constitute a waiver of Appellant's right to arbitration. *See In re Mercury Constr. Co.*, 656 F.2d at 939 ("It is only when . . . delay results in actual prejudice that it may amount to 'default' within the [FAA]"); *see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249-50 (4th Cir. 2001) (noting that when the time between filing of action and arbitration was less than six months, there was no waiver).

A litany of South Carolina cases addressing this issue mandate that the Court find the Circuit Court's Order was in error and contrary to South Carolina law. *Compare Toler's Cove Homeowners Association, Inc. v. Trident Construction. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (holding thirteen month period did not demonstrate waiver of the right to seek arbitration when discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions"); *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding a

[10] Respondent contends Appellant has "refused" to produce any information in this case and the continuing delay and "track record" has resulted in prejudice to him. Without reiterating arguments, Appellant simply states that it has not substantially engaged in the litigation machinery in order to preserve its rights for arbitration, as clearly outlined in the case law cited by Appellant. Moreover, although Appellant appreciates the need for extensions of time given certain circumstances, Respondent's counsel requested approximately six (6) months to file his brief. Thus, to the extent there is a delay, Respondent bears some responsibility.

thirteen month period did not demonstrate waiver when "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes); *General Equipment & Supply Co. v. Keller Rigging & Construction, Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding period of less than eight months did not establish waiver where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories") *with Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver of the right to compel arbitration); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); *Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (finding waiver after two-and-a-half year period when the parties sought assistance from the court on approximately forty occasions).

In the case *sub judice*, Appellant filed its motion to compel arbitration only four months after Respondent filed the lawsuit. Furthermore, Appellant did not engage in discovery prior to filing its motion to compel arbitration. In fact, Appellant made a strategic decision prior to filing its motion to compel arbitration to not engage in discovery so as to avoid even the appearance of taking advantage of the judicial system and/or waiving its right to arbitrate. While Respondent takes issue with the requested extension, there can be no argument that one extension request resulted in prejudice to Respondent in any form. Simply put, Appellant did not take advantage of the judicial

system in any way prior to filing its motion to compel discovery.

A court order compelling discovery responses, while simultaneously penalizing a party for responding to discovery, defies logic and places Appellant in an impossible situation—as such, it should be reversed.

IV. Appellant's Arguments are Properly Preserved.

Appellant is perplexed by Respondent's arguments related to preservation. The Order denying Appellant's motion to compel arbitration necessarily includes a ruling on Appellant's arguments regarding standing, assignment, arbitrability, and scope. They are all one and the same, as the cited case law clearly suggests. *See, e.g., State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delicti" in his request for directed verdict); *In re: Robert D.*, 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation); Jean H. Toal, *Appellate Practice in South Carolina*, (2d Ed. 2002) (noting that a party need not use the exact name of a legal doctrine in order to preserve it as long as it is clear the issue was raised). Furthermore, they were all argued as one and the same in briefing and at the arbitration hearing—Respondent's suggestion that Appellant did not raise the issues is simply inaccurate.[11] Thus, the issues were clearly raised to the Circuit Court and the Circuit Court's ruling encompasses the core of the issue. Furthermore,

[11] For example, the undersigned stated at the November hearing: "I'll deal with the assigning issue first. The arbitration agreement says specifically that the arbitrability of the claim between you and us or our employees and agents, successors or assigns, which arises out of or relates to your credit application purchase or condition of this vehicle, this contract – and it goes on and on. So specifically references that assigns would be part of it." (R. p. 18). It was further argued that "if there is an assignment, and whether there's an issue about whether they're [sic] standing on that, it still has to be sent to the arbitrator to make the ultimate decision about whether or not you can enforce that arbitration clause." (R. p. 19). These examples are not exhaustive of the times the issues were raised and further support that the issues are all interconnected to the ruling in the Circuit Court's Order.

Appellant briefed and argued issues regarding discovery and waiver at both hearings and in briefing—to suggest otherwise is simply a misrepresentation.

Moreover, Appellant misconstrues the preservation rules with respect to the discovery Order—the Circuit Court's Order granting the motion to compel discovery addressed discovery and waiver; thus, again, the issues were raised to the Circuit Court and ruled upon. Thus, Respondent's arguments with respect to preservation are wholly without merit.

CONCLUSION

For the reasons cited herein and in Appellant's Brief, Appellants respectfully request this Court reverse the Circuit Court's first order and compel arbitration and void or reverse the Circuit Court's second order regarding discovery and waiver.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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The undersigned counsel hereby certifies that Respondents Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White's Final Reply Brief complies with South Carolina Appellate Court Rule 211(b).

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PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U.S. Mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

Appellants' Final Reply Brief

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