THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143

Palmetto Construction Group, LLC	Respondent
v.	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	Petitioners

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PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that a Petition for Rehearing *En Banc* regarding the Opinion of the Court of Appeals that is the subject of this petition was made by the Petitioner's on July 10, 2019 and finally ruled on by the Court of Appeals on November 15, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Master's Orders refusing to compel arbitration are interlocutory and not appealable?

2. Did the Court of Appeals err in holding that the Petitioners waived their right to arbitration?

STATEMENT OF THE CASE

This action arises out of a construction project in Augusta, Georgia. (R.p. 13, lines 1-3). On March 29, 2012, the Petitioner, Restoration Specialists ("Petitioner Restoration") was awarded a contract to construct the Charlie Norweed VAMC Parking Garage in Augusta, Georgia ("the Norwood Parking Garage Project" or the "Project"). (R.p. 94). Prior to the contract award, the Respondent entered into a Teaming Agreement with Petitioner Restoration in December 2011. (R.pp. 32-37). The Respondent entered into a Subcontract Agreement with Petitioner Restoration on September 190, 2014 in connection with the Project. (R.pp. 17-31).

Respondent filed this lawsuit on March 7, 2016, alleging a breach of the Subcontract Agreement. (R.pp. 9-41). Simultaneously with filing the lawsuit, Respondent filed a Motion to Stay and to Compel on March 7, 2016. (R.pp. 42-60). The basis of *Respondent's Motion to Stay and to Compel was that the Subcontract Agreement contained*

mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate in Georgia or other agreed upon location and, if necessary, arbitrate all claims contained in Respondent's lawsuit. (R.pp. 42-60).

Respondent simultaneously served all Petitioners with both the Complaint and Motion to Stay and to Compel on March 14, 2016. (R.pp. 66-71).

Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. (R.pp. 61-71). The Circuit Court entered default against the Petitioners on April 21, 2016. (R.p. 3).

On the evening of June 2, 2016, the Petitioners were served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. (R.pp. 72-73 and 476). The Petitioners were unaware of the default status of the case and the scheduling of the damages hearing until they received this hearing Notice on June 2, 2016. (R.pp. 74-76). Upon receipt of this Notice of Hearing, the Petitioners immediately retained legal counsel on June 3, 2016. (R.pp. 74-76; R.p. 79, lines 13-14). Petitioners' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016, citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Petitioners' grounds for relief. (R.pp. 77-87).

At the hearing on June 6, 2016, the Master in Equity ("Master") granted Petitioners' Motion for Continuance of the damages hearing and held the Motion to Set Aside Entry of Default in abeyance. (R.p. 466, Tr. p. 11, line 18 – p. 12, line 4). The Master then directed the Petitioners to provide financial information relative to the Project to see what could be resolved between the parties and scheduled the matter to reconvene for a status conference

on July 14, 2016. (R.p. 466, Tr.p.12, lines 6-23). Per the Master's direction, the Petitioners provided certain relevant documents and basic written discovery responses to Respondent.

On July 11, 2016, the Petitioners filed a formal Motion to Stay and to Compel on the basis of the mandatory contractual mediation/arbitration provisions. (R.pp. 88-93). In addition, the Petitioners joined in and consented to Respondent's Motion to Stay and to Compel, rendering that motion a joint Motion to Stay and to Compel mandatory mediation/arbitration ("Joint Motion"). (R.pp. 88-93). As such, Petitioners' singular and joint Motions to Stay and Compel mandatory mediation/arbitration were pending before the Master at this time.[1]

The parties reconvened before the Master on July 14, 2016. (R.p. 467). The Petitioners also filed a Memorandum in Support of their Motion to Lift Entry of Default on July 14, 2016, which included Petitioners' continued assertion of their right to arbitration. (R.pp. 94-124). During the reconvened hearing the Master stated that the Clerk of Court "closed out" the Respondent's Motion to Stay and Compel. (R.p. 467, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Petitioners' 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 further ruled from the bench finding Petitioners in default, denying Petitioners' Motion to Lift Entry of Default and scheduling a default damages hearing for October 4, 2016. (R.p. 467, Tr. p. 9, lines 12-17 and Tr. p. 12, lines 7-8).

Upon completion of the reconvened hearing, the Master issued a formal order dated July 14, 2016. (R.p. 4). The Master's formal order: (a): Denied Petitioners' Motion to Lift

[1] While Respondent asserts that it "set aside" or "withdrew" its Motion to Stay and Compel, the record is devoid of evidence substantiating same.

Entry of Default for lack of good cause; (b): Denied Petitioners' Motion to Stay and Compel mandatory mediation/arbitration on the basis of default; and (c): Set a damages hearing for October 4, 2016. (R.p. 4). Petitioners received written notice of entry of these orders on July 18, 2016. (R.pp. 477-482).

The Petitioners filed a timely Motion to Reconsider and to Alter and Amend the Master's orders pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. (R.pp. 125-129). The Master scheduled the hearing on Petitioners' Rule 59(e) motion to be held on October 11, 2016, seven days after the scheduled damages hearing on October 4, 2016. (R.pp. 483-484).

On September 7, 2016 standing on their rights to mandatory mediation/arbitration, the Petitioners requested in writing that the Master schedule the hearing on Petitioners' Rule 59(e) motion prior to the October 4, 2016 damages hearing. (R.p. 485).

On September 7, 2106, the Master replied to Petitioners' request and made the decision to switch the hearing dates, with the motions hearing to be held on October 4, 2016 and, if necessary, the damages hearing to be held on October 11, 2016. (R.pp. 486-492). The Master asked the parties to advise if this plan was acceptable. (R.pp. 486-492). The Petitioners informed the Master that this plan was acceptable. (R.pp. 486-492). The Respondent notified the Master that it would defer to the Master, but preferred the damages hearing to proceed on October 4, 2016 and the motions hearing to be held thereafter on October 11, 2016. (R.pp. 486-492).

After further consideration, the Master then reversed his decision to switch the hearing dates and informed the parties that the damages hearing would proceed on October 4, 2016 and the motions hearing would be held on October 11, 2016. (R.pp. 486-492). The

Petitioners received written notice of the Master's decision on September 12, 2016. (R.pp. 486-492).

The Master's decision to proceed with the damages hearing and not hear the Petitioners' Rule 59(e) motion prior thereto effectively denied this motion as proceeding with the damages hearing under these circumstances would severely prejudice, and potentially force a waiver of Petitioners' rights to arbitration and foreclose any appeal therefrom. Therefore, subject to, without waiving, and fully reserving their rights to arbitration, the Appellants commenced an appeal in this matter on September 30, 2016. (R.pp. 496-500).

Thereafter, the Master notified all parties that he intended to go forward with the hearing set for October 4, 2016. (R.pp. 493-495). During that hearing, the Master did not proceed with the damages hearing nor issue a ruling on the Rule 59(e) motion, stating instead, that he wished to establish a record for appellate court review of this matter. (R.p. 470, Tr. p. 9, lines 14-19). Accordingly, the Master accepted Petitioners' Memorandum in Support of Defendant's Motion to Reconsider and to Alter or Amend (R.pp. 130-136), discussed the procedural posture of the case (R.pp. 468-470), allowed the parties to proffer information related to Petitioners' Motion to Reconsider and to Alter or Amend (R.pp. 470-474) and allowed Respondent to proffer information related to damages alleged (R.pp. 474-475), to which Appellants' vehemently objected (R.p. 475). Further, pursuant to the Master's request, the parties thereafter submitted additional legal memoranda to the Court for consideration regarding Petitioners' Rule 59(e) motion. (R.pp. 149-327).

On October 27, 2016, the Respondent filed a Motion to Dismiss Appeal. (R.pp. 328-367). Thereafter, on November 10, 2016, the Court of Appeals issued an order stating

that based on the Master's actions at the October 4, 2016 hearing, it appeared the Master intended to issue a final written order on the Rule 59(e) motion. (R.p. 7). Accordingly, the Court of Appeals dismissed Petitioners' initial appeal without prejudice ruling that the Petitioners could appeal after the Master's issuance of a final, written order on the Rule 59(e) motion. (R.p. 7).

On October 28, 2016, the Master issued an order ruling on Petitioners' motion to reconsider pursuant to Rule 59, SCRCP. (R.pp. 5-6). The Master's Order: (a): Denied Defendants' Motion to Amend on the basis that Defendants did not show good cause to lift the default, and (b): Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. (R.pp. 5-6). Petitioners received written notice of entry of this order on November 2, 2016. (R.pp. 501-502).

The Petitioners commenced the instant appeal on November 14, 2016, appealing the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016. (R.pp. 501-507). The South Carolina Court of Appeals issued its opinion, dated June 26, 2019, dismissing the Petitioners' appeal finding that: (a): the Master's July 14, 2016 and October 28, 2016 orders are interlocutory and not appealable and (b): because Petitioners were in default, they waived their right to assert arbitration as a defense. (A. pp. 4-10).

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE MASTER'S ORDERS REFUSING TO COMPEL ARBITRATION ARE APPEALABLE.

(A): The Master's Orders refusing to compel arbitration raise appealable arbitration issues that are immediately appealable.

The Petitioners have appealed the Master's Orders dated July 14, 2016 and October 28, 2016. The Master's July 14, 2016 Order ruled, in part, that "Defendants' motion to stay and to compel arbitration is denied as Defendant is in Default." The Master's October 28, 2016 Order ruled that "the affirmative defense of arbitration has been waived and Defendant's Motion to Stay and Compel filed July 11, 2016 was not properly made."

Both orders refuse to stay this action and deny Petitioners' application and rights to compel arbitration. Accordingly, the Master's orders raise appealable arbitration issues that is immediately appealable under both the federal and state arbitration acts.

Under the Federal Arbitration Act, an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration or refuses to compel arbitration—is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991).

Under the South Carolina Uniform Arbitration Act, an order denying an application to compel arbitration is immediately appealable. S.C. Code Ann. §15-448-200(a)(1); *Cape Romain Contractors, Inc. v. Wando E, LLC,* 405 S.C. 115, 747 S.E. 2d (2013); *Towles v. United Healthcare Corp.,* 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). Also, 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. App. 1999).

In addition to the precedent set forth above, the Master's orders refusing to compel arbitration are immediately appealable in that they deny the Petitioners the right to arbitration and, therefore, affect a substantial right of the Petitioners. An order denying a party a 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). Such orders must be appealed immediately and cannot be challenged in an appeal from final judgment. *Id.*

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATION.

(A): Appellate Standard of Review.

The denial of a motion to compel arbitration, based on a finding of waiver, is a legal conclusion subject to *de novo* review on appeal. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013); *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E. 2d 639, 641 (Ct. App. 2003).

(B): Public Policy Supports Contractually Agreed Arbitration.

The parties' contract is clearly an integrated and executed written agreement whereby Respondent and the Petitioners agreed to resolve their disputes through mandatory mediation, and if necessary, through arbitration. (R.pp. 17-31); *see also* Brief of Appellants, Arguments – Section II. (C): All Appellants Are Entitled to Mediation/Arbitration Under the Alternative Dispute Resolution Provisions of the Contract. (A. pp. 144-147) and Reply Brief of Appellants, Arguments – Section II. (A): The Respondent's Claims Against the Ward Appellants Relate To and Are Intertwined With The Subcontract And, Therefore, Are Subject To Arbitration. (A. pp. 71-74). Pursuant to South Carolina Code Annotated §15-48-10, such an agreement is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." South Carolina Code Ann. § 15-48-10. Likewise, under federal law such an agreement is "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.

Moreover, "the policy of the United States and South Carolina is to favor arbitration

of disputes." *Tritech Elec. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E. 2d 864 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E. 2d 135, 136 (1995). Further, South Carolina and federal courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E. 2d 349 (2002); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A] as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense...*") *Id.* (emphasis added).

Given both the United States and South Carolina's well recognized and articulated preference for arbitration, and the fact that the parties entered into a written agreement to arbitrate all disputes arising out of or related to the contract, this Court should accept certiorari, reverse the Court of Appeals and Master's rulings, and stay this action and compel the matter to mandatory mediation/arbitration.

(C): The Petitioners Have Not Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

(1): The Court of Appeals Ruling That The Petitioners Waived Their Right To Arbitration Constitutes Reversible Error Upon A Novel Question of Law And Matter Of First Impression In South Carolina.

The Petitioner's appeal and the Court of Appeals' analysis herein raises a novel question of law and matter of first impression in South Carolina. Specifically, the question raised is whether the singular fact that a default is entered against a defendant constitutes a waiver of the right to compel arbitration. As a necessary corollary, this novel question

raises an additional query; specifically, whether an entry of default constitutes a bright-line dispositive factor negating and rendering irrelevant all other factors, and associated facts, related to the defendant's efforts to enforce arbitration.

In analyzing Petitioner's appeal, the Court of Appeals made the initial and improper ruling that the Master's orders did not raise any appealable issues. Therefore, the Court of Appeals dismissed the entire appeal as interlocutory.

Despite ruling that the appeal was interlocutory, the Court of Appeals issued its additional substantive ruling finding that the Petitioners waived their right to arbitration. The Court of Appeals cited the standard for waiver as follows:

> "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." [*Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999)]...(citations omitted) (internal quotations omitted)."

Court of Appeals Opinion Number 5561, Pg. 5 (S.C. Ct. App. Filed June 26, 2019). (A. p. 8).

After citing this standard, however, the Court of Appeals' analysis ignored the issue of prejudice as well as the other well-established factors for determining waiver of arbitration under both South Carolina and federal law. Instead, the Court of Appeals cited a single South Carolina case and rendered a cursory review of several additional cases from other jurisdictions in support of its ruling that Petitioners waived their right to arbitration solely by virtue of the entry of default.

The single South Carolina case cited by the Court of Appeals is *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989). The Court of Appeals citation to *Wham*, however, is prefaced with its express acknowledgment that *Wham* does not specifically address the issue at hand. *Id.* (A. p. 8). Furthermore, *Wham*

is distinguishable from the present case for the reasons set forth in Appellants' Petition for Rehearing *En Banc*. (A. pp. 43-56).

The remaining cases summarily cited by the Court of Appeals from jurisdictions other than South Carolina are equally distinguishable and inapposite to the arbitration issues before this Court. Petitioners have distinguished these cases on the grounds set forth in Appellants' Petition for Rehearing *En Banc*. (A. pp. 43-56).

In contrast to those distinguishable cases, the Petitioners presented the well-reasoned opinion of the Supreme Court of Utah in *Cedar Surgery Center v. Bonelli*, 96 P. 3d 911, 2004 UT 58 (Utah 2004) on the waiver issue for consideration by the Court of Appeals.

The *Cedar* case applies the Utah standard of waiver of the right to arbitration. Utah's waiver standard is strikingly similar to the waiver standards under South Carolina law and the federal law in the District of South Carolina and the 4th Circuit. 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 in the case 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 in the amount of $381,370 had been entered against them after a damages hearing.

Following the entry of default 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 Supreme Court of Utah employed the Utah waiver standard stated above.

Applying this standard, which is extremely similar to the applicable South Carolina and federal law waiver standards herein, 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 litigant who fail to respond to a complaint or district court proceeding." *Id.* at 915. However, the *Cedar* 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 all of the relevant facts before it, the Supreme Court of Utah found that the defendants' failure to participate in the underlying litigation and the entry of default judgment therefrom **did not** constitute a waiver of their right to arbitration. (emphasis added) *Id.*

In its Opinion, the Court of Appeals summary of cases from jurisdictions outside of South Carolina did not include a citation to or discussion of the *Cedar* case. Upon completing its cursory review of those cases from other jurisdictions; however, the Court of Appeals summarily and improperly concluded that, because Petitioners were in default, they waived their right to assert arbitration as a defense. Court of Appeals Opinion Number 5561, Pg. 7. (A. p. 10).

Based on the controlling authorities cited below, the Court of Appeals Opinion constitutes reversable error upon which Petitioner's Writ of Certiorari should be granted.

2. The Court Is Required To Apply The Proper Legal Standards To The Question Of Whether Appellants Waived Their Right to Mandatory Mediation/Arbitration.

The parties' contract contains mandatory alternative dispute resolution provisions requiring the parties to mediate, and if necessary, arbitrate their disputes. The issue in this case is whether the Petitioners have waived these rights, including the right to arbitration.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E. 2d 388, 391 (1994). "Stated differently, waiver requires a party to have known of a right and known he was abandoning that right." *Id.*

The determination of whether the Petitioners voluntarily and intentionally waived

their right to arbitration must be based on the application of the proper legal standards to the particular facts of this case.

State Law Standard

The standards for establishing waiver of the right to arbitration are well established in South Carolina. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013). In South Carolina, "[i]n order to establish waiver of the right to enforce an arbitration clause, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999).

The Court of Appeals has recognized three factors to consider when determining whether a party has waived its right to compel arbitration. These three factors are as follows: (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. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E. 2d 799, 807 (Ct. App. 2011) (internal quotation marks omitted).

To establish prejudice, the non-moving party must show something more than mere inconvenience. *Id.* (internal quotation marks omitted). In addition to the above factors, the Court of Appeals has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E. 2d at 808.

Federal Law Standard

The standards to determine waiver are equally well established in federal law

jurisprudence. *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008). Under federal law governing arbitration agreements subject to the Federal Arbitration Act[2], the party opposing arbitration bears a heavy burden of proving default or waiver. *Id.* Default or waiver only arises when the party seeking arbitration "so substantially utilize[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also, Brown v. Green Tree,* 585 F. Supp. 2d 770; *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 2d 506 (Ct. App. 2003). Because of the strong federal policy favoring arbitration, the federal courts do not lightly infer the circumstances constituting waiver. *Patten Grading*, 380 F. 3d 200.

In the present case, the Court of Appeals improperly based its ruling on one single factor, i.e., the entry of default. The Court of Appeals did not consider the essential factors listed in either of the legal standards set forth above nor render any findings as to the case facts related relevant thereto. A proper analysis of the waiver question must consider all of these factors as well as the entire set of facts and circumstances related thereto. The court should review all of the facts of the case, including the entire course of conduct of the Petitioners, analyzed under the proper standards governing waiver of arbitration.

3. Applying The Proper Legal Standard To The Facts Of This Case Establishes Appellants Have Not Waived Nor Defaulted Upon Their Right To Mandatory Mediation/Arbitration.

As in all waiver cases, any appropriate analysis is heavily fact-driven. *Liberty Builders*, 336 S.C. at 665, 521 S.E. 2d at 753 ("There is no set rule as to what constitutes a

[2] The Respondent asserts that the Project involves interstate commerce and, therefore, the arbitration provisions in the subcontract agreement are governed by the Federal Arbitration Act.

waiver of the right to arbitrate; the question depends on the facts of each case." (quoting *Hyload, Inc. v. Pre-Eng'd Prods., Inc.*, 308 S.C. 277, 280, 417 S.E. 2d 622, 624)). For this reason, and because there is no set rule as to what constitutes a waiver of the right to arbitration, the Court of Appeals finding of waiver based on the singular fact of the entry of default is improper. Motions to compel arbitration can only be resolved after a fact-intensive inquiry. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E. 2d 249 (Ct. App. 2007). Accordingly, all facts must be considered as each case turns on its particular facts. *Id.*

Only A Brief Period Of Time Passed Between Commencement Of Suit And Petitioners Initial And Continuing Efforts To Assert Their Right To Arbitration Before The Master

In the present case, the Petitioners were unaware of the default status of the case and the scheduled damages hearing scheduled for June 6, 2016 until they received the damages hearing notice on June 2, 2016. (R. pp. 72-73). Petitioners immediately retained legal counsel on June 3, 2016. (*Id.*) Petitioners counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016 citing the mandatory mediation/arbitration provisions and Respondent's Motion to Staty and Compel mediation/arbitration as one of Petitioner's grounds for relief.[3] (R. pp. 77-81; R. pp. 82-27). Petitioner's counsel took these actions within 2 ½ months after commencement of this action and within 1 ½ months after the entry of default.

The Petitioners' counsel next raised and again put the court on notice of the application of the contractual mandatory mediation/arbitration provisions at the June 6, 2016 hearing. (R. p. 465, Tr. p. 8, lines 4-8). The Master expressly acknowledged

[3] Petitioners 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).

Petitioners' counsel's comments and the existence of the mandatory mediation/arbitration provisions. (R. p. 466, Tr. p. 12, lines 10-17). In fact, Respondent acknowledged mediation was required 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 Petitioners again asserted their right to arbitration and joined in Respondent's Motion to Stay and Compel by virtue of Petitioners' Motion to Stay and Compel mediation/arbitration filed July 11, 2016. (R. pp. 88-93). Petitioners filed their motion less than four (4) months after commencement of the action, within 2 ½ months after the entry of default and within 5 weeks of learning of the entry of default.

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

Finally, the Petitioners 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 Petitioners actions described above show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration early, often and continuously before the Master. Petitioners' actions were absolutely consistent with their right to arbitration and do not constitute a voluntary and intentional abandonment of their right to arbitration.

Discovery Has Been Extremely Limited In The Proceeding Before The Master

Discovery has been extremely limited in this case. No depositions have been taken

in this action. The Appellants have not served interrogatories, requests to produce nor any other form of written discovery. The Respondent has not responded to any interrogatories, requests to produce or any other form of written discovery. In fact, the only discovery to date is in the form of Appellants' answers to Respondent's basic First Set of Interrogatories and First Request for Production. This participation in discovery by Appellants was minimal and carried out pursuant to the direction of the Master. This minimal discovery does not constitute a waiver of Appellants' contractual right to arbitration. *See, Patten Grading,* 380 F. 3d at 206 (reciting precedent that the party seeking arbitration will not "lose its contractual right by prudently pursuing discovery in the face of a court-ordered deadline.").

The Master's Assistance Has Been Limited And The Petitioner's Have Not Substantially Engaged In Litigation Or Utilized The Litigation Machinery

As stated above, discovery has been extremely limited in this case. Also, the parties' availing of the Master's assistance in this proceeding has been limited to: (a) two brief motions hearings concerning motions for a continuance of the damages hearing, to lift entry of default and to stay this action and compel mediation/arbitration; and (b) one brief status conference to allow the proffer of information for the record on appeal and Respondent's alleged damages.

Respondent Has Not Been Prejudiced

Finally, the Respondent has failed to show prejudice through an undue burden caused by the short delay in Appellants' demand for arbitration. In evaluating prejudice,

> our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of

> the judicial system," prejudice will likely not exist, and the law would favor arbitration: (1) if the parties conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system', prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E. 2d 249, 251-52 (citation omitted0 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E. 2d 74, 76 (Ct. App. 2003).

The lack of discovery in this case establishes that the Petitioners have not taken "advantage of the judicial system" and actual prejudice to the Respondent does not exist.

Notwithstanding the lack of actual prejudice, Respondent attempts to claim prejudice through its' counsel's unsworn statements alleging that "Palmetto would be severely prejudiced if the default were lifted as the passage of time pushed Palmetto closer to closing their doors, and further, Palmetto has taken actions, like withdrawal of its motion to compel arbitration and referral of the action to the Master in Equity, as a result of [Petitioners'] failure to timely answer." *See*, Palmetto Construction's Opposition To Defendants' Motion To Reconsider Alter Or Amend. (R. p. 139, lines 12-16).

In addition, in the Final Brief of Respondent, Respondent alleges, without evidentiary support or citation to the Record on Appeal, that it faces bankruptcy due to Petitioners' efforts in advancing the arbitration provision. (A. p. 108). Finally, Respondent asserts as a general statement in its Final Brief that it has incurred attorneys' fees in litigation with Petitioners in the circuit court, before the Master and in the Court of Appeals, including one appeal that has already been dismissed by this Court.[4] (*Id.*).

[4] The dismissal by the Court of Appeals was without prejudice and expressly reserved the right of Petitioners to refile their appeal upon disposal of Petitioners' Rule 59(e) motion. (R. p. 7).

The statement related to Respondent "closing [its] doors" as a result of Petitioner's efforts to compel arbitration is a conclusory allegation made by Respondent's counsel. This statement is not evidence. It references no citation to and is not supported by evidence in the Record on Appeal. Likewise, Respondent's "bankruptcy" allegation lacks citation to and is not supported by evidence in the Record on Appeal. Proof of prejudice cannot be speculative, nor based on such conclusory allegations. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F. 3d 200 (4th Cir. 2004); *see also* Brief of Appellants, Arguments – Section II. Because The Contract Contains Mandatory Mediation/Arbitration Provisions And The Appellants Have Not Defaulted Upon Nor Waived Their Rights To Mediation/Arbitration, The Court Erred When It Failed To Stay This Action And Compel Mediation/Arbitration. (A. pp. 142-168).

Respondent's remaining claims of prejudice (i.e, withdrawal of Respondent's motion to compel arbitration, referral of the action to the Master[5], and unverified claim of expenditure of some unstated amount of attorneys fees, including the overinclusive claim of alleged fees incurred after Petitioners' asserted their right to arbitration in the Master's court) fail as well. These claims individually and collectively fall into one of the following categories: (1) conclusory allegations by Respondent's counsel, (2) activities which are not supported by the Record on Appeal, (3) certain nominal/standard procedures, or (4) unsubstantiated, unquantified and overinclusive claim for attorneys fees; none of which constitute actual prejudice to Respondent. In short, Respondent's claims are insufficient to establish "actual prejudice" under applicable South Carolina and federal law. *Id.*

[5] Referral of the action to the Master does not constitute prejudice under South Carolina law. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001).

Finally, the Respondent itself demanded mandatory mediation/arbitration of its claims upon commencement of this lawsuit. Certainly, in light of Respondent's own acknowledgment of the application of mandatory mediation/arbitration to the parties' dispute, as well the additional facts of this case, any claim of prejudice arising during the brief period between the date litigation commenced and when the Petitioners asserted their right to arbitration lacks merit.

In summary, the proper legal standards under both South Carolina and federal law are set forth above. Applying any other standards would be an error of law and modify the long-standing arbitration jurisprudence of South Carolina and the federal courts in the District of South Carolina and the Fourth Circuit Court of Appeals. Applying the proper legal standards to all of the relevant facts in this case, the Court of Appeals should have held that the Petitioners have not waived their right to mandatory mediation/arbitration under either state or federal law. *See Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F. 3d 200 (4th Cir. 2004); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 506 (Ct. App. 2003).

Based on the above authorities, the singular fact that default was entered against Petitioners barely a month after this litigation commenced does not constitute a waiver of Petitioners' right to mandatory mediation/arbitration of the parties' disputes. For this

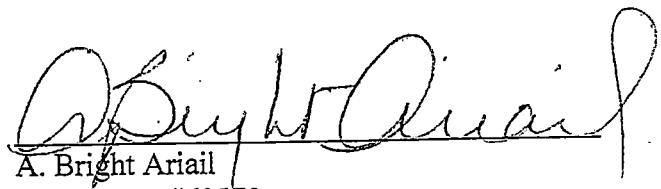
reason and under the legal authority and arguments set forth herein, Petitioners' Petition for Writ of Certiorari must be granted on the issues of appealability and waiver.

CONCLUSION

Based on the foregoing, the Court's Opinion filed June 26, 2019, is in error and therefore, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



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December 16, 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

Case No. 2016-CP-10-1143

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 Petitioners' Petition for a Writ of Certiorari and accompanying Appendix on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on December 16,, 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.

December 16, 2019

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December 16, 2019

VIA FACSIMILE AND EXPRESS MAIL
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Ct. App. No. 2016-002308; Op. No. 5661 (filed June 26, 2019)

Dear Mr. Shearouse;

On behalf of Petitioners/Defendants, enclosed for filing, please find the following documents:

- The original (unbound) and six copies of a Petition for a Writ of Certiorari seeking review of the Court of Appeals' opinion in the above referenced case;
- Two copies (one unbound) of an Appendix which contains the opinion of the Court of Appeals, the Court of Appeals' Order on the Petition for Rehearing, the Court of Appeals' letter on Rehearing *En Banc*, Appellants' Petition for Rehearing *En Banc*, Respondent's Return to Appellants' Petition for Rehearing, Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing *En Banc*, the Final Brief of Appellants, the Final Brief of Respondent, the Final Reply Brief of Appellants, and the Record on Appeal;
- The Original Proof of Service for the Petition for a Writ of Certiorari and Appendix; and
- A firm check in the amount of $250.00 for the filing fee.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

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Enclosures

cc: The Honorable Jenny Abbott Kitchings (without appendix; via priority mail)
Andrew Epting, Esquire and Jann Gunnar Rannik, Esquire (via priority mail)
Michelle Endemann, Esquire (via priority mail)

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