

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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

**PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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COUNTER - STATEMENT OF THE CASE

Respondent's Return to Writ for Certiorari asserts that Petitioners filed three appeals during the course of the appellate proceedings. Respondent's assertion is incorrect as to the number of appeals inasmuch as the Appellants filed two appeals in this matter, to wit: (1): Initial appeal filed September 30, 2016 and (2): Second appeal filed November 10, 2016. Furthermore, the Court of Appeals opinion does not take issue with the number of appeals nor is such issue relevant to the questions before this court. These facts are established by a review of the Court of Appeals opinion and the record set forth below.

On September 30, 2016, the Petitioners served their initial Notice of Appeal on the Respondent. (**App'x 0069**). On October 3, 2016, the Respondent filed its first Motion to Dismiss Appeal. (**App'x 0631**). The Court of Appeals returned Respondent's first Motion to Dismiss on October 4, 2016 because the Notice of Appeal had not been filed with the Court of Appeals as of that date. (**App'x 0709**). On October 5, 2016, in compliance with Rule 203, SCACR, the Petitioners filed the Notice of Appeal, along with copies of the orders¹ challenged on appeal with the Clerk of the Court of Appeals on October 5, 2016. (**App'x 0688**).

On October 6, 2016, the Petitioner's refiled their original Notice of Appeal, along with a second filing fee and copies of the orders challenged on appeal with the Clerk of the Court of Appeals. (**App'x 0699**). The sole purpose of refiled the original Notice of Appeal was to include the court reporter's certification of the July 14, 2016 hearing

¹ The copies of the orders filed with the Clerk of the Court of Appeals included the Master's Bench Order contained in the transcript of the July 14, 2016 hearing and the Master's formal written order dated July 14, 2016. (R.pp. 512).

transcript containing the Master's bench order, which certification had been inadvertently omitted from the Petitioners' October filing with the Court of Appeals. (*Id.*).

On October 5 and 6, respectively, the Petitioners served the Respondent with copies of the Petitioners' above filings with the Court of Appeals. (**App'x 0688, 0699**). The above filings are part and parcel of the initial appeal and service of copies of these filings upon the Respondent did not constitute the commencement or service of additional appeals in the matter.

On October 27, 2016, the Respondent moved to dismiss Petitioners' initial appeal by filing its Second Motion to Dismiss Appeal. (**App'x 0501**). 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. (**App'x 0177**). 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. (*Id.*).

On October 28, 2016, the Master issued his final, written order denying Petitioners' motion to reconsider pursuant to Rule 59, SCRC². (**App'x 0175**). Consistent and in compliance with the Court of Appeals order of November 10, 2016, the Petitioners commenced the instant appeal on November 14, 2016. (**App'x 0677**).

On December 2, 2016, the Respondent filed a motion to dismiss Petitioners' November 14, 2016 appeal. (**App'x 0541**). The Court of Appeals dismissed Respondent's

² Respondent incorrectly states that the Master's October 28, 2016 Order denied Petitioners' "motion to amend their answer..." Respondent's Return to Writ for Certiorari, Pg. 3.

motion on February 1, 2017 and proceeded with the appeal. (**App’x 0178**).

Thereafter, the parties submitted appellate briefs and the Court of Appeals held oral arguments on April 2, 2019. On June 26, 2019, the Court of Appeals issued its opinion, dismissing the Petitioners’ November 14, 2016 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. (**App’x 0004**). It is upon these findings that the Petitioners’ seek a Writ of Certiorari seeking review of the Court of Appeals opinion.

ARGUMENTS

I. THE COURT OF APPEALS DID NOT ISSUE A SUBSTANTIVE RULING ON THE MASTER’S DENIAL OF PETITIONER’S MOTION TO LIFT THE ENTRY OF DEFAULT.

The Respondent’s Return to Writ for Certiorari states that the “Court of Appeals affirmed, that Appellants were properly in default...” *Return*, pg. 5. Also, Respondent asserts that the Court of Appeals found no abuse of discretion by the Master in denying the Petitioners’ relief from default. *Return*, pg. 7.

It would appear from these assertions that the Respondent claims the Court of Appeals 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 Petitioners’ motion for such relief. However, the opinion of the Court of Appeals does not contain any of the Respondent’s assertions.

Contrary to these assertions, the Court of Appeals made no rulings or findings in its opinion as to the propriety of the Master’s denial of Petitioners’ motion to set aside the entry of default or the Appellants’ appeal therefrom. The Court of Appeals did not discuss

the Rule 55(a), SCRCPC “good cause” standard for lifting an entry of default. Likewise, the Court of Appeals did not discuss the “abuse of discretion” standard of review for orders denying a motion to lift entry of default. Finally, the Court of Appeals made no finding as to whether the Master did or did not abuse his discretion in denying Petitioners’ motion to set aside the entry of default. In fact, the phrase “abuse of discretion” is not found anywhere in the Court of Appeals’ opinion. Indeed, if the Court of Appeals had affirmatively ruled on this issue³ and found there was no abuse of discretion, it would not have dismissed the appeal as interlocutory.

Instead, the Court of Appeals 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 Court of Appeals 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 Court of Appeals issued a substantive ruling on the Master’s denial of Petitioners’ Motion to Set Aside Entry of Default and the Petitioners’ appeal therefrom lack merit.

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

³ The Court of Appeals court could have ruled upon the Master’s order denying Petitioners’ Motion to Lift Entry of Default as there were other appealable issues before the court (i.e., the appealable issues of the Master’s refusal to stay this action and the denial of Petitioners’ applications and rights to compel arbitration). *See, Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E. 2d 397 (Ct. App. 2001). However, the Court of Appeals elected not to do so and dismissed the entire appeal as interlocutory.

(A): The Court of Appeals Ruling That The Petitioners Waived Their Right To Arbitration Solely On The Basis Of The Entry Of Default 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 Appeal's 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 arbitration. As a necessary corollary, this novel question raises an additional novel query; specifically, whether an *entry of default alone* 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.⁴

In addressing these questions, the Court of Appeals did in fact impose a novel bright-line test holding for the first time in South Carolina that the singular factor of an entry of default against a defendant constitutes a voluntary and intentional waiver of that defendant's right to compel arbitration.

The Court of Appeals ruling does not cite to a single case in South Carolina imposing this bright-line test, and holding that an entry of default alone, to the exclusion and non-consideration of other factors and associated facts, constitutes a waiver of arbitration. In fact, the only South Carolina case referenced by the Court of Appeals opinion as to the effect of the default on the right to arbitration 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

⁴ The Respondent asserts that the "when properly framed as follows, the questions raised are not novel..." 1. Whether a default order – rather than a default judgment – is immediately appealable, and 2. Whether a party in default has standing to seek affirmative relief. However, even as framed by Respondent, there resides within Respondent's second query the novel question of whether the singular fact of an entry of default constitutes a waiver of the right to arbitration.

Wham does not specifically address the issue before the court. (App'x 0008). Furthermore, a review of the *Wham* case confirms the express acknowledgment of the Court of Appeals and establishes its distinguishability from the present case for the reasons set forth in Petitioners' Petition for Rehearing *En Banc*. (App'x 0043).

Turning from its express acknowledgment that *Wham* did not address the issue at hand, the Court of Appeals looked to and relied upon summary citations to cases from jurisdictions outside of South Carolina in support of its ruling. (App'x 0004). If this matter did not raise a novel question of law or matter of first impression in South Carolina, the Court of Appeals would not have been compelled to rely upon holdings from other jurisdictions.

In addition, even the out of state cases relied upon by the Court of Appeals are distinguishable on the numerous grounds set forth in Appellants' Petition for Rehearing *En Banc*. (App'x 0043).

In summary, the Court of Appeals ruling that the Petitioners waived their right to arbitration *solely* on the basis of the entry of default constitutes reversible error upon a novel question of law and matter of first impression in South Carolina.

(B): The Petitioners Raised The Issue of Arbitration At Their First Appearance In The Master's Court And Vigorously And Continuously Thereafter And Such Actions Were Absolutely Consistent With Their Right To Arbitration And Do Not Constitute A Voluntary And Intentional Wavier Of The Right To Arbitration.

The record reflects that the Petitioners were not aware of the default status of the case and the scheduling of the damages hearing until they received the damages hearing notice on June 2, 2016. (App'x 0244). Petitioners immediately retained legal counsel on Jun3 3, 2016. (*Id.*).

Petitioners' counsel immediately filed a Motion for Continuance of the damages

hearing contemporaneous with and a Motion to Set Aside Entry of Default on June 3, 2016 citing the mandatory mediation/arbitration provisions in the parties' contract and Respondent's Motion to Stay and Compel mediation/arbitration as one of Petitioners' grounds for relief⁵. (**App'x 0249, 0254**). The Petitioners understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (**App'x 0249**).

Thereafter, the Petitioners continued to raise their right to arbitration repeatedly at the hearings before the Master, as well as in their motions, memorandums, and filings in the Master's court. The litany of these vigorous efforts by the Petitioners' are set forth in the Statement of the Case in the Petition for Writ of Certiorari. Petitioner's actions were absolutely consistent with their right to arbitration and do not constitute a voluntary and intentional waiver of their right to arbitration.

(C): The Petitioners' Actions Do Not Constitute A Repudiation Of Their Right To Arbitration.

The Respondent asserts that Appellants' initial failure to respond to the jurisdictional and venue allegations in the complaint constitutes an "emphatic repudiation" of the right to compel arbitration. The Respondent's assertion fails to recognize that under both federal and South Carolina law⁶, the court action is not dismissed but merely stayed during a temporary divestment of the court's jurisdiction during the arbitration proceeding. *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 585 F. Supp. 2d 708

⁵ Respondent indicates throughout its *Return* that the Petitioners raised the issue of arbitration for the first time in their Motion to Stay and Compel.

⁶ In fact, the South Carolina Uniform Arbitration Act requires that the court action be stayed *if an order for arbitration or an application therefor has been made* under the Act. (emphasis added). S.C. Code Ann. §15-48-20(d) (2005).

(D.S.C. 2007); *Widner 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). The Court regains full jurisdiction over the matter at such time as the arbitration proceeding is completed and the stay is lifted for purposes of confirmation/approval of the arbitration award and/or for appeals to be taken therefrom. Indeed, the Respondent acknowledged as much in the filing of its own Motion to Stay and Compel contemporaneous with its complaint.

Furthermore, the Respondent's complaint contains no allegations whatsoever concerning the application of mandatory mediation/arbitration provisions to the Respondent's claims. On the other hand, the Respondent's Motion to Stay and Compel, filed contemporaneously with the complaint, did contain such allegations and expressly demanded a stay of the lawsuit and submission of Respondent's claims to mandatory mediation/arbitration.

The South Carolina and federal arbitration acts both require an application for arbitration to be made by motion to the court holding jurisdiction over the matter. S.C. Code. Ann. §15-48-10, et seq. (1976) (Revised 2005) and 9 U.S.C. §1, et seq. The motion is to be heard and ruled upon by the court having jurisdiction. The Appellants were justified in relying on the Respondent's Motion to Stay and Compel to the court, including the court's jurisdiction over that motion. The Appellant's, however, never received the opportunity to be heard on this motion, at a hearing to which they were entitled under both the South Carolina and federal arbitration acts, due to the Clerk of Court's administrative "closure" of this motion and the Master's "adjudication" of this motion on that basis.

A finding of waiver requires a voluntary and intentional abandonment or relinquishment of the right to arbitration. *Parker v. Parker*, 313 S.C. 482, 443 S.E. 2d 388

(1994). Based on the above legal precedent and South Carolina arbitration jurisprudence cited in the Petition for Writ of Certiorari as applied to the *entire facts of this case*, the Appellants' failure to timely respond to the complaint shortly after commencement of suit due to an unintentional and good faith misunderstanding does not constitute an "emphatic repudiation" of the right to arbitration.

D. The Cases Cited By The Respondent In Support Of Its Argument That The Petitioners Waived Their Right To Arbitration Are Distinguishable And Do Constitute Binding Precedent For A Finding Of Waiver In The Present Case.

The Respondent asserts that South Carolina's arbitration jurisprudence has long understood that the right to arbitration can be waived by failing to raise arbitration as a defense in a pleading. *Return*, Pg. 5. The Respondent cites the following three South Carolina cases and one federal court decision from the Sixth Circuit in support of this assertion: (1): *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989) (quoting 5 Am. Jur. 2d *Arbitration & Award* §51 at 556-57); (2): *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 689 S.E. 2d 602 (2010); (3): *Howard v. S.C. Dept. of Highways*, 343 S.C. 149, 538 S.E. 2d 291 (Ct. App. 2000); (4): *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F. 3d 434 (6th Cir. 2202)

All four of these cases are distinguishable and cannot serve as binding precedent for a finding of waiver of arbitration in the present case

In the *Wham* case, the Court of Appeals prefaces its opinion with the express acknowledgment that its decision does not specifically address the issue pending before this court. Furthermore, *Wham* is distinguishable from the present case for the reasons set forth in Appellant's Petition for Rehearing *En Banc*. (App'x 0043).

The remaining two South Carolina cases, *Partain* and *Howard*, are briefed and

distinguished from the present case in the Brief of Appellants. (**App’x 0121**).

The *Gen. Star* case is an opinion issued by the United States Court of Appeal, Sixth Circuit. The *Gen. Star* opinion is briefed and distinguished from the present case in the Reply Brief of Appellants. (**App’x 0061**).

The Respondent next asserts that a party in default has waived its right to plead and therefore waived the right to raise the affirmative defense of arbitration until the default has been lifted for good cause. The Respondent cites the following three South Carolina cases in support of this assertion: (1): *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E. 2d 880 (1978); (2): *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E. 2d 566 (2013); (3): *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 681 S.E. 2d 885 (2009).

The *Howard and Limehouse* cases do not involve arbitration agreements or the question of whether a party has waived its right to arbitration. The *Sundown* case does not involve arbitration, but simply states the elements for the lifting of an entry of default.

In summary, all of the cases above are distinguishable and cannot serve as binding precedent for a finding of waiver of arbitration in the present case.

E. The Cedar Surgery Case Is A Well-Reasoned Opinion Applying A Waiver Standard Similar To The State And Federal Courts In South Carolina To A Default Situation. Respondent’s Arguments Attempting To Distinguish Cedar Surgery Are Misplaced.

The Respondent attempts to distinguish the case of *Cedar Surgery Center v. Bonelli*, 96 P.3d 911, 2004 UT 58 (2004) on the following two grounds: (1): Respondent states that the defaulting defendant’s very first action in the *Cedar Surgery* case included filing a motion to compel arbitration and then indicates that Petitioners first mention of arbitration was not at their initial appearance before the Master, but rather made after Petitioners moved for relief from default. (2): Respondent asserts that neither the *Cedar*

Surgery court nor the Court of Appeals found an abuse of discretion.

The Respondent's attempts to distinguish the *Cedar Surgery* case on these grounds are misplaced as established in Sections I. and II. (B) of this Reply.

F. The Petitioners Did Not Prevent The Respondent From Presenting Evidence Of Actual Prejudice And No Such Evidence Exists In The Record In This Matter.

The Respondent asserts that the Appellants' conduct in asserting their right to arbitration and appealing the Master's orders denying arbitration prevented it from presenting the necessary evidence of prejudice in this matter. The Respondent cites *Champion v. Whaley*, 280 S.C. 116., 311 S.E. 2d 404 (Ct. App. 1984) in support of this assertion. However, the Respondent's assertion lacks merit and the *Champion* case is inapposite to the question of prejudice under arbitration jurisprudence in the state and federal courts in South Carolina.

In *Champion*, the plaintiff, a real estate broker, appealed the trial court's non-suit of his action for breach of contract to recover his real estate commission under an exclusive agency contract for sale of a house. The agency contract required the property to be sold as a condition precedent to the sellers' obligation to pay the commission

In *Champion*, the Court of Appeals held that if the seller under an agency contract for the sale of a house prevents a condition of the contract from occurring, then the condition is excused and his obligation to pay becomes unconditional. *Champion*, 280 S.C. at 120, 311 S.E. 2d at 406. Clearly, the *Champion* holding has nothing to do with arbitration and is entirely inapposite to the requirement of a showing of prejudice before this court.

Furthermore, the Record on Appeal refutes the Respondent's claim that it was prevented from presenting evidence of prejudice. To the contrary, the Respondent had

multiple opportunities to present evidence of prejudice, if such prejudice existed. Specifically, the Respondent had the following opportunities in which to present evidence of prejudice, but failed to do so:

(1): In Respondent's memorandums or other court filings before the Master in opposition to Appellants' Motion for Continuance, Motion to Lift Entry of Default and Motion to Reconsider and to Alter or Amend;

(2): At the hearings before the Master on June 6, July 14, and October 4, 2016;

(3): During the Respondent's proffer of information related to damages allowed by the Master at the October 4, 2016 hearing.

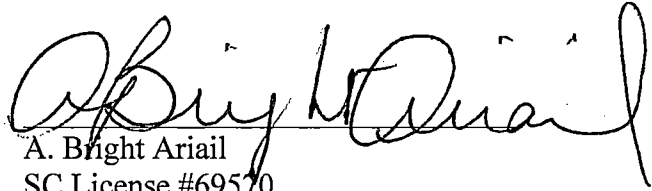
The Respondent had the opportunity on each of these occasions to present evidence of prejudice by sworn affidavit, documentary evidence and/or a proffer of damages. On each occasion the Respondent failed to do so. Instead, the Respondent attempts to claim prejudice through speculation, conclusory and unsubstantiated allegations, alleged activities/occurrences which lack evidentiary support are not contained in the Record on Appeal⁷ and certain nominal/standard procedures which do not constitute prejudice under applicable law. *See*, Petition of Writ for Certiorari – Section II., (C), 3., Pgs. 21-24. In short, Respondent's claims are insufficient to establish "*actual prejudice*" under applicable South Carolina and federal law. *Id.*

CONCLUSION

Based on the Petition for Writ of Certiorari and 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.

⁷ Including the conclusory assertion raised for the first time in Footnote 4 of the *Return* that Respondent and its principals went bankrupt as a result of Petitioners' actions.

Respectfully submitted this 23rd day of January, 2020.

A handwritten signature in cursive script that reads "A. Bright Ariail". The signature is written in black ink and is positioned above the typed name and contact information.

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APPEAL FROM CHARLESTON COUNTY
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Palmetto Construction Group, LLC Respondent

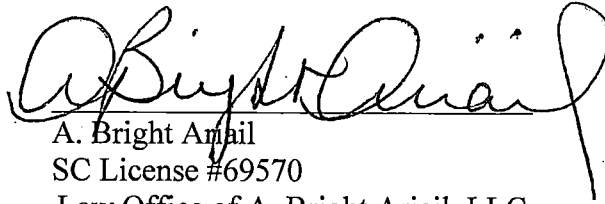
v.

Restoration Specialists, LLC, Petitioners
Reuben Mark Ward, and
Lynnette Pennington Ward

PROOF OF SERVICE

I certify that Petitioners' Reply to Respondent's Return to Writ for Certiorari on Palmetto Construction Group, LLC was served by depositing a copy of it in the United States Mail, postage prepaid, on January 23, 2020, 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.

January 23, 2020

A handwritten signature in black ink, appearing to read "A. Bright Ariail". The signature is fluid and cursive, with a large loop at the end.

A. Bright Ariail

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