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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2019-002052
[Lower Court Case No. 2016-CP-10-01143]

Palmetto Construction Group, LLC — Respondent

v.

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

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS……2

TABLE OF AUTHORITIES……..3

STATEMENT OF ISSUES ON APPEAL……..5

STATEMENT OF THE CASE……5

FACTS……12

ARGUMENTS

I. THE MASTER'S ORDERS DENYING PETITIONERS' MOTION TO STAY AND TO COMPEL ARBITRATION ARE IMMEDIATELY APPEALABLE AND THE RULING OF THE COURT OF APPEALS DISMISSING THE APPEAL AS INTERLOCUTORY CONSTITUTES REVERSIBLE ERROR……10

II. BECAUSE THE CONTRACT CONTAINS MANDATORY MEDIATION/ARBITRATION PROVISIONS AND THE PETITIONERS 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……..13

CONCLUSION……...22

TABLE OF AUTHORITIES

CASES

Am. Bankers Ins. Group, Inc. v. Long, 453 F. 3d 623 (4th Cir. 2006)……..……26

American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996)….

Bazzle V. Green Tree Financial Corp., 351 S.C. 244, 569 S.E. 2d (2002)…….……...23

Brown v. Green Tree Services, LLC, 585 F. Supp. 2d 770 (DSC 2008)…….39, 41

Cape Romain Contractors, Inc. v. Wando E, LLC, 405 S.C. 115, 747 S.E.2d 461 (2013)…..

Carlson v. South State Plastering, LLC, 404 S.C. 250, 743 S.E. 2d 860 (Ct. App. 2013)….22, 38, 41

Cedar Surgery Center v. Bonelli, 96 P.3d 911 2004 UT 58 (Utah, 2004)……....45, 46

Cent. Fla. Inv., Inc. v. Parkwest Assocs., 2002 UT 13, 40 P.3d 599 (2002)……

Chandler v. Blue Cross Blue Shield, 833 P.2d 356 (Utah 1992)…….

Charming Shoppes, Inc. v. Overland Constr. Inc., 717 N.Y.S.2d 860 (N. Y. Sup. Ct. 2000)…….

Choctaw Generation Ltd. P'ship v. American Home Assur. Co., 271 F. 3d 403 (2d Cir. 2001). 25, 26

Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001)…….

Davis v. KB Home of S.C., Inc., 394 S.C. 116, 131, 713 S.E. 2d 799, 807 (Ct. App. 2011)…….....39

Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 575 S.E. 2d 74 (Ct. App. 2003)…….

General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC., Inc., 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001)…….21, 27, 31, 41

Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E. 2d 135 (1995)……...23

Hyload Inc. v. Pre-Eng'd Prods, Inc., 308 S.C. 277, 417 S.E.2d 622 (1992)……..

Interconex, Inc. v. Ugarov, 224 S.W.2d 523 (Tex. Ct. App. 2007)…….

Lafitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009)……..

LaFrance Architect v. Point Five Dev. Burlington, LLC 91 A.3d 364 (Vt. 2013)…….

Lamell Lumber Corp. v. Newstress Int'l, Inc., 2007 BT 83, 182 Ut. 282 (2007)…….

Lee v. Grandcor Medical Systems, Inc., 702 F. Supp. 252 (D. Colo. 1988)……

Lester v. Dawson, 327 S.C. 263, 491 S.E. 2d 240 (1997)……

Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999)…..38, 41

MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 370, 588 S.E. 2d 639 (Ct. App. 2003)……..22

McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)…….

McDonnell v. Dean Witter Reynolds, Inc., 620 F. Supp. 152 (D. Conn. 1985)……..32, 33, 34, 35

Menorah Ins. Co. v. INX Reins. Corp., 72 F.3d 218 (1995)…….

Miller v. British American Assurance Co., 238 S.C. 94, 119 S.E.2d 527 (1961)…….

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)……...23

Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994)……

Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc. , 380 F. 3d 200 (4th Cir. 2004)……21, 36, ……...37, 39, 40, 41

Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998)……

Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 559 S.E.2d 132 (1950)

Rich v. Walsh, 357 SC 64, 590 S.E. 2d 506 (Ct. App. 2003)……....39, 41

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)….

Robinson & Wells, P.C. v. Warren, 669 P.2d 844 (Utah 1983)……

Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983…….

Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935 (Utah 1993)……

Southern Bell Tel and Tel. o.v. Hamm, 306 S.C. 70, 409 S.E.2d 775 (1991)……

State ex rel. Barden & Robeson Corp. v. Hill, 208 W. Va. 163, 539 S. E. 2d 106 (2000)……42, 43 44

Stedor Enter., Ltd. v. Armtex, Inc., 947 F.2d 727 (4th Cir. 1991)……

Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F. 3d 753 (11th Cir. 1993)……...26

Thomson-CSF, S.S. v. Am. Arbitration Assoc., 64 F. 3d 773 (2d Cir. 1995)……25

Thynes v. Lloyd, 294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987)….

Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.E. 605, 586 S.E.2d 581 (2003)..

Towles v. United Healthcare Corp., 388 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999)……..23

Tri-State Delta Chemicals, Inc. v. Crow, 61 S.W.2d 172 (Ark. 2001)…

Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 540 S.E. 2d 864 (Ct. Appp. 2000)……...23

U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc., 585 F. Supp. 2d 708 (2007)…..
…….25, 26, 47

Wham v. Shearson Lehman, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)..

Widdicombe v. Tucker-Cales, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005)..

Woodruff v. Spence, 76 Wash. App. 207, 883 P.2d 936 (1994)…

STATUTES

S.C. Code Ann. §14-3-330 (1976)…..
S.C. Code Ann. §15-48-10 (1976)……22, 23, 42, 43, 45
9 U.S.C.§2..…….43, 45

OTHER AUTHORITIES

Rule 8(c), FRCP…….32, 37
Rule 8(c), SCRCP……28
Rule 12(b)(1), SCRCP……24
Rule 55(c), SCRCP…….……...14, 16, 18, 19, 20, 22
Rule 59(e), SCRCP…
Rule 8(c), W.VA.RCP…….44
Rule 9, W.VA.RCP…

Am.Jur. 2d *Arbitration and Award* §51….

Black's Law Dictionary 120 (9th ed. 2009)……... 28, 32

STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE MASTER'S ORDERS REFUSING TO COMPEL ARBITRATION ARE INTERLOCUTORY AND NOT APPEALABLE?

II. 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 (the "Project"). (A. p. 0183, lines 1-3). The Respondent and Petitioner Restoration Specialists, LLC ("Petitioner Restoration") entered into a Subcontract Agreement in connection with the Project. (A. pp. 0183, 0187-0201). Respondent filed this lawsuit on March 7, 2016, alleging a breach of the Subcontract Agreement and additional claims relating to the Project against the Petitioners, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Petitioners"). (A. pp. 0181-0211). Simultaneously with filing the lawsuit, Respondent filed a Motion to Stay and to Compel on March 7, 2016. (A. pp. 0212-0230). 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. *(Id.)*

Respondent simultaneously served all Petitioners with both the Complaint and

Motion to Stay and to Compel on March 14, 2016. (A. pp. 0236-0241).

Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. (A. pp. 0231-0235). The Circuit Court entered default against the Petitioners on April 21, 2016. (A. p. 0173).

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. (A. pp. 0242, 0649). 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. (A. pp. 0244-0245). Upon receipt of this Notice of Hearing, the Petitioners immediately retained legal counsel on June 3, 2016. (A. pp. 0244-0245, 0249, 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 their grounds for relief. (A. pp. 0247-0257).

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. (A. p. 0639, 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. (A. p. 0639, 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. (A. p. 0258 – 0263). 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"). (*Id.*). 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. (A. pp. 0533 - 0536). 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. (A. pp. 0264 – 0294). During the reconvened hearing the Master stated that the Clerk of Court "closed out" the Respondent's Motion to Stay and Compel. (A. p. 0640, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Petitioner's joinder in the motion. The Master issued a bench ruling finding that the Clerk's action constituted an adjudication of this motion. (A. p. 0640, 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. (A. p. 0640, 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. (A. p. 0174). The Master's formal order: (a): Denied Petitioners' Motion to Lift 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. *(Id.)*. Petitioners received written notice of entry of these

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

orders on July 18, 2016. (A. pp. 0650 – 0655).

The Petitioners filed a timely Motion to Reconsider and to Alter and Amend the Master's July 14, 2016 order pursuant to SCRCP 59(e) and applicable case law on July 27, 2016. (A. pp. 0295 – 0299). 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. (A. pp. 0656 – 0657).

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. (A. p. 0658).

On September 7, 2106, the Master replied to Petitioners' request and made the decision to "flip" 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. (A. p. 0661). The Master asked the parties to advise if this plan was acceptable. (*Id.*). The Petitioners informed the Master that this plan was acceptable. (*Id.*). 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. (A. p. 0662).

After further consideration, the Master then decided not to switch the hearing dates and informed the parties that the damages hearing would proceed on October 4, 2016 and the Rule 59(e) motions hearing would be held on October 11, 2016. (A. p. 0663). The Petitioners received written notice of the Master's decision via email on September 12, 2016. (*Id.*).

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 asserting and reserving their rights to arbitration, the Petitioners commenced an appeal in this matter on September 30, 2016. (A. pp. 0669 – 0673).

Thereafter, the Master notified all parties that he intended to go forward with the hearing set for October 4, 2016. (A. pp. 0666 – 0668). 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. (A. p. 0643, 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, discussed the procedural posture of the case, allowed the parties to proffer information related to Petitioners' Motion to Reconsider and to Alter or Amend and allowed Respondent to proffer information related to damages alleged, to which Petitioners' vehemently objected. (A. pp. 0641 – 0648, Tr. pp. 1-32). 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. (A. pp. 0307 – 0500).

On October 27, 2016, the Respondent filed a Motion to Dismiss Appeal. (A. pp. 0501 – 0540). 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. (A. p. 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 an order ruling on Petitioners' motion to reconsider pursuant to Rule 59, SCRCP. (A. pp. 0175 – 0176). 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. (*Id.*). Petitioners received written notice of entry of this order on November 2, 2016. (A. pp. 0677 – 0678). *(Notice of Appeal).*

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. (*Id.*). 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. 0004 – 0010).

On July 10, 2019, the Petitioners filed a Petition for Rehearing *En Banc* with the South Carolina Court of Appeals. (A. pp. 0043 – 0060). The Respondent filed a Return to Petitioners' Petition for Rehearing ("Respondent's Return") on August 2, 2019. (A. pp. 0029 – 0041). The Petitioners filed a Reply to Respondent's Return on August 12, 2019. (A. pp. 0013 -0028).

By order and letter dated November 15, 2019, the South Carolina Court of Appeals denied Petitioners' Petition for Rehearing *En Banc*. (A. pp. 0011 – 0012).

On December 16, 2019, the Petitioners filed a Petition for Writ of Certiorari seeking

review by the South Carolina Supreme Court of the South Carolina Court of Appeal's opinion, dated June 26, 2019. The Respondent served and filed a Return to Petitioner's Petition for Writ of Certiorari ("Respondent's Return") on January 13, 2020. The Petitioners replied to Respondent's Return on January 23, 2020.

The South Carolina Supreme Court granted Petitioners' Petition for Writ of Certiorari on June 16, 2020.

FACTS

This case arises out of a construction project in Augusta, Georgia. (A. p. 0183, lines 1-3). On March 29, 2012, the Petitioner, Restoration Specialists ("Petitioner Restoration") was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia. ("the Norwood Parking Garage Project" or the "Project"). (A. p. 0264). The Respondent entered into a Subcontract Agreement with Petitioner Restoration on September 10, 2014 in connection with the Project. (A. pp. 0187-0201, 0264).

The Subcontract Agreement contains mandatory mediation/arbitration provisions. Specifically, the Subcontract Agreement contains a provision (Section 6.1.1) requiring the submission of any claim arising out of or related to the agreement to mediation as a condition precedent to binding dispute resolution. (A. p. 0223). Additionally, Section 6.1.2 sets out specifically that the mediation shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the agreement. (*Id.*).

Section 6.1.2 of the Subcontract Agreement provides that a request for mediation may be made concurrently with the filing of binding dispute resolution proceedings. (*Id.*).

Under Section 6.2, any claim subject to but not resolved by mediation shall be resolved by binding arbitration pursuant to Section 6.3 of the agreement. Further, Section 6.3.1 provides that the arbitration shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the agreement. (*Id.*).

Section 6.3.4 of the Subcontract Agreement provides that either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought be joined consents in writing to such joinder. (A. p. 0224).

Section 6.3.5 of the Subcontract Agreement provides that the agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to therein shall be specifically enforceable under applicable law in any court having jurisdiction hereof. (*Id.*).

Respondent's Complaint alleges that Petitioner Restoration has failed to pay the contract balance due under the Subcontract Agreement and asserts additional claims relating to the Project against the Petitioners, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Petitioners"). (A. pp. 0182-0186).

ARGUMENTS

I. THE MASTER'S ORDERS DENYING PETITIONERS' MOTION TO STAY AND TO COMPEL ARBITRATION ARE IMMEDIATELY APPEALABLE AND THE RULING OF THE COURT OF APPEALS DISMISSING THE APPEAL AS INTERLOCUTORY CONSTITUES REVERSIBLE ERROR.

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 are 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. §15-448200(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.E2d 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. 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.* Consequently, the substantial right to resolve the parties' dispute by arbitration would be lost if the appeal was delayed until after final judgment. *Id*.; *see also Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983).

The South Carolina Court of Appeals ("Court of Appeals"), citing *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987) held that "the denial of a motion to set aside an entry of default is not appealable until after final judgment." (A. p. 0006). Thereafter, the Court of Appeals states and rules as follows:

> "Petitioners 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 Petitioners. Accordingly, both the master's July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable."
>
> (A. pp. 0006-0007)

The Court of Appeals then found that the master's denial of Petitioners' application to compel arbitration as well as his finding that Petitioners default status constituted a waiver of Petitioners right to arbitration did not constitute appealable issues before the court. (A. p. 0007-0008). Based on these findings, the Court of Appeals dismissed the entire appeal as interlocutory, including the appeal from the Master's refusal to compel arbitration. (A. p. 0010).

Ordinarily, an order denying a motion to lift entry of default is interlocutory and not immediately appealable. *Thynes*, 294 S.C. 152, 363 S.E.2d 122. An order that is not immediately appealable, however, can be considered under the court's appellate authority and should not prevent the review of another appealable issue before the court. *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 556 S.E. 2d 397 (Ct. App. 2001). Stated

differently, where there is a single order that is appealable in part, the entire order should be considered upon the appeal. *See Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 559 S.E. 2d 132 (1950), overruled on other grounds; *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985).

In the present case, the Master's refusal to stay this action, his finding of a waiver of the right to arbitration by Petitioners and his denial of Petitioners' applications and rights to compel arbitration are all appealable issues that are squarely before this court. The Court of Appeals' own decision to review and issue a substantive finding on the question of waiver of arbitration after initially ruling that the master's orders were interlocutory, and not immediately appealable, bears witness to the appealability of the issues before this court.

The Master's orders concerning the arbitration rights of the Petitioners are immediately appealable and subject to mandatory *de novo* review on appeal. (*Id.*), *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, 588 S.E.2d 639 (Ct. App. 2003). Furthermore, the Court of Appeals could and should have exercised its appellate authority in this instance to review the Master's denial of Petitioners' Motion to Lift Entry of Default. Such a review would have best served the interests of judicial economy and eliminated the inevitable additional appeals which will arise from a piecemeal appellate review of the Master's orders. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009); *Southern Bell Tel. and Tel. o. v. Hamm*, 306 S.C. 70, 409 S.E.2d 775 (1991); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

Instead, the Court of Appeals declined to conduct a full review of the Master's orders and improperly dismissed the entire appeal, including the appeal from the Master's refusal to compel arbitration, as interlocutory, and not appealable.[2] The Court of Appeals decision regarding appealability constitutes reversible error.

II. BECAUSE THE CONTRACT CONTAINS MANDATORY MEDIATION/ARBITRATION PROVISIONS AND THE PETITIONERS 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): 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 Contractual Arbitration Agreements.

The right to arbitration is a substantial right. The arbitration jurisprudence of South Carolina and the federal arbitration jurisprudence under the Federal Arbitration Act profoundly impacts myriad and wide-ranging contracts, projects and transactions in the State of South Carolina and across the country. These contracts, projects and transactions which involve the arbitration clauses and arbitration rights thereunder are engaged in by individuals, small businesses, large commercial corporations and ventures and government institutions located throughout the state and elsewhere. These contracts, projects and

[2] The Court of Appeals could and should have ruled upon the Master's order denying Appellants' 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 Appellants' applications and rights to compel arbitration). *See Initial Brief of Appellants, Section 1.* However, the Court of Appeals declined to do so and improperly dismissed the entire appeal as interlocutory. *See Petitioners' Reply to Respondent's Return to Writ for Certiorari, Section 1.*

transactions impact local, regional, intrastate and interstate commerce throughout South Carolina and the nation. As such, the proceeding before this Court involves a matter of first impression concerning a question of exceptional importance to the arbitration jurisprudence affecting the citizens and commerce of South Carolina.

In the present case, 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. (A. pp. 0187-0201); *see also Arguments Section II (C)* below. 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…") (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, the South Carolina Supreme Court should reverse and remand the orders of the Master and the Court of Appeals.

(C): All Petitioners Are Entitled to Mediation/Arbitration Under the Alternative Dispute Resolution Provisions of the Contract.

The Respondent's Complaint and the causes of action asserted against all Petitioners, including the individual Petitioners, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Petitioners"), allegedly arise out of or are related to the contract containing the arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration.

Moreover, the arbitration provisions of the contract expressly allow for the joinder of non-signatories, such as the Ward Petitioners, to the arbitration. Specifically, § 6.3.4 of the contract states in relevant part:

> "Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder."

Based on the allegations in the Complaint, the Ward Petitioners are first party Defendants substantially involved in common questions of law and fact whose presence is required for a complete resolution of this matter. The Ward Petitioners consented in writing to their joinder in the arbitration in their Motion to Stay and to Compel Pursuant to SCRCP 12(b)(1) and Applicable Case Law. Specifically, the Ward Petitioners stated in

their motion:

> "The Plaintiff has moved the Court to stay this action and compel mediation, and if necessary, arbitration by the parties to proceed as contractually required by the mandatory mediation/arbitration provisions contained in Article 6 of the contract. **The Defendants hereby join in and consent to Plaintiff's motion and the relief requested therein, including the stay of this matter and submission of Plaintiff's claims to mediation and, if necessary, binding arbitration**." (emphasis added).
>
> (A. pp. 0260-0261).

Furthermore, the Respondent is equitably estopped from denying the applicability of the mandatory mediation/arbitration clause as to all Petitioners. The record establishes that Plaintiff initially acknowledged the validity of the arbitration provisions to all claims in this matter by filing its Motion to Stay and Compel at the commencement of this action. The Respondent's Motion to Stay and Compel demanded that all claims in this action, including Respondent's claims against the Ward Petitioners, be stayed and compelled to mediation, and if necessary, to arbitration. Specifically, the Respondent alleged that " a dispute has arisen out of and involving [the] Subcontract Agreement and that the **[Petitioners] are bound to mediate and arbitrate.**" (emphasis added). (A. p. 0215).

"The very essence of equitable estoppel is to prevent a party from taking one position when it is to that party's advantage, and taking the opposite position when it is to that party's disadvantage." *See U.S. ex rel. Coast Roofing v. P. Browne & Assoc.*, 585 F.Supp 2d. 708, 715 (D.S.C. 2007). Thus, the fact that Respondent acknowledged the validity of the arbitration provision, as well as Petitioners' standing to be involved in mediation and arbitration under that provision, "strongly speaks to both the provision's validity and [all of] the Petitioners' standing to enforce the arbitration provision in the agreement." *See id.*

In addition to Respondent's own acknowledgement of the Petitioners' standing under the arbitration clauses, the "intertwined claims" test further equitably estops Respondent from denying all Petitioners, including the Ward Petitioners, standing to enforce the arbitration provisions.

Under the intertwined claims test, "the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.' *Id.* (quoting *Thomson-CSF, S.S. v. Am. Arbitration Assoc.,* 64 F.3d 773, 779 (2d Cir. 1995); *see also Choctaw Generation Ltd. P'ship v. American Home Assur. Co.*, 271 F. 3d 403, 406 (2d Cir. 2001)). To be equitably estopped from denying the applicability of an arbitration clause, the signatory need not necessarily assert a cause of action against the nonsignatory for breach of the contract containing the arbitration clause. *Id.* Instead, estoppel is appropriate if "in substance [the signatory's underlying] complaint [is] based on the [nonsignatory's] alleged breach of the obligations and duties assigned to it in the agreement." *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627-28 (4th Cir. 2006) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F. 3d 753, 757 (11th Cir. 1993)).

Such is unquestionably the case here. While Respondent does not include a cause of action for breach of the Subcontract Agreement against the Ward Petitioners in its Complaint, at the heart of its various claims against the Ward Petitioners are its allegations that: (a) Respondent relied to its detriment on representations made by Petitioner Mark Ward that he would manage the construction Project awarded under the primary contract and that all monies therefrom would be used to pay for material and labor supplied to the

Project; and (b) all Petitioners, including the Ward Petitioners, are contractually bound to pay funds on claims made on the surety bond required by the primary contract for the Project. Therefore, it is clear that Respondent's claims are substantively "intertwined" with the obligations it alleges the Ward Petitioners assumed in connection with the primary contract. *See U.S. ex. Rel. Coast Roofing*, 585 F. Supp. 2d. 708.

Based on the above, as well as the remaining authorities cited below in the *Initial Brief of Petitioners,* all of the Petitioners, including the Ward Petitioners, have standing to enforce the mandatory mediation/arbitration provisions and be involved in mediation and arbitration of the claims asserted in this matter. *Id.*

(D): The Respondent's Motion To Stay And Compel, Which Motion The Petitioners Joined In And Consented To, Should Be Properly Adjudicated And The Relief Requested Therein Granted.

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

The Clerk of Court "closed out" this motion due to the referral of the case to the Master. (A. p. 0640, Tr. p. 9, lines 5-8). The Clerk's closure of the motion occurred despite Petitioners' formal joinder in the motion. The Master issued a bench ruling, finding that the Clerk's action constituted an adjudication of this motion. (*Id*). The Master's ruling became final in his written order denying Petitioners' Motion to Stay and Compel dated July 14, 2016. The summary closure of this joint motion as an administrative matter and

the Master's "adjudication" of this motion on that basis does not constitute a proper adjudication of this motion nor a valid basis for waiver of Petitioners' arbitration rights. *See General Equipment v. Keller Rigging,* 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001) (finding that the referral of a case to the Master-in-Equity does not constitute a waiver of the right to arbitration).

For this reason, and based on the remaining controlling authorities cited below in the *Initial Brief of Petitioners*, the joint motion should be properly adjudicated and a judicial decision rendered granting the motion and submitting the matter to mandatory mediation/arbitration.

(E): 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 Rulings Of The Master and the Court of Appeals That The Petitioners Waived Their Right To Arbitration Constitute Errors Of Law And Should Be Reversed.

The Master, without citing any supporting authority, ruled in his July 14, 2016 order that "Defendants' motion to stay and compel arbitration is denied as Defendant is in Default" and in his October 28, 2016 order that "the affirmative defense of arbitration has been waived and Defendants' Motion to Stay and Compel filed July 11, 2016 was not properly made."

On appeal, the Court of Appeals ruled that "because Petitioners were in default, they waived their right to assert arbitration as a defense." (A. p. 0010).

The Petitioners' appeal from the Master's orders and the Court of Appeals' analysis

herein raises a novel question of law and a matter of first impression in South Carolina. Specifically, the question raised is: **Does the singular fact that a default is entered against a defendant constitute a voluntary and intentional waiver of defendant's right to arbitration**? As a necessary corollary, this novel question raises an additional query; specifically, **Does an entry of default constitute a bright-line dispositive factor, thus excluding, negating and rendering irrelevant all other factors, and associated facts, related to the defendant's efforts to enforce arbitration**?

In analyzing Petitioners' appeal, the Court of Appeals issued its 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)."

(A. p. 0008)

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 long-standing South Carolina and federal law jurisprudence. 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 South Carolina Legal Authorities Cited In Support Of The Court Of Appeals Finding Of Waiver Are Distinguishable And Inapposite To The Arbitration Issues Before This Court

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 acknowledgement that *Wham* does not specifically address the issue at hand. (A. p. 0008).

Furthermore, *Wham* is distinguishable and inapposite to the present case on the numerous grounds set forth below. In *Wham*, the defendants sought to set aside an entry of default, or in the alternative, to stay the proceedings and compel arbitration. The *Wham* court specifically stated that its opinion addressed only the questions relating to the standard for granting relief from an entry of default under Rule 55(c) of the South Carolina Rules of Civil Procedure. *Id.* at 463, 381 S.E.2d at 500. Concerning the motion to stay and compel arbitration, the *Wham* court stated:

> "Because we vacate the order denying the motion by Shearson Lehman for relief from entry of default and remand the issue raised by the motion, we need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration. *See, however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E.2d 527 (9161) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award §51* at 556-57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer)."

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

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

In addition to lacking precedential value, the *dicta* portion of the *Wham* decision is not instructive in the instant case. The *dicta* portion of the *Wham* case includes the court's

express acknowledgement that it did not address the motion to compel arbitration followed by citations to: (a) *Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E.2d 527 (1961) and (b) 5 Am.Jur.2d *Arbitration and Award* §51 at 556-57 (1962). These two cited authorities are inapposite and factually distinguishable from the instant case.

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

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

The pleading of a condition precedent to the commencement of litigation is not an affirmative defense under the South Carolina Rules of Civil Procedure 8(c). Instead, it constitutes the pleading of a special matter under Rule 9, SCRCP. None of the parties to this appeal have raised the condition precedent defense in this action.

Importantly, the defendant was not in default in the *Miller* case and the case did not involve the question of whether a defendant had waived its right to arbitration solely by

virtue of the entry of default rendered against it.

Likewise, the citation to 5 Am.Jur. *Arbitration and Award* §51 in the *Wham* case is neither binding nor authoritative precedent under the facts of this case.

First, the cited second edition of *American Jurisprudence* is an encyclopedia of the United States law and the particular section referenced in *Wham* does not cite to any South Carolina legal authorities.

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

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

In short, the *Wham* opinion is not dispositive of the arbitration issues before this court.

The Legal Authorities Outside Of South Carolina Cited In Support Of The Court Of Appeals Finding Of Waive Are Distinguishable And Inapposite To The Arbitration Issues Before This Court

The remaining cases summarily cited by the Court of Appeals from jurisdictions

outside of South Carolina are equally distinguishable and inapposite to the arbitration issues before this Court.

First, as a general matter, none of these cases involve interstate commerce and arbitration rights governed by the Federal Arbitration Act ("FAA"). As such, with the exception of *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W.Va. 2000) (which applies a mix of West Virginia law and several federal court opinions) these cases do not consider, evaluate or apply the federal law standard of waiver under the FAA.

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

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

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

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

The *Charming Shoppes* court, however, found both the defendant's default **and** its use of the judicial proceedings as the basis of waiver. Also, the *Charming Shoppes* case is further distinguished from the present case in Sub-paragraph 2 below.

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

(2): *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S.2d 860 (N.Y. Sup. Ct. 2000) – This is a New York case applying a broad New York waiver of arbitration standard stated as follows: "[a] defendant may waive any right to submit issues to arbitration by his actions." *Id*. at 296. This New York standard is certainly broader than either of the longstanding waiver standards under South Carolina law or federal law under the Federal Arbitration Act ("FAA"). *See Initial Brief of Petitioners, Section II. E. 2.* In particular, the New York standard fails to require a showing of substantial delay in asserting the right to arbitration, substantial participation in the lawsuit and/or use of the litigation machinery and prejudice.

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

Therefore, based upon the finding of **both** a procedural waiver by default and waiver by the use of judicial proceedings, the court found defendant waived **any** right to

arbitration and denied its motion to compel arbitration.

(3): *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d 936 (1994) – This is a case from the State of Washington, in which the court did not actually reach a determination as to whether the defendant waived his right to arbitration. Instead, the court remanded the case for an evidentiary hearing and framed the issue as "[w]hether [the defendant] knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to the entry of default judgment [in which Plaintiff was awarded his full requested damages and court costs]." *Id*. at 211.

The *Woodruff* case is distinguishable from the present case for the following reasons: (1) the *Woodruff* court articulates the Washington waiver of arbitration standard as follows: "Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored." This standard is significantly different than the South Carolina standard or federal standard under the FAA. *See Initial Brief of Petitioners, Section II. E. 2*. Specifically, the Washington standard as articulated by the *Woodruff* court does not require findings of substantial delay in seeking arbitration, substantial participation in litigation or prejudice; and (2) the *Woodruff* plaintiff had obtained a default judgment for his full requested damages as compared with the entry of default obtained by PCG when the present litigation was in its infancy.

(4): *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523 (Tex. Ct. App. 2007) – This is a Texas case which applies the Texas waiver of arbitration standard, a standard similar to both the South Carolina and federal standards of waiver. Recognizing that "public policy favors arbitration", the *Interconex* court stated that "there is a strong presumption against

finding a waiver of arbitration, and any doubts regarding waiver are resolved in favor of arbitration." *Id*. at 533. Thus, the court stated that waiver would be found "**only** when (1) the party seeking arbitration has substantially invoked the judicial process and (2) the party opposing arbitration suffers actual prejudice as a result." (emphasis added) *Id.*

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

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

Based on the above findings, the court held that Interconex waived any right to arbitration it may have had. Therefore, while the entry of default was considered in the

court's decision, it was not the sole dispositive factor determining the court's finding of waiver. Instead, the *Interconex* court looked at all the particular facts before it as is the requirement under South Carolina and 4th Circuit federal law and determined that the two prong test of waiver had been met before concluding Interconex had waived any right to arbitration.

(5): *LaFrance Architect v. Point Five Dev. S. Burlington, LLC*, 91 A.3d 364 (Vt. 2013) – This is a Vermont case in which the defendant failed to answer and plaintiff obtained a default judgment in the amount of $69,024.90, against defendant, in addition to interest and costs. The *LaFrance* court found that the defendant waited more than nine (9) months after being properly served before participating in the case. In fact, defendant did not respond at all until after plaintiff commenced an action to domesticate the default judgment in New York.

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

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

Id. at 372.

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

Applying the Vermont waiver standard to the facts before it, the *LaFrance* court found that there was both substantial delay and prejudice. Based on its findings of

substantial delay and prejudice, the court ruled that defendant had waived its right to arbitration.

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

(6): *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106 (W. Va. 2000) – This is a West Virginia case applying West Virginia law and relying on additional federal authorities, including *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996) and *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985), as well as Rules 8(c) and 9 of the West Virginia Rules of Civil Procedure, all of which are distinguishable from the present case.

The Fourth Circuit opinion in *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996) in fact establishes that a party's failure to raise arbitration as an affirmative defense is insufficient standing on its own to waive the right to arbitration in the Fourth Circuit. Instead, a finding of waiver requires sufficient delay and significant utilization of the litigation machinery by the party asserting the right to arbitration and legally sufficient prejudice to the opposing party to constitute waiver of a right to arbitration. *Id*. Applying this standard, the *American Recovery* court held that the plaintiff's claims against the defendant were arbitrable inasmuch as: (1) plaintiff's claims related to the parties' agreement containing the arbitration provisions and (2) plaintiff failed to carry its burden of proving that defendant's actions constituted a default of its right to arbitrate under the Federal Arbitration Act ("FAA").

The case of *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985) is an opinion issued by the United States District Court for the District of Connecticut. The *McDonnell* plaintiff commenced his action in April 1982. The *McDonnell* court addressed the merits of the arbitration waiver question before it and fully analyzed this issue even though the defendant, Dean Witter Reynolds, Inc. ("Dean Witter"): (1) had not asserted arbitration as an affirmative defense in its pleading and (2) had, three years after suit was filed and only three days before jury selection for trial, for the first time sought to compel arbitration of plaintiff's claims via a motion to compel arbitration. The court cited the following standard as the proper test by which to determine the question of waiver in cases pending in the Second Circuit: (1) whether the delay in the filing of a motion to compel arbitration prejudices the opposing party; or (2) whether there has been the litigation of substantial issues going to the merits by the time an intention to arbitrate was communicated by the defendant to the plaintiff. *Id*. at 159. Also, the court stated that the giving of notice of an intention to arbitrate to the party opposing arbitration was an important factor in Second Circuit cases as well. *Id*.

Applying these principles to the facts of the case, the *McDonnell* court stated:

"it is clear that Dean Witter has waived its right to arbitrate. Plaintiff, without notice that Dean Witter might move to compel arbitration, embarked on lengthy and expensive discovery and will be greatly prejudiced and inconvenienced by the delay. For its part, Dean Witter has engaged in robust pretrial litigation over a period of nearly three years, and **at no point raised the arbitration defense in an answer or other filing**. (emphasis added). In addition to moving for several extensions and attending chambers conferences, Dean Witter has engaged in discovery that would not have been available to it if it had gone to arbitration The instant motion [to compel arbitration] was filed only after this case was assigned and reassigned for trial. Under these circumstances, not only has Dean Witter's delay prejudiced plaintiff, but Dean Witter also has litigated "substantial issues going to the merits."…Accordingly, …Dean Witter has waived its right to compel arbitration of this dispute."

Id. at 159.

Furthermore, while fully acknowledging that other courts find the arbitration defense in Rule 8(c) pertains exclusively to completed arbitration proceedings, the *Barden* court found that, under West Virginia law, arbitration is an affirmative defense that **may under appropriate circumstances, be deemed waived** if not pled under W. Va. R. Civ. P. 8(c). *Id*., 539 S.E.2d at 111 (emphasis added). Thus, even under West Virginia law the failure to assert arbitration as an affirmative defense does not automatically constitute waiver. Instead, further **appropriate circumstances** are required, and even then, this **may be**, but is not required to be, deemed a waiver.

Finally, the *Barden* court's reliance on W. Va. R. Civ. P. 9 further distinguishes the *Barden* case since the pleading of the special matter of a condition precedent under Rule 9 of the South Carolina or Federal Rules of Civil Procedure is not at issue in the present case.

Cedar Surgery Case

In contrast to the distinguishable cases cited above, the Petitioners have 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) as persuasive on the waiver issue both before the Master and on appeal. The *Cedar Surgery* case supports the proposition that the entry of default does not constitute a waiver of Petitioners' right to mandatory mediation/arbitration.

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. Inv., 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 $381,370.00 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, one which is extremely similar to the applicable South Carolina and federal law waiver standards herein, the *Cedar* court state that "[i]deally, the [defendants] would have raised the contractual arbitration clause in an answer to

[plaintiff's] complaint and then brought a motion to compel arbitration, rather than simply ignoring the district court proceedings altogether. However, we do not find that such failure evidences an intent on the part of the [defendants] to waive their right to arbitration and pursue redress through litigation." *Id.* at 915.

The *Cedar* court expressly acknowledged "that adherence to [the Utah waiver] standard may reward litigants who fail to respond to a complaint or district court proceeding." *Id.* at 915. However, the *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. (A. p. 10).

Based on the controlling authorities cited below, both the Master's and the Court of Appeals' rulings constitute errors requiring reversal and remand.

2. The Court Is Required To Apply The Proper Legal Standard To The Question Of Whether Petitioners Waived Or Defaulted Upon 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 substantial 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 all of 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). "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." *Id.* (internal quotation marks omitted).

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[3], 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.

Turning to the present case, the Master and the Court of Appeals improperly based

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

their ruling on one single factor, i.e., the entry of default. The Master and 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 facts of the case 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. A trial court and any appellate 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 Petitioners 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 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. (A. pp. 0242-0246). Petitioners immediately retained legal counsel on June 3, 2016. (A. pp. 0245, 0249). 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. [4] (A. pp. 0247-0258). Petitioners' 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. (A. p. 0638, Tr. p. 8, lines 4-8). The Master expressly acknowledged Petitioners' counsel's comments and the existence of the mandatory mediation/arbitration provisions. (A. p. 0639, 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." (A. p. 0638, 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. (A. pp. 0258-0263). 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. (A. pp. 0533-0536).

[4] Appellants understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (A. pp. 0249-0250).

Petitioners also filed a memorandum in support of Petitioners' Motion to Lift Entry of Default that date. (A. pp. 0264-0294). 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. (A. pp. 0267-0268).

Following the reconvened hearing, the Master issued his order, dated July 14, 2016, denying the Petitioners' application for arbitration and setting a damages hearing for October 4, 2016. (A. p. 0174).

In response, the Petitioners timely filed a Motion to Alter and Amend the Master's order pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (A. pp. 0295-0299). The Master scheduled the hearing on the parties' Rule 59(e) cross-motions for October 11, 2016.

In light of the Master's scheduling of the Rule 59(e) motion to be held seven (7) days after the damages hearing, the Petitioners, once again, took action to protect their rights to mandatory mediation/arbitration. Specifically, on September 7, 2016, the Petitioners informed the Master in writing of the direct impact that the parties' Rule 59(e) cross-motions would have on arbitration rights of the parties. (A. p. 0658). Accordingly, standing on their rights to mandatory mediation/arbitration, the Petitioners requested in writing that the Master schedule the Rule 59(e) motion hearing prior to the October 4, 2016 damages hearing. (*Id.*).

The Master ultimately denied Petitioners' request and informed the parties that the damages hearing would proceed on October 4, 2016, followed by the Rule 59(e) motions hearing on October 11, 2016. (A. p. 0663).

The Master's decision effectively denied the Petitioners' Rule 59(e) 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 continuing to fully assert and reserve their rights to arbitration, the Petitioners commenced an appeal in this matter on September 30, 2016. (A. pp. 0669-0673).

The Petitioners actions described above, coupled with their efforts to protect their rights to arbitration on appeal, show the Petitioners' vigorous efforts to assert their right to mandatory mediation/arbitration before the Master as well as the appellate courts throughout this litigation. The Petitioners have acted early, often and continuously to protect their rights to mandatory mediation/arbitration during this entire action. Petitioners' actions are absolutely consistent with their rights to arbitration and do not constitute a voluntary and intentional abandonment of their rights to arbitration.

Discovery Has Been Extremely Limited In The Master's Court And Minimal Discovery Was Conducted Per The Master's Direction

Discovery has been extremely limited in this case. No depositions have been taken in this action. The Petitioners have not served interrogatories, requests to produce nor any other form of written discovery, and accordingly, 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 Petitioners' answers to Respondent's basic First Set of Interrogatories and First Request for Production. This participation in discovery by Petitioners was minimal and carried out pursuant to the direction of the Master. This minimal discovery at the direction of the Master does not constitute a waiver of Petitioners' 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 Petitioners' 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 has been limited to: (a) two (2) 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 (1) brief status conference as required by the Master 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 Petitioners' 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; and (2) 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 omitted) (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 76 (Ct. App. 2003)).

The lack of significant discovery in this case establishes that the Petitioners have

not taken "advantage of the judicial system." *See Id.*; *Patten Grading,* 380 F.3d 200. In fact, the sole discovery conducted herein is extremely limited and is confined to the minimal discovery directed by the Master. Accordingly, prejudice does not exist and the law favors arbitration of the parties' dispute. *Id*.

Notwithstanding the lack of actual prejudice, Respondent attempts to claim prejudice through its counsel's unsworn and unsubstantiated statements alleging the "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." (A. p. 0309, lines 12-16).

In addition, 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 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 the Court of Appeals.[5] (*Id.*).

The statement related to Respondent "closing [its] doors" as a result of Petitioners' efforts to lawfully compel arbitration is a conclusory and unsupported 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 counsel's conclusory "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

[5] The dismissal by the Court of Appeals was without prejudice and expressly reserved the right of Appellants to refile their appeal upon disposal of Appellants' Rule 59(e) motion. (A. p. 0177).

unsupported 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).

In addition, the referral of the case to the Master does not constitute prejudice resulting in a waiver of the right to arbitration. *See General Equip.*, 344 S.C. 553, 544 S.E.2d 643.

Respondent's remaining claims of prejudice (i.e., the purported withdrawal of Respondent's motion to compel arbitration and unverified claim of expenditure of some unspecified 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 remaining claims, as well as those previously discussed, individually and/or collectively, fall into one or more of the following categories: (1) conclusory non-evidentiary allegations by Respondent's counsel, (2) alleged activities which are not supported by evidence in the record, (3) alleged activities occurring outside of the short time period between Respondent's commencement of this action and Petitioner's application for arbitration which is the period during which prejudice should be considered, (4) alleged activities which could have been avoided but for Respondent's opposition to Petitioners' early application for arbitration, (5) certain nominal/standard procedures which do not constitute prejudice, and/or (6) unsubstantiated, unspecified and overinclusive claims for attorney's fees. None of these alleged claims constitute actual prejudice to the Respondent. In short, Respondent's alleged claims are insufficient to establish "actual prejudice" under applicable South Carolina or federal law. *General Equip.*, 344 S.C. 553, 544 S.E.2d 643; *Patten Grading*, 380 F.3d 200.

Finally, the Respondent itself demanded mandatory mediation/arbitration of its claims against the Petitioners 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 as 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 severely 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 particular facts in this case**, both the Master and 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); *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2001); *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 506 (Ct. App. 2003); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200 (4th Cir. 2004). The Master and the Court of Appeals committed reversible error in failing to reach such a holding.

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 voluntary and intentional waiver of Petitioners' right to mandatory mediation/arbitration of the parties' dispute. To the contrary, a consideration of all the particular facts in this case establish that the Petitioners have vigorously, continuously and consistently asserted their right to arbitration at both the trial court and appellate court levels throughout this entire action. For these reasons, and under the legal authorities set forth herein, the South Carolina Supreme Court should reverse the orders of the Master and the Court of Appeals and remand this action.

CONCLUSION

Based on the foregoing, the Orders of the Master, dated July 14, 2016 and October 28, 2016 and the Opinion of the Court of Appeals, dated June 26, 2019, are in error and should be reversed and remanded.

Respectfully submitted,

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