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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, Petitioners
Reuben Mark Ward, and
Lynnette Pennington Ward

REPLY BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

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

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

COUNTER - STATEMENT OF THE CASE

Respondent's Brief 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 Petitioners 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. (A. p. 0069). On October 3, 2016, the Respondent filed its first Motion to Dismiss Appeal. (A. p. 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. (A. p. 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.

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,

(A. p. 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. (A. p. 0699). The sole purpose of refileing the original Notice of Appeal was to include the court reporter's certification of the July 14, 2016 hearing 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. (A. pp. 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. (A. p. 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. (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 his final, written order denying Petitioners'

2016. (A. p. 0688).

motion to reconsider pursuant to Rule 59, SCRCP.² (A. p. 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. (A. p. 0677).

On December 2, 2016, the Respondent filed a motion to dismiss Petitioners' November 14, 2016 appeal. (A. p. 0541). The Court of Appeals dismissed Respondent's motion on February 1, 2017 and proceeded with the appeal. (A. p. 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. (A. p. 0004). It is upon these findings that the Petitioners' seek review by the South Carolina Supreme Court of the opinion of the Court of Appeals.

ARGUMENTS

I. THE MASTER'S ORDERS ARE IMMEDIATELY APPEALABLE AND THE RULING OF THE COURT OF APPEALS DISMISSING THE APPEAL AS INTERLOCUTORY CONSTITUTES REVERSIBLE ERROR.

The Respondent asserts that Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016 were not immediately appealable, and the Court of Appeals did not err in dismissing the Petitioners' appeal.

The Respondent argues the following two grounds in support of this assertion:

² Respondent incorrectly states that the Master's October 28, 2016 Order denied Petitioners' "motion to amend their answer..." Respondent's Brief, Pg. 3, line 10.

(1): An order denying a motion to be relieved from default is not appealable until after final judgment; and

(2): Because Petitioners were in default they waived their right to move to compel arbitration.

The Respondent's arguments fail on numerous grounds. First, under federal law, an order that refuses to compel arbitration is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. §16(a)(1); *Stedor Enter., Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991).

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

Third, under South Carolina law, an order finding that a party waived its rights to compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999).

Fourth, 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) and 9 U.S.C. §1, et seq.

Fifth, the Petitioners did not waive their right to arbitration, including the right to move to compel arbitration. *See* Brief of Petitioner.

Sixth, under South Carolina law, an order affecting a substantial right of a party, including a party's mode of trial to which he is entitled is immediately appealable. S.C. Code Ann. §14-3-330(2); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E. 2d 333 (Ct. App. 2005). In fact, such

orders **must** be appealed immediately and cannot be challenged in an appeal from final judgment. (emphasis added). *Id.*

Seventh, under South Carolina law, an order that is not immediately appealable, such as an order denying a motion to lift entry of default; 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).

The applicability of these long-standing legal principles and Petitioners' additional supporting legal authorities to the facts of this case establish the immediate appealability of the Master's orders and the error of the Court of Appeals in dismissing the Petitioners' Appeal. *See* Brief of Petitioners, Section I.

II. THE COURT OF APPEALS DID NOT ISSUE A SUBSTANTIVE RULING ON THE MASTER'S DENIAL OF PETITIONERS' MOTION TO LIFT ENTRY OF DEFAULT.

The Respondent cites the abuse of discretion standard applied to motions to lift an entry of default in the Standard of Review Section of Respondent's Brief. Respondent's Brief, Pg. 4. Also, the Respondent asserts that the Court of Appeals found no abuse of discretion in this case. Respondent's Brief, Pg. 10.

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 Petitioners’ appeal therefrom. The Court of Appeals did not discuss the Rule 55(a), SCRCF “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 issue and found there was no abuse of discretion, it would not have dismissed the appeal as interlocutory.

Instead, the Court of Appeals cites *Roo 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.

III. BOTH THE MASTER AND THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATION.

(A): Respondent Is Equitably Estopped From Denying The Applicability Of The Mandatory Mediation/Arbitration Clause To The Parties Disputes In This Action.

The Respondent commences its arguments before this Court with incendiary and defamatory attacks upon Petitioners Mark Ward and Restoration Specialists, LLC.³

Respondent then pivots to a footnote reference to a separate lawsuit⁴ as well as unsupported claims of prejudice none of which are contained in the record on appeal.⁵

Respondent follows the above with claims that it initially sought to compel arbitration in this lawsuit because it is “usually...an expedient means of resolution.” Respondent’s Brief, Page 4. Respondent’s claim conveniently ignores the essential and pivotal fact that Respondent’s legal claims are subject to the mandatory mediation/arbitration provisions agreed upon and contained in the contract.

Finally, Respondent asserts that it withdrew its motion to compel arbitration and is not equitably estopped from denying the applicability of the mandatory mediation/arbitration clause. First, while Respondent asserts that it withdrew its motion to compel arbitration, the record is devoid of evidence substantiating Respondent’s assertion. Second, the Respondent’s Motion to Stay and Compel mandatory

³ Respondent alleges that Petitioners Mark Ward and Restoration Specialists, LLC stole funds from two federal construction projects. Respondent’s Brief, Pg. 4.

⁴ Respondent’s footnote 2 makes unsubstantiated claims concerning a separate lawsuit. This lawsuit is not a part of the record on appeal. Furthermore, the matters at issue in that lawsuit involve a separate, distinct and unrelated construction project, different parties and construction contracts, and separate/dissimilar factual and legal issues.

⁵ Respondent’s claims of prejudice asserted as footnote 3 in Respondent’s Brief are speculative, conclusory and unsupported by evidence in the record on appeal.

mediation/arbitration, joined in and consented to by Petitioners, should have been properly adjudicated and granted. Brief of Petitioners, Section II. (C) and (D). Third, for the reasons stated in Section II. (C) of the Brief of Petitioners, the Respondent's argument contesting equitable estoppel must fail.

(B): The Respondent's Claims Against the Ward Petitioners Relate To And Are Intertwined With The Subcontract And, Therefore, Are Subject To Arbitration.

The Respondent asserts that its claims against the Ward Petitioners are not intertwined or interwoven with the Subcontract between Petitioner Restoration Specialists, LLC and are not subject to arbitration. The Respondent's assertion is expressly refuted by the language of the alternative dispute resolution provisions in the Subcontract Agreement. Section 6.1.1 and 6.2 of the Subcontract read as follows:

“[a]ny claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution (emphasis added).” Section 6.1.1.

“For any claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding arbitration shall be . . . Arbitration pursuant to Section 6.3 of this Agreement (emphasis added)” Section 6.2.

These are not narrow arbitration clauses requiring only the arbitration of claims arising under the Subcontract. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967); *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d 88 (4th Cir. 1966). In contrast, these are broad arbitration provisions not limiting arbitration to the literal interpretation or performance of the contract, but embrace disputes having a relationship to the contract regardless of the label attached to the dispute. *See Id.*

Respondent's own statements and allegations clearly assert actions by the Ward Petitioners which relate to and are intertwined with the Subcontract and which

Respondent alleges give rise to liability on the part of the Ward Petitioners. For example, the summary below is a sampling of Respondent's own statements and allegations contradicting Respondent's assertion that the claims against the Ward Petitioners are not intertwined and, thus not arbitrable:

(1): Mr. Ward of Restoration Specialists approached PCG about working on the VA project as a concrete subcontractor, as well as in a supervisory capacity. Further, Mr. Ward indicated that Restoration Specialists was unable to secure the sizable bond the VA Project required, and asked that PCG obtain the bond from its surety, Hanover. PCG agreed and a subcontract was entered into between Restoration Specialists and PCG dated September 10, 2014. (A. pp. 0093-0094);

(2): Pursuant to the subcontract agreement between Restoration Specialists and PCG, PCG agreed to aid Restoration Specialists in obtaining the bond. (Subcontract) (A. p. 0094);

(3): PCG's surety, Hanover, did issue the payment and performance bond for the project, Bond N. 9000-0045. However, Hanover required that both PCG and Restoration Specialists, as well as their respective principals and their spouses sign an indemnity agreement, requiring them to indemnify Hanover for any sums it expends in paying claims made on the bond. (Indemnity Agreement) (A. p. 0095);

(4): Claims have been made by other subcontractors upon the Payment Bond and as a consequence subcontractors are making claims against Palmetto and its surety. Palmetto Restoration and individually, M. Ward and Mrs. Ward, all signed an indemnity agreement with a surety in relation to a Payment Bond for this project (Exhibit C). Accordingly, Restoration, Mr. Ward and Mrs. Ward must indemnify the surety and Plaintiffs to the extent that they are required to pay. (A. p. 0183);

(5): Mr. Ward represented that he would manage this project and that all monies from the project would be used to pay for material and work supplied to or performed on the project. Mr. Ward has a pecuniary interest in the project. The representations of Mr. Ward were material and were relied upon by Palmetto. Mr. Ward intended and induced Palmetto to rely upon his representations. Mr. Ward is personally liable for his own tortious conduct. Palmetto's justifiable reliance upon Mr. Ward has damaged Palmetto. (A. p. 0184);

(6): All Defendants are contractually bound to pay funds if there are claims on the surety bond. There are claims on the surety bond. (A. p. 0185);

(7): Hanover made a demand under its indemnity agreement and upon the VA for the contract balance but by this time Mr. Ward had collected all but \$90,000 of the \$8.1 Million contract. (A. p. 0095);

(8): PCG sued all [Petitioners] for actual and constructive fraud and negligent representation regarding the [Petitioners'] misappropriation of funds paid to them by the VA, which resulted in over \$1.4 Million in claims by subcontractors on the payment bond. (A. p. 0095).

As a whole, these statements and allegations, many of which are disputed by Petitioners, clearly establish that the parties' dealings, the subcontract, the indemnity agreement and Respondent's claims against the Ward Petitioners arising therefrom are all related to and intertwined with the subcontract as part and parcel of the VA Project.

In addition, the Respondent filed a Motion to Stay and Compel mediation/arbitration at the commencement of suit. The Respondent did not carve out the claims against the Ward Petitioners as being independent of the Subcontract and not subject to arbitration. To the contrary, the Respondent **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.**

Based on the above, as well as the additional authorities cited in Section II. (C) of the Brief of Petitioners, all of the Petitioners, including the Ward Petitioners, have standing to enforce the mandatory mediation/arbitration provisions. Accordingly, all of the Petitioners, including the Ward Petitioners, are entitled to an order compelling mediation/arbitration of the Respondent's claims in this action.

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

The Respondent asserts that Petitioners' 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 (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 Petitioners 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 Petitioner's, however, never received the

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).

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 both South Carolina and federal arbitration jurisprudence cited in the Brief of Petitioner as applied to the *entire facts of this case*, the Petitioners' failure to initially 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 Not Constitute Binding Precedent For A Finding Of Waiver In The Present Case.

The Respondent asserts that South Carolina's arbitration jurisprudence has long recognized arbitration as an affirmative defense that is waived if not pled. Respondent's Brief, Pg. 8. The Respondent cites the following three South Carolina cases 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).

All three 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 prefaced 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 the Brief of Petitioners, Section E.I., at 24-27.

In the *Partain* case, the defendant raised the existence of an arbitration agreement, which it labeled as an affirmative defense in its answer. The *Partain* court's reference to this defense, and others raised by the defendant, in the procedural history of the case constituted a simple reference as to the mechanics and structure of defendant's answer, including the defenses asserted therein. The *Partain* court's reference to the mechanics of defendant's answer does not constitute a ruling that arbitration is an affirmative defense that is waived if not pled in South Carolina.

In fact, the sole legal issue before the *Partain* court was whether the plaintiff's claims were within the scope of the arbitration agreement. In short, the opinion in *Partain*, does not stand as precedent that arbitration is an affirmative defense that is waived if not pled in South Carolina.

The *Howard* case is equally distinguishable and inapposite to the waiver issue before this Court. The *Howard* case does not involve an arbitration agreement, the issue of waiver of the right to arbitration, nor the filing of applications for arbitration by all parties to the litigation. Instead, the *Howard* case concerns the defense of assumption of the risk.

On the other hand, contrary to the Respondent's arguments and cited cases, is the Court of Appeals opinion rendered in *General Equipment v. Keller Rigging*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001). In *General Equipment*, the defendants filed an answer denying the plaintiff's allegations, but did not include an affirmative defense of arbitration. Six months later, two weeks prior to the scheduled trial, the defendants filed a motion to

compel arbitration. The Master denied defendant's motion to compel arbitration and the defendants appealed.

If, under South Carolina law, the defendants had waived their right to arbitration by failing to plead arbitration as an affirmative defense, the appellate court would have been bound to affirm the Master's denial of defendant's motion to compel arbitration. As a necessary corollary, the appellate court would not have analyzed the traditional issues under South Carolina's established standard for waiver concerning the extent of the parties' involvement in litigation, the period of delay and the undue burden and prejudice caused by the delay. Instead, in reversing the Master's decision below, the Court of Appeals applied the South Carolina waiver standard to **all of the facts of the case** and found that the defendants had not waived their right to arbitration.

"Waiver is a voluntary and intentional abandonment or relinquishment of a know right." *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388 (1994). Applying the controlling authorities cited herein and in the Brief of Petitioners to all of the facts of this case, the record establishes that Petitioners have not intentionally and voluntarily waived their right to arbitration.

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 the defaulting defendant's very first action in the *Cedar Surgery* case included filing a motion to compel arbitration and that Petitioner Mark Ward's affidavit herein made no mention of arbitration and (2): Respondent asserts that neither the *Cedar Surgery* court nor

the Court of Appeals found an abuse of discretion by the trial courts in their respective rulings on the parties' motions to lift default.

Respondent's first argument conveniently ignores Petitioner's citation to the mandatory mediation/arbitration provisions as a ground for relief under Petitioners' Motion for Continuance of the damages hearing and Motion to Set Aside Entry of Default filed along with Petitioner Mark Ward's affidavit in Petitioners' initial appearance in this action.

The Respondent's attempts to distinguish the *Cedar Surgery* case on this ground as well as its second ground are further misplaced as established in Sections II. (E) 3. of the Brief of Petitioners and Section I. of this Reply Brief of Petitioners.

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 first argues, without citation to supporting authority, that it did not have the burden of showing prejudice because the finding of waiver by the Court of Appeals was based on Petitioners' default status. Respondent's argument portends that the singular fact of default constitutes an absolute waiver of arbitration, to the exclusion of all other facts related to a defendant's efforts to enforce arbitration.

However, both South Carolina and federal arbitration jurisprudence have always considered all of the facts of the case and required a showing of prejudice to establish a waiver of arbitration. *See* Brief of Petitioner. Therefore, any finding that Petitioners waived their right to arbitration solely on the basis of the entry of default constitutes reversible error.

Alternatively, the Respondent argues the lack of evidence of prejudice in the record is due to Petitioners' conduct in this action. Specifically, the Respondent asserts that the

Petitioners' 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 argument. However, the Respondent's argument 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 Petitioners' 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: (a) speculative, conclusory and unsubstantiated allegations, (b) alleged activities/occurrences which lack evidentiary support and are not contained in the Record on Appeal⁷, (c) alleged activities occurring outside of the short time period between Respondent's commencement of this action and Petitioner's application for arbitration, (d) alleged activities which could have been avoided but for Respondent's opposition to Petitioner's early application for arbitration, (e) certain nominal/standard procedures which do not constitute prejudice, and (f) unsubstantiated, unspecified and overinclusive claims for attorney's fees. *See* Brief of Petitioners, Petition of Writ for Certiorari – Section II., (E), 3., Pgs. 44-47. In short, Respondent's claims are insufficient to establish “*actual prejudice*” under applicable South Carolina and federal law. *Id.*

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.

⁷ Including the conclusory and unsubstantiated assertion raised for the first time in Footnote 3 of Respondent's Brief that, as a result of the “Petitioners' actions”, [the Respondent] was forced into insolvency, and its principals honored their debt to the surety who paid when the funds went missing.”

Respectfully Submitted,

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