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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2018-000171

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

Cleo Sanders .....Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr. ..... Defendants

Of whom, Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the ..... Appellants

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APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Rules 219(b), 221(a), and 240, SCACR, Appellants Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram ("Hendrick") and Isiah S. White (collectively "Appellants") request rehearing or rehearing en banc of the Panel's Opinion 5779, filed October 21, 2020 (the "Opinion"). The Opinion: (1) affirmed the Circuit Court's denial of Appellants' motion to stay and compel arbitration; and (2) affirmed the Circuit Court's order compelling discovery and finding Appellants waived their right to participate in arbitration by participating in discovery after Appellants filed their Notice of Appeal.

ARGUMENT

Appellants respectfully submit that in rendering the Opinion the Panel overlooked or misapprehended both the record and the controlling law.[1] The Panel's decision creates a blanket rule that the assignment of a contract containing an arbitration clause, regardless of the circumstances of the assignment, the language of the arbitration clause, or the details of the lawsuit, extinguishes the assignor's right to compel arbitration. This has never been the law of South Carolina and its implications are far reaching across all types of contracts in the heavily favored arena of arbitration. At the very least, it is an issue of first impression that warrants rehearing en banc to maintain uniformity of decisions.

I. The Panel's Opinion Ignores the Law Interpreting Arbitration Agreements, While Creating A Bright-Line Rule Which Eviscerates the Parties' Ability to Contract.

Respectfully, the Panel significantly erred in its review, analysis and interpretation of the arbitration clause and case law concerning arbitrability and scope, and reconsideration is necessary to protect the rights of Appellants and to prevent such a contradictory blanket-rule

[1] This case was originally to be considered for oral argument but ultimately decided without oral argument pursuant to Rule 215, SCACR.

regarding arbitration. Without discussing any case law regarding arbitration or arbitration agreements and without analyzing the arbitration clause itself, the Opinion abruptly concludes that solely because the contract was assigned, Hendrick's "alleged rights arising from the contract, including the right to have an arbitrator determine the arbitrability of the action and the right to arbitrate, were extinguished as to Appellants." (Op. p. 4).

The Panel failed to consider the language of the arbitration clause at issue, much less analyze the clause through the lens of South Carolina's arbitration jurisprudence. Thus, the Panel created a bright-line rule regarding the confluence of assignment, standing and arbitration, which directly contravenes South Carolina and federal law regarding arbitration agreements. As our Supreme Court has stated, "[t]he question of the arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (emphasis added).

The Opinion recognizes the salient issue is one of arbitrability, as it applied the following standard of review: "'Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings.' *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)." (Op. pp. 2-3). *Pearson*, like the situation in this case, involved the question of whether one party to the litigation had the right to compel arbitration even though the contract containing the arbitration clause did not clearly bestow that right. In *Pearson,* the party compelling arbitration was not a signatory to the contract containing the arbitration clause yet still had the right to compel; here, the party compelling arbitration is a signatory to the contract but merely assigned it thereafter. The Panel's citation to *Pearson* is instructive for two reasons: (1) *Pearson* recognizes that the right to compel arbitration may exist even when a party lacks the

general right to enforce the contract containing the contract clause; and (2) the Court in *Pearson* substantively addressed the question of arbitrability, but it did so in the absence of an arbitration clause like the one at issue here that ***specifically delegates*** any determinations about arbitrability ***to the arbitrator***. *Compare Pearson*, 400 S.C. at 285, 733 S.E.2d at 599 ("Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration") *with* R. p.112 ("Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, ***and the arbitrability of the claim or dispute***) . . . shall . . . be resolved by neutral, binding arbitration and not by a court action. . .). This distinction is the foundation of the Opinion's misapprehension of the record and applicable law, because South Carolina law only recognizes "[t]he question of the arbitrability of a claim" as "an issue for judicial determination" ***when the parties have not provided otherwise***. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118.

The parties here provided otherwise and the Opinion, by failing to recognize that parties to an arbitration agreement have the right to craft terms as they wish (just as parties to any other contract are entitled to do), demotes arbitration agreements to a sub-contract class, where heretofore parties are prohibited from agreeing to delegate to the arbitrator the issue of arbitrability (and any other gateway issues the parties deem fit to delegate). The Panel's Opinion treats the contractual, gateway terms of what the parties have agreed to arbitrate as if they do not exist, effectively creating a carte-blanche prohibition on delegation to an arbitrator of such issues (including the effect of a purported assignment on the right to compel arbitration). This does not comport with longstanding policy in South Carolina and federal courts giving the parties great leeway in crafting the terms of their arbitration agreement, including who should resolve

gateway issues. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S. Ct. 2772, 2777 (2010) ("Parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . [A]rbitration is a matter of contract. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

The Opinion also permits a plaintiff, without regard to the chosen words of the contract to which he agreed, to base his theories of liability on the contract containing the arbitration clause ***while at the same time*** denying the defendant, who also agreed to those contractual terms, from presenting to the arbitrator his position regarding standing to compel arbitration vis a vis the effect of an assignment. In other words, the Opinion allows plaintiffs, including Respondent, to use such a contract as both a sword and a shield while tying both hands behind the defendant's back.[2] The Opinion also leaves no room for nuance – for analysis of the contractual language

[2] Under the FAA, "[a] party aggrieved by the alleged failure . . . or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Courts have held that when a plaintiff sues under a contract but then attempts to avoid the arbitration clause within the contract, an aggrieved party may compel arbitration. *See, e.g.*, *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding that a signatory to an arbitration agreement "is estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed"); *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration Int'l., Inc.*, 198 F.3d 88 (2nd Cir. 1999) (court implies that assignor could compel arbitration); *Lachmar v. Trunkline LNG Co.,* 753 F.2d 8 (2d Cir. 1985) (accepts, without deciding, that assignor may participate in arbitration); *Tenneco Resins, Inc. v. Davy Int'l, A.G.,* 770 F.2d 416, 417, 422 (5th Cir. 1985) (same); *Stations W., Ltd. Liab. Co. v. Pinnacle Bank of Or.*, No. 06-1419-KI, 2007 U.S. Dist. LEXIS 30666, at *8-9 (D. Or. Apr. 23, 2007) ("Since plaintiff alleges a claim against Pinnacle for breach of contract while at the same time disclaiming the arbitration provision in that very contract, Pinnacle qualifies as "[a] party aggrieved" and may compel arbitration."); *Vainqueur Corp. v. Lamborn & Co.,* 305 F. Supp. 1007 (D.N.Y. 1969) ("When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, and one of the parties to that agreement fails to comply with its

chosen, the terms of the assignment, the relationship of the parties to the assignment or any other number of issues which normally would be considered in the context of standing and assignment under a contract. Reconsideration and rehearing is warranted.

II. The Panel's Failure to Analyze the Arbitration Clause and Conduct the Proper Analysis Through the Arbitration Jurisprudence Lens Warrants Reconsideration.

The Opinion overlooks the required, basic arbitration analysis that this Court recently performed in July of this year[3] in *Doe v. TCSC, LLC*, 430 S.C. 602, 607-08, 846 S.E.2d 874, (Ct. App. 2020), an opinion by the Honorable Judge Hill. In *Doe*, the question before the Court was whether the parties intended for the court or an arbitrator to decide the issue of whether the arbitration agreement was valid and enforceable on the grounds of unconscionability. The Court thoroughly laid out its analysis regarding arbitration provisions, beginning with the notion that "the first task of a court is to separate the arbitration provision from the rest of the contract," and noting that "[t]his may seem odd, but it is the law, known as the *Prima Paint* doctrine." *Id.* at 607-08, 846 S.E.2d at 876-77.

The Court's citation to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) accurately noted that the United States Supreme Court held that the "arbitrator[,] rather than court[,] must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced; but if fraudulent inducement claim went to the arbitration provision specifically, [the] claim would be for court because such a claim goes to the 'making' of the arbitration agreement and § 4 requires the court to 'order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue." *Id.* at 608, 856

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terms, the other party is entitled to an order compelling arbitration even if that party has irrevocably assigned its rights under the agreement.").

[3] *Doe* was decided well after briefing was completed in this matter.

S.E.2d at 877 (quoting *Prima Paint*, 388 U.S. at 403–04). Notably, the arbitration provision in *Doe* was the entire contract, and the Court then had to consider whether the contract constituted a valid agreement to arbitrate consistent with arbitration principles of South Carolina and the federal courts.

The *Doe* Court also discussed a delegation clause identical to the one at issue and stated "[b]ecause it is clear and unmistakable the delegation clause committed disputes over the 'interpretation and scope' of the Arbitration Agreement and issues of 'arbitrability of the claim or dispute' to the arbitrator, the FAA requires us to honor that agreement and leave resolution of these discrete gateway issues to the arbitrator.[4]" *Id.* at 609, 846 S.E.2d at 877. In so doing, the Court noted its reasoning was consistent with *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772, 2779 (2010), wherein the United States Supreme Court held unless a party focused its unconscionability challenge on the delegation clause itself (rather than the arbitration agreement generally), a court must treat the delegation clause "as valid under § 2, and must enforce it under §§ 3 and 4, *leaving any challenge to the validity of the Agreement as a whole for the arbitrator*." (emphasis added). The *Rent-A-Center* Court held:

> There are two types of validity challenges under § 2: "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye,* 546 U.S., at 444, 126 S.Ct. 1204. In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403–404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Buckeye, supra,* at 444–446, 126 S.Ct. 1204; *Preston v. Ferrer,* 552 U.S. 346, 353–354, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). That is because § 2 states that a "written provision" "to settle

[4] The *Doe* Court went on to determine that although those issues were for arbitration, it was within its purview to determine the whether the *arbitration clause* itself (which was the entire contract) was valid and enforceable.

> by arbitration a controversy" is "valid, irrevocable, and enforceable" *without mention* of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye,* 546 U.S., at 445, 126 S.Ct. 1204; see also *id.,* at 447, 126 S.Ct. 1204 (the severability rule is based on § 2).

Rent-A-Center, 561 U.S. at 70–71, 130 S. Ct. at 2778 (ultimately concluding that because the respondent challenged the validity of the contract as a whole, not the specific delegation provision, the decision of whether the entire agreement was unconscionable was for the arbitrator, not the court to decide).[5]

The entirety of Respondent's argument before this Court opposing arbitration is that Appellants lack standing under the contract generally; in other words, both Respondent's argument and the Opinion's focus on the effect of the assignment concern the contract as a whole – not the arbitration clause or the delegation provision in particular. In fact, Respondent expressly denied making such specific arguments: "Validity [of the arbitration clause] is not the issue" (R. Br. p. 19); "Sanders has never asserted that assignment of the contract invalidates the arbitration clause" (R. Br. p. 19); "Sanders never argued and Judge Nicholson never ruled that Appellants' assignment of its contract rights invalidated the arbitration clause;" (R. Br. p. 21). Consistent with *Rent-A-Center*, the questions of standing and the effect of the assignment thereof

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[5] Further explaining, the *Rent-A-Center* Court stated:

> But even where that is not the case—as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

561 U.S. at 71, 130 S.Ct. at 2778.

are tethered to the contract as a whole. Those questions too are for the arbitrator pursuant to our jurisprudence and the arbitration clause at issue.

The Opinion concedes that the question of the effect of an assignment falls within the gateway issues "of the right to have an arbitrator determine the arbitrability of the action and the right to arbitrate" but then contradictorily determined the assignment extinguished those rights with respect to Appellants. (Op. p. 4). The latter determination, like the former, is one for the arbitrator. For this additional reason, and for the reasons set forth in Hendrick's appellate briefs on this point, rehearing is warranted.

III. The Opinion Overlooks that the Arbitration Clause Language In This Case Broadly Reserves For The Arbitrator Questions Like the Effect of an Assignment On Arbitrability.

In misapprehending the import of *Rent-A-Center* and its own decision in *Doe*,[6] the Panel cites *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc*., 590 F. Supp. 2d 677, 680 (D.N.J. 2008) to support its perfunctory conclusion that the assignment of the contract categorically extinguished Hendrick's right to have an arbitrator decide the question of arbitrability and the right to arbitrate. *Highlands* was decided prior to *Rent-A-Center* and it is questionable whether it remains good law. Moreover, the arbitration clause at issue in *Highlands* is significantly different than the one at issue in this appeal. Indeed, the arbitration clause in *Highlands* did not contain a delegation clause and stated the following:

> All disputes, controversies or claims arising out of or relating to this Agreement shall be submitted for arbitration to a New Jersey office of the American Arbitration Association on demand of either party. Such arbitration proceeding shall be conducted in New Jersey, and shall be heard by one arbitrator in accordance with the then[-]current Commercial Arbitration Rules of the American Arbitration Association. All matters within the scope of the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.) shall be governed by it.

[6] It is important to note that the Court in *Doe* was dealing with a one-page arbitration agreement: "Here . . . the arbitration provision is the entire contract[.]" 430 S.C. at 608, 846 S.E2d at 877.

Id. at 680.

The clause at issue here states:

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

(Emphasis added).

The language at issue in the arbitration clause before this Panel expressly includes a delegation clause that mandates that questions of interpretation, scope and arbitrability as matters to be resolved by arbitration. *Doe*, 430 S.C. at 609, 846 S.E.2d at 877 (holding "it is clear and unmistakable the delegation clause committed disputes over the 'interpretation and scope' of the Arbitration Agreement and issues of 'arbitrability of the claim or dispute' to the arbitrator, the FAA requires us to honor that agreement and leave resolution of these discrete gateway issues to the arbitrator").

The Opinion overlooked other court opinions that Appellants cited outlining the proper analysis the specific issue of whether standing to compel arbitration in light of a purported assignment is a question of arbitrability. For example, in *AT&T v. United Computer Systems*, No. 94-56755, No. 95-55015, 1996 U.S. App. LEXIS 28484, at *6-7 (9th Cir. Oct. 30, 1996), the Ninth Circuit Court of Appeals addressed the precise issue, wherein it stated:

> We reject AT&T's contention that the issue of [defendant's] standing to compel arbitration is not subject to arbitration. Paragraph 33 of the licensing agreement provides: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration[.]" This expansive language requires AT&T to submit to arbitration any dispute concerning the substantive provisions of the agreement, including a dispute regarding an assignment under Paragraph 13 of the agreement.

> AT&T argues that the issue on appeal is about who should decide whether the assignment was valid-- the courts or the arbitrators. However, the actual question here is not *who* decides the assignment issue, but whether the matter of assignment is within the scope of the arbitration agreement. As the Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1990) notes, when the question is whether the arbitration agreement includes a particular *merits-related dispute*, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 115 S. Ct. at 1924 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). *Here Paragraph 33's broad and expansive language requires AT&T to submit the assignment issue to arbitration and the court did not err in remanding this issue to arbitration.*

Id. (emphasis added); *see also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including the standing of a party to the arbitration, the *res judicata* effect of a prior arbitration award and the timeliness of filing a grievance, are for the arbitrator, so long as the *subject matter* of the dispute is within the arbitration clause.") (emphasis in original)). Other courts have also considered the strong presumption in favor of arbitration when analyzing standing arguments and questions of arbitrability. *See e.g.*, *CVD Equip. Corp. v. Dev. Specialists, Inc.*, No.CV 11062-VCG, 2015 WL 4506052, at *1 (Del. Ch. July 23, 2015) (holding that standing and jurisdictional questions are questions of scope, and that questions of scope, including whether the arbitration provision was drafted broadly enough to include disputes arising from the contract brought not by a signatory to that contract, but by an assignee of that signatory pursuant to an assignment for the benefit of creditors, are questions of substantive arbitrability which were agreed upon to be decided by the arbitrator); *Oakwood Acceptance Corp. v. Hobbs*, 789 So. 2d 847, 851-52 (Ala. 2001); (refusing to decide the plaintiffs' argument that the defendant did not have standing in light of an assignment and holding that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so and concluding that

based on the arbitration clause, whether assignee has standing to enforce the arbitration agreement between plaintiffs and assignor is a question that must be decided by the arbitrator).

The Opinion overlooks and ignores the "clear and unmistakable" evidence that the parties agreed to arbitrate the issue of arbitrability. The arbitration clause here is even broader than the one at issue in *AT&T*, wherein the Court found that the assignment issue was one for the arbitrator not the Court. Yet here, the Panel fully overlooked and therefore fully failed to consider the language of the arbitration clause in contravention of long-standing jurisprudence. Respectfully, the Opinion fails to conduct the appropriate analysis of standing and the effect of the assignment through the lens of the arbitration clause and the delegation of the issues of scope, interpretation and arbitrability. For this additional reason, and for the reasons set forth in Appellants' briefs on this point, rehearing is warranted.

IV. The Opinion Misapprehends and Overlooks its Exclusive Jurisdiction Over this Appeal and Therefore the Circuit Court's Lack of Jurisdiction to Issue the Discovery Order.

It also appears the Opinion misunderstood and therefore misapprehended Appellants' second argument with respect to the Circuit Court's lack of jurisdiction to issue an order regarding discovery once this appeal was filed. As outlined below, the February 20, 2018 Circuit Court order granting Respondent's Motion to Compel Discovery Requests (the "Discovery Order") was issued nearly ***two weeks after*** the February 6, 2018 filing of Appellants' Notice of Appeal. The Discovery Order is void because the Circuit Court lacked jurisdiction to issue it.

Both the South Carolina Appellate Court Rules and case law make clear that upon the filing of a Notice of Appeal, all matters affected by that appeal are automatically stayed and the Circuit Court no longer has jurisdiction to adjudicate. *See Jackson v. Speed*, 326 S.C. 289, 311,

486 S.E.2d 750, 761 (1997) (finding that service of a notice of appeal divests the lower court of jurisdiction over the order appealed, except for matters not affected by the appeal). Rule 241(a), SCACR, in governing matters which are stayed while on appeal, provides:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 205, SCACR, expressly grants this Court exclusive jurisdiction over the appeal, leaving the Circuit Court without jurisdiction to determine anything affected by the appeal. Under Rule 205 and the last sentence of the above-quoted portion of Rule 241, the lower court may not act or issue orders that impact an issue on appeal. *Arnal v. Fraser*, 371 S.C. 512, 518-19, 641 S.E.2d 419, 422 (2007).

Despite this Court's clearly established and exclusive jurisdiction over this case as of February 6, 2018, the Circuit Court nevertheless issued its Discovery Order on February 20, 2018. There is no reasonable argument that the Discovery Order addressed matters over which the Circuit Court retained jurisdiction as unaffected by the appeal. This case cannot be parsed into compartments: The Circuit Court's January 10, 2018 Order denying Appellants' Motion to Compel Arbitration is the entirety of the parties' dispute. The Motion to Compel Arbitration impacts the Circuit Court's foundational jurisdiction to adjudicate ***any*** dispute between the parties that have agreed to arbitrate all disputes. There can be no question that this appeal

divested the Circuit Court of jurisdiction to make any additional determinations in this case, which should be in arbitration and not in the Circuit Court in the first instance.[7]

One need look no further than the incredible determination that Appellants somehow waived their right to compel arbitration by responding to the Circuit Court's improvidently issued, post-appeal Discovery Order: This is ***conclusive evidence*** that the Discovery Order did – in fact – impact matters on appeal. Indeed, the Discovery Order ***was expressly used*** to impact matters on appeal by potentially eroding the right Appellants seek to protect on appeal. This is the case-in-point why lower courts are divested of jurisdiction to adjudicate any matters that might impact the issues on appeal.

Despite these clear rules regarding exclusive jurisdiction and the crux of Appellants' argument regarding the same, the Opinion misapprehended the law and failed to find the Notice of Appeal deprived the Circuit Court of its jurisdiction to issue the Discovery Order. The Opinion overlooked Rules 205 and 241, SCACR, by neglecting to find the Circuit Court without power to issue the Discovery Order. There can be no question this Discovery Order intruded on appeal and threatened Appellants' right to seek or participate in arbitration. *See Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, our supreme court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).

The Panel's refusal to exercise its exclusive jurisdiction results in an impossible result in this instance: the Discovery Order (to which Appellants did not initially respond in order to avoid substantially utilizing the litigation machinery) triggers an alleged waiver of Appellants'

[7] Indeed, the development and exchange information and "discovery" in an arbitration is vastly different from formal discovery in a South Carolina court of common pleas.

right to compel arbitration even though the adjudication of that right was already before this Court for decision. To allow lower courts to issue orders like the Discovery Order while the issue of arbitration is pending of appeal puts litigants in the proverbial "Catch-22" no-win situation.[8] For this additional reason, and for the reasons set forth in Appellants' final briefs on this point, rehearing is warranted.

CONCLUSION

For all of the reasons set forth herein, and for the reasons set forth in its appellate briefs, Appellants respectfully submit that they are entitled to rehearing and rehearing en banc of the Panel's Opinion.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

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[8] And regardless, there was no waiver here under South Carolina law. *Compare Toler's Cove Homeowners Assoc., Inc. v. Trident Constr., Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (holding thirteen month period did not demonstrate waiver of the right to seek arbitration when discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions"); *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding a thirteen month period did not demonstrate waiver when "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.,* 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding period of less than eight months did not establish waiver where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories") *with Deloitte & Touche, LLP v. Unisys Corp.,* 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver of the right to compel arbitration); *Evans v. Accent Manufactured Homes, Inc*., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); *Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (finding waiver after two-and-a-half year period when the parties sought assistance from the court on approximately forty occasions).

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PROOF OF SERVICE

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

1. **APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

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