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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

# RESPONDENT'S PETITION FOR REHEARING

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ATTORNEY FOR RESPONDENT

A petition for rehearing shall be in accordance with Rule 240 and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 221, SCACR. Respondent hereby submits the following in support of his request for this Court to reconsider, rehear, or otherwise vacate its January 28, 2022, order granting the appellants' petition for a writ of supersedeas. (Exhibit A).

## I. THE COURT MAY HAVE MISAPPREHENDED THE ISSUE.

This Court's January 28, 2022 order seems to have determined the issue raised by the appellants' petition for a writ of supersedeas to be one of jurisdiction. It is not. In granting the appellants' petition, this Court addressed the wrong question – whether it had "exclusive jurisdiction" over the "proceedings and discovery" occurring in the trial court. The question this Court did not address was whether the trial court abused its discretion by denying appellants' motion for a stay.[1]

There can be no doubt the circuit court has jurisdiction over discovery matters. This is true even in cases involving an appeal of a motion to compel arbitration. *See, e.g.* Sanders v. Savannah Highway Automotive Company, 432 S.C. 328, 852 S.E.2d 744 (Ct. App. 2020)(holding trial court had jurisdiction to enter order compelling discovery after Defendants filed notice of appeal of order denying arbitration and further finding discovery orders are interlocutory and not immediately appealable).

Appellants argue the Sanders case stands for the "the unremarkable proposition that a circuit court has jurisdiction to hear and try tort cases." Appellants Reply pp.2-3. This is a red-herring and ultimately a distinction without a difference. In Sanders, the same arguments

[1] The questions of whether discovery was encompassed in Judge Bentley's denial of appellants' motion to compel arbitration and whether discovery is "affected by" the pending appeal are discussed in subsection II(a) and (b) below.

regarding a stay and the divestiture of the circuit court's jurisdiction were made by Sanders as the appellants in this case.[2] This Court specifically rejected Sanders' notion the circuit court lacked subject matter jurisdiction to compel discovery responses while an appeal on the issue of arbitration was pending and declined to address the discovery orders further because "discovery orders are interlocutory and not immediately appealable." *Id* at 335.

More importantly, this court said *nothing* about having exclusive jurisdiction over discovery in the circuit court or that discovery was a matter affected by the appeal of the denial of a motion to compel arbitration. If this Court had *exclusive* jurisdiction over discovery under these circumstances, the circuit court in Sanders would have necessarily lacked jurisdiction, subject matter or otherwise, to compel discovery because the matter would have been exclusively within the realm of the Court of Appeals' jurisdiction. By declining to say the issue of discovery while an appeal is pending over arbitration was within the appellate court's sole and exclusive jurisdiction, the Sanders court effectively said discovery matters remain within the jurisdiction of the circuit court to decide pursuant to Rules 205 and 241, SCACR, and that it would not entertain such interlocutory orders through an appeal.[3]

This Court's grant of appellants petition for writ of supersedeas here, however, appears to be in direct conflict with its own prior holding in Sanders. In so doing, this Court further failed to analyze whether Judge McCoy's denial of appellant's motion to stay was an abuse of discretion. As set forth herein and in respondent's return to appellants' petition, no such thing occurred, and the appellants' petition should have been denied.

## II. THE COURT MAY HAVE OVERLOOKED SEVERAL POINTS.

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[2] See Sanders final brief pp. 8, 16-17. https://ctrack.sccourts.org/public/caseView.do?csIID=66702

[3] The standard for granting the extraordinary relief of a supersedeas is discussed in subsection II (c).

Judge McCoy's decision should have been afforded a significant amount of deference. It is axiomatic that Judge McCoy, having read the parties' submissions, listened to oral arguments, and considered the totality of circumstances presented, was in the best position to render a decision. In framing the issue as one of jurisdiction, however, it appears this Court simply substituted its own judgment for that of Judge McCoy. In so doing, it appears this court overlooked several key aspects. Any one of the following points should compel this court to vacate its January 28 order.

**a. The Court may have overlooked the fact discovery will be conducted regardless of forum, appellants have already participated in discovery in the circuit court, and a stay only serves to delay and prejudice respondent.**

A complete stay of all proceedings is simply not appropriate here because of the appellants' actions or inactions in earlier stages of this litigation. Judge McCoy's Order simply directs Appellants to respond to discovery. Appellants have "not refused to comply with the order" and been "cited for contempt".[4]

Instead, they began complying with the order, sought further relief from the circuit court on various issues, and, only upon a negative ruling on its motion to quash production from third parties, petitioned this court for a writ of supersedeas - nearly a year after Judge McCoy issued her order.

[4] An order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. See Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986). Discovery orders can be appealed in two circumstances, 1) "after the trial court holds a party in contempt" Tucker v. Honda of South Carolina Mfg., 354 S.C. at 577, 582 S.E.2d at 406-07 (2003) or 2) when the order affects "substantial rights which 'in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinues the action'". S.C. Code §14-3-330(2)(a).

Once Judge McCoy denied appellants' motion for a stay, appellants did not immediately seek appellate relief. Instead, they thereafter negotiated a confidentiality order to govern discovery and produced several thousand pages of documents along with video footage while representing more was forthcoming. The confidentiality order negotiated by the appellants specifically covers the discovery process, has safeguards in place to enable the parties to identify and label documents as confidential, and allows the parties to raise objections related to discovery and/or the designation of confidentiality for particular documents.

After the entry of the confidentiality order in June 2021, appellants then began producing documents. Only now, nearly a year after Judge McCoy's order, and following two subsequent hearings on the appellants' discovery motions – first for the confidentiality order and another to quash third party subpoenas - did the appellants file their writ of supersedeas of Judge McCoy's order on January 14, 2022.

Appellants do not seem to argue Judge McCoy's order compelling discovery affects their "substantial rights" or the merits of the case. Even if they made that argument, appellants would have to show that once the information was produced there would be no more need for the action. *See, e.g.*, Knight Pub. Co. v. Univ. of South Carolina, 295 S.C. 31, 32, 367 S.E.2d 20, 21 (1988) ("The appealed order allows discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions. This order is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976) because it in effect determines the action and prevents an appealable judgment."), overruled on other grounds, Simpson v. Sanders, 314 S.C. 413, 445 S.E.2d 93 (1994).

That is not the case here. Even if appellants provide the proverbial "smoking gun" through discovery, respondent would have to use that information in a motion or a trial to finally

determine his claims. Appellants would then have the right to appeal that judgment without worrying that the rights they seek to protect could never be vindicated. Similarly, if respondent provided appellants the proverbial "smoking gun" somehow proving one of their defenses, appellants would have to use that information in a motion or trial to finally determine the defense. This would need to occur in either the circuit court or arbitration. The order compelling discovery simply does not affect or finally decide any issue in the case.

Further, Appellants admit they have produced over 5,500 pages of documents and videos already and continue to review materials for privilege and relevance. Appellants Reply Brief p. 7. Appellants also admit that discovery is appropriate even if their appeal is granted and the case was referred to arbitration. Appellants Reply Brief p. 3. Thus, the exchange of information and documents would admittedly occur no matter the forum for adjudication. The question is whether it can proceed now in the circuit court. The answer should be yes.

Appellants have all the information in this case. No matter if the case is determined by an arbitrator or a jury, nothing suggests discovery in arbitration is vastly different from formal discovery in the South Carolina Court of Common Pleas. Because an arbitrator can allow for the additional exchange of information to ensure a fundamentally fair process, the arbitrator could allow for the same discovery as in the circuit court or even greater discovery if needed. The only difference being in court, the discovery is uniform across all cases while in arbitration discovery may vary from case to case.

Even if this case is referred to arbitration, engaging in the information and document exchange process beforehand, rather than beginning from scratch in an arbitration forum, would actually benefit the parties and the arbitrator. The arbitrator would still retain the right to determine

such pre-trial matters, but the parties will have already identified the key areas of interest and related documents, thus narrowing the pre-trial issues required to be decided by an arbitrator.

Ironically, the primary effect of a stay of discovery pending the appellants' appeal of the arbitration issue is delay. Appeals routinely remain pending for several years, and the entire judicial system has been delayed since the arrival of the coronavirus pandemic. The practical effect of granting a stay in this case is antithetical to one of the main arguments put forward for the supposed benefits of arbitration – savings of time and expense. See, e.g. Appellants Petition p. 11 (declaring the "worst possible outcome" would be to undergo discovery if the case were then ordered to arbitration).

Ultimately, even appellants admit information and documents will be exchanged regardless of the forum and they have already begun doing so. Similarly, testimony will be taken, subpoenas will be issued, hearings on pre-trial matters will be briefed, argued, and decided. Routine litigation expenses related to these matters will be incurred either way; the only exception being the fees associated with the arbitrator – an expense not found in the circuit court.

Moreover, with a stay in place, the supposed benefit of a quicker resolution is lost, and the effectiveness of either the court or an arbitrator to determine the merits is diminished. Documents are lost or discarded. Photos and videos are lost or discarded. Memories fade. Witnesses relocate. Employees obtain jobs elsewhere. In short, staying discovery does a disservice to a speedy and just resolution of the merits, particularly for the respondent. This is perhaps one of the most compelling reasons why interlocutory discovery orders are not normally immediately reviewable, by appeal or supersedeas. It also reinforces that Judge McCoy's

decision must be upheld at this stage, and this court should reconsider and vacate its January 28 order.

**b. The Court may have overlooked that the pending appeal arises from a different order than Judge McCoy's discovery order forming the basis of appellants' petition for a writ of supersedeas.**

The court may not have noticed the order compelling discovery issued by Judge McCoy arose from a motion and hearing that occurred well after the order denying appellants' motion to compel arbitration.

Appellants filed their motion to compel arbitration on June 22, 2020. The motion was heard on June 30, 2020 by Judge Bentley Price. That motion was denied by order filed July 6, 2020, and the appellants motion to reconsider was denied by order filed July 22, 2020. Appellants did not seek a stay of proceedings in its motion to compel arbitration, nor did Judge Price's order that is currently pending on appeal address the matter of a stay.

Thereafter, respondent served Standard Interrogatories and First Request for Production to the appellants on September 3, 2020. After appellants refused to respond to the discovery requests in their entirety, respondent filed a motion to compel on September 16, 2020. A hearing was held by Judge Jennifer B. McCoy on December 8, 2020. Appellants opposed Plaintiff's motion to compel by making the same arguments presented here and further moving for a stay of discovery.

On February 11, 2021, Judge McCoy issued her order granting the motion to compel and denying the motion to stay of discovery. Defendants moved to alter or amend Judge McCoy's order seeking only an extension of time to comply. They did not challenge the propriety of the order itself or the denial of their motion to stay. Judge McCoy denied the Appellants motion to alter or amend by order filed July 23, 2021. Judge McCoy's discovery order compelling discovery and denying appellants motion to stay did not address the issue of arbitration and it has not been

appealed. Thus, the matters on appeal (arbitration) were not addressed and therefore not affected by Judge McCoy's order.

**c. The Court may have overlooked the requirement of exceptional circumstances to grant appellants' writ of supersedeas.**

Appellants argue *Oncology and Hematology Associates of S.C., LLC*, 387 S.C. 380, 692 S.E.2d 920 (2010)(requiring exceptional circumstances to address an interlocutory order) is inapplicable because they filed a writ of supersedeas rather than a writ of certiorari. Appellants Reply Brief, p. 3. Once again, this is a distinction without a difference.

Rule 241, SCACR identifies no standard of review for the issuance of a writ of supersedeas and the undersigned is unaware of any case law articulating the exact standard of review.[5] In *Oncology and Hematology Associates,* however, the petitioners there initially combined their writ of certiorari with a writ of supersedeas and a notice of appeal. 387 S.C. 380, fn 1. The Supreme Court dismissed the appeal as interlocutory and not immediately appealable, but determined "exceptional circumstance existed, warranting the grant of a writ of certiorari." *Id.* Thus, it is certain a writ of certiorari requires exception circumstances. *See also, Hollman v. Woolfson*, 348 S.C. 571, (2009)(exceptional circumstances required to issue writ of cert.); *Laffitte v. Bridgestone Corp*, 381 S.C. 460 (2009(same).

A writ of supersedeas should therefore apply the same standard for this Court to exercise its discretion. If it did not, all kinds of interlocutory orders that are otherwise unreviewable by the appellate courts could be given appellate relief by fiat. This cannot be. There must be a standard governing the issuance of a writ of supersedeas which gives due deference to the circuit court's findings and the longstanding principle that interlocutory orders are not immediately reviewable;

[5] It appears the decision is discretionary, but when the court should exercise its discretion is unclear. *See, e.g.* Matter of Decker, 322 S.C. 212, 214 (1995).

a principle that has been stated by South Carolina appellate courts over and over again. The appellants have simply presented no exceptional circumstances warranting the intervention of this Court by way of supersedeas, and the January 28 order should be vacated.

**d. The Court may have overlooked the fact appellants cited no binding South Carolina authority supporting the conclusion discovery should be stayed pending resolution of appellants' appeal.**

The court may not have noticed that the appellants cite only nonbinding federal court authority for the argument that discovery is automatically stayed pending the appeal of the denial of a motion to compel arbitration.[6] Notably, neither the Bradford-Scott opinion, 128 f.3d 504 (7th Circuit 1997), nor any other court cited by appellants in their briefs, granted the relief the appellants here seek – undoing an order compelling discovery from which the appellants have already begun compliance and negotiated a confidentiality order to govern. To the contrary, the only South Carolina authority cited by appellants stand for the unremarkable proposition that the circuit court retains jurisdiction to proceed with matters not affected by the appeal.

Several federal circuits have also held discovery is *not* necessarily stayed pending the appeal of the denial of a motion to compel arbitration. See, e.g. Britton v. Co–Op Banking Group, 916 F.2d 1405, 1411–12 (9th Cir.1990). Even courts in the 4th Circuit have so held. Hill v. PeopleSoft USA, Inc. 341 F.Supp.2d 559 (USD Md. 2004).

In Hill, the district court refused to issue an automatic stay of all proceedings, but bowing to jurisprudential concerns, also refused to allow the litigation to reach the stage of trial prior to the resolution of the appeal of the arbitration decision. *Id.* at 559.[7] However, in *Hill,* the court did

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[6] Respondent disputes the valid formation of an agreement at all, and specifically argued the FAA (and federal court authority analyzing the FAA) does not apply to this matter. Resp. Final Brief, p. 17, fn 7.

[7] Respondent has no objection to a limited stay applicable to dispositive motions and/or trial prior to the resolution of the pending appeal. Discovery, however, should proceed in the meantime.

permit discovery to move forward during the time of the appeal, as well as allowing the parties to amend their pleadings. *Id.* at 561.

In the Britton case, the Ninth Circuit cited Moore's Federal Practice ¶ 203.11, which states that "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal." Britton, 916 F.2d at 1411 (citing Moore, *supra* at ¶ 203.11, 3–54). Applying Moore's teachings, the Ninth Circuit concluded that the issue of arbitrability was distinct from the remainder of the case. Therefore, because "an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal[ ]" *Id.* at 1412 (citations omitted), the Ninth Circuit permitted the district court to continue its proceedings.

Moreover, the Second Circuit, which governs New York - the very place the appellants seek to conduct arbitration – adopted the reasoning of the Britton court and likewise ruled further trial court proceedings are not involved or affected by the appeal of the denial of a motion to compel arbitration. *See, e.g.* Motorola Credit Corp. v. Uzan, 388 F.3d 29 (2d Cir. 2004).

The undersigned has found no reported South Carolina opinions granting a supersedeas under the circumstances existing in this case. However, binding South Carolina appellate court opinions on the issue of stays appears to uniformly decline to entertain such matters at this stage because they can be appealed at a later time. See, eg. that *Edwards v. Suncom*, 369 S.C. 91, 631 S.E.2d 529 (2006) (ruling on motion to stay is interlocutory); *Carolina Water Service, Inc. v. Lexington County Joint Mun. Water and Sewer Com'n*, 373 S.C. 96, 644 S.E.2d 681 (2007)(order lifting stay not immediately appealable); *Williamsburg Rural Water and Sewer Co., Inc. v.*

*Williamsburg County Water and Sewer Authority*, 2007 WL 8434643 (2007)(order denying motion to stay is interlocutory).

This Court should *not* grant supersedeas over a matter that has been so routinely declined to be entertained by the South Carolina appellate courts, particularly when the party seeking such extraordinary relief provides no binding authority to grant the request under these unique circumstances.

**e. The Court may have overlooked the fact document production is an exception to the automatic stay general rule.**

Rule 241, SCACR, governs the issue of stays and supersedeas. The general rule of an automatic stay applies to matters decided in the order. Exceptions to the general rule are found in subsection (b).

Rule 241 (b)(2) excepts from the automatic stay judgments directing the delivery of documents, the very thing Judge McCoy ordered appellants to do. Moreover, S.C. Code Ann. § 18-9-150 specifically provides the execution of a judgment directly delivery of documents or personal property "shall not be stayed by appeal" without a surety bond or placing the documents with the court or receiver. No such thing has been done or requested by appellants, and the issuance of a stay conflicts with the plain language of Rule 241 (b)(2), SCACR and S.C. Code Ann. § 18-9-150. Accordingly, this Court should again decline to grant supersedeas over a matter that is specifically exempted from the automatic stay general rule.

## CONCLUSION

For the reasons set forth herein, the Court's January 28, 2022 order granting appellants petition for a writ of supersedeas should be vacated, and the petition should be denied with such other relief as the Court deems appropriate.

s/ *Aaron E. Edwards*

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Mt. Pleasant, South Carolina
Dated: February 10, 2022

# EXHIBIT A

# The South Carolina Court of Appeals

Joseph Abruzzo, Respondent,

v.

Bravo Media Production LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

Appellate Case No. 2020-001095

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ORDER

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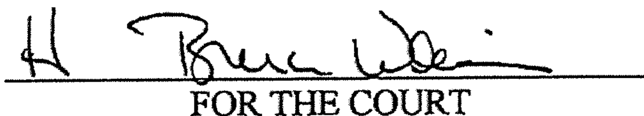
Appellants have filed a petition for a writ of supersedeas, seeking this court to stay all further proceedings in the circuit court, including discovery and third-party subpoenas. This court notes that pursuant to Rule 205, SCACR, this court has exclusive jurisdiction over the appeal, and the circuit court may proceed only with "matters not affected by the appeal." *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter[ ] affected by the appeal' under Rules 205 and 241(a)."). Because it appears to this court that the proceedings and discovery occurring are matters affected by this appeal, Appellants' petition for supersedeas is granted. All matters affected by this appeal, including the ongoing discovery and third-party subpoenas, shall be stayed pending this court's resolution of the appeal and the remittitur being sent down.



FOR THE COURT

**FILED**
**Jan 28 2022**

# EXHIBIT A

Columbia, South Carolina

cc:
Helen F Hiser, Esquire
James David Smith, Jr., Esquire
Danielle F. Payne, Esquire
Aaron Eric Edwards, Esquire

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

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Appeal No. 2020-001095

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Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

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## PROOF OF SERVICE

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I certify that I have served **Respondent's Petition for Rehearing** on Appellants by emailing and mailing it to their attorneys of record as follows:

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February 10, 2022

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February 10, 2022

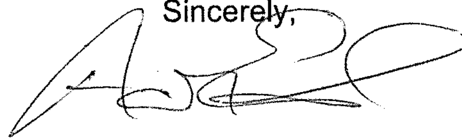
**Via S.C. Court E-filing and U.S. Mail**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

In Re: Abruzzo vs. Bravo Media Productions LLC, et al.
Case No: 2020-CP-10-472 (Charleston)
Appeal No.: 2020-001095

Ms. Kitchings:

Enclosed please find Respondent's Petition for Rehearing in the above-referenced matter. If you have any questions, please contact me.

Sincerely,



*s/ Aaron E. Edwards*

Enclosures
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