

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS  
Deadra L. Jefferson, Circuit Court Judge  
Case No.: 2011-CP-10-5191

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Appellate Case No. 2013-002679

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Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc. .... Appellant.

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FINAL REPLY BRIEF OF APPELLANT

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## REPLY ARGUMENT

### **I. The order compelling arbitration is subject to appeal.**

Respondent Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease, LLC (hereinafter “Lend Lease”) argues that Appellant Allsouth Electrical Contractors, Inc. (“Allsouth”) simply cannot ever “directly” appeal an order compelling arbitration. Lend Lease argues that such an order cannot be immediately appealed at the time the order is entered (Respondent’s Final Brief p. 4), and Lend Lease argues that the order compelling arbitration can never be appealed thereafter **unless** there exists some other ground for appeal unrelated to the Order compelling arbitration (Respondent’s Final Brief, p. 5). This is not and cannot be the law.<sup>1</sup>

South Carolina courts have indeed held that an order compelling arbitration is not immediately appealable. Heffner v. Destiny, 321 S.C. 536, 471 S.E.2d 135 (1995) *see also* Toler’s Cove Homeowners Ass’n v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003)( “[A] court’s order compelling arbitration is not immediately appealable under South Carolina law.”). As such, a party who argues that it is not required to arbitrate a dispute must first go through the arbitration process prior to appealing the order. In contrast, an order denying a motion to compel arbitration is immediately appealable. Therefore, a legal distinction already exists for some reason between a party seeking to compel arbitration and a party arguing it did not contractually agree to arbitration. Lend Lease seeks to extend this legal distinction and take the position that a party compelled to arbitrate can never directly appeal the order compelling arbitration. Lend Lease argues that in order for this Court to have jurisdiction, a party

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<sup>1</sup> Allsouth filed a Memorandum on Appealability with this Court at the Court’s request. Allsouth incorporates that memorandum as if fully restated herein verbatim. (R. pp.261-266).

aggrieved by an order compelling arbitration must first have a different ground for appeal upon which to piggy-back any appeal of the order compelling arbitration in the first instance. This argument fails for at least three reasons. First, it amounts to a legal conclusion that an order compelling arbitration cannot be appealed while an order denying arbitration can be appealed. Such a legal distinction with no basis would be a violation of the equal protection clauses of the United States' Constitution (*See* U.S. Const. Amend. XIV) and South Carolina Constitution (*See* S.C. Const. art. I, Section 3.)

Second, if a party must first have a legal right to appeal some other issue related to the arbitration prior to being able to appeal the order compelling arbitration, then the standard applied to the appeal of other issues related to the conduct of the arbitration (e.g. modification and vacation) would necessarily first be applied to the order compelling arbitration. In essence, an aggrieved party forced to arbitrate would first have to meet the “narrow” and “limited” grounds for overturning an arbitration award. *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (“Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances, inter alia, when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.”). The applicable standard to compelling arbitration is merely a matter of contract interpretation. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (“Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.”) *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter ... courts

generally ... should apply ordinary state-law principles that govern the formation of contracts.”). Any heightened standard for the appeal of an order compelling arbitration would, of course, be different from the standard to be applied to any appeal of an order refusing to compel arbitration which is immediately appealable (i.e. contract interpretation as a matter of law v. manifest disregard of the law). This too would violate the equal protection clauses of the United States and South Carolina Constitutions. Indeed, Lend Lease confirms that this heightened standard of review exists if its position is adopted by arguing that this appeal is simply an appeal seeking to vacate an arbitration award. (Respondent’s Final Brief, pp. 8-9). This is not an appeal from the arbitration award. This is an appeal from the Circuit Court’s Order compelling arbitration.

Third, a Circuit Court order compelling arbitration entered prior to arbitration would not be subject to review by another Circuit Court Judge after arbitration. *See* Rule 43, SCRCP (“If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.”) *see also* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial). Therefore, Allsouth could not have even made a “new” motion to the court after the Circuit Court’s original order that is the subject of this appeal.

Accordingly, Lend Lease’s argument that an order compelling arbitration simply cannot *ever* be directly appealed should be rejected. As stated in Allsouth’s Memorandum on Appealability and in Allsouth’s Initial Brief, Allsouth is entitled to

appeal the Circuit Court Order compelling arbitration, and Allsouth is entitled to have that Order reviewed pursuant to contract law.

**II. The Appellate Courts of South Carolina must determine whether or not the South Carolina Circuit Court erred in compelling arbitration.**

Lend Lease argues that this appeal presents a “non-justiciable” question before this Court because the Federal Court entered an order confirming the arbitration award. Allsouth does not, however, seek review of the Federal Court order in this appeal. Allsouth does not seek review of the Arbitration Award in this appeal. Allsouth seeks review of the South Carolina Circuit Court Order compelling arbitration. This is a justiciable issue, and, if Allsouth was not required to arbitrate the entire action brought against it and was still compelled to do so, then Allsouth is prejudiced.<sup>2</sup> Indeed, the Federal Court could not have overruled the State Court order granting arbitration as a matter of comity. Adkins v. Rumsfeld, 464 F.3d 456, 463-64 (4th Cir.2006)(Discussing the Rooker-Feldman doctrine and stating “In other words, the doctrine applies where a party in effect seeks to take an appeal of an unfavorable state court decision to a lower federal court”). This is the proper court to determine whether or not the decision of the South Carolina Circuit Court compelling arbitration was in error.

**III. The Circuit Court erred in compelling arbitration.**

Allsouth’s relies on its Final Brief on the substantive issue in this appeal; however, Allsouth responds to Lend Lease’s arguments in Section IV of its Brief as follows:  
The Circuit Court sent the entire action to arbitration. It did not send some of the claims. It sent all of the claims. This was in error. The legal and equitable causes of action pled

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<sup>2</sup> The portion of the Federal Court order cited by Lend Lease once again highlights Lend Lease’s argument that it seeks to have the standard applied to vacation of arbitration awards applied to whether or not compelling arbitration, as a matter of contract, was appropriate in the first instance.

by Lend Lease had different elements and were subject to different defenses. Most importantly, the causes of action alleged different types of damages. By sending the entire action to arbitration, the claims of Lend Lease that were plainly not claims for contractual or equitable indemnification (*See* Allsouth Final Brief, pp. 4-8) were subject to the arbitration and Lend Lease was allowed to seek damages based upon causes of action not subject to arbitration. S.C. Code Ann. Section 15-48-20(e) plainly states that when only some of the issues are subject to arbitration, the Court should stay the case with regard to those issues only and the remaining issues not subject to arbitration proceed in the Court where filed. The Circuit Court in this case erred by sending the entire matter to arbitration.

The letters attached to the affidavit of William Lesesne are undisputed evidence that Lend Lease **knew, or should have reasonably known, of facts giving rise to the claim** more than 180 days prior to filing the claim. As such any cause of action brought after that time must have been for express or implied indemnity. The Circuit Court in this case erred by sending the entire matter to arbitration.

### **Conclusion**

For the aforementioned reasons, the Orders of the Circuit Court compelling arbitration should be reversed.

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**PROOF OF SERVICE**

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I certify that I have served the Final Reply Brief of Appellant of Respondent Lend Lease (US) Public Partnership, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on July 15, 2014, addressed to its attorney of record, Edward James "Trip" Coyne, III, Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420, Wilmington, NC 28401.

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**CERTIFICATE OF COMPLIANCE**

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I certify that the Final Reply Brief of Appellant Allsouth Electrical Contractors, Inc.  
complies with Rule 211(b), South Carolina Appellate Court Rules.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



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