

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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

Unpublished Opinion No. 2015-UP-164
Submitted February 1, 2015—Filed March 25, 2015
Appellate Case No. 2015-001510

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

v.

Allsouth Electrical Contractors, Inc.....Petitioner

AMENDED RETURN TO PETITION

Edward James Coyne III
S.C. Bar I.D. No. 78633
WILLIAMS MULLEN
300 N. Third Street, Suite 420
Wilmington, NC 28401
Phone: (910) 442-2752

Allen K. McAlister, Jr.
S.C. Bar I.D. No. 78213
WILLIAMS MULLEN
1441 Main Street, Suite 1250
Columbia, SC 29201
Phone: (803) 567-4600

Attorneys for Respondent

Wilmington, North Carolina
August 17, 2015

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TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT OF THE CASE</u>	1
<u>ARGUMENT</u>	3
<u>The Court of Appeals did not err in dismissing the appeal by applying Section 15-48-200(a).</u>	3
<u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

CASES

<u>C-Sculptures, LLC v. Brown,</u> 403 S.C. 53, 742 S.E.2d 359 (2013)	4
<u>Denene, Inc. v. City of Charleston,</u> 359 S.C. 85, 596 S.E.2d 917 (2004)	6-7
<u>Ferla v. Infinity Development Assocs., LLC,</u> 107 P.3d 1006 (2004).....	5-6
<u>Partain v. Upstate Automotive Group,</u> 386 S.C. 488, 689 S.E.2d 602 (2010)	4
<u>Pittman Mortg. Co. v. Edwards,</u> 327 S.C. 72, 488 S.E.2d 335 (1997)	4
<u>Zabinski v. Bright Acres Assocs.,</u> 346 S.C. 580, 553 S.E.2d 110 (2001)	6

STATUTES

S.C. Code Ann. § 15-48-130 (2005)	5
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STATEMENT OF THE CASE

On July 22, 2010, Respondent filed a Complaint instituting a civil action in the South Carolina Court of Common Pleas for Charleston County (the “State Court”) against Petitioner. (R. pp. 28–54). Contemporaneously, Respondent served an arbitration demand on Petitioner. Among other things, the Complaint alleged that the dispute between the Parties was subject to arbitration. (R. pp. 31, 43). The Petitioner filed an Answer, which, among other things, denied that the dispute was subject to arbitration. (R. p. 59).

On October 7, 2011, the Respondent filed a Motion to Stay and Compel Arbitration. (R. pp. 181–195). On October 17, 2011, the Petitioner filed Defendant Allsouth Electrical Contractors, Inc. Memorandum in Opposition to the Plaintiff’s Motion to Stay and Compel Arbitration. (R. pp. 196–198). On December 5, 2011, Respondent filed its Memorandum in Support of Motion to Stay and Compel Arbitration. (R. pp. 200–208). On December 5, 2011, the Respondent’s Motion to Stay and Compel Arbitration came on for hearing, and was heard, before the State Court, the Honorable Deadra L. Jefferson presiding. Tr. (R. pp. 64–93).

On February 9, 2012, Judge Jefferson entered an Order Granting Plaintiff’s Motion to Stay and Compel Arbitration, which ordered the State Court Action be stayed and the Parties proceed to arbitrate the dispute between them. (R. p. 8). Subsequently, on March 6, 2012, Judge Jefferson denied Petitioner’s Rule 59 Motion. Def. R. 59 Motion (R. pp. 210–211); Order Den. Def.’s Rule 59, SCRCF Mot. (R. pp. 9–12).

The Parties proceeded to arbitrate, and on November 29, 2012, an Arbitration Award was entered in the arbitration styled “*Lend Lease (US) Public Partnership LLC*”

f/k/a Actus Lend Lease, LLC v. Allsouth Electrical Contractors, Inc.,” (American Arbitration Association Case No. 31 110 00193 11), (the “Award” entered in the “Arbitration”). (R. pp. 219–232). Subsequently, the Arbitrator denied Petitioner’s request for modification of the Award or rehearing. (R. p. 233).

On February 27, 2013, Petitioner filed with the United States District Court for the District of South Carolina (the “Federal Court”) Allsouth Electrical Contractors, Inc.’s Notice and Petition to Vacate an Arbitration Award pursuant to 9 U.S.C. § 10 (the “Petition to Vacate”), which sought to have the Award vacated. On June 13, 2013, the Federal Court entered an Order that dismissed the Petition to Vacate and confirmed the Award. (R. pp. 234–237). Also on June 13, 2013, the Federal Court entered a Judgment in a Civil Action, reducing the Award to judgment. (R. p. 238). Subsequently, on July 19, 2013, the Federal Court denied Petitioner’s request that it alter or amend its Order and Judgment. (R. pp. 239–241).

The Petitioner did not appeal the Federal Court’s June 13, 2013 Order, June 13, 2013 Judgment in a Civil Action, or July 19, 2013 Order.

The Petitioner did not file any motion with the State Court seeking any of the orders enumerated in *Section 15-48-200 of the South Carolina Code of Laws*, nor did the Petitioner file any motion with the State Court seeking to vacate, correct, or modify the Award pursuant to the Federal Arbitration Act.

On August 26, 2013—almost nine (9) months after the entry of the Award and more than two (2) months after the entry of Judgment by the Federal Court—Petitioner filed Defendant Allsouth Electrical Contractors, Inc.’s Motion to Lift the Stay, seeking to have the State Court lift the stay that had been entered by Judge Jefferson at the time she

compelled the Parties to arbitrate on February 9, 2012. (R. p. 213). This was the first action before the State Court since Judge Jefferson's March 6, 2012 Order Denying Defendant's Rule 59, SCRPC Motion. On November 14, 2013, Respondent filed a Notice of Filing, providing the State Court with copies of, among other things, the Award of the arbitrator and the Judgment in a Civil Action of the Federal Court. (R. pp. 216–241).

On November 27, 2013, the State Court, the Honorable Kristi L. Harrington presiding, granted Defendant Allsouth Electrical Contractors, Inc.'s Motion to Lift the Stay. (R. p. 13). On December 9, 2013, Respondent served Plaintiff's Rule 59 Motion, seeking to have Judge Harrington alter or amend her November 27, 2013 ruling. (R. pp. 244–245). This Motion was never ruled upon due to the Petitioner's appeal.

Petitioner filed a Notice of Appeal on December 11, 2013, and, per the Court of Appeal's direction, a Memorandum on Appealability in this Matter on January 15, 2014.

On March 25, 2015, the Court of Appeals dismissed the Petitioner's appeal.

ARGUMENT

The Court of Appeals did not err in dismissing the appeal by applying Section 15-48-200(a).¹

The Petitioner's argument that the Court of Appeals violated Petitioner's rights to equal protection and/or due process (Pet. Writ Cert. pp. 5–11) hinges on Petitioner's misconstruction of the procedural realty that it created.

In this regard, following the entry of the Award, Petitioner chose to go to the Federal Court to seek to have the award vacated. When the Federal Court did not vacate

¹ While the Petition purports to include two questions, they are materially identical and, as such, are herein treated as one.

the Award, but rather confirmed it, the Petitioner chose not to pursue an appeal to the Fourth Circuit.

If, on the other hand, the Petitioner had chosen to timely come to the Court of Common Pleas in an effort to have the Award vacated or modified, then:

- Petitioner could have argued to the State Court its misguided position that the arbitrator exceeded the scope of his powers, *see S.C. Code Ann. § 15-48-130 (a)(3)(2005)*;
- The Court of Common Pleas would have applied a *de novo* review to the question, *see Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) (“The determination whether a claim is subject to arbitration is subject to *de novo* review.”);²
- If the Court of Common Pleas had ruled against the Petitioner’s argument, then the Petitioner could have properly appealed to the Court of Appeals;
- The Court of Appeals would have applied a *de novo* review to the question of whether the arbitrator exceeded his powers. *Id.*

That is, by using the plain procedures set forth in Section 15-48-130, the Petitioner could have sought review of the question it now complains it has been unfairly prevented from

² Petitioner’s insistence that the standard of review would be different because of the deference granted to arbitrators appears misplaced. Petitioner’s argument is improperly premised on a conflation of the various ways in which a court may vacate an award. That is, while it is true that to vacate an award based upon an arbitrator’s “manifest disregard for the law,” the “governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable,” *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 360 (2013), the ability to vacate an award due to an arbitrator exceeding his power does not require such a deferential standard, *see Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997).

presenting—i.e. does the Award grant relief to the Respondent in excess of that allowed for by the arbitration agreement between the Petitioner and the Respondent.

It makes sense that, post-arbitration, the courts would be concerned with whether the actual award evidences relief in excess of the parties' agreement to arbitrate, as opposed to being concerned with whether any issue should have been arbitrated in the first place, regardless of whether the actual award is based on the issue as to which arbitrability is contested.

Further, even if parties seeking to appeal an order compelling arbitration are treated differently than parties seeking to appeal an order failing to compel arbitration, it cannot be said that there is no rational basis for such treatment. As articulated by the Colorado Court of Appeals:

[Appellants] nevertheless contend § 13-22-221(1)(a), C.R.S.2003, violates equal protection because it permits an interlocutory appeal of a trial court's order denying a motion to compel arbitration, but does not permit the appeal of an order granting a motion to compel arbitration. *See Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo.App.2002); *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo.App.1983). We disagree.

In the absence of a suspect class, the abridgement of a fundamental right, or a special classification triggering an intermediate standard of review, an equal protection challenge is analyzed under the rational basis standard of review. *See Duran v. Indus. Claim Appeals Office*, 883 P.2d 477 (Colo.1994). Under this standard of review, a statutory classification must be upheld if it bears a rational relationship to a legitimate governmental objective and is not unreasonable, arbitrary, or capricious. *Indus. Claim Appeals Office v. Romero*, 912 P.2d 62, 66 (Colo.1996).

A statute is presumed to be constitutional, and appellants here bear the burden of convincing the court the classification does not bear a rational relationship to a legitimate legislative purpose. *See Esser v. Indus. Claim Appeals Office*, 8 P.3d 1218 (Colo.App.2000); *see also Christie v. Coors Transp. Co.*, 933 P.2d 1330, 1333 (Colo.1997) (“If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.”).

Arbitration is a convenient mode of resolving disputes that is favored by the public policy of Colorado. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo.1998); *Cordillera Corp. v. Heard*, 200 Colo. 72, 612 P.2d 92 (1980); *see also Frontier Materials, Inc. v. City of Boulder, supra*; *Gergel v. High View Homes, L.L.C., supra*. The existing statutory scheme, which allows for appellate review to protect the right to compel arbitration, serves a legitimate purpose because it is rationally based on the public policy favoring arbitration. If an arbitrable claim is adjudicated by the trial court, the benefits of a speedy resolution by arbitration are lost.

Because appellants have not shown the statute arbitrarily singles out a group of persons for disparate treatment in comparison to other persons similarly situated, we conclude the provisions of § 13-22-221, which allow an interlocutory appeal of an order denying a motion to compel arbitration but do not authorize an interlocutory appeal of an order compelling arbitration, are rationally based, and do not violate equal protection.

Ferla v. Infinity Development Assocs., LLC, 107 P.3d 1006, 1008-1009 (2004)

(noting that Colorado did allow the order compelling arbitration to be reviewed after the arbitration had been completed and the trial court had confirmed or vacated the award).

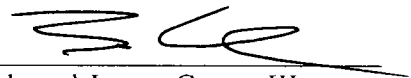
Like the appellants in Ferla, the Petitioner here seeks review of an order compelling arbitration. Similar to Colorado, South Carolina has a policy favoring arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (“The policy of the United States and South Carolina is to favor arbitration of disputes.”) Similar to the appellants in Ferla, the Petitioner here cannot show that Section 15-48-200(a) arbitrarily singles out a group of persons for disparate treatment. *See Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 96, 596 S.E.2d 917, 920, 923 (2004) (explaining that: “If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used [in analyzing an equal protection challenge],” and that “The standard for

reviewing all substantive due process challenges to state statutes . . . is whether the ordinance bears a reasonable relationship to any legitimate interest of government”).

The Petitioner chose to proceed before the Federal Court, rather than to seek relief in the State Court. It is that decision of the Petitioner, not a failure of due process or equal protection, that cost the Petitioner the opportunity to have the South Carolina Court of Appeals consider whether or not the arbitrator exceeded his power.

CONCLUSION

The Petition for Certiorari should be denied.



Edward James Coyne III
S.C. Bar I.D. No. 78633
WILLIAMS MULLEN
300 N. Third Street, Suite 420
Wilmington, NC 28401
Phone: (910) 442-2752
Attorney for Respondent

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PROOF OF SERVICE

I certify that I have served the Amended Return to Petition on Petitioner Allsouth Electrical Contractors, Inc., by depositing a copy thereof in a sealed envelope with a recognized overnight carrier, postage prepaid, on August 17, 2015, addressed to Petitioner's counsel of record, M. Brent McDonald, Smith, Bundy, Bybee & Barnett, PC, Post Office Box 1542, Mount Pleasant, SC 29465.


Edward James Coyne III
S.C. Bar I.D. No. 78633
WILLIAMS MULLEN
300 N. Third Street, Suite 420
Wilmington, NC 28401
Phone: (910) 442-2752
Attorney for Respondent

Wilmington, North Carolina
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