

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-10-5191

RECEIVED

AUG 31 2015

Unpublished Opinion No. 2015-UP-164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

S.C. SUPREME COURT

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

vs.

Allsouth Electrical Contractors, Inc. Petitioner.

**REPLY TO THE RESPONDENT'S AMENDED RETURN
TO THE PETITION FOR CERTIORARI**

Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Petitioner Allsouth
Electrical Contractors, Inc.

Mt. Pleasant, South Carolina
August 28, 2015

Other Counsel of Record:

Edward James "Trip" Coyne, III, Esquire
Allen Keith McAlister, Jr., Esquire
Williams Mullen, P.C.
300 N. Third Street, Suite 420
Wilmington, NC 28401
Attorneys for Lend Lease (US) Public Partnership, LLC

TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
TABLE OF AUTHORITIES.....	i
REPLY	1
The Respondent ignores the fact that the circuit court Order compelling arbitration in the first instance was not reviewable by any other court other than the South Carolina Court of Appeals.....	1
CONCLUSION.....	4

TABLE OF AUTHORITIES

CASES

<u>City of Spartanburg v. Cudd</u> , 132 S.C. 264, 128 S.E. 360 (1925).....	3
<u>Lindsey v. Normet</u> , 405 U.S. 56, 77, 92 S. Ct. 862, 876 31 L. Ed. 2d 36 (1972).....	3
<u>Toler’s Cove Homeowners Ass’n v. Trident Const. Co., Inc.</u> , 355 S.C. 605, 586 S.E.2d 581 (2003).....	2

STATUTES

S.C. Code Ann Section 15-48-130(a)(3)	2
S.C. Code Ann Section 15-48-200.....	1, 4

REPLY

Petitioner Allsouth Electrical Contractors, Inc. (“Allsouth”) hereby submits this Reply to the Respondent’s Amended Return to the Petition for Certiorari.

The Respondent ignores the fact that the circuit court Order compelling arbitration in the first instance was not reviewable by any other court other than the South Carolina Court of Appeals.

The Respondent argues that Allsouth’s right to equal protection and due process “hinges on Petitioner’s misconstruction of the procedural reality it created.” Respondent’s Amended Return to Petition, p. 3. The Respondent’s entire argument regarding procedural reality ignores the very orders—the February 9, 2012 Order and the March 6, 2012 Order—which are the subject of this appeal.

In this case, a lawsuit was commenced by Respondent against Allsouth in circuit court. The Respondent moved to stay its own lawsuit in order to compel arbitration. Allsouth opposed the motion to stay the lawsuit and compel arbitration and argued that the claims made against it were not subject to arbitration. On February 9, 2012 and on March 6, 2012, Judge Jefferson ordered the entire case to arbitration. Judge Jefferson correctly held that whether the claims were subject to arbitration was a judicial determination. February 9, 2012 Order, p. 2 (R. at p. 2). Judge Jefferson, however, incorrectly held—the very subject of the present appeal—that all of the claims were subject to arbitration.¹ February 9, 2012 Order, p. 7 (R. at p. 7). It is this ruling that is the subject of the present appeal.

¹ The Order stated as follows: “Accordingly, all of the underlying claims in this action are within the scope of the arbitration clause and shall proceed to arbitration. It is this very ruling that the Court of Appeals decided it did not have jurisdiction to consider because it simply was not appealable under S.C. Code Ann. Section 15-48-200(a).”

Subsequent to this ruling, Allsouth was not permitted to immediately appeal. 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.”). Additionally, and most important to the present Petition and appeal, the arbitrator could not overrule Judge Jefferson, no other circuit Judge could overrule Judge Jefferson, nor could the federal Judge overrule Judge Jefferson. The only Court that could overrule Judge Jefferson is/was the South Carolina Court of Appeals. The Respondent simply ignores the procedural fact that once Judge Jefferson ruled that all claims were subject to arbitration, Allsouth was stuck with that ruling until it could appeal that ruling to the only Court—the S.C. Court of Appeals—that could address the ruling after the arbitration.

Even in ignoring the crux of the present question before this Court (i.e. How can one party have a right to appeal and not the other party?), the Respondent makes two arguments. First, the Respondent argues that Allsouth could have filed a motion in circuit court, pursuant to S.C. Code Ann. Section 15-48-130(a)(3), and argued that the arbitrator exceeded his powers. Respondent’s Amended Return to Petition, p. 4. This argument is a fallacy because Judge Jefferson had already ruled that all the claims were subject to arbitration. The argument in this appeal is that the claims were not subject to arbitration (a judicial determination in the first instance). The arbitrator did not exceed his power. The circuit court improperly gave the arbitrator the power. It is this ruling that cannot be reviewed anywhere else other than the S.C. Court of Appeals. It is this ruling that the S.C. Court of Appeals held could be never be appealed. As such, Allsouth has been deprived of any appeal of the orders of Judge Jefferson compelling arbitration in

the first instance.

Second, the Respondent actually argues that “even if parties seeking an appeal of 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.” Respondent’s Amended Return to Petition, p. 5. The Court of Appeals in the present case did not identify any rational basis for such disparate treatment of parties to a contract who seek to enforce arbitration and parties to a contract who did not agree to arbitrate. Instead, the Court of Appeals, in dismissing the present appeal, found that a party seeking to challenge an order compelling arbitration simply did not have the right to appeal. Whether or not Courts favor arbitration may indeed give rise to a rational basis for the timing of an appeal (i.e. allowing an immediate appeal of an order denying arbitration and not allowing an immediate appeal of an order compelling arbitration); however, it could never give rise to a rational or even articulable basis for never allowing an appeal of an order compelling arbitration. The United States Supreme Court held in Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876 31 L. Ed. 2d 36 (1972) as follows:

“This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, and the continuing validity of these cases is not at issue here. **When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.**”

(emphasis supplied); *see also* City of Spartanburg v. Cudd, 132 S.C. 264, 128 S.E. 360 (1925). The Court of Appeals’ Opinion does not apply a procedural restraint on the right to appeal an order compelling arbitration, as has previously been applied by the Courts of this state, **but it applies an absolute and outright restraint on any appeal of an order**

compelling arbitration. This outright restraint without any basis in law or fact violates Allsouth's right to equal protection and due process.

Conclusion

For the aforementioned reasons and the reasons stated in the Petition for Certiorari, the Petitioner respectfully asks this Court to grant its Petition for Certiorari due and owing to the fact that the Court of Appeals' interpretation and application of S.C. Code Ann. Section 15-48-200(a) violates the due process and equal protection rights of the Petitioner. The Court of Appeals, therefore, erred in dismissing this action on the grounds of lack of jurisdiction. This Court should grant this Petition for Certiorari.

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



W. H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for Appellant Allsouth Electrical
Contractors, Inc.

Mt. Pleasant, South Carolina
August 28, 2015

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-10-5191

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

RECEIVED

AUG 31 2015

S.C. SUPREME COURT

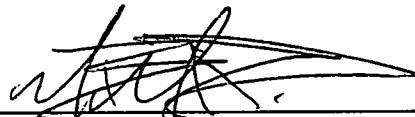
Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease..... Respondent,

vs.

Allsouth Electrical Contractors, Inc.Petitioner.

PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to the Respondent's Amended Return to the Petition for Certiorari on Respondent Lend Lease (US) Public Partnership, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on August 28, 2015, addressed to its attorneys of record, Edward James "Trip" Coyne, III, Esquire, and Allen Keith McAllister, Jr., Esquire, Williams Mullen, P.C., 300 N. Third Street, Suite 420, Wilmington, North Carolina 28401.



Smith, Bundy, Bybee, & Barnett, PC
W. H. Bundy, Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623
Attorneys for Petitioner Allsouth
Electrical Contractors, Inc.

Mt. Pleasant, South Carolina
August 28, 2015