THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge
Trial Court Case Nos. 2013-CP-29-00649, 2014-CP-29-00792

S.C. Ct.App. filed December 10, 2015
Appellate Case No. 2015-000193

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Appellants.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. are the . . . . Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 16, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a party obtaining alternative relief is not aggrieved by denial of the primary relief sought?

2. Did the Court of Appeals err in holding that a party cannot appeal the lower court's refusal to compel arbitration in accordance with the terms of the agreement?

STATEMENT OF THE CASE

This matter comes before the court on petitioners Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc. and Lexon Insurance Company, Inc. (collectively, "Petitioners") appeal of the lower court's refusal to enforce arbitration in Texas in accordance with the parties' agreement. This matter involves two companion cases, C.A. No. 2013-CP-29-649 ("First Lawsuit") and C.A. No. 2014-CP-29-792 ("Second Lawsuit") that were consolidated by the Court of Appeals.

Respondents purchased residential lots in the Riverchase Subdivision and commenced the lawsuits alleging that Petitioners failed to develop the property in accordance with the original master plan for the development as set forth in the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I recorded in Book 480, Page 89

with the Register of Deeds for Lancaster County, SC (the "Covenants") (See First Complaint, ¶ 2, 4, 18; Second Complaint, ¶ 2, 4, 15.) Although Respondents lodge numerous claims against numerous defendants, the gravamen of these actions is that the developer of Riverchase Estates, LGI Land SC, LLC ("Developer"), failed to develop Riverchase Estates in accordance with the Covenants. Accordingly, Respondents do not dispute that the Covenants exist in their chain of title and are binding as between Petitioners and Respondents.

The Covenants provide that "the Developer or the Disputing Party may by written request, whether made before or after the institution of any legal action, require that all unresolved matters as set forth in the Dispute Notice be submitted to binding arbitration . . ." (Covenants, § 10.05(a).) The Covenants further provide that the arbitration proceedings must be conducted in Montgomery County, Texas if the dispute involves the Developer. (Covenants, § 10.05(d).)

Respondents did not initiate arbitration in Montgomery County, Texas even though their dispute involves the Developer. Rather, Respondents filed the lawsuits against Petitioners in Lancaster County. Petitioners served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the First Lawsuit. The lower court denied the demand for arbitration and allowed the lawsuit to proceed in state court.

Petitioners filed a motion to reconsider. Petitioners served a similar Motion to Dismiss or Stay Proceedings and Compel Arbitration in the Second Lawsuit.

The lower court conducted a hearing to address both the motion to reconsider in the First Lawsuit and the motion to dismiss and compel arbitration in the Second Lawsuit. In the First Lawsuit, the lower court altered its prior order and ordered that the parties shall submit to binding arbitration in Lancaster, South Carolina. The order in the Second Lawsuit incorporated the amended decision reached the First Lawsuit and placed the two matters on parallel tracts. A timely appeal followed.

Respondents filed a motion to dismiss this appeal, which was granted by the Court of Appeals. Petitioners filed a petition for rehearing, which was denied by the Court of Appeals. Petitioners seek redress of the errors made by the Court of Appeals in this Petition for Certiorari.

ARGUMENT

1. The Court of Appeals should have held that Petitioners were aggrieved by the lower court's refusal to enforce arbitration as prescribed in the Covenants.

The Court of Appeals elected to create new precedent by holding that a party is not aggrieved when the party is denied its primary relief sought if the party receives some form of alternative relief. This holding conflicts with prior

decisions of this Court and this Court should grant this petition to correct this clear error.

The primary relief sought by Petitioners before the lower court was enforcement of the subject arbitration clause as written, which mandates arbitration in Montgomery County, Texas. The lower court initially denied arbitration entirely in its order filed April 29, 2014. Concluding that arbitration in the wrong venue is preferable to a jury trial in the wrong venue, Petitioners sought in the alterative that an arbitration in Lancaster County should be compelled if the lower court "refuses to reconsider its determination that arbitration in Texas is unconscionable." (Motion to Reconsider, ¶ 4.)

"Rule 201(b), SCACR, provides that '[o]nly a party aggrieved by an order, judgment, or sentence may appeal.' We recently reiterated that '[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.' 'The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.'" Shaw v. City of Charleston, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct.App. 2002)(citations omitted).

Petitioners were aggrieved by the lower court's decision and perfected this appeal to redress the lower court's refusal

to enforce arbitration in Texas. This Court has recognized that a party may be aggrieved by receiving alternative relief in Sickora v. Metro. Life Ins. Co., 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) and allowed appellate review by holding:

> The alternative relief did not prevent a review by this Court on the basic contention. If the primary relief had been granted, as it should have been, the alternative motion would have been unnecessary.

Moreover, "a party may appeal adverse portions of an otherwise favorable verdict or order." Jean Hoefer Toal, Appellate Practice in South Carolina, p. 109 (2d ed.2002) *citing* Neal v. Clark, 196 S.C. 139, 12 S.E.2d 921 (1941).

The United States Supreme Court succinctly noted the difference between appellate rights of a party that was granted *all* relief and a party that was granted *partial* relief.

> We concede that this Court has held that a 'party who receives *all* that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.' But this Court also has clearly stated that a party is 'aggrieved' and ordinarily can appeal a decision '*granting in part and denying in part* the remedy requested.'

Forney v. Apfel, 524 U.S. 266, 271 (1998) (emphasis added) (citations omitted). The Supreme Court in Forney further recognized that a party is aggrieved when it receives "only half a loaf" or a portion of requested relief.

> The context makes clear that, from Forney's perspective, the second 'alternative,' which means further delay and risk, is only half a loaf. Thus, the District Court's order gives petitioner some, but not all, of the relief she requested; and she consequently can appeal the District Court's order insofar as it denies her the relief she has sought.

Forney, 524 U.S. at 271.[1]

Petitioners sought arbitration in Texas. After the lower court flatly denied arbitration, Petitioners requested the alternative and partial relief of arbitration in Lancaster County. Petitioners' responses to the lower court confirm that arbitration in Lancaster County was only a fallback position and that they may seek redress through an appeal of any denial of arbitration in Texas.[2] Even though the party is

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[1] The Supreme Court further noted similar examples cited by the respondent finding "a right to appeal in roughly comparable circumstances. See Brief For Respondent 21, n. 12 (*citing* Gargoyles, Inc. v. United States, 113 F.3d 1572 (C.A.Fed.1997) (permitting appeal where prevailing party recovered reasonable royalty but was denied lost profits); Castle v. Rubin, 78 F.3d 654 (C.A.D.C.1996) (per curiam) (permitting appeal where prevailing party awarded partial backpay but denied reinstatement and front pay); La Plante v. American Honda Motor Co., 27 F.3d 731 (C.A.1 1994) (permitting appeal where prevailing party awarded compensatory but not punitive damages); Graziano v. Harrison, 950 F.2d 107 (C.A.3 1991) (permitting appeal where prevailing party awarded damages but denied attorney's fees); Ragen Corp. v. Kearney & Trecker Corp., 912 F.2d 619 (C.A.3 1990) (permitting appeal where prevailing party denied consequential damages); Carrigan v. Exxon Co., U.S.A., 877 F.2d 1237 (C.A.5 1989) (permitting appeal where prevailing party awarded damages but not injunctive relief))." Forney, 524 U.S. at 272.

[2] The lower court asked Petitioners' counsel what would happen if he just ordered arbitration in Lancaster County and the response was: "Well, then if you order it then they have

successful in obtaining a partial amount or subset of the damages sought, the party is aggrieved if denied the full measure of damages, treble damages, punitive damages or attorneys' fees sought. Petitioners were aggrieved by denial of arbitration in Texas. Petitioners obtained half the loaf: arbitration was compelled but not arbitration where it belongs per the binding agreement of the parties. Accordingly, Petitioners are aggrieved as required by Rule 201(b), SCACR, and this matter should be decided on the merits.

2. The Court of Appeals erred in holding that a party cannot appeal the lower court's refusal to compel arbitration in accordance with the terms of the agreement.

The Court of Appeal's error on the merits was the court's failure to recognize that this case is an appeal of a lower court's refusal to compel and enforce an arbitration clause contained in the contract between the parties (which is immediately appealable) as opposed to an attempt to appeal an order compelling arbitration per a contract (which is not immediately appealable). The lower court did not compel and

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a choice, if they're amenable to it then we . . . move this case along, if they are not then they have the decision to make of whether they want to pay the piper and roll down to Columbia." (Trans. of Hearing, pp. 23-24.) Respondents submitted a proposed order and Petitioners confirmed their opposition in a letter to Judge McMahon which ends with the following: "It should be noted in this letter that the LGI Defendants do not agree with or consent to the Court's announced decision to compel arbitration of these two lawsuits in Lancaster County, South Carolina rather than Montgomery County, Texas."

enforce the arbitration clause contained in the agreement between these parties. Therefore, this appeal presents the immediately appealable issue of whether the lower court acted properly in its refusal to compel and enforce a contractual arbitration clause.

Whether a party may appeal immediately a lower court's *sua sponte* decision to refuse to compel arbitration on the terms contained in the agreement but to make new binding terms to control the arbitration is a novel question in this state. While it is true that a party may not take an immediate appeal from an order compelling arbitration as required in a valid contract,[3] an order denying arbitration is immediately

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[3] Interestingly, many states allow an immediate appeal of a final order compelling arbitration or denying arbitration. See Simmons Co. v. Deutsche Fin. Servs. Corp., 532 S.E.2d 436, 439-40 (Ga.App.2000)("Georgia's procedure allowing a preliminary appeal from an order compelling arbitration recognizes that, if the trial court erred in determining there was an enforceable arbitration agreement, a party may be forced to participate in an unwarranted arbitration proceeding"); Kremer v. Rural Cmty. Ins. Co., 788 N.W.2d 538, 549 (Neb.2010)("Just as an order refusing to compel arbitration diminishes a party's claim that it is entitled to arbitrate, so does an order compelling arbitration diminish a party's claim that it is entitled to litigate in court. These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do"); Sawyers v. Herrin Gear Chevrolet Co., 26 So. 3d 1026, 1034 (Miss. 2010)("In an effort to provide uniformity and judicial economy, this Court holds today that an order compelling arbitration which disposes of all the issues before the trial court or orders the entire controversy to be arbitrated is a final decision, and therefore, immediately appealable"); Cty. of Hawaii v. Unidev, LLC, 301 P.3d 588, 602 (Haw.2013) ("under the collateral order doctrine, 'orders . .

appealable. Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464, n. 4 (2013); see also S.C.Code Ann. § 15-48-200(a)(1) (an appeal may be taken from an order denying an application to compel arbitration).

While no South Carolina precedent has addressed these specific facts, the courts in Tennessee have.[4] In the Tennessee case, the lower court compelled arbitration but refused to compel the arbitration in the forum selected in the applicable contract. After noting that normally an order compelling arbitration is not immediately appealable, the Tennessee Court of Appeals provided an exception to this rule when the trial court reforms an agreement and does not enforce a forum selection clause contained therein. Recognizing the unique policy considerations present upon such an occurrence, the court ruled as follows:

> However, as in this case, when the trial court compels arbitration but, *sua sponte*, reforms the parties' agreement as to their forum selection and that decision is not immediately appealable, both the purposes of the FAA and section 16 are thwarted. If the parties in this case were denied the right to appeal, they would have to proceed through arbitration, then appeal the trial court's action, and if it was determined by this Court

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. compelling arbitration are appealable final orders'").

[4] State laws govern the procedural rules of appeals involving arbitration even the FAA is applicable. Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003).

> that the trial court's reformation of the agreement should be reversed, the parties would have to conduct a second arbitration. Such a result surely does not ensure the 'speed, simplicity, and economy associated with arbitration.' *Accordingly, we hold that an aggrieved party may appeal in the unique situation where the trial court orders arbitration but, sua sponte, reforms the parties' choice of law and forum selection clauses.*

Spell v. Labelle, 2004 WL 892534, at *3 (Tenn.Ct.App. 2004) (italics added).

"Arbitration provisions, this Court has noted, are a species of forum-selection clauses." Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 698, 130 S. Ct. 1758, 1783, 176 L. Ed. 2d 605 (2010). "Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'" Grant v. Magnolia Manor Greenwood, Inc., 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009). As our sister courts in North Carolina have recognized, "[a]lthough a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." Hickox v. R&G Grp. Int'l, Inc., 588 S.E.2d 566, 567 (N.C.App 2003). The Supreme Court in Texas noted that refusing an appeal for failure to enforce the agreed upon forum is "clear harassment."

> Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment. There is no benefit to either the individual case or the judicial system as a whole. The only benefit from breach of a forum-selection clause inures to the breaching party. That party hopes that its adversary will weary or avoid the cost of protracted litigation and settle when it would not otherwise have done so. Likewise, in comparing the respective burdens on the parties, the burden on a party seeking to enforce a forum-selection clause of participating in a trial then appealing to vindicate its contractual right is great while there is no legitimate benefit whatsoever to the party who breached the forum-selection agreement.

In re AIU Ins. Co., 148 S.W.3d 109, 117 (Tex. 2004).

Additionally, immediate appeal furthers this Court's precedent in enforcement of arbitration provisions *according to their terms*. "'[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.'" Cape Romain , 405 S.C. at 125, 747 S.E.2d at 466 (citations omitted). "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." Grant, 383 S.C. at 130, 678 S.E.2d at 438. "Section 4 [of the FAA] specifically states that 'the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*' Id. The district court must, therefore, apply a forum selection clause contained in the agreement if such a clause

exists." Energy Absorption Sys. v. Carsonite Int'l, 377 F. Supp. 2d 501, 504 (D.S.C. 2005); see also 6 C.J.S. Arbitration § 36 (noting that "[a]greements to arbitrate in a particular forum are enforced as a matter of contract law").

Petitioners urge this Court to examine the sound reasoning and policy considerations from these sister jurisdictions. Allowing the immediate appeal of an order refusing to compel arbitration in the forum designated by the applicable arbitration clause improves judicial fairness to litigants and preserves judicial resources by ensuring the burdensome time and expense expended on litigation activities are in the proper forum and not being wasted in the wrong forum. In sum, it is less burdensome and more beneficial to the courts and to the litigants to allow an immediate appeal to ensure the forum is proper than to prepare and try a case in full only to then discover on appeal that the forum was improper.

This Court should allow this appeal to proceed as the gravamen of this appeal is to redress the refusal of the lower court to compel the arbitration prescribed in the parties' agreement. The "unique situation" described in Spell is squarely presented in this matter and this appeal is necessary. Without this immediate appeal, these parties will have to slog through the entire case development, preparation

and trial before an arbitrator in Lancaster County only to thereafter discover on appeal to this Court that the proper forum is Montgomery County, Texas and that time and resources expended have been wasted. Without determining the proper forum at this stage of these proceedings, Petitioners stand to lose even if they ultimately prevail.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari to allow this appeal to proceed on the merits.

Respectfully submitted,

Date: April 15, 2015

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