THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-000798
Lower Court Case Nos.: 2013-CP-29-00649, - 00792

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..Petitioners.

AND

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

v.

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

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

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Appellants, in obtaining its request for alternative partial relief, were not aggrieved by the denial of the primary relief sought?

2. Did the Court of Appeals err in holding that the Appellants had no right to an immediate appeal from the lower court's refusal to compel arbitration in the State of Texas?

STATEMENT OF THE CASE

Petitioners allege in this appeal that they were aggrieved by denial and severance of procedures mandating nonbinding arbitration in the state of Texas, and that this right was immediately appealable. Rule 201, SCACR. The trial court Hon. R. Knox McMahon found as law on September 18, 2014 that requiring binding arbitration between the parties, absent the complexities of non-binding procedures and the resort to Texas form and/or laws under the covenants, would expedite resolution of the case and that no party would suffer prejudice by ordering the parties to submit to binding arbitration in Lancaster County. The South Carolina Court of Appeals found that after careful consideration of Appellants' Motion for rehearing, that the appellate court was unable to discovery that any material fact or principal of law had been either overlooked or disregarded and that there existed no basis for granting a rehearing, denying the same. Petitioners then petitioned for Certiorari, granted by the Supreme Court August 8, 2017.

Noteworthy is this appeal 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. The appeal presents the Supreme Court with the issue of whether the lower court properly refused to *compel* and enforce an arbitration clause and embedded *forum inconveniens* mandates deep within restrictive covenants. They mandate a first requirement that litigants must resort to Texas as a forum state for non-binding arbitration. These restrictive

covenants are filed of record in Lancaster County, filed in Book 480 at Page 89. They are the "agreement" that Appellants refer to in their arguments before this court. (*see*, Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I. (Appx. P. 85). All respondents were purchasers of undeveloped lots within the Riverchase planned unit development.

The question before the Court of Common Pleas involved unconscionability of provisions requiring **non**-binding arbitration outside of South Carolina to occur first in Montgomery County, Texas. It has never been disputed, however, that South Carolina was the *forum actus*, e.g, the place where the developer was alleged to have developed property, bound the property with CCRs, then sold lots and, most important, is alleged to have abandoned registered offices. The two lower courts refused to enforce an arbitration in the state of Texas, specifically, as set forth in the CCRs.

All respondents purchased un-developed lots in what would be the first phases of the Riverchase Subdivision. Defendants commenced the lawsuits alleging that Petitioners failed to develop the property in accordance with the original master plan as set forth in the Declaration of Covenants, Conditions and Restrictions recorded in Section I recorded in Book 480, Page 89 with the Register of Deeds for Lancaster County, South Carolina (the "Covenants") (Appx. P.85.). Although Respondents lodged numerous claims against number defendants, including whether the developer of Riverchase Estates, LGI Land SC, LLC ("Developer"), failed to develop Riverchase Estates in accordance with the Covenants, the graven of the appeal sub judice is whether ADR is mandated *outside* of South Carolina due to oppressive terms and provisions of the covenants.

The mandatory arbitration provisions in the Covenants were disputed by the plaintiffs in the trial court, attacked as unconscionable, oppressive, and void as against the public policy. As noted by the lower court, "[a]ll counsel have acknowledged that the restrictive covenants required, *inter alia*, that arbitration proceedings must be conducted in Lancaster County, South Carolina

unless they involve the Developer, (sic) in which case the proceedings ultimately must be conducted in Montgomery County, Texas." (Appx. p.56 (italics from original); see also Appx. p. 85). Respondents did not initiate arbitration in Montgomery County, Texas. They filed suit in the jurisdiction where they were sold lots of undeveloped, raw land. Lots were sold by LGI Land SC, as developed by Texas entity LGI Development, Inc. The complaint alleged amalgamation of these entities and failure to maintain registered offices, here in South Carolina.

Petitioners served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the First Lawsuit. (Appx. p.49). The lower court denied the demand for arbitration and allowed the lawsuit to proceed in state court. (Appx. pp. 54-60). Petitioners filed a motion to reconsider. (Appx. p.61). Petitioners served a similar Motion to Dismiss or Stay Proceedings and Compel Arbitration in the Second Lawsuit. (Appx. p.67).

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. (Appx. pp. 72-74). The order in the Second Lawsuit incorporated in the amended decision reached in the First Lawsuit, including binding arbitration in Lancaster, South Carolina. Importantly, the trial judge found no party would suffer any prejudice. (Appx. pp. 75-76). To date, petitioners still cannot demonstrate *prejudice*. Petitioners then appealed to the Court of Appeals, appealing the lower court's refusal to enforce arbitration in Montgomery County, Texas. Respondents filed a motion to dismiss this appeal. The Court of Appeals granted the dismissal (Appx. pp.90-91). Petitioners next filed a petition for rehearing, which was denied by the Court of Appeals. (Appx. pp. 92, 106-107). Petitioners then petitioned The Supreme Court for writ of certiorari, granted by the Court on August 8, 2017.

ARGUMENT

I. THE APPELLANTS WERE NOT AGGRIEVED BY DENIAL OF PRIMARY RELIEF SOUGHT IN VIEW OF THE DOCTRINE OF FORUM INCONVENIENS AND WHERE THE GRAVAMENT OF RELIEF GRANTED WAS BINDING ARBITRATION.

The Order and ruling of the Court of Appeals should stand and not be reversed. The Court of Appeals and the Trial Court both recognized the gravamen – *that being alternative dispute resolution in the form of binding arbitration*– was what, precisely, all parties could have reasonably expected under the CCR's. Petitioners had sought relief in their argument and their pleadings in the *alternative* that an arbitration in Lancaster County should be compelled if the lower court "refuses to reconsider its determination that arbitration in Texas is unconscionable." (Appx. p.64, ¶ 4). By severing the provisions the trial court validly exercised its inherent power to manage litigation, as affirmed by the Court of Appeals. The trial judge gave defendants the core relief of what they were requesting ultimately. The *half-loaf* Appellants complain they received erroneously was of their own request - prayed for in the alternative where they, to date, cannot demonstrate prejudice.

It is true "*a party may appeal adverse portions of an otherwise favorable verdict order*". *Jean Hoefer Toal,* Appellate Practice in South Carolina, *p.109 (2d ed. 2002).* That said, the core available relief affecting mode of trial was granted to defendants. Appellants, in fact, obtained the whole loaf available to them, they simply must eat of it in Lancaster County, South Carolina and not Montgomery County, Texas. That is, petitioners now alleged they stand aggrieved by denial of a non-binding arbitration in Texas, *specifically*. They cannot, however, articulate what prejudice they suffer.

The lower court inherently recognized that the labynth of foreign non-binding arbitration mechanisms imposed upon litigants would be unreasonable, unconscionable, and void as a matter

of public policy. The plaintiffs are consumers and purchasers of lots. The defendant is a sophisticated business entity, a Texas developer. The labyrinth of non-binding ADR procedures requiring resort to Texas would serve only to wear down, make weary, or provide a disincentive to those who would otherwise be able to freely resort to the courts. The most valid reason for striking down the enforcement mechanism by the lower court is the disparity of power and the factors cited by Grant v. Magnolia Manor Greenwood, Inc. 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009). While enforcing a forum election clause generally under Texas law, this court noted the general rule that forum selection clauses are generally enforceable and will be invalidated only "(1) if it was the product of fraud or over-reaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if the enforcement would contravene a strong public policy of the forum in which the suit is brought." Id.

The core inquiry is whether the trial court and the court of appeals were correct in refusal to enforce mandatory pre-litigation condition precedents involving the legal doctrine of *forum inconveniens* imposed by developer covenants. The trial court and the court of appeals found that mandating Texas arbitration would be unreasonable in a multi-party, complex matter. No purchaser of land in Riverchase had an opportunity to negotiate these *adhesion* provisions, they were simply purchasers of lots of land in Lancaster County. The lots came bound with restrictive covenants imposed by a Texas developer. What triggers the need to resort to Texas is only where litigants name the Texas developer (LGI Land Development, Inc.) in suit, irrespective of their development activities and commerce then engage in within this state. It is a trap for the unwary and blind, deeply embedded within covenants. Add a builder-referred closing attorney through offer of buyer incentives, and the trap is complete and springs shut.

Followed through to its logical conclusion, the Appellant argument centers on the premise that a developer can impose *forum non conveniens* mandates upon unwary purchasers via master deed, no matter how unconscionable or how badly the terms and conditions violate South Carolina law. That is so, arguably, because purchasers allegedly take with *constructive notice* through closing attorneys and CCRs that come deeply embedded with over-reaching, unfair, and oppressive terms that may violate the public policy of South Carolina. There can be no meeting of the minds, generally. Purchasers take pursuant to Master Deed where there can be no meeting of the minds relating to the CCR provisions on Texas forums if a dispute arises.

However, the Court of Appeals in South Carolina recognized the trial court had properly exercised its power to manage litigation of a case put before it involving complex, multi-party litigation in view of S.C. Code Ann. §15-7-120, which provides :

> **"Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action".**

It is not disputed that the trial court property applied South Carolina law, specifically the above S.C. Code Ann. §15-7-120. The developers in this case restricted and bound land with the developer's (emphasis) restrictions and CCRs. That land, nevertheless, is located in Lancaster County. It is the site of lots developed and sold. Lancaster County was the *forum actus* for development that allegedly never occurred. Then, when attempting resolution with their developer there is the abandonment of principal offices leaving aggrieved purchasers the long trip to Texas, if they have the wherewithal and resources to do so.

The trial court correctly found that it would thus be unreasonable to force purchasers to travel to Texas to engage in the *futility* of a series of complex ADR mechanisms, only to arrive back in Lancaster County ultimately without resolution. The only party benefitting by such a requirement is an out of state developer, LGI Development, Inc. The developer, nonetheless, chose to develop and sell lots in South Carolina. They could therefore reasonably expect to have to deal with disputes in this state, or binding arbitration within this state. To date, Appellants cite an immediately appealable right, but fail to articulate any prejudice they suffer.

The Court of Appeals correctly upheld the trial court in finding that it would be illogical that South Carolina statutes would take a back seat only when and if the law of a foreign state - *here Texas* - governed the substance of the parties' agreements (purchase and development of South Carolina lots) and would thus be controlling. As set forth above, undisputed is the fact that the lots in question are situate in Lancaster County, South Carolina. As such, the Court of Appeals did not ignore precedent by holding that a party is not aggrieved by denial of the primary relief it seeks. Instead, the Court of Appeals recognized the trial court's inherent power to manage complex litigation matters and sever unreasonable edicts in the CCRs enforcing the *gravamen* – binding arbitration. The primary relief (ADR enforcement) sought by alternative relief prayed for by Appellant was, in fact, granted.

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). The issue for Appellants, here, is that can cannot demonstrate *prejudice*.

Binding Arbitration was directed by the lower court, which is all that Appellant could have sought were, in fact, the clauses in the CCRs were unconscionable and/or void as against policy in South Carolina. Petitioners remain aggrieved because they unreasonably continue to seek to *impose forum inconveniens*, e.g., non-arbitration *in Texas*. Noteworthy is the trial judge R. Knox McMahon initially had denied arbitration, outright. Subsequently, Petitioners requested the alternative and partial relief of arbitration in Lancaster County which was the gravamen and core relief granted by the court to Appellants.

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. Petitioners are now allegedly aggrieved by denial of arbitration in forcing purchasers to go to an inconvenient forum imposed by imposing alleged "agreement" where no meeting of the minds occurred. No reasonable person by purchase of a lot of land in Lancaster would expect to have to travel extraordinary distances to resolve disputes with their developer; this is particularly true where the developer should have (and is alleged to have failed) to maintain registered offices in Lancaster. This finding by the trial court was likewise not challenged or disputed by Appellants. Accordingly, Petitioners were not aggrieved as required by Rule 201(b), SCACR, and this ruling of the Court of Appeals and the trial court should be affirmed. Requiring enforcement of arbitration in Montgomery County, Texas was found unreasonable by the trial court in light of S.C. Code Ann. §15-7-120, et. seq. Where, in Lancaster County, was a suitable forum where the relief granted – *binding arbitration* – could take place absent any vexation or oppression that might occur upon already aggrieved purchasers due to un-necessary imposition of

resort to Texas forums, and especially where Lancaster County easily could serve as the site where the case can be adjudicated. It is here that the developer, the construction activity, sales, lands and buyers are all situated.

II. THE REFUSAL TO COMPEL ARBITRATION COUPLED WITH FORUM INCONVENIECE IS NOT IMMEDIATELY APPEALABLE WHERE THE TRIAL COURT NEITHER OVER-LOOKED NOR MISAPPREHENDED UNDERLYING FACTS OR SOUTH CAROLINA LAW

Appellants argument is that the adhesive contract "agreement" (e.g., record covenants) Imposed against South Carolina buyers of lands by a foreign developer were ignored, e.g., that the Court of Appeals failed to recognize the lower court trial judge refused to compel and enforce purchasers to take a trip to Texas where disputes develop. The argument ignores that the developers chose, deliberately, to develop land in South Carolina that would be sold in commerce to private purchasers. They did so under South Carolina laws. The land would come bound by recorded covenants, no matter how oppressive, imposed by a foreign developer.

The instant case involves a trial court decision not to enforce, and to sever from the whole CCR provisions that which was unreasonable, unconscionable, or worse – violated the public policy of this state. Thus, the case sub judice does, in fact, involve appeal of an order compelling arbitration per a "contract", e.g. the developer's own covenants and CCRs. The trial court's exercise of inherent power to manage litigation is not a novel question here. It was a valid exercise of authority. The real question is whether it is reasonable – or not reasonable – to impose inconvenient travel to Texas forums upon buyers of Lancaster County land, where defendants cannot show they will suffer any prejudice whatsoever.

While Appellants cite Tennessee law in support of their appeal contentions, they ignore the trial court's accurate application of South Carolina law, specifically. See, S.C. Code Ann. §15-7-

120. The lower courts did not "*reform*" the parties' "contract" agreements. The lower court severed and refused to enforce unreasonable adhesion provisions involving forum selection that came complete with bow violating public policy in South Carolina. Where, essentially, Texas developers came to South Carolina. They sought to restrict and bind lands they planned to sell to unwary buyers branded with the developer's own uniquely imposed complex series of non-binding ADR mechanisms, the first of which would impose travel to the developer's forum – Texas.

The underlying "manner" provided for in the CCRs for Riverchase was alternative dispute resolution, ultimately, binding arbitration. The trial court cut to the chase and found that all parties could have reasonably expected such. "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). Forum selection clauses are routinely enforced by the courts.[1] "Where designation of a specific arbitral forum (here Texas as a first requirement) 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). The substantial right, here, is binding arbitration. As cited by the trial court judge, it would be illogical to expect otherwise or to examine the CCR "travel" requirements not within the lens of South Carolina law. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E. 2d 485, 493 (Ct. App. 2004). (Quoting Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). The lower courts accurately found that binding arbitration (not binding arbitration by first initiating same in Texas) was consistent with South

Carolina law, and the ruling of law in this case should stand. ADR, and specifically binding arbitration, is the core right enforced by the courts without application of unreasonable extraneous provisions which would have the effect of hindering dispute resolution.

Respondents urge the Supreme Court to follow the sound reasoning and policy considerations of the trial court and South Carolina law. It is here in South Carolina the developer chose to affect lands and impose covenants against lands that would be sold to prospective buyers in commerce. Thus, denying the immediate appeal of an order refusing to compel arbitration in a far away forum does nothing to improve judicial fairness to litigants. It does nothing to preserve judicial economy or resources. By contrast, it imposes unreasonable burdens against litigants, e.g., the time and expense expended on litigation activities (non-binding) in other states. In sum, it is less (not more) burdensome to disallow the appeal to ensure the core relief of binding arbitration is expedited. Lancaster County is where the litigants and lots are located. Holding otherwise would contravene the clear public policy of this state's law and require aggrieved parties to literally tread through the red tape of entire case development, preparation, and trial before an arbitrator, in Montgomery, Texas. The proper forum is South Carolina, where Petitioners first sought to weave a complex web of ADR mechanisms to discourage resort to the proper forum court and laws – South Carolina. The alleged agreement imposing of *forum incoveniens* is unreasonable, oppressive, and burdensome. As found by the trial court, it violates the law and policy of this state. While federal law cited by the Appellants makes clear that forum selection is routinely enforced by the courts, it is not so in the cases of fraud, over-reaching, or if the forum is so inconvenient as to deprive the litigant of his day in court or would contravene a strong public policy of the forum in which it is brought". Id. Here, the very reason for the court's application of S.C. Code Ann. § 15-7-120 (1976, as amended). U.S. Courts have noted, indeed, that arbitration provisions are a

species of forum-selection clauses, routinely enforced by the courts. The Stolt Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 698, 130 S.Ct. 1758, 1783, 176 L. Ed. 2d 605 (2010). However, the substantial right granted unto defendants in this case was mode of trial – binding arbitration, not resort to one-sided forum selections in foreign jurisdictions where the developer maintains principal office locations, like Texas. In the case sub judice, Appellants agreed, albeit in prayer for alternative relief, to arbitration in Lancaster County and said relief was granted by the trial court. Moreover, Appellants have never show any type of prejudice. The decisions of the lower courts should stand.

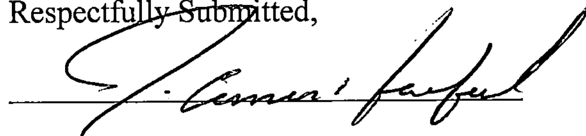
CONCLUSION

The Supreme Court should affirm the decision of the Court of Appeals and the lower court. The decision of the lower courts to enforce binding arbitration without oppressive mandatory requirements imposing resort to foreign forums was a valid exercise of the court's inherent power to manage litigation. The trial court was sound in its reasoning that all parties could have reasonably expected binding arbitration in Lancaster County, South Carolina.

Respondents pray that the Supreme Court affirm the lower courts and order the case to binding arbitration as ordered by the trial court.

Respectfully submitted November 21, 2017.

Respectfully Submitted,



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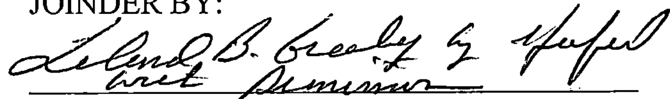

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PROOF OF SERVICE

I certify that I have served the Brief of Respondents by depositing copies in the United States Mail, postage prepaid, on November 20, 2017, addressed to counsel of record as follows:

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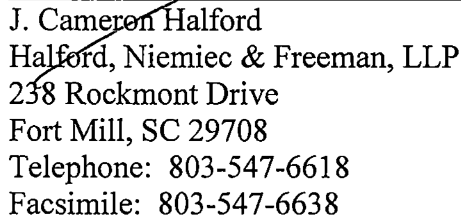

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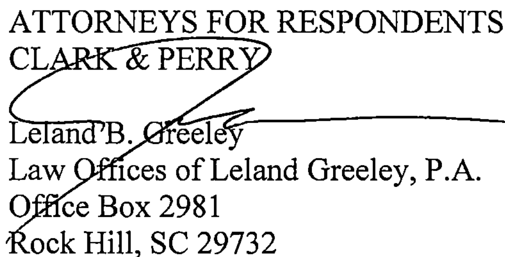

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