**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM AIKEN COUNTY
The Honorable Doyet A. Early, III, Circuit Court Judge

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Case No. 2016-CP-02-02339
Appellate Case No. 2018-001039

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University of South Carolina Aiken, Plaintiff,

v.

University Housing Services, Inc., HG Reynolds Company, Inc., Southern Wall Systems, Inc., McElroy Specialty Interiors, Inc., Croft Hill Siding Inc., East Coast Painting, Inc., and John Does 1 through 3, Defendants,

And

H.G. Reynolds Co., Inc., Third-Party Plaintiff,

v.

William Bell, Bell Siding and Roofing, William Bell d/b/a Bell Siding & Roofing a/k/a Bell Siding and Roofing, LLC, Third-Party Defendants,

Of Which University Housing Services, Inc., and H.G. Reynolds Company, Inc. are the Appellants,

And

Of Which University of South Carolina Aiken is the Respondent.

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**RESPONDENT UNIVERSITY OF SOUTH CAROLINA AIKEN'S MOTION TO DISMISS THE APPEAL OF H.G. REYNOLDS COMPANY, INC.,**

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Respondent, University of South Carolina Aiken (hereinafter "USC"), pursuant to Rule 240 of the South Carolina Appellate Court Rules, herein moves this Honorable Court for an Order dismissing the Notice of Appeal filed by Appellant H.G. Reynolds Company, Inc. (hereinafter "Reynolds") for the reasons stated herein:

## INTRODUCTION

USC initiated this action alleging certain construction defects affecting the Pacer Commons dormitory at the University of South Carolina at Aiken. USC brought claims against multiple defendants, including Reynolds, who built the dormitory, and University Housing Services, Inc., (hereinafter "Developer") who served as the project developer.

By way of its First Amended Complaint, USC asserted causes of action against Reynolds for "Negligence/Gross Negligence" and "Breach of Implied Warranties." Thereafter, USC moved to amend its Complaint to dismiss certain claims against other parties. The trial court granted USC leave to file a second amended complaint. However, this did not alter any cause of action against Reynolds.[1] Further, Reynolds unsuccessfully moved to compel USC's claims to arbitration relying on an arbitration provision contained within the Design Build Agreement to which neither Reynolds nor USC were parties. Reynolds now appeals both the trial court's order granting of leave to amend the pleadings as well as the denial of its motion to compel arbitration.

Because neither USC nor Reynolds are parties to the Design Build Agreement and further because Reynolds is not affected by the trial court's interlocutory order granting USC leave to amend the complaint and dismiss claims against other parties, the instant appeal must be dismissed.

[1] For comparison, the First Amended Complaint is attached as (Exhibit 1) and the Second Amended Complaint as (Exhibit 2), both being fully incorporated herein by reference.

## BACKGROUND

### I. FACTS

In 2003, the land on which Pacer Commons is located was owned by the Aiken County Commission on Higher Education (the "Commission") which it leased to Collegiate Housing Properties Inc., ("Tenant") pursuant to a "Lease Agreement." (Exhibit 3). The Lease Agreement does **not** contain an arbitration provision.

In August of 2003, Tenant entered into a "Design Build Agreement" (Exhibit 4) with Appellant, University Housing Services, Inc., (Developer)[2]. Thereafter, Developer entered into a "Construction Agreement" (Exhibit 5) with Reynolds, wherein Reynolds was hired as the general contractor. The Design Build Agreement between Developer and Tenant contains an arbitration provision; however, the Construction Contract between Developer and Reynolds does **not**.

After completion of construction, on May 20, 2005, the Aiken Student Housing Foundation (the "Foundation") assumed the lease from Tenant. On April 4, 2006, the Commission, as owner and landlord, properly terminated the Lease Agreement and transferred the property *via* Warranty Deed to USC. (Exhibit 6). The Warranty Deed to USC is the only relevant document to which USC is a party and does **not** contain an arbitration provision.

Reynolds's Motion to Compel Arbitration, and this appeal, concern the enforcement of the arbitration provision contained at Article 12 of the Design Build Agreement to which neither Reynold's nor USC is a party.[3]

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[2] Developer has separately filed Notice of Intent to Appeal. This Motion addresses only Reynolds's Appeal, not Developer's.

[3] The instant Motion does not address the merits of Reynold's claim and therefore the language of the subject arbitration provision is not relevant to the Motion. However, for the Court's convenience the following documents are attached as exhibits: the Design Build Agreement (Exhibit 3); the "Lease Agreement" (Exhibit 4); the "Construction Contract" (Exhibit 5); the "Warranty Deed" (Exhibit 6). All of which were submitted as exhibits in support of Reynolds's Motion to Compel Arbitration and incorporated herein by reference.

## II. PROCEDURAL HISTORY

### A. USC's Motion to Amend the Complaint.

USC initially brought suit against Reynolds and Developer (among others) on October 21, 2016. On March 6, 2017, USC filed a Motion to Amend its Complaint seeking to dismiss, without prejudice, certain claims against Developer. *See Second Amended Complaint* (Exhibit 2). Developer opposed this Motion in which Reynolds joined. Pursuant to Rule 15, SCRCP, the trial court granted USC the requested leave to amend the complaint. *See Notice of Appeal.* This Second[4] Amended Complaint left all causes of action against Reynolds unchanged. Reynolds herein takes appeal from this Order.[5]

### B. Reynold's Motion to Compel Arbitration.

Both Reynolds and Developer separately moved to compel USC's claims against them to arbitration based upon the Design Build Agreement. Because neither USC nor Reynolds are parties to the Design Build Agreement, the trial court denied both Reynolds's and Developer's Motions to Compel Arbitration in a single Order. *See Notice of Appeal.* Reynolds and Developer separately filed notice of intent to appeal.[6]

Reynolds's appeal is not justiciable because Reynolds lacks appellate standing and it is not aggrieved by the trial court's rulings. Therefore, the instant appeal should be dismissed.

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4 The trial court's Order mistakenly references this as the "third" amendment.

5 Both Developer and Reynolds unsuccessfully moved, pursuant to Rule 59(e), SCRCP and thereafter filed the instant notice of appeal.

6 On June 6, 2018, this Court, upon its own motion, consolidated Reynolds' appeal with Developer's.

## LAW AND ANALYSIS

### I. The instant appeal should be dismissed because Reynolds is not aggrieved by the trial court's rulings and lacks appellate standing.

"Only a party aggrieved by an order, judgment . . . or decision. . . ." may appeal. Rule 201(b), SCACR. This Court has explained that a party who lacks standing cannot be aggrieved because "[t]here is no material distinction in general standing principles juxtaposed to the ability of an 'aggrieved party' to appeal pursuant to Rule 201(b)." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008). No matter how erroneous or prejudicial a court decision may be to the rights or interest of another, a party may not appeal from a decision that does not affect its own interests. *Bivens v. Knight,* 254 S.C. 10, 173 S.E.2d 150 (1970). A party is "aggrieved" as required by law, only when the ruling of the trial court operates on some personal or property right. *Id.* An appellate Court "has a duty to reject an appeal that is initiated by a party who is not aggrieved as contemplated by law." TOAL, J.H., *Appellate Practice in South Carolina,* Ed. 2, p. 109 (2004); *citing Cission v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970).

Where a party lacks standing to appeal or the issue presented is not a justiciable controversy, this Court should dismiss the appeal. *See* Rule 201(b), SCACR; *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996) (before an appeal may be maintained there must exist a justiciable controversy); *see e.g., Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906 (Ct. App. 1998) (an appellate court should dismiss an appeal in the absence of a justiciable controversy).

#### A. *Reynolds lacks standing to appeal the trial court's order refusing to compel arbitration and therefore, the appeal is not justiciable.*

Generally, "contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it." *Thomas Trancik, M.D., P.A. v. USAA Ins. Co.*, 354 S.C. 549,

554 (Ct. App. 2003). Whether there is an agreement to arbitrate is unavoidably an issue of contract law, and our Supreme Court has recognized that a non-party lacks standing to compel arbitration. *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 127 (2013) (acknowledging that a non-party to a contract lacked standing to compel arbitration pursuant to that contract).

Similarly, the preference for arbitration contained in the Federal Arbitration Act ("FAA")[7] does not remove standing as a requirement to compel arbitration. Court's applying the FAA have continuously demonstrated that arbitration rests on the core principles of contract law and the preference for arbitration does not operate to provide a non-party with standing to compel arbitration. *See Brantley v. Republic Mortg. Ins. Co.*, 2004 U.S. Dist. LEXIS 28831 (D.S.C. 2004) (*affirmed Brantley v. Republic Mortg. Ins. Co.* 424 F.3d 392 (4th Cir. 2005); *citing Britton v. Co-Op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993) ("An entity that is neither a party to nor agent for nor beneficiary of the contract lacks standing to compel arbitration[.]"); *Trompeter v. Boise Cascade Corp.* 877 F.2d 686, 687 (8th Cir. 1989); *Lorber Industries v. Los Angeles Printworks. Corp.*, 803 F.2d 523 (9th Cir. 1986); *Mutual Benefit Life Ins. Co. v. Zimmerman.* 783 F.Supp. 853, 865 (D.N.J. 1992); *see also Jones v. Moneytree,* 686 So.2d 1166, 1168 (Ala. 1998) ("First Colonial has no standing to seek enforcement of the arbitration provision . . . . First Colonial is not a party to the contract containing the arbitration agreement, and it is clear from the language of the arbitration agreement that it applies only to the Joneses and Money Tree, the debtor and the creditor.").

[7] *See* 9 U.S.C. § 1 *et seq.* Reynolds maintains its claim for arbitration is proper under the FAA. USC does not concede that this matter is subject to the FAA. Instead, USC reserves the right to assert this matter is controlled by the South Carolina Uniform Arbitration Act ("SCUAA"). *See* SC Code Ann. §§ 15-48-10 et seq. However, because this Motion does not address the merits of Reynolds claims, USC assumes (without conceding) for the limited scope of this Motion that this matter is subject to the FAA.

There is no "third-party standing" afforded to a non-party, such as Reynolds, to compel arbitration against another non-party, such as USC. Rather, third-party standing may only be conferred: (1) where a signatory seeks to compel a non-signatory to arbitrate the non-signatory's claims against the signatory; or (2) where a non-signatory seeks to compel arbitration against a signatory because of the so-called "intertwined claims test." *See Weckesser v. Knight Enterprises SE, LLC.*, 2018 U.S.App.Lexis15751, 4th Cir. (2018) (unpublished) citing *Raymond James Fin. Servs., Inc., v. Cary*, 709 F.3d 382. 386 (4th Cir. 2013) (the presumption in favor of arbitration applies "only when a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand, not when there remains a question as to whether an agreement [to arbitrate] even exists between the parties in the first place."). In either scenario, at least one party (i.e., the compelling party or compelled party) must necessarily be a signatory/party to the arbitration agreement. *See e.g., id; accord Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 291 (Ct. App. 2012) (acknowledging third-party standing to permit a non-signatory to compel a signatory to arbitration as well as standing of a signatory to compel a non-signatory to arbitration, but not acknowledging standing when a non-signatory seeks to compel another non-signatory to arbitration).

Here, the merits of Reynolds's appeal would ask this Court to declare the rights as between USC and Reynolds under the Design Build Agreement. However, because neither USC nor Reynolds are a party to the Design Build Agreement, Reynolds has no rights as against USC under that agreement, and therefore, the merits need not be reached. As a non-party, Reynolds has no standing to enforce the Design Build Agreement against USC, and thus, no standing to appeal. The trial court's ruling on the enforceability of the Design Build Agreement—whether right or wrong—simply does not implicate a right belonging to Reynolds. *See; Thomas*, 354 S.C. at 554

(a non-party does not have standing to enforce a contract); *see also Bivens*, 254 S.C. 10, 173 S.E.2d 150 (a party who's rights or interests are not implicated by a trial court's order cannot be aggrieved as required to appeal). Reynolds is not, and cannot be, "aggrieved" as required by Rule 210, SCRCP. Consequently, Reynolds lacks standing to appeal. *See Powell*, at 447, 665 S.E.2d at 242 (finding that a party without standing cannot be "aggrieved").

Additionally, "[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 227 467 S.E.2d 913, 918 (1996); *citing Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (internal quotations omitted); s*ee also Hitter v. McLeod*, 274 S.C. 616, 266 S.E.2d 418 (1980).

The lack of justiciability of Reynolds's appeal is underscored by comparison to that of Developer. Unlike Reynolds, Developer is, at least, a party to the Design Build Agreement, and has certain rights under that agreement. Because USC disputes whether Developer is entitled to enforce those rights against USC, those rights are in controversy and are ripe for judicial resolution. This is not the case of Reynolds' appeal. Reynolds has no rights under the Design Build Agreement. Instead, it seeks to enforce a right that belongs, if at all, to Developer. Thus, even if Reynolds's argument held water—which it does not—its rationale makes plain that Reynolds's alleged right to participate in arbitration is contingent upon Developer's right to compel USC to arbitration. This is fatal to Reynolds's ability to pursue the instant appeal because a contingent or hypothetical right is not ripe for adjudication. *See Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996) (finding that before an appeal may be maintained there must be a justiciable controversy which encompasses various doctrines, including ripeness, mootness and standing);

*Waters*, 321 S.C. at 227 467 S.E.2d at 918 (the absence of a non-contingent right renders and issue not justiciable); *accord Johnson v. Brandon Corp.*, 221 S.C. 160, 69 S.E.2d 594 (1952) (finding that although a party may have an interest giving right to appeal, if that interest is divested pending the appeal, the appeal will be dismissed).

B. *Appeal from the Order granting leave to amend complaint is an impermissible interlocutory appeal which is further not justiciable.*

As a threshold matter, an order granting leave to amend pleadings is interlocutory and direct appeal is not permitted. *See Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998) (stating an appeal of an order granting a motion to amend a complaint is interlocutory and generally not appealable); *see also Briggs v. Richardson,* 272 S.C. 376, 256 S.E.2d 544 (1979); *Lake City Dev. Corp., v. Gilbert Constr. Co.,* 283 S.C. 10, 320 S.E.2d 494 (Ct. App. 1984) (both holding that an order allowing amendment of the pleadings is not immediately appealable). While an interlocutory appeal may be joined with a non-interlocutory appeal, Reynolds has no standing to pursue appeal of the non-interlocutory Order refusing to compel arbitration. *See supra.*

Additionally, even if the appeal of this order is not barred as interlocutory, it remains that the Second Amended Complaint did not amend any claim asserted against Reynolds. Therefore, Reynolds is not aggrieved or affected the Order granting leave to amend from which Reynolds appeals. *See* TOAL, J.H., *Appellate Practice in South Carolina,* Ed. 2, p. 19 (2004) ( An appellate Court "has a duty to rejects an appeal that is initiated by a party who is not aggrieved as contemplated by law."); *citing Cission*, 255 S.C. 174, 177 S.E.2d 603. Thus, the instant appeal should be dismissed.

## CONCLUSION

As set forth above, the instant appeal must be dismissed as a result of Reynolds's lack of standing and failure to present a justiciable controversy.

Respectfully submitted,

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The Honorable Doyet A. Early, III, Circuit Court Judge

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And

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William Bell, Bell Siding and Roofing, William Bell d/b/a Bell Siding & Roofing a/k/a Bell Siding and Roofing, LLC, Third-Party Defendants,

Of Which University Housing Services, Inc., and H.G. Reynolds Company, Inc. are the Appellants,

And

Of Which University of South Carolina Aiken is the Respondent.

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**AFFIDAVIT OF SERVICE**

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I hereby certify that I have on this date, served via U.S. Mail and electronic mail to all other counsel of record, a true and correct copy of Respondent's Motion to Dismiss as follows:

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October 2, 2018



***VIA UPS OVERNIGHT DELIVERY***
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

*RE: USC v. University Housing Services, Inc.*
*Appellate Case No. 2018-001039*

Dear Ms. Kitchings:

This firm represents Respondent University of South Carolina Aiken in connection with the above-referenced appeal. Enclosed for filing, please find an original and seven (7) copies of the following documents:

(1) Respondent's Motion to Dismiss the Appeal of H.G. Reynolds Company, Inc.;
(2) Respondent's Affidavit of Service; and
(3) This firm's check in the amount of $25.00 in satisfaction of the filing fee.

After filing the originals, kindly return any extra file-stamped copies to me in the enclosed self-addressed envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact us.

With best regards, I am

Very truly yours,

THURMOND KIRCHNER & TIMBES, PA

Moira McIntire
Paralegal to Thomas J. Rode

cc: All counsel of record.

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FROM: Moira McIntire, Paralegal to Thomas J. Rode

RE: **Appellate Case No. 2018-001039**
**USC v. University Housing Services, Inc.**

PAGES: 14 (including cover)

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Please see attached.

Thank you,

Moira