THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

RECEIVED
OCT 29 2018
SC Court of Appeals

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.

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

---

Respondent ("USC") filed the subject Motion to Dismiss Reynold's appeal on October 2, 2018. Appellant H.G. Reynolds Company, Inc. ("Reynolds") filed a Return on October 19, 2018.[1] USC herein Replies pursuant to Rule 240(f), SCACR.

Reynolds' argument that a respondent is required to somehow challenge appellate standing prior to the commencement of an appeal is illogical, impossible, and without merit. Reynolds lacks standing to bring this appeal, and its own arguments betray this.

BACKGROUND

Here, Reynolds alleges the trial court erred; (1) in failing to compel USC's claims against Reynolds to arbitration pursuant to the Design Build Agreement to which neither USC nor Reynolds is a party; and (2) in allowing USC to amend its complaint and dismiss a cause of action against a party other than Reynolds. However, the fatal flaw in Reynolds' appeal is that the arbitration provision it seeks to enforce is contained in the Design Build Agreement,[2] to which neither USC nor Reynolds is a party. Reynolds has no right to enforce it—either at trial or through appeal, and by conceding the interest it is pursuing on appeal exists only by virtue of its co-defendant's ("Developer") involvement in this action, Reynolds makes plain that it has no standing to appeal.

1. **The rules of issue preservation do not require a party to challenge appellate standing before an appeal is initiated, and Reynolds fundamentally misapprehends the law in this regard.**

Reynolds asserts USC's motion to dismiss is not "preserved" because USC did not challenge Reynolds' *appellate* standing prior to this appeal. Reynolds fails to explain, or cite

---

[1] As of the date of filing this Reply, USC has yet to receive Reynolds' Return, instead having learned it was filed only by review of C-Track at www.sccourts.org.

[2] The only parties to this agreement are University Housing Services Inc., ("Developer") and Collegiate Housing Properties Inc., ("Tenant")

authority, as to how USC was to challenge appellate standing *before* an appeal was initiated. The absurdity of this is manifest. The law simply does not require a party to raise an argument to a proceeding before that proceeding is commenced, if for no other reason than it is impossible.[3]

Notwithstanding, Reynolds completely misapprehends the rules of issue preservation which address the requirements incumbent upon an *appellant* to present an *issue* on appeal. Quite simply, these rules do not constrain a *respondent,* and speak only to what *issues* are properly before an appellate court as opposed to what *parties* are properly before the court. *See S.C. DOT v. First Carolina Corp.,* 372 S.C. 295, 301, 641 S.E.2d 903, 907 (setting forth the basic "requirements to preserving **issues**" as being timely and specifically raised by appellant) (emphasis added, internal quotation and citation omitted); *citing* Toal, J.H., et al. *Appellate Practice in South Carolina,* p. 62 (2d ed. 2002) ("A respondent—the 'winner' in the lower court—may raise [] any additional reasons the appellate court should affirm . . . regardless of whether those reasons have been presented to or ruled on by the lower court."); *see also e.g.,Frederick v. Standard Warehouse Co.*, 239 S.C. 216, 122 S.E.2d 425 (1961) (indicating that and additional sustaining ground will permit dismissal without addressing the merits of a claim); *accord Cty of Beaufort v. Towne Ctr., LLC,* Opinion No. 2011-UP-492 (Ct. App. 2011) (unpublished example of granting dismissal of an appeal based upon the lack of appealability and/or justiciability which was asserted as an additional sustaining ground).

The rules of issue preservation cited by Reynolds are simply inapplicable here, and do not cure Reynolds' lack of appellate standing. Therefore, USC's motion to dismiss should be granted.

---

[3] By this logic, Reynolds has waived a claim to compel arbitration because it failed to file its motion to compel arbitration *before* USC filed the subject lawsuit.

2. **Reynolds concedes the right to seek arbitration is inextricably intertwined with the claims against other parties, therefore because Reynolds is not a party to the Design Build Agreement and has no individual rights to arbitration implicated here, Reynolds lacks standing to pursue the instant appeal.**

Reynold's claims it is an "aggrieved" party with standing to appeal because it "is appealing direct orders to motions [it] filed." (Return p. 8). This utterly misses the mark. Reynolds asserts the mere filing of a motion creates a legal "right" or "interest" sufficient to acquire standing. This is incorrect. The inquiry is not of the effect a ruling has on a motion, but the effect ruling has on a party. *Bivens v. Knight,* 254 S.C. 10, 173 S.E.2d 150 (1970) (A party "is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.").

Although suggesting it was denied a right as to the mode of trial—i.e., arbitration—it is telling that Reynolds is careful to ignore this alleged "right" exists only in the Design Build Agreement between Developer and Tenant. Reynolds cannot site to any contract provision which it relies upon in its own right because it is not a party to any contract with an arbitration provision. Instead, Reynolds seeks to enforce the Developers' contract, acknowledging that but-for the claims against the Developer, USC's claims against Reynolds standing alone could not be compelled to arbitration. *See* (Return at p. 12) (conceding that Reynolds' ability to compel arbitration under the Developer contract is "inextricably intertwined" with the breach of contract claim USC plead against Developer). This is fatal to Reynolds's appeal because the trial court's ruling, right or wrong, [4] effects only Developer, not Reynolds. *Bivens,* 254 S.C. at 13, 173 S.E.2d at 152

[4] Reynolds incorrectly asserts that USC is arguing that because it "believes the circuit court was correct in its findings, it []follows that [] Reynolds" lacks standing. (Return at p. 13). This is simply a false characterization. *See supra.*

(confirming a party "cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interest of some other person"). To the extent that Reynolds might claim it is "effected" by the litigation Developer's rights, this does not create standing. *Powell v. Bank of Am.*, 379 S.C. 437, 446, 665 S.E.2d 237, 242 (Ct. App. 2008) (if a party's interest is merely "tangential" or "peripheral" this is insufficient).

In short, Reynolds make clear its ability to compel arbitration is <u>not</u> mutually exclusive of Developer's right. This is to say that Reynolds has no "personal" or individual right to compel arbitration in the event that Developer cannot compel USC to arbitration under the Design Build Agreement. Without having any of its own rights at stake, Reynolds simply lacks standing to pursue this appeal. *Id.* (finding that although a party may have a preference in how a court might rule, standing will not exist absent a "personal stake" which is more than a "nominal or technical interest."). Reynolds' present appeal is nothing more than an effort to enforce the rights of Developer. Thus, dismissal is proper.

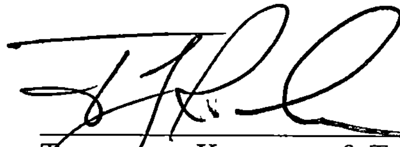
CONCLUSION

In conclusion, the law does not require a Respondent to challenge appellate standing before an appeal is initiated, nor does the law permit a party to pursue an appeal based only upon the alleged rights of another party—as Reynolds concedes is the case here. However, these being the only arguments Reynolds can muster, this Court should dismiss the instant appeal.[5]

---

[5] Reynolds additionally asserts that dismissal is not warranted because "standing to appeal" is distinct from "standing to succeed" on the merits. (Return at p. 9). This again is simply a false argument. *See Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447, 665 S.E.2d 237, 242 (Ct. App. 2008) ("[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)."). Finally, Reynolds argues that this court has jurisdiction to hear this appeal because it arises from the denial of a motion to compel arbitration. (Return at p. 10) To be clear, USC does not challenge this Court's subject matter jurisdiction to hear an appeal from the denial of a motion to compel arbitration, generally. Rather USC argues this particular matter is not appealable because Reynolds has no rights or interests at stake and is simply trying to piggy-back off its co-defendants and assert rights which do not belong to it.

Respectfully submitted,



THURMOND KIRCHNER & TIMBES, P.A.
Jesse Kirchner, SC Bar No. 70479
Michael A. Timbes, SC Bar No. 69730
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843-937-8000
Fax: 843-937-4200

-and-

ALFORD & THORESON, LLC
Gregory M. Alford (6932)
Post Office Drawer 8008
Hilton Head Island, SC 29938
T: 843-842-5500
E: Gregg@alfordlawsc.com

-and-

CAPELL LAW FIRM, LLC
Glynn L. Capell (16552)
Post Office Box 6628
Hilton Head Island, SC 29938
T: 843-689-4280
E:gcapell@capelllaw.com
All for the Respondent/Movant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

RECEIVED
OCT 29 2018
SC Court of Appeals

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.

AFFIDAVIT OF SERVICE

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

FOR APPELLANT UNIVERSITY HOUSING SERVICES, INC.
John L. McCants, Esquire
Rogers Lewis Jackson Mann and Quinn, LLC
P.O. Box 11803
Columbia, SC 29201
jmccants@rogerslewis.com

FOR APPELLANT HG REYNOLDS CO., INC.
Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, PA
P.O. Box 12129
Columbia, SC 29211
msb@swblaw.com
cem@swblaw.com

FOR MCELROY SPECIALTY INTERIORS, INC.
Emily R. Gifford, Esquire
Richardson Plowden & Robinson, PA
P.O. Drawer 7788
Columbia, SC 29201
egifford@richardsonplowden.com

FOR SOUTHERN WALL SYSTEMS, INC.
Jonathan G. Roquemore, Esquire
Hedrick Gardner Kincheloe & Garofalo, LLP
P.O. Box 11267
Columbia, SC 29211
jroquemore@hedrickgardner.com

FOR WILLIAM BELL, BELL SIDING AND ROOFING, WILLIAM BELL D/B/A BELL SIDING & ROOFING A/K/A BELL SIDING AND ROOFING, LLC, AND BELL SIDING AND ROOFING, LLC
W. Duffie Powers, Esquire
Carter R. Massingill, Esquire
Gallivan White & Boyd, PA
P.O. Box 10589
Greenville, SC 29603
dpowers@gwblawfirm.com
cmassingill@gwblawfirm.com

FOR TIM STEPHENS D/B/A SAN-GLO CAROLINA A/K/A SAN-GLO GLASS, INC.
Chris A. Majure, Esquire
Murphy & Grantland, PA
P.O. Box 6648
Columbia, SC 29260
cmajure@murphygrantland.com

FOR DEFENDANT CROFT HILL SIDING, INC.
Thomas F. Dougall, Esquire
William A. Collins, Jr., Esquire
Michal Kalwajtys, Esquire
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, SC 29405
tdougall@dougallfirm.com
wcollins@dougallfirm.com
mkalwajtys@dougallfirm.com

FOR DEFENDANT CROSBY BROADWATER
John E. Cuttino, Esquire
Gallivan White & Boyd
P.O. Box 7368
Columbia, SC 29202
jcuttino@gwblawfirm.com

ATTORNEYS FOR AIKEN, AIKEN BEAUCHAMP & SHEETZ ARCHITECTS, INC.
Kent T. Stair, Esquire
Paul E. Sperry, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
kstair@carlockcopeland.com
psperry@carlockcopeland.com

THURMOND KIRCHNER & TIMBES, P.A.

Moira K. McIntire
Paralegal to Michael A. Timbes & Thomas J. Rode

October 25, 2018
Charleston, South Carolina

15 Middle Atlantic Wharf
Charleston, SC 29401
o: 843.937.8000
f: 843.937.4200
www.TKTLawyers.com

October 25, 2018

RECEIVED
OCT 29 2018
SC Court of Appeals

VIA US MAIL
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 Respodent's Reply to H.G. Reynolds Company, Inc's Return to Motion to Dismiss Appeal. 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.

PRIORITY MAIL

PITNEY BOWES US POSTAGE $ 006.70⁰
02 1P 0001183577 OCT 25 2018
MAILED FROM ZIP CODE 29401

First Class Mail

THURMOND KIRCHNER & TIMBES, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF
CHARLESTON, SOUTH CAROLINA 29401

TO:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
OCT 29 2018
SC Court of Appeals