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Supreme Court of Texas.
CMH Homes, Inc., Vanderbilt Mortgage and Finance, Inc. and Bruce Robin Moore, Jr.
v.
Adam Perez.
No. 10-0688.

February 3, 2011.

Appearances:

Scott A. Brister of Andrews Kurth, LLP, for Petitioners.

Brendan McBride of McBride Law Firm, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The court is ready to hear argument in 10 matter 688, CMH Homes v. Adam Perez.

MARSHAL: May it please the court, Mr. Brister will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF SCOTT A. BRISTER ON BEHALF OF THE PETITIONER

ATTORNEY SCOTT BRISTER: May it please the court, I will be giving the arguments on behalf of my clients, Clayton Entities, as well as Mr. Ramirez and my client, Mr. Moore. This court doesn't often invite the legislature to pass laws and when it does, the legislature doesn't often accept. One immediately comes to mind, the use of tangible property in the Texas Tort Claims Act, which 50 years later has never been accepted, but this is one of those, this case involves one of those rare occasions where the planets lined up. The court asks the legislature to act and the legislature did act. It took 17 years, but in 2009 passed the statute involved in this case. And the question presented in this case is whether when that happens on those few occasions, should the courts take a narrow view of the result [inaudible] that it doesn't apply, trying to narrow it, trying to avoid the result,

because that was the approach that the 4th Court of Appeals took in this case. Civil Practice and Remedies Code Section 51.016 providing for appeal of orders under the Federal Arbitration Act has three requirements. The clause has to be governed by the Federal Arbitration Act and this clause specifically says that it is. It is an entered interlocutory order from a state district court or a state court and this is in an interlocutory order from the district court in Duval County and then the third requirements, the ones at issue, that you can get an interlocutory appeal from that order. If a Federal court's order would be, if an interlocutory appeal of a Federal court's order would be permitted by Section 16 of the Federal Arbitration Act, the FAA. As we pointed out in the 4th Court, at least four Federal circuit courts have permitted appeals of an order like this.

JUSTICE EVA M. GUZMAN: Were there, were there--

CHIEF JUSTICE WALLACE B. JEFFERSON: [inaudible] final orders?

ATTORNEY SCOTT BRISTER: There's nothing in--

CHIEF JUSTICE WALLACE B. JEFFERSON: Dismissing the cases. Those are final, many of those are final so they dispose of everything and an appeal makes sense.

ATTORNEY SCOTT BRISTER: The four that we point to don't say that. That's just a guess. They might be. They might not be. The interesting thing is two of them specifically say that certain peripheral parties were dismissed, but they don't say that the appeal was dismissed or they don't say that the party that brought the appeal to the circuit court was dismissed.

JUSTICE DAVID M. MEDINA: Does it matter that the judge appointed the arbitrator in this case?

ATTORNEY SCOTT BRISTER: It does. That's, to me, what makes this different from other interlocutory orders. This court, for instance--

JUSTICE DALE WAINWRIGHT: Counsel, I'm sorry. Before you go down that route, cane we finish the question about the final decision. Pulling the district court orders in these cases, the cases we're talking about are Federal Court of Appeals' opinions. The district court opinion in WellPoint says the clerk of the court is directed to enter a final judgment in favor of WellPoint. In National American, the district court memo says the clerk of the court is directed to terminate this case because no additional issues remain.

ATTORNEY SCOTT BRISTER: I'm sorry. That's in the opinion or the?

JUSTICE DALE WAINWRIGHT: That's in the district court opinion, the memo opinion. In ACEquip, the district court says nothing remains for this court and judgments having been entered above, the case is hereby closed without prejudice. So the district court opinions, although you're right, hard to tell from the Federal Court of Appeals' opinions, but in the district court opinions, it looked like those were final decisions on the arbitrations.

ATTORNEY SCOTT BRISTER: Well, we're not relying on WellPoint. WellPoint was after a final judgment. One of them, of course, was a stay, specifically says it was a stay and I'd have--

JUSTICE DALE WAINWRIGHT: Universal, which was decided some five to seven years before the federal statute that we're talking about so maybe--

ATTORNEY SCOTT BRISTER: No, it was decided. The statute was '88. It was decided five years after the statute. It would have been decided before in Green Tree.

JUSTICE DALE WAINWRIGHT: I'm sorry. That was ATSA, which was decided in 1983, which was before

the federal statute was decided, right?

ATTORNEY SCOTT BRISTER: Right. Right.

JUSTICE DALE WAINWRIGHT: So if it's the case that the three Federal Court of Appeals' opinions were, in fact, acting on final decisions, then is there federal court support for your position?

ATTORNEY SCOTT BRISTER: First of all, I point out that's not true of all of them. You mentioned, I think would be only true of two and I'd have to back in the district court opinions, though I thought we had done that to make sure, but the point is what does a court look to when the statute doesn't say? And one of the things you look to is how courts are treating it. Assuming no court had ever treated it, what would the court do? Well, you'd have to look at other rules of contract construction. The reason we looked, pointed out to the four federal courts is because those are cases where the appeals courts did permit such an appeal and didn't say anything about whether it had to be final or not even after Green Tree. But those are the only thing you would look to. You would also then, you could look to what's the purpose of the statute and that is where, I think, where this kind of order is different from others because this is an order where the judge says I appreciate you all's contract and you've got it going to arbitration. It says Triple A or whoever's going to pick the arbitrator, but that's not what we're going to do. I've got a former judge friend of mine who needs some business and I'm going to send the case there. That is not compelling the arbitration agreement. That's just sending parties to arbitration because the judge wants to do it.

JUSTICE EVA M. GUZMAN: Is your issue that, I guess there was a six-day interval between [inaudible] or someone else that was suggested.

ATTORNEY SCOTT BRISTER: In the Houston case?

JUSTICE EVA M. GUZMAN: So your issue it was six days?

ATTORNEY SCOTT BRISTER: I'm sorry?

JUSTICE EVA M. GUZMAN: Six days and then he said well, we can't agree. There's an impasse. I mean do you have to wait longer or how do you---

ATTORNEY SCOTT BRISTER: Well the impasse cases in federal court, I think, almost always go five or six months and there's just not that many of them and if you think about this clause, this clause, there's, why do all finance companies use this clause throughout the United States? Well, think about the way it works. The clause says that it's going to be one arbitrator selected by the seller, the finance company, the seller of in this case a manufactured home with the buyer's consent. Well, in the case where the consumer sues their finance company as here, who has a reason to drag their feet? You would think the finance company does. Well, the clause puts the burden on the finance company to be the one to select and present some nominees. Now in that case, if the consumer wants to drag their feet, who does that hurt? It's their claim. So this is designed so that the party that proposes nominees has to, is the one who you would think would drag their feet and the party who wants to get this claim decided does that. If you can ignore that, if you can drag your feet for a couple of weeks and then, of course, if you're the consumer, you pick to the court where you filed the case and you go to the judge and so presumably you've picked a court where you think the judge doesn't like arbitration that much and so you can drag your feet for a couple of weeks. The judge appoints somebody friendly and that causes a big problem. That's why this case is important. That's why we're here. If you, so then what do you do if I concede there are a number of cases from this court saying interlocutory appeals statutes are going to be strictly or narrowly construed. But there's also a situation where if the legislature passes a remedial statute, we'd broadly construe it. So what should the rule be when a remedial statute is intended to broaden an interlocutory appeal? It seems to me the answer is if the purpose of the statute was to broaden interlocutory appeals, that's what you have to do. You don't look at for ways, well maybe these weren't final orders in these. Maybe these weren't this and weren't that.

That can't be the right approach with remedial rules.

CHIEF JUSTICE WALLACE B. JEFFERSON: But even if you broadly construe it under Section 16 and I'm going to simplify this a little bit just for my purposes, an orders appeal both generally it precludes arbitration that the order eases arbitration then there is no appeal. So you've got if it directs arbitration to proceed or compels arbitration or refuses to enjoin arbitration, there's no appeal in those circumstances. If it denies arbitration, if it denies an application to compel arbitration, if the complaints are about the result of a completed arbitration, appeal is allowed. Now it seems like this is, even if it's completely improper, the trial court's selection of the arbitrator, one thing we know is arbitration is going to proceed so would this be more like the category of directing an arbitration to proceed in which there is no appeal than the latter?

ATTORNEY SCOTT BRISTER: For several reasons, as we argued in our brief, we think the order, allowing appeal here would be pro arbitration. Number one, it's arbitration picked by the parties. As this court said In re Louisiana Pacific, one of the central purposes of arbitration is you get to pick your arbitrator. Some would say it's also a central purpose of litigation. That's why there's forum shopping. People like to pick their judge. But one of the central purposes is to get to pick your arbitrator. And the lapse provision means you don't get to do that. It means the judge just sets it aside. That's why this court said one should lean against doing that. And, in fact, this is something that partly because of In re Louisiana Pacific has not come up again. That was a 1998 case. Judges apparently don't do this often, but if this court says well you can do that and we'll take it up at the end, then you're going to see more of it. Now the WellPoint, the reason we discussed WellPoint even though it was after arbitration, this was taken up after arbitration and the 7th Circuit said this is something that should have been taken up before the arbitration. In this case, if the judge completely disregards the method of selecting an arbitrator, then it is more inefficient to go through an arbitration and at the end of the arbitration set it aside and start all over again. And as I indicated, I think as far as what gets people to arbitration the fastest. A rule that says for awhile at least you can get by with a hand-picked arbitrator. It's not going to be the way to do that.

JUSTICE DON R. WILLETT: Which category of Section 16(a) does this order more neatly fall under.

ATTORNEY SCOTT BRISTER: Well it doesn't fall into any of them and it's not expressly listed in 16(a) or 16 (b) and that, of course, as we pointed out in our brief, the interesting thing about the 4th Court's opinion is it says Section 16 says as follows and then it quotes (a) but not (b). (a) says the following orders are appealable and one could assume from that the expresio unius rule. Well, if it's not appealable, it must not be. But what if the 4th Court had just quoted paragraph (b) and that's a list of orders that aren't appealable and we're not in that list either. So one would assume, by the same argument, that this must be appealable because it's not in that one. That's why that rule of, there's a lot of rules of construction for statutes, but that one doesn't work here because it points both ways. We're not in either list. So what do courts do when it's not in either? Well, you're going to have to use some other rules of statutory construction. Now the main one this court has used in interlocutory appeals statutes is as the court said in Surgitek, we're going to take a functional approach and not a formalistic approach. That was the case where you could multi-plaintiffs and one plaintiff has jurisdiction to sue and so a bunch from outside the venue come in and join in and sue and the statute says you can appeal or take an interlocutory appeal from an order allowing intervention or joinder. So somebody took, the judge didn't allow joinder and transferred venue on all the other plaintiffs that were trying to come in and somebody took an appeal from the order transferring venue. Well that's not specifically listed, but that's the function. It was, the reason venue was transferred was because joinder wasn't allowed. Same thing on the plea to the jurisdiction by a government entity. The court's well, this motion that you're appealing doesn't say plea to the jurisdiction on the top. It says motion for summary judgment and the court took a functional approach and said, but it has the same function as a plea to the jurisdiction would. And so our argument is on a functional approach, what was the purpose, what was the legislature trying to do? This court asked the legislature move all these mandamus cases of FAA orders to interlocutory appeal.

JUSTICE DEBRA H. LEHRMANN: Do you envision problems if we do that, if we treat this as mandamus?

ATTORNEY SCOTT BRISTER: On our alternate ground of treating as mandamus, no because it's a discretionary call for the court. It's like people sometimes say well won't the Texas Supreme Court be flooded with cases? The Texas Supreme Court is never flooded with cases because you can deny the petition and won't the courts be flooded with? Sure, they may be flooded with demands, but you don't have to do it. The rule is in federal court, you switch from mandamus, treat a mandamus as an interlocutory appeal or vice versa when you feel like it's the right thing to do. Now I concede a lot of those cases are involved pro se's rather than appellate specialists like myself, but, as the court has said before, there can't be two sets of rules, a strict one for lawyers and a lenient one for pro se's. If the purpose of this case, the purpose of the statute was to stop dual proceedings. Nobody contests that. And what the 4th Court was saying and part of the reason, of course, to switch from is because on a mandamus, the court doesn't have to write an opinion. So we can look at this and we can see why the 4th Court thought we didn't get an interlocutory appeal, but how about mandamus. One sentence--we're not going to do it. That is one of the reasons to switch to interlocutory appeals.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel. The court is ready to hear argument from the Respondent.

MARSHAL: May it please the court, Mr. McBride will present argument for the Respondent.

ORAL ARGUMENT OF BRENDAN MCBRIDE ON BEHALF OF THE RESPONDENT

ATTORNEY BRENDAN MC BRIDE: Good morning, may it please the court, CMH is asking the court to do one of either of two things, both of which would be a radical departure from existing law and greatly expand the scope of appellate jurisdiction in the state of Texas in ways that just aren't permitted. It's not often I get to describe a procedural jurisdictional issue as relatively simple and I do so hesitatingly, but this one's actually fairly simple. Section 51.016 allows an appeal of an arbitration order subject to the FAA to the extent that it would be permitted as an interlocutory appeal by 9 USC, Section 16. CMH, as you just heard their Counsel argue, they concede that nothing in Section 16 permits this kind of interlocutory appeal. There's no expressed language in that statute that would authorize an interlocutory appeal.

JUSTICE DALE WAINWRIGHT: And none that precludes it?

ATTORNEY BRENDAN MC BRIDE: Pardon?

JUSTICE DALE WAINWRIGHT: And none that precludes it?

ATTORNEY BRENDAN MC BRIDE: Correct.

JUSTICE DON R. WILLETT: So you agree that this order falls under neither 16(a) or 16(b)?

ATTORNEY BRENDAN MC BRIDE: Actually, I would argue that it probably falls under 16(b) to the extent that this is an order compelling a case to arbitration. Yes. The closest thing in that list to what this order is is in 16(b). But that--

JUSTICE DALE WAINWRIGHT You think the order at issue was an order compelling arbitration?

ATTORNEY BRENDAN MC BRIDE: Yeah, it was an order granting a motion to compel arbitration and then naming your arbitrator. It also resolved an impasse under Section 5 of the FAA, but it is principally an order granting a motion to compel arbitration which is actually what was filed. So the way the argument goes is that well, in the absence of any expressed language allowing interlocutory appeal, you can assume that federal courts are interpreting this statute, 9 USC Section 16, to allow an interlocutory appeal because they've been rul-

ing on this issue and this is where it gets actually fairly simple. This argument ignores the obvious and that is that none of those four opinions that are cited by the Petitioner involve final orders or involve interlocutory appeals under Section 16 of the FAA, not one of them. As Justice Wainwright already pointed out two of those cases, the only two that postdate Green Tree involved final decisions on the merits in the district court. The cases were dismissed. The ATSA opinion predates the statute entirely though I agree that is the only one where it's clearly treated as thought it were a stay order. That leaves to paraphrase Agatha Christie, and then there was one and that case is the Universal Reinsurance case from 1994 and what's interesting about that case is of the four, this is the only one that actually even mentions anything about Section 16 or jurisdiction for that matter. And what it says is "that Section 16(a)(3) authorizes review of a final decision with respect to an arbitration and the language a final decision does come out of Section 16. The date on this opinion is 1994. In the Green Tree opinion, which is after this, the United States Supreme Court clarified that there's not a loosey-goosey concept of what constitutes a final decision for purposes of Section 16. What they said is that when, essentially what happens in the federal system is if a district court, and it happens in the state system as well, when a district court compels a case to arbitration, it can do one of two things. It can either stay the case on its docket in whole or in part or it can say this is all going to arbitration. I'm dismissing the case off my docket. The case is over as far as I'm concerned, closed. The United States Supreme Court said that the former, or excuse me, the latter where it operates with a dismissal is a final decision and so you can have an appeal of the arbitration order because it is a final decision on the merits in the case, but they said in a footnote, "had the district court entered a stay instead of a dismissal in this case, that order would not be appealable." That footnote has been cited by virtually every federal circuit court since Green Tree came down to explain that absent a final dismissal order or final judgment from the district court, there is no interlocutory appellate jurisdiction for other arbitration-related appeals. So going back--

JUSTICE DEBRA H. LEHRMANN: Let me ask you, with regard to the issue of treating this as mandamus, I mean, don't we regularly do that? Don't we regularly treat improperly styled petitions for review as petitions for mandamus? Don't we regularly support substance over form?

ATTORNEY BRENDAN MC BRIDE: I wouldn't say that it's regularly been done. It's only been done in instances where some kind of instrument was filed properly invoking a court's jurisdiction and that was the case in all the cases that Justice Brister cites. I think it's more important to recognize two principles about that. Number one, this court has specifically addressed that very issue not once but twice. It addressed it in Anglin and it addressed it in D. Wilson Construction, and in both instances, the Court had before it this very issue. Are we going to require appellate practitioners in this state to pursue parallel proceedings where there's potentially split review jurisdiction? And the Court for 20 years has required the whole appellate bar to do exactly that. If it were the case that we could just disregard--

JUSTICE NATHAN L. HECHT: But we didn't say that we wouldn't treat a petition for review as a petition for mandamus. We just said they had to be parallel, but we didn't say you have to file two pieces of paper.

ATTORNEY BRENDAN MC BRIDE: Well actually it did say you'd have to file two pieces of paper because if you were going to treat one as either, then you wouldn't need to do that.

JUSTICE NATHAN L. HECHT: And so if the case says if those two cases do not say you cannot treat a petition for review as a petition for mandamus, then where is your argument?

ATTORNEY BRENDAN MC BRIDE: Well, I think that they do. When those two cases say that the court does not have authority from the legislature to expand it's jurisdiction to deal with.

JUSTICE NATHAN L. HECHT: It's appellate jurisdiction.

ATTORNEY BRENDAN MC BRIDE: Appellate jurisdiction.

JUSTICE NATHAN L. HECHT: It doesn't say you can't treat petition for review as a petition for mandamus. It just doesn't say that does it or does it?

JUSTICE DALE WAINWRIGHT: In Powell v. Stover in 2005, we did exactly that. Footnote 1, we treated a petition for review as a petition for writ of mandamus.

ATTORNEY BRENDAN MC BRIDE: Based on the relief requested though. It was styled as one, but the relief requested was for the other because it was an appeal. I think it went up on a--
JUSTICE DALE WAINWRIGHT: But the document filed was a petition for review.

ATTORNEY BRENDAN MC BRIDE: Styled as a petition for mandamus, I agree with that yeah.

JUSTICE DALE WAINWRIGHT: So we've done it.

ATTORNEY BRENDAN MC BRIDE: But the relief requested invoked the Court's jurisdiction. So here the problem is is that there isn't jurisdiction for an interlocutory appeal so there was nothing in front of the Court of Appeals to hook any jurisdiction. It essentially it's bootstrapping its jurisdiction through an instrument that did n't invoke it's jurisdiction in the first place and then treating it as another one and I would--

JUSTICE NATHAN L. HECHT: But in your view then, CMH Homes could go back and start over and file a petition for mandamus.

ATTORNEY BRENDAN MC BRIDE: The issue is not really before the Court. There may be some diligence issues. I think it's a fair question why they didn't started it with a mandamus in the first place.

JUSTICE NATHAN L. HECHT: If it weren't a diligence issue, they could?

ATTORNEY BRENDAN MC BRIDE: Potentially, sure.

JUSTICE NATHAN L. HECHT: And does Louisiana Pacific require that it be granted?

ATTORNEY BRENDAN MC BRIDE: That's kind of debatable. I've thought about that and it's an older opin ion and there's been a lot of jurisprudence both from this Court and the lower courts in the, in the--

JUSTICE NATHAN L. HECHT: If it's right, does it require that it be granted?

ATTORNEY BRENDAN MC BRIDE: If that rule isn't changed, then possibly yeah.

JUSTICE NATHAN L. HECHT: And so--

ATTORNEY BRENDAN MC BRIDE: Well, it depends on the facts, of course, but none of that's been developed for this Court because it wasn't ruled on in the Court of Appeals.

JUSTICE NATHAN L. HECHT: With respect to the question of does this impede or promote arbitration, doen't Louisiana Pacific basically say that naming an arbitrator improperly impedes arbitration because you have no adequate remedy by appeal?

ATTORNEY BRENDAN MC BRIDE: It does say that, but that's also true of impeding the rights of litigants who have to go through an arbitration who claim that they aren't even subject to arbitration. I think what's happened in the mandamus jurisdiction in the meantime is there's been a lot of cases that have said we're not going to give mandamus review of claims challenging an order granting arbitration by parties who don't think they should be in arbitration at all. I don't know intellectually you can balance a rule that says that a party who agrees

they're supposed to be in arbitration, but doesn't like the trial court's selection of the arbitrator gets an immediate review and a party who says I shouldn't be in arbitration at all doesn't, but that is a question I think that remains unresolved in terms of the age of that opinion and where we are with our mandamus jurisdiction, but nevertheless this isn't a mandamus case.

JUSTICE DALE WAINWRIGHT: It's only a 1998 opinion.

ATTORNEY BRENDAN MC BRIDE: Oh I agree.

JUSTICE DALE WAINWRIGHT: I mean at what point do our opinions age out?

ATTORNEY BRENDAN MC BRIDE: Well, I think they age out when there are potentially conflicting rules that are being developed and they have to be resolved. I'm not saying that I disagree with it. The court may, it's your prerogative. You can come in and say yeah, we got it right then and we're right now. We are going to split that rule and say that some people can and some people can't, sure.

JUSTICE NATHAN L. HECHT: Let me understand, I want to understand your position on the statute. If Louisiana Pacific remains good law, then your view of it would be that despite the recent legislation 51.016, in this particular instance, parties still have to file a petition for mandamus.

ATTORNEY BRENDAN MC BRIDE: Right, but that's the key. There's no parallel proceedings anymore because 51.016 wouldn't authorize an interlocutory appeal either under the TAA or the FAA. First of all, by its own language, it only applies to arbitration under the FAA so it would not authorize under an interlocutory appeal under the TAA and nothing in the TAA authorizes an interlocutory appeal of an order resolving an impasse on an arbitrator selection dispute so there's never going to be an interlocutory appeal of this issue. There can only be mandamus, which means consistent with the purposes of the legislature in passing 51.016.

CHIEF JUSTICE WALLACE B. JEFFERSON: So these are very interesting distinctions, all of these are and jurisdiction we have to take seriously, but what concerns me is okay, let's say an appeal was not proper and let's say we are not going to treat this as a mandamus, then the next step is okay, CMH Homes go file mandamus and we will see if reversing our issues are there or not, but assuming they're not, then this question comes back again, then we can deal with it. Why don't we just find a way to deal with it now? And so the question is under Louisiana Pacific and other cases, does it make sense not to enforce the parties' agreement on arbitration when there's a policy to go toward arbitration [inaudible]?

ATTORNEY BRENDAN MC BRIDE: Well actually the issue is whether or not the trial court abuses discretion in determining whether there's impasse.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, yeah, but I'm saying let's say the trial court did, why shouldn't we decide that now and then get it back to the parties to arbitrate according to the contract?
ATTORNEY BRENDAN MC BRIDE: Well this court's jurisdiction has only been invoked for the limited purpose of revealing the lower court's decision about its own interlocutory appellate jurisdiction.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, so we dismiss everything. We don't treat it as mandamus. It goes back down. It comes back up. Then we're eight months down the road, we're here again, same question. Different procedural context, but the substantive question is the same. You will have wasted your money and they will have wasted their money to get the answer to this question.

ATTORNEY BRENDAN MC BRIDE: In both Anglin and in D. Wilson, the Court bemoaned the fact that sometimes when you're properly following jurisdiction, it's going to cost a little bit more money, but I have a sign on the door to my office that says procedure is power and no place is that more nonmetaphorically true than when it comes to a court's jurisdiction. Unfortunately, that isn't something that we can play loosely with.

JUSTICE DALE WAINWRIGHT: But don't you agree that the legislature in Chapter 51 tried to address this problem?

ATTORNEY BRENDAN MC BRIDE: Yes and no. I strongly disagree with the characterization of 51.016 intending to move all the mandamus on FAA into the realm of interlocutory appeal. That is not the problem they were trying to address. They were trying to address, as this Court's invitation in both Anglin and D. Wilson extended to them said, in fact they tracked the invitation in the statute. They were trying to get rid of the problem of parallel proceedings and that's what I was getting at before. It's actually the Court of Appeals' decision in this case eliminates any possibility of parallel proceedings. There can't ever be an interlocutory appeal of a Section 5 order because it's not allowed under the TAA and it's not allowed under the FAA. It can only be by mandamus. It's axiomatic there can't be a parallel proceeding, but on the flipside and this is really critically important to understand in light of the purposes of 51.016. If you say that 51.016 folds in an interlocutory appeal by interpreting Section 16 to allow it only for FAA, guess what? Now we now have a Section 5 dispute and it might be under the TAA and it might be under the FAA. Guess what I have to do? I got to file a petition for writ of mandamus and I got to file an interlocutory appeal. So it's actually only CMH's position that feeds the expressed purpose and clear purpose of the statute which is not to move everything from mandamus to interlocutory appeal. It is to do away with the burdensome procedure of parallel proceedings.

CHIEF JUSTICE WALLACE B. JEFFERSON: Now you said we can't reach the question of impasse, I understand that, but why is this an impasse, the six days and why is the trial court--

ATTORNEY BRENDAN MC BRIDE: It was several months actually.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why does the trial court to pick the arbitrator?

ATTORNEY BRENDAN MC BRIDE: Because under Section 5 of the Federal Arbitration Act, when the parties reach an impasse and it's a provision of a contract that requires essentially mutual consent, which this does. You can dress it up as who gets to choose first, but everybody has to agree to it. If they can't use their contractual process to decide who their arbitrator's going to be under Section 5 of the FAA, the trial court resolves that impasse. So really the question that would be resolved and I think the record supports what the trial court did is whether or not there was under the mandamus standard a clear abuse of discretion in determining that there was an impasse on the record evidence that was before the trial court. Now that raises another problem with this whole idea of treating an interlocutory appeal and a mandamus as though they were the same thing. For starters, the standard of review is different. It's a clear abuse of discretion for mandamus relief, which is considered extraordinary relief and is a narrower constraint on the ability of the appellate court to intervene in an ongoing jurisdictional matter that's still before the trial court compared to an appellate jurisdiction. I'd also add that it creates potentially untold chaos for the poor appellate bar who doesn't know until the appeal's over which rules they're even practicing under because original proceedings are governed by Rule 52 and they have different requirements. The record is put together in a different way. It's supplemented in a different way. The deadlines for response briefing are different. It's not clear whether you would have to file a response without an invitation, which is the case in a mandamus typically, but not on an interlocutory appeal. There's a separate deadline for when the court's jurisdiction would be invoked on mandamus versus interlocutory appeal and you know how appellate lawyers are. We like to know what rules we're practicing under and we get real edgy when we don't and all that's going to do is cause confusion. There's just no workable way to say that you can file either one and then we'll decide later which we think it ought to have been.

JUSTICE DALE WAINWRIGHT: You mentioned Section 16 of the Federal Act subsection (b)3. It says an appeal may not be taken from an interlocutory order and subsection 3 says compelling arbitration under Section 206 of this title. 206 has an interesting segment in it. At the end, it says such court may also appoint arbitrators in accordance with the provisions of the agreement. What's the implication or the impact of that statement in

206? Have you thought about that?

ATTORNEY BRENDAN MC BRIDE: A little bit and I think what they mean there is where there's a contractually agreed selection process, it's supposed to follow the selection process. Once that process breaks down or becomes unworkable like in the case of an impasse, then you switch actually to Section 5, which specifically deals with that particular problem. So, yeah, it means that pursuant to the way they agreed to select their arbitrator, that's what the court should follow. However, once that breaks down or if it's not workable and there are sometimes there are situations where they agreed on one arbitrator in particular and he can't do the case, he won't do the case or he's dead. So then who's our arbitrator because we can't follow our contractual agreement. That then switches over to Section 5, which allows the court to resolve those kinds of problems for the parties.

JUSTICE DALE WAINWRIGHT: I was thinking more in terms of the impact on jurisdiction. I know it has something to do with the trial court's authority.

ATTORNEY BRENDAN MC BRIDE: Oh I haven't really thought about it in terms of jurisdiction. I think it still doesn't authorize an appeal specifically of a Section 5 order appointing the arbitrator. This is still within the scope of Section 16's prohibition, I think, on---

CHIEF JUSTICE WALLACE B. JEFFERSON: You mentioned it was six months, but there was a hearing and then there was an agreement on a particular person that Mr. Ramirez and then it was determined that he had a conflict or something or--

ATTORNEY BRENDAN MC BRIDE: I disagree with that characterization.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah.

ATTORNEY BRENDAN MC BRIDE: That's the Petitioner's characterization of what happened and I didn't get into that in much detail because I don't really think that's the issue before the court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Actually, I think I'm thinking of a parallel case.

ATTORNEY BRENDAN MC BRIDE: Yeah and it wasn't six months. It was several months. It was two or three months.

JUSTICE EVA M. GUZMAN: But the rejection of the initial set of nominees occurred within six days, January 27th they were proposed. February 2nd, there was notice that there's an impasse and then several months later, the trial court appoints.

ATTORNEY BRENDAN MC BRIDE: Yeah, there was back and forth on several proposed arbitrators both directions over the course of two or three months. They finally had a hearing on it after exchanging several attempts to try to do it and they at the beginning of that hearing, tentatively reached an agreement to I think it was [inaudible], but then as it went on, it came out that there was actually a financial relationship between the plaintiff's Counsel and Mr. Ramos and then unless that was completely waived, that the plaintiff wasn't going to consent to that because of the possibility that you end up with a one-sided right to contest the arbitration because there's not a complete waiver. They couldn't agree on the complete waiver so that agreement fell through. By then, the parties had mutually proposed I think eight different arbitrators that they couldn't agree on. That was all in front of the trial court at that point. Importantly, it was actually CMH that initially notified the trial court that the parties could not agree on Mr. Ramos and asked the trial court. It was CMH that did it. Asked the trial court to appoint Mr. Ramos as the arbitrator with the plaintiff's consent. So given that record, sure, it was certainly well within the trial court's discretion to decide that the parties were at an impasse at that point. In fact, both of them were asking the trial court to appoint their arbitrator without the other side's consent, but again not really an issue before this Court because of the jurisdictional question. I think neither of the types of relief that

are being requested are things that the Court could do without flying in the face of the existing jurisprudence. I think to presume that an interlocutory appellate jurisdiction is granted because the statute is silent on the issue is contrary to a lot of existing law. To allow the Court of Appeals or to direct the Court of Appeals to treat an interlocutory appeal as a mandamus petition, where the court doesn't have jurisdiction over the interlocutory appeal to begin with and nobody's filed a mandamus petition or any other original proceeding is rife with problems and is certainly contrary to what this Court, I think pretty fairly clearly intended when it's been requiring the appellate bar for 20 years to file parallel proceedings.

JUSTICE DALE WAINWRIGHT: You would agree where the federal statute does not include the [inaudible] at issue here either that you can or you can't sections that we should follow federal courts generally?

ATTORNEY BRENDAN MC BRIDE: It's not expressly included, I agree. The closest thing on the list is order compelling arbitration.

JUSTICE DALE WAINWRIGHT: We should try to follow federal court adjudications or interpretations of that statute.

ATTORNEY BRENDAN MC BRIDE: I think you could look to the federal court interpretations of that statute and I think that the only one that's been put in front of the court is actually Green Tree.

JUSTICE DALE WAINWRIGHT: But there's none going your way.

ATTORNEY BRENDAN MC BRIDE: Pardon?

JUSTICE DALE WAINWRIGHT: There's none that say you can't.

ATTORNEY BRENDAN MC BRIDE: I think Green Tree says you can't. It's not specific to Section 5, but it's specific to an order for which there's been no final decision and this is critical because in the absence, they're the ones that have to prove the jurisdiction for the appeal. So you look at the statute it doesn't--I'm sorry, go ahead.

JUSTICE EVA M. GUZMAN: They did have an alternate request for relief to treat it as a mandamus so they filed an interlocutory appeal and also called it a mandamus by asking that it be treated as such. So when you say the only thing before the court was an interlocutory appeal, if you consider their request to treat it as a mandamus and decide to treat it as a mandamus, then there's a mandamus before the court, no?

ATTORNEY BRENDAN MC BRIDE: Except that it didn't comply with any of the rule 52 requirements for a mandamus so that's the problem with doing that is what rules are we practicing under then. Is a response due to that and how does that fold in with the brief and those parallel proceedings over those years, we always knew because they typically would get consolidated.

JUSTICE EVA M. GUZMAN: But they denied on the basis that it failed to comply with the rule, but nonetheless the court had jurisdiction to entertain what the reported via mandamus eight years on the Court of Appeals, they came in that way all the time without verification, etc., etc.

ATTORNEY BRENDAN MC BRIDE: If I may--

JUSTICE EVA M. GUZMAN: --and they denied, but we didn't have jurisdiction.

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer.

ATTORNEY BRENDAN MC BRIDE: I see my time is up, but may I briefly respond to that?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer the question.

ATTORNEY BRENDAN MC BRIDE: Potentially sure, but then it kind of begs the question why the Court didn't do that for the 20 years in between Jack Anglin and D. Wilson because you could have said the same thing then just instead of filing this, instead of inviting the legislature to pass the statute and to avoid all this extra expense, why don't you just file one instrument and call it both and then we'll just decide at the end of the appeal which one it should have been.

JUSTICE DALE WAINWRIGHT: Or ask the legislature again to fix it?

ATTORNEY BRENDAN MC BRIDE: There's nothing to fix now because there's no parallel proceeding requirements.

JUSTICE DALE WAINWRIGHT: It depends on your perspective I suppose?

ATTORNEY BRENDAN MC BRIDE: Well, yes, but under 51.016, and the Court of Appeals' approach to this, there isn't going to be a mandamus parallel proceedings at least not on this issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions.

ATTORNEY BRENDAN MC BRIDE: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF SCOTT A. BRISTER ON BEHALF OF PETITIONER

JUSTICE DEBRA H. LEHRMANN: Justice Brister, may I ask you, how do you respond to Mr. McBride's argument that if we treat this as a mandamus, this is going to create havoc for the appellate bar?

ATTORNEY SCOTT BRISTER: Well, if that's so, the appellate bar is confused and in havoc over nothing. The page limits are exactly the same. The standard of review is exactly the same. The standard of review on an interlocutory appeal from this order since there's facts involved and whether there's been a lapse is going to be abuse of discretion. Now some people say there's a big difference between abuse of discretion and clear abuse of discretion, but I've never had anybody successfully explain what that difference is to me. And the time limits, yes, it's true, interlocutory appeal your time limits are much shorter. There is no specific time limit for mandamus, but we filed ours. If you file it in time for an interlocutory appeal, surely it's in time for mandamus. So let me clear up just a couple of things quickly. It wasn't two or three months. It wasn't several months. It was one month from start to finish. There is no federal case that's ever allowed somebody declare a lapse that fast. Worse, look at what the 4th Court. You can look at these lapse cases in the federal court and what they never do is declare a lapse and then turn to one of the parties and say who would you like me to appoint for arbitrator? Which is what happened here. Yes, when there's a lapse, they get, sometimes the federal courts get suggestions from both sides, sometimes they say pick somebody off a court-approved list. They never turn to one of the parties and say oh, well I see. The plaintiff would like this person. So that's who I'm going to appoint. If you tell people they can do that, everybody will do it. On the four, yes, there may be things in the four Court of Appeals circuit cases we point to. Not stated in the opinion, but where is the circuit cases saying you can't? That appeal is not permitted from these. There are none. They've not put any of those. Nobody cited one and there's no question if anything that's not listed in 16(a) or 16(b) is appealed, you're going to have to file dual proceedings. What would have happened if we had filed a petition for mandamus here? The otherwise side would have said dismiss it because you have an adequate remedy by appeal, the interlocutory appeal. So unless you file both, they're always going to say the other one was the one you should have filed. This Court, why did this Court, this Court specifically asked the legislature, this is in Anglin. We urged the legislature to commend the Texas Act to

admit interlocutory appeals of orders issues pursuant to the Federal Act. Such a procedure already available would be preferable to the reliance on the writ of mandamus. By my count, there are 48 cases where this Court has granted mandamus of Federal Arbitration Act orders, 48. 46 of them have to do with denying a motion to compel arbitration. The other two are In re Poly-America about an unconscionable arbitration act and In re Louisiana Pacific, what the plaintiffs are arguing is when this court invited to switch from mandamus to interlocutory appeal, it meant some of them, but not all of them and there's nothing in the statute to indicate that's the case.

JUSTICE DON R. WILLETT: How does this not fall under, Mr. McBride says it falls under 16(b), one of a couple of provisions and either directing it to proceed or compelling it and you say what?

ATTORNEY SCOTT BRISTER: Read the order. There's one line in the order, accordingly it is hereby ordered adjuded and decreed that Gilberto Hinajosa shall serve as the arbitrator to hear this matter period. There's no reason to compel, there was no reason to compel arbitration because we were agreed to arbitration. That's why we sent the name of three arbitrators. I don't think a judge could immunize an order by putting in oh, also, I'm going to, I mean, what if I put in a temporary injunction order. Also I'm going to compel arbitration. Oh, can't review it now because this Court takes a functional approach. You look to what was the purpose of the order. What did the order do?

JUSTICE DON R. WILLETT: But the function of naming the arbitrator isn't the same as directing the parties to go to that arbitrator for arbitration.

ATTORNEY SCOTT BRISTER: Yeah, our position is when you name an arbitrator that's not listed, some arbitration agreements say the judge gets to pick an arbitrator, not many, that would be. But when you name one that's contrary to the method for selection set down in there, that is setting an arbitration agreement aside. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes arguments for this morning. The Marshal will adjourn the Court.

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