THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No: 2012-CP-46-2692
Appellate Case No: 2012-213352

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook,.....Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence,.....Appellants.

RESPONDENT'S INITIAL BRIEF

Richard A. Harpootlian (Bar No. 2725)
Graham L. Newman (Bar No. 72845)
M. David Scott (Bar No. 68667)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone: (803) 252-4848
Fax: (803) 252-4810

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 6

ARGUMENT 7

I. The circuit court correctly determined the Federal Arbitration Act did not preempt state law where Appellants failed to present any evidence the Resident Contract had a nexus interstate commerce 7

A. The Resident Contract contains no inherent nexus to commerce 7

B. Appellants presented no evidence to show the Resident Contract affected interstate commerce 9

C. Timms v. Greene is binding authority, on point, and the circuit court was obligated to follow the rule of law set forth therein 11

D. Appellants argue the contractual references to Medicare somehow establish federal preemption 15

II. The circuit court did not err in concluding the Resident Contract did not comply with the South Carolina Uniform Arbitration Act 16

III. Respondent presented several additional grounds to the trial court which, although the trial court did not address them in its order, sustain the trial court's conclusion 18

A. Outrageous conduct was not contemplated by the parties at the time they formed a contract 18

B. Respondent is not a party to the contract 22

CONCLUSION 25

TABLE OF AUTHORITIES

South Carolina Cases

Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007).....18-20, 22

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012).....6, 8-10

Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007).....20-22

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).....22

Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012).....23

MBNA Am. Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).....7

McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933).....13

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).....15

Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).....23

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).....6, 23

S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003).....13; 15

Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993).....11-12, 16

Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999).....7

Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001) 7

Federal Cases

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003).....12

Marmet Health Care Ctr., Inc. v. Brown, __ U.S. __, 132 S. Ct. 1201 (2012).....12-14

Varley v. Tarrytown Assoc., Inc., 477 F.2d. 208 (2d. Cir.1973).....11

Other State Court Cases

Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W.Va. 2011).....14

Finney v. National Healthcare Corp., 193 S.W.3d 393 (Mo. App. 2006).....23-24

Noland Health Services, Inc. v. Wright, 971 So. 2d 681 (Ala. 2007).....24

Sennett v. National Healthcare Corp., 272 S.W.3d 237 (Mo. App. 2008).....23-24

Statutes

9 U.S.C.A. § 1.....17

9 U.S.C.A. § 2.....11

S.C. Code Ann. § 15-48-10(a) (Supp. 2011).....17

S.C. Code Ann. § 15-48-10(b)(4) (Supp. 2011).....17

S.C. Code Ann. § 15-51-40 (Supp. 2011).....22

Rules

Rule 15(a), SCRCP.....1

Rule 41(a), SCRCP.....1

Rule 220(c), SCACR.....22

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THE FEDERAL ARBITRATION ACT DID NOT PREEMPT STATE LAW WHERE APPELLANTS FAILED TO PROVIDE ANY EVIDENCE THAT THE RESIDENT CONTRACT INVOLVED INTERSTATE COMMERCE?

2. DID THE TRIAL COURT ERR IN FINDING THE RESIDENT CONTRACT FAILED TO COMPLY WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT?

3. SHOULD THE COURT AFFIRM THE TRIAL COURT BASED ON ADDITIONAL SUSTAINING GROUNDS APPEARING IN THE RECORD?

STATEMENT OF THE CASE

Respondent, the Personal Representative of the Estate of Pauline Cook, filed this action in the York County Court of Common Pleas after Pauline Cook ("Pauline") was killed at an assisted living facility in Rock Hill, South Carolina.

The original complaint alleged that ACTS Retirement-Life Communities, Inc. ("ACTS") owned and operated the facility where Pauline was killed and that ACTS and the two individually-named Appellants breached their duty of due care to Pauline and her statutory beneficiaries by allowing Braquette Walton ("Walton"), an employee at the facility, to have access to Pauline and by failing to take those steps reasonably necessary to prevent Walton from harming Pauline. All Appellants subsequently filed answers, and contemporaneously, ACTS moved that it be dismissed from the suit. Further, all Appellants moved to compel arbitration. Respondent later filed an amended complaint, pursuant to Rule 15(a), SCRCP. The only substantive change made in the amended complaint is that Park Pointe Village, Inc. ("PPV") was added as a party and ACTS was deleted as a party. Contemporaneous with the amended complaint, Respondent filed a

Stipulation of Dismissal pursuant to Rule 41(a), SCRCP, dismissing ACTS from the action. Appellants then filed an amended motion to dismiss or in the alternative to compel arbitration and Respondent opposed the motion.

The Honorable S. Jackson Kimball, III, heard argument on the motion to dismiss/compel arbitration on October 18, 2012. By order dated November 5, 2012, and filed on November 7, 2012, Judge Kimball denied the motion to dismiss and denied the alternative motion to compel arbitration. On November 9, 2012, Appellants filed and served a notice of appeal from Judge Kimball's order.

STATEMENT OF FACTS

Respondent's mother-in-law, Pauline Cook, was a long-time resident of Park Pointe Village ("PPV"), an assisted living community located in York County, South Carolina. PPV is a retirement community providing independent living residences for senior citizens and access to assisted living and nursing care services for its residents. Pauline and her husband retired to an apartment in PPV in 1998. After her husband passed away, Pauline moved to another smaller apartment in PPV, but eventually, she was not able to live alone because of her propensity to fall. (Amended Complaint, pp. 2-3, ¶¶ 7-10).

On or about June 1, 2006, Pauline and PPV entered into the "Resident Contract" that is at the heart of this controversy. ("Resident Contract," pp. 1-40). The specific provisions of the Resident Contract most relevant to the issues involved in this appeal are Section 21.1 ("Resident Contract," p. 36), and Section 23.9 ("Resident Contract," p. 38). Section 21.1 provides that

> Any controversy, dispute or disagreement arising out of or relating to this Contract, or concerning any rights arising under this Contract or a breach

> of this Contract, shall be settled by voluntary arbitration. This arbitration shall be conducted on Company's property in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The decision shall be final, binding and non-appealable, and any court having proper jurisdiction may enter judgment on the award rendered by the arbitrator.

("Resident Contract," p. 36, paragraph 21.1).

Section 23.9 of the Resident Contract provides that "All matters affecting the interpretation of this Contract and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of South Carolina." ("Resident Contract," p. 38, paragraph 23.9).

In July 2011, Pauline moved to PPV's assisted living facility, also located on site in York County. Shortly after her move to the assisted living facility, the events giving rise to this action began to unfold. On Saturday November 12, 2011, Pauline discovered someone had been writing checks from her BB&T checking account and forging her signature on the checks. Pauline later determined all the forged checks were made payable to "Braquette Walton." Unfamiliar with the name "Braquette Walton," Pauline asked several PPV employees and other PPV residents if they knew "Braquette Walton." One of the PPV employees Pauline spoke with was Appellant Marvin Lawrence ("Lawrence"), a chef employed in the PPV kitchen. Lawrence identified "Braquette Walton" to Pauline as a PPV employee and told Pauline she should speak with Appellant Neva Lattimer ("Lattimer"), Braquette Walton's supervisor and the Director of Resident Nursing at PPV. Pauline met with Lattimer and informed Lattimer of the irregularities Pauline had found in her checking account. (Amended Complaint, p. 3, ¶¶ 11-14).

While Pauline was meeting with Lattimer to discuss the matter, Lawrence contacted Braquette Walton ("Walton") to inform her of Pauline's suspicions. As a result

of her conversation with Lawrence, Walton was aware from the outset that Pauline suspected Walton of serious criminal conduct. At approximately 5:00 p.m. on November 12, Pauline and Lattimer contacted law enforcement and met with members of the Rock Hill Police Department on site at PPV. Immediately, police obtained evidence and suspected Walton of stealing, forging and cashing Pauline's checks. Lattimer, Walton's supervisor, had actual knowledge of Walton's conduct and Lattimer knew or should have known that Walton posed a potential threat to Pauline's health and safety. Despite her actual knowledge of the allegations of Walton's criminal conduct, Lattimer chose to take no immediate action against Walton. Lattimer did not change Walton's work schedule, she took no action to bar Walton from the premises or to prevent Walton's reentry, and she did not inform any staff that police had substantial evidence Walton had stolen from Pauline. Instead, Lattimer assured Pauline that she would deal with Walton when Walton returned to work. (Amended Complaint, pp. 3-4, ¶¶ 15-19).

Acting on the knowledge and information provided to her by Lawrence, Walton, shortly before 8 p.m. on the night of November 12, used her electronic entry card that Lattimer allowed her to retain to enter the PPV assisted living building where Pauline lived. Upon gaining entry to the facility, Walton concealed herself in the "Tree Room" until the hall was clear. Walton continuously called the nurses' station phone to monitor the nurses' locations, hanging up the phone as soon as it was answered. Despite these unusual occurrences, the nurses on duty never sought help from security or law enforcement and never attempted to secure or even monitor Pauline's room. Walton waited until the hallway was clear, and then she entered Pauline's unguarded and unlocked room. The lights were turned off. Upon entering the room, Walton confronted

Pauline about the checks. Walton admitted she cashed Pauline's checks and offered to pay Pauline back. (Amended Complaint, p. 4, ¶¶ 20-22).

When Pauline attempted to reach for the phone, Walton grabbed the phone from Pauline and – as Pauline tried to cry out for help – began to smother Pauline. As Pauline struggled for her life, Walton began punching the helpless 84 year-old woman, and ultimately beat and strangled her to death. After Pauline stopped moving, Walton checked her for a heartbeat in three separate locations but found no pulse. Walton then turned on the light in Pauline's room and saw Pauline's blood covering the pillowcases, the headboard, and the sheets of Pauline's bed. (Amended Complaint, p. 5, ¶¶ 23-24).

Walton then staged the scene of Pauline's murder and attempted to make it appear to be an accidental death. Walton used a bed sheet to drag Pauline's lifeless body to the shower; she removed Pauline's nightgown; and placed Pauline's naked body halfway inside of the shower, to make it appear as though Pauline had fallen while bathing. Walton packed the sheets and pillows that were soaked with Pauline's blood into a plastic bag. She then turned on the shower and left the room. (Amended Complaint, p. 5, ¶¶ 25-26).

Only on the following day, Sunday, November 13, 2011, did any PPV employee decide to finally check on Pauline. Linda Roach, a PPV employee, entered Pauline's room to make sure she was awake. Pauline was not in bed and Roach noticed water coming from under the bathroom door. When Roach opened the bathroom door she found Pauline laying half-way in the stand-up shower and half-way out, in the bathroom. The shower was on and the cold water was pouring over Pauline's body. Pauline's upper body

was covering the shower drain, and the water was flooding out into the bathroom and into the rest of the apartment. (Amended Complaint, p. 5, ¶ 27).

An autopsy concluded from the bruising around Pauline's eyes, nose and mouth, it appeared that Pauline's death was caused from being suffocated; the bruising was not consistent with an accidental fall. There was petechia[1] from the neck-up and in the eyes, and abrasions to the left cheek, under the eyes and to the sides, tip and bridge of Pauline's nose. There were also two tongue abrasions noted, one was at the tip of the tongue, that appeared to indicate pushing against a tooth and one was to the right rear that appeared to be a bite mark. A conjunctival hemorrhage was observed in Pauline's left eye. (Amended Complaint, p. 6, ¶ 28).

Walton was arrested for murder on November 17, 2011. Shortly thereafter, Walton gave a statement describing the events on November 12, 2011. Her statement is consistent with what is set forth above. (Amended Complaint, p. 6, ¶ 29).

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

[1] A "petechia" is "a minute reddish or purplish spot containing blood that appears in skin or mucous membrane as a result of localized hemorrhage." Merriam-Webster's Collegiate Dictionary, 926 (11th ed. 2004).

ARGUMENT

I. The circuit court correctly determined the Federal Arbitration Act did not preempt state law where Appellants failed to present any evidence that the Resident Contract had a nexus to interstate commerce.

Appellants argue the circuit court erred by concluding the FAA did not preempt application of state law to the Resident Contract. However, Appellants failed to present any evidence to even suggest the Resident Contract affected interstate commerce. The circuit court, in accordance with the clear and binding authority of the South Carolina Supreme Court, correctly found the Resident Contract, standing alone, was insufficient to invoke federal preemption. Appellants' Brief raises several arguments, both factual and legal, that were never presented below; this Court should not consider these new arguments for the first time on appeal.

A. The Resident Contract contains no inherent nexus to commerce.

Appellants acknowledge that "[t]o ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) (citing Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999)). See also, MBNA Am. Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). "In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Lucey v. Meyer, 401 S.C. 122, 134, 736 S.E.2d 274, 281 (Ct. App. 2012).

The circuit court's findings relevant to this first issue are set forth below.

> The subject matter of the Resident Contract is the provision of living accommodations, described as a "Residential Unit," "together with the facilities, services and medical care" otherwise specified in the contract. The Residential Unit was located in York County, South

> Carolina, as were all other facilities contemplated by the contract. Moreover, as contemplated in the Resident Contract, all services are provided on site.
>
> Further, the Resident Contract does not mention the FAA or contain any reference to federal arbitration. Rather, the only reference to choice of law in the Resident Contract is Section 23.9, which indicates that South Carolina law applies to all matters pertaining to the contract.
>
> Construing the contract as a whole, I find nothing contained in it to support preemption by the FAA. Further, the [Appellants] have failed to support their claim that the contract necessarily involves interstate commerce with affidavits, or other competent evidence, for consideration in support of their motion.
>
> The relationship of the parties to the contract here, like the contract in Timms, does not implicate any connection with the elements of interstate commerce sought to be relied upon by [Appellants]. Pursuant to the contract, PPV was to provide Pauline Cook a residence in South Carolina, limited medical services, security and other services as outlined in the contract. All of these services were to be provided at the facility located in South Carolina. The essence of the contractual relationship simply is not founded upon any connection with interstate commerce.

(Court Order, dated November 5, 2012, pp. 3-4).

Applying the standard of review set forth in Bradley, supra, the record supports the circuit court's conclusion. The Resident Contract contemplated providing services and residential quarters all within the state of South Carolina. Nothing in the Resident Contract gives rise to or suggests a transaction involving or affecting interstate commerce. Appellants introduced nothing save the argument of counsel to implicate interstate commerce in the performance of the Resident Contract. Where the record supports the circuit court's conclusion, the appellate court should not ignore these findings.

B. Appellants presented no evidence to show the Resident Contract affected interstate commerce.

As the South Carolina Supreme Court recently made clear, the party seeking to invoke FAA preemption bears the burden of proving the underlying transaction implicates interstate commerce. Bradley, at 458.C. 447, 730 S.E.2d at 317-18. Bradley involved a dispute arising out of a contract for the purchase of a home. After consummating the purchase, the buyer, Bradley, sued the seller, Brentwood Homes, Inc. ("Brentwood"), in circuit court alleging a number of construction defects. In his complaint Bradley alleged causes of action for negligence, fraud, and breach of warranty. Brentwood moved to compel arbitration. In support of its motion, Brentwood argued the contract was subject to the FAA because the agreement, "on its face involve[d] interstate commerce." Id. at 451, 730 S.E.2d at 314. In addition, Brentwood submitted affidavits establishing "that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank" and that Brentwood "'used subcontractors, materials and suppliers from outside the State of South Carolina' in the construction of Bradley's home." Id. at 452, 730 S.E.2d at 314.

The circuit court in Bradley found "the Agreement 'does not refer to equipment and materials to be furnished from outside the state of South Carolina, nor does it list any subcontractors which were outside the confines of this state.'" Id. at 452, 730 S.E.2d at 315. "Ultimately, the [circuit] court held the Agreement was not subject to the FAA as Brentwood Homes had 'not submitted sufficient evidence to demonstrate that the transaction between [Bradley and Brentwood Homes] involved interstate commerce.'" Id. at 452-53, 730 S.E.2d at 315. Brentwood appealed the circuit court's order.

Like the Appellants here, Brentwood argued the circuit court erred in denying the motion to compel arbitration because the transaction involved interstate commerce and, therefore, was subject to the FAA. In its unanimous opinion, the Supreme Court disagreed. In affirming the trial court, the Court reiterated that

> in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign. 2 S.C. Jur. *Arbitration* § 6 (Supp. 2012) ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated must be governed by state law. To activate application of the federal act, the commerce involved in the contract must be interstate or foreign.").

Id. at 454, 730 S.E.2d at 315-16. Despite the United States Supreme Court's "expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire filed of arbitration." Id. at 455, 730 S.E.2d at 316. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. . . . Our courts consistently look to the essential character of the contract when applying the FAA." Id. (internal citations and quote marks omitted). Bradley further clarified that Brentwood, as the party seeking to invoke FAA preemption, carried the burden of proving the transaction involved interstate commerce. Id.

Here, the Appellants failed to carry that burden. Unlike the movants in Bradley, Appellants produced no evidence save the Resident Contract itself. As the circuit court found, nothing inherent in the Resident Contract – to provide assisted living services, security, and a residential unit – implicates interstate commerce. Appellants introduced nothing to prove anything required under the Resident Contract had any connection to, or otherwise affected, interstate commerce. Ample evidence, specifically, the Resident Contract itself, supports the circuit court's conclusion. Having failed to present to the

circuit court anything in the form of competent evidence, Appellants now come to this Court and raise new arguments and ask the Court to reverse the trial court. Appellants should not be permitted to raise new arguments on appeal and the circuit court's order, supported by the contract – the only document properly before the trial court – should be affirmed.

C. Timms v. Greene is binding authority, on point, and the circuit court was obligated to follow the rule of law set forth therein.

In applying the test for determining applicability of the Federal Arbitration Act, the relevant prong is whether "the contract evidences a transaction involving commerce." Timms v. Greene, 310 S.C. 469, 472, 427 S.E.2d 642, 644 (1993) (quoting 9 U.S.C.A. § 2). In determining whether the contract on its face evidences commerce, the Court is required to look to the entire contract document. "Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law. [Citation omitted]. To activate application of the Federal Act, the commerce involved in the contract must be interstate or foreign. 9 U.S.C.A. § 1; Varley v. Tarrytown Assoc., Inc., 477 F.2d. 208 (2d. Cir.1973)." Timms, at 472-73, 427 S.E.2d at 644.

The South Carolina Supreme Court found the agreement in Timms v. Greene did not involve interstate commerce. 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993). The Timms contract was between a nursing home and one of the nursing home's residents and included an arbitration clause. Id. at 470–71, 427 S.E.2d at 643. In support of its decision, the Supreme Court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired

employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. Id. at 473, 427 S.E.2d at 644. All of the above evidence was presented to the trial court by way of affidavits submitted by the nursing home in support of its motion to compel arbitration. The Court stated that although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties." Id.

The legal and factual analysis applied in Timms is directly on point in this case and the trial court was bound to follow the Supreme Court's analysis and conclusion. Despite the significant and undeniable overlap between the activities of a nursing home (which Timms explicitly found did not involve interstate commerce), and the activities of an assisted living facility, like those provided by PPV and involved in this dispute, Appellants argue Timms is no longer good law and should not be applied here. Yet, Appellants acknowledge Timms has not been expressly overruled. Instead, they argue Timms was overruled by implication by two United States Supreme Court cases: Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003) and Marmet Health Care Ctr., Inc. v. Brown, __ U.S. __, 132 S. Ct. 1201 (2012). But even a cursory review of these cases demonstrates they do not support Appellants' conclusion.

The Supreme Court's conclusion that FAA preemption applied in Citizens Bank was supported by the contract itself, which specifically provided that the FAA "shall apply to [the contract's] construction, interpretation, and enforcement." Id. at 54, 123 S.Ct. 2038. The nexus to interstate commerce was further supported by competent

evidence where "[t]he bank submitted affidavits of bank officers establishing that its loan to Alafabco had been used in part to finance large construction projects in North Carolina, Tennessee, and Alabama." Id. at 57, 123 S.Ct. at 2040. In addition, there was evidence that the "debt was secured by all of Alafabco's business assets, including its inventory of goods assembled from out-of-state parts and raw materials." Id.

Here, as the circuit court correctly concluded, the Resident Contract is devoid of any reference to the Federal Arbitration Act. In fact, the only choice of law reference contained within the Resident Contract indicates the parties agreed South Carolina law would apply. ("Resident Contract," p. 38, paragraph 23.9). Perhaps more significantly, Appellants submitted *no evidence* by way of affidavit or otherwise to suggest the services contemplated in the Resident Contract bore any nexus to interstate commerce. Appellants' entire preemption argument is based upon the unsupported statements of counsel. Of course, the statements of counsel are not competent evidence and neither the circuit court nor this Court should consider counsel's bare assertions in deciding the issue. S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); see also, McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

Appellants' reliance on Marmet Health Care Ctr., Inc. v. Brown ("Marmet") is likewise unavailing. Marmet involved three consolidated suits initially filed in West Virginia courts arising out of negligent acts alleged against nursing homes. The West Virginia Supreme Court of Appeals found that none of the disputes were subject to

arbitration pursuant to the FAA because the provision in each of the nursing home admission agreements requiring arbitration of future disputes was unconscionable. While the Supreme Court in Marmet ultimately concluded the FAA applied to compel arbitration of the disputes, the Supreme Court's analysis does not address whether the contracts themselves involved interstate commerce.

A review of the West Virginia Supreme Court of Appeals' decision indicates that the nexus between interstate commerce and the contracts was not challenged by the injured parties and the primary issue involved in this case was never in dispute in Marmet. As the West Virginia court summarized, "there is *substantial evidence* that the nursing home admission agreements in question are contracts evidencing a transaction affecting interstate commerce under Section 2 of the FAA. The plaintiffs do not seriously contend that the transactions at issue do not have a significant impact upon interstate commerce." Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 281 (W.Va. 2011) (emphasis added). Instead, the Marmet plaintiffs argued, *inter alia*, that the arbitration clause was unconscionable. The Supreme Court's decision in Marmet has no application here, where the Respondent does not argue the arbitration clause is unconscionable, but that the Appellants have failed to produce evidence – substantial or otherwise – that the Resident Contract affects interstate commerce.

Marmet and the underlying facts as set forth in Brown v. Genesis Healthcare Corp. are distinguishable. In those cases, the interstate commerce issue was not dispositive, or even relevant to the Court's conclusion. The parties opposing arbitration in Marmet and Brown conceded at the state court level that the contracts affected interstate commerce. The issue before the Supreme Court was whether a West Virginia

law that applied only to contracts involving the provision of nursing home services would foreclose arbitration where the FAA admittedly applied. Before the case reached the Supreme Court, the state court had already found "substantial evidence" that the contracts affected interstate commerce. Here, Appellants presented no evidence the Resident Contract affects interstate commerce; thus, their reliance on Marmet is misplaced.

As our Supreme Court recently observed in Bradley, supra, the party arguing in favor of FAA preemption bears the burden of proving by sufficient evidence that the transaction involved interstate commerce in order to subject the agreement to the FAA. Id. Appellants essentially ask this Court to take judicial notice that the Resident Contract effects interstate commerce, even where Appellants have presented *no evidence* of a connection.

D. Appellants argue that the contractual references to Medicare somehow establish federal preemption.

Appellants never argued this to the trial court and they are not permitted under the rules of appellate procedure to raise an argument for the first time on appeal. See, e.g., Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Furthermore, even if they had properly presented and preserved the argument, the Appellants presented no evidence that Pauline Cook actually applied for or received Medicare or that the Appellants accepted payment from Medicare. The only thing in the record is the argument of counsel, which, of course, is not competent evidence of anything. See S.C. Dep't of Transp., supra. Moreover, the Resident Contract does not require all residents to enroll in Medicare, as

Appellants argue. The specific clause that Appellants cite in their brief contains an exception: "If not eligible for Medicare, Resident will enroll in some other insurance program providing equivalent benefits as approved in writing by Company." ("Resident Contract," p. 13, paragraph 6.7). Contrary to Appellants' argument (not raised below) the Resident Contract *did not require* residents to enroll in Medicare.

Apart from introducing the Resident Contract and relying on the unsupported arguments of counsel, Appellants made no attempt to show by competent evidence that the Resident Contract had any nexus to or effect on interstate commerce. As the party moving to invoke FAA preemption, this was their burden and they failed to carry it. For the reasons set forth above, the Court should affirm the circuit court's conclusion that the FAA does not apply to preempt application of South Carolina law.

II. The Circuit Court did not err in concluding the Resident Contract did not comply with the South Carolina Uniform Arbitration Act.

Appellants argue the Circuit Court erred in applying the heightened requirements of the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10, *et seq.* ("SCUAA"). Appellants' argument necessarily ignores the fact that it failed to produce any evidence to the trial court that the Resident Contract affected interstate commerce. Appellants based their entire argument to the trial court on their claim that Timms v. Green, supra, (binding authority as Appellants admitted in the trial court) has been implicitly overruled by the United States Supreme Court, and the FAA preempts application of the SCUAA. However, as set forth above, Appellants failed to present evidence sufficient to invoke FAA preemption, as was their burden. The Resident Contract, per its plain and unambiguous terms, contains a choice of law provision stating that South Carolina law shall apply to any and all disputes. Paragraph 23.9 of the

Contract provides that "All matters affecting the interpretation of this Contract and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of South Carolina." (See "Resident Contract," page 38, ¶ 23.9). Nowhere does the Resident Contract make any reference to the FAA, 9 U.S.C.A. §§ 1, *et seq.*, or otherwise provide that any law other than South Carolina law shall govern the parties' rights under the contract.

The Resident Contract clearly does not comply with the SCUAA. First, the Resident Contract does not comport with S.C. Code Ann. § 15-48-10(a) (Supp. 2011) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."). This alone is enough to affirm the trial court's denial of the motion to compel arbitration.

In addition to this failure, Appellants' request for arbitration attempts to circumvent S.C. Code Ann. § 15-48-10(b)(4) (Supp. 2011). That section expressly provides that the SCUAA shall not apply to "[a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." Perhaps recognizing the fallacy of their argument that the SCUAA compels arbitration – it clearly leads to the opposite conclusion – Appellants focus their argument on the interstate commerce nexus, which they failed to support with any evidence at the trial level. Only on appeal do they make any real attempt to substantiate the argument.

The record supports the trial court's conclusion that the Resident Contract does not comply with the SCUAA and the Court should affirm this conclusion.

III. Respondent presented several additional grounds to the trial court which, although the trial court did not address them in its order, sustain the trial court's conclusion.

A. Outrageous conduct was not contemplated by the parties at the time they formed a contract.

The actions alleged in the complaint arise out of the brutal murder of an 84 year-old assisted living patient. It is difficult to imagine a more horrendous death than that endured by Pauline, at the hands of one of the very people to whom she entrusted her safety. While Pauline is obviously not available to testify as to what she intended when she signed the residential services agreement, it defies logic and common sense that she would have agreed to arbitrate a dispute arising out of such a horrific set of facts.

The South Carolina Supreme Court has twice applied a

> definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). Aiken recognized the legal truism that "arbitration is matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to arbitrate." Id. at 149, 644 S.E.2d at 708.

The facts in Aiken, as set forth by Chief Justice Toal in the majority opinion, are as follows: Richard Aiken filed a lawsuit in circuit court against World Finance Corporation of South Carolina and World Acceptance Corporation alleging tortious

conduct arising from the misuse of Aiken's personal financial information by the defendants' employees. The employees obtained Aiken's information from a loan application and other documents he submitted to World Finance. As part of the loan approval process, Aiken signed multiple documents that contained a broadly-worded arbitration agreement. Each arbitration clause provided that "ALL CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT . . . SHALL BE SUBMITTED TO ARBITRATION AND SETTLED BY ARBITRATION IN ACCORDANCE WITH THE UNITED STATES ARBITRATION ACT . . . ." Id. at 147, 644 S.E.2d at 707. World Finance moved to compel arbitration after Aiken filed suit alleging that several employees of World Finance conspired to use Aiken's personal information to obtain sham loans and to embezzle the loan proceeds. Aiken's complaint alleged causes of action for outrage, negligence, negligent hiring/supervision and unfair trade practices.

The circuit court, the Court of Appeals, and the Supreme Court all refused to compel arbitration. The Supreme Court reasoned that

> the "relationship" asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable.

Id. at 150, 644 S.E.2d at 708. It followed that "in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from [the employees'] wholly unexpected tortious conduct." Accordingly, the Court held that the plaintiff's claims for "unanticipated and unforeseeable tortious

conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance." Id. at 151, 644 S.E.2d at 709.

On the same day it decided Aiken, supra, the Supreme Court decided Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007). Chassereau agreed to purchase an above-ground swimming pool from Global Sun Pools and to pay for the pool in installments. After entering the purchase contract, which contained a similar arbitration clause as the one in Aiken, the pool began to malfunction. Chassereau alleged that Global Sun refused to repair the pool, and because of this refusal, Chassereau ceased making installment payments. Thereafter, an employee of Global Sun began "systemically harassing" Chassereau, by repeatedly phoning her at work, disclosing personal information to her friends, relatives, and co-workers, and allegedly making defamatory statements to these same people about Chassereau. Chassereau sued Global Sun and the employee for defamation, intentional infliction of emotional distress, and "unlawful communication." Id. at 169, 644 S.E.2d at 719.

The Court cited Aiken, wherein it had "refused to interpret an arbitration agreement with similar . . . language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." Id., at 172, 644 S.E.2d at 720. The Court affirmed the Court of Appeals' refusal to compel arbitration based on the following reasoning:

> From the beginning of her relationship with Global-Sun, Chassereau certainly knew that she would be required to make payments on the pool she purchased. Furthermore, Chassereau must have expected that Global-Sun employees would contact her and request that she make payments on the pool if she ceased doing so. However, we believe a reasonable person would not have foreseen and would not have expected (and ought not to expect) Global-Sun employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt. Our

> opinion in Aiken unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen.
>
> Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

Id., at 172-73, 644 S.E.2d at 720-21.

The allegations in this case are that Walton, an employee of the Appellant PPV, stole checks from Pauline and later forged those checks. After Pauline discovered the theft and contacted the police, another PPV employee, Appellant Lawrence, warned Walton that she was the subject of a police investigation. Even though PPV and its agents had every reason to know of the potential threat Walton posed to Pauline, they took no action to prevent her from gaining access to Pauline. Undeterred by her supervisors and alerted of the pending police investigator by her co-worker, Walton entered the premises using the entrance card provided to her by PPV, hid for a substantial period of time from the PPV staff on duty that night, then went into Pauline's unlocked and unattended room and beat her to death. The facts alleged in the complaint here are as egregious and extreme as almost anything imaginable.

Tragically, Pauline cannot testify to her intentions when she signed the Resident Contract, but surely she did not foresee or even contemplate that she would be robbed and then beaten to death while Appellants, PPV and its agents, stood by and undertook no efforts to protect her. The nexus between the Resident Contract and the acts complained

of is far more attenuated than the overzealous collection practices the Court in Chessereau found were not subject to arbitration. Likewise, the conduct alleged in Aiken – and found not subject to arbitration – pales in comparison to the conduct alleged here. It is difficult to imagine conduct more outrageous, reprehensible, and unforeseen than the acts alleged in the amended complaint. Pursuant to controlling South Carolina authority, the claims set forth therein are not covered by the arbitration clause.

Although the trial court chose not to address this argument in its order denying the motion to compel arbitration, the illegal and outrageous acts perpetrated upon Pauline Cook were unforeseeable to any reasonable consumer of assisted living services in the context of normal business dealings. Aiken and Chassereau are on point; the cases are controlling authority and they provide additional grounds upon which to sustain the trial court's order denying the motion to compel arbitration.[2]

B. Respondent is not a party to the contract.

As an additional reason to affirm the trial court, Respondent submits, as he did below, that he is not a party to the Resident Contract and should not be bound by the arbitration clause contained therein. The circuit court's order should be affirmed because the wrongful death action set forth in the complaint is brought for the benefit of persons who are not parties to the contract. See S.C. Code Ann. § 15-51-40 (Supp. 2011).

[2] While the trial court's order admittedly does not address the outrageous tort exception to arbitration, the Respondent presented this argument fully to the trial court and, thus, it is proper for this Court to consider the issue as an additional sustaining ground under Rule 220(c), SCACR. See also, I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) ("it is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal.").

Pursuant to this section, Pauline's heirs are entitled to damages arising out of her wrongful death, including pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of Pauline's experience, knowledge and judgment. See, e.g., Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).

Pauline's heirs were not parties to the arbitration agreement and have never agreed with any of the Appellants to arbitrate any claims against them. "[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. . . . Arbitration will be denied if a court determines no agreement to arbitrate existed." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (internal citation omitted); see also, Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012) (same).

While Respondent has found no South Carolina authority directly on point, in Sennett v. National Healthcare Corp., 272 S.W.3d 237 (Mo. App. 2008), the Missouri Court of Appeals addressed a similar set of facts. In Sennett, the son of a nursing home resident brought an action alleging the negligence of the nursing home and its employees caused his mother's wrongful death. The nursing home sought to compel arbitration based upon an arbitration agreement contained in the mother's admittance paperwork. The court refused to compel arbitration of the wrongful death claim, finding the beneficiaries of the action had not agreed to arbitrate the dispute. The court cited with approval language from the case of Finney v. National Healthcare Corp., 193 S.W.3d 393 (Mo. App. 2006):

> There is no question that a contract did not exist between [the wrongful death beneficiary] and Appellants. To bypass the necessity of a valid

> contract between [the wrongful death beneficiary] and Appellants in which [the wrongful death beneficiary] agreed to arbitrate any disputes, Appellants argue that [the wrongful death beneficiary] is bound by the contract signed on [d]ecedent's behalf. In other words, Appellants claim that but for [d]ecedent's death, [the wrongful death beneficiary] would not have a cause of action and, therefore, she stands in the shoes of [d]ecedent. . . .
>
> The wrongful death claim does not belong to the deceased or even to a decedent's estate. The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased. A wrongful death action is not a transmitted right nor a survival right but is created and vested in the statutorily designated survivors at the moment of death. The damages under [the wrongful death statute] are different than the damages [d]ecedent would have been entitled to in a personal injury action against Appellants.

Sennett v. National Healthcare Corp., 272 S.W.3d 237, 241-42 (Mo. Ct. App. 2008) (citing Finney, supra, 193 S.W.3d at 394–95) (internal citations omitted). Accordingly, "a nonparty to the initial agreement containing an arbitration clause is not bound by the clause in her independent cause of action for the wrongful death." Id. The Supreme Court of Alabama has likewise refused to enforce arbitration agreements signed by or on behalf of decedents against beneficiaries of wrongful death claims. See, Noland Health Services, Inc. v. Wright, 971 So. 2d 681, 690 (Ala. 2007) (a nonsignatory personal representative is not bound to arbitrate a medical-malpractice action seeking damages for wrongful death).

Here, the Appellants seek to do what the courts in Sennett, Finney, and Noland refused to permit: they are attempting to enforce an arbitration clause signed by Pauline Cook against the non-party beneficiaries of the wrongful death claim. South Carolina courts have made it clear that a prerequisite to arbitration is *an agreement to arbitrate.* See Towles, Simpson, and Lucey, supra. None of the beneficiaries of the wrongful death action have agreed to arbitrate any dispute with any of the Appellants. The lack of a

mutually binding arbitration agreement is yet another reason the Court should affirm the circuit court's order denying the motion to compel arbitration.

CONCLUSION

For all of the reasons set forth above, the Court should affirm the circuit court's order denying the motion to compel arbitration. The terms of the Resident Contract do not involve interstate commerce and Appellants failed to introduce evidence that performance of duties arising under the Resident Contract bore any connection to commerce. The trial court's conclusion that the FAA does not apply is supported by the entirety of the record. Furthermore, Appellants do not seriously contest the circuit court's conclusion that the Resident Contract fails to comply with the SCUAA, but focus their argument on FAA preemption. Finally, there are additional reasons appearing in the record which support affirming the circuit court; no party would have contemplated that the arbitration agreement would apply to the horrendous conduct alleged in the complaint and the Respondent was not a party to the arbitration agreement and should not be bound by its terms. Respondent respectfully submits the Court should affirm the circuit court's well-reasoned order where there is a substantial factual basis for the order.

Richard A. Harpootlian (Bar No. 2725)
Graham L. Newman (Bar No. 72845)
M. David Scott (Bar No. 68667)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone: (803) 252-4848
Fax: (803) 252-4810

ATTORNEYS FOR RESPONDENT

August 9, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-2692
Appellate Case No. 2012-213352

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook,.....Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence,.....Appellants.

CERTIFICATE OF SERVICE

I, Beth Craft, on behalf of Richard A. Harpootlian, P.A., hereby certify that I served the following individual(s), on August 9, 2013, with a copy of the following:

Document: Respondent's Initial Brief.

Counsel: **VIA HAND DELIVERY**
R. Gerald Chambers, Jr., Esquire
Carmelo B. Sammataro, Esquire
Turner Padget Graham & Laney, P.A.
Bank of America Plaza
1901 Main Street, 17th Floor
Columbia, SC 29201

Beth Craft

Beth Craft

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No: 2012-CP-46-2692
Appellate Case No: 2012-213352

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook,.....Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence,.....Appellants.

RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matters designated by Appellants, Respondent proposes to include the following in the Designation of Matter to be included in the Record on Appeal:

1. Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Compel Arbitration.

Counsel for Respondent certifies that this Designation contains no matter that is irrelevant to this appeal.

Richard A. Harpootlian (Bar No. 2725)
Graham L. Newman (Bar No. 72845)
M. David Scott (Bar No. 68667)

RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone: (803) 252-4848
Fax: (803) 252-4810

ATTORNEYS FOR RESPONDENT

August 9, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2012-CP-46-2692
Appellate Case No. 2012-213352

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook,.....Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence,.....Appellants.

CERTIFICATE OF SERVICE

I, Beth Craft, on behalf of Richard A. Harpootlian, P.A., hereby certify that I served the following individual(s), on August 9, 2013, with a copy of the following:

Document: Respondent's Designation of Matter to be Included in the Record on Appeal.

Counsel: **VIA HAND DELIVERY**
R. Gerald Chambers, Jr., Esquire
Carmelo B. Sammataro, Esquire
Turner Padget Graham & Laney, P.A.
Bank of America Plaza
1901 Main Street, 17th Floor
Columbia, SC 29201

Beth Craft

Beth Craft