

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

NOV 22 2013

S. Jackson Kimball, Special Circuit Court Judge **SC Supreme Court**

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.

**MOTION TO CERTIFY THE CASE TO THE SUPREME COURT
PURSUANT TO RULE 204(b), SCACR**

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ATTORNEYS FOR RESPONDENT

DEC 20 2013

SC Court of Appeals

Respondent, by and through his undersigned counsel, hereby moves the Court pursuant to Rule 204(b), SCACR, to certify this case for review by the Supreme Court before it has been determined by the Court of Appeals. The case involves issues of significant public interest and legal principles of major importance.

The facts giving rise to the complaint took place in a privately-owned assisted living facility located in York County. Park Point Village, Inc. ("PPV") owns and operates the facility. The complaint alleges that an employee of PPV stole checks from an eighty-two-year-old resident, Pauline Cook, and later forged those checks and made substantial withdrawals from Pauline's account. After Pauline noticed money missing from the account, she contacted the appropriate authorities at PPV and alerted them of her discovery. Police interviewed Pauline, identified the PPV employee as the perpetrator, and obtained warrants for the employee's arrest. PPV had actual knowledge of the pending arrest of the employee but allowed her to maintain her employment and to keep her access card that allowed her to enter the PPV property and buildings. The employee learned of the criminal investigation when a co-worker phoned her to tell her Pauline had been asking questions about her. After learning of this, the employee used her PPV-issued pass key to enter the building where Pauline lived. She hid inside the building for a considerable time, waited until all was clear on the hall where Pauline lived, and entered the 82-year-old woman's room. After her attempts to persuade Pauline not to pursue criminal charges against her failed, the employee severely beat Pauline and then suffocated her with a pillow. The employee dragged the lifeless body into the shower and staged the scene to make it appear as if Pauline had fallen in the shower. Police later arrested the employee and charged her with murder. She has since been convicted of that offense.

The primary issue raised by Appellants on appeal is whether the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, (“FAA”) preempts State law where a contract between a resident of an assisted living facility and the facility contains an arbitration clause.¹ In denying Appellants’ motion to compel arbitration, the trial court relied, in part, on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). When the trial court filed its order on November 7, 2012, no South Carolina appellate court had called into question the holding in Timms that contracts between nursing homes and their residents do not involve interstate commerce and, therefore, do not implicate FAA preemption. After Appellants timely appealed the trial court’s order and the parties filed their initial briefs in the Court of Appeals, the Supreme Court decided Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013) (decided August 14, 2013). In a footnote to Cape Romain, the Court “overrule[d] Timms to the extent it determined the FAA did not apply because the contract *on its face* failed to demonstrate that the parties contemplated an interstate transaction.” Cape Romain, at 128 n.5, 747 S.E.2d at 468 n.5. However, the decision in Timms was not based solely on the lack of a nexus to interstate commerce contained within the four corners of the contract, but also on a lack of evidence of any connection between the contract and the performance required thereunder and interstate commerce. For example, the Timms Court noted that the record contained

an affidavit of the administrator of the Center, which avers that the Center engages in interstate commerce in that the Center 1) is a division of National HealthCorp, L.P., a Delaware Limited Partnership; 2) markets its services to persons residing outside this State; 3) hires employees from outside the State; 4) purchases a majority of its goods, equipment and supplies outside the state for use at the Center; and 5) contemplates payment in part by Medicare or Medicaid. Although these factors could evidence the Center’s involvement in interstate

¹ The Record on Appeal filed with the Court of Appeals is attached as Exhibit A to this motion. Appellants’ Final Brief is attached as Exhibit B; Respondent’s Final Brief is attached as Exhibit C; Appellants’ Final Reply Brief is attached as Exhibit D; and Respondent’s Motion to File a Surreply is attached as Exhibit E.

commerce, we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties.

Timms, at 473, 427 S.E.2d at 644 (1993) overruled in part by Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013).

As the above makes clear, the Timms holding was based on the lack of a nexus with interstate commerce on the face of the complaint and the failure of appellants' evidence to show any such nexus. The Court in Cape Romain recognized the dual deficiencies when it overruled Timms only "to the extent it determined the FAA did not apply because the contract *on its face* failed to demonstrate that the parties contemplated an interstate transaction." Cape Romain did not overrule Timms to the extent the Court found appellants' evidence failed to evince a transaction involving interstate commerce.

Moreover, the Court in Cape Romain based its decision to compel arbitration pursuant to the FAA on the evidence in the record that the contract involved interstate commerce. The Court observed "that the materials used in [fulfilling the contract] were manufactured or fabricated in Ohio and transported to South Carolina In addition, Cape Romain consulted with an out-of-state engineering and survey company in connection with [fulfilling the contract]. . . . Cape Romain used barges to transport materials and equipment through various navigable waterways" Id. at 123-24, 747 S.E.2d at 465. In sum, the conclusion in Cape Romain was based on evidence in the record that implicated a nexus between the performance of the contract and interstate commerce.² Evidence of any such nexus is wholly lacking here.

² Another significant distinction between the contract in this case and the contract in issue in Cape Romain is that the contract here specifically invoked application of South Carolina law and contained no reference to the FAA, whereas the contract in Cape Romain provided that if a dispute was arbitrated, the FAA "shall govern the arbitration process." Id. at 120, 747 S.E.2d at 463.

Here, Appellants presented no evidence for the trial court to consider in deciding their motion to compel arbitration save the contract itself. They presented no affidavits, no invoices showing PPV purchased any supplies from out of state; no evidence that any employee lived out of state, and no evidence that PPV marketed its services to out of state residents. Thus, the trial court necessarily had to make its ruling based on the contract because no other evidence was presented.

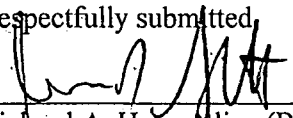
The Court has recognized that application of the FAA is an issue of significant public interest and a matter of major importance by granting Rule 204(b) certification in a number of cases. See, e.g., Cape Romain, supra; Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 748 S.E.2d 221 (2013) (Rule 204(b) certification granted to immediately review question of whether FAA or South Carolina Uniform Arbitration Act applied to arbitration agreement); Crouch Const. Co., Inc. v. Causey, 405 S.C. 155, 747 S.E.2d 482 (2013) (Rule 204(b) certification granted to immediately review appeal of arbitration award); Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012) (Rule 204(b) certification granted to immediately review order denying motion to compel arbitration under FAA); Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) (Rule 204(b) certification granted to immediately review order refusing to compel arbitration); Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 627 S.E.2d 687 (2006) (Rule 204(b) certification granted to immediately review dispute as to manner of selecting arbitrators); Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004) (Rule 204(b) certification granted to review whether order compelling arbitration under FAA was immediately appealable); and Toler's Cove Homeowners Assn, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d

581 (2003) (Rule 204(b) certification granted to immediately review order compelling arbitration under FAA).

Further, certification pursuant to Rule 204(b), SCACR, is warranted here where the facts giving rise to the complaint may have been witnessed by any number of other residents of PPV. These residents are all elderly and many of them may die or suffer significant memory loss while the appeal is heard and considered by the Court of Appeals. The loser in the Court of Appeals will almost certainly petition this Court for a writ of certiorari. In the meantime, Respondent cannot conduct discovery to explore what the other elderly residents of PPV know about the allegations in the complaint and whether PPV was on notice of incidents similar to those that ultimately led to the facts alleged here.

Respondent submits the Court should exercise its discretion under Rule 204(b), SCACR, and certify this case for review in order to clarify what impact, if any, Cape Romain has on this contract, and other contracts throughout the State between nursing homes or assisted living facilities and their residents. Application of the FAA to these types of contracts is an issue of significant public interest and major importance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Heather Hardy, on behalf of Richard A. Harpootlian, P.A., hereby certify that I served
the following individual(s), on November 22, 2013, via Hand Delivery, with a copy of the
following:

Document:

Motion to Certify to South Carolina Supreme Court

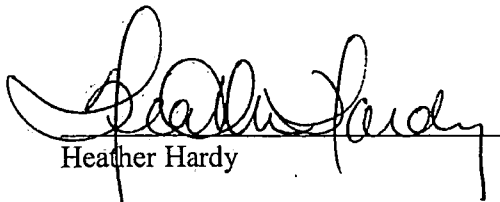
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