IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Civil Action No.: 2012-CP-40-7874
Appellate Case No.: 2014-001625

Christopher Carlton as the Personal Representative of the Estate of Helen Tucker Carlton; Christopher Carlton; John Thomas Carlton; and Christopher Carlton as the Personal Representative of the Estate of Kimberly Carlton Baker,..Respondents,

v.

Greenlawn Funeral Home, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. GREENLAWN IS NOT PRESENTING A NEW ARGUMENT ON APPEAL.

Contrary to Respondent's argument, this issue is properly preserved for appeal. The issue of whether the FAA applies was properly before the trial judge, prior to his rendering a decision in this matter. Initially, Greenlawn filed a Motion to Dismiss, or in the Alternative, to Compel Arbitration. Importantly, the Memorandum in Support of the Motion to Dismiss argued that the FAA applied. [R. p. 57]. Additionally, counsel for Greenlawn presented argument during the hearing on the Motion to Compel that the contracts at issue could implicate interstate commerce. [R, p. 40, line 16-p.41, line 5]. Moreover, the affidavit of Tonya Brazier was submitted to the trial court prior to the issuance of the denial of the Motion to Compel Arbitration. [R. pp. 51-52]. When, based on the trial judge's denial of the Motion to Compel Arbitration, it was clear the trial judge did not properly consider the affidavit of Tonya Brazier, Appellant timely raised the issue via a Rule 59(e), SCRCP motion. [R. pp. 75-81].

Accordingly, under the preservation jurisprudence of our appellate courts, Appellant has properly preserved this issue. See Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (Ct. App. 2006) ("Generally an issue must be raised to and ruled upon by the circuit court to be preserved."); Elam v. S. Carolina Dep't. of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised but not ruled on, in order to preserve it for appellate review."); Coward Hund Const. Co., Inc. v. Bell Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) ("Once the issue has been properly raised by a Rule 59(e)

motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.").

Because this issue was raised to the trial court, both prior to the Court's ruling on the Motion to Compel Arbitration and via a Rule 59(e), SCRCP, motion, this matter is preserved and ripe for appellate review.

II. THE AFFIDAVIT OF TONYA BRAZIER WAS TIMELY FILED AND PRESENTED TO THE TRIAL JUDGE.

Respondents strenuously argue that the affidavit of Tonya Brazier was not timely filed under Rule 6 of the South Carolina Rules of Civil Procedure. Curiously, Respondents omit the portion of the rule which provides, "When a motion is to be supported by affidavit, the affidavit shall be served with the motion; . . . **unless the court permits them to be served at some other time**." See Rule 6(d), SCRCP (emphasis added). Therefore, Respondents are incorrect that "[t]here is no discretion for the Court to allow anything other than a simultaneous filing for the moving party, or for a reply affidavit to be served prior to the hearing." See Initial Brief of Respondents, p. 10. The very text of the rule gives a trial judge discretion as to when affidavits in support of motions may be considered.

Additionally, the affidavit of Ms. Brazier was not, as Respondents argue, submitted untimely and for the first time via Appellant's Rule 59(e), SCRCP, motion. In truth, counsel for Greenlawn addressed the matter with the trial judge at the hearing, and advised that he could provide evidence that items necessary for the completion of the contract at issue were placed in interstate commerce. [R. p. 40, line 16-p.41, line 5]. Additionally, the affidavit was submitted to the trial judge while the matter was still under consideration by the trial judge, in accordance with the colloquy from the hearing,

and prior to a decision having been rendered. Indeed, the affidavit was submitted with Appellant's Proposed Order in this matter. [R. pp. 51-52].

The very email exchange in which the affidavit of Tonya Brazier was submitted, is the same email exchange which is fatal to Respondents' contention that the submission of the affidavit did not "afford the Carlton Family appropriate opportunity for rebuttal." (Initial Respondents' brief, p. 10). Specifically, the Carlton Family's position—and opportunity for rebuttal—is well-documented:

> All,
>
> **I object to the Defendant offering an affidavit for the Court's consideration over a week after the hearing**, when Rule 6(d) clearly states "When a motion is to be supported by affidavit, the affidavit shall be served *with the motion* . . ." Accordingly, as Plaintiff's [sic] proposed order appears to hinge on this untimely (and ultimately irrelevant) affidavit, I request that the Court not consider this untimely affidavit, strike it, and deny the Defendant's motion.
>
> Since this affidavit is untimely and should be stricken, it should not be considered. However, out of an extreme abundance of caution, it is the Plaintiff's [sic] position that this affidavit is not persuasive, even assuming the assertions in the affidavit to be truthful.
>
> The fact that the Defendant bought certain items from out of state is entirely irrelevant to the specific nature of the contract between the parties—namely, burial services that all took place within South Carolina. *See Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract—the provision of patient-resident services in South Carolina—did not require any activities in interstate commerce).[1]
>
> The Defendant's simply purchasing supplies does not implicate interstate commerce.

[1] It should be noted that Timms was expressly overruled by the South Carolina Supreme Court in Dean v. Heritage Health Care of Ridgeway, L.L.C., 408 S.C. 371, 759 S.E.2d 731 (2014) (determining Timms to be a "relic of the past.").

[R. p. 52] (emphasis in original). Thus, Respondents did have time for a rebuttal and, in fact, submitted argument to the trial judge.

The affidavit of Tonya Brazier was properly and timely before the trial judge. The affidavit evidences the contracts at issue implicate interstate commerce, and the Federal Arbitration Act ("FAA").

III. THE CONTRACTS AT ISSUE IMPLICATE INTERSTATE COMMERCE, THEREFORE THE FEDERAL ARBITRATION ACT APPLIES.

As argued extensively in Appellant's Initial Brief, the essential purpose of this contract implicates interstate commerce. Accordingly, the FAA applies.

Respondents' contention that the contract more closely resembles a real estate contract, and their subsequent reliance on real estate contract arbitration cases is imprudent. The essential character of the contracts at issue here were for the provision of perpetual care, internment, merchandise, and funeral goods and services—not just a burial plot. In fact, the factual allegations in the Complaint attack multiple aspects of the contract between the parties, not just the portion related to the burial plot. [R.pp.18-23].

Appellant is not unmoved by the sensitive nature of the facts underlying this litigation, but respectfully, the "core issue of this case" is not, as Respondents argue, "that Helen Carlton desired to purchase the right to have her final resting place in the plot of land next to her late husband." (Initial Respondent's Brief, p.14). Rather, Respondents have alleged that Appellants have breached the contract between them and their decedents in various particulars, including such particulars that have been in the stream of interstate commerce.

Here, the grave marker, the base for the grave marker, and the casket, all of which are instrumentalities of interstate commerce, are relevant to the current dispute as Appellant could not have performed its part of the contract without these items. Even if those items were not relevant to the current dispute, our Supreme Court has determined that the connection may not even need to be that inter-related for interstate commerce to be implicated. See Dean, 759 S.E.2d at 739 (recognizing that "[a]lthough the meals and supplies are irrelevant to the current dispute, they must nonetheless be considered because the residency agreement specifically requires [the a]ppellants provide these goods and services.").

Accordingly, interstate commerce was implicated by the contracts at issue and the FAA should apply. Accord Service Corp. International v. Lopez, 162 S.W.3d 801, 805 (Tex. Ct. App. 2005) (finding that two "pre-need" funeral contracts were subject to interstate commerce); Service Corp. International v. Fulmer, 883 So.2d 621 (Ala. 2003) (finding a contract for the performance of a funeral service, the cremation of the decedent's body, and a vase for the decedent's remains is "unquestionably economic in nature, and the nationwide aggregate effect of such a transaction on interstate commerce easily brings the practice of contracting to provide funeral services and associated goods within the reach of Congress through the FAA.").

CONCLUSION

The trial court erred in denying the Motion to Compel Arbitration because the FAA applies when, as here, the contracts at issue implicate interstate commerce. Moreover, Respondents have not offered any evidence that their claims are unsuitable for arbitration. See Green Tree Fin. Corp. –Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513

(2000) ("The party resisting arbitration bears the burden of proving that the claims are unsuitable for arbitration."). Accordingly, based on the foregoing and for the reasons articulated in Appellant's Initial Brief, Appellant respectfully requests this Court reverse the trial court's order denying the Motion to Compel Arbitration and remand the matter for arbitration.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

November 26, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Greenlawn Funeral Home, do hereby certify that I have this date served the foregoing **Appellant's Final Reply Brief** by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

C. Cantzon Foster, II
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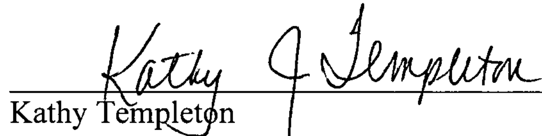

Kathy Templeton

Dated: November 26, 2014