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 BRIEF OF APPELLANT

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Caleb Martin Riser, Esquire
Sheila Marlouvon Bias, Esquire
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ATTORNEYS FOR APPELLANT GREENLAWN FUNERAL HOME

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STATEMENT OF THE CASE

Respondents filed this action on November 28, 2012, alleging breach of contract, trespass, and negligence related to the purchase of burial plots, merchandise and services for Respondents' decedents, Fielder and Helen Carlton. [R. pp. 13-17]. Appellants were served on February 19, 2013, and thereafter on April 11, 2013, filed a Motion to Dismiss or in the Alternative, Motion to Compel Arbitration. [R. pp. 24-30].

On November 22, 2013, a Consent Order was entered which authorized Respondents to amend their complaint and substitute parties. [R. pp. 10-12]. Respondents filed an Amended Summons and Complaint in this matter on October 14, 2013, against Appellant, Greenlawn Funeral Home ("Greenlawn") [R. pp. 18-23]. In lieu of an Answer, Greenlawn filed a Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration in accordance with the contracts evidencing the transactions. [R. pp. 31-38; 54-65].

A hearing on the Motion was held on March 4, 2014, before the Honorable Eugene Griffith, Jr. [R. pp. 34-43]. By Order filed April 1, 2014, Judge Griffith denied the Motion to Dismiss and the Motion to Compel Arbitration. Greenlawn filed a Motion for Reconsideration pursuant to Rules 52 and 59(e), SCRCP. [R. pp. 75-81]. By Order filed July 3, 2014, Judge Griffith denied Greenlawn's Motion for Reconsideration. [R. pp. 2-4]. This appeal follows.

STATEMENT OF THE FACTS

The Amended Complaint alleged that Respondents' decedent, Helen Carlton, purchased two adjacent cemetery burial plots and a grave marker from Greenlawn after her husband, Fielder Carlton, died in August of 2006 ("2006 Contract"). [R. p. 19, ¶ 4].

It was Helen's desire to have her husband buried in one plot and at the time of her demise that she would be buried next to him. [R. pp. 19-20, ¶¶ 4-6]. Helen died in 2011. [Id.].

Following her death, Respondent Christopher Carlton, personally, on behalf of Helen's family, and on behalf of Helen's estate contracted with Greenlawn to purchase funeral services and items necessary for Helen's interment ("2011 Contract"). [R. p. 20, ¶¶ 7-8]. The contract provided that Helen was to be buried in the grave site next to her husband and with a burial marker to be placed on her and her husband's final resting place. [Id.]. According to Respondents, Helen was not buried in her pre-purchased plot, but was buried in an unknown location. [Id. at ¶ 11]. Respondents aver Greenlawn discovered they had misplaced a casket, excavated the casket to determine its true ownership and location, ultimately determined that it belonged to Helen, and eventually removed a headstone marker from their father's burial site resulting in an unmarked grave. [R. pp. 20-21, ¶¶ 13-15]. Respondents raised claims of trespass, breach of contract, and negligence against Greenlawn related to the aforementioned pled facts.

In lieu of an Answer, Greenlawn filed a Motion to Dismiss or, in the Alternative, a Motion to Compel Arbitration. [R. pp. 31-33]. The basis of the motion was that the 2006 and 2011 Contracts contained arbitration clauses requiring this matter to proceed via arbitration and not litigation.

Specifically, in the 2006 Contract, the following language appears on the first page, "**NOTICE: BY SIGNING THIS AGREEMENT, PURCHASER IS AGREEING THAT ANY CLAIM PURCHASER MAY HAVE AGAINST THE SELLER SHALL BE RESOLVED BY ARBITRATION AND PURCHASER IS GIVING UP HIS/HER RIGHT TO A COURT OR JURY TRIAL AS WELL AS**

HIS/HER RIGHT OF APPEAL." [R. pp. 26-27] (emphasis in original). The following language appears on the second page:

> **ARBITRATION: PURCHASER AGREES THAT ANY CLAIM HE/SHE MAY HAVE RELATING TO THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT (INCLUDING ANY CLAIM OR CONTROVERSY REGARDING THE INTERPRETATION OF THIS ARBITRATION CLAUSE) SHALL BE SUBMITTED TO AND FINALLY RESOLVED BY MANDATORY AND BINDING ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA"); PROVIDED HOWEVER, THAT THE FOREGOING REFERENCE TO THE AAA RULES SHALL NOT BE DEEMED TO REQUIRE ANY FILING WITH THAT ORGANIZATION, NOR DIRECT INVOLVEMENT OF THAT ORGANIZATION. THE ARBITRATOR SHALL BE SELECTED BY MUTUAL AGREEMENT OF THE PARTIES. IF THE PARTIES FAIL TO OR ARE UNABLE TO AGREE ON THE SELECTION OF AN APPROPRIATE ARBITRATOR, THE AAA SHALL SELECT THE ARBITRATOR PURSUANT TO ITS RULES AND PROCEDURES UPON THE APPLICATION OF ONE OR BOTH PARTIES. THIS AGREEMENT TO ARBITRATE ALSO APPLIES TO ANY CLAIM OR DISPUTE BETWEEN OR AMONG THE SELLER, YOU AS THE PURCHASER, ANY PERSON WHO CLAIMS TO BE A THIRD PARTY BENEFICIARY OF THIS AGREEMENT, ANY OF THE SELLER'S EMPLOYEES OR AGENTS, ANY OF THE SELLER'S PARENT, SUBSIDIARY OR AFFILIATE CORPORATIONS, EXCEPT AS MAY BE REQUIRED BY LAW, NEITHER PARTY NOR AN ARIBTRATOR MAY DISCLOSE THE EXISTENCE, CONTENT, OR RESULTS OF ANY ARBITRATTION HEREUNDER WITHOUT THE PRIOR WRITTEN CONSENT OF BOTH PARTIES.**

[Id.]. (emphasis in the original). The 2011 Contract contains the following language on the second page,

> ARBITRATION: Seller and Purchaser hereby agree to submit to binding arbitration for any claim, dispute, or issues arising because of or in any way involving, Seller and Purchaser, which in any way arise in connection with Agreement or any transaction between parties whether they be based in law or in equity. Seller and Purchaser agree to submit to arbitration pursuant to the arbitration rules of the American Arbitration Association.

[R. pp. 28-29].

Greenlawn presented evidence of the contracts' adherence to the Uniform Arbitration Act[1] ("UAA") and Federal Arbitration Act[2] ("FAA") to compel arbitration. [R. pp. 45-50; 54-66]. Specifically, Greenlawn presented the trial court with a Memorandum of Law outlining the applicability of the UAA and FAA as well as the affidavit of Tonya Brazier, which clarified that the contract implicated interstate commerce. [Id.].[3]

Judge Griffith disagreed, finding the arbitration clauses in the contracts were not enforceable because the FAA did not apply and the arbitration notices did not comply with South Carolina's statutory requirements for arbitration clauses. [R. pp. 5-9]. Specifically, Judge Griffith found the FAA did not apply because there were no facts to implicate federal law through interstate commerce, that Appellant conceded same, and that, as a matter of law, the UAA was not pre-empted by the FAA. [Id.]. Judge Griffith further found that the 2006 contract was deficient in that it did not reference the code section of the UAA, the notice was not underlined, and the notice of arbitration was not on the first page. [Id.]. With regard to the 2011 Contract, this Court found the contract was deficient in that it did not reference the code section of the UAA, the notice was not capitalized or underlined, and the notice was not on the first page. [Id.].

Appellant filed a Motion for Reconsideration, seeking reconsideration of Judge Griffith's findings. [R. pp. 75-81]. Judge Griffith denied the Motion for Reconsideration, finding the arbitration clauses in the 2006 and 2011 Contracts did not

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[1] Codified at S.C. Code Ann. § 15-48-10 *et. seq.*

[2] Codified at 9 U.S.C.A. § 1 *et. seq.*

[3] Initially, counsel for Greenlawn contended the contract did not implicate interstate commerce; however, new evidence was discovered following the submission of the brief, demonstrated by the affidavit of Tonya Brazier, which clarified the issue and was submitted to, and considered by, the trial court.

comply with the UAA. [R. pp. 2-4]. With regard to the FAA, Judge Griffith found that the 2006 and 2011 contract did not implicate interstate commerce—"[i]t is implausible to this Court that a contract for the burial of South Carolina residents in South Carolina can implicate interstate commerce." [Id.] The instant appeal follows.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." Dean v. Heritage Healthcare of Ridgeway, L.L.C., 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). There is a strong presumption of the validity of arbitration agreements in state and federal courts. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (finding that arbitration agreements enjoy a strong presumption of validity in federal and state courts). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. "Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination." Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which could cover the asserted dispute." Pearson, at 287, 733 S.E.2d at 600 (citing Zabinski, at 597, 553 S.E.2d at 118-19)). "Unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski, at 597, 553 S.E.2d at 118.

"The party resisting arbitration bears the burden of proving that the claims are

unsuitable for arbitration." Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513, 522 (2000).

ARGUMENT

I. The trial judge erred in denying the Motion to Compel Arbitration because the FAA applies.

In the face of the evidence supporting the grant of the Motion to Compel Arbitration, the trial court erred in not considering said evidence and improperly denied the Motion to Compel Arbitration. The trial judge's factual findings are not reasonably supported by the evidence, and this Court must reverse the Order denying the Motion to Compel Arbitration.

a. The FAA preempts the UAA and supersedes the UAA's requirements.

The trial judge specifically found the arbitration clauses at issue did not comply with the provisions of the UAA and, therefore, compelling arbitration was improper. Additionally, the trial judge found the FAA did not supersede the UAA in this matter because the contract did not implicate interstate commerce.

The UAA delineates specific notice requirements for arbitration clauses. Specifically, section 15-48-10 requires that notice of arbitration pursuant to the chapter "shall be typed in underlined capital letters . . . on the first page of the contract." See S.C. CODE ANN. § 15-48-10 (Supp. 2001). Section 15-48-10 is to be strictly construed and failure to comply with the terms can render the arbitration clause unenforceable. McMillian v. Gold Kist, Inc., 353 S.C. 353, 360-61, 577 S.E.2d 482, 486 (Ct. App. 2003) (citing Zabinski, at 588, 553 S.E.2d at 114).

However, failure to specifically comply with the requirements of section 15-48-10 is not dispositive of whether a claim is subject to arbitration. See Bradley, at 447, 730

S.E.2d at 312 (finding a concession that an arbitration agreement does not meet the technical requirements of section 15-48-10 is not dispositive, "[b]ecause an application of the South Carolina law would have rendered the parties' arbitration agreement completely unenforceable, consideration of the applicability of the FAA is required. The FAA is intended to ensure that arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement."). Under the FAA, "a written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C.A. § 2.

Thus, "when a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Marmet Health Care Ctr. Inc. v. Brown, —U.S.—, 132 S.Ct. 1201, 1203 (2012) (quoting AT & T Mobility, L.L.C. v. Concepcion, —U.S.—, 131 S.Ct. 1740, 1749 (2011)). See Zabinski, at 592, 553 S.E.2d at 116 ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539 n. 2, 542 S.E.2d 360, 363 n. 2 (2001) ("State law was therefore preempted *to the extent it would have invalidated the arbitration agreement.* The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved."); Soil Remediation Co. v. Nu–Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that the FAA displaced the South Carolina notice-requirement statute, which would have precluded arbitration, where parties agreed to arbitration and the

transaction involved interstate commerce).

Consequently, as here, if the arbitration provisions of the contract do not comply with the notice provisions of section 15-48-10, the FAA preempts and supersedes the UAA because the FAA does not impose specific procedures regarding how notice of arbitration must be given in contracts. See McMillan, at 361, 577 S.E.2d at 486; see also Soil Remediation, at 459, 476 S.E.2d at 152 ("Because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with section 2 of the FAA. The FAA therefore displaces the statute, if the agreement is covered by the act."). Therefore the trial court erred to the extent its ruling determined the FAA could not supersede the UAA.

b. The 2006 and 2011 contracts implicate interstate commerce, therefore the FAA applies.

Notwithstanding the foregoing, "in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign." Bradley, at 454, 730 S.E.2d at 315-16. Here, the trial judge erred in finding that "no facts implicate federal law through interstate commerce." [R. p. 6]. To the contrary, Appellant submitted the affidavit of Tonya Brazier, Administrative Manager for Thompson Funeral Home at Greenlawn Memorial Home, which clarified that the 2006 and 2011 Contracts implicated interstate commerce. Viewing all the facts and pleadings, the Motion to Compel Arbitration should have been granted and the trial judge's failure to grant the Motion to Compel was an error of law warranting reversal.

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." Lucey v. Meyer, 401 S.C. 122, 133, 736 S.E.2d 274, 280 (Ct. App. 2012); see also Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (holding that

unless the parties specifically contracted otherwise, the FAA would apply whenever an arbitration agreement involves interstate commerce). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'—words signaling 'an intent to exercise Congress' commerce power to the full.'" Id. (citing Thornton v. Trident Med. Ctr. L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003)); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 57 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). Accordingly, "[b]ecause the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider-range of transactions than those actually in commerce—that is, within the flow of interstate commerce." Id.

A "court must examine the agreement, the complaint, and the surrounding facts, focusing particularly on what the terms of the contract specifically require for performance," to ascertain whether an arbitration agreement implicates interstate commerce and the FAA. Dean, at 380, 759 S.E.2d at 732 (citing Bradley, 398 S.C. at 455, 730 S.E.2d at 316)) (internal citations and quotations omitted). This is generally a fact specific inquiry. Id. Further, courts must look to the essential character of the contract when determining when to apply the FAA. Bradley, at 455, 730 S.E.2d at 316. Here, although the face of the agreements might, at first blush, belie an interpretation that the contracts could implicate interstate commerce,[4] the surrounding facts unequivocally

[4] Indeed, trial counsel for Appellant made the initial determination that the contract did not implicate interstate commerce; however, this issue was clarified by the filing of the affidavit of Tonya Brazier.

demonstrate that the contracts involve interstate commerce.

Ms. Brazier's affidavit establishes that under the terms of the 2006 Contract Greenlawn provided, and Respondents' decedents purchased, items manufactured outside of South Carolina. Specifically, a bronze grave marker was manufactured in Pittsburg, Pennsylvania, and the granite base for the grave marker was manufactured in Elberton, Georgia. Additionally, Ms. Brazier's affidavit establishes the casket contracted for by Respondents, and provided by Greenlawn pursuant to the 2011 Contract, was manufactured in Batesville, Indiana. It was error for the trial court to find Ms. Brazier's affidavit "not persuasive with respect to the Defendant's Motion for Reconsideration." Ms. Brazier's affidavit was persuasive to the Motion to Compel in that it contained facts evidencing interstate commerce and, by implication, the applicability of the FAA.

The "essential character of the [2006 and 2011] Contracts"—provisions for perpetual care, internment, merchandise, and funeral goods and services—include instrumentalities of interstate commerce, which, under the Commerce Clause, Congress has the authority to regulate. Cape Romain Contractors, Inc. v. Wando E., L.L.C., 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013) ("Under the reach of the Commerce Clause, 'Congress has the authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or person or things in interstate commerce . . . and (3) those activities having a substantial relation to interstate commerce.'") (citing United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009), United States v. Morrison, 529 U.S. 598, 609 (2000)); see also Cape Romain, at 122, 747 S.E.2d at 464; see e.g. Perez v. U.S., 402 U.S. 146, 150 (1971) (Instrumentalities of interstate commerce are the "things" moving in commerce); U.S. v. Ballinger, 395 F.3d 1218, 1225

(11th Cir. 2005) (same); U.S. v. Cobb, 144 F.3d 319, 322 (4th Cir. 1998) (same). Moreover, the South Carolina Supreme Court has "previously held that incorporating out-of-state materials . . . are indicators of interstate commerce." Cape Romain, at 124, 747 S.E.2d at 465; Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (finding that the use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (finding the consultation with out-of-state technicians is an indicator of interstate commerce).

As evidenced by the comments during the hearing and in the Order on Reconsideration, the trial court did not consider the essential purpose of the contract, but assumed that a funeral services contract could not implicate interstate commerce. Indeed, at the hearing, the following colloquy occurred:

> [Appellant's counsel]: . . . But it is on the Court to examine the pleadings and motions to decide, if in fact, interstate commerce is implicated by the claims and then it is Your Honor's, it's the defendant's position that even under, that even if the South Carolina Arbitration Act doesn't apply, that because of the strong favorability to arbitration under South Carolina and Federal Law that it could very well be implied and enforceable under the Federal Arbitration Act.
>
> [The Court]: This is going to be kind of hard to say, you put something in the stream of commerce and it is a grave site.
>
> [Appellant's counsel]: Your Honor, I would have to check the details of the actual merchandise. These contracts also include the purchase of headstones and caskets that may very well have crossed state lines. . . .

[R. p. 40, line 16 – p. 41, line 5]. In the Order on Reconsideration, the trial court found that, "It is implausible to this Court that a contract for the burial of South Carolina residents in South Carolina can implicate interstate commerce." [R. pp. 2-4].

The trial court's reasoning, and as was urged by Respondents to adopt, [R. p.

52]—is similar to that of the trial court in Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) and is the same reasoning the South Carolina Supreme Court determined to be a "relic of the past" in Dean. Both Timms and Dean dealt with the breadth of interstate commerce in regards to nursing home residency contracts. In Timms, the court held that the "contract was obscure, if not devoid, of any basis for holding that interstate commerce was involved." Timms, at 472, 427 S.E.2d at 644. The Timms Court further found that the nursing home's assertion regarding supplies and goods was irrelevant to the interstate commerce analysis because it was not the basis of the contract between the parties, which was to provide for patient care services in a South Carolina facility." Id. at 473, 427 S.E.2d at 644.

In overruling Timms, our Supreme Court noted that there, the appellants were contractually obligated to provide meals and medical supplies, which were instrumentalities of interstate commerce. Dean, at 381, 759 S.E.2d at 733. The Dean Court specifically held, "[a]lthough the meals and medical 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." Id. Here, the grave marker, the base for the grave marker, and the casket—all instrumentalities of interstate commerce—are extremely relevant to the current dispute as Greenlawn could not have successfully performed their part of the contract without those items. Those items must be considered in the interstate commerce analysis because the contracts at issue specifically required Greenlawn to provide these goods and services. See Bradley, at 455, 730 S.E.2d at 316 (holding that the Court must focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce

was involved). Cf. Zabinski, at 580, 553 S.E.2d at 110 (determining that construction contracts involve interstate commerce because they are based on transactions for the purchase and use of materials and supplies from out-of-state vendors).

The Bradley opinion is also helpful here. In Bradley, Bradley and Brentwood Homes ("Brentwood") entered into a Home Purchase Agreement ("Agreement"), which contemplated the purchase of a completed dwelling where Brentwood functioned as the seller of the dwelling and not the contractor for the construction of the dwelling. Bradley, at 450, 730 S.E.2d at 313. After the closing, Bradley commenced an action against Brentwood related to numerous construction defects in the dwelling. Id. After six months of discovery requests, Brentwood filed an Amended Answer which claimed the circuit court did not have jurisdiction to rule on Bradley's lawsuit due to an arbitration provision in the Agreement. Id.

Brentwood contended that even if the arbitration provision in the Agreement did not comply with the requirements of the UAA, arbitration was proper because the transaction involved interstate commerce, thereby invoking the FAA. Id. In support of their contention, Brentwood submitted an affidavit of Bradley's, attesting that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank & Co., and the affidavit of Edward Terry, Brentwood's Vice President ("Terry Affidavit"). Id. The Terry Affidavit attested that Brentwood used subcontractors, materials, and suppliers from outside the state of South Carolina. Id. The circuit court found the Agreement did not refer to equipment and materials to be furnished from outside of South Carolina. Id. The Court also discounted the Terry Affidavit, finding Terry never directly dealt with Bradley. Id.

Although the Supreme Court disagreed with Brentwood and found the FAA did not apply, the Court's analysis and reasoning with regard to determining the character of the transaction as interstate or intrastate and the importance of the additional evidence submitted to the Court is instructive here. First, the Court evaluated the "historical intrastate character of real estate contract." Despite South Carolina courts having spoken on the character of the development of real estate transactions, the precise issue of the sale of a residential real estate had not been addressed. The Court noted, "Because the precise question presented in the instant case has not yet been addressed by our appellate courts, we have looked to other jurisdictions." Id.

Similarly, our appellate courts have not addressed whether funeral services contracts are considered interstate commerce such that the FAA may be invoked. However, Alabama and Texas have addressed this issue, finding funeral services contracts implicate interstate commerce. In Service Corp. International v. Lopez, a Texas Court of Appeals analyzed two "pre-need" funeral contracts and a third contract executed for Lopez's father, to see if arbitration should be compelled in a suit alleging, *inter alia*, fraud, negligence, breach of contract, breach of warranty, and intentional infliction of emotional distress. 162 S.W.3d 801, 805 (Tex. Ct. App. 2005). The Court ultimately found the contracts at issue evidenced transactions involving interstate commerce and were therefore subject to the FAA. Id. The Court noted, "whether the parties contemplated that their transaction would substantially affect interstate commerce is irrelevant; if the transaction affected interstate commerce 'in fact,' the arbitration provision is governed by the FAA." Id. (internal citations omitted).

The Alabama Supreme Court reached an identical conclusion in Service Corp.

International v. Fulmer, 883 So.2d 621 (Ala. 2003). Specifically, the court agreed with the appellant's contention that the "general practice" of providing funeral services is well within the reach of Congress' commerce power. Id. The funeral contract at issue in Fulmer was for, *inter alia*, the performance of a funeral service, the cremation of the decedent's body, and a vase for the decedent's remains. Id. The court reasoned that the underlying contract (for the sale of goods and service), 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." Id. The Fulmer court additionally found that given the outer limits of Congress' commerce power—as demonstrated in Wichard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942)—"it would be difficult indeed to give an example of an economic or commercial activity that one could, *with any confidence*, declare beyond the reach of Congress's power under the Commerce Clause, and by extension, under the FAA." Id. Accord Episcopal Hous. Corp., at 640, 239 S.E.2d at 652 (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because it would be virtually impossible to construct a building of that size with materials, equipment, and supplies all produced and manufactured solely within South Carolina); Blanton, at 541, 570 S.E.2d at 569 (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because the contract contemplated the use of materials manufactured outside the state, but also realistically could not have been completed without the use of interstate commerce).

The Bradley court also analyzed whether the contents of the affidavits referenced

items particular to the completion of the agreement. There, the Court that found the use of the lender was tangential to the performance of the contract and that the use of out-of-state suppliers and subcontractors had no bearing on the purchase of a completed dwelling. Here, however, Ms. Brazier's affidavit demonstrates the coffin and grave marker, specifically contracted for by Respondents, were integral, not tangential, to Greenlawn's performance under the 2006 and 2011 Contracts. Indeed, the grave marker is an integral part of Respondent's claims in this matter. See R. pp. 28-23, ¶15 ("Upon information and belief, [Greenlawn] has removed the headstone marker from Plaintiffs [sic] father's burial site, without permission from the family and the father now lies in an unmarked grave.").

The evidence before the trial court was the Complaint, the Agreement, and the surrounding facts—i.e. Ms. Brazier's affidavit. A review of this evidence, specifically Ms. Brazier's affidavit, demonstrates that the contracts at issue implicate interstate commerce, and by extension the FAA. Accord Blanton, at 541, 570 S.E.2d at 568-69 (finding the undisputed affidavit of the respondent asserted the contract affected interstate commerce by averring her design and drawings contemplated purchase or acquisition of materials and labor from states other than South Carolina). Therefore, the trial court erred in denying the motion to compel arbitration.

II. The trial court erred in denying the Motion to Compel Arbitration because Respondents did not meet their burden of proving the claims are unsuitable for arbitration.

At no point have Respondents argued that this matter is unsuitable for arbitration. Rather, Respondents argued that the parties must agree that the FAA would apply or the agreement must implicate interstate commerce. [R. pp. 67-74]. However, the facts at hand and South Carolina case law do not bear out Respondents' argument to the trial court.

First, Respondents' argument that the parties must explicitly agree to the application of the FAA for it to apply is an incorrect statement of law and is, therefore, not persuasive. As set forth herein, FAA jurisprudence demonstrates that the FAA will apply unless the parties *have specifically contracted against it.* See Munoz , at 538, 542 S.E.2d at 363 ("Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.") (citing Allied-Bruce, 513 U.S. at 265; Soil Remediation Co., at 454). There is absolutely no evidence that the parties specifically contracted against the application of the FAA.

Second, there exists evidence that interstate commerce was implicated in this contract. Tonya Brazier's affidavit attests to instrumentalities of interstate commerce being used to fulfill Greenlawn's obligation under the contract. Although Respondents urged the trial court that the affidavit did not in fact, evidence interstate commerce, Respondent's legal support—Timms—has been overruled and is no longer good law.

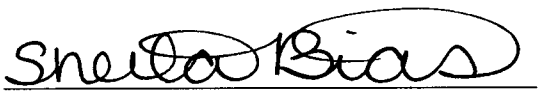
Respondents' arguments do not meet the burden of demonstrating that this matter

is not suitable for arbitration. Thus, the trial court erred in failing to compel arbitration.

CONCLUSION

Based on the foregoing, Appellant respectfully request this Court reverse the trial court's order denying our Motion to Compel Arbitration and remand this matter for arbitration.

Respectfully submitted,



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v.

Greenlawn Funeral Home,..... Appellant.

CERTIFICATE OF COUNSEL

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

November 26, 2014

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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.

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 Brief** by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Kathy J. Templeton
Kathy Templeton

Dated: November 26, 2014