THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Common Pleas Case Number 2013-CP-10-7413
Appellate Case No. 2015-001788

Affordable Concrete and Masonry d/b/a RSS, LLC ..... Respondent.

v.

Roper Hanks, LLC ..... Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

Affordable filed a Complaint against Haverty's Furniture Company on December 23, 2013. Haverty's filed a Motion to Dismiss on March 5, 2014. On March 19, 2014, Affordable filed a Motion to Amend the Summons and Complaint to add Roper Hanks as a Defendant. Haverty's Motion to Dismiss was denied and Affordable's Motion to Amend was granted on August 4, 2014. A Stipulation of Dismissal to dismiss Haverty's Furniture Company was filed simultaneously with the Amended Summons and Complaint. Roper Hanks filed another Motion to Dismiss, Transfer Venue, and Compel Arbitration on September 29, 2014.

A Hearing on Roper Hanks' Motion to Dismiss, Transfer Venue, and Compel Arbitration was held on December 18, 2014. (R. p. 200). In the Motion and at the Motion Hearing, Roper Hanks argued that the case should be transferred to Georgia and the parties should be compelled to conduct Arbitration. (R. p. 205, line 014-p. 206, line 25). After the Motion hearing and submission by both parties of Proposed Orders, Roper Hanks' Motion was denied. (R. pp. 003-010).

B. FACTS OF THE CASE

The Respondent, Affordable Concrete and Masonry ("Affordable") entered into an Agreement to provide labor and materials for the installation of concrete, pavers and brick work at Haverty Furniture Companies, Inc. ("Haverty") in Charleston, South Carolina for the contract price of $42,043.83 plus $12,530.30 in change orders. (R. pp. 026-027). Affordable is a small company owned by Steve Hughes. The company conducts most of its business in

Horry County, but does some work in other parts of South Carolina. Affordable bid on a contract for Roper Hanks and the bid was accepted on March 7, 2013. (R. p. 207, line 19-22). Affordable began work on the project within ten (10) days of the bid. (R. p. 207, line 22-25). On March 21, 2013, Roper Hanks asked Affordable to submit an Application for Payment for the first period of work, almost a month into the project. (R. p. 208, line 307, 17-20) . It was at this time Roper Hanks sent its written "Subcontract Agreement" to Affordable and then Affordable signed the contract on April 5, 2013. (R. pp. 221, 236). Roper Hanks supplied the form contract to Affordable. The contract was signed in South Carolina. The performance of the contract occurred in South Carolina and related to the development of property in South Carolina. (R. p. 221).

During the project, a conflict developed between Mr. Hanks, the owner of Roper Hanks, LLC, and Mr. Hughes, the owner of Affordable. Affordable started work in March of 2013 and worked for approximately three months on the project. Affordable was paid only $28,657.52 for this work. (R. pp. 026-027). There is still $25,916.62 due and owing to Affordable for the work performed on Haverty's property. (R. p. 027).

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is a matter for judicial determination. *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 306 (Ct. App. 2005). Such determinations are subject to de novo review. *Id.*; *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However, "a circuit court's factual findings will *not* be reversed on appeal if *any* evidence reasonably supports the findings." *Bradley*, 398 S.C. at 453 (emphasis added).

Further, as to the Rule 12(b)(3) portion of the Appellant's Motion, A Trial Court's Order Denying a Motion to Change Venue is not an Order "affecting a substantial right" and, therefore, is not immediately appealable. *Breland v. Love Chevrolet Olds, Inc.*, 339, S.C. 89, 93-94, 529 S.E.2d 11, 13 (2000).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ARBITRATION PROVISION OF THE WRITTEN CONTRACT WAS NOT SUBJECT TO THE FAA AS THE CONTRACT INVOLVED PURELY INTRASTATE COMMERCE.

The Federal Arbitration Act applies only to contracts involving maritime transactions or commerce among the several states or with foreign nations. 9 U.S.C. § 2. The South Carolina Uniform Arbitration Act applies in contracts that involve merely intrastate activity. The Federal Arbitration Act ("FAA") directs that any written provision in any maritime transaction or a contract evidencing a transaction involving commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Commerce, under the FFA, is defined as commerce among the several states or with foreign nations..." 9 U.S.C. § 1. In spite of the broad interpretation of the FFA, the Act does not mirror an intent by Congress to preempt the entire field of arbitration. *Zabinsky v. Bright Acres Ass'n*, 346 S.C. 580, 591, 853 S.E.2d 110, 115-16 (2001).

A court must look at the agreement, the Complaint, and the facts to ascertain whether the transaction is one involving interstate commerce within the meaning of the FAA. *Zabinsky*, 346 S.C. at 594. In all cases, the determination depends on the facts of the case.

Thornton v. Trident Med.Ctr., LLC, 357 S.C. 91, 95-96, 592 S.E.2d 50, 52 (Ct. App. 2003)(citing *Zabinksy* at 594). The Court should focus on what the terms of the contract specifically require in its performance in determining whether interstate commerce was involved. *Seibert v. Brooks*, 2006 WL 7285743 (Ct. App.); *Bradley v. Brentwood Homes*, Inc., 398 S.C.447, 455, S.E.2d 312, 316 (2012)(quoting *Thornton v. Trident Med. Ctr.*, LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003).

The South Carolina Supreme Court found that interstate commerce was not involved in a contract for the sale of land to out of state parties, despite the fact that the parties obtained services of an out of state engineer and lender. *Mathews v. Flour Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880 (1994)(overruled by *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001)(overruling *Mathews* "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FFA applied"). In *Mathews*, the Court was unable to discern from the evidence presented whether the contract *required* administration of anything related to interstate commerce. *Bradley*, 398 S.C. at 455 (citing *Mathews* at 407).

This Court came to a similar conclusion in *Seibert v. Brooks*. *Siebert* also involved a real estate purchase. *Seibert v. Brooks*, 2006 WL 7285743 (Ct. App.). The Defendant argued interstate commerce was involved since the parties were domiciled in separate states, an inspection was sent out of state, and a check was drawn from an out-of-state bank. *Id.* at 1-2. The Court ruled the contract did not involve interstate commerce. *Id.* at 2-3. The focus should be on what is required for performance, not the factors that are incidental to the nature of the contract. *Id.* at 3.

The South Carolina Supreme Court has viewed the development and sale of real estate as an inherently intrastate activity. *Bradley*, 398 S.C. at 456; *Zabinksy*, 346 S.C. at 595. In *Bradley*, an individual entered into an agreement to purchase a home from Brentwood Homes. *Bradley* at 449-50.The purchaser later filed suit for construction defects, fraud, breach of implied warranty, and negligence. *Id.* at 457. Brentwood Homes argued that the contract involved interstate commerce because they used subcontractors, materials and supplies from outside of South Carolina and that the purchase was financed by an out of state lender. *Id.* at 456. The Court ruled these facts were not enough for Brentwood Homes *to satisfy its burden of proof* to negate the intrastate nature of the contract. *Id.* at 458 (emphasis added). The Supreme Court implies the party moving to enforce the arbitration clause has a burden of proof to negate the intrastate nature of certain contracts involving land. The Court has held that such contracts involving the "development of land within South Carolina's borders (are) the quintessential example of a purely intrastate activity." *Zabinsky*, 346 S.C. at 595.

Here, this case arises out of an agreement between a contractor and subcontractor. Affordable is a South Carolina company that was hired to do concrete work in Charleston, South Carolina. Although the Defendant is incorporated in Georgia, they were building a store in South Carolina and the project that the contract is concerned with was in South Carolina. (R. p.221) The contract was signed in South Carolina. (R. pp. 221, 236). The work was performed in South Carolina. (R. pp. 027, 221). Affordable was responsible under the contract to supply all labor, materials, lifts, and safety equipment. (R. p. 222). Affordable's employees are all from South Carolina. The materials were made or purchased within South

Carolina. (R. pp. 092-133). The work was for the development of property in Charleston, South Carolina. (R. p. 221).

There is ample evidence on the record to support the Trial Court's ruling that the contract did not involve interstate commerce, especially when the Appellant failed to provide any evidence, other than the incorporation of the Appellant, that the written "Subcontract Agreement "involved interstate commerce.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ARBITRATION PROVISION OF THE WRITTEN CONTRACT WAS UNENFORCEABLE UNDER THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

Because the FAA did not apply to this contract, the Trial Court correctly examined the arbitration provision under the law of South Carolina. The South Carolina Uniform Arbitration Act governs arbitration provisions in contracts that do not involve interstate commerce. *Zabinsky* at 591. Under this Act, arbitration provisions are valid, enforceable, and irrevocable, save upon such grounds that exist at all or in equity." S.C. Code § 15-48-10(a). However, any Notice that a contract is subject to Arbitration "*shall* be typed in underlined capital letters, or rubber-stamped prominently, on the *first* page of the contract...."S.C. Code § 15-48-10(a)(emphasis added). If the arbitration provision is not underlined, in capital letters, or rubber stamped prominently, on the first page, the arbitration provision is invalid. S.C. Code § 15-48-10(a). Absent such notice the contract *shall not* be subject to arbitration. S.C. Code § 15-48-10(a)(emphasis added).

Here, the arbitration provision that Appellant relies upon is on page thirteen (13) of the written Subcontract Agreement, under the heading "Claims and Disputes". (R. pp. 233-

234). The font is not underlined or in capital letters. It is hidden near the end of a sixteen (16) page document with additional exhibits. The Arbitration Clause in the written contract does not meet the notice requirements under the South Carolina Uniform Arbitration Act and therefore, the clause is unenforceable and the contract is not subject to any Arbitration requirement.

III. EVEN IF THE FAA APPLIED, THE TRIAL COURT WAS CORRECT IN DETERMINING THE ARBITRATION PROVISION OF THE WRITTEN CONTRACT WAS UNENFORCEABLE BECAUSE IT IS AN ADHESION CONTRACT.

Even if the Trial Court had found that the contract involved interstate commerce and the FFA applied, the Arbitration Clause in this case is unenforceable because it is unconscionable. The provisions of the Federal Arbitration Act [FAA], state that arbitration agreements in contracts evidencing transactions involving commerce are valid, irrevocable and enforceable and "Courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011). However, this provision reflects not only the federal policy favoring arbitration but also the principle that an arbitration clause is a *matter of contract law. Id.* at 1745 (emphasis added).

While the FAA states that arbitration clauses are enforceable, it also preserves the defenses of contract law and the court should evaluate the facts based on whether the contract is unconscionable. The Concepcion case is instructive of the methods by which arbitration agreements subject to the FAA may be *invalidated*:

"The final phrase of § 2, however, permits arbitration agreements to be

> declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause *permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'* but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746.

While the court in *Concepcion* specifically limited unconscionability of *class* arbitration waivers, it also reiterated the potential for arbitration clauses to be unconscionable by continuing to hold them to the general contract law standards of unconscionability. Arbitration clauses subject to the FAA are still subject to general contract principals of state law. *York v. Dodgeland of Columbia*, Inc., 406 S.C. 67, 85, 749 S.E.2d 139, 148 (Ct. App. 2013)(citing *Munoz* at 539).

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007). An absence of meaningful choice for one party speaks to the fundamental fairness of the bargaining process. *York* at 86. A starting point is to determine whether the contract was one of adhesion. Adhesion contracts are not per se unconscionable, but finding an adhesion contract is the beginning point of the analysis. *Id.* "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id.* When determining the absence of meaningful choice, courts should take into account: 1) the nature of the injuries suffered by the Respondent; 2) whether the Respondent is substantial business concern; 3) the relative disparity of the parties in bargaining power;

4) the parties relative sophistication; 5) whether there is an element of surprise in the inclusion of the challenged clause; and 6) the conspicuousness of the clause. *Id.*

In the instant case, the Subcontract Agreement was a form document drafted by Roper Hanks and presented to Affordable approximately one month *after* Affordable had already began work on the project and had completed substantial work. The contract was essentially a take-it-or-do-not get-paid document. Specifically, the agreement states in Article XII, page 16:

> "If this Subcontract has not been signed and returned within fifteen (15) calendar days of date of the Subcontract Agreement, subcontractor's failure to do so shall constitute acceptance of this Subcontract Agreement in full as issued. **Subcontractor shall not be entitled to any payment until this Subcontract Agreement has been property executed and all documents and information to be furnished by Subcontractor (including but not limited to, any bonds and evidence of insurance required herein) have been supplied to Owner or contractor."** (R. p. 236).(Emphasis added).

Roper Hanks accepted the bid, Affordable started the work, and then had no opportunity to bargain. The very terms of the contract mandated that Affordable sign the contract or not get paid for the work it had already done. This is a contract with boiler plate terms with exhibits that explained the actual work to be performed. These facts show that it was an adhesion contract, and thus, the door to unconscionability is opened. After a finding of an adhesion contract, the Trial Court then continued the analysis by looking at the elements of unconscionability.

Here, Roper Hanks is a large corporation that does business throughout the southeast United States, while Affordable is a local concrete and masonry company, owned by one individual. Further, the arbitration clause did have an element of surprise because of its

inconspicuousness and the one-sided terms in the document. Similar to *Simpson*, The arbitration clause was entirely in standard small print and located in paragraph "X" labeled "Claims and Disputes" on the thirteenth (13) page of a sixteen (16) page document with additional exhibits attached. (R. pp. 233-234). Most importantly, Affordable had an absence of meaningful choice because Affordable was not presented with the written "Subcontract Agreement" until after substantial work had been performed and only when it was asked to submit a Payment Application. (R. pp. 236, 208, line 17-20). Furthermore, despite complying with the terms and submitting a payment application, Affordable has suffered financial injury by not being paid what is owed for the work performed.(R. p. 028).

All of these facts establish that there was a significant imbalance in the parties' sophistication, Affordable's lack of bargaining power, the nature of the damages, and the inconspicuous placement and form of the arbitration clause. Therefore, Affordable did not have a meaningful choice in agreeing to arbitrate.

In addition to the lack of meaningful choice, the Trial Court looked to determine whether the terms of the contact are so one-sided and oppressive that no reasonable person would make them and no fair person would accept them. *York* at 87. The Arbitration Clause in this case contained oppressive, one-sided terms to which no reasonable person would agree:

1) The Arbitration Clause mandates that the subcontractor abide by the contractor's decision unless it commences arbitration proceedings within thirty (30) days (R. p. 233);
2) After thirty days, the contractor's decision becomes final and binding (R. p. 233);
3) The Contractor, at their "sole option", can consolidate claims of parties in

arbitrations (R. p. 233);

4) If the subcontractor fails to abide by the final binding decision of the contractor, the contractor has the right to withhold sums due to the subcontractor (R. p. 234);

5) The subcontractor is required to agree to an arbitrator selected by the contractor and the owner (R. p. 234);

6) The Contractor can withhold payment to the Subcontractor, and the agreement even allows for the Contractor to pursue *legal* action, if the Subcontractor fails to abide by the Contractor's decision (R. p. 234).;

7) If a dispute arises, the Subcontractor must continue work without interruption despite the claim or controversy (R. p. 234); and

8) The venue for arbitration is "the city of the Owner's office". (R. p. 233).

While paragraph "X" requires the subcontractor to seek redress only through Arbitration, the contractor is excluded from these obligations as it relates to a dispute between contractor and subcontractor. Further, the venue requirement clause for arbitration is extremely oppressive. In this case, the venue for Arbitration under this Agreement would be Atlanta, Georgia. This would force Affordable, a local, small masonry company, to file for Arbitration in a State where Affordable has no contacts. It would require Affordable to bring all of its evidence and witnesses to another State where Affordable does not conduct business, and where none of the events that are the subject matter of the claim took place. Such a clause is oppressive and one-sided against Affordable.

Additionally, the cost prohibitive nature of arbitration coupled with the relative size of the parties makes the clause further imbalanced. A large corporation can more readily afford the high costs of arbitration than a local concrete company, especially if forced to arbitrate in another state. For the foregoing reasons, the arbitration clause is one-sided, and the terms so oppressive that no reasonable person would make them and no fair and honest

person would accept them.

There is ample evidence to support the Trial Court's finding that the Arbitration Provision was unconscionable. Respondent's lack of meaningful choice, outlined above, in conjunction with the one-sided and oppressive terms of the agreement make the arbitration agreement unconscionable and therefore, unenforceable.

IV. THIS COURT NEED NOT REVIEW THE ISSUE OF ESTOPPEL BECAUSE THE APPELLANT FAILED TO PRESERVE THE ISSUE FOR APPEAL AND, IN ANY EVENT, THE RESPONDENT IS NOT ESTOPPED FROM CHALLENGING THE ARBITRATION CLAUSE IN THIS CASE.

The Appellant argues that Affordable cannot seek to avoid the terms of the written "Subcontract Agreement" as Affordable is "simultaneously seeking the benefit of the Contract by bringing a breach of contract claim". (Int. Br. App p. 5). However, this issue of estoppel was not properly preserved for appeal. Roper Hanks failed to argue estoppel in its original Motion or at the Motion Hearing. The issue was not addressed in the original Order as it was not argued by the Appellant. Roper Hanks only first raises this argument in its Motion to Reconsider. A Rule 59(e) Motion to Reconsider cannot be used to add a new ground that was not previously raised below. See *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 832 (1992). The purpose of Rule 59(e) is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Budinich v. Beckton, Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1720, 100 L.Ed. 2d 178, 183 (1988). A party cannot raise an issue for the first time on a Motion to Reconsider. *Anderson Mem. Hos., Inc. v. Hagen*, 313 S.C. 497, 442 S.E.2d 399 (Ct. App. 1994). As Roper Hanks did not raise this issue before its Motion to Reconsider and the issue is not addressed in the Trial Court's Order, it

is not properly preserved for appeal.

Further, Affordable is not estopped from challenging the Arbitration clause as its underlying claims are not solely based on the Defendant's written "Subcontract Agreement." Equitable Estoppel applies when a party to a Written Agreement containing an Arbitration Clause must rely on the terms of the agreement in asserting its claims against the other party. *American Bankers Ins. Group v. Long*, F.3d 623, 627 (4th Cir. 2006). This test examines the nature of the underlying allegations and therefore, courts should examine the underlying Complaint. *Id.*

In this case, Affordable made an offer in the way of a bid to Roper Hanks. Roper Hanks accepted the bid and Affordable began work on the project within ten days. (R. p. 207, line 22-25). This occurred weeks before Roper Hanks written "Subcontract Agreement" was ever presented to Affordable. Affordable's underlying claims for Breach of Contract and Quantum Meruit are not based solely on the Defendant's written "Subcontract Agreement", but the initial contract between the parties, made well before the Written Contract was presented to Affordable. As such, Affordable is not estopped from challenging any portion of the Defendant's written "Subcontract Agreement", including the Arbitration Agreement.

V. THIS COURT NEED NOT REVIEW THE VENUE ISSUE BECAUSE THE DENIAL OF A TRANSFER OF VENUE IS NOT IMMEDIATELY APPEALABLE AND, IN ANY EVENT, THE TRIAL COURT'S DECISION DENYING A CHANGE OF VENUE IS CORRECT

The Court denied Roper Hanks Rule 12(b)(3) Motion to Change Venue. A Trial Court's Order Denying a Motion to Change Venue is not an Order "affecting a substantial right" and, therefore, is not immediately appealable. *Breland v. Love Chevrolet Olds, Inc.*,

339, S.C. 89, 93-94, 529 S.E.2d 11, 13 (2000).

Even if an Order denying the transfer of venue was subject to immediate appeal, the Trial Court was correct in denying the Motion because of the same reasons set forth herein as to the unconscionable adhesion contract. Additionally, the Venue clause is against public policy as the Affordable did not have a meaningful choice in signing the contract and the cost of moving the case to Georgia would effectively deprive Affordable of its day in Court. The contract was not presented to Affordable until after Affordable had completed considerable work on the project. Further, under South Carolina law a cause of action may be brought in the manner provided in the South Carolina Rules of Civil Procedure even if the contract has a venue clause. S.C. Code § 15-7-120.

VI. THE TRIAL COURT CORRECTLY RULED THE APPELLANT'S CHOICE OF LAW PROVISION IS INVALID AND, EVEN IF THE TRIAL COURT HAD FOUND GEORGIA LAW APPLIES, THE AGREEMENT WOULD STILL BE FOUND TO BE INVALID AND UNCONSCIONABLE.

As presented to the Trial Court, generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law. But, if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement. *Id.; Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005).

Here, for the reasons discussed above regarding the unconscionability of the arbitration clause, this choice of law provision is also so one-sided, oppressive and adhesive that it cannot be a meaningful choice on the part of Affordable. Affordable's cost of moving

the case to Georgia would in all likelihood deprive it of its day in Court. The loss occurred in South Carolina, the contract was signed in South Carolina and the entire content and matter of the case relates to South Carolina. Additionally, it would eliminate Affordable's ability to subpoena witnesses to another State. Therefore, the clause is unconscionable and invalid. and South Carolina law applies.

Even if Georgia law did apply to the case, the Arbitration Provision would still be unconscionable under Georgia law. Georgia Courts use a similar analysis for unconscionability. Two prongs are analyzed: 1) the procedural elements of the contract and 2) the substantive components. *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 391, 478 S.E.2d 769, 771 (1996). For all the reasons discussed above under South Carolina law for unconscionability, the Arbitration Provision would still be unenforceable under Georgia law.

The Portion of the Order Denying the Transfer of Venue in this case is not immediately appealable. Even if it was, there is evidence on the record to support the Trial Court's findings that the contract does not contain a valid forum selection clause or choice of law provision. Further, Roper Hanks' argument that Georgia Law applies to the Contract fails because it is against public policy. Even if Georgia law applies, it fails for the same reasons as it would under South Carolina law.

CONCLUSION

Based on the Appellate Court's Standard of Review, there is evidence from the record that supports the Circuit's Court denial of the Defendant's Motion to Dismiss Action, Transfer Venue, and Compel Arbitration. There is evidence that the contract involves purely

intrastate commerce and therefore, the FAA does not apply. As the FAA does not apply, the Arbitration Agreement is void as it does not meet the requirements under South Carolina Law. Even if the FAA applied, there is evidence on the record that shows the choice of arbitration provision is unconscionable and therefore, unenforceable. Although the denial for Change of Venue is not immediately appealable, there is also evidence to support the Trial Court's Denial of the Appellant's Motion to Transfer Venue as the Contract does not contain a valid forum selection clause.

WHEREFORE, based upon the foregoing, the Respondent respectfully requests the trial court's decision be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with South Carolina Rule of Appellate Procedure 221(b).

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SWORN to before me this 28th day
of April 2016.

Mallary W. Hitchcock

Notary Public for South Carolina
My Commission Expires: 08/01/22

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, this 29th day of April, 2016 to the address below:

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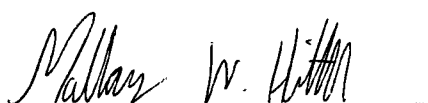

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