THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No. 2016-000635

ANGELA CARTMEL ..... Respondent

v.

EDWARD BRICE TAYLOR ..... Appellant

FINAL BRIEF OF APPELLANT

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January 3, 2017

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STATEMENT OF THE CASE

Background.

On May 9, 2014, the parties entered into a so-called "Residential Lease Agreement" ("Agreement") for 2694 Camp Rawls Road, Wagener, South Carolina, 29164, located in Aiken County ("Property"). [R. pp. 85-98]. Under the Agreement, the Appellant is the "Landlord"; the Respondent is the "Tenant". [R. p. 85].

The Agreement contemplates a "[r]ent to own contract for a five year lease" which would allow the Plaintiff residential use and to keep horses. [R. p. 85 ¶ 1]. Notwithstanding its title, the Agreement is not strictly residential in nature.

At Paragraph 1, the Agreement provides that: "[t]**he tenant may use part of the property for the following home-based business: the construction of horse jumps** (emphasis added)." [R. p. 85 ¶ 1]. The same paragraph goes on to state that "[t]he Tenant is responsible for all permits and licenses related to the home-based business and the Tenant indemnifies the Landlord of all liability, costs and fees associated with this business." [R. p. 85 ¶ 1].

There is no question that Respondent did, in fact, establish the contemplated horse-jump construction business. She avers to this fact repeatedly in her Complaint, at ¶¶ 4, 20 and 21, in which she seeks business loss/interruption damages. [R. pp. 16, 18-19 ¶¶ 4, 20, 21]. Neither party disputes that the Agreement is an otherwise valid, binding and enforceable written contract. [R. pp.15-27 (Compl.), pp. 28-32 (Ans.), pp. 74-84 (Trans.)].

Arbitration Provision.

The arbitration clause is located at Paragraph 61 of the Agreement:

> "[i]f any dispute relating to this Lease between the Landlord and Tenant is not resolved [by informal discussion] … the parties agree to submit the issue

> first before a non-binding mediator and to an arbitrator in event the mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant."

[R. p. 85 ¶ 61]. The Agreement does not contain a capitalized, underlined notice at the top of its first page that would meet the requirements of S.C. Code Ann.§ 15-48-10.

Procedural History.

The Respondent initiated this suit in the Aiken County Court of Common Pleas on May 14, 2015, claiming damages from Appellant's alleged misrepresentations and other conduct, which she claims resulted in a fire at the Property. [R. pp.15-27]. In her Complaint, at ¶¶ 4, 20 and 21, Respondent alleged the fire loss caused her to suffer damages connected with the interruption of her business. [R. pp. 16, 18-19].

Despite due demand in the Answer, timely filed on August 17, 2015, Respondent declined to engage in either mediation or arbitration. [R. pp. 28-32 (Ans.), pp. 74-84 (Trans)]. Before any discovery had taken place, Appellant served a motion to compel arbitration on September 27, 2015, which initially had to be continued. [R. pp. 1-5, 6].

The matter came to a full hearing on January 25, 2016 before the Honorable L. Casey Manning. [R. p. 1, pp. 74-84]. Respondent submitted no affidavit or testimony at or prior to the hearing. [R. p. 1, pp. 74-84, pp. 39-54]. Likewise, Respondent submitted no evidence other than the Agreement. [R. pp. 39-54, pp. 74-84].

Judge Manning denied the motion by a form order issued the same date, January 25, 2016, which contemplated a formal Order to follow. [R. pp. 7-8]. Ten days later, on February 4, 2015, Judge Manning issued a formal Order which was file-stamped by the Aiken County Clerk of Court on February 8, 2015 [R. pp. 9-13].

On February 10, 2016, the Appellant served a timely Notice of Motion and Motion to Reconsider, which was filed-stamped by the Aiken County Clerk of Court on February 15, 2016. [R. pp. 64-73].

Following a telephonic hearing, Judge Manning issued an Order Denying Motion Rule 59(e), dated February 25, 2016 and filed with the Clerk of Court on March 8, 2016 (of which written noticed was received by Appellant on March 11, 2016) [R. p. 14]. The instant Appeal timely followed on March 22, 2016.

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); *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015). 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, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

STATEMENT OF ISSUES ON APPEAL

I. Does the so-called "real estate exception" articulated by our Supreme Court in *Bradley v. Brentwood Homes, Inc.,* 398 S.C. 447, 730 S.E.2d 312 (2012), apply in the instant case?

II. If *Bradley* does not apply, is this case subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*?

II. Was the circuit court was guided by an error of law in ruling that the subject agreement was ambiguous?

ARGUMENT

I.

The so-called "real estate exception" articulated by our Supreme Court in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) does not apply in the instant case.

A. Scope.

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Id.*, 346 S.C. at 24, 644 S.E.2d at 688.

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015); *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). It is black letter law in South Carolina that "any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration

(emphasis added)." *Landers v. Fed. Deposit Ins. Corp.,* 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013).

Stated another way, the heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.*, 402 S.C. at 109, 739 S.E.2d at 213 (2013) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996)); *see also Cape Romain Contractors, Inc. v. Wando E., LLC,* 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) ("There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration."). Both federal and state public policy strongly favor the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Such a presumption is strengthened when an arbitration clause is broadly written. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (citing *AT & T Tech., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986)).

It has been held that a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at 126, 747 S.E.2d at 467; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.,* 475 U.S. at 650, 106 S.Ct. at 1419.

B. The Federal Arbitration Act.

The South Carolina courts will enforce an arbitration agreement under the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.*, in transactions that involve interstate commerce, "**regardless of whether or not the parties contemplated an interstate**

transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001) (emphasis added). "Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case. *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 ("[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."); *see also Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. at 380, 759 S.E.2d at 732.

The failure of the Agreement to meet the technical requirements of S.C. Code Ann.§ 15-48-10 is irrelevant if the FAA applies. *Zabinski*, 346 S.C. 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."); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453-454, 730 S.E.2d 312, 315 (2012); *see also Soil Remediation Co. v. Nu–Way Envtl.*, 323 S.C. 454, 459–60, 476 S.E.2d 149, 152 (1996) ("[i]f the arbitration agreement in the instant controversy is covered by the FAA, then ... the FAA preempts S.C. Code Ann. § 15–48–10(a); *Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012).

For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving "commerce." 9 U.S.C.A. § 2 (1947). The United States Supreme Court has held "[a]n

order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT & T Tech., Inc.,* 475 U.S. at 650, 106 S.Ct. a 1419. The United States Supreme Court confirmed in *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277, 115 S.Ct. 834 (1995) that the FAA is coextensive with the Commerce Clause of the U.S. Constitution.

"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." *Zabinksi*, 346 S.C. at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." *Thornton v. Trident Med. Ctr., LLC,* 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved").

C. Non-Applicability of the "Real Estate Exception" in this Appeal.

The threshold issue before the Court is whether the "real estate exception" set forth in *Bradley v. Brentwood Homes, Inc.,* 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) has any application in this case, which involves a "mixed use" lease-agreement for residential and commercial activity rather an a "strictly" residential contract.

The short answer is "no" because a mixed-use lease can never be strictly for residential purposes only – and, thus, the exception in *Bradley* cannot apply here.

In *Bradley*, plaintiffs bought a fully completed home from the defendant-developer Brentwood Homes; plaintiffs later filed a construction defect and warranty case against Brentwood Homes. 398 S.C. at 449-450, 730 S.E.2d at 313-314. Brentwood Homes moved

to compel arbitration pursuant to an arbitration provision in the sales contract, arguing that the clause was enforceable under the FAA because of: (1) the existence of a structural warranty from a national warranty company; (2) the fact out-of-state materials were used in the construction of the residence, and (3) financing from an out of state lender. *Id.* at 456, 730 S.E.2d at 316. The circuit court held that FAA did not apply because the transaction did not involve interstate commerce. *Id.*

The Supreme Court, which directly certified the matter, affirmed the circuit court in *Bradley* by holding "this Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction." *Id.* at 456, 730 S.E.2d at 317 (citing *Zabinski,* 346 S.C. at 595, 553 S.E.2d at 117–18). Chief Justice Toal then concluded that "[b]ecause the essential character of the [a]greement was ***strictly*** for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve interstate commerce (emphasis added)." 389 S.C. at 459-460, 730 S.E.2d at 318.

The use of the qualifying adverb "strictly" by Chief Justice Toal is consistent with the foreign authority relied on by the *Bradley* Court – *Saneii v. Robards,* 289 F.Supp.2d 855, 858-859 (W.D. Ky. 2003) ("contracts strictly for the sale of residential real estate focus entirely on a commodity – the land – which is firmly planted in one particular state.") and *Garrison v. Palmas Del Mar Homeowners Ass'n,* 538 F.Supp.2d 468, 473 (D.P.R. 2008) ("[t]he FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers."). 389 S.C. at 459-460, 730 S.E.2d at 318.

If *Bradley* remains good authority[1], then Appellant would concede a lease or a rent to own arrangement *strictly* for a tenancy in real property located within South Carolina would probably fall under the "real estate exception." However, the Agreement at bar is not strictly a residential-only contract. *Bradley*, therefore, does not apply.

A cursory examination of the Agreement proves Appellant's point. Unlike in *Bradley* – where the contract was "*strictly*" residential – here the Agreement between Appellant and Respondent has a substantial commercial component (the "horse jump construction business"). [R. p. 85 ¶ 1]. The fact that the Agreement specifically and expressly contemplated that Respondent would operate a business, and obtain all necessary permits and licenses, cannot be reasonably deemed to be "ancillary" either – especially since Respondent is claiming substantial losses arising out of that very business. [R. pp. 16, 18-19, ¶¶ 4, 20, 21]. The commercial aspect of the Agreement is just as important and front-and-center as the residential aspect; the fact that the business is run from a "home" is irrelevant.

Accordingly, the presence of the business component in the Agreement, by virtue of the express dual/mixed residential-commercial use language, creates a direct nexus to

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[1] In *Bradley,* the Court repeatedly held that the defendant Brentwood Homes – the party *seeking* arbitration – had failed to meet *its* burden of proof in the motion. 398 S.C. at 459-460, 730 S.E.2d at 317 (2012). Two years later, the Supreme Court handed down *Dean v. Heritage Healthcare of Ridgeway, LLC*, which unequivocally puts the burden of proof on the party opposing arbitration. 408 S.C. at 379, 759 S.E.2d at 731 (2014) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513 (2000)). To the extent *Bradley* can be read to put the burden of proof on the movant in a motion to compel arbitration, then it appears to be directly overruled by *Dean*. Also, Bradley's holding that national warranty clauses are ancillary in considering arbitrability may now be questionable in light of the Supreme Court's recent decision in *Parsons v. John Weiland Homes*, 2016 WL 4411112 (2016) (involving residential sale and construction purchases, rather than sale only as in *Bradley*).

interstate commerce – which makes *Bradley* inapposite. Likewise, because the Agreement is clearly both residential and commercial, the express terms of the contract are not strictly limited to the real estate, and the Agreement cannot automatically be deemed as limited to intrastate commerce – which additionally serves as another way in which the facts of the instant Appeal differ from *Bradley*. 389 S.C. at 459-460, 730 S.E.2d at 318.

Also, unlike in *Bradley*, there is no useful policy served in holding that a mixed use "residential + commercial" contract should be deemed intrastate only. These kinds of mixed use contracts are fairly rare. The Respondent wanted to operate a home-based business, negotiated it into her lease, and agreed that the Appellant would, thus, be a residential and commercial landlord. [R. p. 85 ¶ 1]. By seeking her business-loss damages, she should not be heard to claim the Agreement was purely residential. [R. pp. 16, 18-19, ¶¶ 4, 20, 21]. Moreover, the Agreement required Respondent to administer matters related to the commerce portion of the contract - i.e., procurement of the permits and licenses for the horse jump construction business. [R. p. 85 ¶ 1]. Thus, the holding of *Matthews v. Flour Corp.* is also satisfied here. 312 S.C. 404, 407, 440 S.E.2d 880, 882 (1994) *overruled on other grounds in Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 537-538, 542 S.E.2d 360, 363-364 (2001).

In light of the foregoing, the trial court erred in holding that the Agreement was solely for the lease/sale of real property. [R. p. 11]. The trial court seems to misapply *Bradley* and *Saneii* by (apparently) finding the Agreement was "strictly" residential in nature when it was obviously not strictly residential by its own terms. [Id.]. The trial court's focus on the "indemnification" clause in ¶ 1 of the Agreement is further misplaced,

particularly when the trial court ignored the "home-based business" clause that precedes it. [R. p. 85 ¶ 1].

The limited evidence submitted in the case cannot reasonably support the trial court's findings that the real estate exception applies. *Bradley,* 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. For this reason, the trial court should be reversed.

II

Since *Bradley* does not apply, this case is subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*

In section I.3 of Appellant's Brief, *supra*, Appellant has shown that the trial court erred by holding that the Agreement was solely for the lease/sale of real property [R. p. 11][2]. ("The issue before the Court is whether the residential lease with option to purchase agreement affects interstate commerce"). As Appellant has demonstrated, the contract was a mixed-use, residential and commercial, transaction. [R. p. 85 ¶ 1]. Since the *Bradley* real estate exception does not apply, then the only remaining question is the general applicability of the FAA to the Agreement.

As the party litigating against arbitration, Respondent bore the burden of proof to that the claims at issue "are unsuitable for arbitration." – not the Appellant. *Dean,* 408 S.C. at 379, 759 S.E.2d at 731; *Hall*, 413 S.C. at 269, 776 S.E.2d at 94. She failed to meet her burden. Other than the claim for business damages in her Complaint and the submission of the Agreement, the Respondent failed to offer any evidence or testimony that met her

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[2] The circuit court also erred in citing *Lewis v. Carnaggio*, 257 S.C. 54, 183 S.E.2d 899 (1971), for the proposition that the intent of the parties is probative in determining whether a transaction constitutes interstate commerce – a concept which is directly rejected by the more recent opinion in *Munoz,* 343 S.C. at 538, 542 S.E.2d at 363, n.3.

burden of showing that her home-based horse-jump business did not touch on interstate commerce. [R. pp.15-27 (Compl.), pp. 41-53 (Lease), pp. 74-84 (Trans.)]. Respondent's memorandum of law is silent on this issue as well. [R. pp 39-40.].

Nothing exists in the record that could support a finding the Respondent's horse-jump building business was restricted within the borders of this State. Moreover, Judge Manning never analyzed or considered the extent or scope of the Respondent's business, but entirely focused on the fact the contract had a residential component. Accordingly, the record cannot support Judge Manning's finding that the "*nature or character of the transaction or the contract itself ... does not involve interstate commerce*" to the extent he means the Respondent's business did not touch on interstate commerce. [3.8.16 Order, p. 3]. *See Bradley,* 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. First, it's not likely what he meant; in any event, the evidence could not reasonably support such a finding. Thus, it should be reversed on appeal. *Bradley,* 398 S.C. at 453, 730 S.E.2d at 315. [R. p. 11].

The Respondent might be tempted to argue in her Brief that her horse jump business itself is not of an interstate character. However, she did not present any such evidence or make arguments to that effect to the circuit court. [R. pp.15-27, pp. 74-84, pp. 39-54, p. 11]. Nor did Respondent file a cross-appeal or motion to reconsider. Therefore, any new arguments or additional evidence that her horse jump business was limited to South Carolina cannot be part of the appellate review at this time. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); *Wilson v. Willis*, 416 S.C. 395, 408, 786 S.E.2d 571, 577, n.4 (Ct. App.

2016) (holding that in a motion to compel arbitration, where the trial court did not leave the record open for the addition of new evidence, an affidavit not properly admitted into evidence below cannot be considered as part of the record on appeal).

Likewise, this Court – which is tasked with ascertaining *de novo* whether this transaction involves interstate commerce by examining the agreement, the complaint, and the surrounding facts (*Zabinksi*, 346 S.C. at 594, 553 S.E.2d at 117; *Dean,* 408 S.C. at 380, 759 S.E.2d at 732) – might find the record so thin that there is a question as to whether the "horse jump construction" business is either interstate or intrastate, and rule in favor of the latter - intrastate. Such a finding (intrastate commerce), however, would violate the following black-letter precepts which the circuit court failed to apply:

- the heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *Cape Romain,* 405 S.C. at 125, 747 S.E.2d at 466.
- the presumption in favor of arbitratiability is strengthened when an arbitration clause is broadly written. *Landers*, at 109, 739 S.E.2d at 213.
- any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration (emphasis added)." *Landers,* at 109, 739 S.E.2d at 213; *AT&T Tech., Inc.,* 475 U.S. at 650, 106 S.Ct. a 1419.
- a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinksi*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at

126, 747 S.E.2d at 467; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.,* 475 U.S. at 650, 106 S.Ct. at 1419.

- if the transaction involves interstate commerce, the FAA applies "regardless of whether or not the parties contemplated an interstate transaction." *Munoz,* 343 S.C. at 538, 542 S.E.2d at 363, n.3.
- the United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." *Blanton v. Stathos,* 351 S.C. 534, 540 570 S.E.2d 565, 568 (Ct. App. 2002) (citing *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)).

Here, the application of the foregoing authority to the facts in the record mandates reversal. Under well-settled state and federal jurisprudence, because there is *at least* a question about whether the FAA applies in this appeal, this Court must come down in favor of arbitrability. Moreover, the arbitration clause in Paragraph 61 of the Agreement is broad [R. p. 94 ¶ 61], which further mandates arbitration. The arbitration clause is also clearly subject to an interpretation that permits arbitrability, and this Court cannot say with positive assurance that it does not permit arbitrability. Since any doubts must be resolved in favor of granting a motion to compel arbitration, Appellant submits that arbitration is both suitable and permitted – and Respondent has offered nothing to the contrary.

The broad scope of the Commerce Clause of the U.S. Constitution (Art. I, Sec. 8, Clause 3) cannot be ignored either. Since horse-jumps are a part of the national commerce of horse-jumping and other equestrian pursuits (so important to the Aiken County

economy), the Plaintiff should not be heard to claim her horse-jump construction business was not a commercial activity that impacts interstate business – particularly when she offered no proof whatsoever to the contrary.

For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving "commerce." 9 U.S.C.A. § 2 (1947). This proof is clearly demonstrated in the record. [R. pp. 85, 94 ¶¶ 1, 61]. Setting aside the issue of whether her materials are part of interstate commerce, construction of horse jumps for the equine industry is *at the minimum* a commercial activity that *could* affect or involve interstate commerce. Combined with the strong policy in favor of compelling arbitration and that all doubt must be resolved in favor of arbitration, the Court should weigh the record (including lack of contrary evidence from the Respondent) and decide that the FAA applies in the instant Appeal. 9 U.S.C. § 1, *et seq.*; *Landers*, 402 S.C. 100, at 109, 739 S.E.2d at 213; *Cape Romain,* 405 S.C. at 125, 747 S.E.2d at 466; *Chassereau,* 373 S.C. 168, 644 S.E.2d 718; *Zabinksi*, 346 S.C. at 597, 553 S.E.2d at 118.

III.

The circuit court was guided by an error of law in ruling that the subject agreement was ambiguous.

Contrary to the trial ruling [R. p. 11], the Agreement is not ambiguous. It is well-settled in South Carolina that:

> "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. [A court is] without authority to alter an unambiguous contract by construction or to make new contracts for the

> parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."

South Carolina Dep't of Transportation v. M&T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (internal citations and punctuation omitted). "Leases are construed in the same manner as contracts." *Id.*, 379 S.C. at 656, 667 S.E.2d at 13. "The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy." *Id*, 379 S.C. at 656-657, 667 S.E.2d at 13-14.

There was no confusion that the parties intended at the commencement of the Agreement: that the Respondent would use the real estate partly for a commercial business – which she did and for which she now seeks monetary damages for the loss of the business. [R. p. 85 ¶ 1; pp. 16, 18-19, ¶¶ 4, 20, 21][3]. For this reason, the circuit court should also be reversed.

[3] The trial court's ambiguity analysis is likely non-dispositive anyway since only the arbitration clause can be attacked, not the whole underlying contract. *Jackson Mills, Inc. v. BT Capital Corp.*,312 S.C. 400, 403–04, 440 S.E.2d 877, 879 (1994) ("[A]n arbitration agreement itself is subject to termination.... [I]t is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided.)."

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse and vacate the circuit court's ruling and compel arbitration in this matter pursuant to the Federal Arbitration Act.

Respectfully submitted.

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January 3, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

RECEIVED
JAN 05 2017
SC Court of Appeals

Appellate Case No. 2016-000635

ANGELA CARTMEL ..... Respondent

v.

EDWARD BRICE TAYLOR ..... Appellant

CERTIFICATE OF COUNSEL

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

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January 3, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2016-000635

ANGELA CARTMEL ..... Respondent

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Final Brief of Appellant*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid this 3rd day of January, 2017 to the following:

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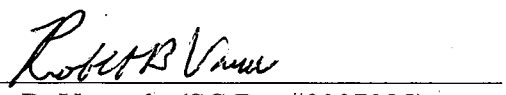

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