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

REPLY BRIEF OF APPELLANT

Robert B. Varnado (SC Bar #0007085)
Alexis M. Wimberly (SC Bar #101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

January 3, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION

The Appellant Edward Brice Taylor ("Appellant" or "Taylor") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondent filed by the Respondent Angela Cartmel ("Respondent" or "Cartmel").

REPLY TO RESPONDENT'S ARGUMENT A.

At pages 3-4 of her brief, Respondent argues that Appellant misinterprets the terms of the Lease Agreement; she contends that the unambiguous and plain meaning of the Lease Agreement is for residential use only. Thus, Respondent concludes that "[i]n the instant case there was no contemplation of a "mixed contract [sic]." [Resp. Br. p. 3]

Respondent's position is incorrect. The Lease Agreement clearly goes on to state in Paragraph 1 that the Respondent "may also use a part of the property for the following home-based business: construction of horse jumps." [R. p. 65 ¶ 1]. Amazingly, Respondent chooses to ignore this language in her analysis. This omission is highly problematic for three reasons.

First, as a general principle of contract construction, it is well-settled that "the parties' intention must be gathered from the contents of the entire agreement and not any particular clause therefrom." *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 498, 649 S.E. 2d 494, 502 (Ct. App. 2007). Likewise, "it is fundamental that in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Bluffton Towne Center v. Gilleland-Prince*, 412 S.C. 553, 569, 772 S.E.2d 882, 890 (Ct. App. 2015). A contract is read as a whole document so that one many not create an ambiguity by pointing out a single

sentence of a clause." *Jones v. Builders Inv. Group, LLC*, 415 S.C. 321, 328-329, 781 S.E.2d 737, 741 (Ct. App. 2015). Thus, applying the "whole agreement" principle of contractual constriction, Respondent cannot claim the Lease Agreement is limited to residential purposes based on one clause in Paragraph 1, when another clause in the same paragraph contemplates a commercial component.

Second, Respondent should not even be allowed to make this argument (i.e., a residential use only contract) because Respondent averred in her Statement of the Case that she is seeking consequential damages for business losses. [Resp. Br. p. 2]. It is black-letter law that a party in appellate proceedings is bound by their admissions in the Statement of the Case. *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 456, 343 S.E.2d 446, 448 (1986); Rule 208(b)(3), SCACR. When combined with the fact she also seeks business loss damages in the Complaint [R. pp. 16, 18-19, ¶¶ 4, 20,21], as well as her own concession at page 4 of her Brief concerning the horse-jump business clause, her admissions should estop the Respondent from arguing that the contract was exclusively residential-only in character. *Id.*

Third, Respondent argued to Judge Manning that the Lease Agreement was ambiguous – and Judge Manning agreed when he signed Respondent's proposed order. [R. p. 11]. Respondent now takes the opposite position that there is no ambiguity. Thus, Respondent has either conceded Appellant's third ground for appeal, or has improperly contradicted herself.

Based on the foregoing, the Court should reject Respondent's contention that the Lease Agreement is unambiguously "residential only" when a plain reading of all the

provisions, plus the Respondent's own admissions, shows the Lease Agreement is unambiguously a "mixed use" contract and not strictly residential.

REPLY TO RESPONDENT'S ARGUMENT B.

In this argument, Respondent makes a conclusory argument that *any* transaction for real estate is inherently intrastate in nature – which goes well beyond the holding in *Bradley v. Brentwood Homes*, 398 S.C. 447, 730 S.E.2d 312 (2012). Respondent offers no citation to authority for this argument. It should therefore not be considered by this Court. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *see also, State v. Colf,* 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified,* 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory"). Moreover, there is nothing that keeps a commercial lease outside the scope of the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq. See, e.g., Mineola Garden City Co., Ltd. v. Bank of America*, 49 F.Supp. 3d 283 (E.D.N.Y. 2014).

Contrary to Respondent's assertion, the Lease Agreement is **not** "simply a residential lease/sales contract with a recitation of the renter/buyer's business in order that Appellant will not be responsible for any injuries related to equine activity." [Resp. Br. pp 4-5]. Rather, as Respondent repeatedly wants to ignore, the contract contemplates a horse-jump construction business. [R. p. 65 ¶ 1].

As to Respondent's assertion that Appellant failed to "provide any proofs that the nature of the agreement between the Parties involves interstate commerce" [Resp. Br. p.

5], Appellant would rely on *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015) and *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) for the proposition that "[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"— and which is discussed at greater length below in the Reply to Respondent's Argument D.

Continuing with Respondent's Argument B, she cites to general authority for applicability of the FAA [Resp. Br. pp. 5-6] — which is accurate law but which Appellant submits is misapplied here for the reasons set forth in Appellant's Initial Brief and this Reply Brief.

If there is a failure in the record to disprove the existence of interstate commerce, it rests with the Respondent as the party opposing arbitration. *Dean*, 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). 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 v. Bright Acres*, 346 S.C. at 597, 553 S.E.2d at 118 (2001); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. at 126, 747 S.E.2d at 467 (2013); *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 214 (2013); *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419 (1986). As no such positive assurance is in the record, arbitration should be compelled. *Id.*

REPLY TO RESPONDENT'S ARGUMENT C.

In section C of her brief, Respondent basically argues that taken together: (1) the underlying nature of the claims; and (2) the notion that neither party contemplated a

contract touching on interstate commerce, should lead this Court to affirm Judge Manning. [Resp. Br. pp. 7-9]. However, it is well-settled that in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski*, 346 S.C. at 596, 596, 553 S.E.2d at 118 (2001). To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Id.*, 346 S.C. at 597, 553 S.E.2d at 118. Moreover, the South Carolina courts will enforce an arbitration agreement under the FAA "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). Thus, Respondent's focus on the underlying merits and intent of the parties is misplaced. As to Respondent's hypothetical involving damage to a tractor trailer [App. Br. p. 7], Appellant would answer affirmatively – *if* the claimant had a lease with an option to operate a tractor trailer business with a binding and enforceable arbitration clause, as is the case here. Accordingly, the Court should reject the arguments set forth in this section.

REPLY TO RESPONDENT'S ARGUMENT D.

In this section, Respondent asserts that the burden of proof rule set forth in *Dean,* 408 S.C. at 379, 759 S.E.2d at 731 (2014) – that unequivocally puts the burden of proving that the claims are unsuitable for arbitration on the party opposing arbitration – does not apply when analysis is based on the "residential exception" flowing from *Bradley v. Brentwood,* 398 S.C. at 459-460, 730 S.E.2d at 317 (2012).

In other words, the Respondent advances a theory that ***while in all other motions to compel arbitration since* Dean *clearly put the burden of proof on the party seeking to avoid arbitration***, in any case where the trial court relies on *Bradley's* residential exception, the burden remains on the party seeking to compel arbitration. This reasoning is erroneous for several reasons.

First, it's an entirely conclusory argument without citation to authority. *Broom v. Jennifer J.*, 403 S.C. at 115, 742 S.E.2d at 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

Second, *Dean* and the cases following it do not limit the arbitration burden of proof rule in any way – they always establish it as a rule in the "Standard of Review." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Hall*, 413 S.C. at 269, 776 S.E.2d at 94 (Ct. App. 2015); *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016); *Wilson v. Willis*, 416 S.C. 395, 408-409, 786 S.E.2d 571, 578 (Ct. App. 2016). Placing this legal principle in the Standard of Review suggests that it is meant to apply in all cases. *Id.*

Third, the *Dean* burden of proof rule is also consistent with long-established federal substantive law applying the FAA, which the South Carolina Supreme Court has held supplants state arbitration law. *Osteen v. T.E. Cuttino Constr.* Co., 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993); *see also Buckeye Check Cashing, Inc. v. Cardegnan*, 556 U.S. 440, 446, 126 S.Ct. 1204, 1208-1209 (2006) (reaffirming a 1984 decision which held that the FAA "created a body of federal substantive law which was applicable in both state and

federal courts"); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 53, 790 S.E.2d 1, 6 (2016) (applying the holding of *Buckeye*)[1].

Fourth, even if this Court were to deem *Bradley* in conflict with *Dean* regarding the burden of proof, it should still apply *Dean* because it is the newer precedent. *See Bruner v. Automobile Ins. Co. of Hartford Conn.*, 165 S.C. 421, 164 S.E. 134, 135 (1932) (generally establishing that in cases of conflicting precedent, the latest will be followed). It is true that the Court of Appeals is bound by precedent of the Supreme Court. S.C. Const. Art V § 9; *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993). But here, the rulings of *Dean* and *Johnson* are also Supreme Court precedents that come after *Bradley* and do not overrule anything in *Bradley* except to shift the correct burden of proof. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Johnson*, 416 S.C. at 512, 788 S.E.2d at 218.

Thus, placing the burden of proof properly on Respondent is consistent with prevailing and current Supreme Court precedent at the time of the motion to compel arbitration. This rule is also being applied by the Court of Appeals in recent opinions. *Hall*, 413 S.C. at 269, 776 S.E.2d at 94; *Wilson* 416 S.C. at 408-409, 786 S.E.2d at 578. It should be applied here, too. *Shea v. State Dep't of Mental Retardation,* 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983) ("The maintenance of a harmonious body of decisional law is essential to the efficient administration of justice. Therefore, if the judicial

[1] Examples of federal case law that establishes the burden of proof are *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91, 121 S.Ct. 513, 522-523 (2000) and *Shearson / American Exp., Inc. v. McMahon*,482 U.S. 220, 227, 107 S.Ct. 2332, 2337 (1987). It was the *Green Tree* case, in fact, which was cited by the South Carolina Supreme Court in *Dean*, 408 S.C. at 279, 759 S.E.2d at 727.

system is to operate efficiently, this court must be bound by decisions of the Supreme Court.").

Turning to Respondent's argument that "Appellant is very well aware that the equine industry ... is isolated to those horse riders using facilities in said locales," not only is this an unsupported and illogical statement (no one does equine activity in Georgia?), but it violates *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") and *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, facts not properly admitted into evidence below cannot be considered as part of the record on appeal).

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent.

Respectfully submitted,

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 05 2017
SC 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

CERTIFICATE OF COUNSEL

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

Robert B. Varnado (SC Bar #0007085)
Alexis M. Wimberly (SC Bar #101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

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

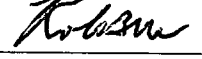
v.

EDWARD BRICE TAYLOR ..... Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Final Reply Brief of Appellant i***n the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

Bradford M. Owensby, Esquire
Banks & Owensby, LLC
319 Park Avenue, SE
Aiken, SC 29801



Robert B. Varnado SC Bar #0007085
Alexis M. Wimberly SC Bar #101611
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

January 3, 2017
Mt. Pleasant, South Carolina