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

PETITION FOR REHEARING

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February 13, 2018

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellant Edward Brice Taylor ("Appellant" or "Taylor") moves the Court of Appeals for rehearing on its unpublished opinion, filed January 31, 2018, affirming the decision of the Honorable Casey L. Manning who denied arbitration.

INTRODUCTION

This not a big appeal, but it is an important one. It implicates whether this Court is serious about enforcing the federal Uniform Arbitration Act – or whether it is not. The issue before the Court was 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The unpublished opinion of the Court ignores both the holding of *Bradley* and the clear line of arbitration authority. It is worthy of more than short shrift. The case should be reversed, unless this Court wants to (1) enter a holding that if the case touches *in any way* on residential activity, it is not subject to arbitration under the Act, regardless of the other case law in the State; and (2) that the non-moving party is therefore relieved of its obligations to show why arbitration is inapplicable.

ARGUMENT

The Current Law of Arbitration.

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).

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). 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.

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).

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.

The Court appears to cite all of the foregoing but not to apply any of it. It begs the question of whether this law applies. If it does, then the Court cannot rely on *Bradley* to affirm the trial court.

Bradley *Does Not Apply; the other Authority Does.*

The Appellant has conceded that 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. Yet, the Court of Appeals has found that it has.

It is the presence of the business component in the Agreement, by virtue of the express dual/mixed residential-commercial use language, which creates a direct nexus to interstate commerce – and 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. The trial court erred in holding that the Agreement was solely for the lease/sale of real property. [R. p. 11]. The Court of Appeals has fallen into the same trap.

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 Court of Appeals has seemingly done the same thing.

The limited evidence submitted in the case cannot reasonably support the trial court's findings that the real estate exception applies – nor this Court's affirmation. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. If one looks at the "essential nature of the Contract" (as the Court of Appeals says that it does, citing *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52), then the affirmance is misplaced. For this reason, the trial court should be reversed, and the Court of Appeals should grant rehearing on this case.

Respondent Failed to Meet Her Burden.

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 clearly failed to meet her burden, but the Unpublished Opinion lets her off the hook.

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 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.].

This analysis is germane to the proceedings. The Court of Appeals, however, has apparently found 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 – **without actually making the finding**. 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)).

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 Court of Appeals ignored this law.

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court of Appeals should grant a rehearing and reverse its ruling. The one quote in the Unpublished Opinion (from *Bradley*) which the Court of Appeals' decision hangs upon ("This court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction") is misplaced when (1) the Court considers that this was a mixed-use contract; and (2) the Court applies the substantive federal and State law. Either this State stands behind its law of arbitrability in cases large and small – or it doesn't. As it stands, the Unpublished Opinion falls into the latter category.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Petition for Rehearing*** in 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 day to the following:

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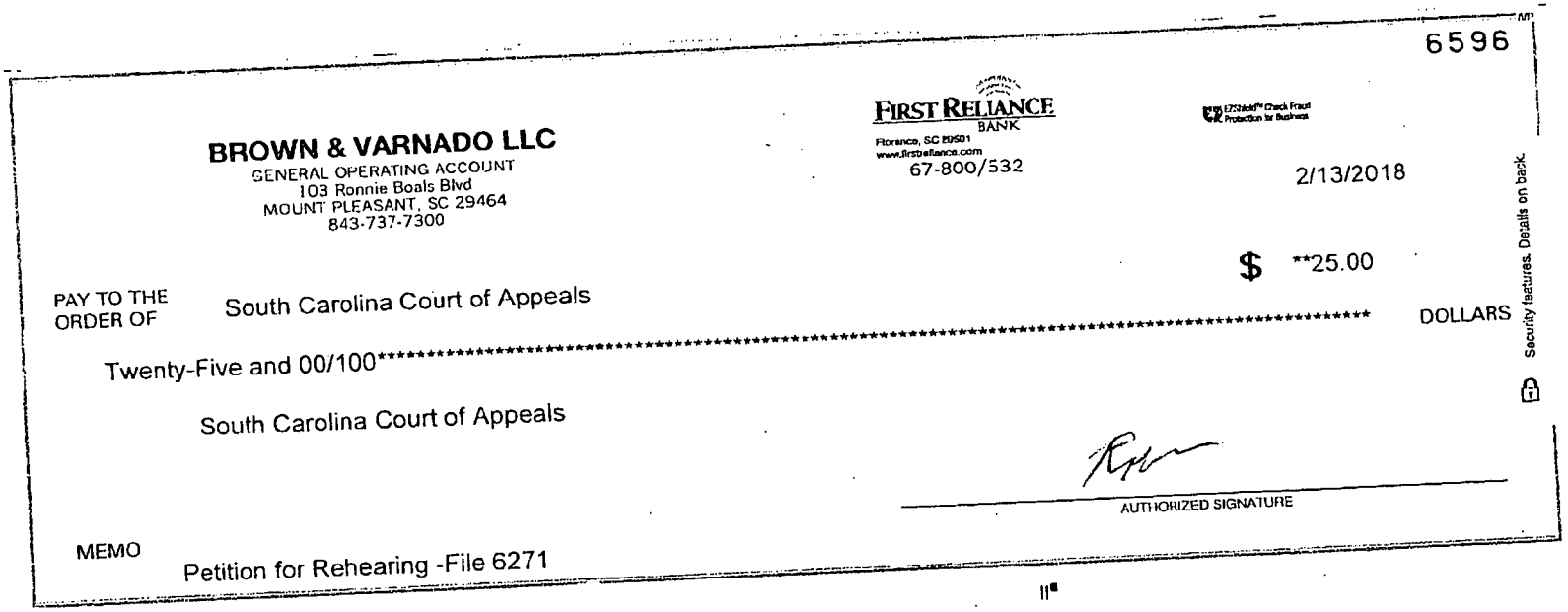

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February 13, 2018

VIA FEDEX AND FACSIMILE
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Fax: 803-734-1839

Re: *Angela Cartmel v. Edward Brice Taylor*
Appellate Case No.: 2016-000635
Unpublished Opinion No. 2018-UP-0416
Filed January 31, 2018
Our File No. 6271

Dear Ms. Kitchings:

The Appellant Edward Brice Taylor respectfully submits the original and six (6) copies of his ***Petition for Rehearing*** in the above-captioned matter, plus an additional copy to be hand-stamped and returned to my office. My firm's check in the amount of $25.00 for the petition fee is attached herewith. I am serving counsel of record via email and regular US Mail. Should you have any questions please do not hesitate to contact our office.

With best regards, I remain,

Very truly yours,

BROWN AND VARNADO LLC

Robert B. Varnado

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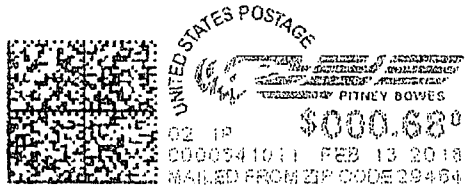
Enclosure(s): as stated
cc: Bradford M. Owensby, Esquire *(via US Mail and email)*



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