

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No.: 2018-000784
Opinion No. 2018-UP-0416 (S.C. Ct. App. filed January 31, 2018)

ANGELA CARTMEL Respondent,

v.

EDWARD BRICE TAYLOR Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

On May 9, 2014, the parties entered into a so-called “Residential Lease Agreement” (“Agreement”) for 2694 Camp Rawls Road, Wagener, South Carolina, 29164 (“Property”). [App. pp. 85-98]. Under the Agreement, the Appellant is the “Landlord”; the Respondent is the “Tenant”. [App. p. 85]. The Agreement contemplates a “[r]ent to own contract for a five year lease.” [App. p. 85 ¶ 1].

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).” [*Id.*]. 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.” [*Id.*].

This commercial use clause is in addition to allowing the Plaintiff residential use and to keep horses at the Property. [*Id.*]. Therefore, notwithstanding its title, the Agreement is not strictly residential in nature. The Appellant believes that the “mixed use” nature of the Agreement, rather than one being strictly for residential use only, is critical.

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. [App. pp. 16, 18-19 ¶¶ 4, 20, 21]. She does not state in her Complaint that her business is intrastate only. [*Id.*]. Neither party disputes that the Agreement is an otherwise valid, binding and enforceable written contract. [App. pp.15-27 (Compl.), pp. 28-32 (Ans.), pp. 74-84 (Trans.)].

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. The Petitioner,

however, has consistently argued that the arbitration clause at ¶ 61 of the Agreement is subject to the Federal Arbitration Act (“FAA”), 9 U.S.C.A. § 1 *et seq.*

The arbitration clause is located at Paragraph 61 of the Agreement, which provides that:

“[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.”

[App. p. 85 ¶ 61].

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 misconduct, which she claims resulted in a fire at the Property. [App. pp.15-27]. Despite demand, Respondent declined to engage in either mediation or arbitration under the Agreement. [App. 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. [App. 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].

Importantly, at the hearing, Respondent submitted no affidavit or testimony prior to the hearing as the party opposing arbitration. [App. p. 1, pp. 74-84, pp. 39-54]. Likewise, Respondent submitted to the Court no evidence or limited discovery material as to the nature of the horse jump construction business; Respondent only entered the Agreement. [App. pp. 39-54, 74-84]. The Complaint is silent as to whether the business was interstate

or intrastate, and it was not amended. [App. pp.15-27]. Appellant believes that these omissions are germane to the appeal.

Judge Manning denied the underlying motion by a form order issued the same date, (January 25, 2015), which contemplated a formal Order to follow; ten days later, on February 4, 2015, he issued a formal Order. [App. pp. 7-8, 9-13]. On February 10, 2016, the Appellant served a timely Notice of Motion and Motion to Reconsider, which Judge Manning denied in an *Order Denying Motion Rule 59(e)*, dated February 25, 2016. [App. pp. 64-73]. The *Order Denying Motion Rule 59(e)* was filed with the Clerk of Court on March 8, 2016 (of which written notice was received by Appellant on March 11, 2016), and the instant Appeal timely followed on March 22, 2016. [App. p. 14].

The Court of Appeals took the matter for consideration without oral argument; it issued an Unpublished Opinion (2018-UP-046) affirming the Circuit Court on January 31, 2018. [App. pp. 153-155]. Appellant filed a timely Petition for Rehearing, which was denied on March 26, 2018. [App. pp. 156-164, 165]. He then filed a timely Petition for Certiorari to this Court, which was granted on June 27, 2018.

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, LLC*, 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).

QUESTION APPROVED FOR REVIEW

Does the so-called “real estate exception” articulated in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), apply in the instant case; if not (as Appellant contends), then did the Circuit Court and Court of Appeals err in not requiring arbitration pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*?

ARGUMENT

The Court of Appeals and Circuit Court incorrectly applied the “real estate exception” from Bradley to the instant case, and should have required arbitration under the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq.

The principle issue before this Court was whether the “real estate exception” from *Bradley* applies in this case. 398 S.C. at 453, 730 S.E.2d at 315. In *Bradley*, the plaintiffs bought a fully completed home from (and then brought a construction defect action against) the defendant-developer, 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. *Id.* 398 S.C. at 456, 730 S.E.2d at 316.

The trial 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 by holding that “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, writing for the Court, then explained 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.

Assuming that *Bradley* remains good authority¹, then Appellant would concede that an arbitration clause contained within 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” as intrastate commerce – and, thus, outside the scope of the FAA. However, the Agreement at bar is clearly not strictly a residential-only contract. [App. p. 85 ¶ 1]. *Bradley*, therefore, does not apply. 398 S.C. at 449-450, 730 S.E.2d at 313-314.

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”). [App. p. 85 ¶ 1]. The fact that the Agreement

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 considering the Supreme Court’s decision in *Parsons v. John Weiland Homes*, 418 S.C. 1, 791 S.E.2d 128 (2016) (involving residential sale and construction *purchases*, rather than sale only as in *Bradley*).

specifically and expressly contemplated the operation of a business, cannot be deemed to be “ancillary” because Respondent is claiming substantial losses arising out of the loss of that very business. [App. pp. 16, 18-19, ¶¶ 4, 20, 21]. The commercial aspect of the Agreement is just as important as the residential aspect; the fact that the business is run from a “home” is irrelevant, and the same holds true for the Agreement’s title.

The Court of Appeal’s opinion, therefore, is inconsistent with *Bradley*. Yes, *Bradley* does state that “this Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction.” 398 S.C. at 456, 730 S.E.2d at 317 (citing *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117–118). And, yes, the Court of Appeals makes this point in the last sentence of the Unpublished Opinion as the linchpin of its affirmation.

But stating the holding from *Zabinski* is only the launching point for *Bradley* – not the final word. In fact, the *Bradley* Court goes on to say, “because the precise question presented in the instant case has not yet been addressed by our appellate courts, we have looked to other jurisdictions for guidance.” *Id.*, 398 S.C. at 456-457, 730 S.E.2d at 317. In other words, the *Bradley* Court did not stop its analysis at *Zabinski*; thus, neither the Court of Appeals nor the Circuit Court should be allowed to stop at *Zabinski* either.

The *Bradley* Court specifically reviewed two foreign cases as precedent – *Saneii v. Robards*, 289 F.Supp.2d 855, 858-859 (W.D. Ky. 2003) and *Garrison v. Palmas Del Mar Homeowners Ass’n*, 538 F.Supp.2d 468, 473 (D.P.R. 2008). *Saneii* uses the adverb “strictly” in considering the residential exception, which is the same wording used, in the same context, by the *Bradley* Court. *Saneii*, 289 F.Supp.2d at 858-859 (“contracts strictly for the sale of residential real estate focus entirely on a commodity – the land – which is

firmly planted in one particular state.”); *Bradley*, 389 S.C. at 459-460, 730 S.E.2d at 318. *Garrison’s* holding is similar. See 538 F.Supp.2d at 473 (“[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.”).

Accordingly, the correct holding of *Bradley* that the Court of Appeals was required to apply was whether the agreement was strictly (or not) for the use of a residence, and not for anything else. *Id.*; see also S.C. Code. Ann. § 14-8-200 (“... the court [of appeals] shall apply the same scope of review that the Supreme court would apply in a similar case.”). The Court of Appeals, however, ignored the broader holding of *Bradley*, by basing its entire opinion on the quotation from *Bradley* that references the earlier standard set forth in *Zabinski*. If *Zabinski* covered this situation, Appellant asks, *then why did Bradley bother to go on to analyze it more deeply instead of ending its analysis there?*

Because the Agreement is clearly both residential and commercial, if one looks at the “essential nature of the Contract” [as the Court of Appeals says that it does, citing *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003)], then the Court of Appeals’ affirmance based on *Zabinski*, rather than *Bradley’s* actual holding, is misplaced. This error by the Court of Appeals runs counter to the clear provision in the South Carolina Constitution that the decisions of the Supreme Court bind the Court of Appeals. See S.C. CONSTITUTION ART. V § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); see also, Toal, et al, *Appellate Practice in South Carolina 3d* (2016), p. 21. The Supreme Court should therefore reverse the Court of Appeals and bind this matter over to arbitration.

Respondent Failed to Meet Her Burden in Opposing Arbitration.

Since the *Bradley* real estate exception does not apply, then the only remaining question is the general applicability of the FAA to the Agreement. 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 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)². 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.”); *see Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459–60, 476 S.E.2d 149, 152 (1996) (holding that “[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)); *see also Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012).

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. To determine

² “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 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.

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.* But 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.”); *Cassareep v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). The Court of Appeals appears to cite all the foregoing legal principles but does not apply them to the case at bar.

Moreover, 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 v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015).

But Respondent put nothing into evidence before the Circuit Court beyond: (1) the claim for business damages in her Complaint; and (2) 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. [App. pp.15-27 (Compl.), pp. 41-53 (Lease), pp. 74-84 (Trans.)]. Her memorandum of law to the

Circuit Court is silent on this issue. [App. pp 39-40.]. Respondent's did not file a cross-appeal or motion to reconsider. Therefore, any new arguments or additional evidence that Respondent's horse jump business was somehow 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).

Thus, the Respondent clearly failed to meet her burden of proof in opposing arbitration. There was nothing for the Circuit Court too look at, and there is no evidence which reasonably supports its findings. This Court – which is now tasked with ascertaining *de novo* whether this transaction involves interstate commerce by examining the agreement, the complaint, and the surrounding facts (*Zabinski*, 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 thin, but that blame falls on Respondent.

Under both well-settled state and federal jurisprudence, because there is *at least* a question about whether the FAA applies in this appeal, the Court of Appeals should have come down in favor of arbitrability. *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*, 408 S.C. at 380, 759 S.E.2d at 732.

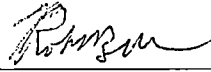
Moreover, making a finding against arbitration however, violates the following black-letter precepts which both the Court of Appeals and Circuit Court were also bound to apply:

- That 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.
- That the presumption in favor of arbitrability is strengthened when an arbitration clause is broadly written. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213.
- That any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.” *Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986).
- 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.

CONCLUSION

The one quote in the Unpublished Opinion (cited from *Bradley*, but actually from *Zabinski*) – which the Court of Appeals’ entire decision hangs upon – is misplaced because the Agreement is a mixed residential and commercial use contract, rather than strictly residential only. Respondent did not meet her burden of proof, and on these facts, denying arbitration violates black-letter principals. This is not a big case, but either this state’s courts stand behind the law of arbitrability, as promulgated by the United States Supreme Court and the South Carolina Supreme Court, or they do not. For this reason, this Court should reverse the decision of the Court of Appeals and direct the Circuit Court on remand to cause the case to be bound over for arbitration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney for Appellant hereby certifies that a true copy of the *Brief of Appellant* in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail to the following:

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