

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2012-213352
Case No: 2012-CP-46-2692

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook, Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence, Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT'S DETERMINATION THAT THE RESIDENT CONTRACT DOES NOT INVOLVE INTERSTATE COMMERCE AND, THEREFORE, DOES NOT TRIGGER APPLICATION OF THE FEDERAL ARBITRATION ACT CONSTITUTE REVERSIBLE ERROR?

- II. DID THE CIRCUIT COURT ERR IN APPLYING THE SOUTH CAROLINA UNIFORM ARBITRATION ACT TO IMPOSE ADDITIONAL REQUIREMENTS TO INVALIDATE THE ARBITRATION PROVISION OF THE RESIDENT CONTRACT?

INTRODUCTION

In a three page, *per curiam* opinion, the Supreme Court of the United States directly addressed the issue presented in this appeal; to wit, whether there exists a sufficient nexus with interstate commerce “to make enforceable, pursuant to the FAA, an arbitration agreement” included within the contract between the parties. *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). In light of its prior pronouncements defining “the term ‘involving commerce’ in the FAA¹ as the functional equivalent of the more familiar term ‘affecting commerce’ -- words of art that ordinarily signal the broadest permissible exercise of Congress’ *Commerce Clause* power. . . .,” the Court encountered no difficulty rejecting the Supreme Court of Alabama’s “misguided” search for evidence that the agreements in question were “in commerce” and whether, in isolation, they had a “substantial effect on interstate commerce.” *Citizens Bank*, 539 U.S. at 56 (internal citations and quotation omitted). Instead, the Court explained a sufficient nexus exists “if in the aggregate the economic activity in question would represent ‘a general practice’ . . . subject to federal control” without any required showing of a “specific effect upon interstate commerce.” *Id.*, 539 U.S. at 56-57 (emphasis added).

The *Citizens Bank* holding relies upon the express recognition of the “broad impact of commercial lending on the nation economy [and] Congress’ power to regulate that activity pursuant to the *Commerce Clause*.” 539 U.S. at 58. The key is the economic activity and the nearly unfettered ability of Congress to regulate it pursuant to its *Commerce Clause* powers. At issue in this case is an arbitration clause within a contract for assisted living services at an adult retirement community, and the comparison

¹ Federal Arbitration Act (hereinafter “FAA”), 9 U.S.C. § 16(9)(1).

is obvious. It would be absurd to argue that Congress' role in regulating the provision of health-care related services is any less expensive. Indeed, the circuit court recognized the broad exercise of *Commerce Clause* power by Congress in the healthcare field but nevertheless felt constrained to apply binding but antiquated South Carolina precedent to reach the erroneous conclusion that the arbitration provision is not subject to the FAA because "nothing in the Resident Contract evidences a 'transaction involving interstate commerce.'" (R. p. 9; p. 185, lines 11-15) Compounding its error, the circuit court imposed rigorous statutory requirements intended to single out the arbitration provision at issue in direct contravention of binding authority expressly forbidding disparate treatment of arbitration provisions versus contract provisions in general.

Further, the circuit court's reliance on *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) ("the contract must objectively evidence, in writing, a transaction involving interstate commerce."), to reject application of the FAA in this matter constitutes error because *Timms* has been effectively overruled by later holdings by the Supreme Court of the United States clarifying the broad scope of the FAA and vacating State hostility to its enforcement. As a result, the order denying Appellants' amended motion to compel arbitration should be reversed, and Respondent's claims must be submitted to arbitration.

STATEMENT OF THE CASE

I. Nature Of The Case.

This appeal arises from the order of the Court of Common Pleas for York County entered November 7, 2012, which denied Appellants' amended motion to dismiss or, in the alternative, to compel arbitration (the "amended motion") in this wrongful-death and survival action. Appellants' amended motion was predicated upon an arbitration provision contained within the Resident Contract Respondent's Decedent Pauline C. Cook (hereinafter "Cook") signed upon her admission to the assisted living wing of Park Pointe Village in Rock Hill, South Carolina, on or about January 1, 2006.

This appeal is taken pursuant to the FAA. Appellants timely served Respondent with their Notice of Appeal on November 9, 2012, and filed the notice with this Court the same day.

II. Proceedings And Disposition Below.

A. The Arbitration Agreement.

On or about January 1, 2006, Cook and Park Pointe Village, Inc. (hereinafter "Park Pointe") entered into the Resident Contract applicable to Cook's admission to Oak Bridge Terrace, the assisted living section of Park Pointe Village. (R. pp. 25-74) Pursuant to the Resident Contract, Park Pointe agreed to provide "the Residential Unit, together with the facilities, services and medical care . . . until the Resident's death or earlier termination of this Contract." (R. p. 35, § 1) Park Pointe's obligation to provide the residential unit, facilities, services, and medical care extended to Cook "regardless of a change in medical condition." (R. p. 36, §2.4)

As reflected in Section 21 of the Resident Contract, Cook and Park Pointe anticipated and agreed that any dispute arising out of their contract would be subject to binding arbitration. Specifically, Section 21 provides as follows:

SECTION 21. Arbitration

21.1 Procedural Rules

Any controversy, dispute or disagreement arising out of or relating to this Contract, or concerning any rights arising under this Contract or a breach of this Contract, shall be settled by voluntary arbitration. This arbitration shall be conducted on Company's property in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The decision shall be final, binding and non-appealable, and any court having proper jurisdiction may enter judgment on the award rendered by the arbitrator.

(R. p. 70) (emphasis added)

The agreement to arbitrate expressly extends to disputes arising out of Park Pointe's provision of security services pursuant to Section 5.13 of the Resident Contract. (R. pp. 42-43, §§ 5.12, 5.13) ("Company will, as part of the services included in the Monthly Rate, provide certain security services at the Retirement Community in accordance with Company's prevailing policy which is subject to change from time to time.") Park Pointe contracted to "provide . . . security services" to Cook pursuant to the terms of the Resident Contract. (*Id.*)

B. The Pleadings

Respondent Paul Sullivan (hereinafter "Sullivan"), as Personal Representative of the Estate of Pauline C. Cook, initiated these proceedings with the filing of his Summons and Complaint in the court of common pleas for York County on or about July 25, 2012,

followed by a Summons and Amended Complaint² on or about September 5, 2012. In his Amended Complaint, Sullivan alleges that Appellant Park Pointe is a retirement community that provides independent living residences and access to assisted living and nursing care. (R. p. 137, ¶ 8) He also alleges that Cook and her husband came to Park Pointe Village in 1998 and that Cook transitioned into assisted living in July 2011 given her propensity to fall. (R. pp. 137-138, ¶ 10)

Sullivan acknowledges that Cook signed the Resident Contract and suggests that the Resident Contract gave rise to a duty on the part of Appellants to exercise due care in, among other things, providing security to Cook and other Park Pointe residents. (R. p. 141, ¶ 32) He also alleges that Park Pointe, Appellant Neva Lattimer (hereinafter “Lattimer”) and Appellant Marvin Lawrence (hereinafter “Lawrence”) breached the duty of care owed to Cook by, among other things, failing to take adequate security precautions to ensure the safety of Cook and other Park Pointe residents. (R. p. 139, ¶ 18; p. 141, ¶ 32(1)). Sullivan’s amended complaint includes causes of action for wrongful death and survival, as well as negligence, gross negligence, and negligent supervision, as well as a prayer for the award of actual damages, including “medical, surgical and hospital bills”, and punitive damages. (R. pp. 149-150, ¶ 78 and last unnumbered para.)

Appellants filed timely answers to the amended complaint, wherein they entered a general denial and asserted numerous substantive defenses, including incorporation by

² Sullivan filed his voluntary dismissal as to Defendant ACTS Retirement-Life Communities, Inc., on or about September 5, 2012, thereafter substituting as a defendant Park Point Village, Inc., improperly identified as Park Pointe Village, Inc., a wholly owned subsidiary of ACTS Retirement-Life Communities, Inc. The remaining facts and causes of action Sullivan alleges in his Amended Complaint were unchanged.

reference of the terms and conditions of the Resident Contract, specifically Section 21 relating to the agreement to submit claims arising under the Resident Contract to binding arbitration. (R. p. 88, ¶ 83; p. 108, ¶ 83; p. 129, ¶ 83) Appellants also affirmatively pled application of the FAA, 9 U.S.C. § 1, *et seq.*, and the South Carolina Uniform Arbitration Act (hereinafter “SCUAA”), S.C. Code Ann. § 15-48-10, *et seq.*, as a bar to Sullivan’s tort-based claims. (R. p. 88, ¶ 82; p. 108, ¶ 82; p. 129, ¶ 82)

C. Appellants’ Amended Motion To Dismiss Or, In The Alternative, To Compel Arbitration.

In light of the agreement of the parties to arbitrate claims arising under the Resident Contract, as well as the strong state and federal policies favoring enforcement of arbitration agreements, Appellants moved for an order dismissing Sullivan’s amended complaint or, in the alternative, to compel arbitration via written motion filed August 27, 2012, an amended motion filed September 21, 2012, and a supporting memorandum. In support of their amended motion, Appellants argued that the arbitration provision of the Resident Contract is governed by the FAA inasmuch as the Resident Contract and the services provided thereunder necessarily involve interstate commerce. (R. pp. 21-22) Moreover, Appellants urged the circuit court to follow the modern trend in South Carolina’s courts towards a more liberal enforcement of arbitration provisions even where those agreements do not conform with the rigid requirements of the SCUAA. (*Id.*) Finally, Appellants argued that the arbitration provision is valid and enforceable and that it binds Sullivan as the personal representative of Cook’s Estate.

D. The Trial Court’s Order Denying The Amended Motion To Dismiss Or, In The Alternative, To Compel Arbitration.

Following oral argument on October 18, 2012, the circuit court denied

Appellants' amended motion via written order entered November 7, 2012. The circuit court's order denied the motion on two express grounds. First, the circuit court determined that "nothing in the Resident Contract evidences a 'transaction involving interstate commerce.' Thus, the FAA does not apply." (R. p. 4) Relying upon *Timms*, 310 S.C. 469, 427 S.E.2d 642, the circuit court grossly over-simplified the nature of services provided pursuant to the Resident Contract to bolster its erroneous conclusion that interstate commerce is not implicated. (*Id.*) ("[T]he Residential Unit was located in York County, South Carolina, as were all other facilities contemplated by the contract³ [and,] . . . as contemplated in the Resident Contract, all services were provided on site.") The circuit court also emphasized that the Resident Contract does not mention the FAA or refer to federal arbitration but instead contains a choice of law provision favoring application of South Carolina law.

Second, the circuit court determined, incorrectly, that this dispute is not subject to arbitration because the Resident Contract fails to conform to the formalities set forth in SCUAA, specifically S.C. Code Ann. § 15-48-10(a), and because § 15-48-10(b) exempts from binding arbitration claims arising out of a tort-based personal injury claim. (R. p. 5) In light of its erroneous conclusions regarding the perceived lack of a nexus with interstate commerce and the "local" nature of the contract between the parties, the circuit court declined to address Sullivan's additional arguments in opposition to the motion to compel arbitration.

³ This assertion is incorrect inasmuch as the Resident Contract specifically contemplates the provision of assisted living and nursing services to Cook at other "affiliated" communities, none of which are located in South Carolina. (R. p. 38, §§ 4.5, 4.6)

STATEMENT OF THE FACTS

On or about January 1, 2006, Cook and Park Pointe entered into the Resident Contract applicable to Cook's admission to the Park Pointe Village retirement community located in Rock Hill, South Carolina. (R. pp. 25-74) At all times relevant to this appeal, Cook was a resident in Oak Bridge Terrace, the assisted living wing at Park Pointe Village. (R. p. 77, ¶ 10) Park Pointe is a non-profit corporation that qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. (R. p. 75, ¶ 2) Park Pointe owns and operates Park Pointe Village, which provides the services described in its Resident Contract⁴. (R. pp. 76-77, ¶ 8) At the time of the events giving rise to Sullivan's amended complaint, Lattimer was employed as Director of Resident Nursing at Park Pointe Village. (R. p. 77, ¶ 14) Lawrence worked as a cook at Park Pointe Village. (R. p. 76, ¶ 4)

As reflected in Section 21 of the Resident Contract, Cook and Park Pointe anticipated and agreed that any dispute arising out of their contract would be subject to binding arbitration. (R. p. 70) This agreement to arbitrate extended to disputes arising out of Park Pointe's provision of security services pursuant to Sections 5.12 and 5.13 of the Resident Contract. (R. p. 43) ("Company will, as part of the services included in the Monthly Rate, provide certain security services at the Retirement Community in

⁴ The Resident Contract defines "assisted living residence" as "[a] licensed assisted living residence which provides Assisted Living Services under this Contract and which may or may not be located on the campus of Retirement Community." (R. p. 31) "Assisted living services" means "[a]ssistance with activities of daily living, such as eating, bathing, dressing, grooming and toileting, provided in an Assisted Living Residence." (*Id.*)

accordance with the Company's prevailing policy which is subject to change from time to time.")

In his amended complaint, Sullivan alleges that on Saturday, November 12, 2011, Cook discovered someone was writing and cashing unauthorized checks drawn on her checking account and that the checks in question were made payable to "Braquette Walton" (hereinafter "Walton"). (R. p. 138, ¶ 11) Sullivan further alleges that Lawrence informed Cook that Walton was a Park Pointe employee and suggested that Cook bring the matter to the attention of Walton's supervisor, Lattimer. (*Id.*, ¶¶ 12-13) After their meeting, Lattimer and Cook turned the matter over to local law enforcement. (R. p. 78, ¶ 16) At the same time, it is alleged that Lawrence contacted Walton to confront her about the forged checks. (R. p. 97, ¶ 15)

Later in the evening of November 12, 2011, Walton, who was not scheduled to be on duty, accessed the grounds at Park Pointe Village and entered Oak Bridge Terrace using her employee access badge. (R. p. 139, ¶ 20) It is alleged that she concealed herself until she could enter Cook's room undetected by Park Pointe staff. (*Id.*, ¶¶ 21-22) It is further alleged that Walton confronted Cook about the forged checks, murdered Cook, and then staged the room to make it appear as if Cook sustained fatal injuries after falling in the shower. (R. pp. 139-140, ¶¶ 22-26) Park Pointe staff discovered Cook's remains during the early morning hours of November 13, 2011. (R. p. 80, ¶ 27)

STANDARD OF REVIEW

In South Carolina, “the determination of whether a claim is subject to arbitration is subject to *de novo* review.” *Aiken v. World Finance Corporation of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 29 (Ct. App. 2005). At the same time, the findings of fact by the circuit court will not be reversed where “any evidence reasonably supports the findings.” *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT

In this case, the circuit court's manifest errors in denying the motion to compel arbitration require reversal. First, the circuit court erroneously disregarded binding precedent from the Supreme Court of the United States to conclude that the written agreement at issue does not involve interstate commerce, thereby triggering application of the FAA. Second, the circuit court erred in applying provisions of the SCUAA in a manner that imposed heightened requirements upon arbitration agreements specifically and not upon all contracts generally, again in violation of clear and binding precedent to the contrary. In light of the agreement of the parties to arbitrate claims arising under the Resident Contract, which specifically and admittedly contemplates the provision of security services, as well as the strong state and federal policies favoring enforcement of arbitration agreements, the order of the circuit court denying the motion to compel arbitration is in error and must be reversed.

I. THE CIRCUIT COURT'S DETERMINATION THAT THE RESIDENT CONTRACT DOES NOT INVOLVE INTERSTATE COMMERCE AND, THEREFORE, DOES NOT TRIGGER APPLICATION OF THE FEDERAL ARBITRATION ACT CONSTITUTES REVERSIBLE ERROR.

Sullivan wrongly contends, and the circuit court erroneously concluded, that the FAA does not apply to the arbitration provision of the Resident Contract. This was error. Contrary to the restrictive view adopted by the circuit court, that the underlying agreement between the parties must actually touch interstate commerce, the FAA applies to arbitration agreements that are part of a written contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. The circuit court's ruling to the contrary in this case is incorrect in several respects.

The arbitration provision of the Resident Contract unquestionably implicates interstate commerce as contemplated by the FAA and applicable precedent. “The FAA has an expansive reach, similar to that of the Commerce Clause” *THI of S.C. at Columbia, LLC v. Wiggins*, No. 3:11-888-CMC, 2011 WL 4089435, at *1 n. 3 (D.S.C. Sept. 13, 2011) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995)); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002). In addition, “Congress’ *Commerce Clause* power may be exercised in individual cases without showing any specific effect upon interstate commerce if *in the aggregate* the economic activity in question would present a general practice . . . subject to federal control.” *Citizens Bank*, 539 U.S. at 56-57 (2003) (internal quotations and citations omitted) (emphasis added). In order to determine whether a transaction involves interstate commerce under the FAA, the court examines the agreement, complaint, and surrounding facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

The Supreme Court of the United States has long recognized that the FAA’s expansive application to agreements “involving interstate commerce” reflects the intent of Congress to exercise power to the fullest extent permitted by the *Commerce Clause*. *Citizens Bank*, 539 U.S. at 56 (“We have interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’ -- words of art that ordinarily signal the broadest possible exercise of Congress’ *Commerce Clause* power.”). For example, in *Citizens Bank*, the Court concluded that a debt restructuring agreement executed in Alabama between an Alabama bank and an Alabama construction company involved interstate commerce because the debt was secured by an

inventory of goods assembled from out-of-state materials. 539 U.S. at 57. In *Preston v. Ferrer*, 552 U.S. 346, 354 (2008), the Court held that a personal services contract between an California agent and a client involved interstate commerce because the client worked as a nationally syndicated television personality.

In other contexts, the Court has held that “interstate commerce” has a similarly wide reach. *See, e.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329-30 (1991) (holding that services to non-resident patients, receipt of Medicare reimbursements, and sending of peer review reports across state lines satisfied the interstate commerce requirement pursuant to the Sherman Act); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (holding that a restaurant’s purchase of goods that had moved in interstate commerce affected interstate commerce for purposes of the Civil Rights Act of 1964). Read together, these cases “stand for the proposition that the FAA reaches the broadest amount of commercial activity allowed by the Constitution -- which can include a local business buying supplies from a company procuring those supplies from out of state.” *Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321, at *4 (N.D. Okla. Jan. 29, 2008).

South Carolina courts follow this approach by construing the term “involving interstate commerce” under the FAA expansively. *See, e.g., Zabinski*, 346 S.C. at 594-96, 553 S.E.2d at 117-18 (holding that a real estate partnership involved interstate commerce because it utilized out-of-state materials, contractors, and investors); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (holding that an installment contract involved interstate commerce where the builder was domiciled in South Carolina but assigned rights to a Delaware creditor, the contract was prepared in Minnesota, and

proceeds were disbursed from Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 651-52 (1977) (holding that a construction contract involved interstate commerce where materials, equipment, and supplies were produced and manufactured out of state), *aff'd*, 273 S.C. 181, 255 S.E.2d 451 (1979); *see also McCollum v. Tenet HealthCare Corp.*, No. 0:06-1934-JFA-BM, 2006 WL 3373096, at *3-4 (holding that an employment agreement involved commerce where the employee contracted with the out-of-state defendant, was paid by an out-of-state entity, and his employment involved treatment of out-of-state patients and the use of out-of-state products); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986) (holding that a construction contract involved commerce where the equipment, materials, and subcontractors were furnished from out-of-state); *Soil Remediation Co. v. Nu-Way Env'tl. Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Munoz*, 343 S.C. 531, 542 S.E.2d 360 (2001). Thus, even where “the arbitration provision does not meet the technical requirements of § 15-48-10(a) [of the SCUAA], the inquiry does not end there.” *Zabinski*, 346 S.C. at 590.

The court instead must examine whether the FAA preempts state law because an arbitration provision exists in “a contract evidencing a transaction involving commerce.” *Dobson*, 513 U.S. at 273. In *Dobson*, the Court clarified the correct interpretation of the phrase “evidencing a transaction” and specifically rejected any argument that the phrase requires a contract evidence “on its face” a transaction involving interstate commerce as the circuit court erroneously ruled in this instance. (November 7, 2012 Order p. 2-3)⁵

⁵ While the circuit court cites *Dobson*, it is clear the court failed to apply its holding correctly. Rather than looking at the nature of the *transaction* – the provision of assisted living and security service – the court instead focused on the facts that the facility is located in South Carolina and its services are provided “on site.” (*Id.*)

Cf. Timms, 310 S.C. at 472, 427 S.E.2d at 644 (1993) (“the contract [must] on its face evidence [] commerce.”). The Court further concluded that such an approach would lead to arbitrary results not grounded in facts or context and would turn on whether “the parties happened to think to insert a reference to interstate commerce in the document or happened to mention it in an initial evaluation.” *Dobson*, 513 U.S. at 278-79. Thus, the Court determined that the question is not whether the contract itself evidences a transaction involving interstate commerce, but whether the transaction underlying the contract does. *Id.*

In *Dobson*, as in later cases, the Supreme Court of the United States defined the appropriate scope of the FAA - this time by broadly interpreting the phrase “involving commerce” as the equivalent “affecting commerce,” thereby reaching the fullest contours of Congress’ *Commerce Clause* powers. 513 U.S. at 277. In other words, the FAA will preempt state law in transactions involving an arbitration provision if Congress would have the authority to regulate the transaction underlying the agreement pursuant to its *Commerce Clause* powers. Going further, the Court expanded the scope of the FAA in *Citizens Bank* via the “aggregate effects” test, discussed *infra*, to reject any contention, including the circuit court’s conclusion in this case, that the underlying contract must “by itself, have a substantial effect on interstate commerce.” 539 U.S. at 55.

The circuit court also runs afoul of precedent, which holds that “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). An agreement to arbitrate will be enforced unless a

party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110. Here, the parties specifically addressed the issue of security services, and it is beyond question that Sullivan’s amended complaint alleges that Park Pointe failed to meet its obligations to Cook to keep her safe from harm.

A. The Parties’ Contract “Involves Commerce.”

When examined in the aggregate, agreements to provide assisted living and security services containing arbitration provisions, such as the arbitration provision within the Resident Contract at issue here, sufficiently “involve commerce” such that Congress would be justified in regulating the practice pursuant to its *Commerce Clause* powers. *See, e.g., Rainbow Health Care Ctr., Inc. v. Crutcher*, 2008 U.S. Dist. LEXIS6705 (N.D. Okla. 2008) (nursing home admission agreements, when examined in the aggregate, evidence interstate commerce due to the nature of the goods and services nursing homes provide); *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 988 (Ala. 2004) (the transaction underlying a nursing home admission agreement is “unquestionably economic in nature,” and, pursuant to the aggregate effects test, affects interstate commerce sufficiently to warrant FAA preemption).

The circuit court concluded, erroneously, that “nothing in the Resident Contract evidences a ‘transaction involving interstate commerce.’” (R. p. 4) That conclusion is belied, however, upon closer examination of the Resident Contract and in view of applicable precedent. As noted, Cook and Park Pointe entered into a contract whereby

Cook agreed to pay for, and Park Pointe agreed to provide, a residential unit, facilities, services and medical care to Cook for life regardless of any change in her medical condition. (R. p. 35, § 1; p. 36, § 2.4) Going further, Section 6.7 of the Resident Contract required, as a condition precedent to the provision of nursing services⁶ under Section 5, that Cook “enroll in Part A of the Medicare Program and subscribe to and pay for coverage under Part B of the Medicare Program and pay for any Medicare Part B deductibles as defined by the Medicare Program.” (R. p. 47, § 6.7) Cook and other residents also were obligated to subscribe to and pay for Medicare supplemental coverage, also known as “medigap insurance.” (*Id.*) Cook was admittedly receiving assisted living services at the time of her death, and Park Pointe was obligated to provide skilled nursing services to her at any time a change in her condition so required.

In addition to assisted living and nursing services and a residence, Park Pointe contracted to “provide . . . security services” to Cook pursuant to the terms of the Resident Contract. (R. p. 43) It also afforded Cook and other residents the additional option of contacting Park Pointe Village personnel for 24-hour emergency response services. (R. p. 42) (Section 5.12 Response System) Clearly, Sullivan’s wrongful death and survival actions against Appellants are grounded on the allegation that Park Pointe and its employees assumed and breached the duty to provide security to Park Point Villare residents. (R. pp. 141-142, ¶¶ 32-34) Indeed, Sullivan expressly relies on this assertion to support his claim that Appellants breached a duty of care owed to Cook. (*Id.*)

⁶ The Resident Contract also provided that assisted living and nursing services could be provided at “another affiliated Retirement Community,” none of which are located in South Carolina. (R. p. 38, §§ 4.5, 4.6)

It would be inconsistent and unjust to permit Sullivan to rely upon the Resident Contract to his advantage while at the same time repudiating the arbitration provision. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012) (“[A] party may not ‘rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.’”) (quoting *Jackson v. Iris.com*, 524 F. Supp. 2d 742, 749 (E.D. Va. 2007) (internal quotation and citation omitted)).

These allegations necessarily implicate the services that Park Pointe was contractually obligated to provide to Cook pursuant to the terms and conditions of the Resident Contract. Even the circuit court recognized that the provision of assisted living and security services “involve commerce”. Specifically, during oral argument of Appellants’ amended motion on October 18, 2012, the court observed “obviously care facilities like that get employees from out of state, equipment or medicine or food shipped from Charlotte or whatever. . . .” (R. p. 182, lines 15-17) The critical issue, and the reason the circuit court erred in declining to enforce the arbitration provision, is that it refused to apply the broad standard for “involving commerce”. Once again, the court’s own statements at oral argument are illustrative: “What hit me yesterday was the FAA isn’t mentioned, there’s no caption giving notice of the application of the state statute, *and there is no provision in the agreement that acknowledges the involvement of interstate commerce so as to bootstrap the FAA.*” (*Id.*, lines 20-24)

Contrary to the court’s observations at oral argument and memorialized in its written order, Sullivan’s claims clearly implicate the parties’ contractual agreement to submit claims arising under the Resident Contract to binding arbitration. Further, the

circuit court expressly acknowledged that the provision of services contemplated by the Resident Contract necessarily involve commerce but refused to apply the correct standard as enunciated by the Supreme Court of the United States with regard to application of the FAA. Inasmuch as the parties entered into a valid and enforceable agreement to arbitrate disputes, and because the agreement between the parties “involves commerce,” the circuit court erred in declining to order binding arbitration as provided for in the Resident Contract.

B. *Timms v. Greene* Is Not Controlling And Should Be Overruled.

Compounding its error in declining to compel arbitration on the basis that nothing in the Resident Contract “involves commerce,” the circuit court erroneously relied upon *Timms* in its misguided attempt to impose additional impediments to arbitration under the FAA⁷. In *Timms*, the South Carolina Supreme Court held that a contract between a nursing home and one of its residents lacked a sufficient nexus to interstate commerce to invoke the FAA - precisely the conclusion the circuit court reached in this case. The nursing facility at issue in *Timms* alleged it was a division of a Delaware limited partnership, marketed its services to out-of-state residents, hired out-of-state employees, purchased a majority of its supplies outside the state, and “contemplate[d]” payment by Medicare or Medicaid. 310 S.C. at 473, 427 S.E.2d at 644. Notwithstanding these connections with interstate commerce, the court held that “[a]lthough these factors could evidence the [facility]’s involvement in interstate commerce, we find that their

⁷ In fairness to the circuit court, it clearly appreciated the import of more recent federal authority addressing the “aggregate effects” analysis under the FAA yet felt constrained to apply *Timms*. (R. p. 185, lines 11-15) (“I wouldn’t disagree with you, that decision just hasn’t been made in South Carolina. I don’t disagree with that. I would have thought the same thing but I couldn’t find anything in South Carolina that agreed with what I thought.”) Nevertheless, the circuit court’s failure to apply the correct standard amounts to reversible error.

relationship to the *agreement between the [facility] and the [resident]* is insufficient to form the basis of the contract between the parties.” *Id.* (emphasis added) Clearly, the *Timms* Court acknowledged that the facility’s operations in the aggregate affected commerce; however, it declined to apply the FAA because there was no specific connection between interstate commerce and the parties’ agreement.

Timms can no longer stand as viable precedent in light of more recent holdings from the Supreme Court of the United States construing and applying the “involving interstate commerce” standard, *see, e.g., Citizens Bank*, 539 U.S. 52,⁸ and our courts’ adoption of the same approach. *See, e.g., Thornton*, 357 S.C. at 95-96, 592 S.E.2d at 52-53; *see also Grohn v. Sisters of Charity Health Servs. Colo.*, 98 Colo. J. 2722, 960 P.2d 722, 725 (Colo. Ct. App. 1998) (rejecting *Timms*). *Citizens Bank* effectively overruled the view of the *Timms* Court with regard to applicability of the FAA, as the interstate commerce indicated in *Timms* meets the requirements set forth in *Citizens Bank*. The recent decision in *Marmet Health Care* further bolsters this conclusion. In light of this more recent controlling authority, this Court should view *Timms* as against the overwhelming weight of contemporary precedent, as well as authority from other jurisdictions recognizing that nursing home arbitration agreements, by their nature,

⁸ *See also Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (state’s categorical prohibition against pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes held contrary to the terms and coverage of the FAA).

involve interstate commerce pursuant to the FAA.⁹

Even assuming *Timms* enjoys continued vitality, a point Appellants vigorously dispute, the parties' pleadings and the Resident Contract nonetheless demonstrate a sufficient nexus between interstate commerce and the arbitration provision within the Resident Contract to warrant an order compelling binding arbitration. In his original Complaint, Sullivan alleged that Park Pointe Village is the wholly owned subsidiary or alter ego of ACTS Retirement-Life Communities, Inc., a Pennsylvania entity. (R. pp. 152-153, ¶¶ 2-3) Sullivan also alleged that Park Pointe "is a retirement community providing independent residences for senior citizens and access to assisted living and nursing care services for its residents." (R. p. 153, ¶ 9) Further, Sullivan alleged that one of Park Pointe's employees, Walton, was stealing, forging, and cashing checks drawn on Cook's account. These allegations are essentially repeated *verbatim* in Sullivan's Amended Complaint. (R. pp. 136-137, ¶¶ 2, 8-9; p. 138, ¶ 11) More importantly, the allegations of Sullivan's Complaint and Amended Complaint, standing alone, implicate exercise of control by an out-of-state entity and fraudulent transactions involving a financial institution regulated by the federal government, thus providing a sufficient nexus to interstate commerce.

⁹ See, e.g., *Canyon Sudar Partners, LLC v. Cole*, No. 3:10-1001, 2011 WL 1233321, at *10 (S.D. W. Va. Mar. 29, 2011); *Carter v. SSC Odin Operating C., LLC*, 353 Ill. Dec. 422, 428-29, 955 N.E.2d 1233, 1239-40 (Ill. App. Ct. 2011); *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 415 N.J. Super. 272, 290-93, 1 A.3d 906, 817-18 (N.J. 2010); *Triad Health Mgmt. of Ga. III, LLC v. Johnson*, 298 Ga. App. 204, 205-06, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009); *Rainbow Health Care Ctr., Inc.*, 2008 WL 268321, at *2-6; *Miller v. Cotter*, 448 Mass. 671, 678, 863 N.E.2d 537, 544 (Mass. 2007); *Washburn v. Beverly Enters.-Georgia, Inc.*, No. CV 16-51, 2006 WL 2728627, at *2 (S.D. Ga. Aug. 3, 2006), *rev'd on other grounds*, 2006 WL 3404804 (S.D. Ga. Nov. 14, 2006); *In re Nexion Health at Humble, Inc.*, 48 Tex. Sup. Ct. J. 805, 173 S.W.3d 67, 69 (Tex. 2005); *Briarcliff Nursing Home v. Turcotte*, 894 So.2d 661, 667-68 (Ala. 2004); *Owens, supra*, 890 So.2d at 987-88; *Toledo Kaiser Permanente Med. Grp.*, 987 F.Supp. 1174, 1180 (N.D. Cal. 1997).

Finally, contrary to the holding of *Timms*, the arbitration provision of the Resident Contract triggers the FAA because the Resident Contract expressly evidences commerce on its face. See *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *5 (D.S.C. Dec. 15, 2011); see also *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 875 n.5 (11th Cir. 2005); *Primerica Fin. Servs. v. Wise*, 217 Ga. App. 36, 37, 456 S.E.2d 631, 633 (Ga. Ct.App. 1995). As the circuit court itself acknowledged, it is beyond argument that the provision of assisted living and security services pursuant to the Resident Contract necessarily involves goods, personnel, and wire transfers that move in interstate commerce. (R. p. 182, lines 15-17) Further, Sullivan himself implicates interstate commerce when he pleads that Park Pointe is the “wholly owned subsidiary” and “alter ego” of an entity organized and existing in a state other than South Carolina. (R. p. 136, ¶ 2) In light of these provisions, there is no question that the FAA governs the arbitration provision of the Resident Contract and, thus, the trial court erred in reaching the opposite conclusion.¹⁰

¹⁰ Appellants respectfully submit that this Court’s decision in *Flexon v. PHC-Jasper, Inc. d/b/a Coastal Carolina Medical Center*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012), *reh’g denied*, 2012 S.C. App. LEXIS 61 (July 23, 2012), is not controlling. In *Flexon*, the Court affirmed the circuit court order denying a motion to compel arbitration with respect to a dispute arising out of an employment agreement, finding that the subject employment agreement did not involve interstate commerce and that the FAA did not apply. Assuming, *arguendo*, that *Flexon* was correctly decided, it is nevertheless distinguishable from this case. As this Court has recognized, “[i]n all cases, determination of whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts of the case.” *Thornton*, 357 S.C. at 95-96, 592 S.E.2d at 52 (*citing Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 (“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.”)). Unlike the employment agreement at issue in *Flexon*, the Resident Contract for the admission, care, and treatment of Pauline Cook is, with respect to its effect on interstate commerce, much broader, both on its own and in the aggregate as a general practice. *Cf. Flexon*, 399 S.C. at 86, S.E.2d at 2 (affirming circuit court’s determination that the agreement “calls [merely] for local medical services to be performed by a Hardeeville [i.e., local] resident at a medical facility located in Hardeeville.”)

II. THE CIRCUIT COURT ERRED IN APPLYING THE SOUTH CAROLINA UNIFORM ARBITRATION ACT TO IMPOSE ADDITIONAL REQUIREMENTS TO INVALIDATE THE ARBITRATION PROVISION OF THE RESIDENT CONTRACT.

The trial court's determination that the arbitration provision is invalid because it does not conform to statutory requirements regarding typefont, etc., cannot stand. The court's decision to single out and invalidate the arbitration provision on this basis clearly violated § 2 of the FAA and binding precedent on that issue. Section 2 provides that a written arbitration agreement "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 (emphasis added). Thus, a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, but not "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1742-43, 179 L.Ed.2d 742 (2011). In short, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Assocs., Inc. v. Casaratto*, 517 U.S. 681, 687 (1996) (internal quotations and citation omitted).

The Supreme Court of the United States repeatedly has rejected state laws that place arbitration agreements in a class apart from other contracts and limit their validity. The Court has done so even where state law did not expressly mention arbitration, but, as applied, disfavored arbitration. *See Preston*, 552 U.S. at 346 (FAA preempts state law that lodges primary jurisdiction in a non-arbitral forum even though the parties agreed to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempts state statute that required judicial resolution of disputes arising out of franchise agreements). Other

courts have recognized that the FAA preempts state laws that disfavor arbitration. *See, e.g., Bradley v. Harris Res., Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) (FAA preempts statute that applies only to forum-selection clauses in franchise agreements, and not all contracts generally); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999) (FAA preempts statute applicable only to venue clauses in franchise agreements, and not all contracts); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (FAA preempts judicial ruling that applies only to forum-selection clauses in franchise agreements); *cf. Carter v. SSC Odin Operating Co., LLC*, 237 Ill.2d 30, 46, 927 N.E.2d 1207, 1218 (2010) (FAA preempts the anti-waiver provisions of nursing-home law that does not “target” arbitration agreements specifically).

It follows, then, that the arbitration agreement at issue here is voidable “if and only if the party resisting arbitration can point to a generally applicable principle of contract law under which the agreement could be revoked.” *Fitz v. Islands Mech. Contractor, Inc.*, No. 08-cv-00060, 2010 WL 2384585, at *6 (D. V.I. June 9, 2010) (internal quotations and citation omitted); *see also Bradley*, 275 F.3d at 890 (“[A] state law that invalidates arbitration agreements is not preempted by the FAA only if the law is ‘generally applicable,’ or applies to ‘any contract’” (internal citation omitted)). Sullivan never made such an allegation, and it was error for the circuit court to refuse enforcement of the arbitration provision on the basis that it did not comply with certain formulaic provision of the South Carolina Code that do not pertain to all South Carolina contracts generally.

Here, the circuit court went to great lengths to avoid enforcement of the arbitration provision. For example, the court attempted to distinguish the nature of Sullivan's claims against an assisted living facility from the more typical allegations of medical malpractice or resident abuse and neglect. (R. pp. 179-180). The court also expressed concern that binding arbitration might hamper Sullivan's ability to pursue personal causes of action in addition to any claims arising under the Resident Contract, even though that is not alleged in this case and even though the Supreme Court of the United States has invalidated state rules barring mandatory arbitration of wrongful death and survival actions. (R. pp. 180-181) *See Marmet Health Care*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (state's categorical prohibition against pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes held contrary to the terms and coverage of the FAA); *cf.* S.C. Code Ann. § 15-48-10(b) (exempting from SCUAA "[a]ny claim arising out of personal injury, based on contract or tort. . ."). Thus, the circuit improperly engaged in efforts to single out the of arbitration provision of the Resident Contract in violation of federal law.

Going further, the circuit court held the arbitration provision of the Resident Contract to heightened drafting requirements not applicable to contracts generally. Specifically, the court observed there was "[n]o mention of the arbitration provision . . . anywhere else in the document. In particular, the requisite notice that the agreement is subject to arbitration pursuant to the SCAA [sic] is not displayed on the front page of the document as required by statute." While Appellants concede the circuit court correctly interpreted S.C. Code Ann. § 15-48-10(a), they nevertheless urge this Court to find that these provisions of the statute are preempted as impermissible requirements targeting

exclusively against arbitration provisions in violation of the FAA.

CONCLUSION

For the reasons stated herein, Appellants submit they are entitled to an order reversing the judgment of the circuit court denying the motion to compel arbitration pursuant to the Federal Arbitration Act.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2012-213352
Case No: 2012-CP-46-2692

Paul Sullivan as Personal Representative of the
Estate of Pauline C. Cook, Respondent,

v.

Park Pointe Village, Inc., a wholly owned subsidiary of
ACTS Retirement-Life Communities, Inc., Neva Lattimer,
and Marvin Lawrence, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF APPELLANTS and the REPLY
BRIEF OF APPELLANTS comply with Rule 211(b), SCACR, as well as the South
Carolina Supreme Court's Order dated August 13, 2007.

TURNER PADGET GRAHAM & LANEY P.A.

November 19, 2013

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