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.

SURREPLY BRIEF OF RESPONDENT

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ARGUMENT

I. Cape Romain[1] is not controlling where the Appellants failed to introduce any evidence to support their argument that the contract bears a nexus with interstate commerce. Nothing in Cape Romain relieved Appellants of their burden of showing, through evidence introduced to the trial court, that the contract bears a nexus with interstate commerce in order to invoke FAA preemption.

Appellants argue Cape Romain overruled Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993), and requires reversal of the trial court's order denying the motion to compel arbitration. However, the conclusion in Cape Romain is based on evidence in the record indicating a nexus between the contract and interstate commerce, thereby invoking FAA preemption. Here, the Appellants introduced no evidence – other than the contract itself – for the trial court to consider. As the party moving to compel arbitration under the FAA, Appellants carried the burden of showing some connection between the contract and interstate commerce. See, e.g., Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012) (Party moving in the trial court to compel arbitration under the FAA failed to satisfy its burden of proof where none of the factors relied upon established the involvement of interstate commerce.). Because Appellants failed to carry this burden, the trial court correctly denied their motion.

In Cape Romain, the Supreme Court reversed the decision of the trial court denying a motion to compel arbitration pursuant to the FAA. As recited in the Supreme Court's opinion, the trial court was presented with evidence

> (1) that certain raw materials used in constructing the marina originated in Ohio; (2) that Cape Romain transported the raw materials on its equipment and barges through the navigable waterways of the Charleston Harbor and up the Wando River to the project site; and (3) that the marina was constructed in navigable waterways under a permit issued by the Army Corps of Engineers.

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[1] Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013).

Id. at 122, 747 S.E.2d at 464. The Court found that rather than restricting its analysis to the face of the contract, the trial court should have considered "all three broad categories of activity within the purview of Congress's commerce power—use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce." Id. at 123, 747 S.E.2d at 465. The Court reaffirmed that the FAA does not preempt the entire field of arbitration. To the contrary, "the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement." Id. at 126, 747 S.E.2d at 466. In Cape Romain, the parties' agreement expressly "invoke[d] the FAA and such contractual provisions [were] enforced in accordance with their unambiguous terms." Id.

Here, the contract contained no reference to the FAA, but instead contained a choice of law provision indicating the parties' intent that South Carolina law apply to determine any and all disputes. (R. p. 72, ¶23.9). Appellants introduced no evidence that performance of the contract involved use of the channels of interstate commerce or the regulation of persons, things or instrumentalities of interstate commerce. Further, they introduced nothing to suggest the activities necessary to carry out the contract had any bearing on interstate commerce. Simply stated, they introduced nothing except the contract itself to support their argument for FAA preemption.

Appellants argue that "in Cape Romain the 'instrumentalities of interstate commerce' factor weighed in favor of a finding of interstate commerce where materials used in the construction were manufactured or fabricated outside of South Carolina and transported to this State. . . . The same result follows here." (Reply Brief of Appellants, p. 3) (citations omitted).

The distinction between Cape Romain and this case is that the movant in Cape Romain introduced evidence "that the materials used in constructing the dock were instrumentalities of interstate commerce, as they were manufactured or fabricated in Ohio and transported to South Carolina to be used in constructing the marina. In addition, Cape Romain consulted with an out-of-state engineering and survey company in connection with the installation of the dock sections." Id. at 123, 747 S.E.2d at 465. By contrast, Appellants appear to argue that the court should take judicial notice that an assisted living facility and the services it provides necessarily involve interstate commerce. The only support for their argument on this issue is the recitation of statements made by the trial judge from the bench – but not included in his written order – that "care facilities . . . get employees from out of state, equipment or medicine or food shipped from Charlotte or whatever . . ." (Reply Brief of Appellants, p.4, n.3). But Appellants introduced **no evidence** of any of these factors to the trial court, as was their burden, and these matters are not so indisputable as to be the subject of judicial notice.

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. . . . Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. . . . Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. . . . For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). While it may be true that PPV employs out-of-state workers and receives materials from out-of-state, it is entirely possible that all employees are South Carolina residents and all materials are obtained in-state. Appellants' bare assertion that out-of-state workers and materials support application of the FAA is not so indisputable as to the be proper subject of judicial notice.

Even if certain materials were obtained out-of-state, that portion of Timms that Cape Romain did not overrule found that "[a]lthough these factors[2] could evidence the Center's involvement in interstate commerce, we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties." Timms v. Greene, 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993) overruled in part by Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013).

By its explicit terms, Cape Romain overruled Timms only "to the extent it determined the FAA did not apply because the contract *on its face* failed to demonstrate that the parties contemplated an interstate transaction." Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 123n.5, 747 S.E.2d 461, 465 (2013) (emphasis in original). The Timms holding was also based on a failure of evidence. (See footnote 2). The Court in Cape Romain could have simply overruled Timms in its entirety. It did not. Pursuant to Bradley, supra, Appellants have the burden of proving a nexus to interstate commerce. Where the only thing Appellants introduced for the trial court to consider is the contract, the trial court's decision is necessarily limited to an examination of the face of the contract. Because Cape Romain finds an examination limited to the four corners of the contract is not a proper basis for deciding a motion to compel arbitration, Cape Romain supports Respondent's argument and rebuts Appellants'.

Appellants further argue that the conclusion to compel arbitration in Cape Romain "necessarily follows" here "given the types of services contemplated by the Resident Contract." (Reply Brief of Appellants, p. 5). They argue the provision of "medical care is undoubtedly one

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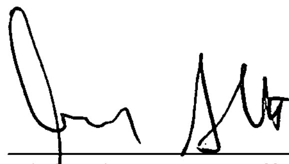
[2] The evidence presented in Timms indicated that the care center (1) was a division of a Delaware Limited Partnership; (2) marketed its services to persons residing outside the State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the State for use at the Center; and (5) contemplated payment in part by Medicare or Medicaid. Timms v. Greene, at 473, 427 S.E.2d at 644.

of the most highly regulated activities in the United States" and cite, by way of example, the Affordable Care Act. Notwithstanding the fact that the Affordable Care Act was enacted years after the contract was executed, Appellants' argument suffers from the same failure of proof as all their arguments. In Cape Romain, the record demonstrated that the activities implicated in the marine construction contract were subject to federal regulation where the marina was constructed in navigable waterways under a permit issued by the Army Corps of Engineers. These facts appeared in the record. Here, there are no facts in the record to show federal regulation of the activities undertaken in the contract. In fact, there is nothing in the record to demonstrate that Pauline Cook ever received any medical care from PPV because Appellants did not present any evidence for the trial court to consider.

CONCLUSION

Cape Romain did not completely overrule Timms, but only overruled it in part. Nothing in Cape Romain shifted the burden of the party moving to compel arbitration under the FAA of producing evidence that the agreement in fact bears a nexus with interstate commerce. Appellants produced no such evidence and Cape Romain is not controlling where there is a complete failure of factual evidence. For these reasons and those set forth in Respondent's Brief, the Court should affirm the trial court's order.



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