RECEIVED

APR 26 2018

S.C. SUPREME COURT

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

Unpublished Opinion No. 2018-UP-~~0416~~ 046
Filed January 31, 2018
Petition for Rehearing Denied March 26, 2018

Angela Cartmel .....Respondent,

v.

Edward Brice Taylor .....Petitioner.

Appellate Case No. 2016-000635
Lower Court Case No. 2015-CP-02-1181

PETITION FOR CERTIOARI

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

Other Counsel of Record:
Bradford M. Owensby, Esquire
Banks & Owensby, LLC
319 Park Avenue SE
Aiken, SC 29801
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals.

QUESTION FOR REVIEW

Did the Court of Appeals err in affirming the Circuit Court's denial of the Petitioner's Motion to Compel Arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.*?

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" which would allow the Plaintiff residential use and to keep horses. [App. p. 85 ¶ 1].

Notwithstanding its title, however, the Agreement is *not* strictly residential in nature. 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)." [App. p. 85 ¶ 1]. 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." [App. p. 85 ¶ 1].

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]. 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.)].

An 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]. 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 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]. In her Complaint, at ¶¶ 4, 20 and 21, Respondent alleged the fire loss caused her to suffer damages connected with the interruption of her business. [App. pp. 16, 18-19].

Despite due demand in the Answer, Respondent declined to engage in either mediation or arbitration. [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, Respondent submitted no affidavit or testimony at or prior to the hearing. [App. p. 1, pp. 74-84, pp. 39-54]. Likewise, Respondent submitted no evidence to the Court other than the Agreement. [App. pp. 39-54, 74-84].

Judge Manning denied the underlying motion by a form order issued the same date, January 25, 2016, 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 noticed 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) on January 31, 2018. [App. pp. 153-155]. Petitioner filed a timely Petition for Rehearing, which was denied on March 26, 2018. [App. pp. 156-164, 165].

ARGUMENT

***Did the Court of Appeals Apply the Correct Holding from* Bradley?**

The issue before this 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)] applies in this case, which involves a "mixed use" lease-agreement for residential and commercial activity – rather than a strictly "residential only" contract as found in *Bradley.*

The Petitioner has always conceded that a lease (or a rent to own arrangement) *strictly* for a tenancy in real property – located within South Carolina – falls under the "real estate exception" set forth in *Bradley.* However, the Agreement at bar is clearly not strictly a residential-only contract. [App. p. 85 ¶ 1].

If the Court of Appeals had said: "well, OK, any case which touches in any way on residential use is automatically intrastate in nature, not interstate," then Petitioner would have

understood – except that is not what *Bradley* ultimately holds. Yes, *Bradley* does say 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 v. Bright Acres Assocs.*, 346 S.C. 580, 595, 553 S.E.2d 110, 117–18 2001)). And, yes, this is what the Court of Appeals uses in the last sentence of the Unpublished Opinion. As the linchpin of its affirmation.

But articulating the holding from *Zabinski* is only the launching point for *Bradley* – not the final word. In fact, *Bradley* goes 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, the Court of Appeals should not be allowed to either.

In *Bradley*, Chief Justice Toal reviewed *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) *Id.*, 389 S.C. at 459-460, 730 S.E.2d at 318. She then held: "[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.

This was the true holding of *Bradley* that the Court of Appeals was required to apply – whether the agreement is strictly (or not) for the purchase of a completed home, 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, ignores the broader holding of *Bradley*. Instead, it bases its entire opinion on the part of *Bradley* that references the earlier, standard set forth in *Zabinski* rather than the

expanded ruling of *Bradley* – and thus, the Court of Appeals fails to determine the case at bar on the correct *Bradley* holding. If *Zabinski* covered it, Petitioner asks, then why did *Bradley* go on to analyze it more deeply instead of ending its analysis there?

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, *Appellate Practice in South Carolina 3d* (2016), p. 21.

In the case at bar, 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, apparently, has fallen into the same trap.

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 shows that the facts of the instant Appeal differ from the facts in *Bradley*. 389 S.C. at 459-460, 730 S.E.2d at 318.

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*, is misplaced. The Supreme Court should therefore take *certiorari*.

If the Supreme Court wants to limit *Bradley*, or carver out an exception to the FAA for any contract which touches in any way on residential property, that is fine. *Bradley* should be updated to show that 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).[1] But the Petitioner does not think that the Court of Appeals' decision is in keeping with *Bradley* as it stands now; rather, the Court of Appeals' decision is based on *Zabinski*. This failure by the Court of Appeals meets the burden of certiorari. Rule 242(b)(3), SCACR.

Respondent Failed to Meet Her Burden.

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 appears to cite all of the foregoing but chooses not to apply any of it.

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

---

[1] In *Bradley,* the Court repeatedly held that the defendant Brentwood Homes – the party *seeking* arbitration – had failed to meet <u>its</u> burden of proof in the motion. 398 S.C. at 459-460, 730 S.E.2d at 317 (2012). 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)).

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. [App. pp.15-27 (Compl.), pp. 41-53 (Lease), pp. 74-84 (Trans.)]. Respondent's memorandum of law to the Court of Appeals is silent on this issue as well. [App. pp 39-40.].

All of the foregoing analysis is germane to these proceedings, as Court of Appeals notes. But 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 based solely on the Agreement; and rule in favor of the latter – intrastate. Such a finding (intrastate commerce), however, would violate the following black-letter precepts which the Court of Appeals was bound to apply, and 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 arbitrability is strengthened when an arbitration clause is broadly written. *Landers*, 402 S.C. 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,* 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).

- 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 v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363, n. 3 (2001).

- 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, the Court of Appeals should have come down in favor of arbitrability. Moreover, the arbitration clause in Paragraph 61 of the Agreement is broad [App. p. 94 ¶ 61], which further mandates arbitration.

The arbitration clause is also clearly subject to an interpretation that permits arbitrability, and the Court of Appeals could not 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. Thus, the Supreme Court should take *certiorari.*

CONCLUSION

Based on the foregoing arguments and citation to authority, the Supreme Court should extend *certiorari* and reverse the Court of Appeals. The one quote in the Unpublished Opinion (from *Bradley,* but actually from *Zabinski*) – which the Court of Appeals' decision hangs upon – is misplaced when: (1) the Supreme Court considers that this was a mixed-use contract; (2) the Supreme Court recognizes the final holding of *Bradley*; and (3) when the Supreme Court applies the substantive federal and State law. Thus, Petitioner has shown that he has met the third reason set forth in Rule 242(b) – where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. *See* SCACR 242(b)(3).

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. The Petitioner therefore files this Petition.

Respectfully submitted.

BROWN & VARNADO LLC

Robert B. Varnado, (S.C. Bar # 0007850)
Alexis Wimberly McCumber (S.C. Bar # 101611)
103 Ronnie Boals Blvd. (29464)
P.O. Box 1127
Mt. Pleasant, SC 29465
(843) 737-7300
(843) 654-5109 fax

April 25, 2018
Mount Pleasant, South Carolina

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

Unpublished Opinion No. 2018-UP-0416
Filed January 31, 2018
Petition for Rehearing Denied March 26, 2018

Angela Cartmel .....Respondent,

v.

Edward Brice Taylor .....Petitioner.

Appellate Case No. 2016-000635
Lower Court Case No. 2015-CP-02-1181

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Petition for Certiori*** 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:

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

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

April 25, 2018
Mt. Pleasant, South Carolina