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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Judge
The Honorable Daniel Coble, Circuit Court Judge

Case No. 2019 CP 40-04452
South Carolina Court of Appeals Appellate Case No. 2023-001058

South Carolina Supreme Court Appellate Case No. 2024-000588

Anesthesiology Professionals of Columbia, LLC,..... Respondent,

v.

Lifepoint Health d/b/a Providence Health and Providence
Hospital, LLC,..... Petitioner.

APPENDIX

**NELSON MULLINS RILEY
& SCARBOROUGH LLP**

C. Mitchell Brown
mitch.brown@nelsonmullins.com
William C. Wood, Jr.
bill.wood@nelsonmullins.com
1320 Main Street, 17th Floor
Columbia, SC 29201
803.799.2000

Attorneys for Petitioner

GRIFFIN HUMPHRIES, LLC

Margaret Nicole Fox
mfox@griffinhumphries.com
James Mixon Griffin
jgriffin@griffinhumphries.com
PO Box 999
Columbia, SC 29202
803.744.0800

Attorneys for Respondent

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Jun 30 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge
L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-04452

Anesthesiology Professionals of
Columbia, LLC

Respondent,

v.

Lifepoint Health d/b/a Providence
Health and Providence Hospital LLC

Appellants.

NOTICE OF APPEAL

The unusual nature of this matter requires this explanatory notice. Lifepoint Health d/b/a Providence Health and Providence Hospital LLC ("Appellants") and Anesthesiology Professionals of Columbia, LLC, ("Respondent") were involved in an arbitration that ended with the arbitrator concluding that neither party owed the other anything. Respondent then instituted a legal challenge by filing this action to vacate the arbitration decision, but did not serve a summons or petition for the action on Appellants.

Appellants were unaware of the legal challenge, and claims they were never told of it, never learned of it, and never were billed for it. The legal challenge action began with purported "accepted service" by counsel who had no engagement with Appellants to act in the legal challenge action, and who did not inform Appellants of the legal challenge action.

The legal challenge action resulted in an Order of the Circuit Court entitled "Proposed Order" (attached), purporting to vacate the arbitration result. A motion to reconsider was filed (again, unknown to Appellants) leading to another Order (attached), which directed that an attachment be placed with a final order by the clerk, which attachment was never so placed, and regarding which no one has ever received.

After the second above-referenced Order on the motion to reconsider (but not ever any order with attachment), and after the passage of more than 30 days thereafter, Appellants

learned for the first time about the legal challenge action, when they received a notice that an all new arbitration proceeding would allegedly need to occur as a result of the legal challenge action.

Appellants moved to dismiss (in essence set aside) the Orders of the Circuit Court vacating the first arbitration on grounds, inter alia, of lack of personal jurisdiction of Appellants. Appellants never were served with the legal challenge action (either a summons or petition) nor did they authorize any counsel to accept service for it in the legal challenge action. *See BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006)(default set aside on grounds of lack of personal jurisdiction). Appellants also requested in the alternative a ruling that the Order of the Circuit Court on the Motion to Reconsider be declared to be non-final because there had never been any final order sent out by the clerk with the attachment as ordered by the circuit court to occur. (Had this declaratory relief been ordered, then Judge Manning's Orders could have been timely appealed).

On May 31, Judge Coble issued an Order (attached) denying Appellants' motion.

Appellants hereby appeal the Order of the Honorable Daniel Coble dated May 31, 2023, denying Appellants' Motion to Dismiss or in the Alternative to Enter Final Order filed June 10, 2022. Appellants received notice of the entry of the May 31 Order on June 22, 2023.¹ Appellants also appeal the related Orders of the Honorable L. Casey Manning, all attached hereto.

[Signatures Next Page]

¹ The NEF for the May 31 Order incorrectly states that John Perry Bozeman, Tre Allen Holloway and J. Walker Coleman, IV, of K&L Gates, attorneys for Appellants, were electronically served with the May 31 order. None of those attorneys ever received a copy of the May 31 order by electronic means at their work email addresses from the Court or from any other person on May 31, 2023. The NEF states that attorney Jeffrey Stuart Patterson, also of K&L Gates and lead attorney for Appellants before Judge Coble, was not served electronically and needed to be served by "traditional means." Attorney Patterson did not receive electronic notification on May 31, 2023 from the Court even though he had previously received electronic notifications of filings in the matter (the reason for now stating he must be served otherwise is unknown) and he was never served by any other means. Attorney Patterson discovered the filing of the May 31 Order on his own on June 22, 2023, while personally checking the public docket for the matter because of the long passage of time since the entry of the Form 4 order and the submission of proposed orders by the parties to Judge Coble.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/C. Mitchell Brown
C. Mitchell Brown, Esq.
William C. Wood, Jr., Esq.
Meridian Bldg., 17th Floor
1320 Main Street
P.O. Box 11070 (29211)
Columbia, SC 29201
mitch.brown@nelsonmullins.com
bill.wood@nelsonmullins.com

June 30, 2023

ATTORNEYS FOR APPELLANTS

Other Counsel of Record:

James M. Griffin, Esq.
Margaret N. Fox, Esq.
4408 Forest Drive, Suite 300
P.O. Box 999 (29202)
Columbia, S.C. 29206
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

ATTORNEYS FOR RESPONDENT

Exhibit 1

(Order filed May 31, 2023)

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SC Court of Appeals

ELECTRONICALLY FILED - 2023 May 31 4:47 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4004452

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Anesthesiology Professionals of Columbia,
LLC,

Petitioner,

v.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,

Respondents.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No. 2019 CP 40-04452

ORDER

Before the Court is the Motion to Dismiss, or in the Alternative, to enter Final Order ("the Motion to Dismiss"), filed by Respondents Lifepoint Health d/b/a Providence Health ("Lifepoint") and Providence Hospital LLC's ("Providence") on June 10, 2023. Respondents request the Court grant the Motion to Dismiss on the grounds the Court did not have personal jurisdiction over Respondents when it granted the Petition to Vacate the arbitrator's decision because (i) a summons did not accompany the Petition served on the Respondents' counsel, former Nelson Mullins attorney Ms. Erin Stuckey, for the underlying arbitration proceedings, and (ii) because Respondents allege Ms. Stuckey lacked actual or implied authority to accept service of the Petition on behalf of the Respondents. Alternatively, Respondents contend a final order was never issued on the Petition, and thus request the Court enter a final order on the same. On January 4, 2023, Petitioner Anesthesiology Professionals of Columbia, LLC ("APC") submitted its memorandum in opposition to the Motion to Dismiss. This Court conducted a hearing on the Motion to Dismiss on April 18, 2023.

Having considered the briefings of counsel, as well as the argument presented at the hearing conducted on this matter, the Court finds that Respondents voluntarily entered an appearance in

this action through the actions of its counsel, Nelson Mullins, who executed a written acceptance of service on behalf of Respondents, submitted filings in this Court, and argued the appeal from the arbitrator's ruling before this Court. Additionally, the Court is unpersuaded by Respondents' contention that a final order has not been entered on the Petition based on an argument that is tantamount to a scrivener's error. Accordingly, the Court **DENIES** the Motion to Dismiss.

FINDINGS OF FACT

Based on the record before the Court, it makes the following findings of fact:

On or about April 14, 2014, Petitioner APC entered into an agreement effective April 15, 2014, with Sisters of Charity Providence Hospitals to provide general anesthesiology services at the hospital ("the Agreement"). Respondents subsequently purchased the hospital operated by the Sisters of Charity in Richland County and received an assignment of the Agreement. Section 7.2 of the Agreement provided that the hospital could terminate the Agreement without cause during the initial five (5) year term (the "Initial Term"). In March 2017, less than five years into the Agreement, Respondents terminated the same without cause pursuant to Section 7.2.

Following termination of the Agreement, a dispute arose between Petitioner and Respondents regarding Petitioner's demand for 180 days of post-termination compensation provided under Section 7.2 of the Agreement. Unable to resolve this dispute with Respondents, Petitioner filed a demand for arbitration with the American Health Lawyers Association ("AHLA") in accordance with Article 23 of the Agreement on January 25, 2018. Article 23 of the Agreement entitled "Dispute Resolution," requires that any controversy or claim arising out of or relating to the Agreement shall be resolved by binding arbitration conducted by a single arbitrator in accordance with the AHLA Alternative Dispute Resolution Rules of Procedure for Arbitration ("AHLA Rules").

On or about April 30, 2018, Respondents, through retained counsel Erin Stuckey of Nelson Mullins, filed an answer and counterclaim with the AHLA. Petitioner filed its answer to the counterclaim on June 22, 2018, and an arbitrator was duly selected to preside over the matter pursuant to the AHLA procedures. An evidentiary hearing was conducted in Richland County on March 12, 2019, and March 28, 2019. Lifepoint and Providence were represented by Ms. Stuckey and Mr. Daniels of Nelson Mullins at the arbitration hearing.

On May 15, 2019, the Arbitrator issued a written award, entitled "Final Determination and Order." In the award, the Arbitrator found that the parties intended that APC would be paid 180 days of post-termination compensation under Section 7.2 of the Agreement, as contended by APC. However, the Arbitrator ruled that Section 7.2 was unenforceable because it violated the federal anti-referral law known as Stark. Specifically, the Arbitrator stated,

"[b]ased on this Arbitrator's expertise in healthcare law and though this Arbitrator does not determine fair market value, this Arbitrator is able to conclude that any "severance" payment under this Agreement would not be commercially reasonable since it would entail six months of compensation to APC when it was no longer providing services to Providence. This Arbitrator concludes that paying "severance" in a PSE is not commercially reasonable nor Stark compliant. Therefore, this Arbitrator denies APC's request for an additional five months post contract termination or "severance" compensation and all claims of interest."

Award, p. 20-21.

On August 12, 2019, APC filed a Petition to Vacate the Arbitration Award (the "Petition") pursuant to S.C. Code § 15-48-130 alleging that:

- a. The Arbitrator exceeded the scope of his authority under the arbitration agreement.
- b. The Arbitrator was required to determine the dispute solely based on the evidence presented by the parties at the hearings held and conducted in accordance with the procedure set forth in the agreement.
- c. The Arbitrator had no authority to consult outside sources or to make an independent investigation of the disputed matters.

d. In addition, the Arbitrator acted in manifest disregard of South Carolina law regarding the enforcement of contracts, by his misapplication of the Stark law.

Upon filing the Petition, APC's counsel corresponded with counsel for Respondents, Ms. Stuckey – who had represented Respondents throughout the arbitration – to inquire if she was authorized to accept service of the Petition on behalf of her clients, the Respondents. Specifically, counsel for Petitioner stated:

Dear Erin:

I am providing you a courtesy copy of the Petition to Vacate the arbitration award in the above case that we filed on August 12, 2019, in the Richland County Court of Common Pleas.

I am requesting that you accept service on behalf of the respondents in this action. To this end, I am also enclosing an acceptance of service form for you to execute on behalf of your clients. If you are authorized, please execute the acceptance forms and return to me at your earliest convenience. If you are not able to do so, please notify me immediately so that we may effectuate service.

See Pet.'s RIO Mot. to Dismiss Ex. A.

Ms. Stuckey replied to the August 19, 2019, correspondence via her Nelson Mullins email account on August 20, 2019 stating, "wanted to let you know that I received this and am checking with my client regarding acceptance of service." *Id.* Ex. B. On August 27, 2019, Ms. Stuckey further responded via the same email, "I can accept. I am out of the office this afternoon but I will sign and return to you tomorrow." *Id.* Ex. C

On September 3, 2019, Ms. Stuckey executed and mailed an acceptance of service form on behalf of Lifepoint and Providence to counsel for APC. *Id.* Ex. D. The acceptance of service form states, "I Erin Stuckey hereby accept service and acknowledge receipt of Petitioner's Petition to Vacate Arbitration Award pursuant to S.C. Code 15-48-130 on behalf of Lifepoint Health d/b/a Providence Hospital and Providence Hospital LLC in connection with the above captioned matter

on this 3rd day of September, 2019.” Id. Ex. E. The acceptance of service form was filed with this Court on September 10, 2019. *See* Pet.’s RIO Mot. to Dismiss Ex. E.

Thereafter, counsel for Petitioner and Ms. Stuckey, on behalf of Respondents, jointly drafted a Consent Scheduling Order for Briefing that was filed with the Court. *Id.*, Ex. F. In accordance with the Consent Scheduling Order, and the Court-granted extensions to the same, Mr. Stuckey filed Respondents’ initial brief and designation of matter to be included in the record on appeal on March 24, 2021, and Respondents’ Final Brief in Opposition to the Petition to Vacate on June 1, 2021. Id. Exs. G & H. Ms. Stuckey thereafter appeared on behalf of Respondents and presented argument on their behalf at a hearing conducted by the Honorable Casey Manning on June 22, 2021. At the conclusion of the hearing, Ms. Stuckey, on behalf of Respondents, submitted a proposed order to chambers.

On August 4, 2021, the Court adopted APC’s proposed order in toto and filed the same (“Order and Final Judgment”); however, prior to filing the same, the word “Proposed” was not removed from the caption of the filed version of the Order and Final Judgment. Id. Ex. I. Thereafter, on August 16, 2021, Ms. Stuckey, on behalf of Respondents filed a Motion to Reconsider the August 4, 2021 Order and Final Judgment. Id. Ex. J. Among the relief sought in the Motion to Reconsider, was a request from Respondents to remove the word “Proposed” from the caption of the Order and Final Judgment, thereby correcting what Respondents described as a “scrivener/clerical error” contained in the same. Id. After considering Lifepoint and Providence’s Motion to Reconsider, the Court notified the parties it was denying the same and requested Petitioner submit a proposed order reflecting his ruling and correcting the scrivener’s error. The order, including Exhibit A which omitted “proposed” from the caption of the original August 4, 2021 Order and Final Judgment, submitted by Petitioner to the Court, with Ms. Stuckey copied,

was adopted in toto by the Court and thereafter sent to the Clerk for filing. Notably, the filed November 29, 2021 Order directed the clerk of court to file Exhibit A as a replacement for the original, and instructed the clerk of court that the replacement "shall retain the original filing date of August 4, 2021." Exhibit A, the replacement order, was never filed by the Clerk of Court despite Judge Manning's instruction. *See* Pet.'s RIO Mot. to Dismiss Ex. K.

Following the expiration of the thirty-day window in which Respondents could have appealed the denial of their Motion to Reconsider, and in accordance with the Order and Final Judgment vacating the Arbitration Award, Petitioner reinitiated proceedings with the AHLA to begin the process of selecting a new arbitrator and conducting a second arbitration. Then, on June 10, 2022, over two years after Nelson Mullins made its appearance on behalf of Respondents in the arbitration proceedings and had continued, through Ms. Stuckey, to litigate the appeal in Circuit Court - Respondents filed the present Motion to Dismiss claiming lack of personal jurisdiction and absence of a final order and judgment on the Petition.

CONCLUSIONS OF LAW

I. The Court has personal jurisdiction over Respondents.

Respondents urge the Court to dismiss the Petition pursuant to Rule 12(b)(2), SCRCP, for lack of personal jurisdiction on the grounds a summons was not served with the Petition, and even if one had been included with the Petition, Ms. Stuckey lacked the requisite authority required by Rule 4(d)(3), SCRCP to effectuate service of the Petition on Respondents. As set forth below, the Court finds these arguments are not supported by the State's procedural rules, arbitration statute, or agency law. Accordingly, the Motion to Dismiss is denied.

A. A Summons Is Not Required for an Application to Vacate an Arbitration Award.

Respondents contend that a summons was required to accompany the Petition to Vacate.

This is not correct. Petitioner filed an application in circuit court to vacate the arbitrator's decision pursuant to S.C. Code Ann. § 15-48-130. An application filed under Section 130 "shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions," S.C. Code Ann. § 15-48-170. Section 170 further provides "[u]nless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action." Section 170 does not require that a summons be served with the application. Rather as the plain language states, the application must be served in the same manner as summons are required to be served, unless otherwise agreed. Accordingly, this argument is not persuasive.

B. Lifepoint and Providence Voluntarily Appeared in this Action through Its Retained Counsel and thereby have Waived Any Challenge to Service of Process.

Respondents contend that service of the Petition on Ms. Stuckey was insufficient to effectuate service on Respondents because Ms. Stuckey did not have express or implied authority to accept service on behalf of the Respondents. However, this argument must fail because the record before the Court necessitates a finding that Ms. Stuckey had apparent authority to enter an appearance and accept service of the Petition on behalf of the Respondents. Accordingly, any challenge to service of the Petition has been waived and the Court has personal jurisdiction over the Respondents. Accordingly, the Motion to Dismiss must be denied.

1. *Ms. Stuckey had apparent authority to accept the Petition on behalf of the Defendants.*

An agency relationship may be established by evidence of actual or apparent authority. *See Fochtman v. Clanton's Auto Auction Sales*, 233 S.C. 581, 106 S.E.2d 272 (1958); *see also Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982) (agency relationship may be proven by evidence of apparent or implied authority, even where parties have entered agreement to

contrary). The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996). Concomitantly, the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 470 S.E.2d 397 (Ct.App.1996). Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. *Beasley v. Kerr-McGee Chem. Corp.*, 273 S.C. 523, 257 S.E.2d 726 (1979); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993); *see also Moore v. North American Van Lines*, 310 S.C. 236, 423 S.E.2d 116 (1992) (basis of apparent authority is representations made by principal to third party and reliance by third party on those representations).

The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432–33, 540 S.E.2d 113, 117–18 (Ct. App. 2000). It is undisputed that Respondents held Nelson Mullins out as its counsel to Petitioner during all relevant times over the course of the contract dispute with Petitioner and during arbitration before the AHLA. Neither Petitioner, nor its counsel, were ever informed by Respondents that Nelson Mullins' representation was solely limited to the arbitration proceedings or that Nelson Mullins ceased representing Respondents upon the issuance of the arbitration award. Despite an opportunity to do so, Respondents have not provided the Court with any documentation

between Respondents and Nelson Mullins indicating Nelson Mullins' representation of Respondents did in fact cease following the arbitration award or that Petitioner was ever informed that Nelson Mullins was no longer representing Respondents.

Moreover, absent the conveyance of such information, Rule 4.2, SCRE, prohibits Petitioner's counsel from communicating with Respondents – parties Petitioner and its counsel knew to be represented by Nelson Mullins. Accordingly, Petitioner, through its counsel, was ethically required to, and did, communicate with Nelson Mullins regarding the Petition. Petitioner detrimentally relied upon this representation by not serving Respondents' registered agent and instead accepting Nelson Mullins' acknowledgment of service as sufficient. Under these circumstances, Nelson Mullins was Respondents' apparent agent for purposes of Petitioner's appeal from the arbitrator's ruling and Respondents are thereby bound by Nelson Mullins' actions.

Notably, this scenario – in which Nelson Mullins had been engaged in the dispute from its inception – is markedly different from those cases cited by Respondents in which various courts found service incomplete when a pleading was served on an attorney that had represented the party previously, but in a separate, unrelated matter to that set forth in the pleading. See MIS Mot. to Dismiss at 7. Most significantly, Nelson Mullins through Ms. Stuckey voluntarily appeared on behalf of Respondents and litigated the appeal from the Arbitrator's ruling to conclusion in this Court. Respondents have not cited any authority involving a factually similar situation.

2. Respondents' appearance through Ms. Stuckey is equivalent to personal service.

Having found Nelson Mullins had apparent authority to act on behalf of Respondents in this matter, it follows that Respondents appearance through Ms. Stuckey is equivalent to personal service. Rule 4(d), SCRCF; *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007) (“Voluntary appearance by defendant is equivalent to

personal service.”); *see also Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999) (“We now hold a non-lawyer cannot represent a corporation in circuit or appellate courts”). Here, it is undisputed that Nelson Mullins represented Respondents in their contract dispute with Petitioner over its claim for post-termination severance pay under the Agreement. Nelson Mullins’ representation of Respondents in this capacity continued with Ms. Stucky’s appearance on their behalf during the arbitration proceedings and in the appeal of the arbitrator’s ruling in this Court. In short, Nelson Mullins’ appearance on behalf of Respondents in this Court is equivalent to personal service, regardless of any claimed defective service of process.

On this point, *Stearns Bank Nat. Ass’n v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793, (Ct. App. 2007) is instructive. In that matter, the Court of Appeals upheld the lower court’s ruling that a party had voluntarily appeared solely based upon the representations of counsel. The Court noted,

In the November 9 letter, Cisa not only announces his representation of Glenwood Falls without reservation but also expresses an intent to reach the merits of the case, especially when he writes “for DC Development, Inc., to recover any money in this action, my opinion is that Glenwood Falls, LP needs to assert a claim over and against the architects and engineers who designed this project.” *See Jenkinson v. Murrow Bros. Seed Co.*, 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring) (“In order to establish waiver of the right to contest jurisdiction, it is only necessary that a party, by its conduct, evince an intent to proceed to the merits of the case.”). Moreover, the November 9 letter contains not the slightest hint of a desire to challenge service of process. Based on the record before us, we hold the master did not err in finding the November 9 letter was a voluntary appearance by Glenwood Falls.

373C. at 341, 644 S.E.2d at 798.

As is evident from the correspondence surrounding the service of process of the Petition between counsel for Petitioner and Respondents, as well as the acceptance of service on file, Nelson Mullins entered a general appearance on behalf of Respondents in this action without reservation. Nelson Mullins litigated this Petition for over two years, causing this Court to expend

limited and valuable resources and costing Petitioner significant fees and expenses. Yet, Respondents now claim the Petition should be dismissed because they did not specifically retain Nelson Mullins to represent them in this appeal from the arbitration proceeding. Importantly, Respondents do not claim that they discharged Nelson Mullins prior to the Court issuing the August 4, 2019 Order and Final Judgment vacating the arbitrator's ruling. Nor do Respondents contend that they would not have retained Nelson Mullins had they been informed of this appeal.

Because Petitioner and its counsel have dealt with Respondents' attorneys reasonably, in good faith, and without being provided any indication that Nelson Mullins' actions were not authorized, Respondents are estopped from denying that Nelson Mullins was their agent for purposes of this litigation. *Id.* Respondents' sole remedy, if in fact Nelson Mullins' actions were not authorized, is to assert a claim against its attorneys. *Lord Jeff Knitting Co. v. Mills*, 281 S.C. 374, 377, 315 S.E.2d 377, 379 (Ct. App. 1984) ("[I]f the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy in such a case being against the attorney."); *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) ("Any communication failure or mistake on the part of an attorney is directly attributable to his client"). Respondents' claim that Nelson Mullins lacked authority to accept service of the Petition and enter an appearance in this action on their behalf does not provide a basis to void two years of litigation and vacate this Court's final order.

II. That the August 4, 2021 Order Contains a Scrivener's Error in the Caption and has not been remedied due to a clerical error does not nullify the Order.

Respondents contend that a final order granting the Petition has not been entered in the present matter, and request the court enter a final order – presumably to restart the time in which Respondents could appeal the same. However, the Court finds the August 4, 2021 Order is a final

order. The fact that the Order contained a scrivener's error in the caption does not negate its finality. Nor does the clerical failure of the clerk's office to replace the original August 4, 2021 order with Exhibit A to the November 29, 2021 nullify the original order. This is especially true, whereas here, the replacement order (Exhibit A to the November 29, 2021 Order) is identical to the original August 4, 2021 order in every respect except for removal of the word "Proposed" from the case caption. Had the Clerk's office filed Exhibit A, it is clear from the November 29, 2021 Order that the filing date *would have remained the same* – August 4, 2021.

Moreover, that Exhibit A was inadvertently omitted by the clerk's office from the November 29, 2021 Order does not prejudice Respondents. A plain reading of the November 29, 2021 Order illustrates that Exhibit A merely removed the word "proposed" and did not substantively alter the findings of the Order and Final Judgment granting the Petition. Thus, this is not a scenario in which Respondents were denied an opportunity for the Court to reconsider an issue that was raised for the first time in the replacement order. Moreover, even if this clerical mistake had not occurred and Exhibit A had been filed, Nelson Mullins remained the agent for Respondents and Ms. Stuckey did not appeal the November 29, 2021 Order within the thirty-day window.

In the November 29, 2021 Order denying Respondents' motion to reconsider, the Court instructed the Clerk to correct a clerical mistake in the caption of the August 4, 2021 Order. The November 29, 2021 Order specifically states "the corrected order shall retain the original filing date of August 4, 2021." The fact that the Clerk's office has apparently failed to perform this ministerial task does not change the finality of the Court's original order vacating the arbitration award or the finality of Judge Manning's Order denying Respondent's motion to alter or amend. Accordingly, the Court declines the alternative relief sought by Respondents.

CONCLUSION

Nelson Mullins had apparent authority to accept service of the Petition to Vacate and enter an appearance on behalf of Respondents in this case. Petitioner, its counsel, and this Court reasonably, and in good faith, relied upon Nelson Mullins' apparent authority to represent Respondents in this litigation. Respondents' claim that they did not authorize Nelson Mullins to take these actions does not provide a basis to void two years of litigation and to vacate this Court's August 4, 2021 Order and Final Judgment overruling the arbitrator's decision. Based on the foregoing, the Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

The Honorable Daniel Coble



Richland Common Pleas

Case Caption: Anesthesiology Professionals Of Columbia Llc vs Lifepoint Health ,
defendant, et al
Case Number: 2019CP4004452
Type: Order/Dismissal

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2023-05-31 15:46:38 page 14 of 14

Exhibit 2

(Petitioner's Proposed Order filed August 4, 2021)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Anesthesiology Professionals of Columbia,
LLC,

Petitioner,

v.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,

Respondent.

C/A No. 2019-CP-40-04452

PETITIONER'S PROPOSED
ORDER

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Jun 30 2023

SC Court of Appeals

This matter is before the Court upon Anesthesiology Professionals of Columbia, LLC's ("APC" or "Petitioner") Petition pursuant to S.C. Code Ann. § 15-48-130(a) for an order vacating the Final Determination and Order (the "Award") issued by Arbitrator Richard D. Sanders on May 15, 2019. Having reviewed the parties' briefings, as well as considered the arguments presented by counsel at the hearing on this matter on June 22, 2021, the Court hereby GRANTS APC's Petition for the reasons set forth below.

FACTUAL FINDINGS

A. THE AGREEMENT & DEMAND FOR ARBITRATION

1. APC and Respondent Lifepoint Hospital d/b/a/ Providence Health and Providence Hospital LLC (the "Hospital") entered into the Agreement effective April 15, 2014, to provide in-patient anesthesiology services to surgical patients at the Hospital. *See* (R. 271:3-11); (R. 118-160); (R. 30 ¶¶ 8-9).

2. Section 7.2 of the Agreement provided that the Hospital could terminate the Agreement without cause during the initial five (5) year term (the "Initial Term").

3. Section 7.2 of the Agreement provides:

7.2 Termination Without Cause. Either party may terminate this Agreement for any or no reason, and without penalty, upon the provision of one hundred eighty (180) days prior written notice to the other party. In the event Hospital terminates this Agreement pursuant to this Section 7.2 without cause and with such termination to take effect prior to the expiration of the Initial Term, Hospital agrees that it shall continue to compensate [APC], in accordance with the terms of Section 4.4 and Exhibit E herein, for a period of one hundred eighty (180) days.

(R. 117-160).

4. In March 2017, the Hospital provided APC with notice it was terminating the Agreement without cause. *See* (R. 286:9-287:18); (R. 248-249).

5. The parties agreed that APC would continue to provide services through September 30, 2017 (the "Termination Date"). *See* (R. 250-251).

6. Following the Termination Date, a dispute arose between the parties regarding APC's demand for 180 days of post-termination compensation (the "Post-Termination Payments") provided under Section 7.2 of the Agreement.

7. Pursuant to Article 23 of the Agreement entitled "Dispute Resolution", any controversy or claim arising out of or relating to the Agreement shall be resolved by binding arbitration conducted by a single arbitrator in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Rules of Procedure for Arbitration.

8. Unable to resolve the dispute over the Post-Termination Payments, APC filed a demand for arbitration with the AHLA on January 25, 2018. (R. 22-78).

9. The Hospital filed its Answer and Counterclaim to the Demand on April 30, 2018, (R. 79-90), asserting as an affirmative defense that payment of the Post-Termination Payments to APC would not be commercially reasonable or fair market value because the APC physicians were not providing services (R. 82 at 8).

10. Thereafter, the Arbitrator was appointed by the American Health Lawyers Association (AHLA) and the parties proceeded with discovery.

B. DISCOVERY & PRE-HEARING DISCLOSURES

11. Given the Hospital's assertion that the Post-Termination Payments to APC would not be commercially reasonable or fair market value, APC requested all evidence the Hospital had to support this position in four separate interrogatories. *See* (R. 332-334, INT Nos. 4, 5, 6, 7, & 8).

12. In response to each interrogatory concerning this affirmative defense, the Hospital answered,

ANSWER: Respondent is not claiming that the Agreement runs afoul of the Stark law.
Id.

13. Similarly, in response to requests for production of documents supporting this Stark-based affirmative defense, the Hospital claimed attorney-client privilege and that the work product doctrine precluded disclosure of the responsive documents but confirmed that,

RESPONSE: PYA prepared a summary appraisal report of fair market value compensation and commercial reasonableness related to the Agreement (the "appraisal (R. 337, RFP No. 9).

14. Also, in response to APC's request for an identification of all witnesses with knowledge of the facts in the case and a summary of their testimony, the Hospital did not identify a single witness that had knowledge related to this affirmative defense. (R. 329-332, INT Nos. 1 & 3).

15. Nor did the Hospital identify an expert to testify on these matters in its discovery responses. (R. 334, INT No. 9; R. 338, RFP Nos. 10, 11, & 12) (referring to confidential PYA appraisal report).

16. Additionally, APC's counsel raised the issue of this Stark-related affirmative defense during a pre-trial conference with the Arbitrator. Specifically, APC's counsel inquired whether the Hospital intended to present evidence on commercial reasonableness or fair market value in support of its affirmative defense at the hearing. The Hospital's counsel indicated such testimony would not be presented and that the Hospital was not contesting the Agreement under the Stark law.

17. Finally, in its prehearing witness disclosure, the Hospital did not identify an expert witness nor a lay witness that had knowledge and intended to testify on commercial reasonableness and fair market value. *See* (R. 258-260).

C. THE ARBITRATION HEARING

18. The hearing on this matter took place on March 12, 2019, and March 28, 2019.

19. At the hearing, APC presented testimony from individuals involved in the negotiation of the Agreement in support of APC's interpretation of Section 7.2 of the Agreement. These witnesses included Mr. Martin, the COO of the Hospital when the Agreement was executed, as well as the APC physicians.

20. In its case, the Hospital elicited testimony from Mr. Bernard and Mr. Doyle. Both gentlemen are currently employed as executives with the Hospital; however, neither were associated with the Hospital at the time the Agreement was negotiated or executed and, thus,

necessarily did not have first-hand knowledge related to the same. (R. 305:19-21; 306:6-10; 312:13-16; 323:9-13; 324:14-20).

21. Over the objection of APC's counsel, the Arbitrator permitted Mr. Bernard and Mr. Doyle to testify that it would not be commercially reasonable, nor fair market value, for the Hospital to comply with the early termination provision of Section 7.2 of the Agreement and the severance payments due thereunder. (R. 310:6-311:1; 321:25-322:15).

22. Neither Mr. Bernard nor Mr. Doyle, who are hospital executives, are experts in making such judgments and each admitted that hospitals rely on independent third-party experts to make such determinations on their behalf – not their executives. (R. 312:17-23; 327:2-328:1).

D. THE AWARD

23. Despite these admitted gaps in knowledge in such testimony, and their lack of expertise in making such determinations, the Arbitrator relied on such testimony and his independent experience to find the Agreement's Post-Termination payment requirement was not commercially reasonable and therefore violated the Stark law. *See* (R. 17, 20). Moreover, such conclusion was reached despite the repeated representations by the Hospital that it was not contesting APC's claim based on the Stark law.

CONCLUSIONS OF LAW

24. S.C. Code Ann. § 15-48-130(a) provides that upon application by a party, the Court shall vacate an award where the misconduct of an arbitrator prejudices the rights of any party or where an arbitrator exceeds his power.

25. It is clear from the Record in this case that the Arbitrator exceeded the scope of his authority by ruling on an issue that was not before him – whether payment of the Post-Termination

Payments pursuant to Section 7.2 of the Agreement was commercially reasonable. Pre-trial discovery and disclosures make evident that neither party submitted this issue to the Arbitrator; therefore, the Arbitrator patently exceeded the scope of his authority when ruling on the same. *See Pittman Mtg. Co. v. Edwards*, 327 S.C. 72, 77 (1997) (vacating portion of arbitration award that exceeded issues presented and relief sought by parties).

26. Moreover, in ruling on an issue that was not before him, the Arbitrator prejudiced the rights of APC by permitting testimony on commercial reasonableness and fair market value from Hospital witnesses when the Hospital made repeated representations during discovery it was not challenging such Stark-related issues and did not identify an expert or lay witness in its pre-trial disclosures that it expected to testify to these matters.

27. Without notice that such issues would be considered by the Arbitrator, APC was not prepared to refute such testimony. Nor was it given an opportunity to explore the opinions presented by the Hospital on these issues during discovery or retain its own expert to refute the same.

28. Such prejudice was only further compounded by the Arbitrator's reliance on "his expertise in healthcare law" (R. 20-21) when the procedural rules he was bound by under the AHLA require "the Final Award [] be based on evidence presented at [the] hearing," Rule 7.2, AHLA.

29. Based on the Arbitrator's failure to circumscribe the Award to the issue before him, and the unambiguous prejudice to APC resulting therefrom, the Court vacates the Award and remands the matter back to arbitration for a rehearing before a different AHLA arbitrator. *See* S.C. Code Ann. § 15-48-130(c).

30. On remand, the arbitrator's inquiry shall focus solely on the issue the parties had an opportunity to conduct discovery on following APC's filing of the Petition – whether interpretation of Section 7.2 of the Agreement entitles APC to Post-Termination Payments.

IT IS SO ORDERED.

THE HONORABLE L. CASEY MANNING
CHIEF ADMINISTRATIVE JUDGE
FIFTH JUDICIAL CIRCUIT

_____, 2021
Columbia, South Carolina



Richland Common Pleas

Case Caption: Anesthesiology Professionals Of Columbia Llc vs Lifepoint Health ,
defendant, et al
Case Number: 2019CP4004452
Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2021-08-04 12:50:04 page 8 of 8

Exhibit 3

(Order filed November 29, 2021)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Anesthesiology Professionals of Columbia,
LLC,

C/A No. 2019-CP-40-04452

Petitioner,

ORDER

v.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,

RECEIVED

Jun 30 2023

Respondent.

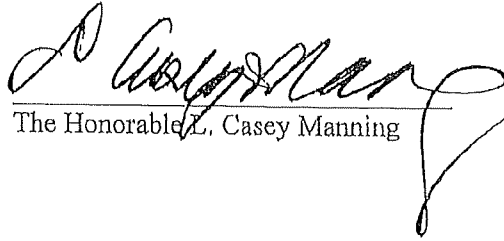
SC Court of Appeals

This matter is before the Court upon Respondent Lifepoint Health d/b/a Providence Health and Providence Hospital LLC's ("Providence") motion to reconsider the August 4, 2021 order of this Court ("Order") granting the petition of Anesthesiology Professionals of Columbia, LLC's ("APC") to vacate the Final Determination and Order (the "Award") issued by Arbitrator Richard D. Sanders on May 15, 2019. The arguments set forth by Respondent in its motion were previously considered by the Court and rejected. The motion does not set forth any additional grounds warranting a reversal in the Court's determination that the Award should be vacated. Accordingly, the Court hereby **DENIES** Respondent's Motion to alter or amend its judgment pursuant to Rule 59(e), SCRCP.

Additionally, the Court hereby **GRANTS** Respondent's request pursuant to Rule 60(a), SCRCP, to amend the clerical mistake in the caption of the Order presently on file. The Clerk of Court is hereby instructed to replace the Order on file entitled "Petitioner's Proposed Order" with the document attached hereto as Exhibit A and entitled "Order". The corrected Order shall retain the same filing date as the version originally filed on August 4, 2021.

IT IS SO ORDERED.

Dated: 11-23-2021


The Honorable J. Casey Manning



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
DEPUTY CLERK

POST OFFICE BOX 11829
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 11, 2023

Mr. C. Mitchell Brown, Esquire
PO Box 11070
Columbia SC 29211

William C. Wood, Jr., Esquire
1320 Main Street, 17Th Flr (29201)
PO Box 11070
Columbia SC 29211

Mr. James Mixon Griffin, Esquire
PO Box 999
Columbia SC 29202

Ms. Margaret Nicole Fox, Esquire
PO Box 999
Columbia SC 29202

Re: Anesthesiology Professionals of Columbia, LLC v. Lifepoint Health
Appellate Case No. 2023-001058

Dear Counsel:

This Court has received the Appellants' notice of appeal. A preliminary review of the orders challenged on appeal indicates it might not be appealable.

Accordingly, it is requested that each party serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter.

The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

Catherine Hannissaw, Deputy

CLERK

RECEIVED

Jul 31 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2023-001058

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge
L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-04452

Anesthesiology Professionals of
Columbia, LLC

Respondent,

v.

Lifepoint Health d/b/a Providence
Health and Providence Hospital LLC

Appellants.

APPELLANTS' MEMORANDUM SUPPORTING
APPELLATE JURISDICTION

These appeals involve a fundamental deprivation of due process of law to the Appellant Lifepoint Health d/b/a Providence Health and Providence Hospital LLC (collectively "Lifepoint"). While procedurally complicated, as explained below, none of that is the fault of LifePoint. Appellate jurisdiction exists to correct the erroneous orders below as set forth herein.

Lifepoint has appealed the order of the Honorable Daniel Coble dated May 31, 2023 ("May 31 Order") (Exhibit 1), which denied Lifepoint's Motion to Dismiss or in the Alternative to Enter Final Order filed June 10, 2022. (Exhibit 4 (motion and supporting memorandum).) Lifepoint received notice of the entry of the May 31 Order on June 22,

2023.¹ Lifepoint also appeals the related orders of the Honorable L. Casey Manning entered in the matter. (Exhibits 2 and 3.) As set forth below, each of these orders is properly and timely before the Court on appeal.

FACTUAL BACKGROUND

This appeal arises from an arbitration that ended on May 15, 2019. The arbitrator concluded that neither party owed the other anything. (Exhibit 5 (email transmitting order & order).) That same day, having received the arbitrator's order, Jonah Fecteau, Lifepoint's Senior Associate General Counsel, thanked attorney Erin Stuckey for her "hard work and effort on this case" and indicated that he looked "forward to working with you again in the future," ending the representation. (Exhibit 6.)²

From that date, May 15, 2019, until 2022, no one -- not Erin Stuckey, not any other attorney or person at Nelson Mullins, not Respondent, not Respondent's counsel or

¹ The NEF for the May 31 Order incorrectly states that John Perry Bozeman, Tre Allen Holloway and J. Walker Coleman, IV, of K&L Gates, attorneys for Lifepoint, were electronically served. None of those attorneys ever received a copy of the May 31 Order by electronic means at their work email addresses from the Court or from any other person on May 31, 2023. The NEF states that attorney Jeffrey Stuart Patterson, also of K&L Gates and lead attorney for Lifepoint before Judge Coble, was not served electronically and needed to be served by "traditional means." Attorney Patterson did not receive electronic notification on May 31 even though he had previously received electronic notifications of filings in the matter (the reason for now stating he must be served otherwise is unknown). He was never served by any other means. Attorney Patterson discovered the filing of the May 31 Order on his own on June 22, 2023, while personally checking the public docket for the matter because of the long passage of time since the entry of the Form 4 order and the submission of proposed orders by the parties to Judge Coble. There is no dispute that the appeal from Judge Coble's order was timely made within thirty days of entry of the order pursuant to Rule 58, SCRCP and Rule 203(b), SCACR.

² By letter of March 2, 2018, Lifepoint engaged Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins"), through its partner Frank Powell in the Boston office to represent it "in connection with an arbitration captioned Anesthesiology Professionals of Columbia, LLC v. Providence Hospital ..." and that Nelson Mullins had "not been asked to represent [it] in other legal matters" at that time. (Exhibit 7.)

personnel, not the Court or any Court personnel -- ever communicated with anyone at Lifepoint, including Mr. Fecteau, about any of the subsequent proceedings that occurred in the circuit court. (Exhibit 8, ¶¶ 7-12, Exhibit 11.) No one at Lifepoint ever authorized anyone, including Ms. Stuckey or any other attorney at Nelson Mullins, to represent it or act on its behalf in the proceedings initiated in the circuit court by Respondent pursuant to S.C. Code Ann. § 15-48-130 by the filing of a petition to vacate the arbitrator's decision ("the Challenge Action"). Lifepoint was totally unaware Respondent instituted the Challenge Action.

Respondent initiated this action, the Challenge Action, on August 12, 2019. (Exhibit 9.) Respondent did not serve the summons and petition as prescribed by S.C. Code Ann. 15-48-170. Rather, the Challenge Action began with purported "accepted service" by Ms. Stuckey (Exhibit 10)³, who had no engagement with Lifepoint to act in the Challenge Action. She never informed Lifepoint of its existence. Lifepoint was unaware of the Challenge Action, and, without any contradicting evidence in the record of this case, was never told of it, never learned of it, and never was billed for it. (Exhibits 8 & 11.)

Thus, without the knowledge, acquiescence, or input of Lifepoint, the Challenge Action proceeded, resulting in the first order of Judge Manning entitled "Proposed Order ..." dated August 4, 2021 ("August 4 Order")(Exhibit 2), purporting to vacate the arbitration result. Ms. Stuckey filed a motion to reconsider (again, unknown to and unauthorized by Lifepoint) on August 16, 2021 (Exhibit 12)⁴ leading to the second order of

³ Ms. Stuckey no longer works at Nelson Mullins, effective December 31, 2021. Exhibit 10 is a composite exhibit of the emails between Ms. Stuckey and counsel for Respondent and the filed acceptance of service of Ms. Stuckey.

⁴ The tenth day after August 4, 2021, fell on a Saturday so the time for filing the reconsideration motion was Monday, August 16, 2021. *See* Rule 6(a), SCRCP.

Judge Manning dated November 23, 2001 (“November 23 Order”). (Exhibit 3.) It denied the motion’s request to rescind the August 4 Order vacatur. However, it granted Ms. Stuckey’s request to correct the filed August 4 Order and directed the Clerk to enter an attached amended order, which was, in fact, not attached to the reconsideration order and which no one ever received, and which was never entered by the Clerk on the docket in this case.

After the November 23 Order (which the Clerk never carried out by entering the revised, correct order on the docket), and after the passage of more than 30 days from Judge Manning’s signing of it and entry of it on the court’s docket, Lifepoint learned for the first time about the Challenge Action, when it received a notice that an all new arbitration proceeding would allegedly need to occur as a result of the Challenge Action. (Exhibit 8, ¶ 13.) Lifepoint moved to dismiss (in essence set aside) on the basis of lack of personal jurisdiction the two orders of the Circuit Court vacating the arbitrator’s decision of May 15, 2019. (Exhibit 4.) Lifepoint never was served with the Challenge Action (either the summons or petition) nor did it authorize any counsel to accept service for it in the Challenge Action. *See BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006)(default set aside on grounds of lack of personal jurisdiction). Lifepoint also requested in the alternative a ruling that Judge Manning’s November 23 Order on its Motion to Reconsider be declared to be non-final because there had never been any final order entered by the Clerk as ordered by the circuit court to occur.

Judge Coble issued the May 31 Order on May 31, 2023. (Exhibit 1.) It denied Lifepoint’s motion to set aside Judge Manning’s two orders vacating the arbitration ruling on due process and lack of personal jurisdiction grounds, and it declined to declare that

Judge Manning's orders were not final for purposes of appeal because of the failure of the Clerk to enter a corrected, final order as directed.

ARGUMENT

A. THE APPEAL FROM JUDGE COBLE'S MAY 31, 2023 ORDER DENYING LIFEPOINT'S MOTION TO VACATE THE PRIOR ORDERS OF JUDGE MANNING FOR LACK OF PERSONAL JURISDICTION OR TO DECLARE JUDGE MANNING'S ORDERS AS NON-FINAL DUE TO FAILURE TO ENTER A FINAL JUDGMENT AS REQUIRED BY JUDGE MANNING IS TIMELY AND PROPERLY BEFORE THE COURT ON APPEAL.

As set forth above, until it received notice from the arbitration organization in 2022 that a new arbitration hearing needed to be scheduled, Lifepoint had no knowledge that the Challenge Action pursuant to S.C. Code Ann. § 15-48-130 had been allegedly commenced by Respondent and had not, therefore, authorized anyone (including Ms. Stuckey, who purported to appear on its behalf) to act in the matter. Because it did not serve Lifepoint as required by S.C. Code Ann. § 15-48-170, Respondent had no proof that Lifepoint, itself, had notice of the Challenge Action. The matter had proceeded all the way through an initial order and a reconsideration motion, and the ordinary time for appeal would have run-- had a proper final order been entered⁵ -- without Lifepoint being served or in any other way being notified and given an opportunity to participate in the defense of the arbitrator's judgment.

Once it received notice that the Challenge Action existed, Lifepoint filed its "Motion to Dismiss or in the Alternative to Enter Final Order" on June 10, 2022, and a supporting memorandum. (Exhibit 4.) Although it was captioned as a motion to dismiss and cited Rules

⁵ As set forth more fully in Section B, *infra*, Lifepoint contends that because the Clerk failed to enter a correct, final order as directed in the November 23 Order, the time for appeal from Judge Manning's orders never started to run pursuant to Rule 203(b)(1), SCACR or did not start to run until entry of Judge Coble's May 31 Order declaring (respectfully, incorrectly), that the orders were final despite the clerk's failure to carry out the directive of Judge Manning and the requirements of Rule 58(a)(2), SCRCP that judgments be entered to be effective.

4(d)(3) and 12(b)(2), SCRPC, because of the then-existing status of the Challenge Action – the Challenge Action had proceed through an initial judgment, “denial”⁶ of post-judgment motions, and the time for appeal had arguably run without any opportunity for Lifepoint to defend itself – the motion was substantively a motion under Rule 60(b)(4), SCRPC to vacate the prior orders as void because of lack of personal jurisdiction over Lifepoint. *See Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 27-28, 609 S.E.2d 510 (2005)(holding a court must look past the caption of a motion and address the substance of the motion and quoting *Richland Cty v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002), “[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed,” and citing *Mickle v. Blackmon*, 255 S.C. 135, 140, 177 S.E.2d 548, 549 (1970) for the rule of “treating [a] motion based on its substance and effect as opposed to how it was captioned”).

As the motion and the supporting memorandum indicate (Exhibit 4), Lifepoint’s primary argument was that the proceedings before Judge Manning were void from their inception because the circuit court lacked personal jurisdiction over it, and it was denied due process because it was never served or otherwise given any notice of the Challenge Action and allowed to defend the arbitrator’s order. *See McDaniel v. U.S. Fidelity & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1986) (holding that “[t]he definition of void under the rule [60(b)(4)] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts that lacked subject matter jurisdiction or personal jurisdiction”). Lifepoint asserted exactly these points, noting that it had not been served as required by statute, had never voluntarily appeared in the matter at any point, had never

⁶ See footnote 5, *supra*.

authorized Ms. Stuckey or any other person to act on its behalf in the Challenge Matter, and had never, from the inception of the case until notice from the arbitration company, known of the existence of the Challenge Action. *See* Exhibit 4 (Motion, p. 1; Memorandum, pp. 3-9.)

Because Judge Coble's May 31 Order resolves a motion that substantively, and given the procedural posture of the case, properly is treated as a Rule 60(b)(4), SCRCP motion to vacate as void the orders of Judge Manning for lack of due process and personal jurisdiction, the general rule that the denial of a motion dismiss pursuant to Rule 12(b)(2), SCRCP is not immediately appealable is inapplicable. *See Mid-State Distr., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 737 (1993); *but see Thompson v. LG Chem, Ltd., et al.*, App. Case No. 2021-000557 (Ct. App. order March, 10, 2022)(dismissing appeal from denial of 12(b)(2) motion), *cert. granted*, App. Case No. 2022-000803 (S.C. order March 7, 2023) (granting petition raising issue of immediate appeal of denial of a 12(b)(2) motion involving constitutional due process grounds under S.C.Code Ann. § 14-3-330 substantial right provision and asking for overruling of *Mid-State* case if necessary to uphold appellate jurisdiction).

Unlike a Rule 12(b)(2) motion filed early in a matter as an initial response or after being asserted in an answer, here, there are no further proceedings to be taken in the circuit court in the Challenge Action as a result of Judge Coble's order. The petition to vacate has been (albeit, respectfully, incorrectly) granted and upheld via the combination of orders including the incomplete Judge Manning order and Judge Coble's refusal to set it aside (despite the lack of personal jurisdiction) and is now subject to review in this Court.

Our courts have repeatedly exercised jurisdiction over and addressed on appeal orders granting or denying motions under Rule 60(b), SCRCP, including Rule 60(b)(4). *See, e.g., Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning App.*, 340 S.C. 57, 530 S.E.2d 383 (2000) (reversing summary dismissal of appeal by the Court of Appeals from denial of motion

under Rule 60(b)(1) and citing *Winesett v. Winesett*, 287 S.C. 332, 338 S.E.2d 340 (1985) for the proposition that “a denial of a Rule 60(b) motion is directly appealable”⁷; *Sijon v. Green*, 289 S.C. 126, 345 S.E.2d 246 (1986) (affirming a circuit court ruling on defendant’s Rule 60(b)(4) motion that defendant, who received no notice of hearing in which judgment was entered against him, was entitled to vacatur of the judgment and a hearing to determine whether he received notice of the hearing)⁸; *Belle Hall Plantation Homeowners’ Assoc., Inc. v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) (upholding on appeal Master’s vacation of foreclosure sale pursuant to Rule 60(b)(4) on grounds of lack of personal jurisdiction where homeowner was never properly served and had no notice of foreclosure hearing); *McDaniel*, 324 S.C. at 643-44, 478 S.E.2d at 870-71 (addressing appeal from denial of Rule 60(b)(4) motion and affirming on the basis of unreasonably late filing (four years) and inapplicability of the rule to the particular facts because judgment merely voidable, not void).

B. THE APPEAL OF JUDGE MANNING’S AUGUST 4 ORDER AND NOVEMBER 23 ORDER IS TIMELY AND PROPERLY BEFORE THE COURT OF APPEAL.

In addition to appealing Judge Coble’s order that denied the motion to vacate Judge Manning’s orders and dismiss the petition as void for lack of personal jurisdiction, and also denied Lifepoint’s alternate request that the Judge Manning’s orders be declared non-final for

⁷ While it rejected the Court of Appeals summary dismissal of the appeal, noting that the appeal of the Rule 60(b) ruling was distinct from an appeal from the dismissal of the underlying appeal, the Supreme Court, which had granted certiorari, reached the merits of the matter rather than remand and affirmed the judgment of the circuit court on the ground that a Rule 60(b) motion could not be employed to extend the time for filing a Notice of Appeal where a party had an opportunity to appeal but failed to timely take it. Here, Lifepoint, which never knew of the existence of the Challenge Action because it was never served or given other notice of the matter, had no such opportunity.

⁸ The Supreme Court modified the circuit court’s ruling that the absence of proof of notice from the judgment roll, standing alone, as a matter of law, proved lack of notice. *Id.* at 128, 345 S.E.2d at 248.

purposes of counting the time for appeal under Rule 203, SCACR, Lifepoint also appeals directly the two orders of Judge Manning. Such appeal is timely and appropriate for two reasons.

- (1) **ON THEIR FACE, JUDGE MANNING'S ORDERS ARE NOT FINAL FOR PURPOSES OF TRIGGERING THE TIME FOR APPEAL UNDER SCACR 203(B), BUT MAY BE REVIEWED DIRECTLY ON APPEAL BECAUSE JUDGE COBLE'S ORDER IN THIS CASE IS PROPERLY BEFORE THE COURT AND REVIEWING JUDGE MANNING'S ORDERS WOULD SERVE JUDICIAL EFFICIENCY.**

Judge Manning's orders, on their face, did not trigger the running of time for appeal of those orders under Rule 203(b), SCACR. The August 4 Order was the first substantive order in the Challenge Action. Assuming personal jurisdiction for sake of argument only, a motion for reconsideration was timely filed. (Exhibit 12.) Thus, the time for filing an appeal of the August 4 Order was stayed per Rules 52(b) & (c), SCRCP and Rule 203(b)(1), SCACR.

By its terms, the November 23 Order effectively withdrew the August 4 "Proposed Order..." that had been filed. That August 4 Order had no further effect. Per the direction of Judge Manning, a substitute order was supposed to be supplied and was required to be entered in its place *nunc pro tunc*, but the substitute order was not attached to the November 23 Order (as was stated) and the Clerk, contrary to the November 23 Order, has never entered such an order. (Exhibit 3.) As stated in Rule 58(a)(2), SCRCP, "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record." Here, Judge Manning's purported revised judgment was never set forth as a separate document and never entered on the record in this case. Thus, it was not "effective" to trigger the time for appeal under Rule 203(b)(1), SCACR, which runs from "receipt of written notice of entry of the order or judgment." The ineffectiveness of the November 23 Order to trigger the time for appeal is further supported by the last sentence of the same rule which states, "When a form or other short order or judgment indicates that a more full and complete order or

judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.” *Id.*

Even though Judge Manning’s orders are not, on their face, technically final for purposes of triggering the time for appeal under Rule 203(b)(1), SCACR, the Court may nonetheless exercise direct appellate review over the orders. As our Supreme Court has repeatedly held, “[a]n order that is not directly appealable may be considered if there is an appealable issue before the court” where immediate consideration would promote judicial economy and advance the resolution of some or all issues in the case. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005). Here, as set forth above, the appeal from Judge Coble’s May 31 Order is properly before the Court. The Court may, therefore, review Judge Manning’s Orders although they are technically not finalized by entry of the required written document and the time for appeal has not yet commenced.

(2) ALTERNATELY, ENTRY OF JUDGE COBLE’S MAY 31 ORDER ESSENTIALLY EXCUSING THE FAILURE OF THE CLERK OF COURT TO ENTER A FINAL JUDGMENT AS DIRECTED BY JUDGE MANNING TRIGGERED THE TIME FOR APPEAL AND THE ORDERS WERE TIMELY APPEALED BY LIFEPOINT.

Judge Manning’s November 23 Order expressly stated that the original August 4 Order was superseded and that a new order was to be separately entered *nunc pro tunc* in its place. (Exhibit 3.) This never occurred to trigger the time for the running of an appeal as required under Rule 203(b)(1), SCACR.

Again, assuming for sake of argument only that the circuit court had personal jurisdiction over Lifepoint at the time of Judge Manning’s actions, Judge Coble’s May 31 Order excusing the non-existence of the amended order and failure of the Clerk to enter the new order and the entry of the May 31 Order to that effect, arguably closed the hole in the record of the Challenge Action on post-judgment motions, thus triggering the thirty day appeal

period pursuant to Rule 203(b)(1), SCACR. Lifepoint timely served its notice of appeal within the 30 day period -- June 30, 2022— after entry of the May 31 Order, much less the 30 day period after receiving notice of its entry. *See, supra*, footnote 1. Thus, assuming Judge Manning had personal jurisdiction to act as to Lifepoint (which Lifepoint denies), then Lifepoint timely appealed from Judge Manning's orders and this Court has jurisdiction to directly review those orders on their merits.

Conclusion

For the reasons set forth above, the Court has jurisdiction to review all of the orders Lifepoint has appealed – the May 31 Order of Judge Coble and the August 4 and November 23 Orders of Judge Manning.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/C. Mitchell Brown
C. Mitchell Brown, Esq.
William C. Wood, Jr., Esq.
Meridian Bldg., 17th Floor
1320 Main Street
P.O. Box 11070 (29211)
Columbia, SC 29201
mitch.brown@nelsonmullins.com
bill.wood@nelsonmullins.com

July 31, 2023

ATTORNEYS FOR APPELLANTS

Other Counsel of Record:

James M. Griffin, Esq.
Margaret N. Fox, Esq.
4408 Forest Drive, Suite 300
P.O. Box 999 (29202)
Columbia, S.C. 29206
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

ATTORNEYS FOR RESPONDENT

Exhibit 1

See Appendix, pages 4-18

Exhibit 2

See Appendix, pages 19-27

Exhibit 3

See Appendix, pages 28-30

Exhibit 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2019-CP-40-04452
	)	
Anesthesiology Professionals of Columbia, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	RESPONDENTS' MOTION TO
	)	DISMISS OR IN THE ALTERNATIVE
Lifepoint Health d/b/a Providence Health and Providence Hospital, LLC,	)	TO ENTER FINAL ORDER
	)	
Respondents.	)	
	)	

Pursuant to Rules 4(d)(3), and 12(b)(2) of the South Carolina Rules of Civil Procedure, Respondents Lifepoint Health, d/b/a Providence Health and Providence Hospital, LLC ("Respondents") hereby move this Court for an Order dismissing Petitioner's Petition to Vacate Arbitration Award with prejudice. Alternatively, and without waiving, and expressly reserving, their service/personal jurisdiction defenses, Respondents request that this Court enter a final order on the Petition.

Respondents base this Motion on the grounds that because they were not properly served with notice of Petitioner's Petition to Vacate Arbitration nor voluntarily appeared in the action, as required under S.C. Code Ann. § 15-48-170, and Rule 4(d) of the South Carolina Rules of Civil Procedure, this Court lacks personal jurisdiction over Respondent.

The grounds for this Motion are stated more fully in the accompanying memorandum of law, along with the exhibits attached thereto, all of which are incorporated herein by reference.

WHEREFORE, Respondents respectfully request that Petitioner's Petition to Vacate Arbitration Award be DISMISSED WITH PREJUDICE. In the alternative, Respondents

respectfully ask this Court to prepare a final order and have the same entered by the Clerk of Court for Richland County.

Respectfully submitted,

/s./ John P. Bozeman

John P. Bozeman (S.C. Bar No. 105262)

Email: John.Bozeman@klgates.com

Jeffrey S. Patterson (S.C. Bar No. 9414)

Email: Jeffrey.Patterson@klgates.com

J. Walker Coleman, IV (S.C. Bar No. 66196)

Email: Walker.Coleman@klgates.com

K&L Gates LLP

State Street Financial Center

One Lincoln Street

Boston, MA 02111

Phone: (617) 261-3124

Fax: (617) 261-3126

ATTORNEYS FOR RESPONDENTS LIFEPPOINT
HEALTH d/b/a PROVIDENCE HEALTH AND
PROVIDENCE HOSPITAL, LLC,

June 10, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2019-CP-40-04452
	)	
Anesthesiology Professionals of Columbia, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF RESPONDENTS'
Lifepoint Health d/b/a Providence Health	)	MOTION TO DISMISS OR IN THE
and Providence Hospital, LLC,	)	ALTERNATIVE TO ENTER FINAL
	)	ORDER
Respondents,	)	
	)	

Respondents, Lifepoint Health d/b/a Providence Health and Providence Hospital, LLC ("Respondents"), hereby submit this Memorandum in support of their Motion to Dismiss Petitioner's Petition to Vacate Arbitration Award, with prejudice, pursuant to Rules 4(d)(3) and 12(b)(2) of the South Carolina Rules of Civil Procedure. In the alternative, and without waiving their request for dismissal, Respondents request the Court to enter a final order on the Petition.

BACKGROUND

1. On or about January 25, 2018 Petitioner filed a demand for arbitration with the American Health Lawyers Association ("AHLA"), Claim No. 4419.
2. On May 15, 2019, the Arbitrator issued a Final Determination and Order in the First Arbitration (the "Arbitration Award").
3. Petitioner, dissatisfied with the Arbitration Award, filed a Petition to Vacate Arbitration Award in this Court ("Petition").
4. Petitioner never issued a summons nor attempted actual service of process on either of the Respondents.

5. Instead, Petitioner requested an "Acceptance of Service" from attorney Brin Stuckey employed by Nelson Mullins. There is no indication that a Summons was provided or served on Ms. Stuckey.

6. As set forth in the Affidavit of Jonah Fecteau (attached as Exhibit A to the motion), neither of the Respondents had ever designated Ms. Stuckey as a managing or general agent and she was not authorized to accept service on their behalf.

7. Respondents never saw the Petition when it was filed, they were never served with a Summons, they were not aware of any of the filings purportedly made on their behalf in response to the Petition, and they were completely unaware of the proceeding in this Court until, as explained below, early 2022 when they were contacted by American Health Lawyers Association (AHLA) to administer a second arbitration.

8. On or around August 4, 2021, this Court entered an Order purporting to adopt Petitioner's *proposed* order vacating the Arbitration Award (the "Proposed Order").

9. On or around August 16, 2021, Ms. Stuckey filed a motion for reconsideration, to alter or amend judgment, and to correct a clerical mistake (the "Motion to Alter or Amend") with the Proposed Order. Ms. Stuckey filed the Motion to Alter or Amend without Respondents' approval, permission, knowledge, or consent.

10. Respondents were not aware of the Proposed Order until 2022 when the AHLA began issuing notices regarding a new arbitration. The AHLA is attempting to select a new arbitrator and begin a new arbitration proceeding (the "Second Arbitration").

11. Contemporaneous with this Motion, and without waiving any of its defenses related to the lack of adequate service, Respondents have filed a motion to stay arbitration and for the entry of the final order amending the Proposed Order mistake.

12. Respondents now ask this Court to dismiss the Petition, with prejudice.

ARGUMENT

I. THE COURT SHOULD DISMISS PETITIONER'S PETITION PURSUANT TO RULE 12(B)(2) FOR LACK OF PERSONAL JURISDICTION.

The Court should dismiss the Petition because Petitioner failed to serve the notice required to grant this Court personal jurisdiction over Respondents. *See Roche v. Young Bros., Inc., of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) (“[Service of process] serves at least two purposes. It confers personal jurisdiction on the courts and assures the defendant of reasonable notice of the action.”); *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996) (“[I]nquiry must be made as to whether the plaintiff has sufficiently complied with the [service of process] rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.”). South Carolina’s Uniform Arbitration Act states that notice of an initial application for an order *shall be served in the manner provided by law for the service of a summons in an action*. S.C. Code Ann. § 15-48-170 (emphasis added). Petitioner was therefore required to serve notice of the Petition on Respondents in accordance with Rule 4(d)(3) of the South Carolina Rules of Civil Procedure, governing service of process on corporations. *See* SCRCPP 4(d)(3). Rule 4(d)(3) requires Petitioner to effect service:

by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any *other agent authorized by appointment or by law to receive service of process* and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

SCRCPP 4(d)(3) (emphasis added). Additionally, Rule 4(d) states that a defendant’s voluntary appearance is equivalent to personal service. SCRCPP 4(d). Respondents never voluntarily appeared in this action as Respondents were unaware this action was even proceeding. *See Exhibit A*, ¶ 7. And, Ms. Stuckey was not an authorized agent by law or by appointment to receive service of

process. As a result, the requirements of Rule 4 have not been satisfied, and this Court lacks personal jurisdiction over Respondents. *See Roche*, 318 S.C. at 209, 456 S.E.2d at 899. Therefore, pursuant to Rule 12(b)(2), the Petition should be dismissed.

A. This Court Lacks Personal Jurisdiction Over Respondents Because a Summons Was Never Served On Respondents.

This Court does not have personal jurisdiction over Respondents because there is no indication that Respondents received or accepted a Summons. *See* SCRCP 4(a) (“Copies of the original summons shall be served upon each defendant.”); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8, 753 S.E.2d 537, 541 (2014) (“The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend.”). Rather, the purported “Acceptance of Service” signed by Ms. Stuckey on or about September 3, 2019, defective in its own right due to a lack of client authorization only acknowledges receipt of “Petitioner’s Petition to Vacate Arbitration.” The document makes no mention of a Summons. “A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction.” *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996) (holding dismissal of petition proper because respondent never served with a summons and complaint). The failure in this case to serve a Summons, in and of itself, deprives the Court of personal jurisdiction over Respondents. Therefore, the Court should dismiss the Petition.

B. Service of The Petition on Ms. Stuckey Was Otherwise Insufficient Because Ms. Stuckey Did Not Have Express or Implied Authority to Accept Service on Respondents’ Behalf.

Should the Court decide not to dismiss the Petition for the reason set forth above in Section I.A, it should still dismiss the Petition because service was otherwise defective under Rule 4(d)(3) of the South Carolina Rules of Civil Procedure, which requires that the summons and complaint

be served on a corporation's "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."¹ SCRCP 4(d)(3). The purported "Acceptance of Service" by Ms. Stuckey in this case fails to satisfy Rule 4(d)(3) because Ms. Stuckey was not an officer or managing or general agent of Respondents and she was not vested with authority by appointment or by law to accept service on Respondents' behalf.

South Carolina law is clear that "[a]ctual appointment for the specific purpose of receiving process is ... expected and the mere fact that a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Moore*, 322 S.C. at 523, 473 S.E.2d at 67 (citing *Hamilton v. Davis*, 300 S.C. 411, 414, 389 S.E.2d 297, 298 (Ct. App. 1990)). The court must "look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent." *Id.* (quoting *Hamilton*, 300 S.C. at 414, 389 S.E.2d at 298). "Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, *there must be evidence the defendant intended to confer such authority.*" *Id.* (emphasis added) (quoting *Hamilton*, 300 S.C. at 414, 389 S.E.2d at 298).

1. Ms. Stuckey Did Not Have Express Authority.

Here, Ms. Stuckey did not have express authority to accept service on behalf of Respondents. *See Exhibit A*, ¶¶ 7-11. Respondents never intended to appoint and never did appoint Ms. Stuckey as their authorized agent for service of the Petition. *Id.* at ¶¶ 7-11, 14. Ms. Stuckey's representation of Respondents in this matter was done without their approval, permission,

¹ The South Carolina Court of Appeals has indicated that the language "authorized ... by law" in Rule 4(d)(3) refers to an agent authorized by legislative enactment to receive process. *See Hamilton v. Davis*, 300 S.C. 411, 414, 389 S.E.2d 297, 298 n.1 (Ct. App. 1990). Accordingly, this provision is inapplicable.

knowledge, or consent. *Id.* at ¶ 14. Prior to 2022, Respondents did not engage or retain any law firm to represent them with respect to the Petition because Respondents were entirely unaware the Petition had been filed. *Id.* at ¶¶ 7, 9. Because Respondents did not have any knowledge of the Petition's existence, it is impossible for them to have conferred upon Ms. Stuckey express authority to accept or waive service of the Petition. See *Khurana v. Strategic Distrib., Inc.*, No. 07-5188, 2008 WL 5191816, at *2 (E.D. Pa. Dec. 10, 2008) (attorney has express authority to accept service "when the client actually empowers the attorney to be served on his behalf," but no authority "is automatically conferred upon the attorney solely through the existence of an attorney-client relationship"). Further, Respondents had no reason to know of the pending Petition. They never received any bill from Ms. Stuckey or Nelson Mullins indicating that any further work was being done after the arbitration was completed. See Exhibit A, ¶ 11.

2. Ms. Stuckey Did Not Have Implied Authority.

Additionally, Ms. Stuckey did not have implied authority to accept service on Respondents' behalf. See *Olympus Corp. v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300, 305 (S.D.N.Y. 1985) (noting for implied authority to exist, the surrounding circumstances must indicate the client's intent to grant such authority). In South Carolina, implied authority exists "where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." *Town of Kingstree v. Chapman*, 405 S.C. 282, 315, 747 S.E.2d 494, 511 (Ct. App. 2013). Implied authority is "proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." *Id.* Here, because Respondents had no knowledge of the Petition or Ms. Stuckey's purported acceptance of service of the Petition, this Court cannot find she had implied authority to effectuate valid service of process.

Courts consistently refuse to find that attorneys possess implied authority to accept or waive service where the attorney represented the client in a previous matter and later endeavored to accept service in a subsequent action. *See, e.g., Sain v. HSBC Mortg. Servs., Inc.*, No. CA 4:08-2856-TLW-TER, 2009 WL 2858993, at *4 (D.S.C. Aug. 28, 2009) (dismissing plaintiff's claims because service on defendant was improper, thereby depriving the court of personal jurisdiction; "[T]he fact that RTT has represented HSBC in other matters does not convert RTT into an agent to accept service of a new summons and complaint in a separate action on HSBC's behalf."); *J. & L. Parking Corp., Inc. v. U.S.*, 834 F. Supp. 99, 102 (S.D.N.Y. 1993) (holding an "attorney does not become a client's agent for service of process simply because she represented the client in an earlier action").

The mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service. Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service. Instead, the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service.

U.S. v. Ziegler Bolt & Parts Co., 111 F.3d 878, 881 (Fed. Cir. 1997) (internal citations omitted) (finding that an attorney was not a proper agent to receive service despite having represented the client in a prior related matter; "[T]he government has shown, at most, that Mr. Yackshaw had broad powers to represent Ziegler throughout the course of the [earlier and related] administrative proceedings [T]his evidence is insufficient to show that Ziegler had empowered Mr. Yackshaw to receive service in the current action.").

That Respondents did not even know about the Petition or Ms. Stuckey's purported representation in connection therewith precludes a finding of any authority, express or implied. For example, in *Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, an attorney, Newcombe, purported to represent the defendants in a lawsuit. *Fed. Deposit Ins. Corp. v. Oaklawn Apartments*,

959 F.2d 170, 172 (10th Cir. 1992). He filed a motion to dismiss, the sole basis of which was failure to state a claim, which the court denied. *Id.* Newcombe then filed with the court: (1) an answer, denying the material allegations of the complaint and asserting the defenses of lack of personal jurisdiction and failure to state a claim; and (2) a status report, stipulating to personal jurisdiction. *Id.* Later, the defendants retained an attorney (Dace) who filed a motion to dismiss for lack of service and lack of personal jurisdiction. *Id.* at 173. Defendants submitted affidavits in support of the motion, stating that they had never been served, that neither they nor their agents or representatives had authorized Newcombe to represent them or file any pleadings on their behalf, and that they had never spoken to Newcombe before Newcombe filed the first pleading purportedly on their behalf. *Id.* The trial court denied the motion, holding the defendants' failure to raise insufficiency of service and lack of personal jurisdiction in their first responsive pleading waived the defenses, and granted plaintiffs' motion for summary judgment. *Id.*

The Tenth Circuit, reviewing the district court's grant of summary judgment, reversed. *Id.* at 176. The Tenth Circuit found that "Appellants' affidavits stating that neither they nor their agents or representatives authorized Newcombe to represent them or file any pleading on their behalf were sufficient to overcome the presumption of attorney Newcombe's authority to act on their behalf." *Id.* at 175. The Court recited the rule that "[a]n agent's authority to act cannot be established solely from the agent's actions; the authority must be established by an act of the principal" and thus found that "Newcombe's belief ... [was] insufficient to establish that Newcombe was authorized to act on behalf of [defendants] and waive their defenses of lack of personal jurisdiction and insufficient service of process." *Id.* The Court indicated that the defendants could have, but did not, "implicitly authorize[]" Newcombe to appear if they "sat back

idly knowing that Newcombe was making appearances on their behalf,” which would have effected a waiver of their defenses. *Id.*

The facts of this case are similar. Like Newcombe, Ms. Stuckey purported to act and file papers on Respondents’ behalf for over two years without their knowledge or consent. *See Exhibit A*, ¶¶ 10-11, 14-15. Respondents did not “sit back idly knowing” Ms. Stuckey was making appearances on their behalf. Instead, as indicated in the Fecteau Affidavit, Respondents had no idea that the Petition existed, that she made appearances on their behalf, or that she litigated the case for more than two years with no notice, communication, or billing to the client. *See id.* at ¶¶ 7-11, 14-15. These facts conclusively overcome any argument that Ms. Stuckey acted with implied authority.

Therefore, this Court should find that Ms. Stuckey was not authorized to act on Respondents’ behalf, either through her acceptance of service or through her subsequent appearances and filings, and therefore no waiver of these defenses could have occurred.

II. THE COURT MUST ISSUE A FINAL ORDER ON THE PETITION.

Without waiving and while affirmatively preserving the lack of service defense raised above, Respondents, in the alternative, request that this Court enter a final order on the Petition. On August 4, 2021, this Court signed and entered “Petitioner’s Proposed Order. *See Exhibit B*. In response, and without any knowledge or consent of Respondents, Ms. Stuckey filed a motion to reconsider pointing out that the order which had been entered was specifically designated as a “proposed” order. The Court, on November 29, 2021, granted that portion of Ms. Stuckey’s motion asking for a final order. *See Exhibit C*. The Court indicated that the final version of the Order would be attached to the November 29 Order and that it should be entered by the Clerk. However, no copy of a final order was attached and the Clerk’s office has never entered any final

version of the Order. In the event, the Court denies Respondents' request to dismiss for failure of process, Respondents respectfully ask this Court to prepare a final order and have the same entered by the Clerk of Court for Richland County.

CONCLUSION

Because proper service of the Petition never took place under Rule 4(d) of the South Carolina Rules of Civil Procedure, as required by S.C. Code section 15-48-170, this Court lacks personal jurisdiction over Respondents. As a result, Respondents respectfully request that this Court dismiss the Petition pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, with prejudice, and grant such further relief as this Court deems just and proper.

Without waiving the foregoing requested relief of dismissal, Respondents, in the alternative ask this Court to issue a final order and have the same entered by the Clerk of Court for Richland County.

Respectfully submitted,

/s./ John P. Bozeman

John P. Bozeman (S.C. Bar No. 105262)

Email: John.Bozeman@klgates.com

Jeffrey S. Patterson (S.C. Bar No. 9414)

Email: Jeffrey.Patterson@klgates.com

J. Walker Coleman, IV (S.C. Bar No. 66196)

Email: Walker.Coleman@klgates.com

K&L Gates LLP

State Street Financial Center

One Lincoln Street

Boston, MA 02111

Phone: (617) 261-3124

Fax: (617) 261-3126

ATTORNEYS FOR RESPONDENTS LIFEPOINT
HEALTH d/b/a PROVIDENCE HEALTH AND
PROVIDENCE HOSPITAL, LLC,

June 10, 2022

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Anesthesiology Professionals of Columbia,
LLC,

C/A No. 2019-CP-40-04452

Petitioner,

v.

Lifepoint Health d/b/a Providence Health
and Providence Hospital, LLC

Respondents.

**AFFIDAVIT OF JONAH FECTEAU IN SUPPORT OF MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

I, Jonah Fecteau, having been duly sworn, do hereby depose and say as follows:

1. I am over the age of 18, of sound mind, and able to make this affidavit.
2. I make this affidavit based on my personal knowledge and recollection, as well as based on review of certain business records, which are maintained in the ordinary course of the business of LifePoint Health ("LifePoint").
3. I am the Vice President and Managing Counsel for Litigation for LifePoint Health, which indirectly (through its subsidiaries) owns Providence Hospital, LLC. Until last year (2021), Providence Hospital, LLC operated the Providence Health healthcare facility in South Carolina under the d/b/a Providence Health. (LifePoint Health and Providence Hospital, LLC are collectively referred to herein as the "LifePoint Parties".)
4. I was the in-house counsel responsible for managing the involvement of the LifePoint Parties in the arbitration proceeding before Arbitrator Richard D. Sanders with the American Health Lawyers Association ("AHLA"), AHLA Claim No. 4419 ("Arbitration").

5. I retained Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins") to represent the LifePoint Parties in that Arbitration.

6. Arbitrator Sanders issued a Final Determination and Order in the Arbitration on May 15, 2019.

7. Following the issuance of the Final Determination and Order in the Arbitration, I was not aware of the filing of the Petition to Vacate and did not grant a request to accept service filed by Petitioners. I would not have waived service in this case as a courtesy.

8. My team has conducted a search of records received through our registered agent for service of process, CT Corporation. Neither I nor, to my knowledge, anyone else at LifePoint was served with a copy of the Petition to Vacate.

9. Since I was unaware of the filing of the Petition to Vacate, I never retained or authorized any firm to represent the LifePoint Parties in connection with the Petition to Vacate prior to learning of its existence in 2022, more than two years after it was filed.

10. Prior to 2022, I was not aware of any pleadings, draft responses, or proposed strategy from any law firm regarding any work allegedly done on behalf of the LifePoint Parties in connection with the Petition to Vacate.

11. My team has also conducted a search of legal invoices related to this matter. I never received any invoices from Nelson Mullins for any work allegedly performed on behalf of the LifePoint Parties in connection with the Petition to Vacate. Neither I nor LifePoint were aware anyone at Nelson Mullins was allegedly doing any work on behalf of the LifePoint Parties on any Petition to Vacate in 2019, 2020, or 2021.

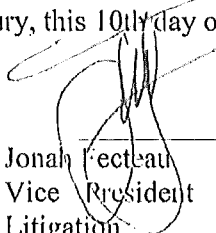
12. I was not aware of any rulings made by the Court in 2019, 2020, or 2021.

13. I only became aware of subsequent proceedings in this Court related to the Arbitration in 2022 after receiving emails from the AHLA in connection with scheduling a new arbitration.

14. After investigating this issue with new counsel, I learned that one of the attorneys from Nelson Mullins purported to represent the LifePoint Parties in connection with the Petition to Vacate. To be clear, this subsequent representation and any and all pleadings, briefs, motions, and other filings made with this Court were undertaken without approval, permission, knowledge, or consent of the LifePoint Parties. I was not aware of any filings in, or orders of, this Court at the time they were made.

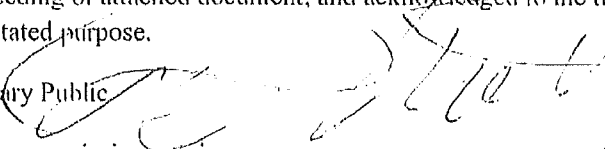
15. The LifePoint Parties had no knowledge, input, approval, or control over decisions made in connection with this Petition.

Signed under the pains and penalties of perjury, this 10th day of June, 2022.


Jonah Pecteau
Vice President and Managing Counsel,
Litigation
LifePoint Health

State of _____

On this 10 day of June 2022, before me, the undersigned notary public, personally appeared the above-named Jonah Pecteau, proved to me through satisfactory evidence of identification, which was Driver's Lic, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily in said capacity for its stated purpose.

Notary Public 

My commission expires:

9/30/2026



EXHIBIT B

See Appendix, pages 19-27

EXHIBIT C

See Appendix, pages 28-30

Exhibit 5

[REDACTED] Thank you again for the opportunity to represent Providence in this matter, and also to Joe and John, copied on this e-mail, for their hard work and efforts leading up to and at the arbitration hearing.

Erin

Erin R. Stuckey
Nelson Mullins Riley & Scarborough, LLP
erin.stuckey@nelsonmullins.com
803-255-9426

From: Rich Sanders [mailto:rsanders@southernhealthlawyers.com]
Sent: Wednesday, May 15, 2019 6:38 PM
To: Erin Stuckey <Erin.Stuckey@nelsonmullins.com>; Jim Griffin <jgriffin@griffindavislaw.com>; Maggie Fox <mfox@griffindavislaw.com>
Cc: Karl Lesser <klesser@southernhealthlawyers.com>; Rich Sanders <rsanders@southernhealthlawyers.com>
Subject: AHLA Claim No. 4419 - Anesthesiology Professionals of Columbia, LLC vs. Lifepoint Health d/b/a Providence Hospital - Final Determination and Order Attached

◀External Email▶ - From: rsanders@southernhealthlawyers.com

Counsel,

Please see the attached Final Determination and Order in this matter. I have enjoyed working with you and appreciate the professional manner in which you have handled this arbitration.

Sincerely,

Rich

--
Richard D. Sanders, Esq.
Southern Health Lawyers, LLC
(a Sanders & Mustari Law Firm)
PLEASE NOTE OUR NEW ADDRESS
3 Alliance Center
3550 Lenox Road, Suite 2100
Atlanta, Georgia 30326
(404) 806-5575
(866) 871-2238 Fax
rsanders@southernhealthlawyers.com
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Confidentiality Notice

AMERICAN HEALTH LAWYERS ASSOCIATION

Anesthesiology Professionals of Columbia, LLC,	AHLA Claim No. 4419
Petitioner,	FINAL DETERMINATION AND ORDER
v.	
Lifepoint Health d/b/a Providence Health,	
Respondent.	

This matter came before the undersigned Arbitrator, Richard D. Sanders, to render a decision regarding a contract dispute between Petitioner Anesthesiology Professionals of Columbia, LLC ("APC") and Respondent Providence Hospital LLC¹ ("Providence") regarding the interpretation of a termination provision in an exclusive services contract for the provision of anesthesia services. Previously, this Arbitrator ruled that the disputed provision was ambiguous, since both parties advanced different interpretations, and scheduled an evidentiary hearing to consider parole evidence. The evidentiary hearing was conducted on March 12, 2019 and March 28, 2019.

This Arbitrator has carefully considered the evidence presented and arguments of counsel, and he hereby makes the following factual and legal determinations.

A. FINDINGS OF FACTS.

1. At the time of the initiation of the contract in question, Providence was a private Catholic hospital organized in 1938 by the Sisters of Charity. (Transcript of March 12, 2019 testimony (hereinafter "Mar. 12 Tr.") at 164:13-18.) The original campus, located in

¹ Lifepoint Health was named as the Respondent in the Arbitration Demand. Providence Hospital LLC, is wholly owned subsidiary of Providence Health and is the real party in interest.

downtown Columbia, has 258 licensed beds. (*Id.* at 164:20-21.) In 1999, a second campus was opened in northeast Columbia and is known as Providence Northeast. (*Id.* at 164:24 – 165:2.)

2. Prior to 2010, the Providence Northeast campus operated as a community hospital. (*Id.* at 167:18-24.) In 2010, Providence Northeast became affiliated with The Moore Orthopaedic Clinic ("Moore"), and Providence Northeast became an orthopaedic specialty hospital. (*Id.* at 168:2-5.)
3. In June, 2013 Providence hired Carl Martin was hired as the Chief Operating Officer. [Tr. *Id.* At 7:1-3].
4. In the Fall of 2013, Martin became aware that Palmetto Health was encouraging the only two anesthesiology groups in the Richland County, South Carolina medical market to merge. Martin was concerned that Providence's level of service from its existing provider group would be diminished because Palmetto Health, which is a much larger hospital system than Providence, would receive preferential treatment from the combined anesthesiology group. In addition, Martin was not satisfied with the existing contractual terms with the current group. (*Id.* at 8:7-10:12, 11:21-14:23.)
5. Subsequently, Martin and Dr. Gokul Ghondi began exploring the option of a few anesthesiologists breaking away and forming a new entity to provide exclusive services to Providence. (*Id.* at 17:15-20.) Ultimately, Martin and Dr. Ghondi reached an agreement whereby Dr. Ghondi and a group of anesthesiologists would leave their current groups, form APC, and provide exclusive services to Providence. APC would hire the CRNAs which were employees of Providence. Providence was to provide compensation to APC for the services and, in turn, Providence was to bill and collect for all anesthesia services

provided by APC and to retain all reimbursement. (*Id.* at 20:14-22:24.) Martin negotiated the terms of the agreement exclusively on behalf of Providence and Dr. Ghondi negotiated on behalf of APC.

Medical Director and Exclusive Agreement for General Anesthesia Services

6. As a result, the parties in 2014 entered into a Medical Director and Exclusive Agreement for General Anesthesiology Services (hereinafter, the "Agreement") between Sisters of Charity Providence Hospitals and APC for the provision of anesthesia at Providence. (Joint Ex. No. 1.)
7. Though APC sought a longer contract term, the parties agreed to an initial term of five years commencing at 12:00 a.m. EST on April 15, 2014. (Joint Ex. No. 1, § 7.1.) Because of the risk APC was taking as a start up practice, Dr. Gondi sought a termination provision requiring one year's notice. (*Id.* at 23:10-25:7; 84:11-13.) The parties reached an agreement for notice of 180 days. (Tr 24:13-21 and Joint Ex. No. 1 § 7.2.)
8. The Agreement contained a "Termination Without Cause" provision, which provides, in full:

7.2 Termination Without Cause. Either party may terminate this Agreement for any or no reason, and without penalty, upon the provision of one hundred eighty (180) days prior written notice to the other party. In the event Hospital terminates this Agreement pursuant to this Section 7.2 without cause and with such termination to take effect prior to the expiration of the Initial Term, Hospital agrees that it shall continue to compensate [APC], in accordance with the terms of Section 4.4 and Exhibit E herein, for a period of one hundred eighty (180) days.

(*Id.* § 7.2)

9. Upon Providence's early termination of the Agreement, this Termination Without Cause provision is interpreted differently by each party which is the subject of this arbitration

proceeding.

10. Providence interprets the provision to mean that Providence would provide APC with 180 days prior written notice of its intent to terminate the Agreement and would compensate APC according to the Agreement terms during that 180 day notice period. APC was to continue to provide services during the notice period. After the notice period concluded, Providence maintains that it fulfilled its financial obligation under the Agreement.
11. Dr. Gondi and Martin both testified that Section 7.2 is the provision setting forth their agreement that Providence must provide a 180 day's notice of termination, followed by 180 days of post-termination compensation if Providence elected to terminate the Agreement prior to its expiration without cause. (Tr. 28, 29, 82, 83.)
12. Martin testified that the 180 days' notice period followed by 180 days additional compensation was approved by counsel. (*Id.* at 25:2-7; 32:14-21) Martin considered this additional compensation to be a form of severance. (*Id.* at 25:23-26:2.) He testified that severance terms such as this are not uncommon in the healthcare field. According to Martin, he himself had an eighteen-month severance payment provision in his employment agreement. (*Id.* at 24, 25.) Lastly, Martin explained that he was comfortable with this post-termination compensation obligation because Providence owned APC's accounts receivables and this would defer the cost of this obligation in the event Providence wanted to change providers. (*Id.* at 29:10-25.)
13. The Agreement was signed by Martin on behalf of Providence and Dr. Gondi on behalf of APC. (Joint Ex. No. 1)
14. Exhibit E to the Agreement, entitled "Compensation," sets forth the compensation to be paid by Providence to APC in exchange for the anesthesia services provided by APC.

Separate amounts of compensation were to be paid for Physician and for CRNA coverage.

(Joint Ex. No. 1, Ex. E.)

15. Pursuant to the original 2014 Agreement, Providence was to pay APC \$275,000 per month for Physician coverage and \$271,875 per month for CRNA coverage. (*Id.*)

16. Dr. Gondi testified that from these sums paid by Providence, APC was responsible for paying not only physician salaries, but also CRNA salaries, health insurance premiums, professional liability insurance premiums, and retirement benefits. (Mar. 12 Tr. at 101:23 – 102:12; 104:12-18.) Dr. Beesburg estimates that APC spent more than \$400,000 to put the group in a position to provide anesthesia services to Providence. (Mar. 12 Tr. at 125:6-9)

17. Exhibit E to the Agreement further required that Providence's compensation to APC

“...shall at all times remain commercially reasonable and consistent with fair market value. The compensation will be inspected and reviewed by a qualified third party selected by the Hospital to ensure it constitutes “fair market value.” The compensation arrangement is contingent on it being found to be commercially reasonable and consistent with fair market value as defined under the federal Stark Law. The compensation arrangement between Hospital and Group set forth in this Exhibit E will be reviewed annually.” (Joint Ex. No. 1, Exhibit E, ¶ I.B.(1).)

AMENDMENTS

18. The Agreement was amended on two occasions, first to expand the number of CRNAs² (First Amendment) and second to reduce the number of CRNAs when the orthopedic surgery group left Providence.³ (Second Amendment) (Mar. 12 Tr. at 85:8-18).

19. Pursuant to the First Addendum, APC was to increase its anesthesia service coverage and was to be paid \$325,000 per month for Physician coverage beginning March 1, 2015 and

² The first amendment is dated December 30, 2014.

³ The second amendment is dated February 15, 2016.

- \$328,134 per month for CRNA coverage beginning January 1, 2015. (Joint Ex. No. 2, First Addendum ¶¶ 3-4.)
20. In April 2015, Moore gave Providence 90 days' notice that it was terminating its agreement with Providence, and the departure of Moore was effective in July 2015. (Mar. 12 Tr. at 168:12-16.)
21. This was described as a "devastating blow" to the Providence Northeast campus. The inpatient census went from 45-55 patients down to 3-5 patients per day. (*Id.* at 168:21 -- 169:6; 102:20-25)
22. On February 15, 2016, Providence Hospital, LLC (which by that time had assumed the Agreement) and APC executed a Second Addendum to the Agreement (hereinafter, the "Second Addendum"). (Joint Ex. No. 3.)
23. The Second Addendum provides, "Hospital and APC agree that there have been losses to medical staff performing surgery, a loss of surgical volume, and a reduction in the need for Anesthesia Services." Accordingly, through the Second Addendum, Providence and APC agreed to reduce the Anesthesia Services coverage being provided by APC because of the effect Moore's departure had on the surgical volumes. (Joint Ex. No. 3, at 1, second and third WHEREAS clauses and Mar. 12 Tr. At 170:5-16.)
24. Pursuant to the Second Addendum, the compensation rates for physician and CRNA coverage were decreased. Beginning February 1, 2016, APC was to be paid \$250,000 per month for physician coverage and \$227,500 per month for CRNA coverage, for total monthly compensation of \$477,500. (Joint Ex. No. 3, Second Addendum, at ¶¶ 3-4.)
25. Neither the First nor the Second Amendment amended the terms of Section 7.2.
26. Martin testified that he knew when joining Providence that the hospital was "financially

distressed.” (*Mar. 12 Tr.* at 6:25 – 7:3; 12:16-18.)

27. The current Market CFO for Providence, John Doyle, testified that while under the ownership of the Sisters of Charity, the hospital was “near bankruptcy” and was within approximately 90 days of closing its doors because of its substantial financial losses. (Transcript of March 28, 2019 testimony (hereinafter “*Mar. 28 Tr.*” at 7:10-16.)
28. For a number of years leading to the sale of Providence to Lifepoint in 2016, Providence experienced significant financial losses, culminating with its worst financial performance in 2015. (*Mar. 12 Tr.* at 166:1-7.) The hospital recorded just under a nine million dollar loss in 2017. (*Mar. 28 Tr.* at 9:12-13.)

TERMINATION NOTIFICATION

29. By letter dated March 23, 2017, Providence, exercising its right to terminate the Agreement without cause or penalty, provided written notice of termination of the Agreement to APC. (Joint Ex. No. 7, Letter from Scott Campbell, Market Chief Executive Officer, to APC, attention Gokul Gondi, M.D.)
30. The termination date contained in the March 23, 2017 letter was September 19, 2017. (*Id.*)
31. The Parties agree that following the March 2017 notice of termination, Providence continued to compensate APC through the 180 day notification period.

TERMINATION EXTENSION TO SEPTEMBER 30, 2017

32. During this period, Providence approached Dr. Gondi about extending the end-date of the termination notification period from September 19 to September 30, 2017. (*Mar. 12 Tr.* at 173:23 –174:6.)
33. APC was in agreement with this proposal, and Dr. Gondi signed an August 8, 2017 letter extending the termination date from September 19 to September 30, 2017. (*Mar. 12 Tr.* at

174:18 – 175:3; Joint Ex. No. 8.)

34. The Parties agree that Providence paid APC for the entire month of September, through September 30, 2017. (Mar. 12 Tr. at 104:24 – 105:5; *id.* at 175:4-7.)
35. In September 2017, the members of APC were Dr. Gondi, Dr. Fengler, and Dr. Beesburg. (Mar. 12 Tr. at 105:10-13; 112:25 – 113:1.) At that time, APC employed a number of other non-member physicians and CRNAs. (*Id.* at 105:13-23.) APC terminated all of the non-member employees effective September 30, 2017 and released them from their non-compete agreements. (*Id.* at 105:24 – 106:5.)

MEDSTREAM OPPORTUNITY

36. Providence engaged MedStream Anesthesia Solutions (hereinafter, “MedStream”) to provide anesthesia services at Providence beginning October 1, 2017. (Mar. 12 Tr. at 181:14-22.) The agreement with MedStream costs Providence approximately \$1 Million less per annum than its agreement with APC. At the time, MedStream did not have any anesthesiologist in the Columbia market who could staff Providence.
37. After the termination notice was sent to APC, but while APC was still providing anesthesia services at Providence, Joe Bernard told Dr. Gondi that Providence wanted him to continue working as a physician at Providence. (*Id.* at 108:14-20.)
38. Mr. Bernard testified that he was the principal person discussing the transition with MedStream, and that Providence encouraged MedStream to bring on the APC physicians and CRNAs. Providence took the position that as far as Providence was concerned, none of the APC physicians or CRNAs were to be excluded. (*Id.* at 175:22 – 176:8; 176:23 – 177:1.)
39. Dr. Gondi testified that the CRNAs that were previously employed by APC were offered

contracts by MedStream. (Mar. 12 Tr. at 106:16-20.) He further testified that APC did not have to continue paying any CRNA salaries or other benefits starting October 1, 2017. (*Id.* at 109:13 – 110:2.)

40. Drs. Gondi, Beesburg, and Fengler were all offered contracts with MedStream. (*Id.* at 106:21-23 (Gondi); 132:4-7 (Beesburg); 152:17-21 (Fengler).)

41. Dr. Gondi began working for MedStream immediately after the Providence-MedStream contract went into effect on October 1, 2017. (*Id.* at 107:15-17.) He testified that he withdrew as a member of APC because he was “uncomfortable” with the claims that are being asserted against Providence, and that he is not making a claim for additional compensation from the hospital. (*Id.* at 110:6-16.)

42. Dr. Beesburg began working full-time for MedStream in October 2017. (*Id.* at 132:4-18.)

43. Dr. Fengler was offered a position with MedStream in the late summer, and began working for MedStream in January 2018 when he came back from his travels. (*Id.* at 152:17 – 153:19.)

44. In January, Dr. Beesburg split time with Dr. Fengler until the Spring of 2018. Since then, Dr. Beesburg and Dr. Fengler have only worked on occasion when MedStream does not have an anesthesiologist available because of vacation or conferences. (*Id.* at 133-135, 155.)

45. Dr. Beesburg testified that he continued to pay various expenses related to the physicians and APC after September 30, 2017. Such expenses included, cell phones, short term and long term disability insurance, health insurance, medical malpractice, professional association fees and licensing fees. He continued to pay these expenses until January 1, 2019. (*Id.* at 139-143.)

46. Dr. Beesburg testified that from January 2019 through March 12, 2019, he continued to pay fees for accounting and legal fees and the office manager on behalf of APC. (*Id.* at 141:16-142:2.)

47. He testified that he has not initiated efforts to dissolved APC because of this litigation. (*Id.* at 142:6-14.)

48. Dr. Beesburg also testified that the office manager is shared with Palmetto Anesthesia Consultants of which he and Dr. Fengler are 50% owners. Palmetto Anesthesia Consultants provides anesthesia services to Palmetto Surgery Center. (*Id.* at 142:19-143:12)

**PAYMENT OF FIRST INVOICE SUBMITTED BY APC TO PROVIDENCE POST
TERMINATION NOTICE**

49. In the summer of 2017, during discussions between APC and Providence after the termination notice had been sent, APC did not indicate that it would be claiming entitlement to additional compensation beyond September 30, 2017. (*Id.* at 177:5-13.)

50. On or about September 15, 2017, APC submitted an invoice in the amount of \$477,500 to Providence (hereinafter, the "September invoice"). (Joint Ex. No. 9.)

51. The invoice was not for any anesthesia services actually rendered by APC to patients of Providence. (Mar. 12 Tr. at 95:7-10; 96:1-3.)

52. John Doyle became the Market CFO of Providence on August 14, 2017. (Mar. 28 Tr. at 10:14.)

53. In August 2017, Doyle approved payment of an invoice to APC in the amount of \$477,500. (*Id.* at 13:23 – 14:3.)

54. Doyle testified that he had been instructed by Providence's CEO, Scott Campbell, to pay physicians in a timely manner as a result of prior issues at the hospital of physicians being

- paid late. APC's September 2017 invoice was in the same amount, \$477,500, as its prior invoices since the February 2016 Second Amendment, and in the same amount of the invoice that Doyle had approved in August 2017. (Mar. 28 Tr. at 11:18-22; 13:5-11.)
55. When Doyle approved the invoice on September 20, 2017, APC was still providing anesthesia services at Providence, and Doyle mistakenly believed the invoice was for the services being provided by APC for September 2017. (Mar. 28 Tr. at 12:2-12.)
56. The invoice was placed in the routine stack of invoices (as opposed to unique invoices for one-time services) for Doyle to approve. (*Id.* at 12:17-22.)
57. Doyle did not look at the invoice details. Because he was receiving pressure to pay physician invoices in a timely manner, the invoice was in the same amount as prior APC invoices, and APC was still providing services at the hospital, he mistakenly assumed the September invoice was a routine invoice and signed off on it. (*Id.* at 13:5-11.)
58. Doyle admitted that he made a mistake in paying the September invoice submitted by APC in the amount of \$477,500. (*Id.* at 14:8-9.)
59. The following month, October 2017, APC submitted another invoice in the amount of \$477,500. (Joint Ex. No. 10.)
60. At this point, Doyle knew that APC was no longer providing anesthesia services at Providence. Upon review of the invoice, Doyle realized for the first time that APC was submitting severance invoices to Providence. (Mar. 28 Tr. at 14:24 – 15:20.)
61. Providence demanded that APC repay Providence the \$477,500 that had been paid for the September 2017 invoice, informing APC that the invoice had been paid by mistake. (Mar. 28 Tr. at 15:17-20; Joint Ex. No. 11.)
62. APC has not repaid Providence the \$477,500. (Mar. 28 Tr. at 15:21-25.)

63. Providence did not reserve or “book” in its financial records the six months of compensation, or early termination payment, being sought by APC as an obligation on its books. Likewise, Martin testified that he did not reserve this as a potential liability. (Mar. 12 Tr. at 60:24 – 61:1.)

64. Doyle testified that if Providence had interpreted Section 7.2 as entitling APC to six months’ additional compensation, the amount would have been recorded as a liability pursuant to Generally Accepted Accounting Principles. (Mar. 28 Tr. at 20:8-15.)

THE PARTIES’ REQUESTED RELIEF

1. In its Arbitration Demand, APC claims that it is entitled to retain the \$477,500 paid by Providence for the September invoice, and also seeks a declaratory judgment that it is entitled to five additional payments of \$477,500 each, plus prejudgment interest due thereon. (Arbitration Demand ¶ 31.)
2. Providence denies APC’s claims, and has asserted counterclaims, which seek return of the \$477,500 it mistakenly paid to Providence in payment of the September invoice. (*See generally* Respondent’s Answer to Petitioner’s Arbitration Demand and Counterclaims of Respondent.)

APPLICABLE LAW AND LEGAL ANALYSIS

A. CONTRACT LAW

Under Article 14 of the Agreement, entitled “Governing Law,” the Agreement is to be construed and interpreted in accordance with South Carolina law. (Joint Ex. No. 1, Art. 14.)

Under South Carolina law, “[w]hen interpreting a contract, a court must ascertain and give effect to the intention of the parties.” Further, the court held, “Interpretation of a contract is governed by the objective manifestation of the parties’ assent at the time the contract was made, rather than

subjective, after-the-fact meaning one party assigns to it," Laser Supply & Servs., Inc v. Orchard Park Assocs., 676 S.E.2d 139, 143 (S.C. 2009) (citing Chan v. Thompson, 395 S.E.2d 731, 734 (S.C. Ct. App. 1990)). Columbia E. Associates v. Bl-Lo, Inc., 386 S.E.2d 259, 261 (S.C. App. 1989). "The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into... The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Kluttz Resort Realty, Inc. v. Down'Round Dev. Corp., 232 S.E.2d 20, 25 (S.C. 1977)

The uncontradicted testimony from both Martin and Dr. Gondi establish that Providence and APC intended that either party could terminate the Agreement without cause by providing 180 day's prior written notice of termination to the other party. During the notice period, APC would continue to provide services to Providence. Both Martin and Dr. Gondi testify that the intent of the last sentence of Section 7.2 of the Agreement provides for an additional 180 days post termination compensation. They both testified that the provision was designed as an enticement for the APC members to leave their current practices and provided them with compensation during the transition in the event Providence decided to terminate the Agreement and change providers. According to Martin, the compensation was meant to provide a "safety net" to APC during its transition. Neither Martin nor Dr. Gondi defined what was met by "safety net." Dr. Gondi, however, indicated that he wanted to recover funds for start up and wind down costs of the practice. Martin testified that he considered the payment to be "severance" compensation. He compared it

to the severance he received under his employment agreement.

The question before this Arbitrator is what was the intent of the parties at the time of their negotiations with regard to the agreed to post termination 180 day's payment. On this point, the evidence supports the intent of the parties was for Providence to pay APC an additional 180 days' payment following the 180-day notice of termination period. According to Martin, this compensation was meant to aid APC in its transition. Severance payments are consistent with employment agreements; it is not a provision found in the personal service agreement exception under Stark law such as was included in the arrangement between APC and Providence. This opinion addresses the Stark Law below.

APC argues that, just because MedStream hired the CRNAs and contracted with APC anesthesiologists, that would not change Providence's obligations under Section 7.2. Martin testifies that the intent of the payment was to provide for transition. Since there is no specific language in Section 7.2 addressing any limitations to the 180 days payment, this Arbitrator is required to look at the intent of the parties as to what they were trying to address by including this compensation. Physicians and CRNAs finding employment with another group or APC entering into a contractual relationship with another hospital would eliminate the need for compensation to cover transition costs in situations where the transition is accomplished in such a short timeframe as the evidence indicates.

Dr. Beesburg testified that APC continued to make payment for benefits for CRNAs and physicians after their relationship with APC was terminated. There is no commercially reasonable explanation for Providence continuing to cover CRNA's and the physician's health benefits, nor renew any APC practice license when Dr. Beesburg knew APC was no longer going to function as an anesthesia practice. In fact, Dr. Beesburg testified that he was part owner of a second

anesthesia practice that shared the APC office manager. It would seem only logical that the other anesthesia practice would pick up costs for expenses and benefits attributed to its physician owners. This would be especially true since APC was no longer an entity providing anesthesia services directly to any provider.

B. FEDERAL STARK LAW

The Federal Stark law regulates relationships between physicians and hospitals. It is a strict liability law that must be followed. Stark precludes a hospital from providing remunerations to physicians unless an exception applies. The arrangement between Providence and APC falls under the personal services exception ("PSE"). To meet the requirements of the PSE:

- (i) the arrangement must be set out in writing, signed by the parties, and specify the services covered,
- (ii) the arrangement must cover all of the services the physician will provide to the entity,
- (iii) the aggregate services contracted must not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement,
- (iv) the term of the arrangement must be at least one year,
- (v) the compensation paid over the arrangement's term is set in advance, must not exceed fair market value, is reasonable and determined through arm's length negotiations and does not take into account the volume or value of any referrals or other business generated between the parties,
- (vi) the services performed must not violate any State or Federal law, and
- (vii) the arrangement must meet such other requirements as the Secretary may impose by regulation as needed.

As noted above, it is important that an arrangement between the physician and hospital be commercially reasonable and that all compensation be consistent with fair market value.

A precursor to determining fair market value is to justify the commercial reasonableness of the arrangement. "An arrangement will be considered 'commercially reasonable' in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential DHS referrals." This definition comes from guidance provided by the Centers for Medicare and Medicaid Services in the preamble to Stark at 69 F.R. 16903 and with guidance provided in the "OIG Supplemental Compliance Program Guidance for Hospitals" found at 70 F.R. 4866 (January 31, 2005). In addition, in Stark Phase II, CMS clarified that "an arrangement will be considered "commercially reasonable" in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician (or family member or group practice) of similar scope and specialty, even if there were no potential DHS referrals." 69 FR 16054-01 (March 26, 2004).

The Stark definition of "fair market value" states in relevant part:

Fair market value means the value in arm's-length transactions, consistent with the general market value, "General market value" means ... the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party... at the time of the service agreement. Usually, the fair market price is... the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals. 42 C.F.R. § 411.351

Exhibit B to the Agreement contains a limitation that compensation must at *all times* remain commercially reasonable and consistent with fair market value as defined under the federal Stark law. Further, Article 25 "Survivability" requires that the parties continue to comply with Exhibit

E and thus with Stark.

Based on the commercially reasonable requirement that an "arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential DHS referrals," this Arbitrator finds that the remaining five "severance" payments from Providence to APC would not pass this test. A contractual obligation by a hospital to compensate physicians for non-performance is not consistent with the Stark exception criteria. Further, PSE arrangements do not contain "severance" provisions. Such provisions are found in employment agreements. Though Martin testified to the fact that the physician practice providing anesthesia services to Providence prior to APC had a provision in its agreement that provided for a year of payments following a year's termination notification, this is not commercially reasonable. It is inconsistent with Stark that a hospital would pay physicians during a time when those physicians are not providing services to the hospital.

As to the fair market value requirement, though Martin testified the Agreement was fair market value, there is no objective proof that a fair market value determination from an objective third-party source was obtained. Doyle testified, based on his experience in healthcare, that he would not consider the compensation arrangement for a post termination period of 180 days to be consistent with fair market value. Exhibit E I.(B)(1) of the Agreement indicated that it compensation is contingent on being found to be commercially reasonable and consistent with fair market value. Though Providence offers no documentation regarding fair market value, Stark requires that the payment must be commercially reasonable and consistent with fair market value in order to meet the exception. Doyle and Bernard's testimony is conclusive here.

APC claims that the arrangement was commercially reasonable based on the negotiation between the parties. Martin explained his reasoning for limiting the notice of termination period to six-months was because of difficulty with receiving quality service after informing a group their contract is being terminated. Martin further explained his agreement to make post-termination payments was intended to provide a level of security or a "safety net" to the physicians who were taking a risk by leaving existing practices to form APC, for the sole purpose of providing services to Providence resulting in considerable cost savings to Providence. Martin further justified the post-termination payments because APC agreed to assign the accounts receivables to Providence and this income stream would offset the payment obligation. Doyle's testimony indicated that very little revenue came in following APC's termination, however. He stated that payors generally make payment for claims within 21 days. Therefore, Martin's argument to support a long-term post termination compensation arrangement would be covered by accounts receivables is not supported by Doyle's testimony. In addition, the compensation received from third party payors should be utilized by Providence to pay its costs associated with providing care to the patients.

This Arbitrator agrees, as APC argues, that Providence did have an obligation to obtain an objective third party fair market value determination prior to finalizing the agreement and then annually thereafter. Providence failed to provide testimony at the time of the hearing on this subject. In addition, APC provided no objective expert opinion that the arrangement would be consistent with fair market value either. Such failure does not negate Stark law requirements that the arrangement be commercially reasonable and consistent with fair market value, however.

Each total monthly post termination payment was in a total amount of \$447,500, which was intended to cover expenses for both APC CRNAs and the physicians. As of October 2, 2017, APC had no costs associated with the CRNAs. For the practice to receive compensation that covered

the cost of the CRNAs no longer affiliated with APC, that portion would result in a concern for fair market value and commercial reasonableness. In looking at the intent of the parties at the time the provision was negotiated, the testimony indicates that the purpose of the post termination compensation was to provide a "safety net" transition for APC. Transition of the CRNAs was completed by October 1, 2017. In addition, Dr. Gondi was also employed by Medstream as of that date. The other physicians had opportunities to affiliate with Medstream at the conclusion of the termination notice, September 30, 2017. Therefore, any transition costs borne by APC should be very limited. Start-up costs, on the other hand, were established at more than \$400,000 in Dr. Beesburg's testimony.

Neither party introduced evidence that any fair market value evaluation was performed at the time the contract was executed. Providence, however, introduced evidence through the testimony of both Bernard and Doyle that any payment from Providence to APC in 2019 would neither be fair market value nor commercially reasonable. While Dr. Beesburg and Dr. Fingler testified that such a payment would not constitute a windfall, neither witness offered any testimony regarding fair market value or commercial reasonableness.

While Providence does not offer any evidence to contradict Martin's testimony regarding the hospital's intent at the time the contract was executed, the plain language of the contract in Exhibit E requires compliance with Stark *at all times*. Martin's testimony, while uncontested, lacks any documentary support of either legal review or fair market value determination at the outset of the agreement or thereafter. Nevertheless, Joint Exhibits 4 and 5 make it clear that both parties had counsel during the negotiation of the Agreement. While the contract may have complied with Stark at the time the parties executed it, this Arbitrator determines that any payment from Providence to APC in 2019 would not be fair market value or commercially reasonable. Such

a payment would subject both parties to potential liability under Stark, and Article 9 of the Agreement states that “[t]he parties Expressly acknowledge that it has been and continues to be their intent to comply, and the parties shall comply with all federal, state and local laws and regulations.”

In expressing intent to both provide a “severance” payment to APC and comply with Stark, the parties adopted provisions in the Agreement that conflict with each other. While Section 7.2 may require a “severance” payment based on the parole evidence presented by the parties, Exhibit E states that all compensation under the Agreement is *contingent* on complying with Stark. Even the last sentence of Section 7.2, which is at the heart of the dispute between the parties, states that *any* compensation must be made in accordance with Exhibit E and thus Stark.

PAYMENT OF POST TERMINATION INVOICE

Doyle testified that he approved the September 2017 invoice received from APC for \$447,500. Following Doyle’s sign off, Providence made payment to APC in that amount. Doyle had an obligation to determine whether or not payments approved for physician agreements had an underlying contract to support the payment. In his haste to promptly pay APC, he did not verify that the invoice was correct.

Dr. Beesburg confirms in his testimony that this additional payment from Providence, albeit erroneous, covers substantially all of the startup costs that APC incurred to be able to offer services to Providence under the Agreement. This effectively provides the “safety net” that the parties contemplated at the time they executed the Agreement.

Based on the foregoing, this Arbitrator hereby finds as follows:

1. Stark is a strict liability statute; to violate it would place Providence and APC at great risk. Based on this Arbitrator’s expertise in healthcare law and though this Arbitrator

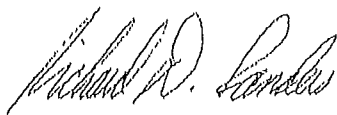
does not determine fair market value, this Arbitrator is able to conclude that this any "severance" payment under this Agreement would not be commercially reasonable since it would entail six months of compensation to APC when it was no longer providing services to Providence. This Arbitrator concludes that paying "severance" in a PSE is not commercially reasonable nor Stark compliant. Therefore, this Arbitrator denies APC's request for an additional five months post contract termination or "severance" compensation and all claims for interest.

2. Because Providence had an obligation to validate an invoice for payment to a physician/physician practice before making payment and APC established its start-up costs as more than \$400,000, this Arbitrator denies Providence's demand for the return of the \$477,500 that it paid to APC. The original intent of the parties entering the agreement was to provide for a "safety net" during the transition following an early termination by Providence, and this payment is commercially reasonable because it covers APC's start-up costs.

3. Each party is responsible for their own legal costs associated with this arbitration.

This Determination is binding and in full settlement of all claims submitted to the AHLA ADR Service in accordance with Article 23 of the Agreement.

This the 15th day of May 2019.



Richard D. Sanders, Arbitrator

Exhibit 6

[REDACTED]

From: Fecteau Jonah <Jonah.Fecteau@LPNT.net>
Sent: Wednesday, May 15, 2019 7:28 PM
To: Erin Stuckey
Cc: Bernard Joe; Doyle John; Francis Powell; Milliken Jonessa
Subject: Re: [EXTERNAL] FW: AHLA Claim No. 4419 - Anesthesiology Professionals of Columbia, LLC vs. Lifepoint Health d/b/a Providence Hospital - Final Determination and Order Attached

Erin,

Thanks for passing this along. [REDACTED]

[REDACTED] In any event, I'm certainly appreciative of all your hard work and effort on this case, and I look forward to working with you again in the future. Thanks again.

Jonah M. Fecteau
Senior Associate General Counsel – Litigation
LifePoint Health
Phone: 615-920-7647
jonah.fecteau@lpnt.net

From: Erin Stuckey <Erin.Stuckey@nelsonmullins.com>
Sent: Wednesday, May 15, 2019 6:21:44 PM
To: Fecteau Jonah
Cc: Bernard Joe; Doyle John
Subject: [EXTERNAL] FW: AHLA Claim No. 4419 - Anesthesiology Professionals of Columbia, LLC vs. Lifepoint Health d/b/a Providence Hospital - Final Determination and Order Attached

Cyber Security Reminder: Please use caution – This message originated outside LifePoint Health. Report suspicious messages using the Report Phishing icon or forward e-mail to Phishing@lpnt.net.

Jonah,

I left you a voicemail a few minutes ago. Attached is the order that arbitrator Rich Sanders just issued this evening in the APC v. Providence matter. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thank you again for the opportunity to represent Providence in this matter, and also to Joe and John, copied on this e-mail, for their hard work and efforts leading up to and at the arbitration hearing.

Erin

Erin R. Stuckey
Nelson Mullins Riley & Scarborough, LLP
erin.stuckey@nelsonmullins.com
803-255-9426

From: Rich Sanders [mailto:rsanders@southernhealthlawyers.com]
Sent: Wednesday, May 15, 2019 6:38 PM
To: Erin Stuckey <Erin.Stuckey@nelsonmullins.com>; Jim Griffin <jgriffin@griffindavislaw.com>; Maggie Fox <mfox@griffindavislaw.com>
Cc: Kari Lesser <klesser@southernhealthlawyers.com>; Rich Sanders <rsanders@southernhealthlawyers.com>
Subject: AHLA Claim No. 4419 - Anesthesiology Professionals of Columbia, LLC vs. Lifepoint Health d/b/a Providence Hospital - Final Determination and Order Attached

◀External Email▶ - From: rsanders@southernhealthlawyers.com

Counsel,

Please see the attached Final Determination and Order in this matter. I have enjoyed working with you and appreciate the professional manner in which you have handled this arbitration.

Sincerely,

Rich

Richard D. Sanders, Esq.
Southern Health Lawyers, LLC
(a Sanders & Mustari Law Firm)
++PLEASE NOTE OUR NEW ADDRESS++
3 Alliance Center
3550 Lenox Road, Suite 2100
Atlanta, Georgia 30326
(404) 806-5575
(866) 871-2238 Fax
rsanders@southernhealthlawyers.com
Named to Best Lawyers in America- Healthcare Since 2010

NOTE: The information contained in this message is confidential and may be protected by the attorney-client privilege and/or the work product doctrine. If you have received this electronic message in error, please reply to the sender and destroy this message.

Confidentiality Notice

Exhibit 7



Francis R. Powell
T 617.217.4604
francis.powell@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

One Post Office Square, 30th Floor
Boston, MA 02109
T 617.217.4700 F 617.217.4710
nelsonmullins.com

March 2, 2018

First Class Mail and E-Mail

Scott Campbell, MHA
Chief Executive Officer
Providence Hospital LLC
2435 Forest Drive
Columbia, SC 29204

RE: Anesthesiology Professionals of Columbia, LLC v. Providence Hospital

Dear Mr. Campbell:

Thank you for selecting Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins" or the "Firm") to serve as attorneys for Providence Hospital, LLC ("Providence"). We appreciate the confidence that you have shown in our Firm, and we look forward to the opportunity to represent your company.

We believe that a successful, professional relationship begins with a mutual understanding of expectations about the services we will provide, legal fees, and other important aspects of our representation. This letter and the accompanying Terms of Engagement (the "Terms"), which are incorporated herein by reference, set forth our engagement arrangement.

Nelson Mullins is being retained to provide legal representation to Providence and its affiliates, including LifePoint Health, in connection with an arbitration captioned *Anesthesiology Professionals of Columbia, LLC v. Providence Hospital* (the "Engagement"). We have not been asked to represent Providence in other new legal matters at this time. In the event we provide representation or advice to you on any other matter, the terms of this Engagement will apply to such representation, unless we agree with you in writing to different terms.

Nelson Mullins has represented in the past, is currently representing, and expects to represent in the future [REDACTED] in a variety of transactional and regulatory matters that were adverse, or that would potentially be adverse, to Providence. Providence accepts such relationship and agrees to waive any conflict or potential conflict relating [REDACTED] (to the maximum extent allowed under the South Carolina Rules of Professional Responsibility). Additionally, by executing this conflict waiver, Providence consents

CALIFORNIA | COLORADO | DISTRICT OF COLUMBIA | FLORIDA | GEORGIA | MARYLAND | MASSACHUSETTS | NEW YORK
NORTH CAROLINA | SOUTH CAROLINA | TENNESSEE | WEST VIRGINIA

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Scott Campbell, MHA

Page 2

March 2, 2018

to Nelson Mullins' continued and future representation of [REDACTED] and agrees not to assert any conflict of interest or seek to disqualify Nelson Mullins from representing [REDACTED] to the maximum extent allowed by law.

Providence has agreed to pay the legal fees, costs, and expenses regarding this Engagement. Unless otherwise specified, the Firm's fee structure is based upon hourly rates for all attorneys, policy advisors, paralegals, law clerks, research assistants, and practice assistants. We record time expended on hourly fee matters in increments of one-tenth of an hour and calculate fees on that basis, unless otherwise specified. Erin Stuckey, an Of Counsel in Nelson Mullins' Columbia, South Carolina office will have primary responsibility for this matter. Her hourly rate in this matter will be \$295 per hour. Additionally, Tim McKissock, a partner in the Columbia office will provide a supervisory function, and his hourly rate will be \$375 per hour. The above rates are subject to future changes.

Our invoices are due within thirty (30) days from presentation of the invoice. Our rates will change from time to time based on, among other variables, changes in attorney seniority or status, and changes in our rates generally. For more information on this subject, please refer to the Terms. Information regarding costs and expenses is also set forth in the Terms.

We appreciate the opportunity to represent Providence Hospital and LifePoint Health, and, assuming this letter is acceptable to you, we look forward to providing our services to Providence and LifePoint Health on a mutually satisfactory basis. The effective date of our agreement is the date on which our services commenced, and the date of this letter agreement on Page 1 is for convenience of reference only.

Of course, if you have any questions, please let us know. Once again, we are pleased to have this opportunity to represent Providence and LifePoint Health in this matter and look forward to working with you.

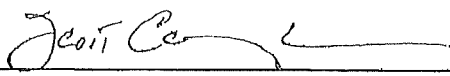
Very truly yours,

Francis R. Powell

cc: Jonah M. Fecteau, Esq.

**ACCEPTED AND AGREED WITH
CONSENTS AND WAIVERS GRANTED:**

PROVIDENCE HOSPITAL, LLC

By: 
Scott Campbell

LPH_APC_000002

NELSON MULLINS RILEY & SCARBOROUGH LLP

TERMS OF ENGAGEMENT

Except as modified by mutual agreement in writing, Nelson Mullins Riley & Scarborough LLP ("we") and the client ("you") agree to the following provisions with respect to the relationship between them:

Respective Responsibilities of Attorney and Client We will keep you reasonably informed of significant developments arising regarding the matter or matters within the scope of our engagement (the "Subject Matter") and will consult with you as to our progress and issues that arise. You will be candid and cooperative with us and will keep us informed with complete and accurate factual information, documents and other communications relevant to the Subject Matter or otherwise reasonably requested by us to perform the services. You will also assist us by making decisions appropriate to enable completion of the work and performance of the services. We provide only legal services. Among other things, we are not providing investment, insurance, accounting or technical advice.

Timely Billing and Payments Fees, charges and expenses will generally be billed monthly and are payable upon presentation. You agree that you will promptly review our invoices, raise any questions regarding the amounts and items billed within 30 days of presentation and pay all amounts billed consistent with these Terms of Engagement. We reserve the right to postpone or defer providing additional services or to discontinue our representation, if billed amounts are not paid when due. We also reserve a right to charge a late fee at the rate of 10% per annum on all sums not paid within 30 days of presentation of our invoice, and you agree to pay such late fees if applicable.

Billing Rates The rates of the specific attorneys or staff involved from time to time in your matters, and the basis of all of our other charges, are available to you at any time on request. These rates are subject to increase, normally once per year, without notice, unless otherwise requested by you. We also change our rates, as well as our other charges, from time to time, to reflect competitive conditions, inflation, a change in an attorney's status and other factors. Individual rate changes will be evident from the detailed information you receive with each bill.

Charges for Other Items Your invoice will include other charges and costs that you agree by these Terms to pay, including the following: (1) **Charges.** We have a Schedule of Standard Charges, which is available upon request, for services such as document reproduction, long distance telephone calls, facsimile, couriers, and computer legal research. These charges are generally billed at our estimated costs, including in some cases an allocation of associated overhead; (2) **Charges for Travel, Lodging, Meals and Meetings.** Our attorneys are instructed to seek transportation, lodging, meal and other travel accommodations at reasonable rates. You agree to pay all reasonable travel charges for these items. When a meeting is for your benefit, you agree to pay actual meal (and related service) costs and other direct and specific meeting-related costs, if billed to you; and (3) **Costs and Expenses.** You also agree to pay any and all other costs that we incur for your benefit (such as for expert witnesses, consulting services, external duplicating or scanning, filing fees, special delivery charges, special appearance fees and other fees imposed on attorneys in connection with the specific engagement, etc.) at our actual cost. At our option, we may send vendor invoices to you for direct payment, and you agree to pay them in a timely manner. Notwithstanding the foregoing, we assume no obligation to advance any costs or expenses on your behalf or to pay vendors, experts, consultants or other third parties we engage on your behalf. As with all of our fees, charges, and costs to be charged to you, additional information is available on request.

Disclosure of Conflicts and Other Information; Waiver of Prospective Conflicts on Unrelated Matters Nelson Mullins represents many clients. To allow us to conduct a conflicts check, you represent that you have identified to us all persons and entities that are or may become involved in the Subject Matter, including all persons and entities that in any material respect are related, affiliated or associated with you, and other involved or potentially involved parties. You also agree that you will promptly notify us if you become aware of any other persons or entities that are or may become involved in the Subject Matter.

Agreement to Use Name In connection with advertising and marketing efforts, the Firm may provide a list of representative clients and matters. Rules regarding disclosure of the identity of clients and/or the amount of work that the Firm has performed for a client vary by jurisdiction. In order to avoid any uncertainty, we prefer to address an agreement regarding disclosure of the identity of clients, the nature of the work performed, and the amount of work performed at the commencement of our engagement. Your consent to the engagement of Nelson Mullins will constitute your informed consent to the use of your name, the nature of work performed, and the amount of work performed by Nelson Mullins in connection with advertising and other marketing efforts by Nelson Mullins. If you have any questions regarding this or would like to discuss it, please let us know.

Confidentiality and Privacy; Electronic Communication In the course of providing our clients with legal advice, we sometimes receive significant personal financial or other confidential information from our clients. We store our electronic client file documents electronically offsite with a third party entity and certain physical documents are also stored offsite. In addition, while we work predominantly on secure network connections, there may be times, for example when we are travelling, that a public wireless connection may be used. Also, during the course of our engagement, we will likely exchange electronic versions of documents and e-mails with you. In order to guard this information, we maintain various physical, electronic, and procedural safeguards. If you have any questions or concerns regarding the foregoing, please let us know. Otherwise, your consent to the engagement of Nelson Mullins will be deemed consent to the provisions regarding Confidentiality, Privacy and Electronic Communication set forth above, including without limitation, the acknowledgement and consent to the storage of client information and documents offsite, and our use of electronic communication.

Fees Not Contingent; Estimates Not Binding; No Guarantee of Outcome Unless otherwise specifically agreed in writing, our fees are not contingent upon the outcome or completion of a matter. It is typically impractical to determine the amount of effort that will be needed to complete the necessary work on a matter or the total amount of fees, charges and costs that may be incurred. Unless otherwise expressly agreed in writing, our estimates and budgets are not intended to be binding, are subject to unforeseen circumstances, and do not limit or "cap" our fees and other charges or costs. We do not guarantee the outcome of any matter. During our representation, we may express our opinions, views or beliefs concerning various matters. Any such statements are intended to be an expression of opinions, views and beliefs only, and should not be construed by you as a guarantee of any type.

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Termination of Representation You can terminate our services at any time. If you do, you agree to give us prompt written notice of the termination. Upon our termination, you will remain obligated to pay for all services rendered and costs or expenses paid or incurred on your behalf before the termination or which are reasonably necessary thereafter. If we are attorneys of record in any proceeding, you agree to promptly execute and return to us any Substitution of Attorney document we provide to you. We can also withdraw from this representation at any time, except to the extent limited by applicable law or rules of professional conduct. The most common reasons for withdrawal include: (1) you fail to honor the terms of our engagement letter, including these Terms of Engagement or fail to pay our invoices in a timely manner; (2) you make it unreasonably difficult to represent you effectively or you insist on conduct contrary to our advice on a matter; or (3) facts or circumstances arise that, in our view, render our continuing representation unlawful or unethical. If we elect to withdraw, you will take all steps necessary to free us of any obligation to perform further services, including the execution of any documents necessary to complete our withdrawal. Notwithstanding any termination or withdrawal, you will remain obligated to pay us for all services provided and to reimburse us for all costs and expenses paid or incurred on your behalf before such termination or withdrawal or which are reasonably necessary thereafter. Our representation of you will be considered terminated at the earlier of (1) your termination of our representation, (2) our withdrawal from our representation of you, (3) the substantial completion of our work for you, as evidenced by a final bill, or (4) by a substantial period of inactivity with respect to you not caused by our negligence.

Registered Limited Liability Partnership/Limitation on Liability The firm of Nelson Mullins Riley & Scarborough LLP is a South Carolina registered limited liability partnership, registered also as a foreign limited liability partnership in certain other jurisdictions. As a result, our individual partners, as distinguished from the partnership, are generally not liable to you, directly or indirectly, for debts, obligations, or liabilities that are incurred, created, or assumed by the Firm.

Document Retention and Destruction In the course of our representation of you, we are likely to come into possession of copies or originals of documents or other physical or electronic materials belonging to you or otherwise constituting client records, such as correspondence, pleadings, transcripts, exhibits, physical evidence, and other items reasonably necessary to your representation (collectively, "Client Materials"). Once the particular matter to which those Client Materials relate has been concluded, we will either (1) return the Client Materials to you at your last known address, (2) retain them in our storage, or (3) dispose of them. In the event the Client Materials are returned to you, you agree we have the right, but not the obligation, to keep a copy of the Client Materials. If you do not request the return of the Client Materials upon conclusion of the matter, in the absence of any other specific arrangements with you or legal requirements to the contrary, you hereby agree that we may

dispose of those Client Materials consistent with our records retention policy that we may have in effect from time to time without notice to you. Our own files pertaining to the matter will not be delivered to you. You agree that our Firm's files include, for example, Firm administrative records, time and expense reports, personnel and staffing materials, and credit and accounting records, as well as internal lawyers' work product (such as drafts, notes, internal memoranda, and legal and factual research, including investigative reports and mental impressions, prepared by us for our internal use), and our lawyers' internal communications with one another. You agree that our files remain our property and for various reasons, including the minimization of unnecessary storage expenses, or for no reason, we may destroy or otherwise dispose of our files in a reasonable time after the conclusion of the matter without notice to you.

No Waiver of the Firm's Privilege From time to time issues may arise for the Firm that raise questions under attorneys' professional conduct rules, including possible disputes with a client and conflicts of interest issues. When such issues arise, we generally seek the advice of certain of our partners who assist with these matters, including, without limitation, our General Counsel. We consider such consultations to be protected from disclosure under the attorney-client privilege. Accordingly, as part of our agreement concerning our representation, you agree that if the Firm determines, in its own discretion, to consult with counsel (either internal counsel or, if it chooses, outside counsel), the Firm has your consent to do so and you further agree that the Firm's on-going representation of you shall not result in a waiver of any attorney-client privilege that the Firm may have to protect the confidentiality of the Firm's communications with such counsel.

Application to Subsequent Matters; Miscellaneous The agreement reflected herein applies to our present representation of you and to any subsequent matters we specifically agree to undertake on your behalf in the future, unless we agree in writing to a different arrangement. You also agree to pay us on the same basis as set forth above with respect to our fees and charges and for expenses incurred in responding to subpoenas, in testifying (and preparing testimony) by deposition or otherwise, and otherwise responding with respect to claims or demands relating to or arising out of the Subject Matter, whether or not related to our services and whether or not we are then representing you. These Terms of Engagement and the accompanying letter supersede all other prior and contemporaneous written and oral agreements and understandings between us regarding the Subject Matter and contain the entire agreement between us regarding the Subject Matter, and can be modified only by your and our subsequent written agreement. You acknowledge that no promises have been made to you regarding the Subject Matter by us other than those stated in these writings. The terms of this letter, including the Terms, are severable, and any term or provision of this letter, including the Terms, that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

LPH_APC_000004

Exhibit 8

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Anesthesiology Professionals of Columbia,
LLC,

C/A No. 2019-CP-40-04452

Petitioner,

v.

Lifepoint Health d/b/a Providence Health
and Providence Hospital, LLC

Respondents.

**AFFIDAVIT OF JONAH FECTEAU IN SUPPORT OF MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

I, Jonah Fecteau, having been duly sworn, do hereby depose and say as follows:

1. I am over the age of 18, of sound mind, and able to make this affidavit.
2. I make this affidavit based on my personal knowledge and recollection, as well as based on review of certain business records, which are maintained in the ordinary course of the business of LifePoint Health ("LifePoint").
3. I am the Vice President and Managing Counsel for Litigation for LifePoint Health, which indirectly (through its subsidiaries) owns Providence Hospital, LLC. Until last year (2021), Providence Hospital, LLC operated the Providence Health healthcare facility in South Carolina under the d/b/a Providence Health. (LifePoint Health and Providence Hospital, LLC are collectively referred to herein as the "LifePoint Parties".)
4. I was the in-house counsel responsible for managing the involvement of the LifePoint Parties in the arbitration proceeding before Arbitrator Richard D. Sanders with the American Health Lawyers Association ("AHLA"), AHLA Claim No. 4419 ("Arbitration").

5. I retained Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins") to represent the LifePoint Parties in that Arbitration.

6. Arbitrator Sanders issued a Final Determination and Order in the Arbitration on May 15, 2019.

7. Following the issuance of the Final Determination and Order in the Arbitration, I was not aware of the filing of the Petition to Vacate and did not grant a request to accept service filed by Petitioners. I would not have waived service in this case as a courtesy.

8. My team has conducted a search of records received through our registered agent for service of process, CT Corporation. Neither I nor, to my knowledge, anyone else at LifePoint was served with a copy of the Petition to Vacate.

9. Since I was unaware of the filing of the Petition to Vacate, I never retained or authorized any firm to represent the LifePoint Parties in connection with the Petition to Vacate prior to learning of its existence in 2022, more than two years after it was filed.

10. Prior to 2022, I was not aware of any pleadings, draft responses, or proposed strategy from any law firm regarding any work allegedly done on behalf of the LifePoint Parties in connection with the Petition to Vacate.

11. My team has also conducted a search of legal invoices related to this matter. I never received any invoices from Nelson Mullins for any work allegedly performed on behalf of the LifePoint Parties in connection with the Petition to Vacate. Neither I nor LifePoint were aware anyone at Nelson Mullins was allegedly doing any work on behalf of the LifePoint Parties on any Petition to Vacate in 2019, 2020, or 2021.

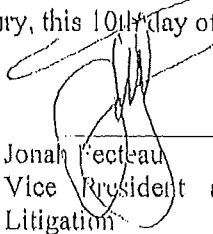
12. I was not aware of any rulings made by the Court in 2019, 2020, or 2021.

13. I only became aware of subsequent proceedings in this Court related to the Arbitration in 2022 after receiving emails from the AHLA in connection with scheduling a new arbitration.

14. After investigating this issue with new counsel, I learned that one of the attorneys from Nelson Mullins purported to represent the LifePoint Parties in connection with the Petition to Vacate. To be clear, this subsequent representation and any and all pleadings, briefs, motions, and other filings made with this Court were undertaken without approval, permission, knowledge, or consent of the LifePoint Parties. I was not aware of any filings in, or orders of, this Court at the time they were made.

15. The LifePoint Parties had no knowledge, input, approval, or control over decisions made in connection with this Petition.

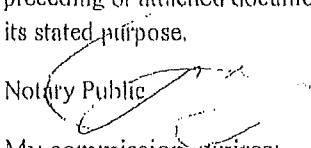
Signed under the pains and penalties of perjury, this 10th day of June, 2022.



Jonah Pecteau
Vice President and Managing Counsel,
Litigation
LifePoint Health

State of _____

On this 10 day of June 2022, before me, the undersigned notary public, personally appeared the above-named Jonah Pecteau, proved to me through satisfactory evidence of identification, which was Dr. Pecteau, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily in said capacity for its stated purpose.


Notary Public

My commission expires:

9/30/2026



Exhibit 9

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No. _____

Anesthesiology Professionals of Columbia,
LLC,

Petitioner,

v.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC

Respondent.

**PETITION TO VACATE
ARBITRATION AWARD
PURSUANT TO S.C. CODE 15-48-130**

1. Plaintiff Anesthesiology Professionals of Columbia, LLC, (APC) is, and at all times mentioned in this Petition was, a South Carolina limited liability corporation with its principal place of business in Richland County, South Carolina.
2. Defendant, Lifepoint Health ("Lifepoint") is, and at all times mentioned in this Petition was, a corporation organized and existing under the laws of a State other than South Carolina.
3. Defendant, Providence Hospital LLC ("Providence") is, and at all times mentioned in this Petition was, a corporation organized and existing under the laws the State of South Carolina and operates a hospital ("the hospital") in Richland County.
4. On or about April 14, 2014, APC entered into an agreement with Sisters of Charity Providence Hospitals to provide general anesthesiology services at the hospital, hereinafter "Agreement."
5. Lifepoint and Providence subsequently purchased the hospital operated by the Sisters of Charity in Richland County and received an assignment of the Agreement.
6. Article 23 of the Agreement entitled "Dispute Resolution," requires that any controversy

or claim arising out of or relating to the Agreement shall be resolved by binding arbitration conducted by a single arbitrator in accordance with the American Health Lawyers Association Alternative Dispute Resolution Rules of Procedure for Arbitration (AHLA).

7. Lifepoint and Providence terminated the Agreement without cause.
8. Following termination of the Agreement, a dispute arose between APC, Lifepoint and Providence regarding APC's demand for 180 days of post-termination compensation provided under Section 7.2 of the Agreement.
9. On or about January 25, 2018, APC filed a demand for arbitration with the AHLA.
10. On or about April 30, 2018, Lifepoint and Providence filed an answer and counterclaim with the AHLA.
11. On or about June 22, 2018, APC filed an answer to the counterclaim.
12. An Arbitrator was duly selected pursuant to the AHLA procedures.
13. An evidentiary hearing was conducted in Richland County on March 12, 2019 and March 28, 2019. The Arbitrator participated by telephone during the March 28, 2019 hearing.
14. On May 15, 2019 the Arbitrator issued a written award, named "Final Determination and Order."
15. A copy of the Final Determination and Order is attached as Exhibit A.
16. In the award, the Arbitrator found that the parties intended that APC would be paid 180 days of post-termination compensation under Section 7.2 of the Agreement.
17. However, the Arbitrator ruled that Section 7.2 was unenforceable because it violated the federal anti-referral law known as Stark.
18. Specifically, the Arbitrator stated

"Based on this Arbitrator's expertise in healthcare law and though this Arbitrator does not determine fair market value, this Arbitrator is able to conclude that any "severance"

payment under this Agreement would not be commercially reasonable since it would entail six months of compensation to APC when it was no longer providing services to Providence. This Arbitrator concludes that paying "severance" in a PSE is not commercially reasonable nor Stark compliant. Therefore, this Arbitrator denies APC's request for an additional five months post contract termination or "severance" compensation and all claims of interest."

Award, p. 20-21.

19. By making this finding, the Arbitrator exceeded the scope of his authority under the arbitration agreement. The Arbitrator was required to determine the dispute solely based on the evidence presented by the parties at the hearings held and conducted in accordance with the procedure set forth in the agreement. The Arbitrator had no authority to consult outside sources or to make an independent investigation of the disputed matters.
20. In addition, the Arbitrator acted in manifest disregard of South Carolina law regarding the enforcement of contracts, by his misapplication of the Stark law.
21. In simplistic terms, the Stark law prohibits a physician from referring patients to a hospital if the physician has a financial relationship with the hospital, unless an exception applies. The law prohibits referrals, not financial relationships.
22. The contract dispute before the Arbitrator related to post-termination payments owed to APC, when its physicians were not providing any services to the hospital. Stark law simply was not implicated in this post-termination of contract dispute. This point was conceded by Lifepoint and Providence during discovery in the case.
23. The award should therefore be vacated under S.C. Code § 15-48-130 because the Arbitrator
 - a. Exceeded the scope of his authority;
 - b. Engaged in misconduct that prejudiced the rights of APC; and
 - c. Acted with manifest disregard to the applicable law.

WHEREFORE, APC requests judgment

1. Vacating the Arbitrator's Final Determination and Order;
2. Remanding the case for another arbitration proceeding between the parties with a different arbitrator;
3. Awarding attorneys fees and costs of this action; and
4. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: s/ James M. Griffin
James M. Griffin
Margaret N. Fox
GRIFFIN DAVIS, LLC
4408 Forest Drive, Suite 300
P.O. Box 999 (29202)
Columbia, S.C. 29206
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

August 12, 2019

Exhibit 10

From: Erin Stuckey
To: Maggie Fox
Cc: Jim Griffin
Subject: Re: APC v. Lifepoint Health, Case No.: 2019-CP-40-04452
Date: Tuesday, August 27, 2019 12:22:49 PM

Hi Maggie,

I can accept. I am out of the office this afternoon, but will sign and return to you tomorrow.

Thanks,
Erin

Sent from my iPhone

On Aug 27, 2019, at 12:12 PM, Maggie Fox <MFox@griffindavislaw.com> wrote:

Hi Erin-

Just following up on the below. Please advise if you can accept service.

Thanks,

Maggie Fox
GRIFFIN DAVIS
4408 Forest Dr., Suite 300
Columbia, SC 29206
803.744.0800

On Aug 20, 2019, at 12:40 PM, Erin Stuckey
<Erin.Stuckey@nelsonmullins.com> wrote:

Jaime, Jim, and Maggie,

Wanted to let you know that I received this and am checking with my client regarding acceptance of service.

Thanks,
Erin

Erin R. Stuckey
Nelson Mullins Riley & Scarborough, LLP
erin.stuckey@nelsonmullins.com
803-255-9426

From: Jaime Harmon <JHarmon@griffindavislaw.com>
Sent: Monday, August 19, 2019 10:56 AM

To: Erin Stuckey <Erin.Stuckey@nelsonmullins.com>
Cc: Jim Griffin <JGriffin@griffindavislaw.com>; Maggie Fox
<MFox@griffindavislaw.com>
Subject: APC v. Lifepoint Health, Case No.: 2019-CP-40-04452

◀External Email▶ - From: jharmon@griffindavislaw.com

Please find attached correspondence regarding the above-referenced matter.

<Image001.jpg> **Jaime Harmon**
Legal Assistant
GRIFFIN DAVIS
803 744 0800 o | 803 744 0805 f
4408 Forest Drive
Suite 300
Columbia, SC 29206
P O Box 999 (29202)

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JAMES M. GRIFFIN

4408 Forest Drive, Suite 300 / PO Box 999 (29202)
Columbia, SC 29206

jgriffin@griffindavisllc.com
803 744 0800 o | 803 744 0805 f

August 19, 2019

VIA ELECTRONIC AND U.S. MAIL

Erin Stuckey
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070

Re: Anesthesiology Professionals of Columbia, LLC v. Lifepoint Health
d/b/a Providence Health Providence Hospital LLC
Case No.: 2019-CP-40-04452

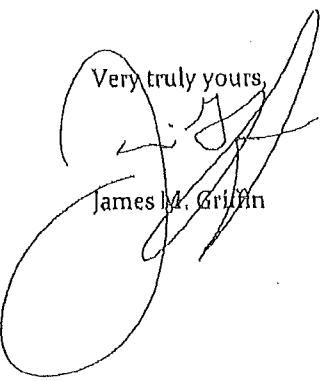
Dear Erin:

I am providing you a courtesy copy of the Petition to Vacate the arbitration award in the above case that we filed on August 12, 2019 in the Richland County Court of Common Pleas.

I am requesting that you accept service on behalf of the respondents in this action. To this end, I am also enclosing an acceptance of service form for you to execute on behalf of your clients. If you are authorized, please execute the acceptance forms and return to me at your earliest convenience. If you are not able to do so, please notify me immediately so that we may effectuate service.

With kind regards, I am

Very truly yours,


James M. Griffin

JMG/jh
Enclosures

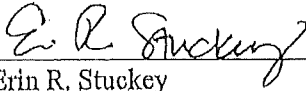
GRIFFIN & DAVIS LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
Anesthesiology Professionals of	)	Civil Action No. 2019-CP-40-04452
Columbia, LLC,	)	
	)	
Petitioner,	)	
	)	ACCEPTANCE OF SERVICE
vs.	)	
	)	
Lifepoint Health d/b/a Providence Health	)	
and Providence Hospital LLC,	)	
	)	
Respondent.	)	

I, Erin R. Stuckey, hereby accept service and acknowledge receipt of Petitioner's Petition to Vacate Arbitration Award Pursuant to S.C. Code 15-48-130 on behalf of Respondents Lifepoint Health d/b/a Providence Hospital and Providence Hospital LLC in connection with the above-captioned matter this 3rd day of September 2019.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Erin R. Stuckey
SC Bar No. 74828
E-Mail: erin.stuckey@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

*Attorney for Respondents Lifepoint Health d/b/a Providence
Health and Providence Hospital LLC*

Columbia, South Carolina

Exhibit 11

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

Anesthesiology Professionals of Columbia LLC,
Petitioner,

Civil Action No. 2019-CP-40-
04452

vs.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,

Appellee.

)
) RESPONSE OF NELSON
) MULLINS RILEY &
) SCARBOROUGH LLP TO
) PETITIONERS SUBPOENA
) DATED JUNE 20, 2022
)
)
)

Without waiving any applicable attorney-client privilege and/or work product protection, Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins") responds to Petitioner's SCRCF 45 subpoena dated June 20, 2022 as follows:

REQUESTS AND RESPONSES

1. All communications between Ms. Stuckey and/or You and Respondents related to the Service Correspondence and/or the Acceptance of Service of the Petition during the Relevant Time Period.

Response: Nelson Mullins has no communications responsive to the request.

2. All communications between Ms. Stuckey and/or You and Respondents related to the Petition during the Relevant Time Period.

Response: Nelson Mullins has no communications responsive to the request.

3. All communications between Ms. Stuckey and/or You and Respondents related to C.A. No. 2019-CP-40-04452 during the Relevant Time Period.

Response: Nelson Mullins has no communications responsive to the request.

4. All NMRS invoices sent to Respondents reflecting request for payment of costs and services provided by Ms. Stuckey and/or You in connection with the Petition during the Relevant Time Period.

Response: Nelson Mullins has no invoices responsive to the request.

5. All NMRS invoices sent to any person other than Respondents reflecting request for payment of costs and services provided by Ms. Stuckey and/or You in connection with the Petition during the Relevant Time Period.

Response: Nelson Mullins has no invoices responsive to the request.

6. All documents relating to Ms. Stuckey and/or You providing Respondents or any person with of any filings, including drafts, in C.A. No. 2019-CP-40-04452 during the Relevant Time Period.

Response: The only documents Nelson Mullins has in its possession responsive to the request are documents filed with the court by Ms. Stuckey or counsel for Petitioner and correspondence, either by letters or email between Ms. Stuckey, counsel for Petitioner, and the Court. None of these documents indicate they were provided to Respondent or any other persons. Per agreement with Petitioner's counsel, these documents are not being copied and produced as they are already in the possession of Petitioner's counsel. Otherwise, Nelson Mullins has no documents responsive to the request.

7. All documents reflecting notes taken by Ms. Stuckey and/or You concerning a discussion of C.A. No. 2019-C-40-0445 with Respondents during the Relevant Time Period.

Response: Nelson Mullins has no documents responsive to the request.

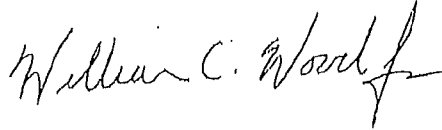
8. For those persons identified in the documents provided in response to Request No. 5 herein, provide all documents reflecting communications between Ms. Stuckey and/or You while discussing C.A. No. 2019-C-40-0445 with such persons during the Relevant Time Period.

Response: Nelson Mullins has no documents responsive to the request.

9. For those persons identified in the documents provided in response to Request No. 5 herein, provide all notes taken by Ms. Stuckey and/or You while discussing C.A. No. 2019-C-40-0445 with such persons during the Relevant Time Period.

Response: Nelson Mullins has no documents responsive to the request.

NELSON MULLINS RILEY & SCARBOROUGH LLP



By: _____
William C. Wood, Jr.

Its: Partner and Associate General Counsel
For the Firm

Columbia, South Carolina

July 5, 2022

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

Anesthesiology Professionals of Columbia LLC,
Petitioner,

Civil Action No. 2019-CP-40-
04452

vs.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,
Appellee.

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on July 5, 2022, he served a copy of the following:

Response of Nelson Mullins Riley & Scarborough LLP to Petitioners Subpoena Dated June 20, 2022

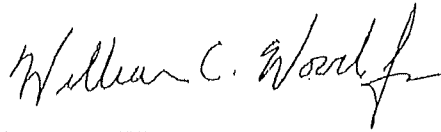
upon counsel for the parties in the matter by email and first class mail at the follow addresses:

James M. Griffin
Griffin & Davis, LLC
4408 Forest Drive, Suite 300
Columbia, SC 29206

jgriffin@griffindavislaw.com

Jeffrey S. Patterson
K&L Gates
State Street Financial Center, One Lincoln Street
Boston, Massachusetts 02111

jeffrey.patterson@klgates.com



July 5, 2022

Exhibit 12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Anesthesiology Professionals of Columbia,	)	Civil Action No. 2019-CP-40-04452
	)	
Petitioner,	)	
	)	
vs.	)	<u>RESPONDENT'S MOTION FOR</u>
	)	<u>RECONSIDERATION, TO ALTER</u>
	)	<u>OR AMEND JUDGMENT, AND TO</u>
Lifepoint Health d/b/a Providence	)	<u>CORRECT A CLERICAL MISTAKE</u>
Health and Providence Hospital LLC,	)	
	)	
Respondent.	)	
	)	

Pursuant to Rules 59(e) and 60(a) of the South Carolina Rules of Civil Procedure, Respondent Lifepoint Health d/b/a Providence Health and Providence Hospital LLC (hereinafter, "Providence") hereby respectfully requests that this Court alter or amend its August 4, 2021 Order (hereinafter, the "Order"), which granted the Petition of Anesthesiology Professionals of Columbia (hereinafter, "APC") to vacate the Final Determination and Order issued by Arbitrator Richard D. Sanders, Esquire. Through this Motion, Providence requests that the August 4, 2021 Order be vacated in its entirety and that the Court instead enter an Order denying APC's Petition.

Rule 59(e) of the South Carolina Rules of Civil Procedure allows a party to file a motion to alter or amend the judgment no later than 10 days after receipt of the written notice of the entry of the order. "A motion under Rule 59(e) long has been viewed as [a] 'motion for reconsideration' despite the absence of those words from the rule." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The South Carolina Supreme Court has explained that the procedural rules allow a party "to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Id.* at 21, 602 S.E.2d at 779.

The specific grounds for this Motion are as follows:

1. In its Order, the Court failed to consider Providence's argument that, with narrow exceptions, an arbitration award is conclusive, and an arbitration award will be vacated only under narrow, limited circumstances. *Glissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009); *Pittman Mortgage Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997); *Trident Technical Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985); *White v. Preferred Research*, 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993).
2. In its Order, the Court failed to consider or rule on Providence's arguments regarding interpretation of the Medical Director and Exclusive Agreement for General Anesthesiology Services (hereinafter, the "Agreement") and the amendments thereto, which establish that APC was not entitled to the additional unearned compensation it sought.
3. The Arbitrator did not exceed the scope of his authority or powers within the meaning of S.C. Code Ann. § 15-48-130(a)(3). "The question of whether arbitrators have exceeded their powers relates to arbitrability of the issue they have attempted to resolve." *Batten v. Howell*, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct. App. 1990). The *Batten* Court explained, "Arbitrators exceed their powers when they attempt to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement. Conversely, if an issue resolved by arbitrators is within the scope of the arbitration agreement, the statutory language does not require the Court to review the merits of the decision." *Id.* "A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues

under the guise of questioning the arbitrators' powers." *Pittman Mortgage Co.*, 327 S.C. at 76-77, 488 S.E.2d at 338.

4. The Arbitrator did not exceed the scope of his powers because the issues that he decided in the Award—whether APC was entitled to six months of additional post-termination payments, or whether APC's interpretation of the Agreement would not be commercially reasonable or constitute fair market value—were expressly set forth in APC's Arbitration Demand and Providence's Answer and were the subject of the documentary evidence and testimony presented by both parties at the arbitration hearing. As set forth in the Award, the decision rendered by Arbitrator Sanders resolved precisely this issue. Thus, the issue resolved by the arbitrator was within the scope of the arbitration agreement of the parties. For this reason, the Court erred in reviewing the merits of the Arbitrator's decision and concluding that Arbitrator Sanders exceeded the scope of his powers. *Batten*, 300 S.C. at 548, 389 S.E.2d at 172; *Trident Technical Coll.*, 286 S.C. 98, 333 S.E.2d 781 (holding that if the issues presented to the arbitrators are within the scope of the arbitration agreement, they do not exceed their powers when attempting to resolve those issues).

5. Prejudicing the rights of any party is not a ground for vacating an arbitration award. In its Order, the Court ruled that S.C. Code Ann. § 15-48-130(a) provides that "the Court shall vacate an award where the misconduct of an arbitrator prejudices the rights of any party" (Order at ¶ 24.) However, in the Order, no specific misconduct is cited. Instead, the Order cites the Arbitrator's rulings in permitting certain testimony as being allegedly prejudicial to APC. The consideration of

evidence by the Arbitrator does not constitute “misconduct,” and thus the provision of subsection (a)(2) of S.C. Code Ann. § 15-48-130, which requires not only prejudice but also that the prejudice was caused by arbitrator misconduct, does not apply.

6. The Court erred in ruling that the Arbitrator prejudiced the rights of APC by considering testimony and evidence on commercial reasonableness and fair market value. (Order at ¶¶ 25-27.)
7. The Court erred in ruling that the Arbitrator prejudiced the rights of APC by relying on his expertise in healthcare law in construing the evidence and arguments presented at the arbitration hearing. (Order at ¶ 28.)
8. In its Order, the Court failed to consider or rule on Providence’s argument that APC did not meet its burden of establishing that the arbitrator acted in manifest disregard of the law. An arbitrator’s award may be vacated if the arbitrator commits a manifest error and disregards or perversely misconstrues the law. *Trident Technical Coll.*, 286 S.C. at 108, 333 S.E.2d at 787. In *Gissel*, the South Carolina Supreme Court discussed the burden of vacating an award based on this non-statutory ground: “[F]or a court to vacate an arbitration award based upon an arbitrator’s manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Case law presupposes something beyond a mere error in construing or applying the law. Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed. The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law. An arbitrator’s ‘manifest disregard of

the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers." *Gissel*, 382 S.C. at 241-42, 676 S.E.2d at 323-24 (emphasis in original) (citations omitted).

9. In its Order, the Court failed to consider or rule on Providence's argument that the construction of a written instrument is a question of law for the arbitrator, and that the Arbitrator's construction of the Agreement should be confirmed since none of the grounds for vacating an award apply. *Bishop Realty and Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 186, 355 S.E.2d 298, 301 (Ct. App. 1987).

10. In its Order, the Court failed to consider or rule on Providence's argument that the Award was based on grounds other than commercial reasonableness and fair market value, and that Arbitrator's reasoned opinion surpasses the "barely colorable" standard. "[A]rbitrators need not specify their reasoning or the basis of an award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.' If a ground for the award can be inferred from the facts, the award should be confirmed." *Batten*, 300 S.C. at 549, 389 S.E.2d at 172.

Providence incorporates herein its Final Brief in Opposition to Petition to Vacate Arbitration Award, the exhibits contained in the Record on Appeal, its Proposed Order, as well as all arguments and factual and legal positions asserted in this matter.

Additionally, Providence moves under Rule 60(a) of the South Carolina Rules of Civil Procedure to have the August 4, 2021 Order corrected. Under Rule 60(a), "[c]lerical mistakes in

judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” The August 4 Order is titled “Petitioner’s Proposed Order,” and therefore does not accurately reflect that the Order is the final Order of the Court. For this reason, in addition to the other grounds set forth above, Providence respectfully requests that the Court correct the name of the Order.

Based on the foregoing, Providence respectfully requests that the Court vacate the Order and enter an order denying the Petition to Vacate the Arbitration Award.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ERIN R. STUCKEY

Erin R. Stuckey
SC Bar No. 74828
E-Mail: erin.stuckey@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent

August 16, 2021

Columbia, South Carolina

RECEIVED

Jul 31 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge
L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-04452
Appellate Case No.: 2023-001058

Anesthesiology Professional of
Columbia, LLC

Respondent,

v.

Lifepoint Health d/b/a Providence
Health and Providence Hospital LLC

Appellants.

**RESPONDENT'S MEMORANDUM ADDRESSING APPEALABILITY OF ORDERS
SET FORTH IN APPELLANT'S JUNE 30, 2023 NOTICE OF APPEAL**

Pursuant to Rule 240, SCACR, the Court should dismiss the present appeal because the orders Appellants Lifepoint Health d/b/a Providence Health and Providence Hospital LLC seek to appeal are not presently appealable, and therefore, the appeal is appropriately dismissed. Appellants missed the thirty-day window within which to appeal the August 4, 2021, Order and granting APC's Petition to Vacate the Arbitration Award and the November 29, 2021, Order denying Lifepoint's Motion to Reconsider. Rule 203(b)(1), SCACR. Additionally, the Court should dismiss the appeal of the May 31, 2023, Order on Appellants' Motion to Dismiss the arbitration proceedings because it is an interlocutory order not subject to immediate appeal. *See*

Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (holding the denial of a motion to dismiss under Rule 12(b)(2), SCRPC, is interlocutory and not directly appealable). Accordingly, Respondent Anesthesiology Professionals of Columbia, LLC (“APC”) respectfully requests the Court dismiss this appeal.

FACTUAL AND PROCEDURAL HISTORY

Respondent APC entered into an agreement effective April 15, 2014, with Sisters of Charity Providence Hospitals to provide general anesthesiology services at the hospital (“the Agreement”). Appellants subsequently purchased the hospital operated by the Sisters of Charity in Richland County and received an assignment of the Agreement. A dispute arose between Respondent and Appellants regarding Respondent’s demand for 180 days of post-termination compensation provided under Section 7.2 of the Agreement. Unable to resolve this dispute with Appellants, and pursuant to the terms of the Agreement, Respondent filed a demand for arbitration with the American Health Lawyers Association (“AHLA”) in accordance with Article 23 of the Agreement on January 25, 2018.

On or about April 30, 2018, Appellants appeared through retained counsel, Erin Stuckey of Nelson Mullins. An evidentiary hearing was conducted by the selected AHLA arbitrator in Richland County on March 12, 2019, and March 28, 2019. Appellants were represented by Ms. Stuckey and Mr. Chris Daniels of Nelson Mullins at the arbitration hearing.

On May 15, 2019, the Arbitrator issued a Final Determination and Order (“the Arbitration Award”) finding that although the parties intended Respondent APC receive the compensation it sought under the Agreement, the arbitrator would not award the same having determined Section 7.2 was unenforceable because it violated the federal anti-referral law known as Stark.

A. Petition to Vacate the Award

On August 12, 2019, Respondent filed a Petition to Vacate the Arbitration Award (the “Petition”) pursuant to S.C. Code Ann. § 15-48-130. Upon filing the Petition, Respondent’s counsel corresponded with counsel for Appellants, Ms. Stuckey – who had represented Appellants throughout the arbitration – to inquire if she was authorized to accept service of the Petition on behalf of her clients, the Appellants. Specifically, counsel for Respondent stated:

Dear Erin:

I am providing you a courtesy copy of the Petition to Vacate the arbitration award in the above case that we filed on August 12, 2019, in the Richland County Court of Common Pleas.

I am requesting that you accept service on behalf of the [Appellants] in this action. To this end, I am also enclosing an acceptance of service form for you to execute on behalf of your clients. If you are authorized, please execute the acceptance forms and return to me at your earliest convenience. **If you are not able to do so, please notify me immediately so that we may effectuate service.**

See ((May 31, 2023 Order at 4, attached as Ex. 1 to NOA filed June 30, 2021 (hereinafter “May 2023 Order, NOA Ex. 1 at _____”).) (emphasis added).

Ms. Stuckey replied to the August 19, 2019, correspondence via her Nelson Mullins email account on August 20, 2019, stating, “wanted to let you know that I received this and **am checking with my client** regarding acceptance of service.” (Id.) (emphasis added). On August 27, 2019, Ms. Stuckey further responded via the same email, “**I can accept.** I am out of the office this afternoon but I will sign and return to you tomorrow.” (Id.) (emphasis added).

On September 3, 2019, Ms. Stuckey executed and mailed an acceptance of service form on behalf of Appellants to counsel for Respondent. (Id.) The acceptance of service form states, “I Erin Stuckey hereby accept service and acknowledge receipt of Petitioner’s Petition to Vacate Arbitration Award pursuant to S.C. Code Ann. § 15-48-130 on behalf of Lifepoint Health d/b/a

Providence Hospital and Providence Hospital LLC in connection with the above captioned matter on this 3rd day of September, 2019.” (May 2023 Order, NOA Ex. 1 at 4-5.) The acceptance of service form was filed with the lower court on September 10, 2019. (Id. at 5.)

Thereafter, Ms. Stuckey, on behalf of Appellants, engaged in the joint submission of a Consent Scheduling Order for Briefing that was filed with the lower court, and also filed Appellants’ initial brief and designation of matter to be included in the record on appeal on March 24, 2021, as well as their Final Brief in Opposition to the Petition to Vacate on June 1, 2021. (Id.) At a hearing conducted by the Honorable Casey Manning on June 22, 2021, on the Motion to Reconsider, Ms. Stuckey appeared and argued on behalf of Appellants. At the conclusion of the hearing, Ms. Stuckey, on behalf of Appellants, submitted a proposed order to chambers. (Id.)

On August 4, 2021, the lower court adopted Respondent APC’s proposed order in toto, vacating the Arbitration Award and ordering a new hearing be held in arbitration before a different arbitrator (“August 2021 Order and Final Judgment”). *See* (Aug. 4, 2021 Order & Final Judgment, attached as Ex. 2 to NOA filed June 30, 2023 (hereinafter “Aug. 2021 Order, NOA Ex. 2 at ¶ ____”).) However, prior to filing the same, the word “Proposed” was not removed from the caption of the filed version of the August 2021 Order and Final Judgment. (Id. at 1); *see also* (May 2023 Order, NOA Ex. 1 at 5.)

In response to this order, Ms. Stucky on behalf of Appellants, thereafter filed a Motion to Reconsider, to Alter or Amend, and to Correct a Clerical Mistake (“Motion to Reconsider”) the August 2021 Order and Final Judgment pursuant to Rules 59(e) and 60(a), SCRCp, on August 16, 2021. (May 2023 Order, NOA Ex. 1 at 5.) Among the relief sought in the Motion to Reconsider, was a request to remove the word “Proposed” from the caption of the August 2021 Order and Final Judgment, thereby correcting what Appellants described as a “scrivener/clerical error” contained

in the same. (May 2023 Order, NOA Ex. 1 at 5.)

Thereafter, the lower court notified the parties it was denying the same and requested Respondent APC submit a proposed order reflecting his ruling and correcting the scrivener's error. The order ("November 2021 Order), including Exhibit A which omitted "proposed" from the caption of the original August 2021 Order and Final Judgment, submitted by Respondent to the lower court, with Ms. Stuckey copied,¹ was adopted in toto by the lower court and thereafter sent to the Clerk of Court for filing. (Id. at 5-6.) Notably, the filed November 29, 2021, Order directed the Clerk of Court to file Exhibit A as a replacement for the original, and instructed the Clerk of Court that the replacement "shall retain the original filing date of August 4, 2021." See (Nov. 29, 2021 Order at 1, attached as Ex. 3 to NOA filed June 30, 2023 (hereinafter "Nov. 2021 Order, NOA Ex. 3 at ____")); see also (May 2023 Order, NOA Ex. 1 at 6.) Exhibit A, the replacement order, was never filed by the Clerk of Court despite Judge Manning's instruction. See (May 2023 Order, NOA Ex. 1 at 6.)

Following the expiration of the thirty-day window in which Appellants could have appealed the August 2021 Order and Final Judgment and the November 2021 Order denying their Motion to Reconsider, Respondent reinitiated proceedings with the AHLA to begin the process of selecting a new arbitrator and conducting a second arbitration.

B. Motion to Dismiss

On June 10, 2022, over two years after Nelson Mullins made its appearance on behalf of

¹ Contrary to the implication by Appellants that they had never seen the 2021 Orders involving the Petition, Ms. Stuckey was copied on the correspondence to the lower court submitting the proposed orders, including Exhibit A to the November 2021 Order, that were adopted in their entirety by the court. (NOA at 1.) While Appellants may maintain Ms. Stuckey was not their agent, it is simply disingenuous, and contrary to the findings of fact in this matter, to intimate "no one" received these orders. (May 2023 Order, NOA Ex. 1 at 5-6).

Appellants in the arbitration proceedings and had continued, through Ms. Stuckey, to litigate the appeal of the Arbitration Award in the lower court, Appellants filed a Motion to Dismiss claiming lack of personal jurisdiction (Rule 12(b)(2), SCRCP) and absence of a final order and judgment on the Petition. Following this filing, the AHLA informed the parties it was staying arbitration until resolution of this motion. The parties thereafter submitted briefing to the lower court regarding Appellants' arguments contained in the motion to dismiss: (1) improper service of the Petition; (2) Ms. Stuckey's lack of actual or implied authority to accept service of the Petition on behalf of Appellants; (3) whether the August 2021 Order on file with the clerk containing the word "proposed" constituted a final order from which Appellants could appeal. *See* (May 2023 Order, NOA Ex. 1 at 6.)

On April 18, 2023, the lower court heard argument from the parties on the Motion to Dismiss. (*Id.* at 1.) Following the hearing, the parties were informed that the Honorable Daniel Coble was denying the same and he requested Respondent APC prepare a draft order. Counsel for Respondent submitted a proposed order, and Appellants were afforded an opportunity to submit proposed edits to Respondent's order. Having considered Respondent's submission, as well as the proposed edits submitted by Appellants, the court issued the May 2023 Order² containing the court's determination that,

[Appellants] voluntarily entered an appearance in this action through the actions of its counsel, Nelson Mullins, who executed a written acceptance of service on behalf of [Appellants], submitted filings in this Court, and argued the appeal from

² Appellants challenge the accuracy of the NEF for the May 2023 Order arguing the NEF incorrectly states Mr. Bozeman, Mr. Allen, and Mr. Coleman were provided a copy of the May 2023 Order. However, the NEF does not state these individuals were provided with a copy of the May 2023 Order; it merely indicates they were provided *with notice* that an order was filed. *See* (NEF of Order, C.A. No: 2019-CP-40-04452, filed May 31, 2023 (Richland Cty. Ct.C.P.)) As to whether these three individuals received *the notice of the filing* (not a copy of the May 2023 Order), Appellants are silent. In any event, it is unclear to Respondent how this is germane to the present matter.

the arbitrator's ruling before this Court. Additionally, the Court is unpersuaded by Appellants' contention that a final order has not been entered on the Petition based on an argument that is tantamount to a scrivener's error.

(May 2023 Order, NOA Ex. 1 at 1-2.) Following receipt of this order, Respondent reinitiated the proceeding in arbitration.

C. Notice of Appeal

On June 30, 2023, Nelson Mullins - *on behalf of Appellants*- filed the present Notice of Appeal and paid the requisite filing fee. (Id. at 3.) Moreover, Ms. Stuckey, who now works for another firm, was served with the Notice of Appeal as *current counsel for the Appellants*. See (NOA Proof of Service at 1-2, App. No. 2023-001058, filed June 30, 2023.) Thus, the same firm (Nelson Mullins) and attorney (Ms. Stuckey) that Appellants claim did not have agency to represent them in the Petition in 2021 before the lower court continue to act on behalf of the Appellants in this appeal.

Following receipt of the Notice of Appeal, the Court requested the parties submit briefing on the appealability of the orders set forth in the Notice of Appeal.

ARGUMENT

1. Appellants failed to timely appeal the August 2021 Order and Final Judgment and November 2021 Final Order, thereby depriving this Court of appellate jurisdiction until a rehearing has been conducted in arbitration.

"A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(a)-(b)(1), SCACR. A timely motion to alter or amend the judgment, however, tolls this thirty-day period until "receipt of written notice of entry of the order granting or denying such motion." Id. "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks

jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)).

In the present case, the lower court granted Respondent's Petition to vacate the arbitration award and remanded the matter back to AHLA for a rehearing before a different arbitrator. *See* (Aug. 2021 Order, NOA Ex. 2 at 6, ¶ 29.) Within ten days of receiving notice that the lower court granted the Petition, Appellants filed their Motion to Reconsider. *See* (May 2023 Order, NOA Ex. 1 at 6.) The parties were notified on November 29, 2021, of the lower court's denial of the Motion to Reconsider. Upon receipt of such notice, Appellants had thirty days within which to serve APC with a notice of appeal of the Final Order. Rule 203(b)(1), SCACR. Appellants did not appeal either 2021 order within this window of time, and the case was appropriately resubmitted to arbitration before the AHLA. Having failed to appeal these orders within the time afforded by Rule 203(b)(1), the Court does not have jurisdiction to entertain an appeal of these orders. Accordingly, the appeal of these orders should be dismissed, and Appellants should be prohibited from resurrecting their opportunity to appeal the August 2021 Order and Final Judgment granting the Petition to vacate the award and the November 2021 Order denying Appellants' Motion to Reconsider.

2. The May 2023 Order is interlocutory and is not immediately appealable; therefore, the Court must dismiss this appeal for lack of appellate jurisdiction.

Under S.C. Code Ann. § 14-3-330, only certain interlocutory orders are immediately appealable: those that involve the merits of the case or affect a substantial right. *Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) (citing

Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012)); *see also Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 379 (Ct. App. 2002) (“Absent some ‘specialized statute,’ this Court is not permitted to hear a case on appeal not comporting with the requirements of [section 14-3-330].”) “‘An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.’” *Id.* (quoting *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005)). The provisions of section 14-3-330 should be narrowly construed when determining whether an interlocutory order is immediately appealable, and orders issued before or during trial are generally not immediately appealable. *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709.

The Court should dismiss Appellants’ appeal of the May 2023 Order denying its Motion to Dismiss for lack of personal jurisdiction because it is an interlocutory order that is not immediately appealable under S.C. Code Ann. § 14-3-330. *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780. Moreover, examination of the facts in the present case illustrates that the May 2023 Order denying relief under Rule 12(b)(2), SCRCF, and rejecting Appellants’ contention that the scrivener’s error in the caption of the August 2021 Order and Final Judgment invalidated its finality is not immediately appealable under section 14-3-330. The May 2023 Order does not conclusively determine the validity of any of Appellants’ counterclaims and defenses in this matter. *See Richardson*, 439 S.C. at 426, 887 S.E.2d at 157 (citing *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014)); *see also Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780 (holding that party denied dismissal under Rule 12 “has not arrived at the end of the road,...has forfeited nothing, [and] must simply continue to trial.”) Nor does it affect a substantial right of the Appellants. *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780,

n.4 (citing *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991) (finding the avoidance of trial did not constitute the impairment of a substantial right when examining the denial of a motion to dismiss for lack of jurisdiction)). Rather, following a rehearing in arbitration and entry of an award, Appellants will still have the option to appeal the May 2023 Order if they so choose because the underlying case has not been dismissed but for all intents and purposes is stayed pending a rehearing before the AHLA. Thus, it is clear that the May 2023 Order is an interlocutory order that does not finally end the case, and thus, “no immediate appeal is allowed.” *Richardson*, 439 S.C. at 425, 887 S.E.2d at 156 (quoting *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709.)

CONCLUSION

Based on the foregoing, Respondent respectfully requests the Court dismiss the present appeal finding the Court lacks jurisdiction to hear the same because (1) Appellants’ appeals of the August 2021 Order and Final Judgement and November 2021 Order are untimely and (2) the May 2023 Order is an interlocutory order and not immediately appealable.

Respectfully submitted,

By: s/James M. Griffin
James M. Griffin
Margaret N. Fox
GRIFFIN HUMPHRIES, LLC
4408 Forest Drive, Suite 300
P.O. Box 999 (29202)
Columbia, S.C. 29206
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com

Attorneys for APC

July 31, 2023
Columbia, South Carolina

The South Carolina Court of Appeals

Anesthesiology Professionals of Columbia, LLC,
Respondent,

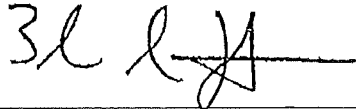
v.

Lifepoint Health d/b/a Providence Health and Providence
Hospital, LLC, Appellant.

Appellate Case No. 2023-001058

ORDER

Appellant appeals from three orders issued by the circuit court regarding arbitration of a contract dispute. Upon receiving the notice of appeal, this court requested memoranda from the parties regarding the appealability of the orders. After carefully considering both parties' memoranda, we dismiss the appeal as interlocutory.



FOR THE COURT

Columbia, South Carolina

cc:

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire

FILED
Aug 29 2023

RECEIVED

Sep 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2023-001058

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge
L. Casey Manning, Circuit Court Judge

Case No. 2019-CP-40-04452

Anesthesiology Professionals of
Columbia, LLC

Respondent,

v.

Lifepoint Health d/b/a Providence
Health and Providence Hospital LLC

Appellants.

PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING EN BANC

Pursuant to Rules 219 and 221, SCACR, Lifepoint Health d/b/a Providence Health and Providence Hospital LLC's (collectively "Lifepoint") petition the Court for rehearing and suggest rehearing *en banc* of the Court's August 29, 2023, order dismissing the appeal as interlocutory. After noting that LifePoint had appealed and that the Court had asked for and received briefing on jurisdiction, the Order states that the appeal is interlocutory, but cites no authority and does not address the arguments raised in the parties' memoranda the Court requested on the issue of jurisdiction. No party asserted the appeal was interlocutory in their briefing on the issue of jurisdiction. Rehearing, and rehearing *en banc* (to ensure uniformity of law with respect to the dismissals of appeals) is appropriate because the dismissal is erroneous as

a matter of law for the following reasons.

I. THE ORDER OF JUDGE COBLE IS A FINAL ORDER IN CASE NUMBER 2019-CP-40-04452 APPEALABLE PURSUANT TO EITHER S.C. CODE ANN. § 15-48-200(6) OR S.C. CODE ANN. § 14-3-330(1).

The Court's dismissal order stating that Lifepoint's appeal is interlocutory is incorrect. Judge Coble's order of May 31, 2023, is a final order resolving all of the issues as to all parties raised in this action, 2019-CP-40-04452 ("the Challenge Action"). Nothing remains for the circuit court to decide. This Court has jurisdiction over this appeal pursuant to S.C. Code Ann. § 15-48-200(6) or, alternately, pursuant to 14-3-330.¹

A. All of the Issues Raised by the Parties and That Would Be Within the Subject Matter and Personal Jurisdiction of a Properly Initiated Petition for Review of an Arbitration Order Under the South Carolina Arbitration Act by a Circuit Court are Resolved.

Lifepoint and Anesthesiology Professionals of Columbia, LLC ("APC") were involved in an arbitration that ended with the arbitrator concluding that neither party owed the other anything. APC then (improperly) instituted the Challenge Action to vacate the arbitration decision pursuant to S.C. Code Ann. § 15-48-130, but did not serve a summons or petition for the action on Lifepoint as required by S.C. Code Ann. § 15-48-170. Lifepoint, utterly unaware of the Challenge Action never learned of it, and was never billed for it. The Challenge Action began

¹ In *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995), the court concluded that in a proceeding under the South Carolina Uniform Arbitration Act in state court, the statutory grounds for appeal in that matter were governed by the specific provisions of S.C. Code Ann. § 15-48-200 rather than the general appellate provisions of S.C. Code Ann. § 14-3-330 where *the two conflict*. Here, there is no conflict as both statutes provide for an appeal from a final order entered in a circuit court proceeding. Of course, an implied repeal is disfavored, and the statutes should be read harmoniously if possible. Pursuant to S.C. Code Ann. § 14-3-330(2)(b), an order affecting a substantial right which "grants ... a new trial" is immediately appealable. The orders on appeal in this case grant a new arbitration proceeding with various restrictions imposed, but not agreed to by the parties in the arbitration agreement, as set forth more fully below at pp 7-9. The orders in this case are analogous to the immediately appealable new trial order taken pursuant to section 14-3-330(2)(b).

with purported “accepted service” by counsel who had no engagement with Lifepoint to act in the Challenge Action, and who did not inform Lifepoint of its existence.²

The Challenge Action resulted in an Order of the Circuit Court entitled “Petitioner’s Proposed Order” purporting to vacate the arbitration result, remand for a new arbitration hearing before an entirely different arbitrator, and limit the matters that could be raised in the new arbitration. *See* Exhibit 2. A motion to reconsider was filed (again, unknown to and unauthorized by Lifepoint) on August 16, 2021 (Exhibit 12) leading to the second order of Judge Manning dated November 23, 2021 (“November 23 Order”). (Exhibit 3.) It denied the motion’s request to rescind the August 4 Order vacatur. However, it granted Lifepoint’s request to correct the filed August 4 Order and directed the Clerk to enter an attached amended order, which amended order was, in fact, not attached to the reconsideration order and which no one ever received, and which was never (and to this day still has not been) entered by the Clerk on the docket in this case.

Over a month after the November 23 Order (which the Clerk never carried out by entering the revised, correct order on the docket), and after the passage of more than 30 days from Judge Manning’s signing of it and entry of it, Lifepoint learned for the first time about the Challenge Action when it received a notice that an all new arbitration proceeding would allegedly need to occur as a result of the Challenge Action. (Exhibit 8, ¶ 13.)

Lifepoint moved to dismiss (in essence set aside) the Orders of the Circuit Court vacating the arbitration decision on grounds, *inter alia*, of lack of personal jurisdiction of

² The details and supporting proof that Lifepoint was never served, never authorized any attorney to accept service or act on its behalf in the Challenge Action, and had absolutely no notice of its existence until called by the arbitration company to schedule a new arbitration is set forth in detail, with supporting exhibits, at pages 2-5 of Appellants’ Memorandum in Support of Appellate Jurisdiction filed July 31, 2023. References to exhibit numbers in this Petition are to the exhibits attached to that Memorandum. References to exhibit letters are to exhibits attached to this Petition.

Appellants.³ Lifepoint also requested in the alternative a ruling that the Order of the Circuit Court on the Motion to Reconsider be declared to be non-final because there had never been any final order sent out by the clerk with the attachment as ordered by the circuit court to occur. Had such declaratory relief been ordered, then Judge Manning's Orders could have been timely appealed.

On May 31, Judge Coble issued an Order (Exhibit 1) on Lifepoint's motion to dismiss the matter for lack of personal jurisdiction or for alternate declaratory relief. The order denied Lifepoint's defensive motion in its entirety and declined to set aside Judge Manning's orders by granting all of the relief claimed by APC and supposedly available under the South Carolina Uniform Arbitration Act ("the Arbitration Act") through the Challenge Action.

A. Judge Coble's Order is a Final, Appealable Order.

S.C. Code Ann. § 15-48-200(6) states:

- (a) An appeal may be taken from:
 - ...
 - (6) a judgment or decree entered pursuant to the provisions of this chapter [Chapter 48 of Title 15].

Id. S.C. Code Ann. § 14-3-330(1) states that an appeal lies from "final judgments" in law cases.

Judge Coble's order is a "judgment or decree" in the Challenge Action, a matter initiated and existing pursuant to the Arbitration Act, which is Chapter 48 of Title 15 of the South Carolina Code. It is a "final judgment" because all claims and defenses by all parties that were asserted in the Challenge Action have been resolved. *See Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942) (defining a final judgment as one that "dispose[s] of the cause, or a distinct branch thereof, as

³ As argued in its Memorandum regarding jurisdiction, pp. 5-6, Lifepoint's motion cited Rules 4(d)(3) and 12(b)(2), SCRCP, as grounds for its motion to dismiss, but the substance of the motion, given the status of the Challenge Action (petition to vacate granted and matter remanded for a new arbitration with a new arbitrator), was a motion under Rule 60(b) to set aside the circuit court's orders.

to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined”, *quoting 2 Am.Jur.* 860, Section 22.) Absolutely nothing remains for the Circuit Court to decide in the Challenge Action. APC filed the Challenge Action to achieve vacatur of the arbitrator’s decision. APC received its requested relief through Judge Manning’s two orders and Judge Coble’s subsequent denial of Lifepoint’s motion to set aside Judge Manning’s orders.

Because it was never properly served with the Challenge Action pursuant to S.C. Code Ann. § 15-48-170, had no notice of the Challenge Action’s existence, and, therefore, never had the ability to participate in its own defense prior to Judge Manning’s rulings, Lifepoint, upon receiving notice that the arbitrator’s order had been vacated and a new arbitrator and arbitration ordered, filed a motion attacking the jurisdiction of the Circuit Court to enter any orders or judgments binding it due to lack of personal jurisdiction and, alternatively, seeking a declaration that Judge Manning’s orders were not final for purposes of appeal due to the failure of the clerk to enter a final judgment as required by Rule 58, SCRPC. Judge Coble’s order, denying Lifepoint’s motion on its merits (respectfully, incorrectly) and declining to set aside Judge Manning’s orders and further declining to rule that Judge Manning’s orders were non-final, ends all proceedings as to all parties in the Challenge Action. The Challenge Action is complete. Any return of an underlying arbitrated dispute and decision to the circuit court would be by the initiation of a whole new action in the circuit court, presumably upon one or more of the grounds stated in S.C. Code Ann. §§ 15-48-120 – 15-48-140 and in the manner provided by S.C. Code Ann. § 15-48-170.

This Court’s order dismissing the appeal on the basis that it is interlocutory is contrary to fact and erroneous as a matter of law. The Challenge Action is complete, and nothing remains to be decided as to any issue or any party. A final judgment in the Challenge Action has been entered and is ripe for appeal. *Cf. Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning App.*, 340 S.C. 57, 530 S.E.2d 383 (2000) (reversing summary dismissal of appeal by the Court of Appeals from denial of motion under Rule 60(b)(1) and citing *Winesett v. Winesett*, 287 S.C. 332, 338 S.E.2d 340

(1985) for the proposition that “a denial of a Rule 60(b) motion is directly appealable”).

Rehearing, or rehearing *en banc* should be granted, the dismissal vacated, and the matter set for briefing and disposition on the merits of the appeal.

II. THE ORDERS OF THE CIRCUIT COURT ARE APPEALABLE PURSUANT TO S.C. CODE ANN. § 15-48-200 (3) AND (5).

S.C. Code Ann. § 15-48-200(3) & (5) state:

(a) An appeal may be taken from:

...

(3) An order confirming or denying confirmation of an award;

...

(5) An order vacating an award without directing a rehearing;

Id. Even assuming all three of the orders appealed from are individually or collectively interlocutory (which Lifepoint denies as set forth above), S.C. Code Ann. §§ 15-48-200(3) & (5) provide independent grounds for a right of immediate appeal of the orders of the circuit court in the Challenge Action. *See National Ave. Bldg. Co. v. Stewart*, 910 S.W. 2d 334, 340-41 (Mo. Ct. App. 1995) (holding that identical provisions in the Missouri Uniform Arbitration Act allow appeals from specific types of orders that apply independently of each other and holding that appeal is not precluded under any one applicable provision even if some other provision would preclude an appeal, thus harmonizing the provisions and preventing a situation where the process of vacatur of arbitrations and rehearings by arbitrators “could continue *ad infinitum*” without the appellate courts ever having an opportunity to review the correctness of the vacatur decision of the trial judge or, as in this case, the jurisdiction of the judge to act at all).

**A. THE ORDERS, INDIVIDUALLY AND COLLECTIVELY, EFFECTIVELY DENY
CONFIRMATION OF THE AWARD BY THE ARBITRATOR AND ARE SUBJECT TO
IMMEDIATE APPEAL.**

According to subsection 3 of the appeal provision of the Arbitration Act, any order denying confirmation of an arbitration award is immediately appealable. APC sought, and Judge

Manning (who decisions were deemed final by Judge Coble⁴) granted vacatur of the arbitration award in this case under the terms of S.C. Code Ann. § 15-48-130, setting forth the grounds governing vacatur of an arbitration award. Assuming for sake of argument only (which Lifepoint denies) that Lifepoint was subject to personal jurisdiction and was represented in the Challenge Action, the papers submitted in opposition to APC's petition expressly requested denial and dismissal of APC's petition. Subsection (d) of that statute states that if, as requested by Lifepoint, a petition to vacate is denied and dismissed, "the court shall confirm the award." S.C. Code Ann. § 15-48-130(d). By the plain language of the statute, confirmation is not discretionary. By granting the vacatur petition of APC and denying the relief requested in the opposition filed to the petition, the circuit court effectively entered orders "denying confirmation of an award," thus triggering the right of appeal from the circuit court's orders under S.C. Code Ann. § 15-48-200(3).

B. THE ORDERS, INDIVIDUALLY AND COLLECTIVELY, VACATE THE ARBITRATOR'S AWARD WITHOUT DIRECTING A REHEARING AS PRESCRIBED BY THE ARBITRATION ACT AND ARE, THEREFORE, SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 15-48-200(5).

According to subsection 5 of the appeal provision of the Arbitration Act, any order vacating an arbitration award without directing a rehearing is immediately appealable. The Arbitration Act does not, however, bestow upon a trial court a freewheeling power to direct rehearing in any manner it chooses. Rather, the power to order a rehearing and its effectiveness is specifically circumscribed by S.C. Code Ann. § 15-48-130(c), which states:

In vacating the award on grounds other than stated in item (5) of subsection (a) [which is inapplicable in this case] the court may order a rehearing before new arbitrators *chosen as provided in the agreement*, or in the absence thereof, by the court in accordance with § 15-48-30, or, if the award is vacated on grounds set forth in items (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 15-48-30.

⁴ Judge Manning was retired and unavailable to hear Lifepoint's motion.

Id. In the Challenge Matter, Judge Manning (whose orders were deemed to be final by Judge Coble) apparently vacated the arbitrator's order based on the grounds set forth in S.C. Code Ann. § 15-48-130(a)(3) & (4). (Exhibit 2, pp. 5-7.) However, the Order goes beyond simply vacating the arbitration award and, contrary to the agreement between the parties and its arbitration provision, Article 23, (Exhibit A, excerpts attached) which prescribes a single arbitrator and application of the American Health Lawyers Association Alternative Dispute Resolution Rules of Procedure for Arbitration (Exhibit B, excerpts attached),⁵ purports to dictate the appointment of the new arbitrator and restrict or condition the ability of any new arbitrator to conduct the arbitration in accord with those rules. (Exhibit 2, ¶¶ 29, 30.)

For instance, the Rules prescribe the circumstances for removal of an arbitrator (Section 4.5) and the process for selecting a new arbitrator (*See* sections 3.2-3.4, 4.7). Importantly, Section 3.1 of the Rules state that “the arbitrator, once appointed, shall have power to determine his or her jurisdiction *and any issues of arbitrability*.” (emphasis added). Section 4.1 empowers the arbitrator, not the trial court remanding the case, to “take any actions and make any decisions that are necessary and proper to conducting a fair and efficient arbitration under the Rules.” Also, when an arbitrator is replaced, Section 4.7 of the Rules states “[g]enerally, a replacement arbitrator will conduct an arbitration de novo. However, the parties may agree to alternative arrangements.” The agreement of the parties does not empower the trial court to dictate how the new hearing before the new arbitrator will be conducted. As stated in S.C. Code Ann. § 15-48-

⁵ According to the Rules, section 1.1, the applicable version of the Rules is the one in effect at the time the arbitration action is filed with the American Health Lawyers Association. The arbitration in this case was filed in 2018 and the excerpts attached as Exhibit B are from the version of the Rules then applicable effective April 30, 2017.

130(c), it is the agreement of the parties that dictates the terms of any new arbitration before any newly chosen arbitrator chosen in accord with the terms of the agreement.

Here, because Judge Manning's orders, declared to be final by Judge Coble, are inconsistent with the statute prescribing how a rehearing shall be ordered, there is no effective rehearing prescribed as envisioned by the statute. Thus, the orders are immediately appealable pursuant to S.C. Code Ann. § 15-48-200(5).

This Court's order dismissing the appeal on the basis that it is interlocutory is contrary to the specific directives that such an order, either effectively denying confirmation of the arbitrator's award or vacating and remanding for rehearing in a manner contrary to the prescriptions of the Arbitration Act, gives rise to a right of appeal under subsections (3) and (5) and is, therefore, erroneous as a matter of law. Rehearing, or rehearing *en banc* should be granted, the dismissal vacated, and the matter set for briefing and disposition on the merits.

CONCLUSION

For the reasons set forth above, in Lifepoint's Notice of Appeal, and in its Memorandum in Support of Appellate Jurisdiction and its supporting exhibits, the Court should grant rehearing or rehearing *en banc* in this matter, vacate its order of dismissal of the appeal as interlocutory, and set the matter for full briefing and disposition on the merits and ultimately vacate the orders of the circuit court and remand the matter for dismissal for lack of person jurisdiction or, alternatively, entry of a declaratory judgment that the orders of Judge Manning are not final judgments and are subject to appeal in due course.

[Signatures Next Page]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/C. Mitchell Brown
C. Mitchell Brown, Esq.
William C. Wood, Jr., Esq.
Meridian Bldg., 17th Floor
1320 Main Street
P.O. Box 11070 (29211)
Columbia, SC 29201
mitch.brown@nelsonmullins.com
bill.wood@nelsonmullins.com

September 28, 2023

Attorneys for Petitioners

Exhibit A

NOTICE REQUIRED BY SECTION 15-48-10 OF THE SOUTH CAROLINA CODE OF LAWS, 1976, IS HEREBY GIVEN THAT THE FOLLOWING AGREEMENT IS SUBJECT TO ARBITRATION.

**MEDICAL DIRECTOR AND EXCLUSIVE AGREEMENT FOR
GENERAL ANESTHESIOLOGY SERVICES**

THIS MEDICAL DIRECTOR AND EXCLUSIVE PROFESSIONAL SERVICES AGREEMENT FOR GENERAL ANESTHESIOLOGY SERVICES (the "Agreement") is entered into to be effective as of April 15, 2014 (the "Effective Date"), by and between Sisters of Charity Providence Hospitals (the "Hospital") and Anesthesiology Professionals of Columbia, LLC ("APC").

Introduction. Hospital is the owner and operator of acute care hospital facilities in Richland County, South Carolina. For purposes of this Agreement, "Hospital" shall include Providence Hospital Downtown and Providence Orthopaedic Hospital.

Hospital provides services in its medical and surgical departments (collectively the "Department") which includes both inpatient and outpatient surgery that require the services of general anesthesiologists. The general anesthesiology services¹ provided in the Department and covered by this Agreement are set forth in the attached Exhibit A (the "Anesthesia Services").

APC (or "Group") employs or otherwise engages physicians who shall exclusively provide Anesthesia Services to Hospital, who are duly qualified and licensed South Carolina physicians, and who, on the basis of training, experience, and continued medical education, are knowledgeable in providing Anesthesia Services ("Physicians"). A list of Group Physicians is attached hereto as Exhibit B. Group also employs or otherwise engages certified registered nurse anesthetists (CRNA's) who shall assist Physicians in the provision of Anesthesia Services, who are duly qualified and licensed South Carolina CRNAs, and who, on the basis of training, experience, and continued medical education, are knowledgeable in providing assistance to the Physicians in the provision of Anesthesia Services. A list of Group CRNAs is attached hereto as Exhibit B-1. For purposes of this Agreement, the term "Group" shall include the Physician(s), and Physician(s) shall also be obligated to comply with all requirements and fulfill all obligations assigned to "Group" under this Agreement. Where applicable, for purposes of this Agreement, the term "Physician" shall also include and apply to CRNA(s), and CRNA(s) shall be obligated to comply with all applicable requirements and fulfill all applicable obligations assigned to "Group" or "Physician" under this Agreement. In addition to other responsibilities and obligations hereinafter set forth, Group shall be responsible for ensuring Physician(s) perform Anesthesia Services in compliance with the terms of this Agreement.

¹ Please note that this Agreement does not apply to cardiac anesthesia services as Hospital contracts separately with a different physician group for cardiac anesthesia services.

Upon written request of the United States Secretary of Health and Human Services or the Comptroller General or any of their duly authorized representatives, the parties will make available those contracts, books, documents, and records necessary to verify the nature and extend of the costs of providing services under this Agreement. Such inspection shall be available up to five (5) years after the rendering of such services. If, after receiving the Hospital's written consent as required by Article 5 of this Agreement, the Group carries out any of the duties of this Agreement through a subcontract with a value of \$10,000 or more over a twelve (12) month period with a related individual or organization, the parties agree to include their requirements of Public Law 96-499, Sec.952 (Sec. 1861 (v) (1) of the Social Security Act) and the regulation promulgated thereunder. No attorney-client, accountant-client, or other legal privilege will be deemed to have been waived by the Hospital, Group, or any Physicians by virtue of this Agreement.

ARTICLE 23 DISPUTE RESOLUTION

In the event of any controversy or claim arising out of or relating to this Agreement, including any and all claims of Physicians arising out of the Group's engagement hereunder, whether such claim or controversy is brought in tort, contract or otherwise, or the breach, termination or validity of this Agreement, the parties will attempt in good faith to resolve such controversy or claim. If the matter has not been resolved within sixty (60) days of the commencement of such discussions (which period may be extended by mutual agreement), then the parties hereby agree to immediately submit the controversy to binding arbitration. The arbitration shall be conducted by a single arbiter in accordance with the American Health Lawyers Association Alternative Dispute Resolution Rules of Procedure for Arbitration. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Each party shall bear its share of the expenses and attorneys' fees incurred in the arbitration and any action to enforce the arbitration award as determined by the arbitrator. The place of arbitration shall be Columbia, South Carolina.

ARTICLE 24 CATHOLIC DIRECTIVES

The Parties acknowledge that the Hospital is an institution operated in accordance with The Ethical and Religious Directives for Catholic Health Facilities as approved by the National Conference of Catholic Bishops. Notwithstanding any provisions of this Agreement to the contrary, the parties shall not provide services or participate in activities during the course of their performance under this Agreement that are inconsistent with the medical ethics or precepts of the Catholic Church.

ARTICLE 25 SURVIVABILITY

Any term or condition of this Agreement that requires or might require performance after termination of this Agreement shall survive such termination.

Exclusive Agreement for
General Anesthesiology Services
Page 18 of 43

APC 0108

Exhibit B

Rules of Procedure for **Commercial Arbitration**

These rules apply to claims received on or after April 30, 2017

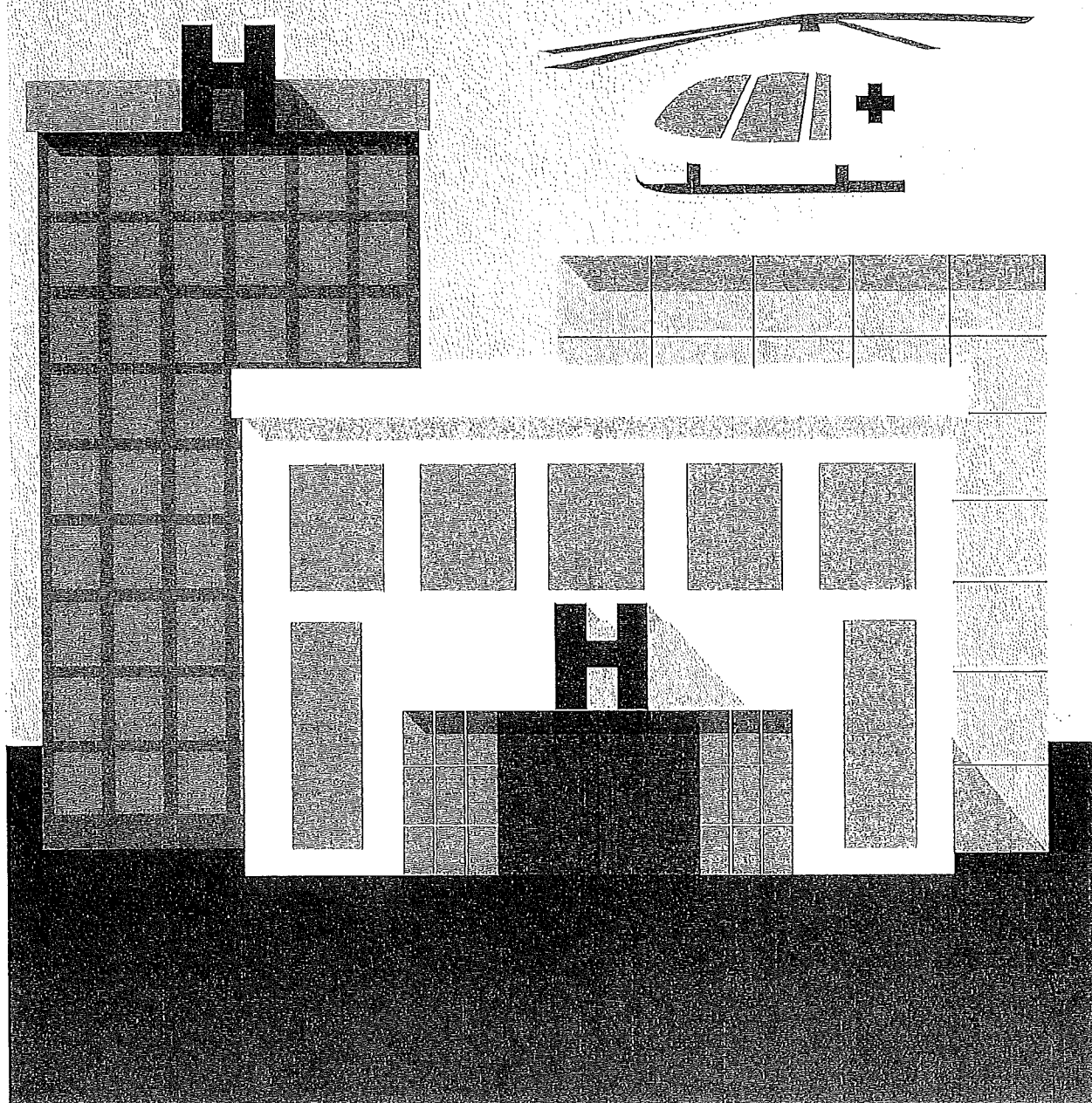
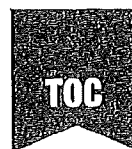


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Section 1: Policies

1.1 Applicable Version of Rules

A claim will be arbitrated in accordance with the version of these rules (Rules) posted on the website of the American Health Lawyers Association (AHLA) on the date a claim is filed. Any reference to the Rules of the American Health Lawyers Association Dispute Resolution Service will be deemed to be a reference to such version of the Rules.

These Rules apply to any contract that invokes arbitration under the Rules of the American Health Lawyers Association unless the claim constitutes a Consumer Case, as that term is defined in the Rules of Procedure for Consumer Arbitration, or an Employment Case, as that term is defined in the Rules of Procedure for Employment Arbitration.

1.2 Electronic Case Management System

- (a) **APPLICABILITY.** Parties, party representatives, the Administrator (defined in Section 1.6), and the arbitrator (once appointed), will transmit written messages and documents regarding a case through AHLA's Electronic Case Management System (ECM).
- (b) **NOTICE.** A message is deemed to have been received by the person(s) to whom it is addressed on the next business day after it is sent through the ECM. A party or party representative is deemed to have notice of the contents of any message sent to it through the ECM.
- (c) **FILING.** A document is deemed to have been filed on the day it is transmitted (uploaded) to the ECM.
- (d) **SERVICE.** A document is deemed to have been served one business day after notice is sent to a party at the email address listed for this party in the ECM.
- (e) **OPTING OUT.** A party or party representative may opt out of using the ECM if it agrees to pay all the additional direct and indirect costs associated with communicating through hard copy documents. AHLA will provide a price list upon request, and will consider claims of indigence in applying and/or adjusting such price list.

1.3 Representation

Parties may designate a representative. The claimant should designate its representative on the claim form. Any party may designate a primary representative, designate additional representatives, change its representative, or withdraw a repre-

Section 3: Appointment of an Arbitrator

3.1 Criteria

If the filing party (Claimant) produces a document that arguably requires arbitration of the claim under the Rules, the Administrator will appoint an arbitrator pursuant to the process described in this Section. After receiving appropriate evidence and argument, the arbitrator, once appointed, shall have the power to determine his or her jurisdiction and any issues of arbitrability.

3.2 Appointment Process

The appointment process begins after the requirements in Section 2 have been met. Unless the parties agree otherwise in writing, the Administrator will appoint a single, neutral arbitrator through the process set forth in the Rules.

- (a) **NUMBER OF CANDIDATES.** In its Demand for Arbitration, the filing party may request and pay for a list of either five (5) or ten (10) proposed arbitrators (candidates). If the filing party requests only five (5) candidates, the responding party may expand the list to ten (10) candidates by paying an additional fee, as established by the Administrator.
- (b) **RANKING SHEET.** The Administrator will provide a list of candidates (Ranking Sheet) based on information provided by the Claimant in the Demand for Arbitration and any additional information a responding party may choose to provide.
- (c) **CANDIDATE PROFILES.** The Administrator will provide the parties with the profiles and resumes of all candidates. Profiles and resumes are completed by candidates, AHILA does not verify the information in profiles and resumes and does not warrant that they are accurate, current, or complete.
- (d) **REVIEW OF CANDIDATES.** In ranking candidates, parties should carefully assess the candidates' qualifications and experience. Parties may contact candidates directly to inquire about their suitability and their availability for appointment. Such contacts must be in writing, and a copy of any such communication must be provided to the other party(ies). When corresponding with candidates, parties may disclose the general nature of the question in dispute in the case, but may not discuss its merits.

Section 3

- (e) **INELIGIBLE CANDIDATES.** A candidate is ineligible to arbitrate a claim only if it would be unethical or impossible for him or her to do so. If a party believes a single candidate is ineligible, it should strike him or her. If a party believes two (2) or more candidates are ineligible, it may petition the Administrator to replace them with eligible candidates and provide a new Ranking Sheet. The Administrator will grant such a petition only if it is clearly established, in the sole discretion of the Administrator, why the candidate(s) to be replaced would be ineligible.
- (f) **RANKING CANDIDATES.** Within ten (10) days after receiving a Ranking Sheet and profiles, parties must rank the candidates sequentially in order of preference in the ECM. The most highly desired candidate should be ranked "1," the second choice should be ranked "2," etc. Parties may strike no more than one (1) candidate. If a party fails to timely submit rankings in accordance with these rules, the Administrator shall send notice that, if the party fails to submit rankings within five (5) days of the posting of the notice, the Administrator will appoint an arbitrator or panel based upon whatever rankings it has received by that date.
- (g) **SELECTION PROCESS.** After removing any candidate struck from the list by a party, the Administrator will select the candidate with the lowest combined score from Ranking Sheets completed on time. The process used in the event of a tie score is illustrated in Exhibit 1.

3.3 Acceptance of Appointment

Within five (5) days after receiving an offer of appointment from the Administrator, a candidate who has been selected must complete the Arbitration Disclosure Checklist and decide whether or not to accept the appointment. The Administrator may grant a reasonable extension of time.

A candidate accepts an appointment by completing an Arbitrator's Acceptance Form in the ECM. If a candidate does not accept the appointment within the five (5) day period, and no extension has been granted, the Administrator will offer it to the candidate with the next lowest ranking. The Administrator will repeat this process until an arbitrator is appointed.

3.4 Appointment Date

The Appointment Date is the date on which an arbitrator's acceptance of appointment is uploaded to the ECM. If a panel has been appointed, the Appointment Date is the date on which the third arbitrator's acceptance of appointment is uploaded to the ECM.

3.5 Arbitration Panels

- (a) **DEFAULT PROCESS.** Parties may agree to appoint a panel of three (3) arbitrators. Unless they specify otherwise, parties will each select a single arbitrator from a list of five (5) or ten (10) candidates provided by the Administrator, and these two (2) arbitrators will select a third arbitrator from this same list of candidates. If the parties designate the same candidate as their top choice, this candidate becomes the panel chair (Chair), and the parties' second choices become the other two panel members.
- (b) **PRESUMPTION OF NEUTRALITY.** If the two (2) selected arbitrators cannot agree on a third arbitrator, the Administrator will appoint a third from the list of candidates. All three (3) arbitrators shall be neutral unless, prior to the appointment date, the Administrator receives a written agreement stating that the party-appointed panelists will not be neutral.
- (c) **PANEL CHAIR.** The third arbitrator (or consensus choice, as determined under Section 3.5(a)) will serve as the Chair. The Chair manages the arbitration process and presides at the hearing. The panel will decide all matters by majority vote except to the extent that the parties agree to have the Chair serve as the sole arbitrator of procedural and/or evidentiary issues.

3.6 Alternative Selection Processes

If the parties agree in writing to an alternative process for selecting an arbitrator, and the validity and interpretation of such agreement are not in dispute, the Administrator will not permit a party to delay or avoid arbitration by failing to abide by the agreement.

Illustration: Party A and Party B agree to appoint an arbitrator directly (on their own) from a list of ten (10) candidates provided by AHILA, and they agree that their direct appointments will select a third arbitrator from this list. Party A fails to appoint an arbitrator within the prescribed period.

The Administrator will offer appointments to the arbitrators as ranked 1 and 2 by Party B. These two arbitrators will select the third.

Section 4: Arbitrators

4.1 Conduct

- (a) **POWERS AND DUTIES.** An arbitrator has the power to:
- (1) determine his or her powers and duties under an arbitration clause;
 - (2) interpret the Rules to the extent that they relate to his or her powers or duties;
 - (3) sanction parties for failing to comply with any orders of the arbitrator or any obligations under the Rules;
 - (4) stay or dismiss proceedings for good cause, which may include agreement of the parties; and
 - (5) take any actions and make any decisions that are necessary and proper to conducting a fair and efficient arbitration under the Rules.
- (b) **ETHICS.** Arbitrators must comply with the Code of Ethics for Arbitrators in Commercial Disputes.
- (c) **SETTLEMENT AND MEDIATION.** Arbitrators should encourage parties to discuss settlement on their own or with the assistance of a mediator. However, arbitrators should not pressure parties to settle, express a point of view on settlement, or participate in settlement discussions. An arbitrator may mediate only as provided in the *Guidelines for Mediation-Arbitration (Med-Arb) and Arbitration-Mediation (Arb-Med)* set forth in Exhibit 2.

4.2 Ex Parte Communication

- (a) **GENERAL RULE.** Except as provided in paragraphs (b) and (c) below, once an arbitrator is appointed he or she may not communicate with a party unless all other parties participate in the conversation or exchange of written messages.
- (b) **NON-NEUTRAL ARBITRATORS.** Parties who have agreed to the use of non-neutral arbitrators may agree to permit *ex parte* communications with such non-neutral arbitrators. Arbitrators are regarded as non-neutral when all parties expect them to be predisposed toward the party appointing them.
- (c) **FAILURE TO PARTICIPATE.** If, after receiving notice, a party fails to participate in a teleconference or video conference or fails to appear at a hearing, an arbitrator may communicate with the participating parties despite that party's absence.

4.3 Case Management

- (a) **DEFAULT TIMEFRAME.** Except as provided below, an arbitrator should use reasonable efforts to issue a Final Award within twelve (12) months after the Appointment Date. Arbitrators should schedule pre-hearing proceedings and hearings accordingly.
- (b) **EXPEDITED REVIEW.** If the parties jointly request expedited review, the arbitrator should make best efforts to issue a final award within ninety (90) days after the Appointment Date.
- (c) **EXCEPTIONAL CASES.** If an arbitrator determines that a case is unusually complex, or that a delay is necessary for other reasons, the arbitrator may allow more time for either pre-hearing proceedings or a hearing. However, arbitrators should exercise their discretion sparingly to permit further delay.
- (d) **TIMEFRAMES.** The arbitrator may extend any timeframe for good cause but should endeavor to do so sparingly. Failure of the arbitration to adhere to any timeframe specified herein shall not result in loss of jurisdiction or invalidate an arbitration award.

4.4 Review Board

- (a) **PURPOSE.** The Review Board (RB) and its designated Review Panel(s) will rule on petitions to remove an arbitrator under Rule 4.5.
- (b) **APPOINTMENT.** When the Review Board is initially constituted, the President of AHLA will appoint two (2) Senior Arbitrators to serve two-year terms; two (2) to serve three-year terms; and one (1), who will be appointed as the Review Board Chair (RB Chair), to serve a four-year term. Thereafter, the President will fill vacancies by appointing Senior Arbitrators, including the RB Chair, to three-year terms. Non-chairs serving on the Review Board will be eligible for appointment to serve as RB Chair. Individuals will be eligible to serve multiple terms on the Review Board, provided that three (3) years have elapsed since their last term of service ended.
- (c) **QUALIFICATIONS.** All Senior Arbitrators must have significant experience in the arbitration, litigation, or mediation of health law disputes.*

*Prior to June 28, 2017, Senior Arbitrators were required to have sat as an arbitrator in at least twenty cases.

Section 4

- (d) **REVIEW PANELS.** When the Administrator notifies the RB Chair that a petition under Rule 4.5(c) requires review, the RB Chair will designate a panel of three (3) Senior Arbitrators drawn from the current RB. This panel may or may not include the RB Chair. In deciding which Senior Arbitrators to select, the RB Chair may take into account their availability, expertise, actual or perceived conflicts of interest, and any other factors relevant to ensuring a well-reasoned and impartial decision. If the RB Chair is not a member of the panel, the RB Chair will designate a Senior Arbitrator as the lead panelist. The lead panelist will preside and perform all administrative functions. The panel will decide substantive matters by majority vote.
- (e) **COMPENSATION.** Senior Arbitrators will receive no compensation for reviewing petitions under Rule 4.5 (Removing an Arbitrator).
- (f) **ETHICS.** When serving on a Review Panel, Senior Arbitrators must comply with the Code of Ethics for Arbitrators in Commercial Disputes.

4.5 Removing an Arbitrator

A party who believes an arbitrator is unfit to serve because of a conflict of interest, a mental or physical impairment, or conduct that calls his or her fairness or impartiality into question, may pursue the following options:

- (a) **UNANIMOUS CONSENT.** If all of the parties request an arbitrator to withdraw, the arbitrator must do so. (Code of Ethics, Canon II (G)).
- (b) **WITHDRAWAL.** A party may request an arbitrator to withdraw in writing, served upon the Administrator, the arbitrator and all other parties. In responding to such a request, an arbitrator should be guided by Code of Ethics Canon II (G)(2).
- (c) **REMOVAL.** A party may file a petition with the Administrator requesting the Review Board to remove the arbitrator. Other parties may file a response with the Administrator within fifteen (15) days of service. If the petitioner so requests, neither the Review Panel nor any party may inform the arbitrator of the petition. In ruling on the petition, however, the Review Panel will consider the arbitrator's lack of opportunity to respond. If the Review Panel grants a petition, it will inform the arbitrator why he or she was removed. The Review Board will not assess costs and expenses for reviewing a petition for removal unless it determines the petition was frivolous.

4.6 Exigent Circumstances

A party may petition the Administrator to have the proceedings suspended while a petition for removal is being reviewed in accordance with Rule 4.5 (c), if delay is likely to cause irreparable harm. Neither the Review Panel nor any party may inform the arbitrator of this petition.

4.7 Replacing an Arbitrator

If an arbitrator is removed pursuant to Rule 4.5, or an arbitrator becomes unable or unwilling to serve, the Administrator will replace the arbitrator as follows:

- (1) The Administrator will ask the parties whether they can agree on a replacement.
- (2) If the parties cannot agree, and the original arbitrator was chosen from a Ranking Sheet (see Rule 3.2), the Administrator will select the candidate with the next lowest combined score, and, if necessary use the tie-breaking procedures set forth in Exhibit 1.
- (3) If no Ranking Sheet is available, the Administrator will create a new one based on the parties' preferences and request the parties to complete the new Ranking Sheet.
- (4) Generally, a replacement arbitrator will conduct an arbitration de novo. However, the parties may agree to alternative arrangements.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 18, 2024

Mr. C. Mitchell Brown, Esquire
PO Box 11070
Columbia SC 29211

Re: Anesthesiology Professionals of Columbia, LLC v. Lifepoint Health
Appellate Case No. 2023-001058

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script that reads "Catherine Harrison, deputy".

CLERK

cc: William C. Wood, Jr., Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire

The South Carolina Court of Appeals

Anesthesiology Professionals of Columbia, LLC,
Respondent,

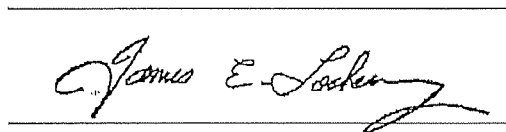
v.

Lifepoint Health d/b/a Providence Health and Providence
Hospital, LLC, Appellant.

Appellate Case No. 2023-001058

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
James Mixon Griffin, Esquire
Margaret Nicole Fox, Esquire

FILED
Mar 18 2024