THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP-27-0331

Phillip Flexon, M.D. ..... Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is ..... Appellant.

REPLY BRIEF OF APPELLANT

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I. APPELLANT HAS PRESERVED ITS RIGHT TO INDEPENDENTLY SEEK ARBITRATION UNDER THE TERMS OF THE AGREEMENT AND PRESENT ITS OWN EVIDENCE OBTAINED THROUGH DISCOVERY IN ORDER TO PROVE THAT THE MEDICAL SERVICES PERFORMED BY RESPONDENT UNDER THE TERMS OF THE AGREEMENT IN FACT INVOLVED OR AFFECTED INTERSTATE COMMERCE AND THERFORE TRIGGERED THE FEDERAL ARBITRATION ACT.

The record is clear that Appellant did not present any argument or litigate any of the facts and arbitration issues presented to Judge Buckner at CCMC's June 9, 2010 arbitration motion hearing, or subsequently on CCMC's appeal. At the June 9, 2010 hearing, Appellant was expressly instructed by Judge Buckner to file its own motion if Appellant wanted to pursue enforcing the arbitration provision in the Agreement against Respondent. (Buckner Tr. at 18 ll. 2-6). The record also clearly reflects that Appellant was not a party to CCMC's appeal, and this fact was also acknowledged by Respondent in his appellate filings. (Resp't Br. at 8).

Moreover, under the Consent Orders[1], as more fully described in Appellant's Initial Brief, Appellant has not only preserved its right to independently seek arbitration, but has preserved its right to engage in discovery and receive the benefit of Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce. (See Appellant's Arb. Mot.;

[1] The Consent Orders specifically provide: "The parties and this Court recognize that [Appellant] may move to compel arbitration, and that this consent order in no way constitutes a waiver of [Appellant's] asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of [Appellant's] asserted right to arbitration. The [Respondent] also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden."

Appellant's Arb. Mot. Reply Mem. Exhibit A). Even Judge Goldsmith ruled at the September 9, 2013 hearing that Appellant was not bound by the prior findings and ruling against CCMC with respect to Appellant's right to independently seek to enforce the arbitration provision contained in the Agreement. (See Goldsmith Tr. at 52). And, in direct contrast to the arguments submitted in Respondent's Initial Brief, counsel for Respondent specifically stated during the September 9, 2013 hearing before Judge Goldsmith that he was not claiming or arguing that Appellant had waived any of these rights. (Goldsmith Tr. at 45 ll. 12-17).

As advocated by counsel for Respondent, and specifically consented to in the Consent Orders by Respondent, Appellant pursued discovery, including obtaining the deposition testimony of Respondent which revealed previously undisclosed facts that support arbitration. Appellant has prosecuted its arbitration motion pursuant to prior directives and orders of the Circuit Court. As a result, Appellant renewed its arbitration motion on May 31, 2013. The record is clear that Appellant's arbitration motion and argument at the September 9, 2013 hearing before Judge Goldsmith was not identical to the motion and argument of CCMC to Judge Buckner on June 9, 2010.

Appellant's right to seek and obtain an order compelling arbitration under the terms of the Agreement has never been substantively decided, rather, Appellant's arbitration rights have continuously been preserved by orders of the Circuit Court with the express consent of Respondent.

II. JUDGE GOLDSMITH'S LEGAL FINDINGS ARE NOT SUPPORTED BY THE FACTS IN THE RECORD WHICH PROVE THAT THE MEDICAL SERVICES PERFORMED BY RESPONDENT UNDER THE TERMS OF THE AGREEMENT WERE NOT CONFINED TO LOWCOUNTRY SOUTH CAROLINA RESIDENTS BUT IN FACT INVOLVED PROVIDING MEDICAL SERVICES TO BOTH SOUTH CAROLINA AND GEORGIA RESIDENTS.

Judge Goldsmith made the legal finding that "the facts and testimony from the [Respondent's] deposition argued by the Defendants herein are not substantially different than those before the court in the prior ruling." (Goldsmith Order at 7-8). In support of this legal finding, Judge Goldsmith adopted the prior factual findings of Judge Buckner that the "[Agreement] at issue is between a Hardeeville resident and a Hardeeville medical center ***to provide specialized care to patients of Lowcountry South Carolina***."[2] (Emphasis added) (Goldsmith Order at 4).

However, it is evident from the uncontradicted deposition testimony of Respondent, as set forth in Appellant's Initial Brief, that Respondent ***was required under the terms of the Agreement*** to provide, and did in fact provide, medical services to patients ***in both Georgia and South Carolina***. The facts in the record before Judge Goldsmith are undisputed[3] and prove beyond doubt that the Agreement

[2] Respondent represented to Judge Buckner that the Agreement "does not involve-- I mean it involved employment of a Jasper County doctor to a Jasper County hospital to render services to Jasper County residents. I mean, in point of fact, that's what we're talking about." (Emphasis added) (Buckner Tr. at 12 ll. 19-22; see also Resp't Opp'n Mem. at 5 where Respondent states that the "[Agreement] at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care ***to patients of lowcountry South Carolina.***" (Emphasis added)).

[3] During the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent did not argue in any way against whether or not interstate commerce was implicated by the admissions of the Respondent in his deposition testimony. (See Goldsmith Tr. at 47 where counsel for Respondent states "Now, Your Honor, I'm not here today to argue whether or not interstate commerce was implicated.")

was not simply between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

Judge Goldsmith's legal findings as to the determination of arbitration under the terms of the Agreement are subject to *de novo* review. See Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 661, 521 S.E.2d 749, 751 (Ct. App. 1999) (citing City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981)).

Based upon the uncontradicted deposition testimony of Respondent, it is apparent that the legal findings of Judge Goldsmith were not supported by the evidence in the record.

III. THE SWORN DEPOSITION TESTIMONY OF RESPONDENT SUBMITTED BY APPELLANT TO JUDGE GOLDSMITH IS A MATERIAL CHANGE IN THE FACTUAL RECORD WHICH CONTRADICTS THE FACTS PRESENTED TO AND RELIED UPON BY JUDGE BUCKNER AND THIS COURT OF APPEALS.

Unlike before Judge Buckner and previously this Court of Appeals, the Respondent has now *admitted* interstate commerce activity while performing duties under his Agreement. Specifically, Respondent's sworn testimony at deposition contradicted the information presented to and relied upon by Judge Buckner and this Court of Appeals.

The factual record before Judge Buckner, which included the express representations of Respondent, was that performance of the Agreement purely involved "employment of a Jasper County doctor to a Jasper County hospital to render services to Jasper County residents." Counsel for Respondent vigorously represented to Judge Buckner and to this Court of Appeals that the medical services performed by Respondent under the Agreement were confined to only South Carolina citizens and medical facilities in South Carolina. (Buckner Tr. at 12 ll. 15-22 & 14 ll. 23-25; Resp't Opp'n Mem. at 3). The factual representations of Respondent were material because Judge Buckner ultimately adopted the language supplied by Respondent word for word and ruled that the "employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to ***provide specialized care to patients of Lowcountry South Carolina.***" (Emphasis added) (Buckner Order at 5 & 6).

The facts and circumstances in the record now are materially different than what was before Judge Buckner. The facts in the record now clearly evidence that performance of the Agreement by Respondent while employed with the Coastal Carolina Medical Center was not confined to the State of South Carolina, but in fact involved ***and required*** providing medical services in both South Carolina and Georgia. As a result, the medical services performed by Respondent under the terms of the Agreement *in fact* involved or affected interstate commerce, and therefore, triggered the FAA.

CONCLUSION

For the foregoing additional reasons, Appellant Lifepoint Hospitals, Inc., respectfully requests that this Court reverse the order of the trial court below; enter stay of that litigation pending arbitration; and order the parties to arbitrate their dispute in accordance with the Agreement's terms.

Respectfully submitted,

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February 24, 2014

THE STATE OF SOUTH CAROLINA
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Phillip Flexon, M.D. ..... Respondent,

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PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is ..... Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing ***REPLY BRIEF OF APPELLANT*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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February 24, 2014

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February 24, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Phillip Flexon v. PHC-Jasper, Inc.
Appellate Case No. 2013-002498

Dear Ms. Kitchings:

Enclosed for filing please find an original and one (1) copy of the **Reply Brief of Appellant** and **Proof of Service** in the above-referenced case. Please file the originals and return a date-stamped copy of each to me in the enclosed self-addressed envelope provided.

Sincerely,

Moore & Van Allen, PLLC

Joseph T. Belton

JTB/hm
Enclosures

cc: William B. Harvey, III, Esquire
James Myrick, Esquire
Dana Lang, Esquire