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.

PETITION FOR REHEARING

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Lifepoint Hospitals, Inc.

Now Comes Appellant, Lifepoint Hospitals, Inc. (hereinafter "Petitioner"), by and through counsel, pursuant to SCACR 221(a) and hereby files this Petition for Rehearing as to the Opinion of the Court of Appeals (the "Court") filed on July 29, 2015.

STATEMENT OF THE CASE

On July 29, 2015, the Court filed Opinion No. 5336 (the "Opinion"), which affirmed the Order of Circuit Court Judge Brooks P. Goldsmith, Jr., dated September 24, 2013 (the "Goldsmith Order") denying Petitioner's motion to compel arbitration. The Court found that Petitioner had failed to convince the Court that Judge Goldsmith erred in denying Petitioner's motion to compel arbitration. The Court concluded that whether the result is based on the "law of the case" doctrine or on waiver, fundamental fairness requires Petitioner to be bound by this Court's opinion in *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) ("*Flexon I*"). (Ct. App. Op. p. 15).

In arriving at this conclusion, the Court made a number of rulings with respect to affirming the findings of the Goldsmith Order. First, the Court ruled that Petitioner had effectively abandoned or waived its right to compel arbitration (Ct. App. Op. pp. 9, 14-15). Second, the Court ruled that even though Petitioner presented facts substantially different from the facts presented to Circuit Court Judge Perry M. Buckner, III, and this Court in *Flexon I*, the Court ruled that the "law of the case" doctrine still applied and its decision in *Flexon I* was the law of the case. (Ct. App. Op. pp. 9-14). Third, the Court ruled that "fundamental fairness" requires Petitioner to be bound by this Court's decision in *Flexon I*. (Ct. App. Op. pp. 15).

Petitioner now moves this Court for a rehearing on the Court's rulings above based on the Court's misapprehension and misapplication of the arguments raised by Petitioner, the applicable law and the record on appeal which demonstrate that the Court should reverse the findings of the Goldsmith Order; enter stay of that litigation pending arbitration; and order the parties to arbitrate their dispute in accordance with the terms of the Physician Employment Agreement (the "Agreement") executed by Respondent Phillip Flexon M.D. on December 18, 2006.

REHEARING STANDARD

The scope of review for deciding a Petition for Rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221 of the South Carolina Appellate Court Rules states, "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the *points supposed to have been overlooked or misapprehended by the court.*" Rule 221, SCACR (2011) (emphasis added). In order to prevail on a petition for rehearing, appellants must demonstrate that the Court overlooked or misapprehended their argument. Jean H. Toal, et al., Appellate Practice in South Carolina 293 (Second ed. 2002) (*citing Kennedy v. South Carolina Retirement Sys.*, S.C. Sup. Ct. Order dated July 23, 2001). "The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." *Id.* (*citing* Rule 221(c), SCACR and Rule 224(i) SCACR).

ARGUMENT

I. THE COURT MISAPPREHENDED OR OVERLOOKED THE FACT THAT PETITIONER HAS AFFIRMATIVELY PRESERVED AND RESERVED ITS RIGHT TO COMPEL ARBITRATION AND HAS NEVER WAIVED OR ABANDONED THIS RIGHT.

A. Petitioner has preserved and reserved its right to compel arbitration.

Petitioner has never waived and has continuously preserved its right to compel arbitration in this matter without any prejudice to Respondent. First, Petitioner filed an Answer in response to Respondent's Complaint and therein asserted an affirmative defense that all of the causes of action alleged by Respondent were subject to an arbitration provision contained in the Agreement. (R. pp. 62, 70) (Ct. App. Op. p. 5). Second, Respondent has entered into four (4) Consent Orders which expressly address and preserve the ability of Petitioner to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. (R. pp. 145, 297-313). The Consent Orders specifically provide:

> The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant'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 Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.[1]

Under the Consent Orders, Petitioner 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. (R. pp. 145, 297-317).

[1]The four (4) Consent Orders are dated June 16, 2010, September 18, 2012, February 1, 2013, and July 2, 2013. The June 16, 2010 Consent Order initially says "the parties and this Court recognize that the Defendant has moved to compel arbitration" rather than "the parties and this Court recognize that one of the Defendants may move to compel arbitration" as provided in the other three (3) Consent Orders.

Moreover, during the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent stated he was not claiming or arguing that Petitioner had waived any of these rights.[2] (R. p. 948, lines 14-17):

As advocated by counsel for Respondent, and specifically consented to and agreed to in the Consent Orders by Respondent, Petitioner pursued discovery, including obtaining the deposition testimony of Respondent which revealed substantially different and material facts that support arbitration. It is without question that Petitioner has properly and diligently prosecuted its arbitration motion based on its multiple agreements with Respondent and pursuant to prior directives and orders of the circuit court. The Court's Opinion overlooks and/or misapprehends the express reservations involved in this case and its ruling is in direct contradiction to the reservations and agreements of the parties.

B. <u>Petitioner has not waived or abandoned its right to compel arbitration.</u>

South Carolina favors arbitration. *See General Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643 (Ct. App. 2001); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864 (Ct. App. 2000) ("The policy of the United States and this State is to favor arbitration of disputes."). The Federal Arbitration Act ("FAA") requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense to arbitrability.*" *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387, 759 S.E.2d 727 (2014) (emphasis added). "Thus, there is a presumption against finding a party has waived its right to compel arbitration." *Dean*, 408 S.C. at 388. A

[2]"I didn't claim waiver . . . I'm not claiming waiver now." (R. p. 948, lines 14-17).

"party seeking to prove a waiver of a right to arbitrate carries a heavy burden." *Id.* Specifically, the party seeking to avoid arbitration "must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* "South Carolina has primarily, though not exclusively, followed the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver." *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506 (Ct. App. 2003). As stated in *Rich*, "though a significant period of time did elapse between the filing of the complaint and the Bank's motion to compel arbitration (approximately 13 months), mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions." *Rich,* 357 S.C. at 72. "Concrete facts rather than speculative assertions are germane to a determination of waiver." *Id.* at 73.

In its Opinion, the Court highlighted *Dean* (cited above) which mandates that "a party seeking to prove a waiver of a right to arbitrate carries a heavy burden and must show prejudice . . . ." (Ct. App. Op. p. 14). In this matter, the Respondent has never made an argument that Petitioner was not entitled to bring its motion to compel arbitration. Moreover, the Respondent has never argued or shown prejudice as a result of Petitioner's efforts in pursuing its arbitration rights under the Agreement. In fact, the opposite is true. Respondent has entered into the four (4) Consent Orders wherein Respondent bargained for and agreed to the manner in which Petitioner has pursued arbitration and has expressly acknowledged that these efforts do not constitute prejudice or undue burden.[3] In addition, counsel for Respondent stated to Judge Goldsmith that

[3]"Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding." *Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46 (Ct. App. 1992). A "consent order is an agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement." *Johnson*, 310 S.C. at 46.

Respondent had not and was not making any claim of waiver. The record on appeal is clear that Petitioner has taken affirmative steps to protect its interests and has preserved its right to compel arbitration, all with and by the consent and agreement of the Respondent. There is no prejudice to Respondent.

Nevertheless, in its Opinion, the Court has offered the following suggestions of what Petitioner could have done in effort to pursue its motion for arbitration sooner: (1) Petitioner could have taken Respondent's deposition for the limited purpose of establishing the arbitrability of Respondent's claims; (2) Petitioner could have presented its own motion to compel arbitration or joined in Coastal's motion; or (3) Petitioner could have requested this Court to hold Coastal's appeal in abeyance until Petitioner's motion to compel could be heard. (Ct. App. Op. p. 15). As discussed in *Rich*, these are mere speculative assertions offered by the Court that do not evidence or prove actual prejudice to Respondent. These speculative assertions also are not supported by the factual and procedural history in this case. As mentioned above, Respondent has never argued or shown actual prejudice which is a fundamental element to prove waiver. In addition, the Court has not analyzed or ruled that Respondent has suffered any actual prejudice as a result of Petitioner's actions in pursuing its arbitration rights. Neither Respondent nor the Court can establish prejudice under the facts of this case.[4] The Court, therefore, misapprehended and/or misapplied the law of waiver and abandonment in its Opinion. Moreover, all of the Court's rulings in the Opinion which affirm the findings of the Goldsmith Order, which Petitioner addresses herein, are foundationally based on some

[4] In actuality, it is the Respondent, through the Consent Orders, who waived and abandoned his right to challenge Petitioner's ability to bring its motion to compel arbitration. The Court should not now interject an argument on behalf of the Respondent that the Respondent himself cannot rightfully and in fairness to Petitioner bring in this action.

misapprehended and/or misapplied waiver or abandonment reasoning. The Court's application of these principles, whether by themselves or through the "law of the case" doctrine, is in error. The Goldsmith Order should be reversed.

II. THE COURT MISAPPREHENDED OR MISSAPPLIED THE "LAW OF THE CASE" DOCTRINE IN AFFIRMING THE FINDINGS OF THE GOLDSMITH ORDER.

A. <u>The Court misapprehended or misapplied the "law of the case" doctrine in affirming the findings of the Goldsmith Order because the Court determined that Petitioner presented facts substantially different from the facts presented to Judge Buckner and this Court in *Flexon I*.</u>

Judge Goldsmith made the legal finding that "the facts and testimony from the [Respondent's] deposition argued by [Petitioner] are not substantially different than those before the court in the prior ruling." (R. pp. 31-32). 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.*"[5] (Emphasis added) (R. p. 28).

However, it is evident from the uncontradicted deposition testimony of Respondent, 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 are undisputed and prove beyond doubt that the Agreement was not simply between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

[5]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) (R. p. 386, lines 19-22); (*see also* R. p. 89, 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)).

In its Opinion, the Court, unlike Judge Goldsmith, determined that the following facts presented by Petitioner are substantially and materially different from the facts Respondent previously advocated to Judge Buckner and this Court:

> During his deposition, Respondent admitted his performance under the Agreement involved providing medical services in both South Carolina and Georgia. When asked about problems resulting from trying to transport a practice from Georgia to South Carolina, [Respondent] stated, '[T]he practice wasn't transported. The practice always existed in both states before and after. It really did. I mean, it was -- you know, it -- by -- by accident there's a river and a state line, but the practice always involved both states.' [Respondent] also stated that he had 'plenty of patients coming from Georgia.' Moreover, [Respondent] indicated that [Petitioner's] CEO, Eric Deaton, insisted [Respondent] remain on Memorial's staff. Therefore, [Respondent] often had to do rounds at both Coastal and Memorial.

(Ct. App. Op. pp. 6, 9).

Unlike before Judge Buckner and previously this Court, the Respondent has now *admitted* interstate commerce activity while performing duties under his Agreement. The factual misrepresentations of Respondent in the *Flexon I* decision 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) (R. pp. 11-12).

The Court ruled that the facts and circumstances in the record now are substantially and materially different than what was before Judge Buckner. In its Opinion, the Court ruled:

> For these reasons, the Court agrees with [Petitioner] that the deposition testimony presented to [Judge Goldsmith] shows facts that are substantially different from the facts presented to [Judge Buckner]. In his deposition, Respondent stated that [Petitioner's] CEO insisted [Respondent] remain on Memorial's staff. Therefore, [Respondent] often had to do rounds at both Coastal and Memorial. Unlike the facts presented to [Judge Buckner], these facts show that [Respondent's] performance of the Agreement required [Respondent] to provide medical services

> in two states. Further, the medium of a deposition was more conducive to a complete presentation of the facts than the interrogatory responses; hence, these two types of evidence were not necessarily 'of the same class and character.' *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957).

(Ct. App. Op. p. 14).

The Court cited *Nelson* which highlights the controlling law in South Carolina whereby the South Carolina Supreme Court has recognized that the "law of the case" doctrine ***does not apply*** when the evidence is substantially different on a second appeal, but then failed to properly apply that standard to the facts of this case. (Ct. App. Op. p. 12). In *Nelson*, the court stated that the "law of the case" doctrine:

> has no application where the facts relating to the question decided are substantially different on a second appeal. In order to escape the application of the doctrine, however, there must be a material change in the evidence. Additional evidence cumulative in nature will not take the case out of the rule and constitute a material change where evidence of the same class and character was considered on the former appeal. *Nelson,* 231 S.C. at 357.

(Ct. App. Op. p. 12).

"[A]s a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal, *provided the same facts and issues* which were determined in the previous appeal are involved in the second appeal. *But if the facts are different*, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings, or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal; and the original proceedings are before the Court on a second appeal so far as it is necessary to determine any new points in controversy between the parties which were not terminated by the

original decree." *Cohen v. Standard Acc. Ins. Co.*, 203 S.C. 263, 274-275, 17 S.E.2d 230, 234 (1941) (emphasis added).

In this matter, the Court has ruled that the facts presented by Petitioner are substantially different facts from those presented to Judge Buckner and this Court in *Flexon I.* As cited above, South Carolina law requires that the "law of the case" doctrine **has no application** where the facts relating to the question decided are substantially different on a second appeal. As such, this Court misapprehended or misapplied the "law of the case" doctrine in affirming the findings in the Goldsmith Order. The Goldsmith Order should be reversed.

B. <u>The Court misapprehended or misapplied the "law of the case" doctrine in ruling that Petitioner is precluded from re-litigating matters that were not raised or should have been raised in *Flexon I*.</u>

Petitioner's right to seek and obtain an order compelling arbitration under the terms of the Agreement has never been substantively decided, rather, Petitioner's arbitration rights have continuously been reserved and preserved by the Consent Orders. Even Judge Goldsmith ruled at the September 9, 2013 hearing that Petitioner was not bound by the prior findings and ruling against Coastal in *Flexon I* with respect to Petitioner's right to independently seek to enforce the arbitration provision contained in the Agreement. (R. p. 955).

The Court states in the Opinion that:

> We acknowledge the [Goldsmith Order] now on appeal includes language implying [Petitioner] waived its right to arbitration by engaging in discovery without reservation or limitation. However, this language was not the basis for the denial of [Petitioner's] motion to compel arbitration.

(Ct. App. Op. p. 9).

Nevertheless, in the Opinion the Court references and analyzes a line of cases which implies a Court ruling that Petitioner is precluded from independently seeking arbitration under the "law of the case" doctrine on account of either previously litigating issues in *Flexon I* or failing to present and litigate issues in *Flexon I.* (Ct. App. Op. pp. 9-11) (*e.g.* "Under the law-of-the-case doctrine, a party is precluded from re-litigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). The Court also concludes that "[Judge Goldsmith] properly concluded that [Petitioner's] failure to timely depose [Respondent] cannot now be grounds for re-argument of issues about ***which the parties*** spent two years litigating in the Court of Appeals." (Emphasis added) (Ct. App. Op. p. 14).

Petitioner did not present argument or litigate any of the facts and arbitration issues presented to Judge Buckner at Coastal's June 9, 2010 arbitration motion hearing, or subsequently on Coastal's appeal. On October 21, 2009, Coastal filed its own independent motion to compel arbitration and stay. At the June 9, 2010 hearing, Petitioner was expressly instructed by Judge Buckner to file its own motion if Petitioner wanted to pursue enforcing the arbitration provision in Agreement against Respondent. (R. p. 392, lines 2-6). The record also clearly reflects that Petitioner was not a party to Coastal's appeal, and this fact was also acknowledged by the Respondent in his appellate filings. (R. p. 134).

Subsequent to the June 9, 2010 hearing, Petitioner filed its own motion on June 17, 2010 to compel arbitration and to stay this matter pending arbitration. (R. p. 90). A hearing was scheduled following Remittitur to the circuit court from Coastal's prior

appeal. Petitioner withdrew its motion without prejudice and subject to its reserved discovery and motion rights in the Consent Orders. Thereafter on May 31, 2013, subsequent to Respondent's deposition, Petitioner renewed its motion for arbitration based on the deposition testimony.[6] The record is also clear that Petitioner's arbitration motion and argument at the September 9, 2013 hearing before Judge Goldsmith was not identical to the motion and argument of Coastal to Judge Buckner on June 9, 2010.

As discussed above, the Respondent has never challenged or made an argument that Petitioner was not entitled to bring its own motion to compel arbitration. Moreover, under the Consent Orders with the affirmative agreement of Respondent, entered into and agreed to by Respondent both before *Flexon I* and after *Flexon I*, Petitioner has preserved its right to receive the benefit of Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce. Lastly, the Court's ruling is also misplaced because the "law of the case" doctrine has no application in this matter because the Court has ruled that the facts presented by Petitioner are substantially different facts from those presented to Judge Buckner and this Court in *Flexon I*. The Court also cites the case of *White v. Murtha* to support Petitioner's conclusion, but then fails to apply its directive:

> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, ***unless the evidence on a subsequent trial was substantially different***, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. 377 F.2d 428, 431-32 (5th Cir. 1967) (emphasis added).

(Ct. App. Op. pp. 11-12). The Goldsmith Order should be reversed.

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[6]This was agreed to and consented to under the February 1, 2013 Consent Order (the third Consent Order, also subsequent to *Flexon I*) between Respondent and Petitioner.

C. **The Court misapprehended or misapplied the "law of the case" doctrine in ruling that Petitioner should have presented the deposition testimony to Judge Buckner in *Flexon I*.**

The Court ruled that the deposition testimony of Respondent should have been presented to Judge Buckner, and therefore, Judge Goldsmith did not commit reversible error in concluding *Flexon I* was the law of the case. In reaching this ruling, the Court reasons that because Respondent's deposition testimony could have been developed and presented in earlier stages of this matter, it is therefore not "new" evidence which should justify an exception to the "law of the case" doctrine. (Ct. App. Op. pp. 12-14).

The Court has again misapprehended and misapplied the "law of the case" doctrine. The following passage from the Opinion clearly shows that the Court's reliance on the "new" evidence standard is misplaced when "substantially different" evidence has already been proven:

> *Smith Int'l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985) (holding the district court did not abuse its discretion in applying the "newly discovered" evidence standard of Rule 60(b)(2), FRCP, ***in determining the appellant had not shown the existence of "substantially different" evidence that justified an exception to the law-of-the-case doctrine***) (emphasis added).

(Ct. App. Op. p. 13). The key point here is that the Court has already found and ruled that the facts presented by Petitioner are substantially different facts from those presented to Judge Buckner and this Court in *Flexon I*. There is no justification for the Court to then pursue any legal analysis under a "new" evidence standard.

As discussed above, Respondent has never challenged or made an argument that Petitioner was not entitled to bring its own motion to compel arbitration. Respondent expressly agreed otherwise in the Consent Orders, whereby Petitioner has preserved its right to receive the benefit of Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce.

Lastly, the Court's ruling is also misplaced because the "law of the case" doctrine has no application in this matter because the Court has ruled that the facts presented by Petitioner are substantially different facts from those presented to Judge Buckner and this Court in *Flexon I*. The Goldsmith Order should be reversed.

III. THE COURT MISAPPREHENDED OR MISAPPLIED THE CONCEPT OF FUNDAMENTAL FAIRNESS IN AFFIRMING THE FINDINGS OF THE GOLDSMITH ORDER.

The fundamentally fair result is for this Court to reverse the findings of the Goldsmith Order and order the parties to arbitrate their dispute in accordance with the terms of the Agreement. The Respondent negotiated and agreed to the arbitration provision in the Agreement. As Plaintiff, Respondent chose not to honor the agreement between the parties to arbitrate his claims, rather, Respondent instigated a lawsuit in Jasper County Circuit Court. Petitioner and Coastal each filed an Answer to Respondent's Complaint and therein asserted an affirmative defense that all of the causes of action alleged by Respondent were subject to an arbitration provision contained in the Agreement.

As a result of preserving its rights through pleadings and Consent Orders, Petitioner has developed and presented substantially different and material facts which evidence arbitration is proper under the FAA. Respondent no longer disputes this point. Ironically, Respondent is now attempting for his own benefit to leverage the passage of time in this matter due to his own errant representations to Judge Buckner and this Court in *Flexon I* to the detriment of Petitioner. Rather than having the Court focus on the FAA standard (which is clearly met based on the facts presented), the Petitioner has been forced to develop and articular sound arguments that the "law of the case" doctrine and waiver are inapplicable to this matter. The circumstances that have produced these issues

are directly related to time spent by Respondent creating these "defenses" and Petitioner relentlessly pursuing the correct result. Based on the facts presented by Petitioner, the correct result is that Respondent's claims against Petitioner should be decided in an arbitration forum, as originally agreed. To do otherwise is to deny Petitioner fundamental fairness.[7]

IV. THE COURT MISAPPREHENDED OR FAILED TO APPLY THE "COMMERCE IN FACT" TEST TO RULE THAT THE MEDICAL SERVICES PERFORMED BY RESPONDENT UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT IN FACT INVOLVED OR AFFECTED INTERSTATE COMMERCE AND THEREFORE TRIGGERED THE FEDERAL ARBITRATION ACT.

It is evident from the facts presented by Petitioner 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. These facts are undisputed.[8] 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. Judge Goldsmith erroneously adopted the factual findings of Judge Buckner (as represented by Respondent) 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) (Goldsmith Order at 4) (R. p. 28).

The question of applicability of the FAA is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001). The Appellate

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[7] Due process is violated when a party is denied fundamental fairness. *City of Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228, 230 (1968). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *South Carolina Dep't. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). Petitioner has not had the opportunity to be heard at a meaningful time and in a meaningful manner on the merits of its arbitration motion.

[8] 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. (R. p. 950) where counsel for Respondent states "Now, Your Honor, I'm not here today to argue whether or not interstate commerce was implicated.")

Court will review a lower court's determination of arbitrability of a contract *de novo*. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). The lower court's factual findings will be reversed where there is no evidence reasonably supporting the findings of the lower court. *Thornton*, 357 S.C. at 94, 592 S.E.2d at 51. When interstate commerce is implicated in fact by a contract, the contract's arbitration provision is enforceable even in the absence of the front page notice required by South Carolina's Act. *Id.*

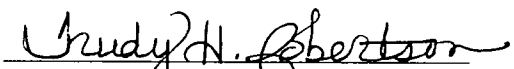
"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. "The FAA is triggered when interstate commerce is involved in fact, even if interstate commerce was not within the contemplation of the parties at the time of contracting." *Allied-Bruce Terminix Cos.*, 513 U.S. at 277. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. The South Carolina Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. ***In other words, the transaction must turn out, in fact, to have involved interstate commerce***. *Id.* at 115 (emphasis added).

The terms of the Agreement and the surrounding facts, as recited above, clearly evidence that performance of the Agreement involved and affected interstate commerce, and therefore triggered the FAA. The Goldsmith Order should, therefore, be reversed.

CONCLUSION

For the aforementioned reasons, Petitioner requests that the Court order a rehearing as prayed above, and reverse the trial court's order on the issues addressed herein.

Respectfully submitted,



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August 13, 2015

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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 ***PETITION FOR REHEARING*** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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August 13, 2015

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August 13, 2015

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

Re: ***Phillip Flexon, M.D. v. Lifepoint Hospitals, Inc., et al.***
Appellate Case No. 2013-002498
MVA File No. 034484.1

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of our Petition For Rehearing and a Proof of Service in the above referenced case. I have also enclosed a check in the amount of $25.00 for the requisite filing fee.

Please file the originals and return a date-stamped copy to me by bearer of this letter.

By copy of this letter, I am serving all counsel of record with a copy of the same.

Thank you for your assistance in this matter.

Sincerely,

MOORE & VAN ALLEN PLLC

Trudy H. Robertson

Trudy H. Robertson

THR/ecp

Enclosures: As Stated

cc: William B. Harvey (w/ enclosures)
James Myrick (w/enclosures)
Dana Lang (w/enclosures)