

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

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

Op. No. 5336 (S.C. Ct.App. filed July 29, 2015)

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 Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.,

Of Which Lifepoint Hospitals, Inc., is the Appellant.

Appellate Case No. 2013-002498

Appeal From Jasper County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5336
Heard June 10, 2015 – Filed July 29, 2015

AFFIRMED

Trudy Hartzog Robertson and Joseph Timothy Belton,
both of Moore & Van Allen, PLLC, of Charleston, for
Appellant.

William B. Harvey, III, of Harvey & Battey, PA, of
Beaufort, for Respondent.

GEATHERS, J.: In this breach of contract action, Appellant Lifepoint Hospitals, Inc. (Lifepoint) seeks review of the circuit court's denial of its motion to compel arbitration. Lifepoint argues the circuit court incorrectly applied the law-of-the-case doctrine to the motion to compel. Lifepoint also argues the circuit court incorrectly applied the "commerce in fact" test to determine whether the physician

services performed by Respondent Phillip Flexon, M.D. affected interstate commerce and, thus, triggered the Federal Arbitration Act (FAA). We affirm.

FACTS/PROCEDURAL HISTORY

In the fall of 2006, Lifepoint and Flexon negotiated for Flexon's employment with PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center (PHC), in Hardeeville, South Carolina. Lifepoint owned Province Healthcare Company, which owned PHC. At the time, Flexon had a medical practice in Savannah, Georgia and was on the staff of Memorial University Medical Center (Memorial) in Savannah. However, Flexon was living in Hardeeville and desired to practice medicine there. Therefore, on December 18, 2006, Flexon and PHC executed a contract for Flexon to begin employment with PHC on March 15, 2007, for a five-year term (Agreement). Flexon's medical practice was to be located at 1010 Medical Center Drive in Hardeeville and "such other practice sites in Beaufort and Jasper Counties . . . reasonably designated by [PHC] from time to time." The Agreement prohibited any "transfer, assignment or other modification affecting the terms or conditions of the [Agreement]" unless "extenuating circumstances [were] shown to exist."

The Agreement contained the following provisions regarding litigation and arbitration:

13.4 **Governing Law and Venue.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. *Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina,* and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby [sic] consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 **Arbitration.** *Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete],* the exclusive jurisdiction of

which shall rest with a court of competent jurisdiction in the state where the hospital is located[,] *any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration* in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration . . . , and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

(emphases added).

After Flexon began employment with PHC, he remained on the staff at Memorial and continued to see patients coming from Georgia. On or about June 30, 2007, Province Healthcare Company, Lifepoint's wholly owned subsidiary, sold PHC to Tenet Healthsystems, Inc. (Tenet). Tenet then presented Flexon with an "Amendment to and Assignment of Physician Employment Agreement" purporting to assign the Agreement to Tenet. Flexon refused to execute this document.¹

On or about August 17, 2007, PHC changed its name to Coastal Carolina Medical Center, Inc. (Coastal). Approximately one year later, Flexon sent a formal notice of termination for cause to Coastal (formerly PHC). In May 2009, Coastal sent Flexon a letter demanding over \$725,000 for amounts Coastal claimed it was owed pursuant to various provisions of the Agreement. Coastal also demanded that Flexon immediately cease working for Memorial.

On May 26, 2009, Flexon filed this breach of contract action against Coastal (a twice-removed subsidiary of Lifepoint), Lifepoint, and Tenet, alleging that prior to entering into the Agreement, Lifepoint failed to disclose it was in negotiations with Tenet for Tenet's purchase of PHC's (now Coastal's) assets. The Complaint stated Flexon's performance of the Agreement required him to close his practice in Savannah, "where he had privileges at surgical hospitals." The Complaint also alleged that during the negotiation of the Agreement, Lifepoint represented that PHC would purchase certain equipment needed by Flexon in the operating room

¹ Ironically, when Flexon was negotiating the Agreement with Lifepoint's CEO in 2006, Flexon mentioned he was glad he wasn't working for Tenet: "[W]e had multiple conversations about how awful Tenet was. That -- the Hilton Head [h]ospital, their problems, and that I -- that I was glad that I wasn't working for them."

and would recruit and hire an audiologist to be part of Flexon's practice but PHC later refused to honor these representations.

On October 23, 2009, Coastal filed a motion to compel arbitration, asserting the Agreement contained a valid and enforceable arbitration provision. During the motions hearing, Coastal stipulated that the arbitration provision in the Agreement violated the notice requirements of the South Carolina Arbitration Act but argued the FAA applied to the arbitration provision and, thus, required arbitration of the parties' claims. To support its argument that the Agreement evidenced a transaction involving interstate commerce, triggering the FAA,² Coastal referenced the Complaint's allegations that (1) Flexon had to "discontinue, close, and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals" in order to sign the Agreement and (2) Lifepoint knew that Flexon "would have to close and terminate an established practice in Savannah in order to fulfill his obligations under the [Agreement]."

Additionally, Coastal referred to three of Flexon's interrogatory responses:

[I]n an answer to an interrogatory that we filed, he said that many Savannah doctors stopped referring patients to Dr. Flexon after a [stock] purchase agreement occurred between our clients. I think the implication here is that he was getting business across state lines, and was relying on that business in order to have a successful practice.

On Interrogatory Four, which was a particularized statement of damages, he mentions that he lost six weeks of his salary while he had to move his practice from Savannah to Coastal, and then move it back again once he quit.

Interrogatory Nine, which was about availability of equipment in the E.R., which is one of the complaints Dr. Flexon had against my client. He said that availability of

² See *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 843 (Ct. App. 1999) ("For the FAA to apply, an agreement must 'evidenc[e] a transaction involving commerce,' specifically interstate commerce." (alteration by court) (quoting 9 U.S.C.A. § 2)).

equipment became so unreliable, [Flexon] began taking his complicated cases to Memorial. . . . So, while he was working for our client, he was sending his complicated cases and performing those surgeries that were being billed by our hospital, performing that surgery in Savannah.

Subsequently, Lifepoint's counsel briefly spoke in support of Coastal's motion to compel:

[COUNSEL]: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but ---

whereupon counsel was cut off by the presiding judge (the first circuit court judge). The following colloquy then transpired:

THE COURT: I think you ought to do that, because obviously [Flexon] isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it.

[COUNSEL]: Yes, sir.

THE COURT: But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but ---

[COUNSEL]: I think that likely it is. So I will make it.

On June 17, 2010, Lifepoint filed its own motion to compel arbitration. Subsequently, the first circuit court judge issued an order denying Coastal's motion. The first circuit court judge based his decision on two grounds: "There is no language in the [Agreement that] mentions, conditions, requires, affects or involves interstate commerce. . . . Further, . . . the parties to [the Agreement] specifically agreed to litigate any dispute arising from, under or pursuant to [the

Agreement] in the courts of South Carolina."³ Coastal appealed the first circuit court judge's order to this court, which affirmed the order. *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) (*Flexon I*). This court concluded the Agreement and surrounding facts did not implicate interstate commerce and, therefore, the FAA did not apply to the Agreement. 399 S.C. at 89, 731 S.E.2d at 4. After the case was remitted, Lifepoint withdrew its motion to compel arbitration without prejudice and took Flexon's deposition.

During his deposition, Flexon 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, Flexon 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." Flexon also stated that he had "plenty of patients coming from Georgia." Moreover, Flexon indicated that Lifepoint's CEO, Eric Deaton, insisted Flexon remain on Memorial's staff. Therefore, Flexon often had to do rounds at both Coastal and Memorial.

Lifepoint then filed with the circuit court its renewed motion to compel arbitration, attaching the above-referenced excerpts from Flexon's deposition. Several weeks later, Coastal filed a motion for relief from judgment pursuant to Rule 60(b), SCRCP, seeking relief from the circuit court's previous order denying arbitration due to "newly discovered evidence," i.e., Flexon's deposition testimony. The presiding judge (the second circuit court judge) conducted a hearing on both motions and later issued an order denying them.

In his order, the second circuit court judge stated,

³ Coastal did not appeal this second ground, i.e., the parties agreed to litigate any dispute "arising from, under or pursuant to [the Agreement] in the courts of South Carolina." Rather, Coastal merely addressed this issue in its Reply Brief, asserting that the provision in question "concern[ed] only those portions of the Agreement carved out of the Arbitration provision" in Article XIII, i.e. "*Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration . . .*" (emphasis added).

As acknowledged by [Coastal] in its appeal, the parties knew that [Flexon] was receiving referrals and other patients from the Savannah area while he was working [for Coastal]. With these facts before it, the South Carolina Court of Appeals ruled that "We agree with the trial court's finding that the Agreement and the surrounding facts did not implicate interstate commerce."

The second circuit court judge further found that the "facts and testimony from [Flexon's] deposition argued by [Lifepoint and Coastal] are not substantially different than those before the court in the prior rulings."

The second circuit court judge concluded that if Lifepoint and Coastal believed Flexon's deposition "was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them." He also concluded that this court's decision on the FAA's applicability to the Agreement was the law of the case. Lifepoint filed a motion to alter or amend this order, which the second circuit court judge denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding that Lifepoint failed to preserve its right to independently seek arbitration?
2. Did the circuit court err in concluding that the decision of this court in *Flexon I* was the law of the case?⁴
3. Did the circuit court err in failing to apply, or applying incorrectly, the "commerce in fact" test to determine whether Flexon's services affected interstate commerce and, thus, triggered the FAA?

STANDARD OF REVIEW

"This court reviews questions of law de novo." *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." *Id.*

⁴ We are combining Lifepoint's Issues II and IV from its brief.

Furthermore, "[t]he question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "The determination of whether a claim is subject to arbitration is subject to *de novo* review." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

LAW/ANALYSIS

I. Preservation of Right to Seek Arbitration

Lifepoint interprets the second circuit court judge's order as implying Lifepoint failed to preserve its right to independently seek arbitration. In response, Lifepoint argues (1) several consent orders in this case have preserved Lifepoint's right to seek arbitration independent of Coastal's motion and allowed Lifepoint to engage in written discovery and depositions without waiving its right to arbitration⁵ and

⁵ The first "Consent Scheduling Order of the Parties" was not executed until June 16, 2010, *after* the hearing on Coastal's motion to compel arbitration. This order includes a provision stating,

The parties and this [c]ourt recognize that Defendant has moved 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 Defendants [sic] asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

Lifepoint executed its own motion to compel arbitration on the same day the parties executed the consent order but did not file the motion until the following day.

The "Amended Consent Scheduling Order," dated September 18, 2012, is similar:

The parties and this [c]ourt recognize that one of the Defendants may move to compel arbitration, and that this

(2) it has prosecuted its arbitration motion pursuant to the directive of the first circuit court judge.

We acknowledge the order now on appeal includes language implying Lifepoint waived its right to arbitration by engaging in discovery without reservation or limitation. However, this language was not the basis for the denial of Lifepoint's motion to compel arbitration. Rather, the second circuit court judge based his conclusion that this court's opinion in *Flexon I* was the law of the case on two grounds: (1) the facts presented in the hearing on Lifepoint's motion were not substantially different from the facts presented in the hearing on Coastal's motion and (2) Lifepoint effectively abandoned its opportunity to present Flexon's deposition testimony by failing to depose him prior to the hearing on Coastal's motion. We will address these two grounds, as well as the first circuit court judge's directive for Lifepoint to file its own motion, in the following section of this opinion.

II. Law of the Case

Lifepoint asserts the second circuit court judge erred in concluding this court's opinion in *Flexon I* was the law of the case. Lifepoint argues Flexon's deposition testimony showed facts substantially different from the facts presented to the first circuit court judge. While we agree the facts were substantially different, the deposition testimony should have been presented to the first circuit court judge. Therefore, the second circuit court judge did not commit reversible error in concluding that *Flexon I* was the law of the case.

"Under the law-of-the-case doctrine, a party is precluded from relitigating, 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*,

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.

The comparable provisions in the "Second Amended Consent Scheduling Order" and "Third Amended Consent Scheduling Order" are identical to this provision.

381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. *Appeal & Error* § 991 (2007)). In other words, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); see *In re Grossinger's Assocs.*, 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995) ("Closely related to the doctrines of claim and issue preclusion is the doctrine of law of the case, which holds that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." (quotation marks omitted)). While the doctrine has been referenced as discretionary,⁶ it is recognized that principles "of authority . . . do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002).

"The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal]." *Ross*, 328 S.C. at 62, 492 S.E.2d at 68; see *In re Grossinger's Assocs.*, 184 B.R. at 434 ("The doctrine applies to all issues decided expressly or by necessary implication."). However, "[t]he prior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court." 5 C.J.S. *Appeal and Error* § 994 (2007); see also *Searles' Adm'r v. Gordon's Adm'r*, 157 S.E. 759, 761 (Va. 1931) ("Every decision of [the appellate] court, whether it be upon an interlocutory or a final decree, is in its nature final, except, possibly, where [the] court disposes of only a part of the case at one term, and reserves it for further and final action at another.").

⁶ See *S. Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922) ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res adjudicata. One directs discretion: the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."); *Slowinski v. Valley Nat'l Bank*, 624 A.2d 85, 89 (N.J. Super. App. Div. 1993) ("Law of the case . . . operates as a discretionary rule of practice and not one of law." (quotation marks omitted)); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("So long as the same case remains alive, there is power to alter or revoke earlier rulings."); 5 C.J.S. *Appeal and Error* § 991 (2007) ("The doctrine is discretionary rather than mandatory. Nonetheless, it should be disregarded only upon a showing of good cause for failure timely to request reconsideration of the original appellate decision, and only as a matter of grace rather than right." (footnotes omitted)).

The policy behind the law of the case is to "promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quotation marks omitted). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *In re Grossinger's Assocs.*, 184 B.R. at 434.

The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that *it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.*

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.⁷

⁷ Lifepoint does not argue that this court's opinion in *Flexon I* was clearly erroneous or that the law has changed. It merely argues that the facts this time around are substantially different.

White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (emphases added) (footnotes omitted).

The South Carolina Supreme Court has also recognized that the doctrine does not apply when the evidence is substantially different on a second appeal. In *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957), the court stated that the 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.

(emphases added). Further,

[o]pposing forces tug at the theory that new evidence can justify departure from the law of the case. It is easy to understand that new evidence can undermine the foundations of an initial decision. *The needs for stability and procedural efficiency, however, counsel that a persuasive justification should be required to support consideration of the new evidence.* Reconciliation of these competing forces calls for discretion, and the exercise of discretion has not yielded any basis for easy generalization. . . .

. . . . *Evidence that could have been presented earlier commonly is not considered, in keeping with the general rules that discourage slovenly or ill-considered approaches to the first trial.* Beyond these relatively easy points, some decisions set a high threshold for considering new evidence, invoking the "manifest injustice" standard discussed below or even the standard for vacating a judgment. And other decisions invoke the mandate principle by ruling that new evidence cannot be

considered if it bears on an issue that was not left open by an appellate decision remanding for further proceedings on other issues.

18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) (emphases added) (footnotes omitted); see *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1005 (8th Cir. 2010) ("It is not clear that any of the defendants' evidence was truly 'new' in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation."); *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); *id.* ("The law-of-the-case doctrine is designed to provide finality to judicial decisions. It thus serves the same objective as the 'newly discovered' requirement in Rule 60(b)(2)." (citation and quotation marks omitted)); *id.* ("In this case, [the appellant] is seeking to reopen factual issues finally laid to rest by the Ninth Circuit in 1982 on the basis of evidence it could have discovered with due diligence at least by the time of trial of this case in 1977. The district court was fully justified in rejecting this attempt." (emphasis added)).

Here, the second circuit court judge ruled Flexon's deposition testimony was not "substantially different" than the evidence before the first circuit court judge. Nevertheless, Lifepoint argues the interrogatory responses presented as evidence before the first circuit court judge did not show that Flexon was "importing [Georgia] patients into South Carolina or that he performed medical services in Georgia as an obligation under the terms of the Agreement," whereas the deposition testimony presented to the second circuit court judge showed that Flexon's *performance of the Agreement* involved both South Carolina and Georgia. Specifically, Lifepoint points to Flexon's interrogatory response, presented to the first circuit court judge, indicating that after the hospital's sale to Tenet, "many Savannah doctors stopped referring patients to [Flexon] because of Tenet's horrible reputation." Lifepoint notes this statement "is limited to doctor referrals rather than any factual representation about the state residency of any *patients* actually referred."

Similarly, Lifepoint highlights Flexon's interrogatory response indicating Coastal's provision of equipment was so unreliable that Flexon started taking his complicated cases to Memorial. Lifepoint contends this statement "does not

evidence that [Flexon] *was actually obligated under the terms of the Agreement* to maintain medical staff privileges at Memorial or perform medical services for patients at Memorial," whereas Flexon's deposition testimony provides, for the first time, evidence that his performance of the Agreement involved more than one state.

For these reasons, we agree with Lifepoint that the deposition testimony presented to the second circuit court judge shows facts that are substantially different from the facts presented to the first circuit court judge. In his deposition, Flexon stated that Lifepoint's CEO insisted Flexon remain on Memorial's staff. Therefore, Flexon often had to do rounds at both Coastal and Memorial. Unlike the facts presented to the first circuit court judge, these facts show that Flexon's *performance of the Agreement* required Flexon 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*, 231 S.C. at 357, 98 S.E.2d at 800.

Nevertheless, the facts gleaned from Flexon's deposition testimony should have been developed before, and raised in, the hearing on Coastal's motion to compel. *See Yankton Sioux Tribe*, 606 F.3d at 1005 ("It is not clear that any of the defendants' evidence was truly 'new' in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("Evidence that could have been presented earlier commonly is not considered, in keeping with the general rules that discourage slovenly or ill-considered approaches to the first trial."). Therefore, the second circuit court judge properly held that *Flexon I* was the law of the case.

Additionally, the second circuit court judge properly concluded that Lifepoint's failure to timely depose Flexon "cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals." *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387, 759 S.E.2d 727, 736 (2014) ("Parties may waive their right to enforce an arbitration clause."); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." (quotation marks omitted)); *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (holding a party seeking to prove a waiver of a right to arbitrate carries a heavy burden and must show prejudice through an undue burden caused by delay in demanding arbitration).

Prior to the hearing on Coastal's motion to compel, Lifepoint could have (1) taken Flexon's deposition for the limited purpose of establishing the arbitrability of Flexon's claims and (2) presented its own motion to compel arbitration or joined in Coastal's motion. Alternatively, Lifepoint could have requested this court to hold Coastal's appeal in abeyance until Lifepoint's motion to compel could be heard. Instead, the other parties' time and resources were devoted to obtaining a ruling from this court concerning the arbitrability of this dispute.

We acknowledge the first circuit court judge's directive to Lifepoint to file its own motion to compel arbitration. However, by that time, Lifepoint had already abandoned any opportunity to file its own motion to compel arbitration or join in Coastal's motion. Lifepoint had kept silent for over seven months after Coastal first filed its motion to compel arbitration and over one year after Flexon filed the complaint. *Cf. Dean*, 408 S.C. at 388, 759 S.E.2d at 736 ("We find that Appellants did not delay in filing their demand for arbitration. . . . [A]fter Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the [Notice of Intent to file a medical malpractice suit against Appellants], rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay.").

Lifepoint does not argue it was prevented from either joining in Coastal's motion to compel or taking Flexon's deposition prior to the hearing on Coastal's motion. Further, while Lifepoint's interests in pursuing arbitration were aligned with Coastal's interests, this did not excuse Lifepoint from taking the steps necessary to protect its own interests in a timely manner. Therefore, whether the result is based on the law-of-the-case doctrine or on waiver, fundamental fairness requires Lifepoint to be bound by this court's opinion in *Flexon I*.

Based on the foregoing, Lifepoint has failed to convince this court that the second circuit court judge erred in denying the motion to compel arbitration. *See Duckett by Duckett v. Payne*, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the trial court erred."). Therefore, we need not reach the question of the FAA's applicability to this case. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we affirm the circuit court's order.

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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

AUG 13 2015
SC Court of Appeals

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).

¹The 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. Petitioner has not waived or abandoned its right to compel arbitration.

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. 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*.

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.

⁵Respondent 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. 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*.

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.

⁶This 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 articulate 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

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.*

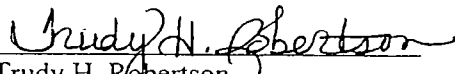
"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. "The FAA is triggered when interstate commerce is involved in fact, even if interstate commerce was not within the contemplation of the 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

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

RECEIVED

AUG 13 2015

SC Court of Appeals

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.

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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The South Carolina Court of Appeals

Phillip Flexon, M.D., Respondent,

v.

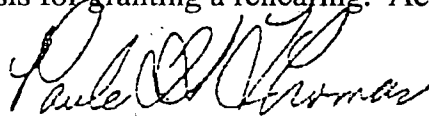
PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center,
Coastal Carolina Medical Center, Inc., Lifepoint
Hospitals, Inc., and Tenet Healthsystems, Inc.,

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

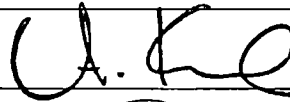
Appellate Case No. 2013-002498

ORDER

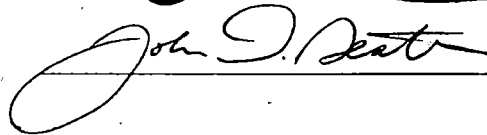
After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


Paul W. Thomas

J.


U. Ke

J.


John D. Beator

J.

Columbia, South Carolina

cc:

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The Honorable Brooks P. Goldsmith

FILED

September 16, 2015

RECEIVED

APR 15 2014

SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

- I. DID APPELLANT PRESERVE ITS RIGHT TO INDEPENDENTLY SEEK ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT?
- II. DID APPELLANT PREVIOUSLY LITIGATE ITS RIGHT TO ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT?
- III. DID THE CIRCUIT COURT FAIL TO APPLY, OR INCORRECTLY APPLY, THE "COMMERCE IN FACT" TEST TO THE FACTS PRESENTED BY APPELLANT AT THE SEPTEMBER 9, 2013, HEARING IN ORDER TO DETERMINE WHETHER 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?
- IV. DID THE CIRCUIT COURT INCORRECTLY APPLY "THE LAW OF THE CASE DOCTRINE"?

STATEMENT OF THE CASE

This litigation was commenced by Respondent filing his Summons and Complaint on May 26, 2009. Respondent asserted multiple causes of action against Appellant, Defendant PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical Center ("CCMC"), and Defendant Tenet Health Systems ("Tenet") which relate to or arise out of a Physician Employment Agreement (the "Agreement") executed by Respondent on December 18, 2006. Appellant and CCMC each filed an Answer to the 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.

On October 21, 2009, CCMC filed a motion to compel arbitration. CCMC advocated that even though the Agreement lacked South Carolina's "notice of arbitration" requirement, the Federal Arbitration Act (the "FAA") preempted the South Carolina requirement because the terms of the Agreement and the surrounding facts affected interstate commerce. On June 9, 2010, CCMC's arbitration motion came before Circuit Court Judge Perry M. Buckner, III, for a hearing. Appellant did not participate in CCMC's arbitration motion and did not litigate any of the facts and arbitration issues before Judge Buckner 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 against the Respondent. Shortly thereafter on June 17, 2010, Appellant filed its own motion to compel arbitration.

CCMC's arbitration motion was later denied by Order of Judge Buckner dated June 30, 2010. CCMC appealed the ruling of Judge Buckner. This matter was then stayed without Appellant's motion for arbitration being heard or ruled upon. By reported decision dated March 7, 2012, the Court of Appeals affirmed Judge Buckner's Order. CCMC then unsuccessfully petitioned the Court of Appeals for Rehearing. Following Remittitur of CCMC's appeal, Appellant withdrew its motion for arbitration without prejudice and subject to its discovery and motion rights specified in four (4) separate Consent Scheduling Orders (the "Consent Orders") between the parties.¹

Appellant and CCMC then obtained the deposition testimony of Respondent on April 30, 2013, and thereafter, Appellant renewed its arbitration motion on May 31, 2013. On September 9, 2013, Appellant's arbitration motion came before Circuit Court Judge Brooks P. Goldsmith, Jr. for a hearing. Appellant's arbitration motion was denied by Order of Judge Goldsmith dated September 24, 2013. Appellant then timely filed and served a motion to alter or amend Judge Goldsmith's Order entered on September 30, 2013. Thereafter, on November 14, 2013, Appellant received written notice of Judge Goldsmith's Order denying Appellant's motion to alter and amend the September 30, 2013 Order. Appellant then filed and served its Notice of Appeal on November 15, 2013.²

¹ The motion was scheduled for a hearing following Remittitur prior to the deposition of the Respondent. Thus, the Appellant withdrew the motion without prejudice to bring it at a later date, pursuant to the Consent Orders, once the deposition of the Respondent was taken.

² The transcript of the hearing on the arbitration motion was timely ordered and was received by the Appellant from the court reporter on December 20, 2013, making this Initial Brief due for service on

FACTS

Appellant is a hospital company based in Brentwood, Tennessee. Appellant owns and operates hospitals and healthcare facilities throughout the United States. Prior to June 30, 2007, Appellant owned and operated the Coastal Carolina Medical Center in Jasper County, South Carolina.

Respondent is a licensed ear, nose, and throat (ENT) medical doctor. (Respondent's May 26, 2009 Complaint ("Compl.") ¶ 1) (R. p. 34). With the assistance of counsel, Respondent negotiated a medical services contract with Appellant which culminated in the Agreement which Respondent executed on December 18, 2006. (Compl. ¶ 7) (R. p. 35); (Respondent's April 30, 2013 Deposition ("Resp't Dep.") at 72 ll. 14-18) (R. p. 469, lines 14-18). The Agreement was for a five-year employment term and contained an arbitration provision³. (Agreement at Art. II & Art. XIII § 13.5) (R. pp. 961 and 969). Prior to entering into the Agreement with the Appellant, Respondent practiced medicine in Savannah, Georgia. (Compl. ¶ 8) (R. p. 35). As a result of entering into the Agreement with Appellant, Respondent "had to discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals." (Compl. ¶ 8) (R.

Tuesday, January 21, 2014 (considering the thirtieth day fell on a Sunday with Martin Luther King, Jr.'s holiday falling on Monday, January 20, 2014). Rule 208(a)(1), SCACR.

³ The Agreement's arbitration provision at Section 13.5 specifically states, in pertinent part, that "[a]ny controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof" (Agreement at § 13.5) (R. p. 969).

p. 35). Respondent began working at the Coastal Carolina Medical Center on March 15, 2007. (Compl. ¶ 15) (R. p. 37).

On or about June 30, 2007, Appellant, through a stock sale, sold the Coastal Carolina Medical Center to Defendant Tenet. (Compl. ¶ 17) (R. p. 37). Respondent continued to be employed by Coastal Carolina Medical Center until he terminated his employment on or about September 16, 2008, and returned to practice medicine in Savannah, Georgia. (Compl. ¶ 21) (R. p. 38); (Final Brief of CCMC February 24, 2011 ("CCMC Br.") at 4) (R. p. 100). Under the terms of the Agreement, Coastal Carolina Medical Center then sent notice to Respondent of a demand for repayment of the hospital's losses incurred on Respondent's account during his two years of employment. (Compl. ¶ 23) (R. p. 39). Respondent then filed this lawsuit on May 29, 2009. Respondent asserted multiple causes of action⁴ against both Appellant and CCMC which relate to or arise out of the Agreement. (See Compl.) (R. p. 34). Appellant and CCMC each filed an Answer 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. (Appellant's August 3, 2009 Answer ("Appellant Answer") at 31) (R. p. 70); (CCMC's July 17, 2009 Answer ("CCMC Answer") at 34) (R. p. 62).

⁴ In the Complaint, Respondent asserted the following causes of action: (1) the first cause of action alleged is for breach of the Agreement; (2) the second cause of action alleged is for fraudulent misrepresentations that Respondent alleges were made in the course of negotiations of the Agreement; (3) the third cause of action alleged is for breach of the duty of good faith and fair dealing implied in the Agreement; and (4) the fourth cause of action was for declaratory judgment.

Defendant CCMC's Arbitration Motion, Hearing and Appeal

While Defendant CCMC's prior motion to compel arbitration is not directly at issue in this appeal, it is nevertheless instructive to review in this background its issues and its distinctions from the present motion of Appellant on appeal. On October 21, 2009, CCMC filed a motion to compel arbitration. (See CCMC's October 23, 2009 Arbitration Motion ("CCMC Arb. Mot.") (R. p. 79). On June 9, 2010, CCMC's arbitration motion came before Judge Buckner for a hearing. (See Transcript of Record June 9, 2010 ("Buckner Tr.") (R. p. 375). The focus of CCMC's argument to Judge Buckner was that the FAA was implicated because Respondent moved his medical practice across state lines from Georgia to South Carolina. (CCMC's October 23, 2009 Memorandum in Support of Arbitration Motion ("CCMC Mem.") at 2 & 3) (R. pp. 81-82); (Buckner Tr. at 7, 14-16) (R. pp. 381 and 388-390). CCMC relied heavily on the facts of Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003) to support its position. (CCMC Mem. at 2 & 3) (R. pp. 81-82); (Buckner Tr. at 5, 11, and 18) (R. pp. 379, 385, and 392). In Thornton, Trident was experiencing a shortage of cardiovascular physicians and began to recruit physicians, including Thornton, from other parts of the country to Charleston, South Carolina. Id. at 93, 592 S.E.2d at 50-51. The recruiting agreement required Thornton to move his practice from Michigan to Charleston, provided financial incentives, and further provided for arbitration in the event of a dispute. Id. at 93, 592 S.E.2d at 51. The parties had a dispute, and Thornton filed a declaratory judgment action seeking a determination that the

arbitration provision was unenforceable. Id. at 94, 592 S.E.2d at 51. The court in Thornton determined that the recruiting agreement and surrounding facts affected interstate commerce, and therefore, the FAA applied. Id. at 95-96, 592 S.E.2d at 52-53. The court relied heavily on the fact that Thornton relocated from Michigan, and the contract provided for him to be compensated for the expenses incurred in moving his personal effects to South Carolina. Id. at 97, 592 S.E.2d at 53.

At the hearing before Judge Buckner, CCMC highlighted the following allegations in Respondent's Complaint in order to demonstrate that the Agreement implicated the FAA based upon the reasoning in Thornton: Respondent's allegations in his Complaint of closing his established practice in Savannah, Georgia to perform the Agreement; losing time and income for his move; and disrupting his Georgia medical practice. (Compl. ¶¶ 8, 13, 26, 29) (R. pp. 35-36 and 39-40); (Buckner Tr. at 7-8) (R. pp. 381-382).

In addition, with only the benefit of limited written discovery, CCMC also referenced a few interrogatory responses of Respondent in order to suggest to Judge Buckner that Respondent may have provided medical services across state lines while employed at the Coastal Carolina Medical Center. First, CCMC pointed out that Respondent stated that "after the sale of the hospital to Tenet was announced in June. . . many Savannah doctors stopped referring patients to [Respondent] because of Tenet's horrible reputation." (Respondent's April 29, 2010 Answer to CCMC's Interrogatory 7 ("Answer to CCMC Interrog.") (R. p. 983); (Buckner Tr. at 8) (R. p. 382). CCMC argued that the *implication* of this interrogatory response is that

Respondent, at some point, was receiving referrals across state lines. (Buckner Tr. at 8) (R. p. 382). Second, CCMC urged Judge Buckner to believe that Respondent was actually performing surgeries at Memorial Hospital in Savannah, Georgia under the terms of the Agreement. (Buckner Tr. at 8-9) (R. pp. 382-383). CCMC relied only on Respondent's statement that "the availability of equipment became so unreliable [at Coastal Carolina Medical Center] that [Respondent] started taking hi[s] complicated cases to Memorial." (Answer to CCMC Interrog. 9) (R. p. 984-985); (Buckner Tr. at 8-9) (R. pp. 382-383).

In contrast to the position of CCMC, counsel for Respondent stressed to Judge Buckner that the facts surrounding the Agreement with the Respondent are the "very facts and circumstances" of Arkansas Diagnostic Center, P.A. v. Tahiri, 370 Ark. 157, 257 S.W.3d 884, 892 (2007), not Thornton. (Buckner Tr. at 12 ll. 8-10) (R. p. 386, lines 8-10). Counsel for Respondent informed Judge Buckner that "I took the Thornton case . . . and I shepardized it. And I found the Arkansas case, which is cited in our brief, which is absolutely dead on." (Buckner Tr. at 11 ll. 17-22 & 12 ll. 23-24) (R. pp 385, lines 17-22 and 386, lines 23-24).

In Tahiri, the Arkansas Supreme Court found there was no interstate commerce involved, and the FAA did not apply to the employment contract at issue. Tahiri, 370 Ark. at 167, 257 S.W.3d at 892. The contract in Tahiri contained an arbitration provision, and the Arkansas Diagnostic Center (ADC) attempted to enforce the provision when Dr. Tahiri filed a complaint against ADC for numerous causes of action, including breach of the contract. Id. at 158-159, 257 S.W.3d at 886-

887. ADC argued interstate commerce was involved because there was “evidence to show that it [ADC itself, rather than Dr. Tahiri individually performing medical services under the contract] treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for Dr. Tahiri to travel to seminars outside of Arkansas.” Id. at 160-161, 257 S.W.3d at 888. The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA. Id. at 165-167, 257 S.W.3d at 891-892. The Arkansas Supreme Court ruled that “most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local patients*.” Id. at 166-167, 257 S.W.3d at 892.

Counsel for Respondent repeatedly emphasized to Judge Buckner that the Agreement was simply a “local” contract and that Respondent was purely providing “local” medical services just like the facts in Tahiri. (Buckner Tr. at 12 ll. 15-22 and at 14 ll. 23-25) (R. pp. 386, lines 15-22 and 388, lines 23-25); (Respondent’s November 25, 2009 Memorandum in Opposition to CCMC’s Arbitration Motion (“Resp’t Opp’n Mem.”) at 3) (R. p. 87). Counsel for the 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) (R. p. 386, lines 19-22); (see also Resp’t Opp’n Mem. at 5 (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)).

It is clear that the factual record before Judge Buckner at the time of the hearing was limited. CCMC presented Judge Buckner with only the "facts that [Respondent] has pled." (Buckner Tr. at 15 ll. 15-16) (R. p. 389, lines 15-16). For instance, Judge Buckner stated that "I have no way of knowing that [Respondent] was a staff privileged doctor in Savannah, and then came to Hardeeville, and therefore, crossed state lines", as was urged by CCMC's counsel. (Buckner Tr. at 15 ll. 8-10) (R. p. 389, lines 8-10).

CCMC's arbitration motion was denied by Order of Judge Buckner dated June 30, 2010. (See Buckner Order at 1) (R. p. 7). Judge Buckner determined that "*on the record before this Court,*" CCMC failed to meet its burden and prove that the contract at issue involved interstate commerce. (Buckner Order at 6) (R. p. 12). It is apparent from the language contained in the June 30, 2010 Order that Judge Buckner was persuaded by the representations of counsel for Respondent that both the terms of the *Agreement and the actual performance of medical services by the Respondent under the Agreement* were confined to only in-state South Carolina medical services and in-state South Carolina patients.

At the behest of counsel for Respondent, Judge Buckner supported his decision by relying on the factual findings and legal conclusion of the Arkansas Supreme Court in Tahiri. (See Buckner Order at 4 & 5) (R. pp. 10-11). In the June 30, 2010 Order, Judge Buckner supported his reasoning by quoting from the finding

in Tahiri that, like Respondent, ADC contracted with “Dr. Tahiri to provide medical services to its *local patients*.” (Buckner Order at 5) (R. p. 11). Moreover, Judge Buckner also supported his decision by incorporating the reasoning of Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). (Buckner Order at 3) (R. p. 9). The Bernhardt court determined that the employment agreement “did not contemplate any actions affecting commerce outside of Vermont” because “performance under the contract . . . was by its terms confined to a single state.” (Buckner Order at 3) (R. p. 9). Ultimately, Judge Buckner 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) (R. pp. 11-12).

Importantly, Appellant did not participate in CCMC’s arbitration motion and did not litigate any of the facts and arbitration issues before Judge Buckner 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 against Respondent. (Buckner Tr. at 18 ll. 2-6) (R. p. 392, lines 2-6). The following exchange occurred at the June 9, 2010 hearing on CCMC’s motion to compel arbitration (Buckner Tr. at 17 ll. 20-25 & 18 ll. 2-7) (R. pp. 391, lines 20-25 and 392, lines 2-7):

Robertson: “I’m not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration

and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that”

Court: “I think you ought to do that, because obviously the plaintiff isn’t on notice of that. I understand that’s your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it.”

Robertson: “Yes, sir.”

Shortly thereafter on June 17, 2010, Appellant filed its own motion to compel arbitration. CCMC then appealed the ruling of Judge Buckner. This matter was then stayed without Appellant’s motion for arbitration being heard or ruled upon, and Appellant was not a party to CCMC’s appeal.

On appeal, CCMC alleged that the trial court erred in failing to properly consider the Complaint, the Agreement, and the surrounding facts in determining whether the FAA applied to the Agreement between the parties. (CCMC Final Br. (“CCMC Br.”) at 4) (R. p. 100). CCMC’s argument centered on the fact that Respondent moved his medical practice, not his residency, from Georgia to South Carolina in order to perform his Agreement. (CCMC Br. at 9 & 10) (R. 105-106); (Final Reply Brief of CCMC February 24, 2011 (“CCMC Reply Br.”) at 4) (R. p. 117). CCMC argued that this was a critical fact which distinguished this case from Tahiri. (CCMC Br. at 10) (R. p. 106). In further support of its position, CCMC reiterated the same facts presented to trial court. (CCMC Br. at 7 & 8) (R. pp. 103-104).

Remarkably in his briefs to the Court of Appeals, Respondent continued to promote the fact that the Agreement was simply “between a local resident and a local

medical facility for services to local citizens.” (Respondent’s Final Brief February 21, 2011 (“Resp’t Br.”) at 1) (R. p. 127) ; (see also Resp’t Br. at 4 (R. p. 130) where “Respondent submits that the Agreement involved does not affect interstate commerce but rather is simply an employment agreement for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.”); (see also Resp’t Br. at 7 & 8 (R. pp. 133-134) where Respondent states that “the fact that, incidental to a local employment agreement, Respondent closed his medical practice in Georgia is insufficient to impress interstate commerce regulation upon an employment agreement between a Jasper County hospital and a Jasper County resident for services to Lowcountry South Carolina patients.”); (see also Respondent’s Return March 29, 2012 to CCMC’s Petition for Rehearing (“Resp’t Return”) at 3) (R. p. 142).

Moreover, Respondent advocated that the allegations in the Complaint referenced by CCMC in support of its position actually related to Respondent’s claims against Appellant, rather than CCMC. (Resp’t Br. at 8) (R. p. 134). As a result, Respondent urged both the Court of Appeals and Judge Buckner not to consider those facts. (Resp’t Br. at 8) (R. p. 134); (see Buckner Tr. at 10 ll. 3-10 & 15 ll. 17-20) (R. pp. 384, lines 3-10 and 389, lines 17-20). Respondent states that (Resp’t Br. at 8) (R. p. 134):

[CCMC] attempts to focus on the allegations that the Respondent’s primary practice was located in Savannah prior to the commencement of his employment under the Agreement. This argument overlooks the nature of that allegation. The second cause of action in the Complaint is for fraud in the inducement. In paragraph 8 [of the Complaint], Respondent alleges that “[Respondent] was enticed to sign [the

Agreement] by the representations of employees and agents of [Appellant] that he would enjoy a long relationship with [Appellant] and Coastal Carolina Medical Center.” [Appellant] is not a party to this appeal . . . Respondent’s allegation of his practice in Savannah is in connection with the cause of action for fraud in the inducement. [CCMC’s] attempt to focus on this to create an issue affecting commerce in connection with the Agreement is misplaced.

By reported decision dated March 7, 2012, the Court of Appeals affirmed Judge Buckner’s Order. Phillip Flexon, M.D. v. PHC-Jasper, Inc., 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). In its Opinion, the Court of Appeals recognized that the trial court rejected CCMC’s argument that the Agreement, and its surrounding circumstances, involved interstate commerce under Thornton. Id. at 86, 731 S.E.2d at 2-3. The Court of Appeals then recounted that the trial court distinguished Thornton and relied on the analysis in Tahiri. Id. at 88-89, 731 S.E.2d at 3-4. In its Opinion, the Court of Appeals again quotes the passage from Tahiri which focuses on the critical fact that employment contract was confined to only local services and local patients. The language quoted in the Opinion states:

[ADC] failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients. . . . Most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local* patients. Id. at 89, 731 S.E.2d at 4.

The Court of Appeals agreed with the trial court and determined that the facts presented were more akin to those in Tahiri, and therefore, affirmed Judge Buckner’s Order. Id. at 89, 731 S.E.2d at 4. CCMC filed a petition for rehearing, which was also denied.

Appellant's Arbitration Motion, Hearing and Instant Appeal

Following Remittitur of CCMC's appeal, Appellant withdrew its motion for arbitration without prejudice and subject to its discovery and motion rights in the Consent Orders. (See Appellant's September 4, 2013 Reply Memorandum to Respondent's Memorandum in Opposition to Appellant's Renewed Arbitration Motion ("Appellant's Arb. Mot. Reply Mem.") Exhibit A) (R. pp. 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.⁵

Appellant preserved its right, with the consent of Respondent, to independently seek arbitration in this matter. Appellant and CCMC then obtained the deposition testimony of the Respondent on April 30, 2013, and thereafter, Appellant renewed its arbitration motion on May 31, 2013.⁶ (See Appellant's May 31, 2013 Renewed Motion to Compel Arbitration ("Appellant's Arb. Mot.") (R. p. 145).

⁵ Respondent has entered into four (4) Consent Orders which specifically address the ability of Appellant to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. 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.

⁶ CCMC also filed a motion for relief from judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure which was denied as part of the September 30, 2013 Goldsmith Order.

On September 9, 2013, Appellant's arbitration motion came before Circuit Court Judge Brooks P. Goldsmith, Jr. for a hearing. (See September 9, 2013 Motions Hearing Transcript ("Goldsmith Tr.") (R. p. 905). During the September 9, 2013 hearing, Appellant argued that the factual record now before this Court evidences that the employment transaction with the Respondent in fact involved and affected interstate commerce. (See Goldsmith Tr. at 9 & 10) (R. pp. 912-913). Appellant offered the deposition testimony of Respondent which is substantially different and contrary to the facts previously presented by Respondent to Judge Buckner on June 9, 2010, and in CCMC's prior appeal to this Appeals Court. (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (see also Appellant's Arb. Mot. Reply Mem. at 4) (R. p. 294).

Appellant argued that the medical services provided by Respondent under the terms of the Agreement were not simply contained to a local clinic, with privileges at a local hospital, and treating local patients. (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 3-4) (R. pp. 147-148); (see also Appellant's Arb. Mot. Reply Mem. at 5) (R. p. 295). In reality, the required performance of the Agreement was not limited to the State of South Carolina, but in fact, the terms of the Agreement actually involved, and the surrounding facts actually evidence, Respondent providing medical services in both South Carolina and Georgia. (Goldsmith Tr. at 10, 12-13) (R. p. 913, lines 12-13); (see also Appellant's Arb. Mot. at 3-4) (R. pp. 147-148); (see also Appellant's Arb. Mot. Reply Mem. at 5) (R. p. 295).

Appellant directed Judge Goldsmith's attention to Article 1, Section 1.1, of the Agreement which states that the "Employer engages Physician and Physician accepts such engagement . . . to render professional physician services to *patients*." (Emphasis added) (Goldsmith Tr. at 12) (R. p. 915); (Agreement at Art. I § 1.1) (R. p. 961); (see also Appellant's Arb. Mot. at 4) (R. p. 148). Appellant presented evidence that Respondent testified in his April 30, 2013 deposition that "[t]he 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." (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (Respondent's April 30 2013 Deposition ("Resp't Dep.") at 269 ll. 20-24) (R. p. 666, lines 20-24). Respondent also testified in his deposition that he had "plenty of patients coming from Georgia." (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 373 ll. 1-2) (R. p. 770, lines 1-2).

In addition, Appellant directed Judge Goldsmith's attention to Article 3, Section 3.6, of the Agreement which states that the "Physician shall perform his/her duties at . . . those hospitals facilities at which Physician maintains Medical Staff privileges." (Goldsmith Tr. at 12-13) (R. pp. 915-916); (Agreement at Art. III § 3.6) (R. p. 962); (see also Appellant's Arb. Mot. at 4) (R. p. 148). As evidenced by Respondent's deposition testimony, Respondent was actually expected to maintain medical staff privileges at Savannah Memorial Hospital ("Memorial"), and did in fact perform medical services for patients at Memorial, as part of the Agreement.

(Goldsmith Tr. at 12-13) (R. pp. 915-916); (see also Appellant's Arb. Mot. at 4) (R. p. 148). Appellant presented evidence that Respondent testified in his April 30, 2013, deposition that one of [Appellant's] issues was, you know, [Respondent] -- I was to continue on the staff at Memorial . . . So that was -- [Appellant] wanted that, [Appellant] wanted me on the staff at Memorial." (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 115 ll. 3-7) (R. p. 512, lines 3-7). Respondent also testified in his deposition that he was working at Memorial "Maybe three [days a week] -- . . . because I was with Memorial and having -- and, again, having to do rounds both places." (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 181 ll. 17-21) (R. p. 578, lines 17-21).

It is evident from the 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 are clear that the employment Agreement was not simply between a local resident and a local medical facility for medical service to patients and/or citizens of Lowcountry South Carolina.

Nevertheless, Appellant's arbitration motion was denied by Order of Judge Goldsmith dated September 24, 2013. (See Goldsmith Order dated September 24, 2013 and entered on September 30, 2013 ("Goldsmith Order")) (R. p. 25). The Appellant timely filed and served a motion to alter or amend Judge Goldsmith's Order entered on September 30, 2013. Thereafter, on November 14, 2013, Appellant

received written notice of Judge Goldsmith's Order denying Appellant's motion to alter and amend the September 30, 2013 Order. This appeal followed.

ARGUMENTS

I. APPELLANT HAS PRESERVED ITS RIGHT TO INDEPENDENTLY SEEK ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT.

Appellant has never waived and has continuously preserved its right to independently seek arbitration in this matter. Respondent has entered into four (4) Consent Orders, as recited above, which specifically address the ability of Appellant to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. (See Appellant's Arb. Mot.) (R. p. 145); (Appellant's Arb. Mot. Reply Mem. Exhibit A) (R. pp. 297-313). In addition, and accordingly, 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) (R. p. 948, lines 12-17).

However, there are a number of confusing findings throughout Judge Goldsmith's Order which insinuate that Appellant failed to preserve its right to independently seek arbitration and conduct discovery without waiver or prejudice:⁷

- "Nowhere in any of these discovery requests, or in any correspondence or email communication before the court was there any mention that these requests were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration." (Goldsmith Order at 2) (R. p. 26).

⁷ Over the objections of Appellant, Judge Goldsmith filed and entered the proposed order of Respondent with no changes.

- “[Appellant] responded to [Respondent’s] initial discovery requests on October 30, 2009, and on November 13, 2009, without any reservation or limitation.” (Goldsmith Order at 2-3) (R. pp. 26-27).
- “On October 21, 2009, CCMC filed a Motion to Compel Arbitration . . . prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt to take the deposition of the [Respondent].” (Goldsmith Order at 3) (R. p. 27).
- “As with the motion by CCMC . . . the motion and supporting memorandum by [Appellant] did not mention the need or attempt to depose the [Respondent] as a condition to a ruling thereon.” (Goldsmith Order at 4) (R. p. 28).
- “Further, if the Defendants believe that the [Respondent’s] deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of [Respondent] prior to the earlier rulings without invoking any issue of waiver or prejudice.” (Goldsmith Order at 8) (R. p. 32).

It is clear from the Consent Orders, as recited above, that Appellant has never waived and has continuously preserved its right to independently seek arbitration and conduct discovery in this matter. 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. (See Appellant’s Arb. Mot. Reply Mem. Exhibit A) (R. pp. 297-313); (see also Respondent’s September 3, 2013 Memorandum in Opposition to Appellant’s Renewed Motion for Arbitration (“Resp’t Opp’n Mem. to Appellant’s Arb. Mot.” at 6)) (R. p. 160). Appellant has prosecuted its arbitration motion pursuant to prior directives and orders of the Circuit Court. Moreover, 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) (R. p. 955). For all of the aforementioned reasons, Appellant has independently preserved its right to seek to compel arbitration under the terms of the Agreement of all causes of actions asserted by Respondent against Appellant in the Complaint.

II. APPELLANT DID NOT PREVIOUSLY LITIGATE ITS RIGHT TO ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT.

Appellant did not present 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. On October 21, 2009, CCMC filed its own independent motion to compel arbitration and stay. 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 Agreement against Respondent. (Buckner Tr. at 18 ll. 2-6) (R. p. 392, lines 2-6). The record also clearly reflects that Appellant was not a party to CCMC's appeal, and this fact was also acknowledged by the Respondent in his appellate filings. (Resp't Br. at 8) (R. p. 134).

Subsequent to the June 9, 2010 hearing, Appellant filed its own motion on June 17, 2010 to compel arbitration and to stay this matter pending arbitration. (See Appellant's June 17, 2010 Arbitration Motion ("Appellant's Withdrawn Arb. Mot.")) (R. p. 90). A hearing was scheduled following Remittitur to the Circuit Court from

CCMC's prior appeal. Appellant withdrew its motion without prejudice and subject to its discovery and motion rights in the Consent Orders. Thereafter on May 31, 2013, subsequent to Respondent's deposition, Appellant renewed its motion for arbitration which was different from its June 17, 2010 motion. (See Appellant's Arb. Mot.) (R. p. 145). Judge Goldsmith's Order incorrectly includes references to language contained in Appellant's June 17, 2010 motion, which was withdrawn, and was not part of Appellant's May 31, 2013 motion or the factual record. Specifically, Appellant's May 31, 2013 arbitration motion did not "adopt by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant [CCMC]." (Goldsmith Order at 4) (R. p. 28); (see Appellant's Arb. Mot.) (R. p. 145).

In addition, there are a number of confusing findings throughout Judge Goldsmith's Order which incorrectly indicate that Appellant has previously presented argument and litigated the merits of its right to enforce the arbitration provision contained in the Agreement:

- "As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion" (Goldsmith Order at 4) (R. p. 28).
- "There is no mention that the Defendants' motions, or the court's consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff." (Goldsmith Order at 5) (R. p. 29).
- "Although the Motion to Compel Arbitration was filed, argued, and appealed by CCMC, as acknowledged by counsel for Lifepoint' the issues and argument are identical for Lifepoint." (Goldsmith Order at 6) (R. p. 30).

- “That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals.” (Goldsmith Order at 8) (R. p. 32).

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. The record is also 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. For all of the aforementioned reasons, the Appellant did not previously litigate its right to arbitration under the terms of the Agreement.

III. THE CIRCUIT FAILED TO APPLY, OR INCORRECTLY APPLIED, THE “COMMERCE IN FACT” TEST TO DETERMINE WHETHER 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.

Judge Goldsmith’s Order failed to apply, or incorrectly applied, the “commerce in fact” test to the facts presented by Appellant at the September 9, 2013 hearing in order to determine whether the medical services performed by Respondent under the terms of the Agreement *in fact* involved or affected interstate commerce, and therefore, triggered the FAA.

A. Standard of Review.

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 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.

B. The Federal Arbitration Act and the "Commerce In Fact" Standard.

The FAA provides in pertinent part: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2010). Unless the parties have contracted otherwise, the FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001). "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses

a wider range of transactions than those actually in commerce - that is, within the flow of interstate commerce.” Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)).

“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).

- C. The facts presented by Appellant To Judge Goldsmith at the September 9, 2013 Hearing clearly demonstrate that the medical services performed by Respondent under the terms of the Agreement in fact involved interstate commerce under the “Commerce In Fact” test.

Under the Consent Orders, and as stated above, Appellant has not only preserved its right to independently seek arbitration, but has preserved its right to engage in discovery with Respondent and to receive the benefit of any discovered evidence without waiver or prejudice to its arbitration rights. At the time of CCMC’s arbitration motion hearing on June 9, 2010, CCMC did not have the benefit of

Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce. The evidence that CCMC did present to Judge Buckner was essentially limited to the pleadings of Respondent. (Buckner Tr. at 15 ll. 15-16) (R. p. 389, lines 15-16). CCMC attempted to leverage the allegations in the Complaint in order to frame its argument that interstate commerce was affected by Respondent closing his practice in Georgia and then beginning employment at the Coastal Carolina Medical Center in South Carolina. (CCMC Mem. at 2 & 3) (R. pp. 81-82); (see Buckner Tr. at 7, 14-16) (R. pp. 381 and 388-390). 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) (R. pp. 386, lines 15-22 and 388, lines 23-25); (Resp't Opp'n Mem. at 3) (R. p. 162).

The terms of the Agreement and the surrounding facts, as recited above, clearly evidence that performance of the Agreement involved and affected interstate commerce. The medical services provided by Respondent under the terms of the Agreement were not simply contained to only a local clinic, with privileges at only a local hospital, and treating only local patients. The required performance of the Agreement was not confined to the State of South Carolina, but in fact involved providing medical services in both South Carolina and Georgia. Unlike before Judge Buckner and previously this Court of Appeals, the Respondent has now *admitted* interstate commerce activity while performing duties under his Agreement. It is now

patently evident from the facts now exposed by Appellant that the medical services actually performed by Respondent tie to contractual obligations expressed in the Agreement which in fact involve and affect interstate commerce under the "commerce in fact" test. (See Goldsmith Tr. at 10, 12-13) (R. p. 913, lines 12-13); (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 115 ll. 3-7, 181 ll. 17-21, 269 ll. 20-24 & 373 ll. 1-2) (R. pp. 512, lines 3-7, 578, lines 17-21, 666, lines 20-24, and 770, lines 1-2).

However, Judge Goldsmith's Order failed to apply, or incorrectly applied, the "commerce in fact" test to the facts presented by Appellant at the September 9, 2013 hearing. The Order states the following:

- "I find that the facts and testimony from the [Respondent's] deposition argued by the [Appellant] herein are not substantially different than those before the court in the prior rulings." (Goldsmith Order at 7-8) (R. pp. 31-32).
- "The surrounding facts are not substantially different now than they were before the earlier courts." (Goldsmith Order at 8) (R. p. 32).
- 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 Order fails to make a ruling, or correctly rule, that the deposition testimony of Respondent presented by Appellant implicates interstate commerce under the "commerce in fact" test, and therefore, triggers the FAA with respect to Respondent's claims against Appellant.

IV. THE CIRCUIT COURT HAS INCORRECTLY APPLIED THE "LAW OF THE CASE DOCTRINE".

Appellant did not litigate any of the facts and arbitration issues presented to Judge Buckner at the June 9, 2010 hearing or subsequently on CCMC's appeal. Additionally, Appellant 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. The facts and circumstances in the record now are materially different than what was before Judge Buckner. Specifically, Respondent's sworn testimony at deposition contradicted the information presented to and relied upon by Judge Buckner and this Court of Appeals in previously denying arbitration. Respondent's argument and Judge Goldsmith's reliance on the "law of the case doctrine" does not apply to Appellant's arbitration motion.

A. The Law of the Case Doctrine.

Under the "law of the case doctrine," a party is precluded from relitigating, 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, 458-59, 674 S.E.2d 151, 153 (2009) (citing Bakala v. Bakala, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (1989). "[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).

B. Findings of Judge Goldsmith in the Order.

The Order makes the following findings:

- “I find that the law of the case doctrine relative to the decision of the South Carolina Court of Appeals applies to these motions.” (Goldsmith Order at 1) (R. p. 25).
- “Although the motion to compel was filed, argued, and appealed by CCMC, as acknowledged by counsel for [Appellant] the issues and argument are identical for [Appellant].” (Goldsmith Order at 6) (R. p. 30).
- “I find 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 rulings.” (Goldsmith Order at 7-8) (R. pp. 31-32).
- “The Court of Appeals has decided that this employment agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. The surrounding facts are not substantially different now than they were before the earlier courts. The decision of the Court of the Appeals on the applicability of the FAA to this Agreement is the law of the case.” (Goldsmith Order at 8) (R. p. 32).

C. The facts and arguments presented by Appellant to Judge Goldsmith at the September 9, 2013 Hearing are different from the facts and arguments presented by CCMC to Judge Buckner at the June 9, 2010 Hearing.

The facts and arguments presented by Appellant to Judge Goldsmith at the September 9, 2013 hearing are not identical (in fact they are materially different) to the facts and argument presented by CCMC to Judge Buckner at the June 2, 2010 hearing. CCMC's argument to Judge Buckner was that interstate commerce was affected by Respondent closing his practice in Georgia and then beginning employment at the Coastal Carolina Medical Center in South Carolina. The only evidence that CCMC presented to Judge Buckner to support this argument was the pleadings of Respondent. Counsel for Respondent inaccurately characterized the facts in his opposing argument to Judge Goldsmith that Appellant was attempting to make the same argument as CCMC as a basis to demonstrate interstate commerce activities. (Goldsmith Tr. at 14-15) (R. pp. 917-918). The Appellant made clear to Judge Goldsmith, as indicated in the above-quoted excerpts from the hearing, that Appellant was not resurrecting the Thornton argument advocated by CCMC to Judge Buckner; but rather was submitting sworn testimony of Respondent which demonstrated undisputable 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 providing medical services in both South Carolina and Georgia.

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*.” This factual theme was continuously urged by Respondent not only to Judge Buckner but also throughout CCMC’s appeal. As a result, it is clear that the previous rulings on CCMC’s motion for arbitration relied on these incorrect factual representations as proffered by Respondent. It is now beyond doubt that Respondent’s medical services under the Agreement in fact involved and affected interstate activities. Tellingly, during the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent did not even argue against whether or not interstate commerce was implicated by the admissions of the Respondent in his deposition testimony. (See Goldsmith Tr. at 47 (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.”)

Further, the Complaint and the Respondent’s interrogatory responses are different than those facts revealed during Respondent’s deposition. Neither the Complaint nor Respondent’s interrogatory responses state that Respondent was importing patients into South Carolina or that he performed medical services in Georgia as an obligation under the terms of the Agreement. Previously, CCMC pointed out to Judge Buckner that Respondent stated that “after the sale of the hospital to Tenet was announced in June. . . many Savannah doctors stopped referring patients to [Respondent] because of Tenet’s horrible reputation.” (Answer to CCMC Interrog. 7) (R. p. 983). It is clear from the record that CCMC did not have corroborating evidence to support its factual opinion surmised from Respondent’s

interrogatory, moreover, this interrogatory reference is limited to doctor referrals rather than any factual representation about the state residency of any *patients* actually referred. Nevertheless, until the admissions in Respondent's deposition testimony were revealed, the record is clear that Respondent inaccurately and repeatedly emphasized the 'local' nature of the contract and that his medical performance under the Agreement was confined to only South Carolina. During the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent represented that "it's alleged in the complaint that [Respondent] had existing clients from Savannah." (Goldsmith Tr. at 17-18) (R. pp. 920-921). Nowhere in the Complaint is there any allegation that Respondent had any clients from Savannah. In fact, the Complaint alleges just the opposite, that "[Respondent] had to discontinue, close, and leave an established practice in Savannah, GA, where he had privileges at surgical hospitals." (Compl. ¶ 8) (R. p. 35).

Lastly, CCMC previously attempted to have Judge Buckner believe that Respondent was actually performing surgeries at Memorial Hospital in Savannah, Georgia. CCMC relied only on Respondent's statement that "the availability of equipment became so unreliable [at Coastal Carolina Medical Center] that [Respondent] started taking hi[s] complicated cases to Memorial." (Answer to CCMC Interrog. 9) (R. pp. 984-985). Again, it is clear from the record that CCMC did not have any corroborating evidence to support its factual opinion construed from Respondent's interrogatory response. The context in which this statement was alleged in Respondent's interrogatory response dealt with Defendant CCMC's alleged

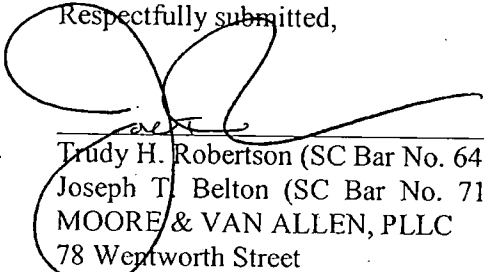
breach of the Agreement on account of its failure to provide Respondent certain equipment as allegedly required under the Agreement. As a result of this alleged breach, Respondent alleges that he was then forced to go to Memorial. This interrogatory response does not evidence that the Respondent *was actually obligated under the terms of the Agreement* to maintain medical staff privileges at Memorial or perform medical services for patients at Memorial.

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 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. For the foregoing reasons, Judge Goldsmith's reliance on the "law of the case doctrine" does not apply to Appellant's arbitration motion.

CONCLUSION

For the foregoing 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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April 19, 2014

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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.

CERTIFICATE OF COUNSEL

This is to certify that this Final Brief complies with rule 211(b), SCACR,
April 14, 2014.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Phillip Flexon, M.D. Respondent,

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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 *FINAL 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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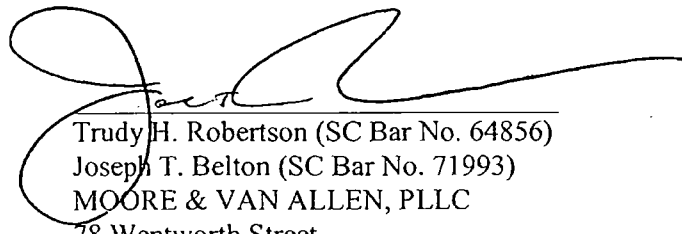
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Brooks P. Goldsmith, Circuit Court Judge

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APR 18 2014

SC Court of Appeals

Case No. 2009-CP27-331

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, ... Defendants

Of whom
Lifepoint Hospital, Inc., is, ... Appellant

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP27-331

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, ... Defendants

Of whom
Lifepoint Hospital, Inc., is, ... Appellant

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In this appeal, Appellant Lifepoint Hospitals, Inc. seeks to relitigate issues which were specifically decided by this Court in an earlier appeal **in this case**. In *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C.83, 731 S.E.2d 1 (Ct. App. 2012) (rehearing denied August 29, 2012), this Court stated: "We agree with the trial court's finding that the [Employment] Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA [Federal Arbitration Act] did not apply to the Agreement." 399 S.C. at 89, 731 S.E.2d at 4. It is noteworthy that the Employment Agreement (hereinafter the Agreement) in question was drafted by Appellant. In the vast majority of its brief, Appellant seeks to argue that both the trial court and this Court in the earlier appeal were somehow wrong, and that the FAA applies to the Agreement. Without reconsidering issues which were decided by a different trial judge, and affirmed on appeal, Judge Goldsmith in the Order below ruled that the "surrounding facts are not substantially different now than they were before the earlier courts," (Order p. 8, R. p. 32, lines 11-12) and that the reported decision by this Court is the law of the case. There is clearly evidence reasonably supporting this factual finding. As such, it should be summarily affirmed.

STATEMENT OF THE CASE

This case was commenced with the filing of the Summons and Complaint on May 26, 2009. (R. pp. 34-42) As alleged in the Complaint, this matter arises from an Employment Agreement (the Agreement) between Respondent and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. (R. pp. 961-979) At the time the Agreement was negotiated and executed, CCMC was owned by Appellant Lifepoint.¹

¹It is alleged by the Respondent that, at the time the Agreement was being negotiated, Appellant was in active discussions with Defendant Tenet for the sale of the hospital, which

In response to the Complaint, Tenet Healthsystems, Inc., filed a Motion to Dismiss alleging that the Complaint failed to state a cause of action. After a hearing on November 30, 2009, the Court denied this Motion to Dismiss.

All parties answered, each asserting an affirmative defense that all of the causes of action were subject to an arbitration provision contained in the Agreement.² (R. pp. 961-979)

On October 6, 2009, Defendant Tenet³ served Interrogatories and Requests for Production on the Respondent. (R. p. 26, lines 16-17) Similarly Appellant served Interrogatories and Requests for Production upon the Respondent on April 16, 2010. (R. p. 26, lines 17-18) Respondent responded to the discovery requests of CCMC on April 19, 2010. Appellant responded to Respondent's initial discovery requests on October 30, 2009, and on November 13, 2009.⁴

Appellant failed to disclose to the Respondent. That sale occurred in June 2007, at the very time that Respondent began his employment. Respondent alleges he would not have considered any employment relationship with Tenet, as Tenet had a very negative reputation to Respondent as a hospital owner. In July 2007, Tenet presented Respondent with an Amendment to and Assignment of Physician Employment Agreement (Assignment, R. p. 55) which purported to assign the Agreement to Tenet. Respondent refused to sign the Assignment, and in August 2008, delivered a formal notice of termination for cause, pursuant to the Agreement. This action followed. (Order, R. p. 26, lines 2-12)

²It is noteworthy that there is only one Employment Agreement in this case. (Order p. 6, R. p. 30, line 6).

³There has been one collective response by Defendants PHC-Jasper, Inc., Coastal Carolina Medical Center, Inc., and Tenet Healthsystems. They are collectively referred to herein as "Tenet." Tenet has also responded for CCMC.

⁴As noted by the Lower Court in the Order under appeal, "Nowhere in any of these discovery requests, or in any correspondence or email communications before the court was there any mention that these discovery requests [or the responses] were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration." (Order p. 2, R. p. 26, lines 18-21)

On October 21, 2009, Tenet (designated as CCMC) filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. (R. p. 79) In support of this Motion, CCMC submitted a Memorandum in Support. (R. pp. 80-83)⁵

A hearing on CCMC's Motion to Compel Arbitration was held before Judge Perry Buckner over seven (7) months later on June 9, 2010.⁶ At the time of the June 9, 2010 hearing, Appellant had not filed a motion to compel arbitration. However, counsel for Appellant acknowledged before Judge Buckner that any such motion would be identical to that of CCMC:

MS. ROBERTSON: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but...

THE COURT: I think you ought to do that, because obviously the plaintiff isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it. But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but...

MS. ROBERTSON: I think that likely it is. So I will make it.
(Order p. 3, R. p. 27)

⁵In its Order, the Lower Court stated, "Nowhere in this Memorandum is there any mention of the desire or attempt to take the deposition of the Plaintiff, generally or with reservation of any rights. Prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt whatsoever to take the deposition of the Plaintiff." (Order p. 3, R. p. 27, lines 5-8)

⁶In its Order, the Lower Court stated, "The parties submitted the transcript of this earlier hearing in connection with the present motions. It is noteworthy that, in the argument before Judge Buckner, counsel for CCMC made no mention that he needed, or wanted, to take the deposition of the Plaintiff, or that he had made any attempt to take the Plaintiff's deposition prior to the hearing." (Order p.3, R. p. 27, lines 9-13)

On June 16, 2010, two weeks before the ruling by Judge Buckner on the identical motion by CCMC, Appellant filed its Motion to Compel Arbitration (R. pp. 90-93), which stated, in part, as follows:

This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc.... All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.⁷

(R. pp. 90-91)

By Order dated June 30, 2010, Judge Buckner denied the motion by Defendant CCMC to compel arbitration (R. pp. 7-12), stating in part as follows:

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton* [*Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)]. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. 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.

(R. pp. 11-12)

On July 29, 2010, Defendant CCMC filed its Notice of Appeal to the South Carolina Court of Appeals. (R. p. 28, lines 27-28) By reported decision dated March 7, 2012, (R. p. 28, lines 28-29) the Court of Appeals affirmed Judge Buckner's Order, stating in part as

⁷In its Order, the Lower Court stated: "As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion and supporting memorandum by [Appellant] did not mention the need or attempt to depose the [Respondent] as a condition to a ruling thereon." (Order p. 4, R. p. 28, lines 13-15)

follows:

We agree with the trial court that the facts of this case are more akin to those in *Tahiri*. [*Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007)]. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services “at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time....” **We agree with the trial court’s finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.** See *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52 (“Our courts consistently look to the essential character of the contract when applying the FAA.”). *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). (emphasis supplied)
(R. p. 29, lines 1-13)

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals (R. p. 29, lines 14-16) which states, in part, as follows:

In his Complaint, Flexon alleges that, “In order to sign Exhibit 1 [the employment agreement],” he had to “discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals.” (R. at 9) The Complaint itself, therefore alleges substantial interstate activity as a consequence of the Agreement. Flexon alleges he lost referrals from Savannah doctors several months after he joined CCMC; if this is true, Flexon was receiving referrals across state lines in support of his practice at CCMC. (R. at 81) (“[A]fter the sale of the hospital to Tenet was announced in June...many Savannah doctors stopped referring patients” to Flexon.) During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83) (“The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial.”). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon’s employment in South Carolina implicate interstate commerce. These facts contradict the Court’s understanding that Flexon’s employment was purely local in nature.⁸ (R. p. 29)

⁸In its Order, the Lower Court stated, “There is no mention that the Defendants’ motions, or the court’s consideration, was in any way hampered or impacted by the failure

By Order filed July 23, 2012, the Court of Appeals ruled “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.” (R. p. 30, lines 1-3)

On August 29, 2012, the Court of Appeals issued its Remittitur of this case to the Jasper Court of Common Pleas. (R. p. 30, lines 4-5)

On April 30, 2013, Defendants took the deposition of Respondent. (R. p. 30, lines 10-11) On May 31, 2013, Appellant filed its Renewed Motion to Compel Arbitration and Stay Action, (R. pp. 145-157), citing certain statements in Respondent’s deposition.⁹

A hearing was held before the Honorable Brooks Goldsmith on September 9, 2013. (R. p. 25, line 1). By Order dated September 24, 2013, Judge Goldsmith, denied Appellant’s Renewed Motion to Compel Arbitration¹⁰, stating as follows:

Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff’s deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings. Further, if the Defendants believe that the Plaintiff’s deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts

or inability to take the deposition of the Plaintiff.” (R. p. 29, lines 35-36)

⁹In its Order, the Lower Court stated: “Lifepoint now points to statements made in the Plaintiff’s deposition which was taken on April 30, 2013. Specifically, Lifepoint cites to the following testimony:

[t]he 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 [Plaintiff’s Depo. p. 269]. [The Plaintiff stated that he had] “plenty of patients coming from Georgia. [Plaintiff’s Depo. p. 373] Lifepoint’s Reply Memorandum at 4.

(Order p.6, R. p. 30, lines 10-16)

¹⁰In addition to Appellant’s Renewed Motion to Compel Arbitration, CCMC filed a Motion for Relief Pursuant to Rule 60(b). In his Order, Judge Goldsmith also denied CCMC’s Motion. CCMC has not appealed this ruling.

when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals.

The Court of Appeals has decided that this "employment agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement." *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). The "surrounding facts" are not substantially different now than they were before the earlier courts. The decision of the Court of Appeals on the applicability of the FAA to this Agreement is the law of the case. Therefore CCMC's motion for relief from judgment under SCRC60 is denied as is Lifepoint's Motion to Compel Arbitration.

(R. pp. 31-32)

Appellant timely noticed its appeal of Judge Goldsmith's Order.

STATEMENT OF FACTS

The underlying facts of this case are succinctly stated by the Court of Appeals in its earlier decision:

Flexon is a resident of Hardeeville, South Carolina, and is licensed to practice medicine as an ear nose, and throat specialist in South Carolina and Georgia. Coastal is a South Carolina corporation with its principal place of business in Jasper County, and it is wholly owned by Tenet, a Delaware corporation. PHC is a South Carolina corporation doing business as Coastal Carolina Medical Center in Jasper County, and it is the wholly-owned subsidiary of Lifepoint, a Tennessee corporation.

On December 18, 2006, Flexon entered into the Physician Employment Agreement (the Agreement) with PHC. The Agreement provided that Flexon would practice for five years "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina... and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time" Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC. The Agreement further provided:

13.4 Governing Law and Venue: This Agreement shall be

governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby (sic) consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 Arbitration: Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration..., and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

Flexon alleges that at the time of negotiating the Agreement, PHC was in negotiations to sell its assets, including the hospital, Coastal Carolina Medical Center, to Tenet. Upon Flexon's commencement of practice at Coastal Carolina Medical Center in March of 2007, PHC allegedly refused to honor commitments it made to Flexon regarding equipment purchases and the recruitment of an audiologist. In June 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Tenet.

In July 2007, Tenet presented Flexon with an Amendment to and Assignment of Physician Employment Agreement (the Amendment), which purported to assign the Agreement to Tenet. Flexon refused to sign the Amendment. In August 2008, he allegedly delivered a formal notice of termination for cause, pursuant to the Agreement. Flexon received a letter, in May 2009, claiming he owed Tenet more than \$725,000, and he must cease his practice of medicine in Savannah, Georgia. Flexon filed this action. *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is subject to de novo review.

However, the trial court's findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

LAW/ANALYSIS

Although Appellant devoted much of its argument before the Lower Court to the issue of whether the Agreement in question is subject to mandatory arbitration under the FAA, and similarly does so in this appeal, the Lower Court did not address this issue in its Order denying Appellant's Motion to Compel Arbitration, or in the Order denying Appellant's Motion for Reconsideration. Rather, the Lower Court instead correctly ruled that this substantive decision had earlier been explicitly made by another trial court, and affirmed by this Court, and hence was the law of the case. (R. p. 32, lines 8-15) There is ample factual support for this ruling, which should therefore be affirmed.

As our Supreme Court has stated on numerous occasions:

The doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* §605 (1995). The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 257, 98 S.E.2d 798, 800 (1957). *Ross v. MUSC*, 328 S.C. 51, 63, 492 S.E.2d 62, 68 (1997).

Similarly:

Under the law-of-the-case doctrine, a party is precluded from relitigating, 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. C.J.S. *Appeal & Error* §991 (2008). *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).

As noted by the Lower Court, "Lifepoint argues that the 'law of the case doctrine'

does not apply in this case because the facts established by the quoted portions of the Plaintiff's deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals...." (R. p. 31, lines 11-14) In their Brief, Appellant argues that the facts established in Respondent's deposition are so different from those before the court in the earlier appeal that "the principles of law announced on the first appeal are not applicable." (App. Br. at 28) Respondent's deposition was argued by Appellant at length before the Lower Court in its Supporting Memorandum and in oral argument. After over an hour of oral argument, the Lower Court ruled:

Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff's deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings.

(R. pp. 31-32)

This factual finding is entitled to great deference by a reviewing court.

As noted in the Lower Court's Order, Appellant cited and relied upon the case of *Nelson v. Charleston & Western Carolina Railway Co*, 231 S.C. 351, 98 S.E.2d 798 (1957) for the proposition that the law of the case doctrine does not apply because "the facts established by the quoted portions of the Plaintiff's deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals." (Order p. 7, R. p. 31, lines 11-14) However, *Nelson* supports the Lower Court's Order, and Respondent's position herein:

Of course, the doctrine of "the law of the case" 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, supra, 231 S.C. at 357, 98 S.E.2d at 800.

Appellant contends that Respondent's deposition testimony that he was performing surgeries in Savannah, and also maintained staff privileges at Savannah Memorial Hospital, while he was working for Appellant in Hardeeville, constituted materially different facts sufficient to take the case out of the law of the case doctrine. However, as noted in the Lower Court's Order, in its Petition for Rehearing dated March 19, 2012 (relative to the prior ruling), CCMC argued in part as follows:

During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83) ("The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial."). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon's employment in South Carolina implicate interstate commerce.

(Order p. 5, R. p. 29, lines 26-33)

Hence, not only was there more than adequate factual support for the Lower Court's ruling, the deposition testimony currently cited by Appellant was merely cumulative in nature to what the trial court and appellate court had before it at the prior ruling.

Finally, there is no showing whatsoever why Defendants did not take a limited deposition of Respondent in the seven months before the courts' earlier consideration of CCMC's Motion to Compel Arbitration, if they felt a full evidentiary record was necessary for this issue. Indeed, the Lower Court ruled as follows:

If the Defendants believe that the Plaintiff's deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. **That they did not then cannot now be grounds for reargument of issues about which the parties spent two**

years litigating in the Court of Appeals. (Emphasis added.)
(Order p. 8, R. p. 32, lines 1-7)

CONCLUSION

In *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012), the Court of Appeals stated explicitly: "We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, **the FAA did not apply to the Agreement.**" 399 S.C. at 89, 731 S.E.2d at 4. (emphasis supplied). There is only one Agreement at issue in this case. Having reviewed Respondent's deposition and other written submissions, and having heard extensive arguments from counsel, the Lower Court ruled that the law-of-the-case doctrine prohibits Appellant from relitigating that the FAA applies to the Agreement. This factual finding should be affirmed.

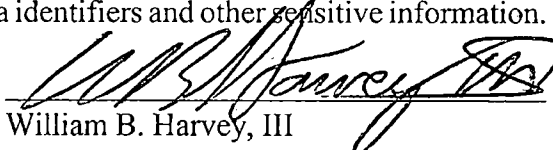
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Dated: April 11, 2014

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules. The undersigned further certifies that this document is in compliance with the South Carolina Supreme Court's Order, of August 13, 2007, regarding the redaction or sealing of personal data identifiers and other sensitive information.


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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP-27-331

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, ... Defendants

Of whom
Lifepoint Hospital, Inc., is, ... Appellant

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's **Final Brief** on all parties, by depositing
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC 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.

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ARGUMENTS

- 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 THEREFORE 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) (R. p. 392, lines 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) (R. p. 134).

Moreover, under the Consent Orders¹, as more fully described in Appellant's Final 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

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."

Respondent in fact involved interstate commerce. (See Appellant's Arb. Mot.) (R. p. 145); (Appellant's Arb. Mot. Reply Mem. Exhibit A) (R. pp. 297-317). 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) (R. p. 955). And, in direct contrast to the arguments submitted in Respondent's Final 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) (R. p. 948, lines 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) (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.*"² (Emphasis added) (Goldsmith Order at 4) (R. p. 28).

However, it is evident from the uncontradicted deposition testimony of Respondent, as set forth in Appellant's Final 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 undisputed³ 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) (R. p. 386, lines 19-22); (see also Resp't Opp'n Mem. at 5 (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)).

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

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

Respondent in his deposition testimony. (See Goldsmith Tr. at 47 (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.")

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) (R. pp. 386, lines 15-22 and 388, lines 23-25); (Resp't Opp'n Mem. at 3) (R. p. 87). 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) (R. pp. 11-12).

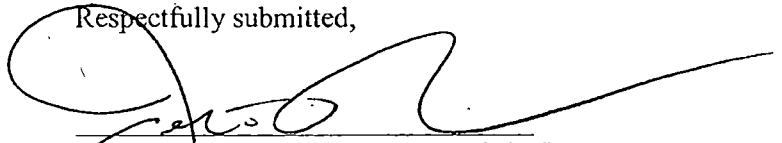
The facts and circumstances in the record now are materially different than what was before Judge Buckner. The facts in the record now clearly evidence that performance of the Agreement by Respondent while employed with the Coastal Carolina Medical Center was not confined to the State of South Carolina, 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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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,

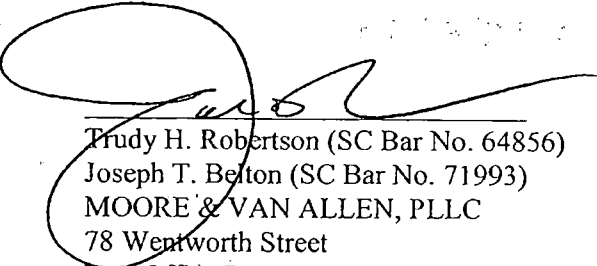
v.

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.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

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Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc., and
Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is Appellant.

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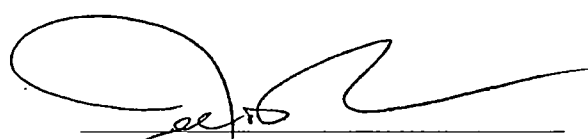
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