STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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/Petitioner

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case was commenced with the filing of the Summons and Complaint on May 26, 2009. As alleged in the Complaint, this matter arises from a single Employment Agreement (the Agreement) between Respondent and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. At the time the Agreement was negotiated and executed, CCMC was owned by Petitioner Lifepoint.[1]

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]

On October 6, 2009, Defendant Tenet[3] served Interrogatories and Requests for Production on the Respondent. Similarly Petitioner served Interrogatories and Requests for

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

[2]It is noteworthy that there is only one Employment Agreement in this case.

[3]There 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.

Production upon the Respondent on April 16, 2010. Respondent responded to the discovery requests of CCMC on April 19, 2010. Petitioner responded to Respondent's initial discovery requests on October 30, 2009, and on November 13, 2009.[4]

On October 21, 2009, Tenet (designated as CCMC) filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. In support of this Motion, CCMC submitted a Memorandum in Support. [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, Petitioner had not filed a motion to compel arbitration. However, counsel for Petitioner 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

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[4]As 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."

[5]In 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."

[6]In 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."

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.

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, 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]

By Order dated June 30, 2010, Judge Buckner denied the motion by Defendant CCMC to compel arbitration, 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

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[7]In 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 [Petitioner] did not mention the need or attempt to depose the [Respondent] as a condition to a ruling thereon."

> 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.

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

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals 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]

By Order Denying the Petition for Rehearing 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."

On August 29, 2012, the Court of Appeals issued its Remittitur of this case to the Jasper Court of Common Pleas.

Over eight months later, on April 30, 2013, Defendants took the deposition of Respondent. On May 31, 2013, Petitioner filed its Renewed Motion to Compel Arbitration and Stay Action, citing certain statements in Respondent's deposition.[9]

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[8]In 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 or inability to take the deposition of the Plaintiff."

[9]In 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.

A hearing was held before the Honorable Brooks Goldsmith on September 9, 2013. By Order dated September 24, 2013, Judge Goldsmith, denied Petitioner's Renewed Motion to Compel Arbitration[10], 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 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 SCRCP60 is denied as is Lifepoint's Motion to Compel Arbitration.

Petitioner appealed Judge Goldsmith's Order. In a unanimous decision, the Court of Appeals affirmed the lower court's ruling. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015), holding that "fundamental fairness requires Lifepoint to be

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[10]In 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.

bound by this court's opinion in *Flexon I*." By Order dated September 21, 2015, the Court of Appeals denied the Petition for Rehearing.

ARGUMENT

This case was commenced by the filing of the Complaint on May 21, 2009. On October 21, 2009, Defendant CCMC filed its Motion to Compel Arbitration. Judge Buckner denied this Motion to Compel Arbitration by Order dated July 12, 2010. CCMC appealed that Order, which was affirmed by the Court of Appeals on March 7, 2012 *Flexon v. PHC-Jasper, Inc.* 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) (hereinafter Flexon I). With the exception of the exchange of written discovery, and the depositions of the Respondent and Eric Deaton (former CEO of CCMC), for over six (6) years the parties have been engaged in the litigation and two appeals of the sole issue of arbitration of the one physician employment agreement at issue in this case.

By its second reported decision, on June 10, 2015 the Court of Appeals again denied a motion to compel arbitration, *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) (Flexon II), ruling that the "new evidence" sought to be relied upon now by Appellant Lifepoint could and "should have been developed before, and raised in, the hearing on Coastal's motion to compel" in 2009. 770 S.C. at 405. Hence, after a thorough analysis of the history of litigation of this one issue, the Court of Appeals ruled that "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*." 770 S.C. at 406. Respondent is

entitled to have this litigation efficiently concluded. Fundamental fairness demands that this Petition for Writ of Certiorari be denied and the case remitted for completion of discovery and trial.

THIS APPEAL DOES NOT FIT ANY OF THE REASONS WHICH ARE GENERALLY CONSIDERED ON A PETITION FOR WRIT OF CERTIORARI

As an initial matter, Rule 242(b) SCACR provides "the character of the reasons which will be [generally] considered" on a petition for writ of certiorari, and this case doe not fall under any of the listed reasons. This appeal does not present a novel question of law. To the contrary, the Court of Appeals reaffirmed its 2012 decision in *Flexon I* that this physician employment agreement is not subject to arbitration under the Federal Arbitration Act (FAA). Both decisions in *Flexon I* and *Flexon II* we by a unanimous court, without dissent or concurring opinion.

After a thorough analysis of the policy behind the law-of-the-case doctrine "to promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues"(citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)), the Court of Appeals in *Flexon II* ruled that "fundamental fairness requires Lifepoint to be bound by this court's opinion in *Flexon I*." 776 S.E.2d at 406 There is no conflict in this ruling with prior decisions of the Supreme Court. Rather it is a ruling based on the failure of Lifepoint to act with diligence to develop and present to the lower court the deposition evidence upon which it relies in its claim of "new evidence."

Finally, there are no constitutional issues involved in this appeal, and there is no involvement of a federal question.

Although there are multiple defendants, there is only one employment agreement at issue in this case, between Respondent Dr. Phillip Flexon and Coastal Carolina Medical Center (CCMC). Petitioner Lifepoint owned CCMC at the time the employment agreement was executed. Shortly thereafter Lifepoint sold CCMC to Tenet Healthsystems, Inc. The appeal in *Flexon I* was by CCMC and Tenet, and the Court of Appeals ruled that "the FAA did not apply to the Agreement." *Flexon I*, 399 S.C. at 89. CCMC and Tenet are not parties to this *Flexon II* appeal, and are therefore conclusively bound by the *Flexon I* decision. Petitioner herein seeks a contrary ruling concerning the same agreement. As the Court of Appeals noted, the U.S. Supreme Court has stated the "The rule of the law of the case is a rule of practice, based upon the 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); *Flexon II*, 776 S.E. 2d at 404. The Court of Appeals did not reach the question of the FAA's applicability to this case, as it ruled that Petitioner Lifepoint was "bound by this court's opinion in *Flexon I*." 776 S.E.2d at 406 which held that the FAA does not apply to this Agreement.

THE COURT OF APPEALS CORRECTLY RULED THAT FUNDAMENTAL FAIRNESS REQUIRES THAT PETITIONER BE BOUND BY THE COURT'S RULING IN *FLEXON I*, IN ORDER THAT THERE MAY BE AN EFFICIENT END TO THE LITIGATION (PETITION'S QUESTIONS 1, 2 AND 3)

The Court of Appeals ruled that "whether the result is based on the law-of-th-case doctring or on waiver, fundamental fairness requires Lifepoint to be bound by this court's opinion in *Flexon I*." 776 S.E.2d at 406. The Court conducted a detailed analysis and concluded that the facts presented "did not excuse Lifepoint from taking the steps necessary to protect its own interests." *Id.* The Court held that "the second circuit court judge properly concluded that Lifepoint's failure to timely depose Flexon 'cannot now be grounds from reargument of the issue about which the parties spent two years litigating in the Court of Appeals'." 776 S.E.2d at 406. This factual finding was supported by evidence reasonably supporting the finding. It was affirmed by the Court of Appeals, and for multiple reasons should be allowed to stand.

Petitioner's entire argument of "new evidence" is based upon the deposition testimony of the Respondent. CCMC's original motion to compel arbitration was filed on October 21, 2009. The hearing on this motion to compel arbitration was held on June 9, 2010, and Judge Buckner issued his order denying this motion on July 7, 2010. The deposition of the Respondent was not taken until April 30, 2013.

In this context, the Court of Appeals analyzed cases nationwide where the presentation of "new evidence" sought to except a case from the law-of-the-case doctrine.

> Opposing 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 foundation 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 call 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.* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* §4478 (2d ed. 202)(emphasis added); *Flexon II,* 776 S.E.2d at 404.

The Court of Appeals ruled that "the facts gleaned from Flexon's deposition testimony should have been developed before, and raised in, the hearing on Coastal's motion to compel. 776 S.E.2d at 405, citing *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 the litigation."). In that connection, the Court of Appeals stated:

> Prior to the hearing on Coastal's (CCMC) 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.
> ...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.
> ...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 interest 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.* 776 S.E.2d at 446.

This ruling is not so much about waiver or law-of-the-case as it is about fundamental fairness, arising from the fact that it took Lifepoint four years after the case was filed to depose the Respondent, when the issue on appeal was fully presented and an appeal decision issued in 2012. The Court of Appeals concluded that "Lifepoint has failed to convince this court that the second circuit court judge erred in denying the motion to compel arbitration." This ruling must be allowed to stand, and this case should be remitted to the lower court for the completion of discovery and trial. The Petition for Writ of Certiorari should be denied.

NEITHER THE LOWER COURT, NOR THE COURT OF APPEALS IN *FLEXON II* REACHED THE ISSUE OF THE FAA'S APPLICABILITY TO THIS CASE, AS BOTH COURTS CORRECTLY FOUND THAT THE PARTIES WERE BOUND BY THE COURT OF APPEAL'S DECISION IN *FLEXON I.* (PETITIONER'S QUESTION #4)

In *Flexon I*, the Court of Appeals held that "We agree with the trial court's finding that the Agreement and surrounding facts did not implicated interstate commerce. Therefore, the FAA did not apply to the Agreement." 731 S.E.2d at 4. It is noteworthy that CCMC and Tenet did not seek writ of certiorari of the decision in Flexon I.

Neither the lower court nor the Court of Appeals in the current appeal reached the issue of the applicability of the FAA to this agreement, because both courts held that the parties were bound by the Court of Appeals' decision in *Flexon I.* As the United States Supreme Court stated in *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950), "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." Petitioner would ask this court to consider an issue decided in this case in 2012, not reached by either courts in this appeal and about which the parties have spent over six years litigating.

CONCLUSION

Fundamental fairness cries out for closure of this issue of arbitration. It has been ruled upon by two (2) circuit judges, and two (2) reported decisions by the Court of Appeals. It is a settled issue. After six (6) years of litigation, Respondent is entitled to finally proceed with discovery and trial. For these reasons, the Petition for Writ of Certiorari should be denied.

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Dated: November 10, 2015

The undersigned certifies that the Respondent's Brief to Petition for Writ of Certiorari complies with Rule 211(b) of the South Carolina Appellate Court Rules. The undersigned further certifies that this documents 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.

William B. Harvey, III

STATE OF SOUTH CAROLINA

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Of whom
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CERTIFICATE OF SERVICE

I certify that I have served Respondent's Return to Petition for Writ of Certiorari on all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed to their respective counsel of record, as follows:

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