

RECEIVED
THE STATE OF SOUTH CAROLINA

In The Court of Appeals

MAY 25 2016

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin H. Dukes, III, Master In Equity

Case No. 2014-CP-07-2779

Appellate Case No. 2015-002363

Mary Beth Marzulli, Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System,
LP d/b/a/ Hilton Head Regional Medical Center, and
Tenet Physician Services-Hilton Head, Inc.,

Appellants.

FINAL BRIEF OF APPELLANTS

Nelson Mullins Riley & Scarborough, LLP
A. Mattison Bogan
Sue Erwin Harper
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

Attorneys for Appellants

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	7
A. Facts relating to employment relationship and patient complaint leading to the dispute	7
B. Facts relating to the applicability of the Federal Arbitration Act and the involvement of interstate commerce	12
STANDARD OF REVIEW.....	17
ARGUMENT	17
I. The Federal Arbitration Act applies and this dispute must be compelled to binding arbitration.....	17
A. The FAA applies to the Contract because the parties expressly agreed that it would.....	18
B. Respondent’s employment necessarily involves interstate commerce, and the determination of whether her employment evidences a “transaction involving commerce” under the FAA requires a broader analysis than what is in the four corners of the Contract	19
C. <i>Flexon</i> does not apply because it turned on entirely different contractual terms and a failure of proof	31
II. The Defamation Claims Are Arbitrable Because the Scope of the Arbitration Agreement is Broad.....	33
III. The Contract is not revocable or unenforceable under state contract law due to unconscionability or because it lacks consideration	37
CONCLUSION.....	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allied-Bruce Terminix Companies v. Dobson</i> , 513 U.S. 265 (1995).....	20, 25, 28, 31
<i>Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.</i> , 96 F.3d 88 (4th Cir. 1996)	36
<i>Ark. Diagnostic Center, P. A. v. Tahiri</i> , 257 S.W.3d 884 (Ark. 2007).....	33
<i>Bernhardt v. Polygraphic Co.</i> , 350 U.S. 198 (1956).....	32
<i>Burwell v. S.C. Nat’l Bank</i> , 288 S.C. 34, 340 S.E.2d 786 (1986)	38
<i>Cape Romain Contractors, Inc. v. Wando E., LLC</i> , 405 S.C. 115, 747 S.E.2d 461 (2013)	18, 19, 23, 24, 27, 28, 29, 31, 43
<i>Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.</i> 361 S.C. 544, 606 S.E.2d 752 (2004)	17
<i>Citizens Bank v. Alafabco, Inc.</i> , 539 U.S. 52 (2003).....	21, 22, 24, 28, 31, 43
<i>Cox v. Assisted Living Concepts, Inc.</i> , No. 6:13-00747, 2014 WL 1094394 (D.S.C. Mar. 18, 2014).....	27
<i>Dean v. Heritage Healthcare of Ridgeway, LLC</i> , 408 S.C. 371, 759 S.E.2d 727 (2014)	17, 24, 25, 27, 28, 29, 31, 32, 33
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985).....	18, 19
<i>Delmore v. Ricoh Ams. Corp.</i> , 667 F. Supp. 2d 1129 (N.D. Cal. 2009)	41
<i>Fleck v. E. F. Hutton Group, Inc.</i> , 891 F.2d 1047 (2d Cir. 1989).....	34, 35
<i>Flexon v. PHC-Jasper, Inc. (“Flexon I”)</i> , 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).....	4, 6, 7, 31, 32, 33, 43
<i>Flexon v. PHC-Jasper, Inc. (“Flexon II”)</i> , 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015).....	4, 6, 7, 31, 32, 33, 43

<i>Fosler v. Midwest Care Center II, Inc.</i> , 928 N.E.2d 1 (Ill. App. Ct. 2010)	26
<i>Fry v. United States</i> , 421 U.S. 542, 547 (1975)	22
<i>GGNSC Louisville Hillcreek, LLC v. Warner</i> , No 3:13-cv-751, 2013 WL 6796421 (W.D. Ky. Dec. 19, 2013)	26
<i>Glover ex rel. Glover v. Darway Elder Care Rehab. Ctr.</i> , No. 4:13-CV-1874, 2014 WL 931459 (M.D. Pa. Feb. 4, 2014)	26
<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79 (2000)	33, 37
<i>Hall v. Green Tree Servicing, LLC</i> , 413 S.C. 267, 776 S.E.2d 91 (Ct. App. 2015)	33
<i>Herron v. Century BMW</i> , 387 S.C. 525, 693 S.E.2d 394 (2010)	41, 42
<i>Hooters of Am., Inc. v. Phillips</i> , 173 F.3d 933 (4th Cir. 1999)	38
<i>J.B. Colt Co. v. Britt</i> , 129 S.C. 226, 123 S.E. 845 (1924)	38
<i>Lackey v. Green Tree Fin. Corp.</i> , 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998)	38
<i>Landers v. Fed. Deposit Ins. Corp.</i> , 402 S.C. 100, 739 S.E.2d 209 (2013)	3, 17, 34, 35, 36, 43
<i>Lucey v. Meyer</i> , 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012)	30, 37, 39
<i>Mandeville Island Farms, Inc. v. American Crystal Sugar Co.</i> , 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)	24
<i>Miller v. Cotter</i> , 863 N.E.2d 537 (Mass. 2007)	25, 26, 29
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	17
<i>Munoz v. Green Tree Fin. Corp.</i> , 343 S.C. 531, 542 S.E.2d 360 (2001)	18, 19
<i>In re Nexion Health at Humble, Inc.</i> , 173 S.W.3d 67 (Tex. 2005)	26

<i>O'Neil v. Hilton Head Hosp.</i> , 115 F.3d 272 (4th Cir. 1997)	42
<i>Parilla v. IAP Worldwide Servs. VI, Inc.</i> , 368 F.3d 269 (3d Cir. 2004).....	41
<i>Pearson v. Hilton Head Hosp.</i> , 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).....	3, 34, 35, 36, 43
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	17, 33
<i>S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.</i> , 312 S.C. 559, 437 S.E.2d 22 (1993)	17
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007)	37, 38, 40, 41, 42
<i>Sonic Automotive, Inc. v. Watts</i> , 563 U.S. 971 (2011).....	41
<i>Stokes v. Metropolitan Life Ins. Co.</i> , 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002).....	34, 36, 43
<i>Summit Health, Ltd. v. Pinhaus</i> , 500 U.S. 322 (1991).....	25, 26
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 98, 592 S.E.2d 53, 53 (Ct. App. 2003).....	32
<i>Timms v. Greene</i> , 310 S.C. 469, 427 S.E.2d 642 (1993)	24, 25
<i>Towles v. United Healthcare Corp.</i> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).....	17, 30, 34, 36, 42, 43
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	23
<i>Univ. of Ala. Found. v. Walley</i> , No. 99-D-1287-N, 2001 WL 237309 (M.D. Ala. Jan. 30, 2001)	29
<i>Visiting Nurse Ass'n of Fla., Inc. v. Jupiter</i> , 154 So.3d 1115, 1125 (Fla. 2014).....	26
<i>Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.</i> , 489 U.S. 468 (1989).....	18, 19
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 553 S.E.2d 110 (2001)	22, 23

Statutes

9 U.S.C. § 1, *et seq.*.....8, 14, 18

9 U.S.C. § 2.....12, 19, 37

15 U.S.C. §§ 2301, *et seq.*.....40

S.C. CODE ANN. § 15-48-10(a)37

S.C. CODE ANN. § 63-7-20.....9

S.C. CODE ANN. § 63-7-310.....9

STATEMENT OF ISSUES ON APPEAL

I. When the parties' contract stated that "arbitration will be conducted under the Federal Arbitration Act," was it error for the trial court to rule that the Federal Arbitration Act did not apply to that agreement?

II. Was it error for the trial court to focus solely on the individual employment contract and not to take a broader view of the involvement of interstate commerce, in the aggregate, in the transaction underlying the contract, *i.e.*, a national company's employment of Respondent and others in the healthcare field nationwide?

III. Because an agreement to arbitrate "all claims . . . related . . . to my employment" is construed broadly to include all claims that "touch matters relating to employment," was it error for the trial court to rule that the defamation claim, based upon Appellants' allegedly untrue police report that Respondent had touched a minor female patient inappropriately, was not arbitrable because it was not "related" to Respondent's employment or its termination?

IV. Because an agreement to arbitrate "all claims . . . related . . . to my employment" is construed broadly to include all claims that "touch matters relating to employment," was it error for the trial court to rule that the defamation claim, based upon Appellants' allegedly untrue police report that Respondent had touched a minor female patient inappropriately, was not arbitrable because it was an intentional tort not "contemplated" by the arbitration agreement?

V. Was it error for the trial court to rule that the arbitration agreement was revocable and unenforceable under South Carolina law because it was unconscionable and because it was not supported by consideration?

STATEMENT OF THE CASE

This is a defamation suit brought against Appellants Hilton Head Regional Medical Center and its present or former affiliates¹ (hereafter “Hospital”) by Respondent, a pediatric physical therapist formerly employed at the Hospital. Early in her employment, Respondent signed a document agreeing to submit to arbitration “any and all claims and disputes that are related in any way to my employment or the termination of my employment” (hereafter “Contract”). (Affidavit of Darlene Nester (“Nester Aff.”), Ex. A – Acknowledgement, R. p. 48.)

After the father of a 9-year-old patient complained that his daughter said Respondent touched her inappropriately during one of their therapy sessions, the Hospital reported this complaint to the Beaufort County Sheriff’s Department. (Affidavit of Beth Gasiorowski (“Gasiorowski Aff.”) ¶¶ 4-5, R. p. 35.) The Hospital suspended Respondent pending investigation. (Gasiorowski Aff. ¶ 8, R. p. 35.) When the Sheriff’s investigation concluded with no criminal charge being made against Respondent, the Hospital offered her reinstatement. (Nester Aff. ¶ 13, R. p. 46.) She declined that offer and resigned. (Affidavit of Ruth Hyde (“Hyde Aff.”) ¶ 12, R. p. 39; Nester Aff. ¶ 13, R. p. 46.) On October 30, 2014, Respondent filed this suit for defamation based on the Hospital’s

¹ Three Appellants are named in the Complaint: (1) Tenet South Carolina, Inc., (2) Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and (3) Tenet Physician Services-Hilton Head, Inc. Hilton Head Regional Medical Center, Respondent’s employer, is owned and operated by Hilton Head Health System, L.P. Healthcare Network South Carolina, Inc., formerly known as Tenet South Carolina, Inc., is the managing partner of Hilton Head Health System, L.P. The Complaint does not explain why Tenet South Carolina, Inc. and Tenet Physician Services-Hilton Head, Inc. are named. Appellants have expressly not waived their right to contest the status of any entity other than Hilton Head Health System, L.P. as a proper party.

reporting the father's complaint to law enforcement and the manner in which she said she was treated after her suspension. (Compl., R. pp. 12-19.)

Based upon the Contract, Appellants responded to the Complaint by filing a Motion to Compel Arbitration and to Dismiss or Stay, supported by the affidavits of Beth Gasiorowski, Ruth Hyde, Darlene Nester, and Anita Propst, including exhibits. (Mot. to Compel, R. pp. 28-33; Gasiorowski Aff., R. pp. 34-36; Hyde Aff., R. pp. 37-43; Nester Aff., R. pp. 44-67; Affidavit of Anita Propst ("Propst Aff."), R. pp. 68-71.) In response, Respondent filed her affidavit and a Memorandum in Opposition to Motion to Compel Arbitration in which she argued that the Federal Arbitration Act did not apply, that application of the South Carolina Arbitration Act was not asserted, that the tort of defamation was not contemplated by the arbitration agreement, and that the arbitration agreement was unconscionable and therefore unenforceable. (Mem. Opp'n Mot. to Compel, R. pp. 72-79; Mem. Opp'n, Ex. A, Affidavit of Mary Beth Marzulli ("Marzulli Aff."), R. pp. 80-86.)

Appellants filed a Memorandum in Support of Motion to Compel Arbitration and to Dismiss or Stay (Mem. in Supp. of Mot. to Compel, R. pp. 101-19), with supporting affidavits as previously filed (Gasiorowski Aff., R. pp. 34-36; Hyde Aff., R. pp. 37-39; Nester Aff., R. pp. 44-46; Propst Aff., R. pp. 68-71) in which they stated that South Carolina and federal courts had previously held an employee's tort claims against his employer were arbitrable when the parties' agreed to a broad arbitration agreement, noting that the Court of Appeals in 2012 (*Pearson*), and the Supreme Court in 2013 (*Landers*), had both held defamation claims were arbitrable. (Mem. Supp., R. pp. 101-19.) Appellants also argued that enforcement of an arbitration agreement under the FAA

was not discretionary, and that numerous courts had found Tenet's Acknowledgement to be enforceable and governed by the FAA. (Mem. Supp. & Tab 7 – Chart of Cases Compelling Arbitration Pursuant to Tenet's Employee Acknowledgment Form and Fair Treatment Process, including attached cases, R. pp. 116, 146-279.)

The trial court heard argument on Appellants' motion in two segments: the first was on April 15, 2015; that hearing was suspended and later re-convened by telephone on April 30, 2015. The only transcript is from the first part of the hearing. (Transcript of April 15, 2015 Hearing before Judge Marvin Dukes, III ("Transcript"), R. pp. 351-410.)

Respondent filed a Supplemental Memorandum in Opposition to Motion to Compel Arbitration, supported by a second affidavit of Respondent and exhibits, in which she made additional arguments: based upon *Flexon*,² that the arbitration agreement did not require performance of anything related to interstate commerce thus the FAA did not apply, and that the Contract was not enforceable because it lacked consideration, it was forced upon her after she had moved to South Carolina, and it contained oppressive and one-sided terms. (Supp. Mem. in Opp'n to Mot. to Compel, R. pp. 288-95; Supp. Mem. in Opp'n, Ex. I – Bank Statement Showing Direct Deposit (Nov. 4, 2011), R. p. 300.)

Appellants filed a Supplemental Memorandum in Support of Motion to Compel Arbitration and to Dismiss or Stay, supported by a second affidavit of Darlene Nester and the affidavits of Cassie Ball, Ruth Hyde Pelletier (second affidavit), Mary Alice Meyer, and John Ross, including exhibits. (Supp. Mem. in Support of Mot. to Compel, R. pp.

² *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) ("*Flexon I*"); see also *Flexon v. PHC-Jasper, Inc.* 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) ("*Flexon II*") (collectively "*Flexon*").

302-14; Second Affidavit of Darlene Nester (“Second Nester Aff.”), R. pp. 280-84; Affidavit of Cassie Ball (“Ball Aff.”), R. pp. 315-17; Affidavit of Ruth Hyde Pelletier (“Hyde Pelletier Aff.”), R. pp. 318-21; Affidavit of MaryAlice Meyer (“Meyer Aff.”), R. pp. 322-24; Affidavit of John Ross (“Ross Aff.”), R. pp. 325-27.) Appellants argued the FAA applied because the arbitration clause was “a written provision” to arbitrate in a “contract evidencing a transaction involving commerce” as this statutory language of the FAA has been interpreted, and that the healthcare industry in which Respondent worked involves interstate commerce because it is an activity that is subject to federal control under the Commerce Clause; in the supporting affidavits, Appellants provided evidence of a number of instances in which interstate commerce was involved in the healthcare business of the Hospital and the work Respondent did there, including evidence that she had attended at least one continuing education program outside of South Carolina for which the Hospital had reimbursed her. (Meyer Aff., R. pp. 322-24; Ball Aff., R. p. 315-17; Hyde Pelletier Aff., R. p. 318-21.)

Respondent filed a Second Supplemental Memorandum in Opposition to Motion to Compel Arbitration, arguing that the FAA did not apply to the arbitration agreement because it was signed in South Carolina after she established her residency here. (Second Supp. Mem. in Opp’n to Mot. to Compel, R. pp. 328-29.) Although she admitted that “other employees at the hospital might have been involved in interstate commerce,” Respondent stated her work had been performed exclusively in South Carolina. She reiterated her claim that the agreement to arbitrate was unconscionable, inequitable, oppressive, one-sided, coerced, and inconspicuous, that the Hospital had misled her about

its contents, and that the damages she was seeking in the suit were unrelated to her employment. (*Id.*, R. pp. 330-31.)

Appellants filed a Response to Plaintiff's Second Supplemental Memorandum Opposing Defendants' Motion to Compel Arbitration and to Dismiss or Stay. (Resp. to Second Supp. Mem. Opp'n Mot. to Compel, R. pp. 333-43.) Appellants argued that Respondent had failed to carry her burden of proving unconscionability and that *Flexon* was distinguishable on the grounds that the parties' agreement in that case expressly provided that South Carolina law applied and venue would be in the South Carolina courts, and that the trial court had ruled in *Flexon* that the party that bore the burden of showing the FAA applied had not provided sufficient evidence of interstate commerce involvement. (*Id.*, R. 333.)

On May 11, 2015, Respondent filed her third affidavit, stating that the out-of-state continuing education program she had attended was not required for her job and the Hospital did not reimburse her for the cost of the program until after her employment ended. (Third Affidavit of Mary Beth Marzulli ("Third Marzulli Aff.") ¶¶ 2-4, R. pp. 344-45.) Additionally she stated that to her knowledge she had never treated a patient who was not a South Carolina resident, her work did not require her to make phone calls across state lines or issue prescriptions for medications shipped across state lines, and that while other employees may have fulfilled the responsibilities of sending Medicare, Medicaid, or other insurance paperwork across state lines, she had no such responsibilities in connection with her job at the Hospital. (*Id.* at ¶ 8, R. pp. 345-46.)

The trial court filed its Order denying Appellants' Motion to Compel Arbitration and to Dismiss or Stay on October 23, 2015. (Order of October 23, 2015 ("Order"), R.

pp. 1-11.) The Court held the FAA did not apply because the Contract was not a “contract evidencing a transaction involving commerce” under the language of the FAA. (*Id.*, R. pp. 4-8.) Specifically, the trial court found: Respondent’s work did not require her to perform actions or administer anything related to interstate commerce; all her work had been in South Carolina; the Contract had nothing to do with her move across state lines to South Carolina; and she was a South Carolina resident when she signed it. (*Id.*, R. pp. 6-8.) The trial court further held the FAA did not apply because *Flexon* was analytically analogous and constituted binding and controlling precedent for its decision. Noting that Appellants moved “only on the basis of the [FAA],” the court observed the Contract was unenforceable under the South Carolina Uniform Arbitration Act because it did not meet the notice requirements of that statute. (*Id.*, R. pp. 7-8.) Additionally, the court found the Contract was unenforceable because it lacked consideration, and that it was unconscionable because it contained oppressive, one-sided terms and Respondent had no meaningful choice when she signed it. (*Id.*, R. pp. 8-10.)

Appellants timely answered the Complaint, reserving their objections to the Court’s denial of the motion to compel arbitration. (Answer, R. pp. 20-27.) Immediately thereafter, Appellants timely filed and served their notice of appeal of the trial court’s order on November 9, 2015. (Notice of Appeal, R. p. 411.)

STATEMENT OF THE FACTS

A. Facts relating to employment relationship and patient complaint leading to the dispute.

On October 10, 2011, while attending orientation at the Hospital for her new job there, Respondent signed an agreement titled “Acknowledgement” (“Contract”). (Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.) In that one-page document,

Respondent acknowledged receipt of, and agreed to use, Tenet's Fair Treatment Process ("FTP"). (Nester Aff., Ex. A., R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.) The FTP is a dispute resolution process that applies to Respondent and all other non-union employees of Tenet facilities and their affiliates. (Nester Aff., Ex. B – Fair Treatment Process, R. pp. 49-63.) The FTP consists of five steps that an employee generally must follow to resolve a problem at work. (*Id.*, R. pp. 51-54.) The fifth and final step of the FEP is "final and binding arbitration." (*Id.*, R. p. 54.)

In the Contract Respondent agreed "to submit to final and binding arbitration":

any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy of any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to the use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial

(Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.)

Respondent also agreed that "such arbitration . . . will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association." (Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.) The FTP referenced in the Contract and which she acknowledged receiving, expressly provided: "The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, will govern arbitrations under the FTP." (Nester Aff., Ex. B at ¶ IV (B)(6)(a), R. p. 59.)

The Contract required the Hospital also to submit any of its claims and disputes to arbitration. (Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.) Further, it imposed a maximum out-of-pocket cost of the arbitration to the employee of one day's pay or a mandated cap, if lower, and provided that Tenet would pay all other fees and

costs associated with the arbitration. (Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.) Finally, the Contract provided that it could not be modified or rescinded except in writing by both the company and the employee. (Nester Aff., Ex. A, R. p. 48; Marzulli Aff. ¶ 3, R. pp. 80-81.)

On May 12, 2014, the father of a 9-year-old female patient telephoned the Rehabilitation Department where Respondent worked. (Propst Aff. ¶¶ 2-3, R. p. 68.) He told the department's office manager who answered the phone that his daughter had complained about Respondent. (Propst Aff. ¶¶ 4-13, R. pp. 68-69.) Specifically, his daughter told him that at their physical therapy session on May 5, 2014, Respondent held her in her lap in a way that made her uncomfortable, and that Respondent had pushed her and slapped her hand. (Propst Aff. ¶¶ 7, 13, R. p. 69.) The father said his daughter was also using the word "vagina" for the first time, and told him she learned the word from Respondent. (Propst Aff. ¶ 9, R. p. 69.) The office manager thereafter reported the father's complaint to the Hospital's Patient Safety Officer and Director of Risk Management. (Propst Aff. ¶ 18, R. 70; Gasiorowski Aff. ¶ 3, R. p. 34.) As required under S.C. CODE ANN. § 63-7-310,³ the Hospital's Patient Safety Officer and Director of

³ S.C. CODE ANN. § 63-7-310(A) requires certain persons, including "medical, emergency medical services, mental health, or allied health professional(s)," to report when they have received, in their professional capacity, information which gives them reason to believe that a child has been or may be abused or neglected as defined in South Carolina Code § 63-7-20. S.C. CODE ANN. § 63-7-310(A); *see also* S.C. CODE ANN. § 63-7-20(4) (defining abuse or neglect of a child as actions of "a parent, guardian, or other person responsible for the child's welfare"). If a person with a duty to report believes a "child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the **reporter must make a report to the appropriate law enforcement agency.**" S.C. CODE ANN. § 63-7-310(B) (emphasis added).

Risk Management reported the father's complaint to the Beaufort County Sheriff's Department. (Gasiorowski Aff. ¶ 5, R. p. 35.) The Hospital also notified Respondent of the complaint and suspended her from all job duties pending completion of investigations by the Sheriff's Department and the Hospital. (Gasiorowski Aff. ¶ 8, R. p. 35; Nester Aff. ¶ 7, R. p. 45.)

During the Sheriff Department's investigation, the investigator told the Hospital's Patient Safety Officer and Director of Risk Management that the 9-year old patient made a number of other allegations against Respondent, including claims that Respondent fondled the child's breasts, that Respondent asked the child to touch her breasts, and that Respondent had pinched the child on her "butt." (Gasiorowski Aff. ¶ 9, R. p. 35.) The parents of the child also indicated they wanted to press criminal charges against Respondent. (Gasiorowski Aff. ¶ 10, R. p. 35.) After investigating the matter for approximately six weeks, on or about July 1, 2014, the Sheriff's Department dismissed the Complaint, reportedly because there was a lack of evidence to support criminal activity. (Gasiorowski Aff. ¶ 12, R. p. 36.)

During the six-week period that Respondent was suspended, the Hospital also conducted its own investigation. (Hyde Aff. ¶ 6, R. p. 38.) In the course of examining Respondent's patient records during that process, the Hospital discovered significant

Respondent contends the Hospital was not "required" to report the allegation of child abuse because the complaint was not received "in a professional capacity" by a "medical services, mental health, or allied health professional" with a duty to report it. Instead, Respondent argues, because the complaint was made to the Rehabilitation Department's office manager, who in turn reported it to the Hospital's Patient Safety Officer and Director of Risk Management, and because, Respondent argues, neither of them is a "medical services, mental health, or allied health professional," a report to a law enforcement agency was not mandatory under the statute. (Mem. Opp'n, R. p. 74.)

inadequacies and gaps in Respondent's documentation. The Hospital had previously counseled Respondent about this same deficiency in her job performance.⁴ (Hyde Aff. ¶¶ 7-8, R. p. 38.)

After both investigations were completed and no charges were filed, the Hospital notified Respondent that it would reinstate her to her position. (Hyde Aff. ¶ 10, R. p. 38.) It paid her for the period she had been suspended. (Hyde Aff. ¶ 10, R. p. 38; Nester Aff. ¶ 9, R. p. 45.) The Hospital also gave her a copy of a Performance Improvement Plan ("PIP") that her supervisor had prepared to address the deficiencies in her recordkeeping that the Hospital had discovered during its review of the records of Respondent's physical therapy sessions with the child. (Hyde Aff. ¶ 11, R. pp. 38-39; Hyde Aff., Ex. A – Record of Conference, R. p. 41.) Respondent accepted the back pay the Hospital offered, but refused to acknowledge receipt of the PIP; she also declined the Hospital's offer of reinstatement, writing her supervisor that "Tenet's actions force me to not return to work for them." (Hyde Aff., Ex. B – Email of Resignation, R. p. 43.)

Three months later, Respondent filed this suit alleging that the Hospital had defamed her during her employment and upon its termination as follows: (1) when it "communicated and published to the Beaufort County Sheriff's Office that Respondent

⁴ For each session with a patient, a physical therapist is required to document, on a pre-printed form called Pediatric Daily Notes ("PDN"), changes in medication or diagnosis, subjective activities, objective goals, the assessment and plan of treatment. (Hyde Aff. ¶ 5, R. p. 38.) In conducting its investigation, the Hospital found Respondent's files on the child in question were missing notes for eleven sessions appearing on charge records from June until August 2013; where there should have been notes on the PDN, Respondent had entered only dates. There were two other sessions in April 2014 that appeared on the charge record but which were missing notes. Three appointments were left blank on the PDN in March and April 2014, but these are not dated. (Hyde Aff. ¶ 6, R. p. 38.) These were serious shortcomings and violated Tenet's written corporate policy. (Hyde Aff. ¶ 7, R. p. 38.)

physically and sexually abused a nine (9) year old female patient” (Compl. ¶ 8, R. p. 16), as the child’s father had reported; (2) when “Appellants repeated the defamation” (Compl. ¶ 11, R. p. 16), at an unspecified time and place and to unidentified individual(s); (3) when an administrator escorted Respondent “in view of other individuals,” (Compl. ¶ 22, R. pp. 17-18.) after she came to the Hospital to retrieve her belongings; and (4) when she was allegedly refused access to another Hospital facility after she asked if she could retrieve items she said were located there, (*id.*).

B. Facts relating to the applicability of the Federal Arbitration Act and the involvement of interstate commerce.

Under the statutory language, the FAA applies to any arbitration provision that is “written . . . in . . . a contract evidencing a transaction involving commerce.” 9 U.S.C. §

2. In its analysis the trial court focused attention only on whether interstate commerce was involved in the Contract itself. The language of the statute, however, calls for a broader analysis: Is interstate *commerce involved* in the *transaction* the Contract *evidences*?

The case law recognizes the statutory language of the FAA requires a broader view than what is in the four corners of the agreement. It is not an analysis of the terms of the Contract alone that determines whether the FAA applies. Nor is it, as the trial court held, an examination of the nature of the work performed under the Contract, or the actions that are necessary to perform it. While one or more of these considerations may be elements of the analysis properly used to conclude that the FAA **does** apply, there are other elements that are necessarily considered before a court may properly conclude the FAA **does not** apply.

Before determining that the FAA does not apply, the court must look beyond the four corners of the Contract and consider whether it “evidences” a “transaction” that “involves commerce.” In some cases, the contract alone will enable the Court to answer this question affirmatively; however, if the contract does not provide a positive answer concerning the involvement of interstate commerce in the underlying transaction, before concluding that interstate commerce is not involved, the court must look to what “transaction” the contract “evidences” and from that determine whether interstate commerce is involved in that transaction.

Because it is the “transaction” that must “evidence” interstate commerce, and the transaction here is Respondent’s employment by Tenet (as well as the employment of other employees across the country who are employed under the same agreement), events that preceded Respondent’s execution of the Contract, as set forth in Appellant’s affidavits, are also relevant:

- Recruitment: The Hospital recruits across the United States to fill job vacancies at its facility in South Carolina. (Ball Aff. ¶ 8, R. p. 316.) The open pediatric physical therapist position that Ms. Marzulli applied for and ultimately accepted was advertised across state lines on the internet at Tenet’s web site. (Hyde Pelletier Aff. ¶ 6, R. 319; Second Nester Aff. ¶ 4, R. pp. 280-81; Meyer Aff. ¶ 4, R. p. 323.) When a job opening is posted on the Hospital’s web site, it is automatically downloaded to the Tenet web site, as well as to the Careerbuilder Job Board and the Allhealthjobs.com Job Board that are distributed throughout the United States. (Meyer Aff. ¶ 5, R. p. 323.)
- Job Application: Ms. Marzulli applied for the open position from her home in Pennsylvania. (Second Nester Aff., R. p. 280; Second Nester Aff., Ex. E – Marzulli’s Internet Job Application – First Page, R. p. 283; Second Nester Aff., Ex. F – HHH offer letter to Marzulli, R. pp. 284-86.) The Hospital’s Rehabilitation Department coordinated a visit by Respondent to the Hospital; in connection with that visit, she traveled from her home in Pennsylvania to Hilton Head for interviews in late June 2011. (Meyer Aff. ¶ 7, R. p. 323.)
- Interviews: When Respondent interviewed at the Hospital on June 29, 2011, she said she wanted to move in September 2011 and that she was tired of the winters in Pennsylvania, her family was in Atlanta, and she had a daughter that was going

to school in Savannah, Georgia. Respondent told the Hospital's Employment Manager that she needed to have a job before she could move from Pennsylvania. (Meyer Aff. ¶¶ 8-9, R. p. 323.)

- Background Check: In the course of checking her references, the Hospital's Employment Manager communicated with two of Respondent's former colleagues in Pennsylvania. (Meyer Aff. ¶ 6, R. p. 323.) In conjunction with the background verification of Ms. Marzulli that the Hospital conducted, the Hospital communicated with HireRight, a California-based service that conducts background checks for Tenet. (Meyer Aff. ¶ 10, R. p. 323.)
- Offer and Acceptance of the Job: Respondent received and accepted the written job offer from her home in Pennsylvania. (Second Nester Aff. ¶ 5, R. p. 281; Second Nester Aff., Ex. E, R. p. 282; Second Nester Aff., Ex. F, R. pp. 284-86.)
- Signing of the Contract and Receipt of the FTP: The Contract states that the arbitration "will be conducted under the Federal Arbitration Act." (Nester Aff., Ex. A, R. p. 48.) The FTP states that "[t]he Federal Arbitration Act, 9 U.S.C. §§ 1, et seq., will govern arbitrations under the FTP." (Nester Aff., Ex. B, R. p. 59.) The FTP provides that it applies to, *inter alia*, Tenet Healthcare Corporation and any hospital or healthcare facility it manages or of which it controls the day to day operations, and that it covers "all employees, regardless of length of service or status" (with certain restrictions not applicable here). (Nester Aff. ¶ 5, R. p. 45; Nester Aff., Ex. A, R. p. 48; Nester Aff., Ex. B, R. pp. 50-51.)

Even if, as Respondent contends, the "transaction" the FAA refers to is only what occurred after she signed the Contract (which Appellants dispute), the numerous affidavits Appellants filed show a variety of ways in which Tenet's healthcare business and Respondent's performing her job in that business evidence a "transaction involving commerce," *to wit*:

- Reimbursement of Respondent's Moving Expenses: The Hospital reimbursed Ms. Marzulli \$2,500.00 of the costs of her move from Pennsylvania to South Carolina. (Meyer Aff. ¶ 12, R. p. 324.)
- Payment of Compensation : Respondent was paid via direct electronic deposit of her paycheck. (Supp. Mem. in Opp'n, Ex. F – Second Affidavit of Mary Beth Marzulli ("Second Marzulli Aff.") ¶ 4, R. p. 296); Supp. Mem. in Opp'n, Ex. I, R. pp. 300-01.)
- Respondent Attended Out-of-state Conference. While employed at the Hospital, Respondent attended a continuing education conference in North Carolina; the

Hospital reimbursed her for the expense of her travel to that conference. (Hyde Pelletier Aff. ¶ 21, R. p. 321.)

- Equipment Required for Respondent to do her Job: Pediatric physical therapists use specialized medical equipment designed to help treat and promote mobility. Some examples of the Hospital's equipment that Ms. Marzulli used in treating her patients were exercise mats, treadmills, trampolines, and toys; she would also have used specialized equipment adapted for use by children such as walkers and wheelchairs. All of this equipment is in use at the Hospital in the Rehabilitation Department where Respondent worked. (Hyde Pelletier Aff. ¶¶ 9-12, R. pp. 319-20.) The equipment Respondent used in the course of her work as a pediatric physical therapist was, for the most part, manufactured outside of South Carolina and shipped here after the Hospital purchased it. (Hyde Pelletier Aff. ¶ 13, R. p. 320; Ross Aff. ¶¶ 6-9, R. p. 326.) Respondent could not have performed her job or properly treated her patients without using this equipment. (Hyde Pelletier Aff. ¶ 12, R. p. 320.)
- Out-of-state Procurement of Equipment Required to do her Job: MedAssets, Inc. provides procurement services to the Hospital pursuant to a written contract between the two. MedAssets, Inc. is a Delaware corporation and is headquartered in Alpharetta, Georgia. (Ross Aff. ¶¶ 4-5, R. p. 325.) The Materials Management department, managed by MedAssets, purchases all equipment and materials used in the Rehabilitation Department, as well as that used in other departments of the Hospital. (Ross Aff. ¶ 6, R. p. 326.) The Materials Management department has purchased for use by employees and patients of the Hospital's Rehabilitation Department exercise mats, treadmills, trampolines, as well as specialized equipment adapted for use by children such as walkers and wheelchairs. (Ross Aff. ¶ 7, R. p. 326.) The Medical Management department purchased these pieces of equipment from sources outside of South Carolina. (Ross Aff. ¶ 8, R. p. 326.) The sellers of this equipment shipped their products from outside South Carolina to the Hospital on Hilton Head Island, South Carolina. (Ross Aff. ¶ 9, R. p. 326.) The Materials Management department paid for this equipment by sending payment to the sellers at their various locations outside of South Carolina. (Ross Aff. ¶ 10, R. p. 326.) If a piece of equipment in the Rehabilitation department must be replaced, that department notifies the Hospital's Materials Management Department which then arranges for the purchase and shipment of the equipment to the department. (Hyde Pelletier Aff. ¶ 14, R. p. 320.)
- Application of Out-of-state Insurance Standards: All physical therapists at the Hospital are required to adhere to the treatment and billing standards of all insurance companies that reimburse for their services to patients. Some of these insurers are outside South Carolina. (Hyde Pelletier Aff. ¶ 15, R. p. 320.)
- Out-of-state Insurance Payments to Hospital: The Hospital accepts and receives reimbursement from out-of-state insurers and multi-state insurers such as Cigna, Aetna, and Blue Cross & Blue Shield-affiliated insurers that are not located in South Carolina. (Ball Aff. ¶ 4, R. p. 316.)

- Medicare/Medicaid Standards and Payments: If there are no written treatment standards for a particular insurer, then physical therapists at the Hospital follow the federal standards and regulations adopted by Medicare with respect to documentation, medical necessity and the like. (Hyde Pelletier Aff. ¶ 16, R. p. 320.) For example, Medicare requires a physical therapist to prepare a plan of care every 90 days and to complete a progress note for each visit. (*Id.*) The Hospital accepts payment from Medicare and Medicaid, both of which are highly regulated by the Federal government. (*Id.* at ¶ 17, R. p. 320.) The patient whose father made the complaint against Ms. Marzulli was a Medicaid patient and the services Ms. Marzulli provided to the patient were paid for by Medicaid. (*Id.* at ¶ 18, R. p. 320.) The Hospital accepts payment from Medicare, a Federal program. (Ball Aff. ¶ 5, R. p. 316.)
- Hospital's Treatment of Out-of-State Patients: Because it is located in a resort area that is a major tourist destination, the Hospital often provides services to individuals who are not South Carolina citizens and who do not reside in South Carolina. (Ball Aff. ¶ 3, R. pp. 315-16.)
- The Hospital is Owned by Out-of-State Shareholders: Tenet Healthcare Corporation, the ultimate owner of Hilton Head Hospital, is owned by its shareholders, most of whom reside outside the state of South Carolina. (Ball Aff. ¶ 9, R. p. 316.) The Hospital regularly enters into contracts with individuals and entities that are not South Carolina citizens. (Ball Aff. ¶ 7, R. p. 316.)
- Out-of-State Contractors and Service Providers: In addition to those of South Carolina origin, the Hospital utilizes out-of-state materials, equipment, and contractors; and payments are made out-of-state to out-of-state sellers and providers of those materials and services. (Ball Aff. ¶ 6, R. p. 316.) The following essential services that the Hospital provides for its in-patients and out-patients involve interstate commerce in the following manner: meals are prepared from food shipped into South Carolina from out-of-state; medical supplies are shipped across state lines from out-of-state vendors; and the hospital receives and pays for goods and services provided by out-of-state vendors and insurers. (Ball Aff. ¶ 10, R. pp. 316-17.)

Here, the transaction the Contract evidences is Respondent's employment relationship with Tenet. Whether interstate commerce is "involved" in that transaction requires a broader look at the evidence than the view the trial court took. The employment "transaction" and whether or not it involved interstate commerce ought to include a review of events relating to that transaction, whether those events occurred

before or after Respondent signed the Contract, as further discussion of this issue will show in section II-B of the legal analysis below.

STANDARD OF REVIEW

“The determination of whether a claim is subject to arbitration is subject to de novo review.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citations omitted); *see also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (“Arbitrability determinations are subject to de novo review.”)

ARGUMENT

I. The Federal Arbitration Act applies and this dispute must be compelled to binding arbitration.

There is a “strong presumption favoring arbitration of disputes.” *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.* 361 S.C. 544, 553, 606 S.E.2d 752, 757 (2004) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Once it is clear that the parties have a contract that provides for arbitration of some issues between them, any doubts concerning the scope of the arbitration clause should be resolved in favor of arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

South Carolina appellate courts have held that “[m]otions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. Based upon the record before the Court in this case, the arbitration agreement here is susceptible

of an interpretation that covers the dispute—Respondent’s actions while performing medical treatment of a patient during her work at the Hospital, reports of which she alleges constitute defamation, are “related” to her employment and thus must be arbitrated. The trial court’s Order should be reversed.

A. The FAA applies to the Contract because the parties expressly agreed that it would.

The Contract expressly states that “arbitration . . . will be conducted under the Federal Arbitration Act.” (Nester Aff., Ex. A, R. p. 48.) Additionally, the FTP referenced in the Contract and which Respondent acknowledged receiving provides: “The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, will govern arbitrations under the FTP.” (Nester Aff., Ex. B at § IV (B)(6)(a), R. p. 59.) “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (citing *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

Thus, when parties agree that the FAA will apply to their agreement to arbitrate, the South Carolina Supreme Court has held it is that federal law, not state law, that properly applies. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122-25, 747 S.E.2d 461, 464-66 (2013). *Cape Romain* involved a subcontract to build a dock in a marina construction project. In that case, as in this one, the trial court declined to compel arbitration after ruling that the FAA did not apply. The Supreme Court disagreed and reversed, finding the FAA applied and the trial court should have compelled arbitration:

[T]he Contract expressly invokes the FAA and such contractual provisions should be enforced in accordance with their unambiguous terms. *See Dean Witter*, 470 U.S. at 221, 105 S. Ct. 1238 (noting that the “preeminent

concern” in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce ‘rigorously’ those terms upon which private parties have agreed); *Muñoz*, 343 S.C. at 538, 542 S.E.2d at 363–64 (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms). We hold it was error to refuse to compel arbitration.

Id. at 126, 747 S.E.2d at 466 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Munoz*, 343 S.C. at 358, 542 S.E.2d at 363-64).

Based upon *Volt*, *Cape Romain*, and *Munoz*, because the parties specifically agreed the FAA would apply, the trial court should have enforced the parties’ agreement in accordance with its terms and held that the FAA applied to the Contract.

But even if the statute were not referenced in the Contract, the involvement of interstate commerce in the parties’ relationship also makes the FAA applicable, as detailed in the following section. *Cape Romain*, 405 S.C. at 123 n.5, 747 S.E.2d at 465 n.5.

B. Respondent’s employment necessarily involves interstate commerce, and the determination of whether her employment evidences a “transaction involving commerce” under the FAA requires a broader analysis than what is in the four corners of the Contract.

The FAA provides what is required for the provisions of that statute to apply to an arbitration agreement:

A written provision in . . . a contract **evidencing a transaction involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . 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 (emphasis added).

The trial court held that the appropriate manner in which to analyze whether the FAA applied to the Contract here was to focus solely on “what the terms of *the contract* specifically require for performance.” (Order, R. p. 5 (emphasis in original).) As the

statutory language of the FAA requires, and as courts interpreting that language have made clear, however, this is much too narrow a view.

The determination of whether an agreement evidences a “transaction involving commerce” under the FAA requires an analysis of the transaction underlying the agreement and the “general practice” that it and other such transactions represent “in the aggregate.” This is the way the United States Supreme Court has explained the analysis in two relatively recent cases.

In the earlier of those cases, *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995), the Court considered whether the word “commerce” should be viewed broadly, extending the FAA to the limits of Congress’s Commerce Clause power, or narrowly, limiting coverage of the FAA to cases where interstate commerce is contemplated by the parties. In finding the expansive interpretation to be the correct one, the Court first observed that the words “involving commerce” are broader than the more commonly used words “in commerce,” thereby concluding that these words cover more than simply persons or activities within the “flow of interstate commerce.” *Id.* at 273 (citation omitted). Thus, the Court held that the term “involving commerce” as used in the FAA “signals an intent to exercise Congress’s commerce power to the full.” *Id.* at 277.

In *Allied-Bruce* the Court also examined whether the words “evidencing a transaction” involving commerce meant that the transaction must turn out to have involved interstate commerce. *Id.* at 277-78. The Court concluded that even if the parties did not “contemplate” involvement with interstate commerce, the FAA will apply so long as the parties’ agreement does, in fact, “involve” interstate commerce.

In the second case, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), the Court answered the next logical question: must the contract itself actually involve commerce, or is it enough that it is the type of contract, in general, that involves commerce? In *Citizens Bank*, the Court was asked to decide whether the parties' debt restructuring agreement was a contract evidencing a transaction involving commerce under the FAA. *Id.* at 53. The case involved an Alabama lending institution that sought to compel arbitration of a dispute with an Alabama corporation and its officers brought in Alabama state court. The United States Supreme Court held that the contract, although solely between Alabama businesses, nevertheless evidenced interstate commerce, thus the FAA applied. *Id.* at 57.

Noting that Alafabco, Inc. did business outside of Alabama, and that the security for the debt included inventory outside Alabama, the Court went on to explain this was only part of the analysis. The Court said that the proper focus of the inquiry is not upon the individual transaction,⁵ but upon "consideration of the 'general practice' those transactions represent." *Id.* at 58. This wide focus compelled the High Court to consider the broad impact of commercial lending on the national economy; because commercial lending was certainly subject to Congress's power to regulate that activity pursuant to the Commerce Clause, the Court found the FAA applied. *Id.*

Both of these cases prove that the trial court's analysis was much too narrow. The trial court needed to examine the circumstances and business underlying Respondent's Contract to consider whether all such agreements between Tenet and its employees

⁵ The Supreme Court held the Supreme Court of Alabama was "misguided" when it searched for evidence that part of the debt was attributable to interstate transactions or that "the loans 'originated out-of-state'" or that the debt was "inseparable from any out-of-state projects. Such evidence might be required if the FAA were restricted to transactions actually 'in commerce,' but, as we have explained, that is not the limit of the FAA's reach." 539 U.S. at 55 (citation omitted).

nationwide, in the aggregate, generally fall within the purview of the Commerce Clause, rather than focusing solely on the individual agreement and what activities its terms required Respondent to undertake.

Like Alafabco, Inc. in *Citizens Bank*, Tenet does business outside South Carolina. (Ball Aff. ¶¶ 3-10, R. pp. 315-17.) Headquartered in Texas, Tenet employs people throughout the United States under agreements in the same form as the Contract here. (Nester Aff., Ex. A, R. p. 48; Nester Aff., Ex. B, R. p. 50; Mem. Supp., Tab 7 – Chart of Cases Compelling Arbitration Pursuant to Tenet’s Employee Acknowledgment Form and Fair Treatment Process, including attached cases, R. pp. 146-279.)

That the broader view is the correct analysis is further supported by the reasoning in one Supreme Court case, not involving the FAA, but which examined the scope of Congress’s Commerce Clause power: “Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States.” *Fry v. United States*, 421 U.S. 542, 547 (1975).

The South Carolina Supreme Court, too, has noted the “FAA’s expansive view of interstate commerce.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594-96, 553 S.E.2d 110, 117-18 (2001). *Zabinski* involved a partnership agreement of a South Carolina partnership with its principal place of business in South Carolina. The agreement was entered into by four South Carolina residents for the purpose of selling and developing real estate on Hilton Head Island, South Carolina; the partnership owned no property outside of South Carolina. After observing that “[t]he development of land within South Carolina’s borders is the quintessential example of a purely intrastate

activity,” the *Zabinski* Court nevertheless concluded the Federal Arbitration Act applied:

[T]he transaction involved interstate commerce as contemplated by the FAA **because the partnership utilized out-of-state materials, contractors, and investors.** . . . Because of the FAA’s expansive view of interstate commerce, we find the FAA covers the partnership agreement in the present case. Thus, the FAA provisions trump conflicting requirements of South Carolina law, and arbitration is required.

Id. (emphasis added) (citations omitted).

More recently, in *Cape Romain Contractors, Inc. v. Wando East, LLC*, 405 S.C. 115, 122-25, 747 S.E.2d 461, 464-66 (2013), the South Carolina Supreme Court took the same broad view of “commerce” the United States Supreme Court had espoused in *Citizens Bank*. *Cape Romain* involved a subcontract for building a dock at a marina on the Wando River. The Supreme Court reversed the trial court’s ruling that building the dock did not involve interstate commerce, thus refusing to apply the FAA and denying the motion to compel arbitration. Our Supreme Court instead held that interstate commerce was clearly involved, that the FAA did apply, and the trial court should have compelled arbitration.

In explaining the vast reach of the Commerce Clause, the Supreme Court noted: “Congress has authority to regulate (1) ‘the use of the *channels* of interstate commerce,’ (2) ‘the instrumentalities of interstate commerce, or persons or things in interstate commerce . . .’ and (3) ‘those activities having a *substantial relation* to interstate commerce.” *Id.* at 122, 405 S.C. at 464 (citations omitted). Citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the court in *Cape Romain* found the transaction in question plainly fell within the purview of Congress’s commerce power because it involved at least two categories of federal commerce power, the channels and the

instrumentalities of interstate commerce. 405 S.C. at 123, 747 S.E.2d at 465. The Court continued:

Even if we were to view this case only through the third category of the federal commerce power—regulation of activities having a substantial relation to interstate commerce—the record demonstrates that the activities implicated in this marine construction project bear on interstate commerce in a way sufficiently substantial to invoke the FAA. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57, 123 S. Ct. 2037, 156 L.Ed.2d 46 (2003) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)) (“Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if **in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’** Only that general practice need bear on interstate commerce in a substantial way.”). Particularly when the commercial aspects of this transaction are considered in the aggregate pursuant to *Citizens Bank v. Alafabco*, it is clear the trial court erred in finding the FAA did not apply.

Cape Romain, 405 S.C. at 122-25, 747 S.E.2d at 464-66 (emphasis added).

After *Cape Romain*, the South Carolina Supreme Court again demonstrated its ever-broadening view of interstate commerce under the FAA when it summarily overruled *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014).

Two decades before *Dean*, in *Timms*, the Court had held that a contract between a nursing facility and a resident did not involve interstate commerce, despite that many of the facility’s goods, equipment, and supplies came from out of state. *Timms* distinguished the nursing facility contract there from contracts which are “clearly predicated upon transactions involving the purchase and use of materials and supplies from outside the state,” and concluded that the nursing facility’s purchase of out-of-state supplies was not sufficiently related to the individual agreement there to “form the basis of the contract between the parties.” *Timms*, 310 S.C. at 472, 427 S.E.2d at 644.

Overruling *Timms* in its entirety, the *Dean* Court found that an agreement between a resident and a nursing facility indeed did involve interstate commerce because the facility provided meals and medical supplies to residents which the facility shipped across state lines from out-of-state vendors. 408 S.C. at 381-82, 759 S.E.2d at 732-33. In *Dean*, the court noted *Timms* was “a relic of the past, decided before the broad definition of interstate commerce set forth in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).” *Dean*, 408 S.C. at 382, 759 S.E.2d at 733. The court squarely rejected any requirement that the interstate elements be so central as to “form the basis” of the contract. *See id.* at 381-82, 759 S.E.2d at 732-33.

Particularly significant here is the Supreme Court’s observation in *Dean* that **“healthcare in general is an activity subject to federal control under the Commerce Clause and thus involves interstate commerce.”** 408 S.C. at 379-382, 759 S.E.2d at 731-733 (citing *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007)) (emphasis added). *Miller* held that the FAA applied “if **in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’**” *Miller*, 863 N.E.2d at 544 (emphasis added). *Miller*, citing a United States Supreme Court decision, held that **“[h]ealthcare is such an activity.”** *Id.* (citing *Summit Health, Ltd. v. Pinhaus*, 500 U.S. 322 (1991) (hospital’s purchase of out-of-state medicines and acceptance of out-of-state insurance establish interstate commerce)) (emphasis added).

The court in *Summit Health* continued: “In addition, and more specifically, accepting payment from Medicare, a Federal program . . . constitutes an act in interstate commerce.” *Id.* at 327. Other courts also have included receipt of Medicare payments, payments from out-of-state insurers, and utilization of equipment obtained in interstate

commerce as sufficient involvement of interstate commerce in arbitration agreements in the healthcare field. *See, e.g., Glover ex rel. Glover v. Darway Elder Care Rehab. Ctr.*, No. 4:13-CV-1874, 2014 WL 931459, at *6 (M.D. Pa. Feb. 4, 2014) (observing receipt of Medicare payments alone “would appear to satisfy that ‘involving interstate commerce’ requirement, and indeed numerous courts have found that this very payment activity satisfies the requirement” (listing cases)); *GGNSC Louisville Hillcreek, LLC v. Warner*, No 3:13-cv-751, 2013 WL 6796421, at *8 (W.D. Ky. Dec. 19, 2013) (“The receipt of Medicare and Medicaid funds are transactions involving commerce and may by themselves establish the appropriate interstate commerce nexus. [The facility] has a nexus with interstate commerce through their and their patients’ participation in Medicare and Medicaid.” (citing *Summit Health Ltd.*, 500 U.S. at 327)); *Visiting Nurse Ass’n of Fla., Inc. v. Jupiter*, 154 So.3d 1115, 1125 (Fla. 2014) (“[R]eferral of Medicare patients was contemplated and occurred as part of the transaction. Thus, this transaction in fact involved interstate commerce and is subject to the FAA.”); *Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1, 14 (Ill. App. Ct. 2010) (arbitration agreement involved interstate commerce sufficiently for FAA purposes because the facility received Medicare and Medicaid payments as well as out-of-state insurance payments and purchased medical equipment and supplies from outside of Illinois); *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) (“In addition, and more specifically, accepting payment from Medicare, a Federal program (which there was some evidence here), constitutes an act in interstate commerce.”); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (“Because ‘commerce’ is broadly construed, the evidence of Medicare payments . . . is sufficient to establish interstate commerce and the FAA’s application in this case.”).

Reading *Dean* together with *Cape Romain* leads to the logical conclusion that because employment and healthcare are economic activities that represent “general practice[s] . . . subject to federal control,” the Contract should not have been considered individually, but rather should be considered “in the aggregate” when determining whether interstate commerce is evidenced and the FAA applies. *Cape Romain*, 405 S.C. at 122-25, 747 S.E.2d at 464-66.

Courts’ ever broadening view of what “a contract evidencing a transaction involving commerce” means, as evidenced in the foregoing cases, demonstrates that the trial court’s solely focusing on the job activities of Respondent under the Contract was error. Instead of considering the individual employee acting under her agreement alone, the focus should have been on the whether the Hospital’s economic activity and Respondent’s and other Tenet employees’ work under the same form of contract, in the aggregate, “involve[ed]” interstate commerce. “Courts construing the language of section 2 [of the FAA] in the context of an employment relationship have generally focused on the nature of the defendant employer’s business, not the employee’s individual duties.” *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-00747, 2014 WL 1094394, at *11 (D.S.C. Mar. 18, 2014) (citation omitted).

Finally, there are numerous decisions, including one from a federal district court in South Carolina, in which courts have granted Tenet’s motions to compel arbitration of employment-related claims under circumstances essentially the same as those here. (Mem. Supp., Tab 7, R. 146-279.) In each of those cases, an employee of a Tenet-affiliated facility signed basically the same Acknowledgement that Plaintiff signed here, the employee’s employment ended, the employee sued the Tenet-affiliated facility by

which he or she had been employed, and Tenet moved to compel arbitration pursuant to the Acknowledgement and the company's Fair Treatment Process ("FTP") referenced therein. Although the plaintiffs in those cases offered almost every imaginable challenge to the arbitration agreement,⁶ in each case the court granted Tenet's motion to compel arbitration and either dismissed or stayed the action. *See id.*

All of the aforementioned cases lead to the inevitable conclusion that commerce is sufficiently evidenced in the underlying transaction to make the FAA applicable to the Contract in this case. *Citizens Bank* and *Cape Romain* indicate that if the economic activity of one of the parties (Tenet)—not necessarily the parties' transaction (here, Respondent's employment by Tenet) or the contract itself (Contract)—has a nexus to interstate commerce, then the FAA is implicated. *See Citizens Bank*, 539 U.S. at 56-57; *Cape Romain*, 405 S.C. at 122-25, 747 S.E.2d at 464-66. In *Citizens Bank*, the Supreme Court clarified further that "application of the FAA [is not defeated] because the individual . . . transaction[], taken alone, did not have a 'substantial effect on interstate commerce.'" 539 U.S. at 56-57.

The trial court's ruling in this case is a "relic of the past." It flatly ignores the holdings in *Allied Bruce*, *Citizens Bank*, *Dean*, and *Cape Romain*. It was error for the trial court to find that it is the "agreement to arbitrate . . . standing alone" that determines whether interstate commerce is involved in a transaction under the FAA. (Order, R. pp. 4-5 and 7.) Instead, the trial court should have looked beyond the individual agreement

⁶ Challenges to the Tenet arbitration agreement that the plaintiffs in these cases offered (and the courts rejected) included two made here: that the arbitration agreement was unconscionable, (Mem. Supp., Tab 7 – Cases 8, 10, 11, 12, 16 & 19, R. pp. 188-93, 196-229, 241-55 & 260-71), and that there was no consideration for the agreement to arbitrate, (Mem. Supp. Mot., Tab 7 – Case 8, R. pp. 188-93).

to determine whether, in the aggregate, such agreements would fall within the purview of the Commerce Clause.

Thus, if Tenet hospitals' employment contracts, used with its employees throughout the United States, are considered in the aggregate, they must be deemed to affect interstate commerce, and thus the agreement to arbitrate in those agreements (and in the Contract here) must be uniformly subject to the FAA. *See, e.g., Univ. of Ala. Found. v. Walley*, No. 99-D-1287-N, 2001 WL 237309 (M.D. Ala. Jan. 30, 2001) (holding that "if the aggregation of the impact of performing a certain discrete activity has a substantial effect on interstate commerce, then an individual's performance of the activity may be regulated by Congress, even if the individual's acts are local in nature").

It is difficult to imagine **any** employment relationship, taken in the aggregate, that would not affect commerce. Indeed, Congress has exercised broad power in regulating employment through such statutes as Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. Additionally, the *Dean* court recognized that healthcare is an activity that represents "a general . . . activity subject to federal control," *Dean*, 408 S.C. at 381 n.7, 759 S.E.2d at 732 n.7 (citing *Miller*, 683 N.E.2d at 534), and, under those circumstances, *Cape Romain* requires application of the FAA to those practices.

The trial court should have considered the abundant evidence of interstate commerce that Appellants provided in affidavits offered in support of the motion: Tenet employs employees across the nation using this same Acknowledgement form.⁷ (Nester

⁷ Applying the trial court's analysis leads to absurd and incongruous results. For example, consider two employees, both employed at the same Hospital and both having signed the same Contract; if the work of one involved out of state travel or the filing of

Aff., Ex. A, R. p. 48; Mem. Supp., Tab 7 – Chart of Cases Compelling Arbitration Pursuant to Tenet’s Employee Acknowledgment Form and Fair Treatment Process, R. pp. 147-50.) Respondent applied via Tenet’s Texas-based web site from her home in Pennsylvania. (Second Nester Aff. ¶¶ 4, 6, R. pp. 280-81; Second Nester Aff., Ex. E., R. p. 286; Second Nester Aff., Ex. F, R. 284; Meyer Aff. ¶ 6, R. p. 323.) She moved to South Carolina to take the job. (See Meyer Aff. ¶ 12, R. p. 324.) She was reimbursed for the costs of her move from Pennsylvania. (*Id.*) She travelled to at least one out-of-state conference during her employment. (Hyde Pelletier Aff. ¶ 21, R. p. 321; Third Marzulli Aff. ¶ 2, R. p. 344). In performing her job duties, she regularly used the hospital’s equipment and supplies that it had acquired from outside South Carolina. (Hyde Pelletier Aff. ¶¶ 10, 13, R. pp. 319-20; Ross Aff., R. p. 326.) Out-of-state insurers and Medicaid are reimbursed the costs of services after reviewing claims that were electronically filed. (See Ball Aff. ¶¶ 4-6, R. 316.)

The factual circumstances in this case, arising as they do in the context of Respondent’s employment by a national healthcare organization,⁸ required the trial court to apply the FAA in reaching its decision. The trial court should have taken the broader

claims with out of state insurance companies, but the work of the other involved solely hands on work with patients in the emergency room work, only the former could be compelled to arbitrate under the FAA.

⁸ That the contracting employer was a national company was significant in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999), with the Court finding arbitration was appropriate, in part, because United Healthcare Corporation was a national company headquartered in Minnesota. *Id.* at 36, 524 S.E.2d at 833. The relevance of one party’s being involved in business nationally or across state lines was also noted in *Lucey v. Meyer*, 401 S.C. 122, 138, 736 S.E.2d 274, 283 (Ct. App. 2012), where the appellate court found arbitration was appropriate “[e]ven though Firm [the law firm that employed the plaintiff in that case] is not a national employer as United was” *Id.*

view espoused in *Allied Bruce, Citizens Bank, Dean, and Cape Romain*. It should have viewed Tenet's economic activity, in the employment of Respondent (and others), in the aggregate, and should have considered the countless ways in which the Commerce Clause permits the federal government to regulate employment and healthcare.

The trial court erred when it failed to recognize that the federal government's regulation of employment in general, the provision of health-related services subject to federal control, the interstate nature of the offer and acceptance of employment here, and the parties' actual use of supplies acquired through interstate commerce during that employment, were sufficient to establish the requisite nexus with interstate commerce that establishes FAA coverage in this case.

C. *Flexon* does not apply because it turned on entirely different contractual terms and a failure of proof.

The error resulting from the trial court's failure to recognize the significance of controlling precedent was exacerbated by a misapplication of *Flexon I* and *Flexon II*, *supra*, n.2, a case upon which it placed great reliance. *Flexon* was quite different, factually and procedurally, and it was error for the trial court to find it constituted controlling precedent that required it to deny the motion to compel arbitration in this case.

The terms in the agreement in *Flexon* that were so critical to the lower court's holding there do not exist in the Contract here. The parties in *Flexon* agreed that South Carolina law would apply, and had "specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina." (Resp. to Second Supp. Mem. Opp'n, including attached *Flexon* Trial Court Order, R. pp. 333-43.) These terms formed the very basis for the court's reasoning in *Flexon* that the FAA did

not apply. The *Flexon* trial court took specific note that the “parties expressly waive[d] the right to bring any legal action or claims in any other courts,” and that venue was set “in the courts, state or federal, within the State of South Carolina” having jurisdiction. (*Flexon* Trial Court Order, R. pp. 337, 340.) There are no such choice of law or venue provisions in the Contract here, and this alone distinguishes *Flexon* and makes it inapplicable in this case.

Moreover, in *Flexon* there was little or no evidence of interstate commerce before the trial court, and the decision specifically turned on that failure of proof.⁹ Indeed, the only evidence in the record before the trial court in *Flexon* were allegations of the Complaint and vague references in the plaintiff’s interrogatory answers that the defendant asserted showed interstate commerce was involved. *Flexon II*, 413 S.C. at 566-67, 776 S.E.2d at 400-01. Holding that “[t]he party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce,” the trial court in *Flexon* concluded that “[o]n the record before this Court, Defendant fails to meet this burden.” (*Flexon* Trial Court Order, R. p. 342 (emphasis added).)

Not only is its erroneous finding that the party seeking arbitration bears the burden of proof¹⁰ more than sufficient to distinguish *Flexon*, but also the marked factual

⁹ See also *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 98, 592 S.E.2d 53, 53 (Ct. App. 2003) (where Court of Appeals distinguished *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), a case in which the U.S. Supreme Court held FAA did not apply because the contract did not evidence “a transaction involving commerce” in part because “the [U.S. Supreme] Court’s finding was based upon **the absence of any proof** demonstrating that plaintiff ‘while performing his duties under the employment contract was working in commerce, was producing goods for commerce, or was engaging in activity that affected commerce’” (citing *Bernhardt*, 350 U.S. at 201)).

¹⁰ The South Carolina Supreme Court has rejected *Flexon*’s erroneous finding that it is the party seeking arbitration that bears the burden of proof on the arbitrability issue. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731. The Arkansas Supreme Court made the same

and procedural differences between that case and this one do not support the trial court's view that *Flexon* is "binding and controlling jurisprudence" and "analytically analogous" to this case. (Resp. to Second Supp. Mem. Opp'n & attached *Flexon* Trial Court Order, R. pp. 333-43.) *Flexon* is neither controlling nor analogous under the circumstances.

II. The defamation claims are arbitrable because the scope of the arbitration agreement is broad.

The trial court held that the defamation claim here is not arbitrable for other reasons, too—because the intentional tort of defamation is not contemplated by the Contract, because defamation is an intentional tort, because the defamation was not "pendent to employment causes of action," and because the alleged publication was not made exclusively to those within Respondent's workplace—thus the defamation was "not 'related' to [Respondent's] employment or termination." (Order, R. p. 10.)

Respondent's agreement to arbitrate "any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet," is known as a "broad" arbitration agreement. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as "broad" a clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to this Contract, or the breach thereof"). Defamation and other tort claims between employer and employee are routinely held to be arbitrable when the parties have agreed to a "broad" arbitration

error in the case upon which *Flexon* places much reliance. See *Ark. Diagnostic Ctr., P.A. v. Tahiri*, 257 S.W.3d 884, 886-88, 891-92 (Ark. 2007). As *Dean* held, and as the Court of Appeals has recently reiterated, "[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (alteration in original) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)); see also *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

agreement like the one in this case. *See Landers v. FDIC*, 402 S.C. 100, 111-12, 739 S.E.2d 209, 214-15 (2013).

A number of South Carolina cases hold that an employee's claim that his employer defamed him is arbitrable when the agreement is to arbitrate is broad and the claims "touch matters" relating to employment, as the claim that Respondent abused a patient does here. *Id.* (Bank president claimed defamation when Bank's CEO criticized his abilities); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) (physician claimed defamation by hospital and employer after he was fired); *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 714-715 (Ct. App. 2002) (discharged employee sued his employer for breach of contract and its agent in tort, including defamation; all claims held to be arbitrable); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (defamation claim against the plaintiff's former employer, premised on a co-worker's statement to a third party that the plaintiff had been terminated for sexual harassment, was arbitrable pursuant to the plaintiff's acknowledgment of receipt of the employee handbook providing that all employment-related disputes must be arbitrated).

In *Landers* the employee had agreed to arbitrate "any controversy or claim arising out of or relating to this [employment] contract, or the breach thereof" *Landers v. FDIC*, 402 S.C. at 111, 739 S.E.2d at 214-15. The Supreme Court held the defamation claim fell within the scope of the arbitration clause because the proof of the truth or falsity of the statements giving rise to the claim would require the presentation of evidence integrally related to Plaintiff's job performance. *Id.* The *Landers* court cited with approval *Fleck v. E. F. Hutton Grp., Inc.*, 891 F.2d 1047 (2d Cir. 1989). In *Fleck*

the court held that the former employer's statement that the plaintiff stockbroker was "basically a criminal" was relevant to job performance and within the scope of an arbitration clause providing for arbitration of all claims arising out of his employment or its termination because "[p]roving the truth or falsity of those statements will require the presentation of evidence integrally related to [the plaintiff]'s performance as a broker." *Id.* at 1053.

In *Pearson*, the agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Contract or the relationship between the parties hereto" *Pearson*, 400 S.C. at 286, 733 S.E.2d at 599. The Court in *Pearson* held the defamation claim was arbitrable because "[t]he cause[] of action against the Hospital arose as a result of [the plaintiff] being placed" there. *Id.* at 297, 733 S.E.2d at 605.

The courts' analyses in both *Landers* and *Pearson* apply to make the defamation claim arbitrable in this case. Proof of the truth or falsity of the child abuse claim will require evidence relating to Respondent's job performance, particularly as it concerns her work with the child involved, and the defamation claim against the hospital arose because Respondent was working there and treating the patient there.

Here, the defamation allegations are that the Hospital defamed Respondent when it reported to law enforcement, as it was required by law to do, "that [Respondent] physically and sexually abused a nine (9) year old female patient," and was "immediately suspended from her employment without pay." (Compl. ¶¶ 8, 12, R. p. 16.) These allegations meet the relatively low bar set forth by the Supreme Court in *Landers*: to be arbitrable under such circumstances, the defamation need only "touch matters" relating to

the claimant's employment. Thus, as a matter of law, the defamation here "aris[es] out of or relat[es] to" Respondent's employment, and must be arbitrated pursuant to the Contract. *Landers*, 402 S.C. at 109-10, 739 S.E.2d at 213-14. The trial court erred when it failed to consider or distinguish these cases in its ruling.

This conclusion is bolstered by the South Carolina Supreme Court's instructions in *Landers* that "arbitration agreements are liberally construed in favor of arbitrability," and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 109, 739 S.E.2d at 213 (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). In light of *Landers*, it is difficult to conclude anything other than that Plaintiff's claims here must be arbitrated under applicable law. *See id.*

The defamation claim Respondent asserts "touches matters" relating to her employment and thus is just as arbitrable under a broad arbitration agreement as the defamation claims in *Stokes*, *Towles*, *Landers*, and *Pearson* were. Not one of these four recent cases offer any support for the trial court's finding that defamation claims in employment cases are not arbitrable because they are not contemplated by the Contract,¹¹ or because defamation is an intentional tort, or because the defamation was not "pendent to employment causes of action," or because publication was not made to exclusively to those within Respondent's workplace. The trial court's decision is not based upon the binding precedent cited above, and thus must be reversed in light of those cases.

¹¹ In *Landers* the Court summarily rejected a similar argument. In commenting on the trial court's finding that tort claims were not arbitrable because they were not foreseeable at the time the parties entered into their arbitration agreement, the Supreme Court noted: "In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable." 402 S.C. at 115-16, 739 S.E.2d at 217.

III. The Contract is not revocable or unenforceable under state contract law due to unconscionability or because it lacks consideration.

Under both the FAA and the South Carolina Uniform Arbitration Act (“SCUAA”), a court may invalidate an agreement to arbitrate “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; S.C. CODE ANN. §15-48-10(a); see *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012) (noting that under the FAA, “a party may seek revocation of the contract under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability” (citing S.C. CODE ANN. §15-48-10(a); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007))). It was on this statutory foundation—that any contract under these facts would be deemed unconscionable or unenforceable due to lack of consideration under South Carolina law—that the trial court found the Contract was not enforceable on these grounds. Neither the law nor the record supports this finding.

The trial court erred in holding the parties’ agreement was unconscionable. (Order, R. pp. 8-10.) “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Respondent bears the burden of proving prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

In attempting to carry her burden of proof that she had no meaningful choice, Respondent offered her affidavit. (Marzulli Aff., R. pp. 80-86.) That affidavit contained two pieces of “evidence”: that she was required to sign the Contract in order to continue

working for Tenet, and that she did not read it carefully.¹² (Marzulli Aff. ¶ 3, R. pp. 80-81.)

The trial court went beyond Respondent's affidavit to find other grounds for the Contract's unconscionability: because Respondent had no meaningful choice in entering into the Contract; because she was an individual, not a substantial business concern like Tenet; because she had no bargaining power as she had already commenced work; because she was required to sign the Contract in order to remain employed; because Appellants are very sophisticated businesses and healthcare companies; because the clause is inconspicuous; and because the Contract was offered on a "take it or leave it" basis. (Order, R. p. 9.) Even assuming these facts were in evidence before the trial court, at most these findings indicate only that this was a contract of adhesion. An adhesion contract alone is not unconscionable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998). Another element of proof is required, and it is this element that is missing in this case.

To be unconscionable under South Carolina law, the terms of a contract must also be oppressive and one-sided. In the context of an arbitration agreement, the South Carolina Supreme Court, citing Fourth Circuit authority, has described unconscionability as whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

¹² A party to a contract has a duty to read the contract and learn its contents before signing it. *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) (citing *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924)).

The only purported bases for the trial court's finding that the Contract was one-sided and oppressive is the Respondent's contention were that it stripped her of her right to a jury trial and, by making its report to law enforcement, Appellants did not employ a "Fair Process" as she feels was required under the "Fair Treatment Process."¹³ (Order, R. pp. 1-11.) If waiver of a party's jury trial right were a valid basis for a finding an arbitration agreement unconscionable, then every arbitration agreement could be deemed unenforceable based on unconscionability. As to the second point, the trial court did not address the FTP/arbitration process itself and made no findings or otherwise explained how it was in any way oppressive or one-sided or not likely to achieve an unbiased decision by a neutral decision-maker.

It was Respondent's burden to show unconscionability, and in doing so she must show how the agreement was one-sided and oppressive. She has utterly failed to do that on this record. *See Lucey v. Meyer*, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012) (holding that where arbitration agreement limited discovery by allowing the parties to be the only witnesses called in person at the trial, this did not make the agreement unconscionable because the "restriction applies equally to both parties" Thus, the court found "the arbitration clause is not one-sided, nor is it oppressive to [the party resisting arbitration]. Because a finding of unconscionability requires an absence of meaningful choice as well as oppressive, one-sided terms, we reverse the trial court").

¹³ Respondent's argument seems to be based on an irrational belief that because Appellants contend she is compelled to arbitrate her disputes with the Hospital, the Hospital should have sought arbitration with her before making its statutorily-required report of alleged child abuse to law enforcement. (Transcript 34:1-36:8, R. pp. 384-86.)

Unlike *Simpson*,¹⁴ in which the arbitration agreement was found to be unconscionable due, in part, to its in fact being oppressive and one-sided, the fairness of the Contract in this case is readily ascertainable on its face. (Nester Aff., Ex. A., R. p. 48; Nester Aff., Ex. B, R. pp. 49-63.) The Hospital is equally bound by the agreement to arbitrate. The Contract waives no rights or remedies otherwise available to Respondent. (Nester Aff., Ex. A, R. p. 48; Nester Aff., Ex. B, R. pp. 49-63.) The provisions of the Contract do not purport to restrict statutory penalties and injunctive or equitable relief as would be available in the courts, including attorneys' fees if recoverable under applicable law. In fact, the Contract does not limit in any way the remedies available to Respondent. The rules of the AAA apply and nothing suggests that those rules are one-sided or unfair. (Nester Aff., Ex. A, R. p. 48; Nester Aff., Ex. B, R. p. 57.) *See, e.g.,*

¹⁴ In *Simpson* the court found the arbitration agreement signed by the plaintiff to be unconscionable and thus unenforceable. However, the Contract at issue here is significantly different from the agreement at issue in *Simpson*. In applying a case-by-case analysis, the *Simpson* court found the plaintiff had no meaningful choice, in part because the agreement involved an automobile, which was "critically important"; the plaintiff lacked business judgment and had no attorney present; the agreement was "hastily" presented for her signature; and the arbitration provision required the plaintiff to forgo certain statutory remedies. 373 S.C. at 27, 644 S.E.2d at 670. The court also found the contract to be one-sided and oppressive because it limited plaintiffs' statutory remedies which defeated the purpose of the statute. *Id.* Additionally, the court found a lack of mutuality of remedy because the defendant had the right to proceed in court for "claim and delivery repossession, injunctive relief or money owed in connection with the purchase or lease of any vehicle and claims by the defendant car dealer . . ." *Id.* at 31, 644 S.E.2d at 672. The court found the agreement to be one-sided and not to promote a neutral and unbiased arbitral forum. *Id.* at 32, 644 S.E.2d at 672. Further, the court found that actions under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* are not subject to arbitration. *Id.* at 32, 644 S.E.2d at 673. For all of these reasons, the court found the arbitration provision to be unconscionable and thus unenforceable. *Id.* at 34-35, 644 S.E.2d at 674. Importantly, the court noted "that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. . . . Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269 (3d Cir. 2004) (noting the “absence of bias favoring either side” in the AAA rules and noting how due process rights were protected under those rules); *Delmore v. Ricoh Ams. Corp.*, 667 F. Supp. 2d 1129 (N.D. Cal. 2009) (noting various ways in which AAA rules, made applicable to the parties’ arbitration agreement, contradicted the employee’s claim the agreement was unconscionable). Finally, Respondent was paid hourly, so her costs of arbitration are capped at eight hours’ pay, with the balance of the total cost of arbitration being borne by Tenet. (Nester Aff., Ex. A, R. p. 48; Nester Aff., Ex. B, R. p. 57; Second Marzulli Aff. ¶ 4, R. p. 296.)

The Contract here is analogous to the one before the Supreme Court in *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010), *vacated on other grounds sub nom. by Sonic Automotive, Inc. v. Watts*, 563 U.S. 971 (2011), where the Court held the arbitration agreement was not unconscionable as a matter of law:

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer. Moreover, both the customer and Century are subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer’s judicial remedies supersede the consumer’s arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson*. In *Simpson*, the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitrable

disputes.

Id. at 534, 693 S.E.2d at 399.

There is insufficient evidence in the record for a finding that the Contract is unconscionable under South Carolina law. The express terms of the Contract actually contradict the trial court's conclusion that the Contract is not "geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. Applying the case-by-case analysis as directed in *Simpson*, Respondent has failed to present sufficient evidence to support any finding that the Contract is unconscionable.

There is no support at all for the trial court's finding that the arbitration agreement is unenforceable because it lacks consideration. As the Court of Appeals noted in *Towles*,

[Respondent]'s continued employment constituted sufficient consideration to render the Acknowledgment [containing the arbitration agreement] legally binding.

Towles v. United HealthCare Corp., 338 S.C. at 40 & n.4, 524 S.E.2d at 845 & n.4 (citing, *inter alia*, *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274-75 (4th Cir. 1997) (holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement where the employer proffered, and the employee signed, an employee handbook and acknowledgment form over three and one-half years after employment began)).

This is no legal or evidentiary support for the trial court's conclusion that the Contract in this case is unenforceable due to unconscionability or the absence of consideration under South Carolina law.

CONCLUSION

The FAA applies because the Contract expressly provides that it does. Moreover, because the Contract evidences Respondent's employment by Tenet, it is a "contract evidencing a transaction involving commerce" to which the FAA applies. *Citizens Bank* and *Cape Romain* make it clear that the proper focus to determine whether the FAA applies to the Contract is to look beyond the individual agreement to determine whether, in the aggregate, such agreements would fall within the purview of the Commerce Clause. Like Alafabco, Inc. in *Citizens Bank*, Tenet does business outside South Carolina, it is headquartered in Texas, and employs people throughout the United States under the same form contract. The trial court disregarded this existing standard and instead took an outdated, overly narrow view of the issue, erroneously considering only what was within the four corners of the Contract and the activities Respondent said her job entailed.

Flexon does not apply because both the agreement and the record in that case were markedly different from this case, and the decision in *Flexon* turned on those differences. *Flexon* is neither "binding and controlling" nor "analytically analogous" to this case, and thus is irrelevant to the issue of whether the FAA applies in this case.

At least four South Carolina appellate Court decisions—*Stokes*, *Landers*, *Pearson* and *Towles*—demonstrate that defamation claims arising during or after a employment are arbitrable when the arbitration agreement is a broad one, as is the Contract here, and the defamation "touches matters" relating to the claimant's employment.

Proof of unconscionability was Respondent's burden, and she failed to show that the Contract is oppressive or one-sided or that she had no meaningful choice other than to enter into it.

The trial court should have considered the now well-settled case law and held that Respondent's agreement to arbitrate all claims arising out of her employment required her to arbitrate the claim that she was defamed by the Hospital's report to law enforcement that she abused a minor patient. The trial court's decision to deny the motion to compel arbitration must be reversed and this case remanded to the trial court for dismissal or a stay.

Signature Page Attached

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Sue Erwin Harper

SC Bar No. 1917

E-Mail: corky.harper@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Appellants

Columbia, South Carolina

May 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master In Equity

RECEIVED

MAY 25 2016

SC Court of Appeals

Case No. 2014-CP-07-2779
Appellate Case No. 2015-002363

Mary Beth Marzulli, Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System,
LP d/b/a/ Hilton Head Regional Medical Center, and
Tenet Physician Services-Hilton Head, Inc., Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan

Sue Erwin Harper
SC Bar No. 1917
E-Mail: corky.harper@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellants

May 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAY 25 2016

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2014-CP-07-2779
Appellate Case No. 2015-002363

Mary Beth Marzulli, Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System,
L.P., d/b/a Hilton Head Regional Medical Center, and
Tenet Physician Services-Hilton Head, Inc., Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

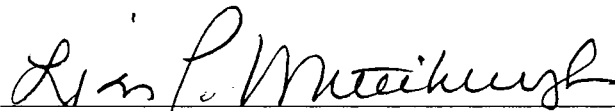
Pleadings:

Final Brief of Appellants

Counsel Served:

Benjamin T. Shelton, Esquire
bshelton@fingerlaw.com
Finger, Melnick & Brooks, P.A.
Post Office Box 24005
Hilton Head Island, SC 29926

Stephen F. DeAntonio, Esquire
sdeantonio@deanlawfirm.com
DeAntonio Law Firm, LLC
Post Office Box 30069
Charleston, SC 29417



Lisa P. Whitehurst
Administrative Assistant

May 25, 2016