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SC Court of Appeals

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

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 REPLY BRIEF OF APPELLANTS

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As Appellants detail in the following Reply, Respondent's brief ignores binding precedent, asserts baseless claims, and advances arguments that are unsupported in the law of arbitration as currently articulated. The trial court's order denying arbitration should be reversed and the matter compelled to binding arbitration as the parties' Agreement provides.

Law/Analysis

I. The Choice of Law Provision was Raised Below.

Asserting the issue was not raised below, Respondent characterizes Appellants' initial argument as their claim that the "mere statement" in the Agreement that "arbitration will be conducted under the Federal Arbitration Act" constitutes a "triggering rule" that "automatically compels arbitration." (Respondent's Brief at 8.) Both the claim that this argument was not raised and Respondent's characterization of it are inaccurate.

Appellants have not declared any automatic or triggering rule. Instead, their argument is simply this: the parties agreed the FAA would apply to their Agreement; the Court's role is to enforce the agreement the parties made; therefore, the Court must apply the FAA to the parties' Agreement.

Contrary to Respondent's claim that this issue was not raised below, the Agreement and all of its terms, including the FAA's applicability, were squarely before the trial court. (Nester Aff. ¶ 4, R. pp. 44-45; Nester Aff. Ex. A, R. p. 48.) An examination of those terms was at the heart of the motion to compel arbitration, and both sides urged the trial court to carefully interpret them. Respondent argued that it was the terms of the Agreement "which must be examined by the Court . . . ." (Supplemental Mem. in Opp'n to Mot. to Compel, R. p. 288.) The trial court, too, emphasized that

"[c]ourts must 'focus upon what the terms of the contract'" require. (Order, R. p. 5.) The trial court also noted that it "look[ed] to the terms of the [Agreement] to determine" the issue of interstate commerce, and concluded that it was what was within "the four corners of the [Agreement]" that was determinative. (*Id.*, R. p. 7.)

Particularly because this Court's review is *de novo*, there is no legitimate basis upon which to find that the choice of law provision, like all other terms of the Agreement, was not before the trial court for consideration.

Respondent makes another argument that is related to the preceding one: she claims that enforcement of the contractual provision calling application of the FAA "overrule[s] and eviscerate[s]" the South Carolina arbitration statute. (Respondent's Brief at 9.) This is nonsense. Parties to a contract may agree that South Carolina law (or any other law with a reasonable relationship to the agreement) will apply to their agreement, and this basic rule applies to arbitration agreements. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 n.2, 542 S.E.2d 360, 363 n.2 (2001)). Just as parties may agree that South Carolina law and not the FAA will apply to their agreement, so may they agree that the FAA, not state law, will apply. In any case, only one law, federal or state, applies—never both. The parties here agreed the FAA would apply. Application of that law instead of state law is not a "backdoor around" the South Carolina statute at all. (Respondent's Brief at 9.) Instead it simply reflects the parties' agreement that the FAA, not the South Carolina statute, would apply.

II. Respondent Fails to Address Recent Cases Germane to the Interstate Commerce Issue, Relying Instead on Outdated, Inapplicable Analyses.

A. Respondent's Brief Ignores Binding Precedent Concerning the Involvement of Interstate Commerce.

Appellants' initial brief contains a detailed analysis of three significant arbitration cases that the South Carolina Supreme Court decided in 2013 and 2014. (Appellants' Brief at 18-31.) Not a single one of those cases—*Dean, Cape Romain Contractors,* or *Landers*—is mentioned in Respondent's brief; yet each of them bears directly on one or more of the issues before the Court in this case, and each of them contradicts one or more of Respondent's arguments.

One of those arguments is that the Agreement did not involve interstate commerce because it did not expressly require Respondent to administer anything related to interstate commerce. (Respondent's Brief at 11-12.) This argument is based in large part on Respondent's emphasizing an outmoded distinction between the recruiting agreement involved in *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), wherein the appellate Court held arbitration should have been ordered based upon that agreement's specific requirements, and the fact that the Agreement here had no such requirements. *See also* § II-C, *infra.*

But in 2013, ten years after *Thornton,* the South Carolina Supreme Court held in *Cape Romain Contractors, Inc. v. Wando East, LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013), that the appropriate way for a court to determine if a contract "evidences a transaction involving commerce," thereby triggering application of the FAA, is not by examining the details within the four corners of the agreement to see if it has any specific effect upon interstate commerce. (Appellants' Brief at 22-23.) Instead, in *Cape Romain*

Contractors the Supreme Court held that a court should determine "if, in the aggregate, the economic activity in question would 'represent a general practice . . . subject to federal control.'" 405 S.C. at 125, 747 S.E.2d at 466 (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003)). If the economic activity in general is subject to federal control, then interstate commerce is involved and the FAA applies. *See id.*; *see also* § II-C, *infra*.

Equally telling is Respondent's failure to distinguish (or mention) the U.S. Supreme Court decision in *Citizens Bank v. Alafabco,* an opinion the South Carolina Supreme Court drew heavily upon in *Cape Romain Contractors*. *See* 405 S.C. at 125, 747 S.E.2d at 466 ("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.").

Citizens Bank was also discussed at length in Appellants' brief (at pages 20-22). The case involved a suit over a commercial loan filed in Alabama state court by an Alabama lending institution against an Alabama corporation and its officers, all Alabama residents. After the trial court granted the motion to compel arbitration, the Alabama Supreme Court, applying Alabama law, reversed and held the arbitration agreement was not enforceable under Alabama law. The United States Supreme Court reversed, finding the arbitration agreement in question evidenced a transaction involving interstate commerce, thus the FAA applied and the arbitration agreement was enforceable.

The *Citizens Bank* Court focused not on the purely Alabama connections that the state court had relied upon, but rather looked at commercial transactions in the aggregate. The Supreme Court cited with approval the dissent in the Alabama Supreme Court's

decision that opined it was inappropriate to require that "a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce." 539 U.S. at 55 (quoting *Alafabco, Inc. v. Citizens Bank*, 872 So.2d 798, 808 (Ala. 2002) (See, J., dissenting)). "[A]pplication of the FAA [is] not defeated because the individual [agreements], taken alone, did not have a 'substantial effect upon interstate commerce' . . . if in the aggregate the economic activity in question would represents a 'general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way." *Id.* at 56-57 (internal citations omitted). The Supreme Court looked at the broad impact of commercial lending on the national economy and Congress's power to regulate that activity pursuant to the Commerce Clause, and found this was sufficient evidence of interstate commerce to bring the parties' arbitration agreement under the FAA.

Not only does Respondent disregard *Cape Romain Contractors* and *Citizens Bank*, but her argument is further undermined by the South Carolina Supreme Court's 2014 decision in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014) (discussed in Appellants' Brief at 24-27). In that case, the Court again reversed a trial court's denial of arbitration and held the FAA applied to an arbitration agreement, this one in a contract between a nursing home and a resident. The Court held the FAA applied for at least two reasons. First, because the facility provided meals and medical supplies which had been shipped across state lines from out-of-state vendors, and

second because "healthcare in general is an activity subject to federal control under the Commerce Clause."[1] *Id.* at 381 & n.7, 759 S.E.2d at 732 & n.7.

Notwithstanding the Supreme Court's decisions in *Citizens Bank, Cape Romain Contractors* and *Dean*, Respondent argues that the utilization of out-of-state materials that flow in interstate commerce has nothing to do with the issue of whether interstate commerce is involved in this case.[2] (Respondent's Brief at 11.) Instead, according to Respondent, the focus must be on Respondent's South Carolina residency and her employment "treating local patients at a local hospital providing them with one-on-one hand-on physical therapy services." (Respondent's Brief at 4.) Respondent contends that Appellants' position—that interstate commerce is involved in the Agreement here because Respondent's job, and the jobs of others at the hospital who signed the same Agreement, involve the flow of goods, services, and people across state lines—"is without support of the jurisprudence of South Carolina." (Respondent's Brief at 11.) This statement is patently wrong in that it completely ignores binding precedent which

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[1] Ironically, *Dean* reversed *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), a 1993 decision similar in its analysis to the trial court's order in this case. In *Dean,* decided twenty-one years later, the Supreme Court found the *Timms* analysis to be "a relic of the past, decided before the broad definition of interstate commerce" that had evolved in the interim. *Dean*, 408 S.C. at 382, 759 S.E.2d at 733.

[2] Respondent mischaracterizes the language of the FAA by stating that the parties must be "engaged" in interstate commerce for the statute to apply. (*See, e.g.*, Respondent's Brief at 11.) The language of the FAA requires that the arbitration clause must be "written . . . in . . . a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The United States Supreme Court recognized the difference between "involving commerce" and "engaged in commerce" in *Citizens Bank v. Alafabco, Inc.*, holding that much less was required to show that "a transaction involve[ed] commerce" than to show that parties were "engaged" in interstate commerce. *See Citizens Bank*, 539 U.S. at 56-57; *see also Circuit City Stores v. Adams*, 532 U.S. 105, 118 (2001) ("The plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'").

holds the FAA applies because the channels and instrumentalities of interstate commerce were utilized and the activities in question, employment and health care, constituted general practices that are subject to federal control. *Cape Romain Contractors*, 405 S.C. at 122-23, 747 S.E.2d at 464-66; *see also* Appellants' Brief at 23-24.

But even if Respondent were correct, and it is only what the performance of the contract references and entails that the Court should examine to determine the involvement of interstate commerce, there is no evidence that the relationship between the hospital and Respondent was solely intrastate. Indeed, Respondent acknowledges that her employment involved interstate commerce because she admits she attended, and the hospital reimbursed her for attending, an out-of-state physical therapy continuing education course. She also does not deny that she moved from Pennsylvania to Hilton Head to take the job, she applied for the job over the internet from her home in Pennsylvania, and, after accepting and moving to South Carolina to assume the job, the hospital reimbursed her for moving expenses.

Cape Romain Contractors, Citizens Bank, and *Dean* all prove that it is not, as Respondent contends, "what the terms of the contract specifically require for performance" that determines whether interstate commerce is involved, (Respondent's Brief at 12), nor is evidence of what part of the transaction (here, Respondent's employment) was attributable to in-state activities; rather, the proper focus is upon "consideration of the 'general practice' those transactions represent." *Citizens Bank*, 539 U.S. at 58. The general practice that Respondent's employment in the healthcare field represents (as also reflected in Appellants' employment of others who have the same

contract) clearly evidences the involvement of interstate commerce in the Agreement here.

B. The Court of Appeals' Decision in *Flexon I* is Distinguishable on its Facts and Procedural Posture.

Instead of addressing the binding United States Supreme Court and South Carolina Supreme Court precedent analyzed in depth in Appellants' brief, Respondent points to one case that she characterizes as "South Carolina jurisprudence [that is] dispositive to the issue." (Respondent's Brief at 13.) This jurisprudence is the South Carolina Court of Appeals' decision in *Flexon v. PHC-Jasper, Inc. (Flexon I)*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012),[3] a case that Respondent claims is "binding and controlling," and which "dictates that the order [of the trial court] be affirmed." (Respondent's Brief at 13-14.) An examination of the record in *Flexon I* demonstrates that Respondent's hyperbole about the case has little, if any, merit.

Flexon I,[4] decided by the Court of Appeals in 2012, pre-dates the Supreme Court's decisions in *Cape Romain Contractors, Landers v. Federal Deposit Insurance Corporation*, 402 S.C. 100, 739 S.E.2d 209 (2013), and *Dean* (none of which she mentions). In characterizing *Flexon* as "analytically analogous" to this case and "dispositive" of the issue, Respondent ignores enormous differences between the facts and procedure in *Flexon* (and in *Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884, 892 (2007), a 2007 Arkansas Supreme Court case upon which *Flexon* was based)

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[3] The South Carolina Supreme Court has never mentioned this decision.

[4] A subsequent case, *Flexon v. PHC-Jasper, Inc. (Flexon II)*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015), held that *Flexon I* embodied the law of the case, and therefore declined to reconsider the decision in *Flexon I.*

and those of this case that make both *Flexon* and *Tahiri* relatively useless in analyzing the issue of FAA applicability here.

Several major differences are that in *Flexon*, the parties' agreement expressly provided that South Carolina law would apply, that they would *litigate* any dispute arising under the agreement in the courts of South Carolina, and that they waived any right to bring a legal action in any other courts. In contrast, the parties here agreed the FAA would apply, and there is no mention in the Agreement that they would have an opportunity to litigate at all, much less that they would litigate anything in the courts of South Carolina.

Also absent in *Flexon* were the numerous affidavits that are in the record here. In *Flexon* there was little evidence[5] offered by the party moving to compel arbitration that interstate commerce was involved. Moreover, the *Flexon* trial court incorrectly held that it was the party seeking arbitration that bore the burden of proving the contract involved interstate commerce.

Both *Flexon* and *Tahiri* applied an incorrect burden of proof that our Supreme Court and Court of Appeals have rejected in South Carolina. The burden in this state is on the one resisting arbitration to show it is not appropriate, not the other way around. *See, e.g.*, *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E. 2d 91, 94 (Ct. App. 2015) (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731)) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for

[5] In *Flexon II*, the Court of Appeals noted there was no evidence before the trial court in *Flexon I* to "evidence that [Dr. Flexon] was actually obligated under the terms of the Agreement" to provide medical services in two states. *Id.* at 575-76, 776 S.E.2d at 405.

arbitration."); *see also Wilson v. Willis*, __ S.C. __, __ S.E.2d __, 2016 WL 806063, at *3 (Ct. App. Mar. 2, 2016) (same).

Thus the trial court's conclusion in *Flexon* that the FAA did not apply was based on a paucity of evidence of interstate commerce, an incorrect allocation of the burden of proof, and an agreement expressly providing for the application of South Carolina law and litigation in South Carolina courts. Not one of these factors is present in this case, thus *Flexon* and its Arkansas forerunner, *Tahiri*, do not apply to the facts before the Court here.

Even without the sharp distinctions between those cases and this one, however, the *Tahiri* and *Flexon* courts analyzed the interstate commerce issue using an analysis that both the U.S. Supreme Court and the South Carolina Supreme Court have drastically revised. As explained in the following section, this further demonstrates that Respondent's reliance on the analysis applied in those cases is misplaced.

C. The *Thornton* Analysis is Outdated and no Longer Applies after *Cape Romain Contractors*.

In addition to relying on *Flexon* and *Tahiri*, Respondent emphasizes the appellate court's analysis in *Thornton v. Trident Medical Center*. Relying on *Thornton*, she posits that the FAA applied in that case primarily because the contract involved was a recruiting agreement that required the employee to move to South Carolina from out of state. (Respondent's Brief at 11-17.) Applying *Thornton*, Respondent concludes that because no move from out of state was required in *Flexon* or *Tahiri* (discussed *supra* pp. 8-10) or in this case, that indicates interstate commerce is not involved and the FAA does not apply. However, while the Court of Appeals correctly held the FAA applied in *Thornton*, the rationale for that ruling is no longer valid because the analytical framework utilized

today to decide whether interstate commerce is involved, and thus whether the FAA applies, has evolved and changed in the thirteen years since *Thornton* was decided.

Like Respondent, the employee in *Thornton* (and the employees in *Flexon* and *Tahiri*) argued that the recruiting agreement at issue did not involve interstate commerce because it only concerned the performance of his duties providing medical services within South Carolina. The Court of Appeals held that he was "correct in urging this Court to focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce is involved." *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52.

Holding that South Carolina "courts consistently look to the essential character of the contract when applying the FAA," the *Thornton* court cited a number of cases that South Carolina appellate courts decided between 1977 and 2002.[6] After examining those

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[6] The *Thornton* Court cited the following cases, listed here chronologically: *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (interstate commerce was involved in the performance of a contract for the construction of an eighteen-story building because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *Timms v. Greene,* 310 S.C. 469, 427 S.E.2d 642 (1993) (interstate commerce was not involved in a contract between a nursing home and patient, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract—the provision of patient-resident services in South Carolina—did not require any activities in interstate commerce) (this case has recently been overruled by *Dean,* discussed *supra*); *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 882 (1994) (interstate commerce not involved in a contract for the sale of land in South Carolina to out-of-state parties; transaction was outside the scope of the FAA because the Court was "unable to discern from the evidence presented whether the contract required respondent to administer anything related to interstate commerce"); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce was involved in contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (interstate commerce was involved in a construction

cases, the *Thornton* Court concluded that performance of the recruiting agreement required activity involving interstate commerce, and the FAA applied, because:

> the subject matter of the contract clearly extends beyond Thornton's obligation to provide medical services in South Carolina. Thornton was recruited and agreed to move from one state to another. . . . The contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines.

357 S.C. at 97, 592 S.E.2d at 53.

Citizens Bank was decided just months before the South Carolina court issued its decision in *Thornton*. Even though the conclusion in *Thornton* was not at odds with *Citizens Bank*, there is no evidence that the *Thornton* Court placed any reliance on *Citizens Bank*. While the result in *Thornton* would have been the same, *i.e.*, interstate commerce was involved so the FAA applied, if the *Citizens Bank* analysis had been applied instead, the opinion probably would not have included any inquiry into what the performance of the contract required the parties to administer. Rather, had the *Thornton* Court applied the *Citizens Bank* analysis in 2003, the Court's reasoning would have looked more like that of the Supreme Court in *Cape Romain Contractors* in 2013. *Cape Romain Contractors* aptly demonstrates that Respondent's reliance on the outdated analysis of *Thornton*—which the *Flexon* trial court relied on in 2010 and the Arkansas Supreme Court had relied on in *Tahiri* in 2007—is misplaced. This is yet another reason

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contract where builder was domiciled in South Carolina, but, under the contract, assigned rights to a Delaware creditor); *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (interstate commerce was involved in a contract for design and architectural services in the construction of a restaurant in South Carolina because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce").

that *Flexon* is not the "dispositive" "South Carolina jurisprudence" Respondent says it is. (Respondent's Brief at 13.)

III. Contrary to Respondent's Unsupported Position, the Scope of the Broad Arbitration Clause Includes Her Defamation Claim.

Respondent's argument that the defamation claim is not arbitrable because it is an intentional tort not grounded on employment issues, and thus is not "related" to her employment or its termination, neglects to deal with another recent Supreme Court decision and two opinions of the Court of Appeals that directly contradict this argument. There is no question that the arbitration agreement here is a broad one, including in its scope "any and all claims . . . related in any way to my employment or [its] termination." *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. The Supreme Court explained in *Landers* that a broad arbitration agreement makes arbitrable all disputes in which a "significant relationship exists" between the claims and the contract or in which the claims "touch matters" relating to the contract.

In *Landers,* the alleged defamation involved, as it does here, statements relating to plaintiff's job performance. *Landers* held that the defamation claim was within the scope of the arbitration clause because proof of the truth or falsity of the allegedly defamatory statements would require presentation of evidence integrally related to plaintiff's job performance. Similarly, *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), held that tort claims, including a defamation claim, were arbitrable because they "arose as a result of [the plaintiff] being placed [at the hospital]" and placement there "was the purpose of the contract." *Id.* at 297, 733 S.E. 2d at 605. Most recently, the Court of Appeals held tort claims were arbitrable in *Wilson v. Willis*,

because they were "premised on rights and duties that would not exist but for" the agreement containing the arbitration clause. 2016 WL 806063, at *7.

Respondent here entered into a broad arbitration agreement in which she agreed to arbitrate "any and all claims and disputes that are related in any way to my employment." Under the logic of all three of the above-mentioned cases, there is no question that the allegedly defamatory statements in this case have the same "significant relationship" with, or "touch matters" relating to, Respondent's employment as existed in those cases. That is because, without her employment at the hospital, there would have been no complaint made to the hospital about Respondent's work, and the hospital in turn would not have made the allegedly defamatory report to law enforcement about actions she had allegedly undertaken in the course of her employment.

The *Landers* Court also looked at the factual allegations the plaintiff pleaded in the Complaint. Here, as there, an employment agreement is involved, and here, as there, the complaint includes job-related claims and factual allegations. Respondent here alleged she "worked for Defendants," that Defendants defamed her by reporting to law enforcement that she had abused a 9-year old patient she was treating in the course of performing her job, and that this "defamation was a subterfuge to get Plaintiff fired" from her job. (Complaint ¶¶ 5, 8 & 18, R. pp. 15-17.) In light of *Landers, Pearson*, and *Wilson*, the breadth of the Agreement, and the manner in which Respondent pleaded the facts, it is clear that, just as they did in those cases, the "tort claims significantly relate to the Agreement" in this case. *Landers*, 402 S.C. at 112, 739 S.E.2d at 115.

A number of South Carolina cases have found defamation and other tort claims arbitrable, particularly when the arbitration provision is broad.[7] These cases belie Respondent's suggestion that only a few cases hold defamation claims are arbitrable. (Respondent's Brief at 22 n.9.) Similarly, there is no support in current authority for Respondent's suggestion that defamation is arbitrable only if it is listed in the agreement as an arbitrable claim (citing *Stokes* on page 21 of her brief), or for her argument that a defamation claim is only arbitrable when it is "so interwoven with the contract that the tort claim could not stand alone." (Respondent's Brief at 21-22 (quoting *Aiken v. World Fin. Corp. of S.C.*, 367 S.C. 176, 623 S.E. 2d 783 (Ct. App. 2006)).)[8]

It is beyond dispute that the statements that allegedly defamed Respondent here were made in connection with the performance of her job and thus they "touch matters" relating to her employment. Additionally, she was employed at the hospital due, in part, to her signing the Agreement. Moreover, the truth or falsity of the alleged defamation would involve an examination of her job performance at the hospital. All of these factors bring the defamation issue squarely within the scope of the arbitration agreement under *Landers, Pearson, Wilson*, and the other cases cited above.

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[7] In addition to *Landers* and *Pearson*, several other South Carolina cases have held defamation (and other tort claims) are arbitrable under a broad arbitration agreement such as the one here: *Wilson*, 2016 WL 806063 (torts); *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) (torts); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (defamation).

[8] The Court of Appeals has recently noted that the party resisting arbitration bears the burden of proving that claims are unsuitable for arbitration and held that even though some of the parties did not sign the arbitration agreement, the tort claims presented were arbitrable because there was a significant relationship between those claims and the contract. *Wilson*, 2016 WL 806063, at *3, 5 (quoting *Hall*, 413 S.C. at 271, 776 S.E.2d at 94; *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600).

IV. The Arbitration Agreement is Not Unconscionable Under *Herron*.

Respondent argues that the Agreement is unconscionable because, *inter alia*, Appellant is a "substantial business concern," the "relative disparity in the parties' bargaining power," and that the terms of the Agreement "strip [her] of her right to a jury trial." (Respondent's Brief at 18.) Again Respondent does not mention or distinguish a critical South Carolina decision that is dispositive on the issue of unconscionability of an arbitration agreement. *See Herron v. Century BMW*, 387 S.C. 525, 639 S.E.2d 394 (2010), *vacated and remanded on other grounds sub nom Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011); *see also* Appellants' Brief at 41-42.

Herron did not consider any disparity in bargaining power or that an arbitration agreement, by definition, waives either party's right to a jury trial. Rather, the factors in *Herron* that the Court considered in holding the arbitration agreement was not unconscionable as a matter of law were that it was not oppressive or one-sided, did not prevent the arbitrator from awarding punitive or double or treble damages, did not limit available statutory remedies, and applied its terms equally to both parties. Respondent's claim that the Agreement is unconscionable based on the factors set forth in her brief is without any foundation in arbitration law as it currently exists in South Carolina.

V. Respondent's Continued At-Will Employment Constitutes Consideration Under *Towles*.

Respondent argues that the Agreement here is not enforceable under "[g]eneral contract principles of state law." (Respondent's Brief at 17.) Specifically, because she had started work before she signed the Agreement, she claims "the purported agreement lacks a component so axiomatic no citation is necessary—consideration." (*Id.*) Indeed, it might be said that there is no citation *possible* for this proposition because it is directly

contradicted by a case that Respondent herself cites in her brief, *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). (*See* Respondent's Brief at 11.) *Towles* expressly held that "continued employment constitutes sufficient consideration to render [the arbitration agreement] binding." 338 S.C. at 40 n.4, 524 S.E.2d at 845 n.4; *see also* Appellants' Brief at 42. Respondent contends that signing the Agreement was required in order for her to keep her job. (Respondent's Brief at 18.) Because her at-will employment continued after she signed the Agreement, Respondent cannot say there was no consideration for it.[9]

VI. Respondent Inappropriately Attempts to Argue the Merits of Her Underlying Claims to this Court and those Issues were not Decided by the Trial Court.

Many of the alleged facts and arguments raised in Respondent's brief are irrelevant to any consideration of the issues before the Court here. "[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Landers v. FDIC,* 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). All that is now presented in this case is whether, what, and how the parties agreed to arbitrate. Any other findings remain for the arbitrator. Respondent's work history, details about the "incident," the report made to the sheriff's department, and whether a hospital employee was required to make this report—"must report" under S.C. Code Ann. 63-7-310(A)) or was merely "encouraged" to do so (as provided under S.C. Code Ann. 63-7-310(B)—are all issues for the arbitrator alone.

[9] It is unclear why Respondent seems to contend that she did not have an employment contract and this was because she was an at will employee. (Respondent's Brief at 16.) The Agreement was an employment contract; the absence of a specific term in that Agreement is what makes her an employee at will. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005).

Conclusion

In light of the detailed legal analysis of controlling cases set forth in Appellants' brief, that Respondent does not mention them in her brief speaks volumes about the viability of the arguments she presents there. Instead of distinguishing the noteworthy cases Appellants cited, Respondent offers only dated case law and obsolete arguments that, under examination, are unsupported (or flatly contradicted) by more recent cases decided by higher courts. Respondent's failure to analyze, distinguish, address, or even mention those dispositive cases is a strong signal that the lower court's refusal to compel arbitration is unsustainable under arbitration law as it currently exists.

Even if Respondent had not failed to show why *Dean, Cape Romain Contractors, Landers,* and other applicable cases do not require arbitration of the issues in this case, the question is, at worst, debatable, and this finding alone is sufficient for this Court to compel arbitration. The South Carolina Supreme Court recently recited in *Landers* a number of basic tenets that apply to agreements to arbitrate: "[A]rbitration agreements are liberally construed in favor of arbitrability"; "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"; there is a "heavy presumption of arbitrability"; and "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]" arbitration must generally be ordered. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (citations omitted).

It cannot be said with any positive assurance that the arbitration agreement here is not susceptible of an interpretation that covers the workplace-related dispute in question. Liberally construing the broad arbitration agreement, resolving all doubts in favor of

arbitrability, and applying the heavy presumption in favor of arbitration, this Court should reverse the trial court, compel arbitration, and dismiss the case.[10]

Signature Page Attached

[10] It is not clear why Respondent contends that Appellants abandoned the motion to dismiss or stay. Appellants seek reversal *in toto*. Given the present posture of the case, it is up to this Court to decide whether to stay or dismiss. In either case, Respondents have not abandoned those grounds. The denial of a motion to dismiss or stay is not immediately appealable; only the denial of the motion to compel arbitration is appealable.

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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

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 Reply Brief complies with Rule 211(b), SCACR.

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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):

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