THE STATE OF SOUTH CAROLINA

In the 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, LP d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., ...Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Should Appellant's Issue on Appeal I be disregarded when the contention that a mere statement in the *Acknowledgement* saying that "arbitration will be conducted under the Federal Arbitration Act" automatically triggers arbitration, was never raised by Appellants in the trial court?

II. Because of the applicable standard of review that if any evidence reasonably supports the circuit court's factual findings that they not be reversed on appeal, shouldn't the trial court's order be affirmed since the evidence reasonably supports the judge's findings that the Federal Arbitration Act (FAA) did not apply, meaning there wasn't a transaction involving interstate commerce?

III. Shouldn't the trial court's order be affirmed because reasonable evidence exists supporting the trial court's ruling that the parties did not have a valid and binding arbitration agreement since it was unconscionable?

IV. Shouldn't the trial court's order be affirmed because reasonable evidence exists supporting the trial court's ruling that the "Acknowledgement" (sic) didn't cover the defamation claim?

V. Shouldn't the trial court's order be affirmed since grounds can be found in the record to support it?

STATEMENT OF THE CASE

The Respondent is dissatisfied with the Appellant's Statement of Facts as it includes subjective statements of fact and matters preceding the initiation of judicial proceedings.[1]

Respondent commenced this action with the filing of the Complaint on October 30, 2014. (Complaint, R. pp. 12-19). The nature of the action sounds in defamation. The nature of the response by Defendants was a Motion to Compel Arbitration and to Dismiss or Stay. (Motion to Compel Arbitration, R. pp. 28-33)[2] The Honorable Marvin H. Dukes, III, sitting as a Circuit Court Judge, held a hearing on April 15, 2015. (Transcript, R. pp. 351-410). The hearing was continued and resumed by phone on April 30, 2015, although there is no transcript of the telephonic hearing. The trial court received and reviewed numerous affidavits, exhibits, memoranda and supplemental memoranda. The Motion to Compel Arbitration was denied and the trial court issued an eleven (11) page order on October 23, 2015. (Order, R. pp. 1-11).

No Motion for Reconsideration of the Order, per S.C.R.C.P. 59 or otherwise, was filed by Appellants. They instead filed an Answer on November 6, 2015. (Answer, R. pp. 20-27). This appeal followed with the Appellants filing a Notice of Appeal on November 9, 2015. (Notice of Appeal, R. pp. 411-426).

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[1] The statement of the case should be objective, rather than argumentative. ... ("The statement shall not contain contested matters...") It informs the court of the procedural history of the case. Sometimes...attorneys mix facts and arguments in their statement of the case. This practice is inappropriate. The statement should only include events transpiring after the initiation of the judicial proceedings. Toal, Vafai, Muckenfuss, *Appellate Practice in South Carolina*, p. 217 (1999); *See* Rule 208 (b)(1)(C).

[2] The Motion to Dismiss was abandoned by Defendants in the trial court, and as such was dismissed. (Order, R. p. 1-11) The Motion to Stay was abandoned as well. Appellants have not raised the issues of the Motion to Dismiss and Stay in this appeal.

STATEMENT OF THE FACTS

The Respondent is a physical therapist, who at the time of the litigation had nearly forty (40) years of professional experience. (Marzulli Aff., R. p. 80). She specializes in pediatric physical therapy and focuses on treating children with special needs and disabilities. (Marzulli Aff., R. p. 80). The Respondent obtained a Bachelor of Science Degree from the University of Alabama in Birmingham and studied at the graduate level. (Complaint, R. p. 15). She was issued a South Carolina license to perform her work on September 14, 2011, (Second Marzulli Aff., R. p. 296). and has been licensed in other states. (Complaint, R. 15). Marzulli has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Alabama. (Complaint, R. p. 15). Respondent also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiners Hospital for Children. (Complaint, R. p. 15). She has held teaching positions and clinical teaching appointments as well. (Complaint, R. p. 15) Respondent has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. (Complaint, R. p. 15). Marzulli has been a member of the American Physical Therapy Association, and has been published. (Complaint, R. p. 15). She is a care-giver to young people afflicted with significant physical afflictions, including neurological maladies. (Complaint, R. p. 15).

Hilton Head Regional Medical Center (a/k/a Hilton Head Hospital) is a local hospital which markets itself as a regional medical center serving and a part of the local Hilton Head Island community. (Order, R. p. 2).

Respondent's first date of employment was September 19, 2011. (Nester Aff., R. p. 44).[3] Marzulli was hired as a pediatric physical therapist. (Nester Aff., R. p. 45). She had purchased a home in South Carolina in 2008 with the intention to use it as her permanent residence. (Second Marzulli Aff., R. p. 296). The Respondent considered South Carolina to be her domicile since that purchase. (Marzulli Aff., R. p. 296). She obtained her South Carolina physical therapist license on September 14, 2011, and her South Carolina driver's license on September 16, 2011. (Second Marzulli Aff., R. p. 296).

Well after her start date, in October 2011, the Respondent was required to sign several administrative documents at a required orientation. (Second Marzulli Aff., R. p. 297). One of the documents was titled *Acknowledgement.*[4] (Marzulli Aff., R. p. 81). Upon receiving the *Acknowledgement* the Respondent was told by the Appellants' human resource representative that the document was an acknowledgment that she could access the employee handbook. (Marzulli Aff., R. p. 81). However, the Plaintiff did not receive the employee handbook contemporaneously with the *Acknowledgement.* (Marzulli Aff., R. p. 81). Buried nondescriptly within the fourth of five paragraphs in this single spaced, small font document is the disputed language attempting to impose arbitration. ("Acknowledgement", R. p. 48). The document was signed October 10, 2011. ("Acknowledgement", R. p. 48).

Mrs. Marzulli's employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one-on-one physical therapy services. (Third

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[3]Initially, the Respondent stated her start date was later, but Nester's asserted date triggered a clarification. (Second Marzulli Aff., R. pp. 296-297). The Respondent will assert in the Argument below that the September 19 start date is significant.

[4] The Court noted below that the document at issue titled, *Acknowledgement* contains an incorrect spelling of the word "Acknowledgment" in its title.

(Marzulli Aff., R. pp. 345-346). Importantly, the testimony presented below described the Respondent's activities this way:

- Her recollection is that all of her patients were local South Carolinians;
- She was not required to make telephone calls across state lines;
- She was not required to send any of her patients' Medicare, Medicaid or other insurance paperwork to providers across state lines;
- While her job did not require her to take certain continuing education courses, she elected on her own to take a single course in Raleigh, North Carolina that she paid for and eventually was reimbursed only after her employment ended and only after she requested reimbursement months after she was terminated; and,
- There was no reimbursement for travel, lodging or board for this one course which she elected to take on her own volition and initiation.

(Third Marzulli Aff., R. pp. 344-346).

Many of the therapies used by Respondent, according to her, are all common to the profession. (Marzulli Aff., R. pp. 81-82). The Respondent testified as to the following as an affiant:

- The therapies required that she place her hands on individuals;
- She does not recall the patient in question sitting in her lap (Original Police Report, R. p. 99.)., but some therapies require a patient to sit between her legs with their back facing her;
- Certain therapies employed muscle manipulation and release (myofascial release);
- Certain patients with certain conditions benefited from myofascial release treatments to the their upper front torso, shoulders, and chest areas;
- Patients with cerebral palsy may benefit from various forms of myofascial release;
- It is necessary and important to the safety of individuals that any physical therapist place hands on the patients they treat and correct certain movements;
- An individual who is not trained in the practice may not know, recognize or understand the nature of or necessity for certain treatments;
- Many treatments performed by physical therapy are uncomfortable for patients, and necessary treatments may even be painful; and
- Some child patients, naturally as children, do not enjoy certain treatments and would rather perform activities which are "fun" to them and not treatments that require work or that may be uncomfortable.

(Marzulli Aff., R. p. 81-82).

The patient in question had a severe affliction, cerebral palsy. (Original Police Report, R. p. 100). The patient was treated in the hospital gymnasium, with the doors almost always open and other people are around. (Original Police Report, R. p. 100). The "incident" allegedly occurred on May 5, 2014. (Original Police Report, R. p. 99). However, a telephone call from the patient's father to the hospital was not made until May 12, 2014. (Original Police Report, R. p. 99). According to the Beaufort County Sheriff's Office, the following information was received from the father:

> (Father) stated he made the complaint to the hospital after his daughter (daughter) told him that during the last physical therapy session the therapist touched her inappropriately. *He is not sure to what extent or what exactly happened.* (italics added) He wanted the hospital personnel and his family to sit down and talk about the incident. ... He wanted to speak with the hospital staff before speaking with law enforcement.

(Original Police Report, R. p. 99).

Anita "Gay" Probst, office manager for the Rehabilitation Department at the hospital, received the call from the father. (Probst Aff., R. p. 68). Probst's version of what she says the father told her is more expansive than what the police reported the father stated. According to Probst, the father told her that "Ms. Marzulli had put his Daughter in her lap in a way that made his Daughter uncomfortable" and that "his Daughter told him and his wife that Ms. Marzulli had pushed her and had slapped *or removed* his Daughter's hands from a railing while she was practicing walking up and down stairs." (Probst Aff., R. p. 69). (emphasis added). The father told Ms. Probst that he did not wish to speak with anyone immediately but would wait to speak with the Physical Therapy Director when she returned from a trip abroad. (Probst Aff., R. p. 70). Ms. Probst is an office manager and not a physical therapist or allied health professional. (Probst Aff., R. p. 68). The Father did not use the terms "sexual abuse" or "physical abuse", according to Ms. Probst. (Probst Aff. R. p. 70).

Instead of meeting with the father and the family, Probst told Beth Gasiorowski, an administrator with Tenet and lawyer by trade holding the title of "Risk Management Director/Patient Safety Officer", about the father's call. (Probst Aff., R. p. 70). Gasiorowski then called the Beaufort County Sheriff's Office "about an allegation of abuse of a minor child", and said "it occurred a couple of times." (911 Call, R. p. 87). (See contents of actual CD) When asked if it involved sexual or physical abuse, the administrator replied it involved "a little bit of both–inappropriate touching." (911 Call, R. p. 87). (See contents of actual CD)[5] (However, as these facts show, neither physical abuse nor sexual abuse was mentioned by the father according to both the police and Probst.

On the morning of May 13, 2014, Marzulli was called away from completing an evaluation report and was informed she needed to go the office of Patrick Phillips, an administrator, because he needed help with a project. (Marzulli Aff., R. p. 82). That was not true. (Marzulli Aff., R. p. 82). The Plaintiff was taken into a conference room where she was told there was an allegation of inappropriate touching and that they were waiting for the police to arrive. (Marzulli Aff., R. p. 82). Employees of the Defendant told Marzulli she was suspended immediately without pay, that she was prohibited from coming on hospital grounds, and she could not return to her office to gather her belongings without an escort. (Marzulli Aff., R. p. 83).

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[5] Defendants claim in their briefing that the report to the police authorities was a mandatory reporting. However, this assertion does not withstand legal analysis as applied to the pertinent statute, S.C. Code Ann. § 63-7-390. Aside from a lack of a reasonable belief that the child had been abused or neglected as defined by the statute, the "reporter" is not a designated professional afforded protection under § 63-7-390. The statute does not include "risk management directors/patient safety officers" or "employers of" in the exhaustive list of those persons required to report.

Marzulli waived her Miranda rights and gave the authorities written and verbal statements. (Original Police Report, R. pp. 99-100). The investigating officer noted that "Marzulli was noticeably upset and crying throughout the duration of the interview." (Original Police Report, R. p. 99). The Plaintiff was subjected to a nearly two month criminal investigation. (Complaint, R. p. 16). The police records describe the reported crime as "CSC (criminal sexual conduct): Aslt (assault) w/Intent to Commit." (Original Police Report, R. pp. 95-98). The Sheriff eventually concluded that the claim was "UNFOUNDED." (Original Police Report, R. pp. 95-98).

The Plaintiff's theory in this defamation action is that Defendants committed a vicious character assassination of the worst proportions: a devastating, false accusation that a physical therapist veteran, married professional, sexually and physically abused a minor of the same sex, a patient who had special needs. (Order, R. p. 3).

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E. 2d 597, 599 (Ct. App. 2012).

ARGUMENT

I. Appellants' contention in their Issue I was not raised in the trial court and therefore is not a properly preserved issue.

Appellants contend the mere statement in the "Acknowledgement" that "arbitration will be conducted under the Federal Arbitration Act" automatically compels arbitration. However,

this issue, distinct from the traditional and established methodology used to analyze arbitrability, was raised neither in the pleadings stage nor at the trial court proceedings.

Generally, claims or defenses not presented in the pleadings will not be considered on appeal. *See McNeely v. South Carolina Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 190 S.E. 2d 499 (1972).

The briefing and transcript are devoid of this triggering rule being presented below. As such, the issue was not raised and ruled upon by the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E. 2d 731 (1998); *Smith v. Phillips*, 318 S.C. 453, 458 S.E. 427 (1995). Additionally, there is no allegation the trial court failed to rule on the issue as no S.C.R.C.P. 59 was filed. See, *Wilder*, supra.

A. Even if the Appellant's Issue I is properly before the court the argument lacks any merit as ruling in the Appellant's favor would effectively overrule and eviscerate the South Carolina Uniform Arbitration Act as well as other statutes which constitute public policy of this State as established by the South Carolina legislature.

In their argument, the Appellants seek a backdoor around the mandatory notice requirements of the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et seq. (1976) (as amended) (hereinafter "SCUAA"). If parties must arbitrate under the FAA when they "said they would"—even if interstate commerce is not involved—the SCUAA would be effectively overruled and eviscerated.[6] Pursuant to § 15-48-10(A) of the SCUAA, "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is

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[6] "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." § 15-48-10(A)

displayed thereon the contract shall not be subject to arbitration." Under the Appellant's argument in Appellant's Issue I, the notice requirements of § 15-48-10(A) would have no effect or force. Indeed, the *Acknowledgement* at issue here **did not** contain underlined capital letters or prominently bold stamped letters on its first page stating that it was subject to the SCUAA. ("Acknowledgement," R. p. 48.).

Ruling for the Appellants on this issue also would eviscerate all effect of the SCUAA's prohibition upon arbitration agreements being made a condition of employment. *See* § 15-48-10(b)(2) ("An agreement to apply this chapter [the SCUAA] shall not be made a condition of employment"). Notably, the *Acknowledgement* **was** made a condition of Ms. Marzulli's employment. (Marzulli Aff. R. p. 81).[7]

II. The evidence reasonably supports the judge's findings that the Federal Arbitration Act (FAA) did not apply, meaning there wasn't a transaction involving interstate commerce.

Both federal and state policy favors arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Zabinski v. Bright Acres Associates,* 346 S.C. 580, 553 S.E. 2d 110 (2001), (citing *Volt Inf. Scis. Inc. v. Board of Trs.,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d. 488 (1989)).

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[7] Following Appellants' logic, other statutes enacted by the legislature could be effectively eviscerated should the court adopt a rule as is raised in Issue I. For example, by extension, companies issuing automobile insurance policies could force their insureds to arbitrate uninsured motorist claims in violation of S.C. Code Ann. § 38-77-200 simply by stating that "any claim against an uninsured motorist arising under this policy of insurance is subject to valid, binding arbitration under the FAA."

"[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, at 478, 109 S.Ct. at 1255. While the federal policy favoring arbitration as expressed in the Federal Arbitration Act is now binding in state courts and supersedes inconsistent state law, the act nonetheless requires *a contract evidencing a transaction involving commerce* to settle a controversy by arbitration. *Zabinsksi, supra,* citing *Allied-Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 115 S.CT. 834, 130 L.Ed.2d 753 (1995). For the FAA to apply, an agreement must "evidenc[e] a transaction involving commerce," specifically interstate commerce. 9 U.S.C. § 2 (1999). Essentially, three factors are analyzed: (1) whether the FAA applies, (2) whether the parties formed a valid and binding arbitration agreement, and (3) whether the agreement covers the Respondent's claim. *See Towles v. United Heathcare Corporation*, 338 S.C. 29, 524 S.E. 2d 839 (S.C. Ct. App. 1999). Contrary to the Appellants' misplaced contention that the trial judge "focused solely on the individual employment contract," the trial judge analyzed the matter consistent with the factors espoused in *Towles*.

A. Ms. Marzulli's work did not require her to perform actions related to interstate commerce.

Mrs. Marzulli was a South Carolina resident and her employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one-on-one, hands-on physical therapy services. The Appellants would essentially request the Court to rule that *all* employment in the health care field involves interstate commerce because hospitals invariably draw products and drugs from around the country and internationally. Under this theory, a South Carolina History teacher, schooling state pupils in the Palmetto state, would be engaged in interstate commerce when the teacher used a blackboard and chalk manufactured

outside of the state's lines. If this were the rule, virtually every type of work would trigger the commerce clause.

Importantly, the Appellants' position on this issue is without support of the jurisprudence of South Carolina. Further, it is in direct contradiction with the analysis contained in *Flexon v. PHC ("Flexon I"),* and by extension *Flexon II.*

In determining whether a transaction is inside or outside of the scope of the FAA, the court determines "whether *the contract* require[s] [a party] to administer anything related to interstate commerce." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. Ct. App. 2003) (quoting *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 SE2d 880, 882 (2001))(emphasis added). Pursuant to the Federal Arbitration Act, "A written provision in any *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such [ ]contract* . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (2009) (emphasis added). Courts must "focus upon what the terms of *the contract* specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of *the contract* when applying the FAA." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. Ct. App. 2003) (emphasis added). "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

Compare the *Acknowledgement* signed by Ms. Marzulli to the recruiting agreement and employment contract signed by the Plaintiff in *Thornton.* In *Thornton* the Court looked to what the contract between the parties required the parties to *perform.* The Court noted in *Thornton*

that the entire contract that was subject to the arbitration provision "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines." *Thornton*, 357 S.C. at 98. Indeed, in *Thornton* "[t]he express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.* Again, the entire agreement in *Thornton*, the recruiting agreement and contract for employment which was part and parcel to it, was the *contract* that the court interpreted.

Here, the only purported contract for the Court to consider is the *Acknowledgement*. The terms of the *Acknowledgement* have nothing to do with Mrs. Marzulli's move to South Carolina which occurred over one month before she signed the *Acknowledgement*. Ms. Marzulli was an at-will employee and had no employment contract with the Defendants. Paragraph four of the *Acknowledgement*, beginning on the final word of line two, states in small single spaced nondescript font, "I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

She signed the *Acknowledgement* while already a South Carolina resident.

Also compare the nature of Mrs. Marzulli's work to the work of the Plaintiff in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (S.C. Ct. App. 1999). In that case, the Plaintiff was required to attend out-of-state conferences, participated in conferences with the Defendant's office in Minnesota, reviewed claims from out-of-state providers and specialty providers located in North Carolina and Georgia, and participated in sales presentations in South Carolina and Georgia, and, reviewed proposals from out-of-state medical and ancillary service providers. The court found those activities provided "sufficient evidence to invoke the FAA."

Here, Ms. Marzulli's work had no similar requirements. She was a local physical therapist providing physical therapy services to local patients at a local facility.

South Carolina jurisprudence is dispositive to the issue. *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (S.C. Ct. App. 2012), a 2012 Court of Appeals decision, dictates that the order be affirmed. On the facts before the Court at that time, Flexon was a South Carolina resident licensed to practice medicine as a physician. He was to practice at sites in Jasper County. There was an arbitration agreement contained within his employment agreement. The trial court found the employment agreement called for local medical services to be performed at a medical facility in Hardeeville, and as such denied the motion to compel arbitration since it didn't involve interstate commerce. *See Flexon, supra.*

Flexon is analytically analogous to the present case before the Court. Here, the Respondent was a South Carolina resident when she signed the purported agreement. The Respondent provided physical therapy services exclusively in South Carolina. She did not travel out of state as a requirement of her work. (By contradistinction, *see Lucey v. Meyer*, 201 S.C.C 122, 736 S.E.2d 274 (Ct. App. 2012), in which employment *contract* detailed at least one specific matter which *required* out of state travel, triggering the commerce clause. Ms. Marzulli never was required to travel out of state for her employment and she had no employment contract. Instead, here, the only alleged contract at issue is the *Acknowledgement* itself.)

Flexon resurfaced to the Court of Appeals and a different panel ruled again in favor of the physician, much because of a law of the case issue. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 766 S.E.2d 397 (Ct. App. 2015) ("*Flexon II*"). Thus, this case is binding and controlling jurisprudence, and disposes of this appeal.

Of manifest import here, the *Flexon I* Court distinguished *Thornton* from *Arkansas Diagnostic Center, P.A. v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884, 892 (2007). *Flexon I*, 399 S.C. at 88-89, 731 S..E.2d at 3-4. The Court examined the analysis in *Tahiri* extensively and quoted three paragraphs found in *Tahiri* verbatim. *Id.*

The facts in *Tahiri* nearly mirror the facts here. And, the arguments by the Defendants in Tahiri are virtually identical to the arguments of the Appellants here. The *Tahiri* court rejected these arguments. For example, the *Flexon I* court notes that in *Tahiri,* the Defendants argued that "interstate commerce was involved because there was 'evidence to show that it treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for Dr. Tahiri to travel to seminars outside of Arkansas.' The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA." *Flexon I*, 399 S.C. 88, 731 S.E.2d 3-4 (quoting *Tahiri*, 370 S.W.3d 884, 888). Just as Hilton Head Hospital is a local hospital which markets itself as part and parcel to the local community, the Defendant in *Tahiri* was a " 'local clinic, with local physicians who had privileges at local hospitals and treated local patients.' " *Id.* at 89, at 4. (quoting *Tahiri*). *Flexon I* also quoted the *Tahiri* court's holding that the Defendant medical clinic in *Tahiri* "failed to prove that [the Plaintiff's] employment facilitated [the medical clinic's] alleged interstate business activities.... Most specific to the employment contract at issue [in *Tahiri*] is that [the Defendant] contracted with Dr. Tahiri to provide medical services to its *local* patients." *Id.* (quoting *Tahiri* at 892 (emphasis in original)). Just as the physician in *Tahiri* was a physician providing services to local patients, here, the Respondent was an at-will employee hired to provide physical therapy *services* to special needs, local patients, who knew the families of the patients she treated personally. (Marzulli Aff, R. p. 80), (Third Marzulli Aff Aff., R. p. 345)

Based on these factors, the Court in *Tahiri* held that the physicians *employment agreement* " 'did not evidence a transaction involving commerce.' " *Flexon I*, at 89 at 4 (quoting *Tahiri* at 892). The *Tahiri* court concluded its holding, stating:

> Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce.... Instead, the question is simply whether the *contract* evidences a *transaction* involving commerce.
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> *Flexon I*, 399 S.C. at 89, 731 S.E.2d at 4 (quoting *Tahiri*, at 892 (emphasis in original)).

Here, the Appellants arguments are identical to the arguments made by the Defendant in *Tahiri* which the *Tahiri* court rejected. Truly, if the *Acknowledgement* required the Respondent here who was employed at will to perform acts which evidence a transaction involving interstate commerce, it would be nearly impossible to imagine any employment which did not involve interstate commerce. The Court's review of the terms of the "*Acknowledgement*" should result in determining *it* does not require the Respondent to administer anything related to interstate commerce.

Further, this is supported by the underlying facts, and the trial courts' factual findings are reasonable. *See Thornton, supra.* Here, the "*contract*" that the Court examines is the *"Acknowledgement."* No other contemporaneous or subsequent contract exists. The FAA only requires arbitration of "*a controversy thereafter arising out of such contract,"* not controversies or acts arising before the contract was entered into. 9 U.S.C. § 2 (2009).

The Respondent was a South Carolina resident, and had already begun working, when she was required to sign the *Acknowledgement* at orientation. She had established permanent residency in South Carolina no later than approximately one month before signing the alleged contract at issue. No arbitration agreement existed within her previous agreement to be partially

recompensed for relocation expenses. Further, Ms. Marzulli was an at will employee with no employment contract. Her act of signing the *Acknowledgement* on October 10, 2011 as a South Carolina resident in no way evidences the involvement of interstate commerce.

Moreover, the facts existing beyond the four corners of the *Acknowledgement* demonstrate that the Respondent's work did not involve interstate commerce, and these facts were considered by the lower court and incorporated into its Order. Marzulli performed all her work in South Carolina. On site physical therapy on Hilton Head did not involve interstate commerce. Arbitration should not be compelled. Given that Appellants asserted only on the basis of the federal act, the South Carolina Act is inapplicable as well. *See Thornton, supra.*

III. The trial court's order should be affirmed because reasonable evidence exists supporting the trial court's ruling that the parties did not have a valid and binding arbitration agreement since it was unconscionable.

The Respondent was established in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011. According to Tenet's records, the Respondent was to begin work on September 19, 2011 and for her first pay period, she received her first direct deposit from Defendants on October 21, 2011. She unquestionably began employment prior to the document at issue was required to be signed by her.

The Respondent had commenced work at Tenet weeks before October 10, 2011, the date she was required to sign the *Acknowledgement*, requiring Ms. Marzulli to submit "any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet." She had no meaningful choice in the matter; she had no negotiating leverage. There was no bargaining for the clause.

General contract principles of state law demonstrate that the arbitration clause is not enforceable. *See Simpson, supra.* In that the Respondent had already established her residency in South Carolina and had in fact begun work before being required to sign the *Acknowledgement* at a subsequent orientation, the purported agreement lacks a component so axiomatic no citation is necessary–consideration. Without consideration, there can be no contract. Without a contract, arbitration cannot be compelled. Even if there were consideration, and there is not, the "agreement" is unconscionable.

In determining unconscionability, the Court considers whether a contract provision is absent of meaningful choice and contains oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F. 2d 287 (4th Cr. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *Id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293.

Here, the alleged defamation is actionable per se, meaning that she suffered presumed damages; the Respondent is an individual, not a substantial business concern; she had no bargaining power as she had already begun work and was required to sign the agreement; the Appellants are very sophisticated business and health care companies; and the clause is unquestionably inconspicuous, buried in a document which is single-spaced in small font, which bears a misspelled title (that in no way gives notice of the substantive right that the Appellants argue the Plaintiff relinquished by signing the same). The Agreement was offered on a "take it or

leave it" basis. The context of the inclusion of the clause and the circumstances of her being required to sign disturbed the trial court.

The terms of the agreement were found below to be oppressive and one-sided. They strip Respondent's right to a jury trial. The Appellants argue that it requires the Respondent to arbitrate something the South Carolina legislature codified as a *criminal act* committed against her by her employer.

What is more, the document requires a "Fair Process" procedure that curiously, the Appellants did not utilize in the controversy. Had Appellants utilized the aforesaid process, they would have better standing to assert that defamation claim was related to Respondent's employment. Instead, Appellants seek to invoke one clause, the one concerning arbitration, while eschewing the procedural mechanism supposedly designed to protect the process rights of the employee, all within the same sentence. This also buttresses the finding that "contract" was unconscionable. The trial court's order should be affirmed.

These factors in sum considered, the Court below was convinced that the Respondent had no meaningful choice but to sign the document titled *Acknowledgement*. She had already begun her job. She had already established a residence in South Carolina. Additionally, the Appellants ask the court, in disregarding the trial court decision, to instead enforce an "agreement" which, according to the Appellants, allows them to report the other bound party to law enforcement without probable cause, thereby filing a criminal "claim". This results in the absurdity that the party—a putative criminal defendant—would be entitled to a jury trial, but would be barred as a Plaintiff from seeking redress by way of jury trial for the tortious communication which was framed by Appellants to be a crime. The trial court found such terms patently oppressive and one-sided, and reasonable evidence supports the trial court's findings.

IV. The trial court's order should be affirmed because reasonable evidence exists supporting the trial court's ruling that the "Acknowledgement" (sic) didn't cover the defamation claim.

Defamation is a false and defamatory statement about the plaintiff published by the defendant to others. It is an intentional tort. It is a crime codified by the South Carolina legislature under S.C. Code Ann. § 16-7-150 (1976) (as amended).[8] The trial court found that the cause of action in this case was not founded on employment or termination grounds; it is not a breach of contract action, discrimination suit or payment of wages claim. The defamation suit was also not pendent to employment causes of action, as they often are in "shotgun" approaches to pleading numerous causes of actions. Instead, the intentional tort pled is not grounded upon employment issues, such as a wrongful communication concerning her firing. The alleged publication of the defamation was not made to individuals exclusively within the Appellants' control or management group, but to individuals outside of and unaffiliated with Respondent's employment. Further, the record reveals that the administration at the hospital didn't treat the incident as an employment issue; rather, they treated it as a criminal matter. It is a reasonable view of the facts that the Appellants went outside the scope of the original call by the father, a person other than the call's recipient made the 911 call, and the underlying allegation was neither investigated nor reported to the police in verbatim fashion. Consequently, the trial court found the libel and slander are not "related" to her employment or termination. Again, as the trial judge

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[8] "Any person who shall with malicious intent originate, utter, circulate or publish any false statement or matter concerning another the effect of which shall tend to injure such person in his character or reputation shall be guilty of a misdemeanor and, upon conviction therefore, be subject to punishment by fine not to exceed five thousand dollars or by imprisonment for a term not exceeding one year, or by both fine and imprisonment, in the discretion of the court; provided, that nothing herein shall be construed to abridge any right any person may have by way of an action for damages for libel or slander under the existing law." S.C. Code Ann. § 16-7-150.

noted, in South Carolina, commission of slander or libel is a violation of the criminal code. See, S.C. Code Ann. § 16-7-150. If one cannot consent to or foresee a criminal act, one cannot agree to arbitrate a criminal act committed against them. Utilizing contractual principles, it is difficult to see that a defamation claim would be contemplated and negotiated in this case, especially one involving the instant allegations.

In terms of South Carolina arbitration cases, *Towles*, supra, involved claims including a defamation claim. But that case is distinguished because the arbitration agreement in that decision expressly listed defamation as an arbitrable claim. Such is not the case here. *Stokes v. Metropolitan Life Insurance Company,* 351, S.C. 606, 571 S.E. 2d 711 (S.C. Ct. App. 2002) is also instructive through distinction. Stokes didn't involve a defamation case, but it did concern causes of action for two intentional torts, trespass and conversion. The Court of Appeals found that the claims were arbitrable. In that case, the Plaintiff was required to arbitrate "...*any* dispute, claim or controversy that may arise *between me and my firm*..." *Stokes*, supra. Obviously, the clause in that case was not as limiting as the instant one. Here, Tenet didn't broaden the reach of the clause to all disputes between Respondent and Appellants; rather, the clause was restricted to matters related to "employment and termination". One can then deduce, and the Court is asked to agree, that the arbitration clause concerns truly employment related issues such as ADA types of issues, hiring and firing.

The *Zabinski* court stated that "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Zabinski*, supra, citing *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001). "With respect to tort claims, the supreme court noted the test from other jurisdictions stating, 'the focus should be on the factual

allegations contained in the petition rather than on the legal causes of actions asserted.' " *Zabinski*, 346 S.C. at 597 n. 4, 553 S.E.2d at 119 n. 4. "The test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable." *Aiken v. World Finance Corporation of South Carolina*, 367 S.C. 176, 623 S.E. 2d 873 (Ct. App. 2006). Here, there is no significant relationship been the actionable per se defamation and the contract. There is no hint of one in the document. The Respondent didn't bring a breach of contract, wrongful termination, discrimination or payment of wages case. The Respondent was an at-will employee and the only alleged contract before the court for consideration is the *Acknowlegement* itself. The Appellants didn't respond to the father's call as he had initially requested, to meet with the hospital's personnel, and the issue wasn't treated as a matter "related to her employment". The defamation claim is not interwoven into the *Acknowledgement* at all; it can be maintained without reference to the document.[9]

V. The trial court's order should be affirmed since grounds can be found in the record to support it.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 201(c), SCACR. See also, *I'ON, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d. 716 (2000). The Respondent respectfully

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[9] As the trial judge noted, there is a slim cache of legal authorities on the issue of whether the tort of defamation is contemplated by an arbitration agreement, but cases exist. The Second Circuit, under different facts, has found that defamation and related claims are not necessarily bound by arbitration provisions. *See, Coudert v. Paine Webber Jackson & Curtis*, 705 F. 2d 78 (1983); *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (1985). No South Carolina case, however, has addressed the issue of whether a party can bind another to arbitrate an act codified as a crime.

requests the Court affirm the decision below on any of the several grounds existing in the record below, whether explicitly argued in this brief.

CONCLUSION

The Respondent requests this Court to affirm the decision of the Circuit Court, find that interstate commerce was not evidenced by the *Acknowledgement* discussed within, that the contract was not valid and binding, and that the arbitration clause did not contemplate the cause of action filed in the underlying action.

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