

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court

L. Casey Manning, Circuit Court Judge

Case No. 2017-CP-40-03750
Appellate Case No.: 2018-001494

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SC Court of Appeals

Capital City OB-GYN Associates, P.A.,.....Respondent,

v.

Medorizon, Inc.,.....Appellant,

**BRIEF OF RESPONDENT
CAPITAL CITY OB-GYN ASSOCIATES, P.A.**

W. Duvall Spruill, Esquire
Emily A. Jordan, Esquire
Turner, Padget, Graham & Laney P.A.
Bank of America Plaza
1901 Main Street, 17th Floor
P.O. Box 1473
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT
CAPITAL CITY OB-GYN ASSOCIATES, P.A.

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STATEMENT OF THE ISSUES ON APPEAL

- I. The circuit court was correct in finding that the Federal Arbitration Act does not apply to the parties' Service Agreement and that §15-7-120(B) of the South Carolina Code (2005) is not preempted.
- II. Whether the circuit court erred in failing to determine that Respondent's claims are within the scope of the arbitration provision in the Service Agreement.
- III. The circuit court was correct in finding the arbitration provision unenforceable.

STATEMENT OF THE CASE

Respondent filed the Complaint June 16, 2017 (**RoA, Page 11**). The Complaint asserted causes of action for negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act, and breach of contract against the Appellant. Appellant filed an Answer on August 29, 2017, and asked for a jury trial. Appellant then served a Motion to Dismiss and to Compel Arbitration on August 30, 2017 (**RoA, Page 19**). A hearing on Appellant's motion was held on January 8, 2018, before the Honorable L. Casey Manning (**RoA, Page 1**). On April 11, 2018, Judge Manning issued an order denying Appellant's motion. Appellant then filed a 59(e) Motion to Reconsider on April 23, 2018. Judge Manning held a hearing on the motion on June 26, 2018, and denied that motion by order filed July 17, 2018 (**RoA, Page 7**). This appeal followed when Appellant filed a Notice of Appeal on August 13, 2018.

STATEMENT OF THE FACTS

Respondent is a professional corporation organized and existing pursuant to the laws of the State of South Carolina and operating a medical practice in Columbia, SC specializing in obstetrics and gynecology (**RoA, Page 12**). Appellant is a medical billing outsourcing service (**RoA, Page 26**).

Respondent and Appellant entered into a Service Agreement dated November 6, 2014 ("Service Agreement") whereby Appellant agreed to provide various services to Respondent incidental to billing third-party payers for professional and facility charges (**RoA, Pages 27 & 29**). The record reflects only that Respondent does all of its business

in Columbia, SC and that Appellant exists under the laws of Illinois and has its main corporate office in Illinois (**RoA, Page 26**).

This Service Agreement included a choice of law provision which provided as follows:

21) **Choice of Law.** This Agreement shall be governed by the internal laws and not the conflict of laws provisions of the State of South Carolina, applicable to agreements made and to be performed entirely within such State, without regard to the conflicts of law principles of such State, and federal laws governing copyright, patent and trademark. The parties hereby agree to jurisdiction of the state of South Carolina (**RoA, Page 35**).

The Service Agreement also included a conflicting provision which provided that any dispute related to the Service Agreement shall be submitted to binding arbitration (**RoA, Page 26**). Specifically, paragraph 14 of the Service Agreement states, in pertinent part, as follows:

14) **Dispute Resolution.** The parties hereby irrevocably and unconditionally agree that any dispute between them arising out of or relating in any way to this Agreement or the transactions arising hereunder or contemplated hereby shall be settled by binding arbitration in accordance with the Federal Arbitration Act and the then current commercial arbitration rules of the American Arbitration Association. Arbitration hereunder shall be held within 15 miles of MED's principal business location or such other place as the Parties may agree. The substantive and procedural law of the State of Illinois shall apply to the arbitration proceedings....With the exception of suits seeking injunctive relief, CLIENT and MED are prohibited from filing any action in law or equity with respect to the dispute before an arbitration award is made. Notice of intent to pursue arbitration must be provided to the other party no later than 90 days following the date of the event giving rise to the dispute. Failure to provide such notice within that time frame shall bar that party from pursuing any damages, claim, or suit (**RoA, Page 34**).

Noticeably, Paragraph 21 and Paragraph 14 are irreconcilable. Paragraph 21 sets forth the agreement of both parties that the laws of South Carolina will govern the Service Agreement and that South Carolina will maintain jurisdiction. This is incompatible with

Paragraph 14 which provides for arbitration in Illinois with Illinois law applying. Yet, Appellant only mentions Paragraph 21 in a footnote in its Brief. This omission and failure to even address Paragraph 21 is consistent with Appellant's approach in its initial brief to the lower court and in its brief of the Rule 59(e) Motion wherein Appellant did not even mention Paragraph 21 **(RoA, Page 37)**.

Respondent notified Appellant that it would not be renewing the Service Agreement with Appellant, and the Service Agreement was terminated by November 1, 2016 **(RoA, Page 27)**. After Respondent retained another medical billing firm in Columbia, South Carolina to manage Respondent's medical billing, it was discovered that during 2013, Medicare put a freeze on Respondent's account thereby preventing Respondent from receiving payments for services rendered to Medicare patients **(RoA, Page 13)**. Appellant failed to identify the reason for the denial of Medicare claims or take any other action to address the denial **(RoA, Page 13)**. As a direct result of the Medicare termination, Respondent was unable to collect for services rendered to Medicare patients from April 2016 until Respondent was re-credentialed in November 2016 **(RoA, Page 13)**.

Further, Respondent discovered that Appellant failed to revalidate Respondent with Medicaid **(RoA, Page 13)**. Due to Appellant's failure to revalidate with Medicaid, Respondent was dis-enrolled in September 2016, and Respondent was unable to collect for services rendered to Medicaid patients **(RoA, Page 13)**.

As a result of Appellant's negligent failure to properly manage Respondent's medical billing and enrollment services, Respondent was unable to collect the sums due

and payable for services rendered, and Respondent seeks to recover damages as a direct result of Appellant's actions and failure to act (**RoA, Page 13**).

STANDARD OF REVIEW

“The determination of whether a claim is subject to arbitration is subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. See *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) (citing *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)). “In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court. See *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (citing *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)).

ARGUMENTS

- I. **The circuit court was correct in finding that the Federal Arbitration Act does not apply to the parties' Service Agreement and that §15-7-120(B) of the South Carolina Code (2005) is not preempted.**

The circuit court did squarely address the gravamen of Appellant's motion to Dismiss and Compel Arbitration. Yet again, with the exception of Footnote 1 in Appellant's Brief, the Appellant completely ignores the implication of Paragraph 21's mandate that the contract be treated as an *intrastate* contract. The circuit court relied on this fact in making the determination that the Federal Arbitration Act (“FAA”) does not apply (**RoA, Pages 3 and 8**).

Appellant begins its argument in its Brief by suggesting that the circuit court was distracted by what they now call “peripheral issues” including the ninety day notice proviso (**App. Brief, Page 3**). Yet, the circuit court dealt with that issue first because that

was the first issue raised by Appellant's written Motion to Dismiss and Compel Arbitration wherein they concluded their argument by suggesting that, on that basis alone, that the Complaint should be dismissed.

Appellant has argued that the FAA applies to this case. They never suggested, and still do not argue that the South Carolina Arbitration Act might apply. The circuit court, after thorough analysis, reached the conclusion that the FAA did not apply because the FAA only applies to disputes arising in interstate commerce. The FAA provides that *unless the parties have contracted otherwise*, the FAA applies in federal or state circuit court to any arbitration agreement which in fact involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). In its Order, the circuit court found that the parties did, in fact, contract otherwise (**RoA, Page 4**).

The circuit court based its finding on the language of Paragraph 21 of the Service Agreement which provides in pertinent part that South Carolina law will govern and jurisdiction will be in South Carolina (**RoA, Pages 4 and 8**). It is not, as the Appellant suggests, that the parties here did not contemplate a transaction involving interstate commerce. Rather, the circuit court found that the parties had addressed that very issue and in Paragraph 21 of the Service Agreement, the parties specifically negotiated for and included a provision wherein each party agreed that this would be an intrastate contract (**RoA, Page 9**). Thus, the circuit court's finding regarding Paragraph 21 ended the question of arbitration. It is this very paragraph which the Appellant now ignores in its Brief.

The court also concluded that the record did not include evidence which would support a finding that the contract involved interstate commerce (**RoA, Page 4**). The Appellant's statement that the Order was wrong cites only that portion which states that, "the record is void of other evidence which would explain any interstate commerce connection (**Appl. Brief, Page 4**). Yet, that statement followed the circuit court's recitation of **all** the facts upon which Appellant relied in trying to support its "interstate connection (**RoA, Page 4**). That is, the Appellant's corporate offices are in Illinois and the Appellant agreed to help the Respondent in its billing practices, all of which arose from services rendered in Columbia, South Carolina. That was the full extent of the record before the court. The fact that Appellant might have other contracts with other customers in other states does not have an impact upon this contract.

The circuit court's determination that the facts were not sufficiently presented to the court to make such a decision is a primary focus of Appellant's argument (**Appl. Brief, Pages 4 and 5**). The court's recitation of facts in its initial Order was not challenged in Appellant's Motion to Reconsider and as such, those facts are now the law of the case (**RoA, Page 8**). Again, the Appellant simply argues that the Court overlooked the existence of the contract itself in determining whether there was sufficient implication of interstate commerce to invoke application of the Federal Arbitration Act (**RoA, Page 8**).

The eight page contract describes the duties of the two parties but does not address the logistics involved (**RoA, Pages 8 and 29**). The record indicates that all of the patients seen by the Respondent were in Columbia, South Carolina where Respondent's office was maintained (**RoA, Page 29**). Any details about a procedure as implemented,

or personnel, location, or practices of the parties is completely missing from the record before the court, so the court correctly refused to read into the contract sufficient interstate commerce connections to determine that the Federal Arbitration Act applies **(RoA, Pages 8 and 9)**. “This is particularly true in light of the fact that Paragraph 21, which is apparently a provision which was specifically negotiated between the parties, provides that this is to be treated as an intrastate contract **(RoA, Page 9)**. While the Appellant does not agree with the court’s interpretation of that proviso, that is the only meaning which makes sense.

Further, the Appellant does not in any way question the circuit court’s statement at Page 4 of the Order which recites, “Further, Paragraph 21 of the Contract addresses this issue specifically when it provides ‘this Agreement shall be governed by the internal laws of the State of South Carolina, applicable to agreements made and to be performed entirely within such State,...’” **(RoA, Page 4)**. How can the Appellant now expect this court to ignore that very specific contract provision without even mentioning it?

The Appellant relies heavily upon the case of *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). However, the facts of *Munoz* are readily distinguishable from the facts in this case on several grounds. First and foremost, the contract in *Munoz* specifically provided that it was to be considered as one involved in interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Yet, the contract in this case said exactly the opposite; that the contract was to be considered an intrastate one. Furthermore, the record in *Munoz* reflected significant activity in South Carolina, Delaware, and Minnesota.

None of the cases cited in Appellant's Brief on page 6 are like this one because none of them include a provision within the contract which states that the contract is to be treated as an intrastate contract. None have a record so void of facts which would call for the application of interstate commerce.

As to Footnote 1 in Appellant's Brief, there are three points which merit attention. First, the Appellant did not preserve this issue for review. In its April 11, 2018, Order, the circuit court found that §15-7-120(B) of the South Carolina Code (2005) was not preempted (**RoA, Pages 2 and 3**). The circuit court concluded that South Carolina law applies to any disputes arising under the Service Agreement and that the venue selection clause which was included in paragraph 14 of the Service Agreement was unenforceable (**RoA, Pages 2 and 3**). The court reaffirmed that finding in its July 17, 2018, Order noting that the Appellant did not challenge those findings (**RoA, Page 8**). As such, that issue was not preserved and is now the law of the case.

Second, the circuit court correctly concluded that not only is Paragraph 14 in direct conflict with Paragraph 21, but it is also in conflict with S.C. Code Ann. § 15-7-120(B) which provides:

A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State. The enforceability of the remaining provisions of the arbitration agreement and the method of selecting a forum for the conduct of the arbitration proceedings is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.

The South Carolina Court of Appeals held in *Tritech* that the FAA preempts S.C. Code §15-7-120 in certain circumstances. The circumstances at issue in *Tritech*, are

distinguishable from the facts of this case. Namely, the *Tritech* decision was premised on the conclusion that the involvement of interstate commerce dictated that the FAA applied. *See Tritech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). That is not the case here.

Third, Appellant's argument that Paragraphs 21 and 14 are not contradictory is incorrect (**Appl. Brief, Page 6, FN 1**). The crux of their argument is that Paragraph 14 carves out claims for equitable relief from its proscription against resolving disputes outside of arbitration (**Appl. Brief, Page 6, FN 1**). Appellant argues that this "carve out" means that the parties have agreed that Illinois law will govern arbitration proceedings and SC law will govern claims for equitable relief. Thus, they argue that Paragraph 14 is not in conflict with Paragraph 21.

This conclusion is illogical. Paragraph 21 of the Service Agreement provides that "this Agreement shall be governed by the internal laws of the State of South Carolina, applicable to agreements made and to be performed entirely with in such state..." (**RoA, Page 35**). Paragraph 21 does not carve out exceptions based on types of claims (**RoA, Page 34**). The language of Paragraph 21 clearly shows an intent by the parties to have the agreement as a whole governed by SC law. Further, Paragraph 14 has absolutely NO language that supports Appellant's conclusion that the parties intended to carve out exceptions (**RoA, Page 34**). There is no language in Paragraph 14 suggesting that the parties intended to have SC law govern only claims in equity.

For all these reasons, the circuit court was correct in finding that the FAA did not apply to the parties' Service Agreement.

II. The circuit court did not err in failing to determine that Respondent's claims are within the scope of the arbitration provision in the Service Agreement.

In Appellant's Brief, the Appellant argues that the circuit court failed to consider whether some of the Respondent's claims asserted in this litigation would have fallen within the purview of the arbitration clause in Paragraph 14. However, the circuit court determined that there was no mandatory arbitration at all, so there was then, and there is now, no reason to discuss the scope of an unenforceable arbitration clause (**RoA, Page 3**). It is irrelevant to the issues before the court.

III. The circuit court was correct in refusing to find the arbitration provision valid and enforceable.

Appellant's third argument in its Brief is controlled by Issue I, which is briefed above. That is, either an arbitration clause is enforceable under the FAA or under the South Carolina Arbitration Act or it is not enforceable. In this case, the circuit court rightfully determined that the FAA was not applicable. Appellant has never, even now, argued that the South Carolina Arbitration Act is applicable. Without statutory support from one source or the other, a circuit court will not stay a legal action and enforce arbitration.

Appellant's contention is that the circuit court never addressed whether the arbitration clause must be enforced (**Appl. Brief, Page 8**). Appellant argues that federal and state law support enforcing arbitration and further argues that the notice requirement under SC law is unenforceable because the FAA preempts the notice requirement (**Appl. Brief, Pages 8, 9, FN 2**). Appellant's claim presumes the FAA applies, which is wrong.

CONCLUSION

The circuit court should be affirmed because the decision relied upon an accurate and logical construction of the contract and the absence of other evidence in the record to impose the FAA.

Respectfully submitted,

Feb. 28, _____, 2019
Columbia, SC

W. Duvall Spruill
W. Duvall Spruill (SC Bar No. 5295)
Emily A. Jordan (SC Bar No. 102281)
Bank of America Plaza
17th Floor, 1901 Main Street
P.O. Box 1473
Columbia, South Carolina 29202
Telephone: (803) 254-2200
Fax: (803) 799-3957
ATTORNEYS FOR THE RESPONDENT
CAPITAL CITY OB-GYN ASSOCIATES,
P.A.