THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

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

v.

Medorizon, Inc., ...Appellant.

FINAL BRIEF OF APPELLANT

Kirby D. Shealy III
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
Telephone: (803) 254-4190
kirby.shealy@arlaw.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

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

v.

Medorizon, Inc., ...Appellant.

FINAL BRIEF OF APPELLANT

Kirby D. Shealy III
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
Telephone: (803) 254-4190
kirby.shealy@arlaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. **Did the circuit court err in failing to find the Federal Arbitration Act applies to the parties' Service Agreement and preempts section 15-7-120(B) of the South Carolina Code (2005)?**

II. **Did the circuit court err in failing to determine that Respondent's claims are within the scope of the arbitration provision in the Service Agreement?**

III. **Did the circuit court err in failing to find the arbitration provision is valid and enforceable?**

STATEMENT OF THE CASE

This appeal arises from a circuit court order denying Appellant's Motion to Dismiss and Compel Arbitration, and a subsequent order denying Appellant's Motion to Alter or Amend.

On June 16, 2017, Respondent filed a complaint in the circuit court, asserting causes of action against Appellant for negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act, and breach of contract. On August 30, 2017, Appellant filed a Motion to Dismiss and Compel Arbitration. A hearing on Appellant's motion was held before the Honorable L. Casey Manning on January 8, 2018. Thereafter, on April 11, 2018, Judge Manning issued an order denying Appellant's motion. Appellant filed a Motion to Alter or Amend on April 23, 2018. On June 26, 2018, Judge Manning held a hearing on the motion, which was denied by order filed on July 17, 2018. Appellant timely filed a Notice of Appeal on August 13, 2018.

STATEMENT OF THE FACTS

Respondent is a South Carolina professional corporation operating a medical practice specializing in obstetrics and gynecology. (R. pp. 11, 15). Appellant is a comprehensive medical billing healthcare service company organized and existing pursuant to the laws of the State of Illinois. (R. p. 13). On November 1, 2014, Appellant and Respondent entered into a

Service Agreement whereby Appellant agreed to provide billing and collection services to Respondent. (R. pp. 26, 29). This Service Agreement included an arbitration provision in which the parties agreed to resolve any dispute between them related to the Service Agreement through binding arbitration. (R pp. 27, 34). Specifically, paragraph 14 of the Service Agreement states, in pertinent part:

> 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.*** (emphasis added).

(R. p. 34).

By letter dated September 29, 2016, Respondent notified Appellant that it would not be renewing the Service Agreement with Appellant. (R. pp. 12, 27). On June 16, 2017, Respondent filed the above-referenced action against Appellant in the circuit court. (R. pp. 11-18).

Prior to filing the action, Respondent made no attempt to submit its claims to arbitration as provided by the Service Agreement. (R. p. 27). Respondent also made no efforts to satisfy the provision in Paragraph 14 of the Service Agreement requiring that "[N]otice 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." (R. pp. 27, 34). Accordingly, by filing an action in the circuit court prior to submitting to arbitration, Respondent directly violated the terms of the

Service Agreement. Appellant submits that Respondent is bound to seek resolution of the matters asserted in Respondent's complaint through binding arbitration.

LEGAL STANDARD

"The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "This determination is subject to de novo review." *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325 (Ct. App. 2012) (*citing Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320, 323 (2009)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (*citing Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007)).

ARGUMENTS

Initially, Appellant respectfully submits that the circuit court failed to squarely address the gravamen of its Motion to Dismiss and Compel Arbitration—that the underlying action should be dismissed and sent to arbitration in accordance with the parties' Service Agreement. Instead, the circuit court focused upon peripheral issues in its orders, addressing the 90-day notice, choice of law, and forum selection clauses contained in the agreement. The circuit court need not have reached any of these issues had it properly analyzed the central question of whether the lawsuit should be dismissed in the first instance. Ultimately, the circuit court should have determined (1) the Federal Arbitration Act (FAA) applies to the parties' Service Agreement and preempts state law; (2) Respondent is required to submit all of its claims to binding arbitration, as they are within the scope of the agreement; and (3) the arbitration provision in the Service Agreement is valid and enforceable. Therefore, Appellant respectfully requests that this Court reverse the circuit court's orders, as discussed more fully below.

I. THE FEDERAL ARBITRATION ACT APPLIES TO THE SERVICE AGREEMENT AND PREEMPTS STATE LAW.

Section 15-7-120(B) of the South Carolina Code of Laws 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 [FAA], and any applicable rules of arbitration.

However, unless the parties specifically contract otherwise, the FAA, 9 U.S.C. §§ 1-16, preempts state law and applies when an arbitration agreement involves interstate commerce. *See* 9 U.S.C. § 2; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Landers v. Federal Dep. Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). The FAA applies to an agreement to arbitrate if the transaction touches interstate commerce, "even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995). The United States Supreme Court has interpreted the words "involving commerce" broadly. *Zabinski*, 346 S.C. at 590, 553 S.E.2d at 115. The circuit court's orders completely ignore these rules.

The circuit court's Order Denying Defendant's Motion to Dismiss and Compel Arbitration incorrectly states that the FAA does not apply and that "[t]he record is void of other evidence which would explain any interstate commerce connection." (R. pp. 4, 8-9). This conclusion disregards the contractual relationship between Appellant and Respondent, which establishes that the FAA's interstate commerce requirement is met. The Service Agreement that forms the predicate for this lawsuit expressed from the outset that the parties' relationship would involve interstate commerce, as Respondent's practice is located in Columbia, South Carolina and Appellant is located in the State of Illinois, from which it was to perform the services spelled

out in the Service Agreement. (R. pp. 23, 26-28). While Appellant's main corporate offices are in Illinois, it provides services to various clients nationwide. (R. p. 23). This arrangement necessarily crosses state lines and unquestionably involves interstate commerce. The FAA must therefore apply.

This case is factually similar to *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) in many respects. In *Munoz*, both the Petitioners and Defendant Builder were domiciled in South Carolina, but Builder assigned all of its rights under the agreement between it and the Petitioners to Creditor, a Delaware corporation with its principal place of business in Minnesota. 343 S.C. at 539, 542 S.E.2d at 364. The Supreme Court noted that Creditor prepared the agreement in Minnesota and forwarded it to Builder in South Carolina. The proceeds of the loan were then disbursed from a bank in Minnesota. *Id.* Based exclusively on these factors, the Court found that, even though the Petitioners may not have contemplated an interstate transaction when they entered into an agreement with Builder, the "contractual relationship with Creditor in fact involves interstate commerce and therefore the FAA applies." *Id.*

For similar reasons, the Service Agreement in the matter at bar involves interstate commerce, and the FAA applies. An essential requirement of the Service Agreement was for Appellant to provide medical billing and collection services out of its location in Illinois to Respondent in South Carolina. Again, this invariably required transactions between the parties to cross state lines and, as a result, involved interstate commerce. *See Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996) ("For the [FAA] to apply, the commerce involved in the contract must be interstate); *Thornton v. Trident Medical Center, L.L.C.*, 357 S.C. 91, 97, 592 S.E.2d 50, 53 (Ct. App. 2003) (holding a recruiting contract between physician and medical center that required physician to move from Michigan to South

Carolina involved interstate commerce and was thus subject to the FAA); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "it 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."); *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce 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'"). Because the contract involves interstate commerce and the FAA applies, section 15-7-120(B) is preempted.[1] *Tritech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000); *see also Albemarle Corp. v. Astrazenica UK Ltd.*, 628 F.3d 643 (4th Cir. 2010). Accordingly, this Court should reverse the trial court's orders.

II. RESPONDENT'S CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION PROVISION IN THE SERVICE AGREEMENT.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a

[1] To the extent it is necessary to address the circuit court's finding that the choice of law provision in Paragraph 21 of the Service Agreement conflicts with the arbitration provision in Paragraph 14, Appellant respectfully submits this determination was error. (R. pp. 4, 8-9). Paragraph 14 states that the substantive and procedural law of the State of Illinois shall apply to arbitration proceedings, but it also carves out claims for equitable relief from its proscription against resolving disputes outside of arbitration. This carve-out makes Paragraphs 14 and 21 completely harmonious, as the parties have agreed that claims for equitable relief may be brought in South Carolina courts, applying South Carolina law. Accordingly, nothing about the interplay of these two paragraphs renders the provisions of Paragraph 14 unenforceable.

written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Wilson v. Willis*, 416 S.C. 395, 404, 786 S.E.2d 571, 575 (Ct. App. 2016).

Paragraph 14 of the Service Agreement reflects that the parties:

> ...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.

(R. p. 34) (Emphasis added).

Respondent's complaint alleges the following causes of action against Appellant: negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act, and breach of contract. (R. pp. 11-18). All of Respondent's factual allegations and causes of action fall squarely within the scope of the arbitration provision in the Service Agreement, as Respondent's claims clearly arise from matters directly connected with Appellant's performance, or alleged failure to perform, under the Service Agreement. Therefore, due to the parties' agreement to arbitrate, Respondent's allegations that arise out of the Service Agreement, and South Carolina courts' strong presumption of arbitrability, this Court should reverse the trial court's orders and dismiss Respondent's claims.

III. THE ARBITRATION PROVISION IS VALID AND ENFORCEABLE.

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "Arbitration is a matter of contract, and . . . . rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at

112. South Carolina law applies a strong presumption in favor of the validity of arbitration agreements based on a policy favoring arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Under South Carolina law "[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." *Zabinski*, 346 S.C. at 588, 553 S.E.2d at 113.

Similarly, Section 2 of the FAA provides in relevant part: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... 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. Although the circuit court's orders rejected the application of the FAA, it never addressed the question of whether the arbitration clause must be enforced. (R. pp. 4, 8-9). The arbitration clause should be enforced, as South Carolina favors arbitration in the same way that federal law does.

Moreover, there is simply nothing unconscionable about the arbitration clause. The parties involved are both sophisticated entities, Respondent could have chosen to contract with a different medical billing provider had it so desired, and there is no suggestion Respondent was coerced or tricked into signing the Service Agreement.[2] *See Fanning v. Fritz's Pontiac-*

[2] Although under section 15-48-10(a) of the South Carolina Code (Rev. ed. 2005), "[a] written agreement to submit any existing controversy to arbitration ... shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract[,]" the FAA preempts this notice requirement. *See Zabinski*, 346 S.C. at 593-94, 553 S.E.2d at 117; ("[W]e recently stated the result in *Soil Remediation* hinged on the fact that application of state law would have rendered the arbitration agreement completely unenforceable under section 15-48-10(a). State law was therefore preempted to the extent it would have invalidated the arbitration agreement.".(*citing Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (internal citations omitted)).

Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions *together with* terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them); *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."). Accordingly, this Court should reverse, and this case should be dismissed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's orders Denying Defendant's Motion to Dismiss and Compel Arbitration and Denying Defendant's Motion to Alter or Amend the Order Denying Defendant's Motion to Dismiss and Compel Arbitration.

Kirby D. Shealy III
ADAMS AND REESE LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
Telephone: (803) 254-4190
Facsimile: (803) 779-4749
kirby.shealy@arlaw.com
Attorneys for Appellant

March 5, 2019.