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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP-27-0331

Phillip Flexon, M.D. .... Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is .... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID APPELLANT PRESERVE ITS RIGHT TO INDEPENDENTLY SEEK ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT?

II. DID APPELLANT PREVIOUSLY LITIGATE ITS RIGHT TO ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT?

III. DID THE CIRCUIT COURT FAIL TO APPLY, OR INCORRECTLY APPLY, THE "COMMERCE IN FACT" TEST TO THE FACTS PRESENTED BY APPELLANT AT THE SEPTEMBER 9, 2013, HEARING IN ORDER TO DETERMINE WHETHER THE MEDICAL SERVICES PERFORMED BY RESPONDENT UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT IN FACT INVOLVED OR AFFECTED INTERSTATE COMMERCE AND THERFORE TRIGGERED THE FEDERAL ARBITRATION ACT?

IV. DID THE CIRCUIT COURT INCORRECTLY APPLY "THE LAW OF THE CASE DOCTRINE"?

STATEMENT OF THE CASE

This litigation was commenced by Respondent filing his Summons and Complaint on May 26, 2009. Respondent asserted multiple causes of action against Appellant, Defendant PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical Center ("CCMC"), and Defendant Tenet Health Systems ("Tenet") which relate to or arise out of a Physician Employment Agreement (the "Agreement") executed by Respondent on December 18, 2006. Appellant and CCMC each filed an Answer to the Complaint and therein asserted an affirmative defense that all of the causes of action alleged by Respondent were subject to an arbitration provision contained in the Agreement.

On October 21, 2009, CCMC filed a motion to compel arbitration. CCMC advocated that even though the Agreement lacked South Carolina's "notice of arbitration" requirement, the Federal Arbitration Act (the "FAA") preempted the South Carolina requirement because the terms of the Agreement and the surrounding facts affected interstate commerce. On June 9, 2010, CCMC's arbitration motion came before Circuit Court Judge Perry M. Buckner, III, for a hearing. Appellant did not participate in CCMC's arbitration motion and did not litigate any of the facts and arbitration issues before Judge Buckner at the June 9, 2010 hearing. Appellant was expressly instructed by Judge Buckner to file its own motion if Appellant wanted to pursue enforcing the arbitration provision against the Respondent. Shortly thereafter on June 17, 2010, Appellant filed its own motion to compel arbitration.

CCMC's arbitration motion was later denied by Order of Judge Buckner dated June 30, 2010. CCMC appealed the ruling of Judge Buckner. This matter was then stayed without Appellant's motion for arbitration being heard or ruled upon. By reported decision dated March 7, 2012, the Court of Appeals affirmed Judge Buckner's Order. CCMC then unsuccessfully petitioned the Court of Appeals for Rehearing. Following Remittitur of CCMC's appeal, Appellant withdrew its motion for arbitration without prejudice and subject to its discovery and motion rights specified in four (4) separate Consent Scheduling Orders (the "Consent Orders") between the parties.[1]

Appellant and CCMC then obtained the deposition testimony of Respondent on April 30, 2013, and thereafter, Appellant renewed its arbitration motion on May 31, 2013. On September 9, 2013, Appellant's arbitration motion came before Circuit Court Judge Brooks P. Goldsmith, Jr. for a hearing. Appellant's arbitration motion was denied by Order of Judge Goldsmith dated September 24, 2013. Appellant then timely filed and served a motion to alter or amend Judge Goldsmith's Order entered on September 30, 2013. Thereafter, on November 14, 2013, Appellant received written notice of Judge Goldsmith's Order denying Appellant's motion to alter and amend the September 30, 2013 Order. Appellant then filed and served its Notice of Appeal on November 15, 2013.[2]

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[1] The motion was scheduled for a hearing following Remittitur prior to the deposition of the Respondent. Thus, the Appellant withdrew the motion without prejudice to bring it at a later date, pursuant to the Consent Orders, once the deposition of the Respondent was taken.

[2] The transcript of the hearing on the arbitration motion was timely ordered and was received by the Appellant from the court reporter on December 20, 2013, making this Initial Brief due for service on

FACTS

Appellant is a hospital company based in Brentwood, Tennessee. Appellant owns and operates hospitals and healthcare facilities throughout the United States. Prior to June 30, 2007, Appellant owned and operated the Coastal Carolina Medical Center in Jasper County, South Carolina.

Respondent is a licensed ear, nose, and throat (ENT) medical doctor. (Respondent's May 26, 2009 Complaint ("Compl.") ¶ 1) (R. p. 34). With the assistance of counsel, Respondent negotiated a medical services contract with Appellant which culminated in the Agreement which Respondent executed on December 18, 2006. (Compl. ¶ 7) (R. p. 35); (Respondent's April 30, 2013 Deposition ("Resp't Dep.") at 72 ll. 14-18) (R. p. 469, lines 14-18). The Agreement was for a five-year employment term and contained an arbitration provision[3]. (Agreement at Art. II & Art. XIII § 13.5) (R. pp. 961 and 969). Prior to entering into the Agreement with the Appellant, Respondent practiced medicine in Savannah, Georgia. (Compl. ¶ 8) (R. p. 35). As a result of entering into the Agreement with Appellant, Respondent "had to discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals." (Compl. ¶ 8) (R.

Tuesday, January 21, 2014 (considering the thirtieth day fell on a Sunday with Martin Luther King, Jr.'s holiday falling on Monday, January 20, 2014). Rule 208(a)(1), SCACR.

[3] The Agreement's arbitration provision at Section 13.5 specifically states, in pertinent part, that "[a]ny controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. . . ." (Agreement at § 13.5) (R. p. 969).

p. 35). Respondent began working at the Coastal Carolina Medical Center on March 15, 2007. (Compl. ¶ 15) (R. p. 37).

On or about June 30, 2007, Appellant, through a stock sale, sold the Coastal Carolina Medical Center to Defendant Tenet. (Compl. ¶ 17) (R. p. 37). Respondent continued to be employed by Coastal Carolina Medical Center until he terminated his employment on or about September 16, 2008, and returned to practice medicine in Savannah, Georgia. (Compl. ¶ 21) (R. p. 38); (Final Brief of CCMC February 24, 2011 ("CCMC Br.) at 4) (R. p. 100). Under the terms of the Agreement, Coastal Carolina Medical Center then sent notice to Respondent of a demand for repayment of the hospital's losses incurred on Respondent's account during his two years of employment. (Compl. ¶ 23) (R. p. 39). Respondent then filed this lawsuit on May 29, 2009. Respondent asserted multiple causes of action[4] against both Appellant and CCMC which relate to or arise out of the Agreement. (See Compl.) (R. p. 34). Appellant and CCMC each filed an Answer and therein asserted an affirmative defense that all of the causes of action alleged by Respondent were subject to an arbitration provision contained in the Agreement. (Appellant's August 3, 2009 Answer ("Appellant Answer") at 31) (R. p. 70); (CCMC's July 17, 2009 Answer ("CCMC Answer") at 34) (R. p. 62).

[4] In the Complaint, Respondent asserted the following causes of action: (1) the first cause of action alleged is for breach of the Agreement; (2) the second cause of action alleged is for fraudulent misrepresentations that Respondent alleges were made in the course of negotiations of the Agreement; (3) the third cause of action alleged is for breach of the duty of good faith and fair dealing implied in the Agreement; and (4) the fourth cause of action was for declaratory judgment.

Defendant CCMC's Arbitration Motion, Hearing and Appeal

While Defendant CCMC's prior motion to compel arbitration is not directly at issue in this appeal, it is nevertheless instructive to review in this background its issues and its distinctions from the present motion of Appellant on appeal. On October 21, 2009, CCMC filed a motion to compel arbitration. (See CCMC's October 23, 2009 Arbitration Motion ("CCMC Arb. Mot.")) (R. p. 79). On June 9, 2010, CCMC's arbitration motion came before Judge Buckner for a hearing. (See Transcript of Record June 9, 2010 ("Buckner Tr.")) (R. p. 375). The focus of CCMC's argument to Judge Buckner was that the FAA was implicated because Respondent moved his medical practice across state lines from Georgia to South Carolina. (CCMC's October 23, 2009 Memorandum in Support of Arbitration Motion ("CCMC Mem.") at 2 & 3) (R. pp. 81-82); (Buckner Tr. at 7, 14-16) (R. pp. 381 and 388-390). CCMC relied heavily on the facts of Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003) to support its position. (CCMC Mem. at 2 & 3) (R. pp. 81-82); (Buckner Tr. at 5, 11, and 18) (R. pp. 379, 385, and 392). In Thornton, Trident was experiencing a shortage of cardiovascular physicians and began to recruit physicians, including Thornton, from other parts of the country to Charleston, South Carolina. Id. at 93, 592 S.E.2d at 50-51. The recruiting agreement required Thornton to move his practice from Michigan to Charleston, provided financial incentives, and further provided for arbitration in the event of a dispute. Id. at 93, 592 S.E.2d at 51. The parties had a dispute, and Thornton filed a declaratory judgment action seeking a determination that the

arbitration provision was unenforceable. Id. at 94, 592 S.E.2d at 51. The court in Thornton determined that the recruiting agreement and surrounding facts affected interstate commerce, and therefore, the FAA applied. Id. at 95-96, 592 S.E.2d at 52-53. The court relied heavily on the fact that Thornton relocated from Michigan, and the contract provided for him to be compensated for the expenses incurred in moving his personal effects to South Carolina. Id. at 97, 592 S.E.2d at 53.

At the hearing before Judge Buckner, CCMC highlighted the following allegations in Respondent's Complaint in order to demonstrate that the Agreement implicated the FAA based upon the reasoning in Thornton: Respondent's allegations in his Complaint of closing his established practice in Savannah, Georgia to perform the Agreement; losing time and income for his move; and disrupting his Georgia medical practice. (Compl. ¶¶ 8, 13, 26, 29) (R. pp. 35-36 and 39-40); (Buckner Tr. at 7-8) (R. pp. 381-382).

In addition, with only the benefit of limited written discovery, CCMC also referenced a few interrogatory responses of Respondent in order to suggest to Judge Buckner that Respondent may have provided medical services across state lines while employed at the Coastal Carolina Medical Center. First, CCMC pointed out that Respondent stated that "after the sale of the hospital to Tenet was announced in June. . . many Savannah doctors stopped referring patients to [Respondent] because of Tenet's horrible reputation." (Respondent's April 29, 2010 Answer to CCMC's Interrogatory 7 ("Answer to CCMC Interrog.") (R. p. 983); (Buckner Tr. at 8) (R. p. 382). CCMC argued that the *implication* of this interrogatory response is that

Respondent, at some point, was receiving referrals across state lines. (Buckner Tr. at 8) (R. p. 382). Second, CCMC urged Judge Buckner to believe that Respondent was actually performing surgeries at Memorial Hospital in Savannah, Georgia under the terms of the Agreement. (Buckner Tr. at 8-9) (R. pp. 382-383). CCMC relied only on Respondent's statement that "the availability of equipment became so unreliable [at Coastal Carolina Medical Center] that [Respondent] started taking hi[s] complicated cases to Memorial." (Answer to CCMC Interrog. 9) (R. p. 984-985); (Buckner Tr. at 8-9) (R. pp. 382-383).

In contrast to the position of CCMC, counsel for Respondent stressed to Judge Buckner that the facts surrounding the Agreement with the Respondent are the "very facts and circumstances" of Arkansas Diagnostic Center, P.A. v. Tahiri, 370 Ark. 157, 257 S.W.3d 884, 892 (2007), not Thornton. (Buckner Tr. at 12 ll. 8-10) (R. p. 386, lines 8-10). Counsel for Respondent informed Judge Buckner that "I took the Thornton case . . . and I shepardized it. And I found the Arkansas case, which is cited in our brief, which is absolutely dead on." (Buckner Tr. at 11 ll. 17-22 & 12 ll. 23-24) (R. pp 385, lines 17-22 and 386, lines 23-24).

In Tahiri, the Arkansas Supreme Court found there was no interstate commerce involved, and the FAA did not apply to the employment contract at issue. Tahiri, 370 Ark. at 167, 257 S.W.3d at 892. The contract in Tahiri contained an arbitration provision, and the Arkansas Diagnostic Center (ADC) attempted to enforce the provision when Dr. Tahiri filed a complaint against ADC for numerous causes of action, including breach of the contract. Id. at 158-159, 257 S.W.3d at 886-

887. ADC argued interstate commerce was involved because there was "evidence to show that it [ADC itself, rather than Dr. Tahiri individually performing medical services under the contract] 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." Id. at 160-161, 257 S.W.3d at 888. The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA. Id. at 165-167, 257 S.W.3d at 891-892. The Arkansas Supreme Court ruled that "most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local patients*." Id. at 166-167, 257 S.W.3d at 892.

Counsel for Respondent repeatedly emphasized to Judge Buckner that the Agreement was simply a "local" contract and that Respondent was purely providing "local" medical services just like the facts in Tahiri. (Buckner Tr. at 12 ll. 15-22 and at 14 ll. 23-25) (R. pp. 386, lines 15-22 and 388, lines 23-25); (Respondent's November 25, 2009 Memorandum in Opposition to CCMC's Arbitration Motion ("Resp't Opp'n Mem.") at 3) (R. p. 87). Counsel for the Respondent represented to Judge Buckner that the Agreement "does not involve-- I mean it involved employment of a Jasper County doctor to a Jasper County hospital ***to render services to Jasper County residents***. I mean, in point of fact, that's what we're talking about." (Emphasis added) (Buckner Tr. at 12 ll. 19-22) (R. p. 386, lines 19-22); (see also Resp't Opp'n Mem. at 5 (R. p. 89) where Respondent states that the "[Agreement] at

issue is between a Hardeeville resident and a Hardeeville medical center to ***provide specialized care to patients of lowcountry South Carolina.***" (Emphasis added)).

It is clear that the factual record before Judge Buckner at the time of the hearing was limited. CCMC presented Judge Buckner with only the "facts that [Respondent] has pled." (Buckner Tr. at 15 ll. 15-16) (R. p. 389, lines 15-16). For instance, Judge Buckner stated that "I have no way of knowing that [Respondent] was a staff privileged doctor in Savannah, and then came to Hardeeville, and therefore, crossed state lines", as was urged by CCMC's counsel. (Buckner Tr. at 15 ll. 8-10) (R. p. 389, lines 8-10).

CCMC's arbitration motion was denied by Order of Judge Buckner dated June 30, 2010. (See Buckner Order at 1) (R. p. 7). Judge Buckner determined that "*on the record before this Court*," CCMC failed to meet its burden and prove that the contract at issue involved interstate commerce. (Buckner Order at 6) (R. p. 12). It is apparent from the language contained in the June 30, 2010 Order that Judge Buckner was persuaded by the representations of counsel for Respondent that both the terms of the Agreement *and the actual performance of medical services by the Respondent under the Agreement* were confined to only in-state South Carolina medical services and in-state South Carolina patients.

At the behest of counsel for Respondent, Judge Buckner supported his decision by relying on the factual findings and legal conclusion of the Arkansas Supreme Court in Tahiri. (See Buckner Order at 4 & 5) (R. pp. 10-11). In the June 30, 2010 Order, Judge Buckner supported his reasoning by quoting from the finding

in Tahiri that, like Respondent, ADC contracted with "Dr. Tahiri to provide medical services to its *local patients*." (Buckner Order at 5) (R. p. 11). Moreover, Judge Buckner also supported his decision by incorporating the reasoning of Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). (Buckner Order at 3) (R. p. 9). The Bernhardt court determined that the employment agreement "did not contemplate any actions affecting commerce outside of Vermont" because "performance under the contract . . . was by its terms confined to a single state." (Buckner Order at 3) (R. p. 9). Ultimately, Judge Buckner adopted the language supplied by Respondent word for word and ruled that the "employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to ***provide specialized care to patients of Lowcountry South Carolina***." (Emphasis added) (Buckner Order at 5 & 6) (R. pp. 11-12).

Importantly, Appellant did not participate in CCMC's arbitration motion and did not litigate any of the facts and arbitration issues before Judge Buckner at the June 9, 2010 hearing. Appellant was expressly instructed by Judge Buckner to file its own motion if Appellant wanted to pursue enforcing the arbitration provision against Respondent. (Buckner Tr. at 18 ll. 2-6) (R. p. 392, lines 2-6). The following exchange occurred at the June 9, 2010 hearing on CCMC's motion to compel arbitration (Buckner Tr. at 17 ll. 20-25 & 18 ll. 2-7) (R. pp. 391, lines 20-25 and 392, lines 2-7):

> Robertson: "I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration

> and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that . . . ."
>
> Court: "I think you ought to do that, because obviously the plaintiff isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it."
>
> Robertson: "Yes, sir."

Shortly thereafter on June 17, 2010, Appellant filed its own motion to compel arbitration. CCMC then appealed the ruling of Judge Buckner. This matter was then stayed without Appellant's motion for arbitration being heard or ruled upon, and Appellant was not a party to CCMC's appeal.

On appeal, CCMC alleged that the trial court erred in failing to properly consider the Complaint, the Agreement, and the surrounding facts in determining whether the FAA applied to the Agreement between the parties. (CCMC Final Br. ("CCMC Br.") at 4) (R. p. 100). CCMC's argument centered on the fact that Respondent moved his medical practice, not his residency, from Georgia to South Carolina in order to perform his Agreement. (CCMC Br. at 9 & 10) (R. 105-106); (Final Reply Brief of CCMC February 24, 2011 ("CCMC Reply Br.") at 4) (R. p. 117). CCMC argued that this was a critical fact which distinguished this case from Tahiri. (CCMC Br. at 10) (R. p. 106). In further support of its position, CCMC reiterated the same facts presented to trial court. (CCMC Br. at 7 & 8) (R. pp. 103-104).

Remarkably in his briefs to the Court of Appeals, Respondent continued to promote the fact that the Agreement was simply "between a local resident and a local

medical facility for services to local citizens." (Respondent's Final Brief February 21, 2011 ("Resp't Br.") at 1) (R. p. 127) ; (see also Resp't Br. at 4 (R. p. 130) where "Respondent submits that the Agreement involved does not affect interstate commerce but rather is simply an employment agreement for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville."); (see also Resp't Br. at 7 & 8 (R. pp. 133-134) where Respondent states that "the fact that, incidental to a local employment agreement, Respondent closed his medical practice in Georgia is insufficient to impress interstate commerce regulation upon an employment agreement between a Jasper County hospital and a Jasper County resident for services to Lowcounty South Carolina patients."); (see also Respondent's Return March 29, 2012 to CCMC's Petition for Rehearing ("Resp't Return") at 3) (R. p. 142).

Moreover, Respondent advocated that the allegations in the Complaint referenced by CCMC in support of its position actually related to Respondent's claims against Appellant, rather than CCMC. (Resp't Br. at 8) (R. p. 134). As a result, Respondent urged both the Court of Appeals and Judge Buckner not to consider those facts. (Resp't Br. at 8) (R. p. 134); (see Buckner Tr. at 10 ll. 3-10 & 15 ll. 17-20) (R. pp. 384, lines 3-10 and 389, lines 17-20). Respondent states that (Resp't Br. at 8) (R. p. 134):

> [CCMC] attempts to focus on the allegations that the Respondent's primary practice was located in Savannah prior to the commencement of his employment under the Agreement. This argument overlooks the nature of that allegation. The second cause of action in the Complaint is for fraud in the inducement. In paragraph 8 [of the Complaint], Respondent alleges that "[Respondent] was enticed to sign [the

> Agreement] by the representations of employees and agents of [Appellant] that he would enjoy a long relationship with [Appellant] and Coastal Carolina Medical Center." [Appellant] is not a party to this appeal . . . Respondent's allegation of his practice in Savannah is in connection with the cause of action for fraud in the inducement. [CCMC's] attempt to focus on this to create an issue affecting commerce in connection with the Agreement is misplaced.

By reported decision dated March 7, 2012, the Court of Appeals affirmed Judge Buckner's Order. Phillip Flexon, M.D. v. PHC-Jasper, Inc., 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). In its Opinion, the Court of Appeals recognized that the trial court rejected CCMC's argument that the Agreement, and its surrounding circumstances, involved interstate commerce under Thornton. Id. at 86, 731 S.E.2d at 2-3. The Court of Appeals then recounted that the trial court distinguished Thornton and relied on the analysis in Tahiri. Id. at 88-89, 731 S.E.2d at 3-4. In its Opinion, the Court of Appeals again quotes the passage from Tahiri which focuses on the critical fact that employment contract was confined to only local services and local patients. The language quoted in the Opinion states:

> [ADC] failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients. . . . Most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local* patients. *Id.* at 89, 731 S.E.2d at 4.

The Court of Appeals agreed with the trial court and determined that the facts presented were more akin to those in Tahiri, and therefore, affirmed Judge Buckner's Order. Id. at 89, 731 S.E.2d at 4. CCMC filed a petition for rehearing, which was also denied.

Appellant's Arbitration Motion, Hearing and Instant Appeal

Following Remittitur of CCMC's appeal, Appellant withdrew its motion for arbitration without prejudice and subject to its discovery and motion rights in the Consent Orders. (See Appellant's September 4, 2013 Reply Memorandum to Respondent's Memorandum in Opposition to Appellant's Renewed Arbitration Motion ("Appellant's Arb. Mot. Reply Mem.") Exhibit A) (R. pp. 297-313). The Consent Orders specifically provide:

> The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.[5]

Appellant preserved its right, with the consent of Respondent, to independently seek arbitration in this matter. Appellant and CCMC then obtained the deposition testimony of the Respondent on April 30, 2013, and thereafter, Appellant renewed its arbitration motion on May 31, 2013.[6] (See Appellant's May 31, 2013 Renewed Motion to Compel Arbitration ("Appellant's Arb. Mot.")) (R. p. 145).

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[5] Respondent has entered into four (4) Consent Orders which specifically address the ability of Appellant to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. The four (4) Consent Orders are dated June 16, 2010, September 18, 2012, February 1, 2013, and July 2, 2013. The June 16, 2010 Consent Order initially says "the parties and this Court recognize that the Defendant has moved to compel arbitration" rather than "the parties and this Court recognize that one of the Defendants may move to compel arbitration" as provided in the other three (3) Consent Orders.

[6] CCMC also filed a motion for relief from judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure which was denied as part of the September 30, 2013 Goldsmith Order.

On September 9, 2013, Appellant's arbitration motion came before Circuit Court Judge Brooks P. Goldsmith, Jr. for a hearing. (See September 9, 2013 Motions Hearing Transcript ("Goldsmith Tr.")) (R. p. 905). During the September 9, 2013 hearing, Appellant argued that the factual record now before this Court evidences that the employment transaction with the Respondent in fact involved and affected interstate commerce. (See Goldsmith Tr. at 9 & 10) (R. pp. 912-913). Appellant offered the deposition testimony of Respondent which is substantially different and contrary to the facts previously presented by Respondent to Judge Buckner on June 9, 2010, and in CCMC's prior appeal to this Appeals Court. (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (see also Appellant's Arb. Mot. Reply Mem. at 4) (R. p. 294).

Appellant argued that the medical services provided by Respondent under the terms of the Agreement were not simply contained to a local clinic, with privileges at a local hospital, and treating local patients. (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 3-4) (R. pp. 147-148); (see also Appellant's Arb. Mot. Reply Mem. at 5) (R. p. 295). In reality, the required performance of the Agreement was not limited to the State of South Carolina, but in fact, the terms of the Agreement actually involved, and the surrounding facts actually evidence, Respondent providing medical services in both South Carolina and Georgia. (Goldsmith Tr. at 10, 12-13) (R. p. 913, lines 12-13); (see also Appellant's Arb. Mot. at 3-4) (R. pp. 147-148); (see also Appellant's Arb. Mot. Reply Mem. at 5) (R. p. 295).

Appellant directed Judge Goldsmith's attention to Article 1, Section 1.1, of the Agreement which states that the "Employer engages Physician and Physician accepts such engagement . . . to render professional physician services to *patients*." (Emphasis added) (Goldsmith Tr. at 12) (R. p. 915); (Agreement at Art. I § 1.1) (R. p. 961); (see also Appellant's Arb. Mot. at 4) (R. p. 148). Appellant presented evidence that Respondent testified in his April 30, 2013 deposition that "[t]he practice always existed in both states before and after. It really did. I mean, it was -- you know, it -- by -- by accident there's a river and a state line, but the practice always involved both states." (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (Respondent's April 30 2013 Deposition ("Resp't Dep.") at 269 ll. 20-24) (R. p. 666, lines 20-24). Respondent also testified in his deposition that he had "plenty of patients coming from Georgia." (Goldsmith Tr. at 10) (R. p. 913); (see also Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 373 ll. 1-2) (R. p. 770, lines 1-2).

In addition, Appellant directed Judge Goldsmith's attention to Article 3, Section 3.6, of the Agreement which states that the "Physician shall perform his/her duties at . . . those hospitals facilities at which Physician maintains Medical Staff privileges." (Goldsmith Tr. at 12-13) (R. pp. 915-916); (Agreement at Art. III § 3.6) (R. p. 962); (see also Appellant's Arb. Mot. at 4) (R. p. 148). As evidenced by Respondent's deposition testimony, Respondent was actually expected to maintain medical staff privileges at Savannah Memorial Hospital ("Memorial"), and did in fact perform medical services for patients at Memorial, as part of the Agreement.

(Goldsmith Tr. at 12-13) (R. pp. 915-916); (see also Appellant's Arb. Mot. at 4) (R. p. 148). Appellant presented evidence that Respondent testified in his April 30, 2013, deposition that one of [Appellant's] issues was, you know, [Respondent] – I was to continue on the staff at Memorial . . . So that was – [Appellant] wanted that, [Appellant] wanted me on the staff at Memorial." (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 115 ll. 3-7) (R. p. 512, lines 3-7). Respondent also testified in his deposition that he was working at Memorial "Maybe three [days a week] -- . . . because I was with Memorial and having -- and, again, having to do rounds both places." (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 181 ll. 17-21) (R. p. 578, lines 17-21).

It is evident from the deposition testimony of Respondent that Respondent was required under the terms of the Agreement to provide, ***and did in fact provide***, medical services to patients in both Georgia and South Carolina. The facts are clear that the employment Agreement was not simply between a local resident and a local medical facility for medical service to patients and/or citizens of Lowcountry South Carolina.

Nevertheless, Appellant's arbitration motion was denied by Order of Judge Goldsmith dated September 24, 2013. (See Goldsmith Order dated September 24, 2013 and entered on September 30, 2013 ("Goldsmith Order")) (R. p. 25). The Appellant timely filed and served a motion to alter or amend Judge Goldsmith's Order entered on September 30, 2013. Thereafter, on November 14, 2013, Appellant

received written notice of Judge Goldsmith's Order denying Appellant's motion to alter and amend the September 30, 2013 Order. This appeal followed.

ARGUMENTS

I. APPELLANT HAS PRESERVED ITS RIGHT TO INDEPENDENTLY SEEK ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT.

Appellant has never waived and has continuously preserved its right to independently seek arbitration in this matter. Respondent has entered into four (4) Consent Orders, as recited above, which specifically address the ability of Appellant to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. (See Appellant's Arb. Mot.) (R. p. 145); (Appellant's Arb. Mot. Reply Mem. Exhibit A) (R. pp. 297-313). In addition, and accordingly, counsel for Respondent specifically stated during the September 9, 2013 hearing before Judge Goldsmith that he was not claiming or arguing that Appellant had waived any of these rights. (Goldsmith Tr. at 45 ll. 12-17) (R. p. 948, lines 12-17).

However, there are a number of confusing findings throughout Judge Goldsmith's Order which insinuate that Appellant failed to preserve its right to independently seek arbitration and conduct discovery without waiver or prejudice:[7]

- "Nowhere in any of these discovery requests, or in any correspondence or email communication before the court was there any mention that these requests were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration." (Goldsmith Order at 2) (R. p. 26).

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[7] Over the objections of Appellant, Judge Goldsmith filed and entered the proposed order of Respondent with no changes.

- "[Appellant] responded to [Respondent's] initial discovery requests on October 30, 2009, and on November 13, 2009, without any reservation or limitation." (Goldsmith Order at 2-3) (R. pp. 26-27).
- "On October 21, 2009, CCMC filed a Motion to Compel Arbitration . . . prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt to take the deposition of the [Respondent]." (Goldsmith Order at 3) (R. p. 27).
- "As with the motion by CCMC . . . the motion and supporting memorandum by [Appellant] did not mention the need or attempt to depose the [Respondent] as a condition to a ruling thereon." (Goldsmith Order at 4) (R. p. 28).
- "Further, if the Defendants believe that the [Respondent's] deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of [Respondent] prior to the earlier rulings without invoking any issue of waiver or prejudice." (Goldsmith Order at 8) (R. p. 32).

It is clear from the Consent Orders, as recited above, that Appellant has never waived and has continuously preserved its right to independently seek arbitration and conduct discovery in this matter. As advocated by counsel for Respondent, and specifically consented to in the Consent Orders by Respondent, Appellant pursued discovery, including obtaining the deposition testimony of Respondent which revealed previously undisclosed facts that support arbitration. (See Appellant's Arb. Mot. Reply Mem. Exhibit A) (R. pp. 297-313); (see also Respondent's September 3, 2013 Memorandum in Opposition to Appellant's Renewed Motion for Arbitration ("Resp't Opp'n Mem. to Appellant's Arb. Mot." at 6)) (R. p. 160). Appellant has prosecuted its arbitration motion pursuant to prior directives and orders of the Circuit Court. Moreover, Judge Goldsmith ruled at the September 9, 2013 hearing that

Appellant was not bound by the prior findings and ruling against CCMC with respect to Appellant's right to independently seek to enforce the arbitration provision contained in the Agreement. (See Goldsmith Tr. at 52) (R. p. 955). For all of the aforementioned reasons, Appellant has independently preserved its right to seek to compel arbitration under the terms of the Agreement of all causes of actions asserted by Respondent against Appellant in the Complaint.

II. APPELLANT DID NOT PREVIOUSLY LITIGATE ITS RIGHT TO ARBITRATION UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT.

Appellant did not present argument or litigate any of the facts and arbitration issues presented to Judge Buckner at CCMC's June 9, 2010 arbitration motion hearing, or subsequently on CCMC's appeal. On October 21, 2009, CCMC filed its own independent motion to compel arbitration and stay. At the June 9, 2010 hearing, Appellant was expressly instructed by Judge Buckner to file its own motion if Appellant wanted to pursue enforcing the arbitration provision in Agreement against Respondent. (Buckner Tr. at 18 ll. 2-6) (R. p. 392, lines 2-6). The record also clearly reflects that Appellant was not a party to CCMC's appeal, and this fact was also acknowledged by the Respondent in his appellate filings. (Resp't Br. at 8) (R. p. 134).

Subsequent to the June 9, 2010 hearing, Appellant filed its own motion on June 17, 2010 to compel arbitration and to stay this matter pending arbitration. (See Appellant's June 17, 2010 Arbitration Motion ("Appellant's Withdrawn Arb. Mot.")) (R. p. 90). A hearing was scheduled following Remittitur to the Circuit Court from

CCMC's prior appeal. Appellant withdrew its motion without prejudice and subject to its discovery and motion rights in the Consent Orders. Thereafter on May 31, 2013, subsequent to Respondent's deposition, Appellant renewed its motion for arbitration which was different from its June 17, 2010 motion. (See Appellant's Arb. Mot.) (R. p. 145). Judge Goldsmith's Order incorrectly includes references to language contained in Appellant's June 17, 2010 motion, which was withdrawn, and was not part of Appellant's May 31, 2013 motion or the factual record. Specifically, Appellant's May 31, 2013 arbitration motion did not "adopt by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant [CCMC]." (Goldsmith Order at 4) (R. p. 28); (see Appellant's Arb. Mot.) (R. p. 145).

In addition, there are a number of confusing findings throughout Judge Goldsmith's Order which incorrectly indicate that Appellant has previously presented argument and litigated the merits of its right to enforce the arbitration provision contained in the Agreement:

- "As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion . . . ." (Goldsmith Order at 4) (R. p. 28).
- "There is no mention that the Defendants' motions, or the court's consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff." (Goldsmith Order at 5) (R. p. 29).
- "Although the Motion to Compel Arbitration was filed, argued, and appealed by CCMC, as acknowledged by counsel for Lifepoint' the issues and argument are identical for Lifepoint." (Goldsmith Order at 6) (R. p. 30).

- "That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals." (Goldsmith Order at 8) (R. p. 32).

The record is clear that Appellant did not present any argument or litigate any of the facts and arbitration issues presented to Judge Buckner at CCMC's June 9, 2010 arbitration motion hearing, or subsequently on CCMC's appeal. The record is also clear that Appellant's arbitration motion and argument at the September 9, 2013 hearing before Judge Goldsmith was not identical to the motion and argument of CCMC to Judge Buckner on June 9, 2010. For all of the aforementioned reasons, the Appellant did not previously litigate its right to arbitration under the terms of the Agreement.

III. THE CIRCUIT FAILED TO APPLY, OR INCORRECTLY APPLIED, THE "COMMERCE IN FACT" TEST TO DETERMINE WHETHER THE MEDICAL SERVICES PERFORMED BY RESPONDENT UNDER THE TERMS OF THE PHYSICIAN EMPLOYMENT AGREEMENT IN FACT INVOLVED OR AFFECTED INTERSTATE COMMERCE AND THERFORE TRIGGERED THE FEDERAL ARBITRATION ACT.

Judge Goldsmith's Order failed to apply, or incorrectly applied, the "commerce in fact" test to the facts presented by Appellant at the September 9, 2013 hearing in order to determine whether the medical services performed by Respondent under the terms of the Agreement *in fact* involved or affected interstate commerce, and therefore, triggered the FAA.

A. Standard of Review.

The question of applicability of the FAA is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). The Appellate Court will review a lower court's determination of arbitrability of a

contract *de novo*. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). The lower court's factual findings will be reversed where there is no evidence reasonably supporting the findings of the lower court. Thornton, 357 S.C. at 94, 592 S.E.2d at 51. When interstate commerce is implicated in fact by a contract, the contract's arbitration provision is enforceable even in the absence of the front page notice required by South Carolina's Act. Id.

B. The Federal Arbitration Act and the "Commerce In Fact" Standard.

The FAA provides in pertinent part: "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 (2010). Unless the parties have contracted otherwise, the FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001). "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses

a wider range of transactions than those actually in commerce - that is, within the flow of interstate commerce." Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)).

"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117. "The FAA is triggered when interstate commerce is involved in fact, even if interstate commerce was not within the contemplation of the parties at the time of contracting." Allied-Bruce Terminix Cos., 513 U.S. at 277. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117. The South Carolina Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. ***In other words, the transaction must turn out, in fact, to have involved interstate commerce***. Id. at 115 (emphasis added).

C. The facts presented by Appellant To Judge Goldsmith at the September 9, 2013 Hearing clearly demonstrate that the medical services performed by Respondent under the terms of the Agreement in fact involved interstate commerce under the "Commerce In Fact" test.

Under the Consent Orders, and as stated above, Appellant has not only preserved its right to independently seek arbitration, but has preserved its right to engage in discovery with Respondent and to receive the benefit of any discovered evidence without waiver or prejudice to its arbitration rights. At the time of CCMC's arbitration motion hearing on June 9, 2010, CCMC did not have the benefit of

Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce. The evidence that CCMC did present to Judge Buckner was essentially limited to the pleadings of Respondent. (Buckner Tr. at 15 ll. 15-16) (R. p. 389, lines 15-16). CCMC attempted to leverage the allegations in the Complaint in order to frame its argument that interstate commerce was affected by Respondent closing his practice in Georgia and then beginning employment at the Coastal Carolina Medical Center in South Carolina. (CCMC Mem. at 2 & 3) (R. pp. 81-82); (see Buckner Tr. at 7, 14-16) (R. pp. 381 and 388-390). Counsel for Respondent vigorously represented to Judge Buckner and to this Court of Appeals that the medical services performed by Respondent under the Agreement were confined to only South Carolina citizens and medical facilities in South Carolina. (Buckner Tr. at 12 ll. 15-22 & 14 ll. 23-25) (R. pp. 386, lines 15-22 and 388, lines 23-25); (Resp't Opp'n Mem. at 3) (R. p. 162).

The terms of the Agreement and the surrounding facts, as recited above, clearly evidence that performance of the Agreement involved and affected interstate commerce. The medical services provided by Respondent under the terms of the Agreement were not simply contained to only a local clinic, with privileges at only a local hospital, and treating only local patients. The required performance of the Agreement was not confined to the State of South Carolina, but in fact involved providing medical services in both South Carolina and Georgia. Unlike before Judge Buckner and previously this Court of Appeals, the Respondent has now *admitted* interstate commerce activity while performing duties under his Agreement. It is now

patently evident from the facts now exposed by Appellant that the medical services actually performed by Respondent tie to contractual obligations expressed in the Agreement which in fact involve and affect interstate commerce under the "commerce in fact" test. (See Goldsmith Tr. at 10, 12-13) (R. p. 913, lines 12-13); (Appellant's Arb. Mot. at 4) (R. p. 148); (Resp't Dep. at 115 ll. 3-7, 181 ll. 17-21, 269 ll. 20-24 & 373 ll. 1-2) (R. pp. 512, lines 3-7, 578, lines 17-21, 666, lines 20-24, and 770, lines 1-2).

However, Judge Goldsmith's Order failed to apply, or incorrectly applied, the "commerce in fact" test to the facts presented by Appellant at the September 9, 2013 hearing. The Order states the following:

- "I find that the facts and testimony from the [Respondent's] deposition argued by the [Appellant] herein are not substantially different than those before the court in the prior rulings." (Goldsmith Order at 7-8) (R. pp. 31-32).
- "The surrounding facts are not substantially different now than they were before the earlier courts." (Goldsmith Order at 8) (R. p. 32).
- Judge Goldsmith erroneously adopted the factual findings of Judge Buckner (as represented by Respondent) that the "employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care *to patients of Lowcountry South Carolina*." (Emphasis added) (Goldsmith Order at 4) (R. p. 28).

The Order fails to make a ruling, or correctly rule, that the deposition testimony of Respondent presented by Appellant implicates interstate commerce under the "commerce in fact" test, and therefore, triggers the FAA with respect to Respondent's claims against Appellant.

IV. THE CIRCUIT COURT HAS INCORRECTLY APPLIED THE "LAW OF THE CASE DOCTRINE".

Appellant did not litigate any of the facts and arbitration issues presented to Judge Buckner at the June 9, 2010 hearing or subsequently on CCMC's appeal. Additionally, Appellant has preserved its right to receive the benefit of Respondent's deposition testimony to prove that performance of the Agreement by Respondent in fact involved interstate commerce. The facts and circumstances in the record now are materially different than what was before Judge Buckner. Specifically, Respondent's sworn testimony at deposition contradicted the information presented to and relied upon by Judge Buckner and this Court of Appeals in previously denying arbitration. Respondent's argument and Judge Goldsmith's reliance on the "law of the case doctrine" does not apply to Appellant's arbitration motion.

A. The Law of the Case Doctrine.

Under the "law of the case doctrine," a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. Judy v. Martin, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009) (citing Bakala v. Bakala, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (1989). "[A]s a general rule, when an appellate Court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal, *provided the same facts and issues* which were determined in the previous appeal are involved in

the second appeal. *But if the facts are different*, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings, or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal; and the original proceedings are before the Court on a second appeal so far as it is necessary to determine any new points in controversy between the parties which were not terminated by the original decree." Cohen v. Standard Acc. Ins. Co., 203 S.C. 263, 274-275, 17 S.E.2d 230, 234 (1941) (emphasis added).

B. Findings of Judge Goldsmith in the Order.

The Order makes the following findings:

- "I find that the law of the case doctrine relative to the decision of the South Carolina Court of Appeals applies to these motions." (Goldsmith Order at 1) (R. p. 25).

- "Although the motion to compel was filed, argued, and appealed by CCMC, as acknowledged by counsel for [Appellant] the issues and argument are identical for [Appellant]." (Goldsmith Order at 6) (R. p. 30).

- "I find that the facts and testimony from the [Respondent's] deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings." (Goldsmith Order at 7-8) (R. pp. 31-32).

- "The Court of Appeals has decided that this employment agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. The surrounding facts are not substantially different now than they were before the earlier courts. The decision of the Court of the Appeals on the applicability of the FAA to this Agreement is the law of the case." (Goldsmith Order at 8) (R. p. 32).

C. **The facts and arguments presented by Appellant to Judge Goldsmith at the September 9, 2013 Hearing are different from the facts and arguments presented by CCMC to Judge Buckner at the June 9, 2010 Hearing.**

The facts and arguments presented by Appellant to Judge Goldsmith at the September 9, 2013 hearing are not identical (in fact they are materially different) to the facts and argument presented by CCMC to Judge Buckner at the June 2, 2010 hearing. CCMC's argument to Judge Buckner was that interstate commerce was affected by Respondent closing his practice in Georgia and then beginning employment at the Coastal Carolina Medical Center in South Carolina. The only evidence that CCMC presented to Judge Buckner to support this argument was the pleadings of Respondent. Counsel for Respondent inaccurately characterized the facts in his opposing argument to Judge Goldsmith that Appellant was attempting to make the same argument as CCMC as a basis to demonstrate interstate commerce activities. (Goldsmith Tr. at 14-15) (R. pp. 917-918). The Appellant made clear to Judge Goldsmith, as indicated in the above-quoted excerpts from the hearing, that Appellant was not resurrecting the Thornton argument advocated by CCMC to Judge Buckner, but rather was submitting sworn testimony of Respondent which demonstrated undisputable evidence that performance of the Agreement by Respondent *while employed with the Coastal Carolina Medical Center* was not confined to the State of South Carolina, but in fact involved providing medical services in both South Carolina and Georgia.

The factual record before Judge Buckner, which included the express representations of Respondent, was that performance of the Agreement purely

"involved employment of a Jasper County doctor to a Jasper County hospital ***to render services to Jasper County residents***." This factual theme was continuously urged by Respondent not only to Judge Buckner but also throughout CCMC's appeal. As a result, it is clear that the previous rulings on CCMC's motion for arbitration relied on these incorrect factual representations as proffered by Respondent. It is now beyond doubt that Respondent's medical services under the Agreement in fact involved and affected interstate activities. Tellingly, during the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent did not even argue against whether or not interstate commerce was implicated by the admissions of the Respondent in his deposition testimony. (See Goldsmith Tr. at 47 (R. p. 950) where counsel for Respondent states "Now, Your Honor, I'm not here today to argue whether or not interstate commerce was implicated.")

Further, the Complaint and the Respondent's interrogatory responses are different than those facts revealed during Respondent's deposition. Neither the Complaint nor Respondent's interrogatory responses state that Respondent was importing patients into South Carolina or that he performed medical services in Georgia as an obligation under the terms of the Agreement. Previously, CCMC pointed out to Judge Buckner that Respondent stated that "after the sale of the hospital to Tenet was announced in June. . . many Savannah doctors stopped referring patients to [Respondent] because of Tenet's horrible reputation." (Answer to CCMC Interrog. 7) (R. p. 983). It is clear from the record that CCMC did not have corroborating evidence to support its factual opinion surmised from Respondent's

interrogatory, moreover, this interrogatory reference is limited to doctor referrals rather than any factual representation about the state residency of any *patients* actually referred. Nevertheless, until the admissions in Respondent's deposition testimony were revealed, the record is clear that Respondent inaccurately and repeatedly emphasized the 'local' nature of the contract and that his medical performance under the Agreement was confined to only South Carolina. During the September 9, 2013 hearing before Judge Goldsmith, counsel for Respondent represented that "it's alleged in the complaint that [Respondent] had existing clients from Savannah." (Goldsmith Tr. at 17-18) (R. pp. 920-921). Nowhere in the Complaint is there any allegation that Respondent had any clients from Savannah. In fact, the Complaint alleges just the opposite, that "[Respondent] had to discontinue, close, and leave an established practice in Savannah, GA, where he had privileges at surgical hospitals." (Compl. ¶ 8) (R. p. 35).

Lastly, CCMC previously attempted to have Judge Buckner believe that Respondent was actually performing surgeries at Memorial Hospital in Savannah, Georgia. CCMC relied only on Respondent's statement that "the availability of equipment became so unreliable [at Coastal Carolina Medical Center] that [Respondent] started taking hi[s] complicated cases to Memorial." (Answer to CCMC Interrog. 9) (R. pp. 984-985). Again, it is clear from the record that CCMC did not have any corroborating evidence to support its factual opinion construed from Respondent's interrogatory response. The context in which this statement was alleged in Respondent's interrogatory response dealt with Defendant CCMC's alleged

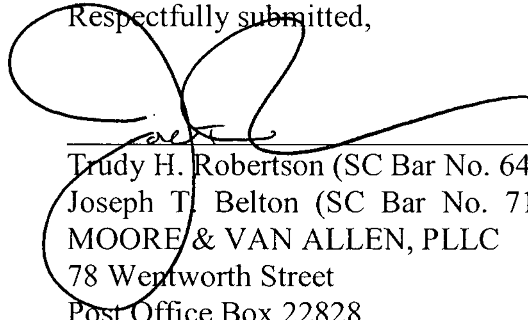
breach of the Agreement on account of its failure to provide Respondent certain equipment as allegedly required under the Agreement. As a result of this alleged breach, Respondent alleges that he was then forced to go to Memorial. This interrogatory response does not evidence that the Respondent *was actually obligated under the terms of the Agreement* to maintain medical staff privileges at Memorial or perform medical services for patients at Memorial.

The facts and circumstances in the record now are materially different than what was before Judge Buckner. The facts in the record now clearly evidence that performance of the Agreement by Respondent while employed with the Coastal Carolina Medical Center was not confined to the State of South Carolina, but in fact involved providing medical services in both South Carolina and Georgia. As a result, the medical services performed by Respondent under the terms of the Agreement *in fact* involved or affected interstate commerce, and therefore, triggered the FAA. For the foregoing reasons, Judge Goldsmith's reliance on the "law of the case doctrine" does not apply to Appellant's arbitration motion.

CONCLUSION

For the foregoing reasons, Appellant Lifepoint Hospitals, Inc., respectfully requests that this Court reverse the order of the trial court below; enter stay of that litigation pending arbitration; and order the parties to arbitrate their dispute in accordance with the Agreement's terms.

Respectfully submitted,



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April 14, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM JASPER COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP-27-0331

Phillip Flexon, M.D. .... Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc., and
Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is .... Appellant.

CERTIFICATE OF COUNSEL

This is to certify that this Final Brief complies with rule 211(b), SCACR,

April 14, 2014.

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April 14, 2014