STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Brooks P. Goldsmith, Circuit Court Judge

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SC Court of Appeals

Case No. 2009-CP27-331

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, ... Defendants

Of whom
Lifepoint Hospital, Inc., is, ... Appellant

RESPONDENT'S FINAL BRIEF

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CASES

In this appeal, Appellant Lifepoint Hospitals, Inc. seeks to relitigate issues which were specifically decided by this Court in an earlier appeal **in this case**. In *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C.83, 731 S.E.2d 1 (Ct. App. 2012) (rehearing denied August 29, 2012), this Court stated: "We agree with the trial court's finding that the [Employment] Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA [Federal Arbitration Act] did not apply to the Agreement." 399 S.C. at 89, 731 S.E.2d at 4. It is noteworthy that the Employment Agreement (hereinafter the Agreement) in question was drafted by Appellant. In the vast majority of its brief, Appellant seeks to argue that both the trial court and this Court in the earlier appeal were somehow wrong, and that the FAA applies to the Agreement. Without reconsidering issues which were decided by a different trial judge, and affirmed on appeal, Judge Goldsmith in the Order below ruled that the "surrounding facts are not substantially different now than they were before the earlier courts," (Order p. 8, R. p. 32, lines 11-12) and that the reported decision by this Court is the law of the case. There is clearly evidence reasonably supporting this factual finding. As such, it should be summarily affirmed.

STATEMENT OF THE CASE

This case was commenced with the filing of the Summons and Complaint on May 26, 2009. (R. pp. 34-42) As alleged in the Complaint, this matter arises from an Employment Agreement (the Agreement) between Respondent and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. (R. pp. 961-979) At the time the Agreement was negotiated and executed, CCMC was owned by Appellant Lifepoint.[1]

[1]It is alleged by the Respondent that, at the time the Agreement was being negotiated, Appellant was in active discussions with Defendant Tenet for the sale of the hospital, which

In response to the Complaint, Tenet Healthsystems, Inc., filed a Motion to Dismiss alleging that the Complaint failed to state a cause of action. After a hearing on November 30, 2009, the Court denied this Motion to Dismiss.

All parties answered, each asserting an affirmative defense that all of the causes of action were subject to an arbitration provision contained in the Agreement.[2] (R. pp. 961-979)

On October 6, 2009, Defendant Tenet[3] served Interrogatories and Requests for Production on the Respondent. (R. p. 26, lines 16-17) Similarly Appellant served Interrogatories and Requests for Production upon the Respondent on April 16, 2010. (R. p. 26, lines 17-18) Respondent responded to the discovery requests of CCMC on April 19, 2010. Appellant responded to Respondent's initial discovery requests on October 30, 2009, and on November 13, 2009.[4]

Appellant failed to disclose to the Respondent. That sale occurred in June 2007, at the very time that Respondent began his employment. Respondent alleges he would not have considered any employment relationship with Tenet, as Tenet had a very negative reputation to Respondent as a hospital owner. In July 2007, Tenet presented Respondent with an Amendment to and Assignment of Physician Employment Agreement (Assignment, R. p. 55) which purported to assign the Agreement to Tenet. Respondent refused to sign the Assignment, and in August 2008, delivered a formal notice of termination for cause, pursuant to the Agreement. This action followed. (Order, R. p. 26, lines 2-12)

[2]It is noteworthy that there is only one Employment Agreement in this case. (Order p. 6, R. p. 30, line 6).

[3]There has been one collective response by Defendants PHC-Jasper, Inc., Coastal Carolina Medical Center, Inc., and Tenet Healthsystems. They are collectively referred to herein as "Tenet." Tenet has also responded for CCMC.

[4]As noted by the Lower Court in the Order under appeal, "Nowhere in any of these discovery requests, or in any correspondence or email communications before the court was there any mention that these discovery requests [or the responses] were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration." (Order p. 2, R. p. 26, lines 18-21)

On October 21, 2009, Tenet (designated as CCMC) filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. (R. p. 79) In support of this Motion, CCMC submitted a Memorandum in Support. (R. pp. 80-83)[5]

A hearing on CCMC's Motion to Compel Arbitration was held before Judge Perry Buckner over seven (7) months later on June 9, 2010.[6] At the time of the June 9, 2010 hearing, Appellant had not filed a motion to compel arbitration. However, counsel for Appellant acknowledged before Judge Buckner that any such motion would be identical to that of CCMC:

> MS. ROBERTSON: Judge, if I may; 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, but...
>
> THE 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. But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but....
>
> MS. ROBERTSON: I think that likely it is. So I will make it.

(Order p. 3, R. p. 27)

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[5]In its Order, the Lower Court stated, "Nowhere in this Memorandum is there any mention of the desire or attempt to take the deposition of the Plaintiff, generally or with reservation of any rights. Prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt whatsoever to take the deposition of the Plaintiff." (Order p. 3, R. p. 27, lines 5-8)

[6]In its Order, the Lower Court stated, "The parties submitted the transcript of this earlier hearing in connection with the present motions. It is noteworthy that, in the argument before Judge Buckner, counsel for CCMC made no mention that he needed, or wanted, to take the deposition of the Plaintiff, or that he had made any attempt to take the Plaintiff's deposition prior to the hearing." (Order p.3, R. p. 27, lines 9-13)

On June 16, 2010, two weeks before the ruling by Judge Buckner on the identical motion by CCMC, Appellant filed its Motion to Compel Arbitration (R. pp. 90-93), which stated, in part, as follows:

> This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts 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 Coastal Carolina Medical Center, Inc.... All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.[7]

(R. pp. 90-91)

By Order dated June 30, 2010, Judge Buckner denied the motion by Defendant CCMC to compel arbitration (R. pp. 7-12), stating in part as follows:

> There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton* [*Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)]. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. 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.

(R. pp. 11-12)

On July 29, 2010, Defendant CCMC filed its Notice of Appeal to the South Carolina Court of Appeals. (R. p. 28, lines 27-28) By reported decision dated March 7, 2012, (R. p. 28, lines 28-29) the Court of Appeals affirmed Judge Buckner's Order, stating in part as

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[7]In its Order, the Lower Court stated: "As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, 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." (Order p. 4, R. p. 28, lines 13-15)

follows:

> We agree with the trial court that the facts of this case are more akin to those in *Tahiri*. [*Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007)]. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time...." **We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.** *See Thornton*, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA."). *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). (emphasis supplied)

(R. p. 29, lines 1-13)

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals (R. p. 29, lines 14-16) which states, in part, as follows:

> In his Complaint, Flexon alleges that, "In order to sign Exhibit 1 [the employment agreement]," he had to "discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals." (R. at 9) The Complaint itself, therefore alleges substantial interstate activity as a consequence of the Agreement. Flexon alleges he lost referrals from Savannah doctors several months after he joined CCMC; if this is true, Flexon was receiving referrals across state lines in support of his practice at CCMC. (R. at 81) ("[A]fter the sale of the hospital to Tenet was announced in June...many Savannah doctors stopped referring patients" to Flexon.) During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83)("The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial."). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon's employment in South Carolina implicate interstate commerce. These facts contradict the Court's understanding that Flexon's employment was purely local in nature.[8] (R. p. 29)

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[8]In its Order, the Lower Court stated, "There is no mention that the Defendants' motions, or the court's consideration, was in any way hampered or impacted by the failure

By Order filed July 23, 2012, the Court of Appeals ruled "the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing." (R. p. 30, lines 1-3)

On August 29, 2012, the Court of Appeals issued its Remittitur of this case to the Jasper Court of Common Pleas. (R. p. 30, lines 4-5)

On April 30, 2013, Defendants took the deposition of Respondent. (R. p. 30, lines 10-11) On May 31, 2013, Appellant filed its Renewed Motion to Compel Arbitration and Stay Action, (R. pp. 145-157), citing certain statements in Respondent's deposition.[9]

A hearing was held before the Honorable Brooks Goldsmith on September 9, 2013. (R. p. 25, line 1). By Order dated September 24, 2013, Judge Goldsmith, denied Appellant's Renewed Motion to Compel Arbitration[10], stating as follows:

> Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff's deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings. Further, if the Defendants believe that the Plaintiff'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

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or inability to take the deposition of the Plaintiff." (R. p. 29, lines 35-36)

[9]In its Order, the Lower Court stated: "Lifepoint now points to statements made in the Plaintiff's deposition which was taken on April 30, 2013. Specifically, Lifepoint cites to the following testimony:

> [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 [Plaintiff's Depo. p. 269]. [The Plaintiff stated that he had] "plenty of patients coming from Georgia. [Plaintiff's Depo. p. 373] Lifepoint's Reply Memorandum at 4.

(Order p.6, R. p. 30, lines 10-16)

[10]In addition to Appellant's Renewed Motion to Compel Arbitration, CCMC filed a Motion for Relief Pursuant to Rule 60(b). In his Order, Judge Goldsmith also denied CCMC's Motion. CCMC has not appealed this ruling.

when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. 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.

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." *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). The "surrounding facts" are not substantially different now than they were before the earlier courts. The decision of the Court of Appeals on the applicability of the FAA to this Agreement is the law of the case. Therefore CCMC's motion for relief from judgment under SCRCP60 is denied as is Lifepoint's Motion to Compel Arbitration.

(R. pp. 31-32)

Appellant timely noticed its appeal of Judge Goldsmith's Order.

STATEMENT OF FACTS

The underlying facts of this case are succinctly stated by the Court of Appeals in its earlier decision:

Flexon is a resident of Hardeeville, South Carolina, and is licensed to practice medicine as an ear nose, and throat specialist in South Carolina and Georgia. Coastal is a South Carolina corporation with its principal place of business in Jasper County, and it is wholly owned by Tenet, a Delaware corporation. PHC is a South Carolina corporation doing business as Coastal Carolina Medical Center in Jasper County, and it is the wholly-owned subsidiary of Lifepoint, a Tennessee corporation.

On December 18, 2006, Flexon entered into the Physician Employment Agreement (the Agreement) with PHC. The Agreement provided that Flexon would practice for five years "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina... and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time ...." Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC. The Agreement further provided:

13.4 Governing Law and Venue: This Agreement shall be

> governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby (sic) consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.
>
> 13.5 Arbitration: Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any 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 and arbitration..., and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

Flexon alleges that at the time of negotiating the Agreement, PHC was in negotiations to sell its assets, including the hospital, Coastal Carolina Medical Center, to Tenet. Upon Flexon's commencement of practice at Coastal Carolina Medical Center in March of 2007, PHC allegedly refused to honor commitments it made to Flexon regarding equipment purchases and the recruitment of an audiologist. In June 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Tenet.

In July 2007, Tenet presented Flexon with an Amendment to and Assignment of Physician Employment Agreement (the Amendment), which purported to assign the Agreement to Tenet. Flexon refused to sign the Amendment. In August 2008, he allegedly delivered a formal notice of termination for cause, pursuant to the Agreement. Flexon received a letter, in May 2009, claiming he owed Tenet more than $725,000, and he must cease his practice of medicine in Savannah, Georgia. Flexon filed this action. *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is subject to de novo review.

However, the trial court's findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

LAW/ANALYSIS

Although Appellant devoted much of its argument before the Lower Court to the issue of whether the Agreement in question is subject to mandatory arbitration under the FAA, and similarly does so in this appeal, the Lower Court did not address this issue in its Order denying Appellant's Motion to Compel Arbitration, or in the Order denying Appellant's Motion for Reconsideration. Rather, the Lower Court instead correctly ruled that this substantive decision had earlier been explicitly made by another trial court, and affirmed by this Court, and hence was the law of the case. (R. p. 32, lines 8-15) There is ample factual support for this ruling, which should therefore be affirmed.

As our Supreme Court has stated on numerous occasions:

> The doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case. 5 Am.Jur.2d *Appellate Review* §605 (1995). The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case. *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 257, 98 S.E.2d 798, 800 (1957). *Ross v. MUSC*, 328 S.C. 51, 63, 492 S.E.2d 62, 68 (1997).

Similarly:

> 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. C.J.S. *Appeal & Error* §991 (2008). *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).

As noted by the Lower Court, "Lifepoint argues that the 'law of the case doctrine'

does not apply in this case because the facts established by the quoted portions of the Plaintiff's deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals...." (R. p. 31, lines 11-14) In their Brief, Appellant argues that the facts established in Respondent's deposition are so different from those before the court in the earlier appeal that "the principles of law announced on the first appeal are not applicable." (App. Br. at 28) Respondent's deposition was argued by Appellant at length before the Lower Court in its Supporting Memorandum and in oral argument. After over an hour of oral argument, the Lower Court ruled:

> Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff's deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings.

(R. pp. 31-32)

This factual finding is entitled to great deference by a reviewing court.

As noted in the Lower Court's Order, Appellant cited and relied upon the case of *Nelson v. Charleston & Western Carolina Railway Co*, 231 S.C. 351, 98 S.E.2d 798 (1957) for the proposition that the law of the case doctrine does not apply because "the facts established by the quoted portions of the Plaintiff's deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals." (Order p. 7, R. p. 31, lines 11-14) However, *Nelson* supports the Lower Court's Order, and Respondent's position herein:

> Of course, the doctrine of "the law of the case" has no application where the facts relating to the question decided are substantially different on a second appeal. In order to escape the application of the doctrine, however, there must be a material change in the evidence. Additional evidence cumulative in nature will not take the case out of the rule and constitute a material change where evidence of the same class and character was considered on the former

appeal.

Nelson, supra, 231 S.C. at 357, 98 S.E.2d at 800.

Appellant contends that Respondent's deposition testimony that he was performing surgeries in Savannah, and also maintained staff privileges at Savannah Memorial Hospital, while he was working for Appellant in Hardeeville, constituted materially different facts sufficient to take the case out of the law of the case doctrine. However, as noted in the Lower Court's Order, in its Petition for Rehearing dated March 19, 2012 (relative to the prior ruling), CCMC argued in part as follows:

> During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83)("The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial."). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon's employment in South Carolina implicate interstate commerce.

(Order p. 5, R. p. 29, lines 26-33)

Hence, not only was there more than adequate factual support for the Lower Court's ruling, the deposition testimony currently cited by Appellant was merely cumulative in nature to what the trial court and appellate court had before it at the prior ruling.

Finally, there is no showing whatsoever why Defendants did not take a limited deposition of Respondent in the seven months before the courts' earlier consideration of CCMC's Motion to Compel Arbitration, if they felt a full evidentiary record was necessary for this issue. Indeed, the Lower Court ruled as follows:

> If the Defendants believe that the Plaintiff'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 Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. **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. (Emphasis added.)
(Order p. 8, R. p. 32, lines 1-7)

CONCLUSION

In *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012), the Court of Appeals stated explicitly: "We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, **the FAA did not apply to the Agreement**." 399 S.C. at 89, 731 S.E.2d at 4. (emphasis supplied). There is only one Agreement at issue in this case. Having reviewed Respondent's deposition and other written submissions, and having heard extensive arguments from counsel, the Lower Court ruled that the law-of-the-case doctrine prohibits Appellant from relitigating that the FAA applies to the Agreement. This factual finding should be affirmed.

Respectfully submitted,
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Dated: April 11, 2014

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules. The undersigned further certifies that this document is in compliance with the South Carolina Supreme Court's Order, of August 13, 2007, regarding the redaction or sealing of personal data identifiers and other sensitive information.

_____
William B. Harvey, III