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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Case No. 2023-CP-10-01512
Appellate Case No. 2023-001494

Charleston SC Property Holdings, LLC, Hanahan SC Property Holdings, LLC, and Michael Flanagan, Receiver……..Respondents,

v.

Rittenberg OP, LLC, Hanahan OP, LLC, Goldner Capital Management, LLC, SC Two OP Holdings, LLC, and Samuel Goldner……..Appellants.

INITIAL BRIEF OF THE RESPONDENT MICHAEL FLANAGAN, RECEIVER

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September 12, 2024

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1. Did the trial court commit an error of law by authorizing the Receiver's termination of the Master Lease prior to a trial and determination of all of the merits of the parties' claims and defenses?

2. Did the trial court abuse its discretion by entering the Lease Termination Order without specifically (1) comparing the interests of the parties and whether the requested action would preserve the status quo or cause substantial injury, (2) examining the merits of the underlying claims, and (3) assessing the time in the receivership's life at which the Lease Termination Motion was filed?

3. Should this appeal be dismissed because it involves an appeal of a non-final, interlocutory order that does not fit within any of the exceptions set forth in S.C. Code Ann. § 14-3-330?

4. Should this appeal be dismissed because intervening events since entry of the Lease Termination Order have rendered the appeal moot?

STATEMENT OF THE CASE

By and through this Appeal, Appellants seek to overturn the trial court's order entered after an evidentiary hearing that authorized a duly appointed state court receiver to, among other things, terminate a non-performing commercial lease related to two skilled care nursing facilities that collectively housed 173 residents who required varying levels of ongoing skilled care.

The underlying litigation involving the commercial lease was commenced on March 28, 2023 in Charleston County when Plaintiffs Charleston SC Property Holdings, LLC and Hanahan SC Property Holdings, LLC (collectively, the "Plaintiffs") as lessors under a lease of two skilled care facilities located in Charleston and Berkeley Counties filed their Summons and Verified Complaint against Rittenberg OP LLC ("Rittenberg", as lessee), Hanahan OP LLC ("Hanahan", as lessee), Goldner Capital Management, LLC, SC Two OP Holdings LLC, and Samuel Goldner (collectively, the "Defendants") which was assigned Case No. 2023-CP-10-01512. The Complaint asserted causes of action against the Defendants for, among other things, breaches of contract related to the non-payment of rent owed under the lease and included a cause of action seeking the appointment of a receiver. Contemporaneously with the filing of Plaintiffs' Summons and Verified Complaint, the Plaintiffs also filed a Motion for Appointment of a Receiver.

A contested hearing on the Motion for Appointment of Receiver was held after which, on April 14, 2023, the trial court entered its Order Appointing Receiver (the "Order Appointing Receiver"). Pursuant to the Order Appointing Receiver, Respondent Michael Flanagan, Receiver (the "Receiver") was appointed effective April 17, 2023 (the "Effective Date"). Shortly after the Order Appointing Receiver was entered, the Appellants filed what was styled as "Defendants' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond." On April 27, 2023, the trial court entered its Form 4 Order denying Defendants' Rule 59(e) Motion for Reconsideration, Request for Stay Pursuant to Rule 62(a), and Offer of Bond (the

"First Order Denying Defendants' Rule 59(e) Motion"). The First Order Denying Defendants' Rule 59(e) Motion did not alter the Order Appointing Receiver in any way. Thereafter, Appellants filed what was styled as "Defendants' Rule 59(e) Motion for Reconsideration of Denial of Request for Stay and Offer of Bond" (the "Defendants' Second Rule 59(e) Motion"). Defendants' Second Rule 59(e) Motion did not seek reconsideration of the Order Appointing Receiver.[1]

After the Effective Date, the Receiver worked to stabilize operations at the two skilled care facilities. However, the rent owed under the lease was not being paid and continued to accrue, and the facilities failed to generate sufficient revenue to meet working capital requirements.

On August 3, 2023, the Receiver filed and served his Motion to Approve Entry into Operations Transfer Agreement and Lease Termination Agreement (the "Lease Termination Motion") which he sought to have heard on an expedited basis. The trial court scheduled a hearing on the Lease Termination Motion for August 23, 2023 (the "August 2023 Hearing"). Prior to the August 2023 Hearing, the Receiver filed his Witness and Exhibit List along with the accompanying Exhibits with the Court and simultaneously served copies of the Exhibits on the Appellants.

At the August 2023 Hearing, the Receiver submitted a number of documents into evidence without objection in support of the relief requested in the Lease Termination Motion including, but not limited to, the following: (1) the Receiver's Affidavit in Support of the Lease Termination Motion, (2) Schedule of Lease Payments Past Due Through August 2023, (3) the Receiver's Initial Report, and (4) the Schedule of Landlord Protective Advances Since the Effective Date. The

[1] Defendants' Second Rule 59(e) Motion was not forwarded to the trial court for review pursuant to Rule 59(g)'s requirements until November 17, 2023 (*i.e.*, after the Notice of Appeal was filed that initiated the instant Appeal). The trial court entered its order denying Defendants' Second Rule 59(e) Motion on March 28, 2024 (the "Second Order Denying Defendants' Rule 59(e) Motion"), and the Second Order Denying Defendants' Rule 59(e) Motion is now subject to a separate appeal filed by the Defendants (*i.e.*, Appellate Case No. 2024-000723).

Appellants did not provide any evidence to refute or contravene the evidence presented to the Court by the Receiver.

After the August 2023 Hearing concluded, the Court entered its Order Approving Receiver's Entry into Operations Transfer Agreement and Lease Termination Agreement (the "Lease Termination Order"). On August 30, 2023, the Appellants filed what was styled as "Defendants' Rule 59(e) Motion for Reconsideration of Order Granting Receiver's Motion to Enter Into OTA and LTA or in the Alternative for Stay Pursuant to Rule 62(a)" ("Defendants' Motion to Reconsider the Lease Termination Order").

Following entry of the Lease Termination Order, the Receiver signed, entered into and delivered the Operations Transfer Agreements and Lease Termination Agreement which went effective at 12:01 a.m. on September 1, 2023. On September 6, 2023, the Receiver filed his Report of Consummation of Operations Transfer Agreements and Lease Termination Agreement with the Court. On September 8, 2023, the trial court entered its Order Denying Defendants' Motion to Reconsider the Lease Termination Order (the "Order Denying Defendants' Motion to Reconsider the Lease Termination Order"). Thereafter, the Appellants filed their Notice of Appeal (the "First Notice of Appeal") with this Court on September 19, 2023.

Pursuant to the First Notice of Appeal, the Appellants appealed, among other things, the Order Appointing Receiver and Lease Termination Order. However, on November 17, 2023, Plaintiffs (as co-Respondents in the instant Appeal) filed their Motion to Dismiss Part of Appeal pursuant to which they sought to have Appellants' appeal of the Order Appointing Receiver and First Order Denying Defendants' Rule 59(e) Motion dismissed as untimely. On January 23, 2024, this Court entered its order dismissing Appellants' appeal of the Order Appointing Receiver and First Order Denying Defendants' Rule 59(e) Motion (the "Partial Dismissal Order"). As a result

of the Partial Dismissal Order, the only orders subject to this Appeal are the Lease Termination Order and the Order Denying Defendants' Motion to Reconsider the Lease Termination Order.

STATEMENT OF THE FACTS

Charleston SC Property Holdings, LLC (a co-Plaintiff in the trial court action and a co-Respondent to this Appeal) owns real property located at 1137 Sam Rittenberg Boulevard, Charleston, South Carolina 29407 upon which a skilled nursing facility is located (the "Charleston Facility"). *See Affidavit of Michael Flanagan in Support of Receiver's Motion to Approve Entry into Operations Transfer Agreement and Lease Termination Agreement* (the "Flanagan Affidavit"), ¶ 4. Hanahan SC Property Holdings, LLC (the other co-Plaintiff in the trial court action and a Co-Respondent to this Appeal) owns real property located at 1800 Eagle Landing Boulevard, Hanahan, South Carolina 29410 upon which a skilled nursing facility is located (the "Hanahan Facility" which, together with the Charleston Facility, shall be referred to collectively as the "Facilities"). *See Flanagan Affidavit*, ¶ 6.

Prior to the Effective Date, Plaintiffs (as lessors) entered into that certain Master Lease Agreement dated June 14, 2021 with Rittenberg and Hanahan (collectively, the "Lessees") pursuant to which the Lessees leased the Facilities as well as the furnishings, furniture, equipment and fixtures located at the Facilities (the "Master Lease"). *See Flanagan Affidavit*, ¶ 8. Rittenberg operated the Charleston Facility and Hanahan operated the Hanahan Facility. *See Flanagan Affidavit*, ¶ 9.

The Charleston Facility was a skilled nursing facility with 125 licensed beds (83 of which were occupied by residents who received varying levels of ongoing care) and had approximately 130 employees, and the Hanahan Facility was a skilled nursing facility with 135 licensed beds (90 of which were occupied by residents who received varying levels of ongoing care) and had approximately 130 employees. *See Flanagan Affidavit*, ¶¶ 5, 7.

On April 14, 2023, in response to a motion filed by the Plaintiffs and following a hearing thereon, Circuit Court Judge George M. McFaddin, Jr. entered the Order Appointing Receiver pursuant to which the Receiver was appointed for Rittenberg and Hanahan, the Facilities, and Rittenberg's and Hanahan's business operations, assets, and property of whatever nature (collectively, the "Receivership Estate") as of the Effective Date and continuing until further order of the trial court. *See Order Appointing Receiver*, p. 4; *Flanagan Affidavit*, ¶ 3.

Appellants initially sought to appeal the Order Appointing Receiver by and through this Appeal. *See First Notice of Appeal*. Although Appellants' Initial Brief directs this Court to issues and concerns the Appellants purportedly have with the Order Appointing Receiver, the validity of the Order Appointing Receiver is not at issue in this Appeal.[2] Appellants' appeal of the Order Appointing Receiver was not timely and the Court entered an Order on January 23, 2024 dismissing Appellants' appeal of the Order Appointing Receiver on jurisdictional grounds (the "Partial Dismissal Order"). *See* Charleston Property Holdings, LLC et al. v. Rittenberg OP LLC, et al., __- OR-__ (S.C. Ct. App. filed Jan. 23, 2024). The Court's ruling in the Partial Dismissal Order is now the law of the case. *See Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 358, 166 S.E.2d 297, 298 (1969) ("[A] decision of this court on a former appeal is the law of the case."); *Robert E. Lee & Co. v. Comm'n of Public Works*, 250 S.C. 394, 399, 158 S.E.2d 185, 188 (1967).

The Order Appointing Receiver noted that Rittenberg and Hanahan "failed to meet their obligations under the Lease" and that "[a] receiver is necessary to protect both the residents of the Facilities and the rights of the Plaintiffs because the Facilities…[were being] subjected to or are in

[2] The Receiver also directs the Court's attention to Appellants' Notice of Appeal dated April 29, 2024 which commenced Appellate Case No. 2024-000723 (the "2024 Appeal"). The Appellants are apparently seeking to appeal the Order Appointing Receiver again by and through the 2024 Appeal.

danger of impairment, waste, loss, substantial diminution in value, misappropriation, and dissipation, and a further delay would cause an injustice to the Plaintiffs and the residents." *Order Appointing Receiver,* pp. 2-3. Furthermore, the Order Appointing Receiver noted that Rittenberg and Hanahan appeared to be insolvent or in imminent danger of insolvency and the trial court concluded appointment of a receiver was appropriate pursuant to both S.C. Code Ann. § 15-65-10(1) and (4). *See Order Appointing Receiver,* p.3.

The Order Appointing Receiver authorized the Receiver to, among other things, "perform all services and take all actions necessary or advisable to oversee, carry on, manage, care for, maintain,…protect, and preserve" the Receivership Estate without further order of the trial court including, but not limited to, "tak[ing] immediate possession of, custody of, and control over the Facilities and all of the Personal Property and Operations and all other property and assets of Lessees." *Order Appointing Receiver*, p.4. The Receiver was also directed to "take full possession of the Facilities" and to "retain custody of same until further order." *Order Appointing Receiver,* p.7. Significantly, the Order Appointing Receiver also granted the Receiver "full authority and discretion to handle all tenancy issues, including, without limitation, *terminating leases*…." *Order Appointing Receiver,* p.11 (emphasis added).

Shortly after his appointment, the Receiver learned that Rittenberg and Hanahan were significantly in arrears with regard to the payment of their unsecured creditors as of the Effective Date. *See Flanagan Affidavit*, ¶ 12; *Receiver's First Report*, p.2 (noting, "Both Facilities are significantly in arrears with regard to the payment of unsecured creditors…. Based on an accounts payable report for the Facilities provided to the Receiver on April 19, 2023, there is in excess of $6,000,000 in unpaid accounts payable, including in excess of $4,000,000 in unpaid accounts payable that are 121+ days old or older.").

In addition, the Receiver discovered that in the months preceding the Effective Date, Rittenberg and Hanahan's workers' compensation insurance and professional and general liability insurance policies covering the Facilities had been cancelled due to nonpayment. *See Flanagan Affidavit*, ¶ 11.

Significantly, the Receiver also learned upon his appointment that the Facilities faced a number of compliance and other issues noted and raised by the Centers for Medicare and Medicaid Services ("CMS") and/or the South Carolina Department of Health & Environmental Control ("DHEC") which were flagged and detailed in the Receiver's First Report. *See Receiver's First Report*, p.2 (noting, "[t]here were four (4) Immediate Jeopardy…tags which had been issued on or about April 13, 2023 for the failure to timely pay certain critical vendors which remained unabated…."); *Flanagan Affidavit*, ¶ 13.

At the time of the Receiver's appointment, the Receivership Estate lacked sufficient funds to meet the Facilities' working capital requirements. *See Flanagan Affidavit*, ¶ 14. Consequently, as authorized by the Order Appointing Receiver, Plaintiffs initially advanced $375,000 on April 21, 2023 to fund the Facilities' working capital requirements and to assist with funding the costs and expenses of the Receivership Estate. *See Flanagan Affidavit*, ¶ 14. However, by the time the August 2023 Hearing occurred, the amount that the Receiver requested from Plaintiffs and that Plaintiffs advanced to fund the Facilities' operating shortfalls (which excluded additional amounts owed on account of monthly rent payments) and pay expenses of the Receivership Estate had swelled to $1,508,000. *See Schedule of Landlord Protective Advances*.

Furthermore, since the Plaintiffs' Complaint was filed, the Lessees failed to make any additional rent payments owed under the Master Lease and the Receiver was unable to make monthly rent payments to the Plaintiffs due to the Facilities' financial performance. *See Flanagan*

Affidavit, ¶ 16. The past due rent owed to Plaintiffs under the Master Lease through August 2023 totaled $4,055,743.94 (*i.e.*, more than $1.8 million above what had been owed as of March 28, 2023 – when the Complaint was filed). *See Schedule of Lease Payments Due Through August 2023*; *August 2023 Hearing Transcript*, p. 6, Lines 9-11 and p. 11, Lines 2-7; *Flanagan Affidavit*, ¶¶ 15-16. Moreover, the past due rent amount owed to Plaintiffs under the Master Lease is exclusive of the amounts owed to Plaintiffs as a result of their having to make protective advances to the Receivership Estate. *See Flanagan Affidavit*, ¶ 17; *August 2023 Hearing Transcript*, p. 6; Lines 12-21.

Notwithstanding the Receiver's efforts, at the time of the August 2023 Hearing, the Facilities had been and were continuing to operate financially at a loss. *See Flanagan Affidavit*, ¶ 18; *August 2023 Hearing Transcript*, p. 6, Lines 9-21.

In light of the Receiver's concerns regarding (i) the Receivership Estate's deteriorating financial condition, (ii) the care and safety of the Facilities' 173 residents, and (iii) preservation of the Receivership Estate and the need to prevent the Receivership Estate from incurring additional operating losses, the Receiver exercised his judgment and determined it was in the best interests of the Receivership Estate to terminate the Master Lease and transfer operations of the Facilities to a new tenant and operator. *See Flanagan Affidavit*, ¶ 19-28, ¶ 30.

The Plaintiffs identified Ensign Group, Inc., or its affiliate ("New Operator"), as a replacement tenant and operator for the Facilities. *See Flanagan Affidavit*, ¶ 22. To facilitate termination of the Master Lease and transfer of operations of the Facilities to the New Operator, the Receiver was required to sign and deliver a Lease Termination Agreement ("LTA") and Operations Transfer Agreement ("OTA") prior to August 31, 2023 or as soon thereafter as practicable. *See Flanagan Affidavit*, ¶¶ 23 – 24, 26, 28.

The Order Appointing Receiver expressly authorized the Receiver to terminate leases and directed the Receiver to "take full possession of the Facilities" and to "retain custody of same until further order." *Order Appointing Receiver*, p.7, 11. The Order Appointing Receiver also authorized the Receiver to "at any time upon notice to all parties, apply to th[e trial] court for further or other instructions or powers, whenever such instructions or additional powers shall be deemed necessary to enable the Receiver to perform properly and legally the duties of the receivership…." *Order Appointing Receiver*, p. 15.

Consequently, the Receiver filed and served his Motion to Approve Entry into Operations Transfer Agreement and Lease Termination Agreement (the "Lease Termination Motion") on August 3, 2023, which the Receiver sought to have heard on an expedited basis. *See Lease Termination Motion*, p.1; *Notice of Electronic Filing* 08-03-2023 @ 02:00:16 PM. The Trial Court then scheduled the August 2023 Hearing, formal notice of which was filed and served on August 16, 2023 (the "Notice of Hearing"). *See Notice of Hearing*, p.1; *Notice of Electronic Filing* 08-16-2023 @ 02:05:22 PM. The Notice of Hearing provided parties with notice of the August 2023 Hearing and directed that "[a]ny response or objection to the [Lease Termination] Motion should be e-filed with the Court and served on counsel for [the Receiver]…on or before August 21, 2023." *Notice of Hearing*, p.1.[3]

The Receiver believed that entry into the LTA to terminate the Master Lease was customary in transactions of the type at issue, was expressly authorized by the Order Appointing Receiver, and was consistent with the parties' existing agreements. *See Flanagan Affidavit*, ¶¶ 20, 31 (noting, "I believe entry into the LTA to terminate the Master Lease is customary in transactions

[3] On August 22, 2023 an Amended Notice of Hearing was prepared and filed to note a time change for the August 2023 Hearing directed by the Court (*i.e.*, from 9:30 a.m. to 1:30 p.m.).

of this nature and is authorized by the Order Appointing Receiver."). The Receiver also believed that the OTA contained commercially reasonable terms which were similar to those seen in typical agreements for the transition of skilled nursing facilities under the control of a receiver. *See Flanagan Affidavit*, ¶ 31.

Furthermore, the evidence also indicated that terminating the Master Lease and promptly transitioning operations of the Facilities to the New Operator would (1) prevent the Receivership Estate from incurring additional, substantial operating losses which, notwithstanding the Receiver's best efforts, continued since the Effective Date, (2) mitigate the Plaintiffs' claims against the Defendants for future rents and other damages, (3) enable the Facilities' existing 173 residents to remain and continue to receive skilled care at the Facilities, and (4) provide an opportunity for the employees working at the Facilities who cared for the residents to continue to be employed and provide care to the Facilities' residents as employees of the New Operator. *See Flanagan Affidavit*, ¶ 33; *August 2023 Hearing Transcript*, p. 6, Lines 1-8.

Notwithstanding having twenty (20) days' notice of the relief sought in the Lease Termination Motion, the Appellants did not file a formal written objection to the Lease Termination Motion. *See Order Denying Defendants' Motion to Reconsider or in the Alternative Stay*, p.1 (noting, "Despite several requests prior to the hearing as to whether the matter was contested, no party stated opposition to the motion nor did anyone other than the moving party submit any briefs or memo before or during the hearing. At the hearing the Defendants for the first-time voiced opposition."). In addition, the Appellants did not object to the admission of any of the Receiver's Exhibits into evidence at the August 2023 Hearing. *See August 2023 Hearing Transcript*, p. 4, Lines 23-25; p. 5, Lines 1-4, 16-17, and 23-24; p. 15, Lines 1-8. Furthermore, the Appellants did not provide any testimony, submit any exhibits into evidence, or provide any

other evidentiary support to refute the evidence presented to the trial court by the Receiver at the August 2023 Hearing. Instead, the Appellants only voiced opposition to the Receiver's requested relief at the August 2023 Hearing noting that "[a]t a later date we believe that it [*i.e.*, the Receiver's requested relief] may be appropriate, but at this time we do believe it's premature." *See August 2023 Hearing Transcript*, p. 5, Lines 25, p. 6, Line 1; p. 7, Lines 23-25; p. 9, Lines 17-18.

Following the August 2023 Hearing, the trial court entered the Lease Termination Order, and for the reasons set forth in the Lease Termination Motion and on the record at the August 2023 Hearing, termination of the Master Lease and transfer of operations of the Facilities to the New Operator went effective at 12:01 a.m. on September 1, 2023. *See Report of Consummation of Operations Transfer Agreements and Lease Termination Agreement*, pp. 2-3.

STANDARD OF REVIEW

The appointment of a receiver lies exclusively in equity. *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887). In addition, an action to terminate the remainder of a lease is in equity. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 366 (1994). The South Carolina Supreme Court has held that "it may now be regarded as settled that this [C]ourt may reverse a finding of fact by the circuit court [in a case of equity] when the appellant satisfies this [C]ourt that the preponderance of the evidence is against the finding of the circuit court." *Finley v. Cartwright*, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899); *see also Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d. 773, 775 (1976) ("In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence."). However, "this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of witnesses. Moreover,

the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *U.S. Bank Trust National Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E. 2d 199, 204 (Ct. App. 2008) (citations omitted).

ARGUMENT

The Court must affirm the trial court's Lease Termination Order entered on August 23, 2023, or alternatively dismiss the Appeal, for the following reasons:

I. The Trial Court Did Not Commit an Error of Law by Authorizing the Receiver's Termination of the Master Lease Prior to a Trial and Determination of all of the Merits of the Parties' Claims and Defenses.

At the August 2023 Hearing, Appellants conceded that the relief the Receiver sought in the Lease Termination Motion might be proper at some point but first wanted "the rights of the parties being determined [and] the merits of this case being heard" prior to the Court ruling on it. *See August 2023 Hearing Transcript*, p. 8, Lines 21-24. The onerous requirement that Appellants ask this Court to impose is inconsistent with the law which recognizes that a court "has the full power and necessary authority to order the receiver to dispose of…property in such manner as may seem in the mature judgment of the Court to be for the best interest of the parties concerned." *Hannon v. Mechanics Bldg. & Loan Ass'n*, 177 S.C. 153, 160-61, 180 S.E. 873, 876 (1935). Moreover, Appellants' argument directly contravenes the line of cases that note that "the advice of the receivers and their opinions in regard to the value of the property, the manner, time, and place of disposing it, and in regard to its care and custody, are entitled to great respect and weight." *Id.*

As noted by the South Carolina Supreme Court, "A receiver represents the court appointing him; he is an officer of the Court and is the agency through which the Court acts. As he has no power other than that given him by the order of appointment, his authority is derived solely from

the court. He is subject only to the Court's direction." *Ex parte Cusaac*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964). A "receiver has only such general powers, rights, and duties as may be conferred upon him by the rules of Court…or by the statute law of the state; or more expressly by the special orders and decrees of the Court." *Hannon*, 177 S.C. at 160, 180 S.E. at 876.

The Order Appointing Receiver authorized the Receiver to, among other things, "perform all services and take all actions necessary or advisable to oversee, carry on, manage, care for, maintain,…protect, and preserve" the Receivership Estate and to "retain custody of same until further order." *Order Appointing Receiver*, pp. 4, 7. The Order Appointing Receiver also granted the Receiver "full authority and discretion to handle all tenancy issues, including, without limitation, *terminating* leases…." *Order Appointing Receiver*, p. 11 (emphasis added). The Order Appointing Receiver was never stayed after its entry and was not appealed timely. *See* Rule 62(a), SCRCP; Charleston Property Holdings, LLC et al. v. Rittenberg OP LLC, et al., ___- OR-___ (S.C. Ct. App. filed Jan. 23, 2024).

The Receiver's unrefuted testimony and the evidence presented at the August 2023 Hearing confirmed that the Receivership Estate lacked sufficient funds to meet the working capital requirements of the Facilities which had continued to operate at a loss since the Effective Date necessitating more than $1.5 million in protective advances from the Plaintiffs to cover these shortfalls. *See Flanagan Affidavit*, ¶¶ 14, 18; *Schedule of Landlord Protective Advances*. Furthermore, the rent owed under the Master Lease was not being paid, and the arrearage through August 2023 had grown to over $4 million. *See Schedule of Lease Payments Due Through August 2023*; *Flanagan Affidavit*, ¶¶ 15-16 (showing amounts owed under the Master Lease through July 2023).

In light of the Receiver's sworn testimony regarding his concerns about (i) the Receivership Estate's deteriorating financial condition, (ii) the safety of the Facilities' 173 residents who required varying levels of ongoing skilled care, and (iii) preservation of the Receivership Estate and the need to prevent the Receivership Estate from incurring additional operating losses, the Receiver exercised his judgment and determined that it was in the best interests of the Receivership Estate to promptly terminate the Master Lease and transfer operations of the Facilities to a new tenant and operator. *See Flanagan Affidavit*, ¶¶ 19-28, 30, and 32; *see also In re American Slicing Mach. Co.*, 125 S.C. 214, 217-18, 118 S.E. 303, 304 (1923) (noting a receiver receives and "preserve[s] the property or fund in litigation, together with the rents, issues and profits, and [is] to apply or dispose of them at the direction of the Court. The Receiver of an insolvent corporation represents, not only the corporation, but also its stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons; he is regarded as a Trustee for them.").

The Receiver's determination that termination of the Master Lease and transfer of the Facilities' operations was in the Receivership Estate's best interest was consistent with the scope of authority given to him by and through the express terms of the Order Appointing Receiver and his opinion on the issue was "entitled to great respect and weight." *See Order Appointing Receiver*, p. 4, 11, 15; *Hannon*, 177 S.C. at 160-61, 180 S.E. at 876 (noting, "[A]dvice of the receivers and their opinions in regard to the value of the property, the manner, time, and place of disposing it, and in regard to its care and custody, are entitled to great respect and weight."). Furthermore, the trial court had "the full power and necessary authority to order the receiver to dispose of…property in such manner as may seem in the mature judgment of the [trial] Court to be for the best interest of the parties concerned." *See Hannon*, 177 S.C. at 160, 180 S.E. at 876; *see also National Cash*

Register Co. v. Burns, 217 S.C. 310, 317, 60 S.E.2d 615, 618 (1950) (noting, "[U]ndoubtedly discretion exists in a court with respect to the administration of property in receivership.").

Although the Appellants received notice of the Lease Termination Motion and, through counsel, attended the August 2023 Hearing, the record is completely devoid of any evidence indicating that the Master Lease was current or that the Appellants had funds in an amount sufficient to bring the Master Lease current (or, at a minimum, could and would make monthly rent payments going forward to prevent the arrearage from increasing). Instead, the record reveals that the Appellants failed to pay the rent prior to the Effective Date, failed to make any rent payments since the Effective Date, and the Receivership Estate would be further harmed if the Master Lease was not terminated promptly. *See Schedule of Lease Payments Due Through August 2023*; *Flanagan Affidavit*, ¶¶ 15-16; *August 23, 2023 Hearing Transcript*, at p. 6, Lines 9-11 ("These facilities are not operating profitably, rent continues to accrue. There's currently more than $4 million of past due rent, which is detailed in Exhibit A."); p. 6, Lines 18-21 ("[T]he reality of it is every day that goes by, the facilities get further in the hole. The receivership estate gets further in the hole."); p. 11, Lines 2-7 ("[T]hese tenants that Mr. Brumback represents have not paid rent going back to last fall…. [The Plaintiffs (as landlords)] are owed hundreds of thousands of dollars…per month. [The Plaintiffs (as landlords) are] now owed over $4 million that Mr. Brumback's clients have made no effort to pay."); p.14, Lines 15-17 ("[I]t looks to me like it's going to happen because nobody's making any kind of payments as it is right now.").

Additionally, although the Receiver did not direct the Court to any specific provision of the Master Lease at the August 2023 Hearing, his testimony indicated that terminating the Master Lease and transferring operation of the Facilities to a new operator was consistent with the parties' existing agreements as a result of the non-payment of rent. *See Flanagan Affidavit*, ¶ 20; *Plaintiff's*

Complaint, Exhibit C - Master Lease[4]; *Jeffcoat v. Morris*, 300 S.C. 526, 528, 389 S.E.2d 159, 160 (Ct. App. 1989) (noting, "A receiver stands in the shoes of the debtor with respect to the property of the latter and the appointment of a receiver will not change any existing contractual relation…."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 722 (1999) ("Under the present rules [of appellate practice], a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

In their Initial Brief, Appellants direct the Court to *DeWalt v. Kinard*, in support of their contention that the Lease Termination Order was granted prematurely and improperly assumed facts concerning the merits of the Plaintiffs' case. *See Appellants' Initial Brief*, p. 18. However, *DeWalt* is clearly distinguishable from the facts applicable to this Appeal. In *DeWalt*, the trial court entered an order on a pre-trial motion that, among other things, specified that land subject to an ownership dispute was to be rented until a final determination was made in the case and directed where rent payments were to be sent in the interim. *DeWalt v. Kinard*, 19 S.C. 286, 288 (1883). On appeal, the South Carolina Supreme Court reversed and remanded the matter to the trial court noting, "The Circuit judge seems to have assumed that the defendant [in his answer to the complaint] admitted the plaintiff's title [to the property], but we do not so understand the pleadings, and *it must be remembered that the motion was heard upon the pleadings alone, no evidence whatever having been submitted*. Hence no facts should have been assumed except such as were alleged in the complaint and admitted in the answer." *DeWalt*, 19 S.C. at 291 (emphasis added).

[4] Pursuant to Article 19.1(a) of the Master Lease, failure of the Lessees to pay rent is deemed an event of default. Article 21.1 of the Master Lease authorizes the Lessors to terminate the Master Lease upon an event of default, and Article 21.6 of the Master Lease required the Lessees to execute a form operations transfer agreement for release upon the occurrence of an event of default.

In the instant matter, unlike in *DeWalt*, the Lease Termination Order was not entered based on pleadings alone or without evidentiary support. To the contrary, the trial court held an evidentiary hearing (*i.e.*, the August 2023 Hearing) at which the Appellants appeared (through counsel) to voice their objection to the entry of the Lease Termination Order. Notwithstanding the Appellants' prior knowledge of and appearance at the August 2023 Hearing, the Receiver was the only party who provided testimony and evidentiary support related to the Lease Termination Motion and the overwhelming weight of the evidence supported the trial court's entry of the Lease Termination Order. *See August 2023 Hearing Transcript*, p. 4, Lines 23-25; p. 5, Lines 1-4, 16-17, and 23-24; p. 15, Lines 1-8 (noting the admission into evidence of the Receiver's exhibits, including the Flanagan Affidavit, without objection); p.14, Lines 15-17 (noting "[B]ut it looks to me like it's going to happen because nobody's making any kind of payments as it is right now. So that's [(*i.e.*, entry of the Lease Termination Order)] what we're going to do.").

For all of the foregoing reasons, the trial court did not commit an error of law by authorizing the Receiver's termination of the Master Lease prior to a trial and determination of all of the merits of the parties' claims and defenses, and the Lease Termination Order should be affirmed.

II. The Trial Court did not Abuse its Discretion in Entering the Lease Termination Order Without Specifically (1) Comparing the Interests of the Parties and Whether the Requested Action Would Preserve the Status Quo or Cause Substantial Injury, (2) Examining the Merits of the Underlying Claims, and (3) Assessing the Time in the Receivership's Life at Which the Lease Termination Motion Was Filed.

First, as a threshold matter, the Appellants did not cite to or direct the trial court to any authority or cases in support of its oral objection which it first lodged at the August 2023 Hearing.

See generally August 2023 Hearing Transcript. Moreover, the Appellants did not expressly state or cite to the factors which serve as the basis for its second issue on appeal at the August 2023 Hearing. *See id*. The first time the Appellants directed the trial court to the factors set forth in the second issue on appeal (*i.e.*, the trial court failed to (1) compare the interests of the parties and whether the requested action will preserve the status quo or cause substantial injury, (2) examine the merits of the underlying claims, and (3) assess the time in the receivership's life at which such motion is being made) and cited to any authority in support of this proposition was by and through Defendants' Motion to Reconsider the Lease Termination Order filed on August 30, 2023. *See Defendants' Motion to Reconsider Lease Termination Order*, pp. 6-9. Accordingly, the trial court denied the Rule 59(e) Motion. *See Order Denying Defendants' Motion to Reconsider the Lease Termination Order*, p.2 (noting, "[A] motion for reconsideration is not a vehicle…'to raise argument or present evidence that could have been presented prior to entry of the judgment.' In other words, '[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.'") (citations omitted); *see also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 72 S.E.2d 693, 695 (2014) ("The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons.").

The Appellants' failure to raise a contemporaneous objection to the Lease Termination Motion on the grounds set forth in the Appellants' second issue on appeal, precludes review by this Court on appeal. *See Washington v. Whitaker*, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994); *see also Zaman v. S.C. Board of Medical Examiners*, 305 SC 281, 284, 408 S.E.2d 213, 215 (1991)

(declining to address appellants' issue on appeal because it was not supported in the transcript of record).

Second, assuming *arguendo* that the Appellants properly preserved their objection which serves as the basis for the second issue on appeal, the trial court did not abuse its discretion in entering the Lease Termination Order because the factors set forth in the second issue on appeal and the cases Appellants cite to in support are (1) not controlling law and (2) are used when a third party creditor seeks to lift a stay of action against the receivership estate rather than factors considered by courts when reviewing actions of a court-appointed receiver.

As noted above, none of the cases cited by Appellants in their Initial Brief in support of their proposition that the trial court should have considered the three factors set forth in the second issue on appeal have any precedential effect. Each of the cited cases involve federal court receiverships from other jurisdictions. *See, e.g.*, *U.S. v. ESIC Capital, Inc.*, 675 F. Supp. 1462 (D. Md. 1987) (involving federal court receivership in the United States District Court for the District of Maryland in which the Small Business Administration was appointed as receiver*); S.E.C. v. Wencke*, 742 F.2d 1230 (9th Cir. 1984) (involving federal court receivership ordered in the United States District Court for the Southern District of California); *S.E.C. v. Stanford Int'l Bank Ltd.*, 424 Fed. Appx. 338 (5th Cir. 2011) (involving federal court receivership ordered in the United States District Court for the Northern District of Texas involving a Ponzi scheme); *S.E.C. v. Universal Fin.*, 760 F.2d 1034 (9th Cir. 1985) (involving federal court receivership ordered in the United States District Court for the Central District of California).

Moreover, the factors considered by the courts in the cases cited to in the Appellants' Initial Brief are analyzed in the context of a third party creditor's request to lift the stay to proceed against receivership estate assets. These factors were not analyzed or relied upon by courts when

determining whether to approve action proposed or relief requested by a court-appointed receiver. For instance, in *U.S. v ESIC Capital, Inc.* – one of the primary cases Appellants rely on in support of the second issue on appeal – the court noted that when considering a motion to vacate a receivership stay, "a district court must consider four factors: (1) comparing the interests of the *receiver* and the *moving party* by (2) determining whether continuance of the stay will preserve the status quo, or whether the *moving party* will suffer substantial injury if not permitted to proceed; (3) examining the merit of the *moving party's* underlying claim; (4) assessing the time in the receivership's life at which the motion to lift stay is made." *U.S. v. ESIC Capital, Inc.*, 675 F. Supp. 1462 (D. Md. 1987) (emphasis added). Because the three-factor test that the Appellants request that this Court apply is not applicable to the relief requested in the Lease Termination Motion, the trial court did not abuse its discretion when it appropriately disregarded these non-binding and inapplicable factors and entered the Lease Termination Order.

For all of the foregoing reasons, the Lease Termination Order should be affirmed.

III. The Appeal should be dismissed because it involves an appeal of a non-final, interlocutory order that does not fit within any of the exceptions set forth in S.C. Code Ann. § 14-3-330.

The Court may affirm the trial court's Lease Termination Order "upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 722 (1999) ("Under the present rules [of appellate practice], a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

The Lease Termination Order is a non-final, interlocutory order. A non-final, interlocutory order is one in which "some further act…must be done by the court prior to a determination of the rights of the parties." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894 (2010). Non-final or interlocutory orders are not immediately appealable unless a statutory exception applies. *See Baldwin Construction Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004); *Charlotte-Mecklenburg Hosp. Auth.* 387 S.C. at 266, 692 S.E.2d at 894 (the right to appeal an order "arises from and is controlled by statutory law"); *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 163 (Ct. App. 2014) (ordinarily, an appeal may not be pursued until "after a party has obtained a final judgment"). It is not clear to the Receiver that any of the four statutory exceptions set forth in § 14-3-330 are applicable to the present Appeal.

South Carolina law provides that appellate courts have jurisdiction to immediately review the following:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas…and final judgment in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action…;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas…granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. CODE ANN. § 14-3-330 (Supp.2015). Although § 14-3-330 states that it applies to law cases, courts have "recognized it as applicable in equity cases as well." *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013).

The exception set forth in § 14-3-330(1) requires, among other things, an order "involving the merits." The South Carolina Supreme Court has declared that an order "involving the merits" is one that "must *finally determine* some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (emphasis added). Although the Receiver readily acknowledges that the testimony submitted into evidence at the August 2023 Hearing and reviewed by the trial court supported the Receiver's contention that the monthly rent for the Facilities was past due and that the arrearage exceeded more than $4 million, the Lease Termination Order does not contain any final determination of any matter forming the whole or part of any parties' cause of action or defense thereto. *See generally Lease Termination Order*, 1-2; *see also Flanagan Affidavit*, ¶¶ 15-16; *August 23, 2023 Hearing Transcript*, p.6, Lines 9-11 ("These facilities are not operating profitably, rent continues to accrue. There's currently more than $4 million of past due rent, which is detailed in Exhibit A."); p.6, Lines 18-21 ("[T]he reality of it is every day that goes by, the facilities get further in the hole. The receivership estate gets further in the hole."). Furthermore, as set forth in Appellants' Initial Brief, one of the primary bases of Appellants' challenge to the Lease Termination Order is that the Plaintiffs had not even proven the merits of their claims. *See Appellants' Initial Brief*, p.15 (noting, "the tenant's right to possession of the property… cannot be revoked until there has been a final determination of all issues at trial" and "Lessors have not been required to prove the merits of their claims….). Consequently, the Receiver believes that

the exception set forth in S.C. Code Ann. § 14-3-330(1) – which requires an order "involving the merits of actions" – is not applicable to this Appeal.

A review of the Lease Termination Order also reveals that it did not determine the action and prevent a subsequent judgment from being entered which could be appealed and did not discontinue the action for the exception set forth in S.C. Code Ann. § 14-3-330(2) to apply. *See generally, Lease Termination Order*, 1-2 (the text of which does not address the issues complained of in the Plaintiffs' Complaint). The Defendants have yet to file their Answer to the Complaint, and the trial court has yet to issue a final judgment from which a subsequent appeal could be filed. Therefore, the Receiver contends that the exception set forth in S.C. Code Ann. § 14-3-330(2) is inapplicable to this Appeal.

Next, for the exception set forth in S.C. Code Ann. § 14-3-330(3) to be applicable, the statute requires, among other things, that the order being appealed from be a final order as opposed to an interlocutory one. To determine whether an order is final or interlocutory, the South Carolina Supreme Court looks to determine "[i]f there is some further act which must be done by the court prior to a determination of the rights of the parties." *Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 267, 692 S.E.2d at 894. As noted by Appellants in their Initial Brief, "this case has not…progressed beyond the filing of Lessors' Complaint [and] no discovery has been conducted." *Appellants' Initial Brief*, p.15. Consequently, the Receiver contends that further action will be required by the trial court before there can be a determination of all of the rights of the parties to this litigation and, therefore, the exception set forth in § 14-3-330(3) is inapplicable.

The Receiver concedes that the fourth and final exception found in § 14-3-330 clearly implicates certain orders involving receiverships. However, the statute specifies that only interlocutory orders "granting, continuing, modifying, or refusing the appointment of a receiver"

are immediately appealable. The Lease Termination Order did not grant the appointment of the Receiver – instead, the Order Appointing Receiver did. As discussed herein, the Order Appointing Receiver was not appealed timely and is now the law of the case. In addition, the Order Appointing Receiver granted the Receiver "full authority and discretion to handle all tenancy issues, including, without limitation, *terminating leases*…." and instructed the Receiver to "take full possession of the Facilities" and "retain custody of same until further order." *Order Appointing Receiver*, p.7, p.10 (emphasis added). The Lease Termination Order (which authorized termination of the Master Lease and transfer of the Facilities' operations) was entered in furtherance of the Order Appointing Receiver and approved the Receiver's actions which were consistent with the express language of the Order Appointing Receiver. The Lease Termination Order did not grant, continue, modify or refuse the Receiver's appointment. Therefore, the statutorily defined exception found in § 14-3-330(4) is inapplicable and the Lease Termination Order is not appealable.

Because the Lease Termination Order is an interlocutory order that does not fit within any of the statutorily defined exceptions found in § 14-3-330, the Appeal should be dismissed.

IV. The Appeal should be dismissed because intervening events since entry of the Lease Termination Order have rendered it moot.

Appellate courts "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Protopapas v. Wall, Templeton & Haldrup, P.A.*, 442 S.C. 217, 227, 898 S.E.2d 150, 155 (Ct. App. 2023).

By and through the Appeal, Appellants request that the Court reverse the trial court's Lease Termination Order "with instruction for the trial court to direct the 1) the reestablishment of the

status quo as it existed at the time the receivership was originally approved, and 2) the preservation of the status quo…until such time as the merits of the parties' underlying claims and defenses are decided…." *Appellants' Initial Brief*, p.28. The relief the Appellants seek is now moot due to intervening events. No stay of the Lease Termination Order was in effect and, for the reasons set forth in the Lease Termination Motion and on the record at the August 2023 Hearing, the Master Lease was terminated and transfer of operations of the Facilities to the New Operator went effective at 12:01 a.m. on September 1, 2023. *See* Rule 62(a), SCRCP ("Unless otherwise ordered by the court, an interlocutory…judgment…in a receivership action…shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."); *see also Report of Consummation of Operations Transfer Agreements and Lease Termination Agreement*, pp. 2-3.

The Appellants have not made clear how this Court could grant the relief they are seeking which would require termination of the New Operator's leasehold rights in and to the Facilities. Furthermore, the Appellants have not discussed or mentioned how the relief they seek would impact the Facilities' 173 former residents who require varying levels of ongoing skilled care or the 230 former employees who are now employed by the New Operator (and who have been employed by the New Operator for more than a year now). *See generally Utley v. S.W. Wilson & Sons*, 205 S.C. 469, 473, 32 S.E.2d 654, 655 (1944) ("The receiver, respondent in the appeal, takes the sound position that the questions which appellant attempts to present are moot because the property has passed into the hands of another purchaser under a sale ordered by the Court…with the result that appellant's alleged option to purchase…is now impossible of performance by respondent."); *but see Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 359-360, 778 S.E.2d 898, 900-901 (2015) (noting in the context of an appeal involving the issuance

of a master's deed that "despite the master-in-equity's issuance of a deed, an appellate court may reach the merits of the appeal" and also noting three general exceptions to the mootness doctrine in the civil context including when "a decision by the trial court may affect future events, or have collateral consequences for the parties…even though the appellate court cannot give effective relief in the present case.").

For all of the foregoing reasons, the Appeal is now moot and should be dismissed.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm Judge Young's Lease Termination Order entered on August 23, 2023 for the reasons set forth in Arguments I and II or, alternatively, dismiss the Appeal for the reasons set forth in Arguments III and IV.

Respectfully submitted,

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Dated: September 12, 2024