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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2020-CP-18-01027
Appellate Case No. 2021-000594

Paulette Walker
as Personal Representative of the Estate of Albert Walker,

Respondent,

v.

Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center
and Durena Stinson,

Defendants,

Of whom Hallmark Longterm Care, LLC
d/b/a Hallmark Healthcare Center is

Appellant.

APPELLANT'S CONSENT MOTION TO AMEND INITIAL REPLY BRIEF OF APPELLANT

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

NOW COMES Appellant, Hallmark Longterm Care, LLC, d/b/a Hallmark Healthcare Center, by and through its undersigned counsel, with the consent of opposing counsel, and, on the grounds set forth below, hereby moves this Honorable Court to grant it leave to amend the Initial Reply Brief of Appellant (in accordance with the attached **Exhibit 1**, which is a redlined version of the affected pages of the Initial Reply Brief of Appellant) and, in conjunction with the grant of such relief, to allow and accept as duly filed/served the Final Reply Brief of Appellant (prepared in accordance with the requested amendment) that Appellant conditionally files/serves contemporaneously herewith.

The reason for the requested amendment is to correct an error that affects two pages of the Initial Reply Brief of Appellant—to be clear, Appellant's principal brief, i.e., the Initial Brief of Appellant, is unaffected. This is an appeal from the denial of a motion to compel arbitration. Certain language on the affected pages of the Initial Reply Brief of Appellant refers to the subject Arbitration Agreement as containing a provision allowing for it to be revoked within 30 days of its signing. There is no such provision, however, and the reference to it was inadvertent, simply the product of the undersigned author's wires having gotten crossed in the drafting process. Indeed, as shown (highlighted in yellow) in the excerpt from the Initial Brief of Appellant attached hereto as **Exhibit 2**, one of the points Appellant makes in distinguishing the circumstances of this case from those

addressed in prior appellate decisions is that, "[u]nlike the arbitration agreements at issue in [those cases], all of which provided that they could be disclaimed or revoked within 30 days of their signing . . . , the instant Arbitration Agreement has no such disclaimer/revocation provision."

To correct this error in the Initial Reply Brief of Appellant and avoid any confusion on this point, the undersigned asks that Appellant be allowed to amend the Initial Reply Brief of Appellant as shown on **Exhibit 1**. The redlining shows (via strike through) the language that the requested amendment seeks to omit. And to be clear, the requested amendment only seeks to omit certain language, not to add any new language.

With sincere apologies to the Court and counsel for the inadvertence that this motion seeks to correct, the undersigned submits that there is good cause to grant the relief requested herein, as it is consistent with the interests of justice and will not cause any undue prejudice, hardship, or delay.

Prior to making this motion, the undersigned consulted with Respondent's counsel Jordan Calloway, Esquire, who kindly offered his consent to the Court's grant of the relief requested herein.

Wherefore, Appellant moves the Court to grant it leave to amend the Initial Reply Brief of Appellant in accordance with the attached **Exhibit 1** and, in conjunction with the grant of such relief, to allow and accept as duly filed/served

the Final Reply Brief of Appellant (prepared in accordance with the requested amendment) that Appellant conditionally files/serves contemporaneously herewith.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

Charleston, South Carolina

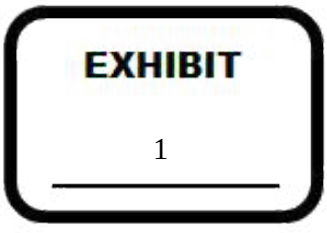
February 2, 2022

transaction—a reasonable, non-speculative inference can be drawn that the parties' possessed a contrary intention.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is indeed necessary to the Arbitration Agreement. So yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; but that is not what happened.

The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

As explained in the Facility's principal brief, it matters not whether the Arbitration Agreement was a condition of admission, only that it was agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon~~, and not revoked within the 30-day revocation~~



~~period~~[12]—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Walker's relationship with the Facility. (*See* Br. of Resp. pp. 2–3 (implicitly acknowledging the hand-in-glove relationship between the Admission Agreement and the Arbitration Agreement by acknowledging that the Admission Agreement "covered the Facility's obligation to provide nursing services to Mr. Walker and Mr. Walker's obligation to pay for those services," i.e., that it set forth the terms of Mr. Walker's admission, while the Arbitration Agreement "was limited to the single, distinct topic of outlining an alternative dispute resolution process" for disputes arising out of his admission—and thus implicitly acknowledging that the Admission Agreement and the Arbitration Agreement govern interrelated aspects of Mr. Walker's relationship with the Facility such that the Arbitration Agreement, if signed ~~and not revoked~~, is inextricably tied to the Admission Agreement).)

~~[12] Likewise a red herring is Plaintiff's argument that the Admission Agreement and the Arbitration Agreement have inconsistent termination provisions because the Arbitration Agreement contains a provision making it revocable for a period of 30 days while the Admission Agreement does not. The revocation provision simply underscores the voluntary nature of the Arbitration Agreement. Again, the Admission Agreement *could* have stood on its own, either without the Arbitration Agreement ever having been executed or with the Arbitration Agreement having been executed but revoked within the 30-day window, but neither of these things happened. The Arbitration Agreement was executed and was not revoked.~~

circumstances *even hint* that the parties actually intended the writings to be distinct, separate contracts"[20] is an incorrect statement of law.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn here. Indeed, it does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission

[20] (Order Denying MTCA pp. 9–10 (emphasis added).)

EXHIBIT 2

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Paulette Walker
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Defendants,

Of whom Hallmark Longterm Care, LLC
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Appellant.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
James D. Gandy, III (SC Bar No. 11925)
Russell G. Hines (SC Bar No. 72100)
T. Ashton Phillips, III (SC Bar No. 104227)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that the **APPELLANT'S CONSENT MOTION TO AMEND INITIAL REPLY BRIEF OF APPELLANT** was served on all other parties to this appeal on February 2, 2022, via email (see attached) to the following counsel of record:

D. Nathan Hughey, Esquire
nate@hugheylawfirm.com
A. Stuart Hudson, Esquire
stuart@hugheylawfirm.com
Bradley H. Banyas, Esquire
brad@hugheylawfirm.com
Hughey Law Firm, LLC
P.O. Box 348
Mt. Pleasant, SC 29465

and

Jordan C. Calloway, Esquire
jordan@mcgowanhood.com
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

Attorneys for Respondents

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

February 2, 2022

Bell, Pollyana (Polly)

From: Bell, Pollyana (Polly)
Sent: Wednesday, February 2, 2022 3:15 PM
To: 'nate@hugheylawfirm.com'; 'stuart@hugheylawfirm.com'; 'Brad Banyas'; Jordan Calloway; 'jordan@hugheylawfirm.com'; 'Jennifer@hugheylawfirm.com'
Cc: Hines, Russell; Justman, Aimee
Subject: Walker v. Hallmark; Appellate Case No. 2021-000594
Attachments: Final Brief of Appellant.pdf; Final Reply Brief of Appellant.pdf; Walker v. Hallmark (2021-000594) -- Consent Motion to Amend Initial Reply Brief.pdf; Appellant's Certification for Final Brief.pdf; Appellant's Certification for Final Reply Brief.pdf; Exhibit 1 -- Redline of proposed amendment to Initial Reply Brief of Appellant.pdf; Exhibit 2 -- Excerpt from Initial Brief of Appellant.pdf

Enclosed please find the following which will be filed today with the Court of Appeals:

1. Final Brief of Appellant
2. Appellant's Certification for Final Brief
3. Final Reply Brief of Appellant
4. Appellant's Certification for Final Reply Brief
5. Appellant's Consent Motion to Amend Initial Reply Brief of Appellant
6. Exhibit 1 -- Redline of proposed amendment to Initial Reply Brief of Appellant
7. Exhibit 2 -- Excerpt from Initial Brief of Appellant

Thank you,

Pollyana Bell
Project Assistant
Commercial Litigation Practice Group
Phone:(843)720-5488 | Fax:(843)579-1369