253 Va. 116

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 960961

THERESA A. MULLINS,

Appellant,

v.

VIRGINIA LUTHERAN HOMES, INC.,

Appellee.

REVISED JOINT APPENDIX

Terry N. Grimes
KING, FULGHAM, SNEAD,
NIXON & GRIMES, P.C.
112 West Kirk Avenue
Roanoke, VA 24011-1602
(540) 982-3711

Counsel for Appellant

Edward A. Natt
OSTERHOUDT, FERGUSON, NATT
AHERON & AGEE, P.C.
1919 Electric Road, S.W., Suite 1
Roanoke, VA 24018
(540) 774-1197

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS, Plaintiff v. VIRGINIA LUTHERAN HOMES, INC. c/o Edward A. Natt, Esquire, Registered Agent 1919 Electric Rd., S.W. Roanoke, VA 24018, Defendant	)	MOTION FOR JUDGMENT Law No. 94000878

COMES NOW the plaintiff, Theresa A. Mullins, and states as follows:

FACTS

(1) At all times material hereto, Brandon Oaks was a life care retirement community and a wholly owned subsidiary of Virginia Lutheran Homes, Inc. ("Brandon Oaks"), a corporation duly organized pursuant to the laws of the Commonwealth of Virginia and doing business in the Commonwealth of Virginia.

(2) In February, 1993, Brandon Oaks hired Mullins to work as a certified nursing assistant. Her compensation was $5.25 per hour plus health insurance coverage and other employment benefits.

(3) On or about September 5, 1993, Mullins was working at Brandon Oaks when she saw an elderly patient falling to the floor. Mullins quickly moved toward the patient and caught her as she was falling. In so doing, Mullins hyperextended her left

thumb and suffered substantial injury to her left hand and wrist and forearm.

(4) Mullins promptly reported the injury to her employer.

(5) Mullins sought and received medical care for her injury at Lewis-Gale Clinic, where she has been followed primarily by Stephen G. Harris, M.D., an orthopedic surgeon.

(6) Dr. Harris ordered that Mullins could not work at Brandon Oaks for a period of time.

(7) Thereafter, Brandon Oaks, through its agents or employees, told Mullins that she should not have attempted to catch the patient as she was falling and instead should have simply let the patient fall to the floor.

(8) By letter dated November 3, 1993, Mullins filed a claim for benefits with the Virginia Workers' Compensation Commission pursuant to and in accordance with the Virginia Workers' Compensation Act, Virginia Code §65.2-100, et. seq. Mullins copied the letter to Rob Bianco at Brandon Oaks. A copy of the letter is attached as Ex. 1.

(9) Thereafter, Brandon Oaks, through its agents or employees, told Mullins that she no longer had a job with Brandon Oaks.

(10) At this time, Mullins continued under the care of Dr. Harris.

(11) On or about March 7, 1994, Dr. Harris released Mullins to return to work, and he stated that she should wear a brace on her wrist and forearm when doing heavy work. A copy of

Dr. Harris' note of March 7, 1994 is attached as Ex. 2.

(12) Mullins promptly took Dr. Harris' note to Brandon Oaks.

(13) Brandon Oaks then informed Mullins that she could not return to work at Brandon Oaks because there were no day shift openings available for certified nursing assistants at Brandon Oaks. A copy of a letter from Louise Hill, resident care coordinator of Brandon Oaks, dated March 7, 1994, is attached as Ex. 3.

(14) Brandon Oaks terminated the employment of Theresa A. Mullins.

COUNT I
RETALIATORY DISCHARGE

(15) Plaintiff incorporates by reference herein the preceding paragraphs of this motion for judgment.

(16) At all times material hereto, Brandon Oaks knew that Virginia Code §65.2-308 (1950), as amended, prohibits an employer from discharging an employee solely because the employee intends to file or has filed a claim under the Virginia Workers' Compensation Act.

(17) Brandon Oaks fired Mullins solely because she filed a claim for workers' compensation pursuant to the Virginia Workers' Compensation Act, in violation of Virginia Code §65.2-308 (1950), as amended.

(18) As a direct result, Mullins has suffered and will continue to suffer economic loss.

COUNT II
ERISA, COBRA CLAIM AND PHSA

(19) Plaintiff incorporates by reference herein the preceding paragraphs of this motion for judgment.

(20) During the course of Mullins' employment, Brandon Oaks provided to her and other employees group health insurance coverage.

(21) At all times material hereto, Brandon Oaks' group health care plan was governed by certain federal laws, including, but not limited to, the Employment Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and the Public Health Service Act (PHSA).

(22) After Brandon Oaks terminated Mullins' employment, Brandon Oaks failed to give notice to Mullins of her right to continued health care coverage as required by 29 U.S.C. §1166; ERISA Section 606; 26 U.S.C. §4980B(f)(6)(B); and PHSA Section 2206.

(23) As a direct result, Mullins has suffered and will continue to suffer economic loss.

COUNT III
FAMILY AND MEDICAL LEAVE ACT

(24) Plaintiff incorporates by reference herein the preceding paragraphs of this motion for judgment.

(25) At all times material hereto, Brandon Oaks was aware of the Family and Medical Leave Act, 29 U.S.C. §2601, et seq.

(26) The Family and Medical Leave Act requires employers to provide up to 12 workweeks of leave during any twelve month

period to employees who must be absent from work due to a serious health condition that makes the employee unable to perform her duties. 29 U.S.C. §2612(a)(1).

(27) The Family and Medical Leave Act further provides that an employee shall be entitled, on return from such leave, to be restored by the employer to the position of employment held by the employee when the leave commenced, or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. 29 U.S.C. §2614(a)(1).

(28) The Family and Medical Leave Act further provides that the taking of leave pursuant to 29 U.S.C. §2612 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. 29 U.S.C. §2614(a)(2).

(29) Brandon Oaks did not permit Mullins to return to work, in violation of the Family and Medical Leave Act.

(30) As a direct result, Mullins has suffered and will continue to suffer economic loss.

WHEREFORE, Mullins respectfully asks this Court to:

(1) issue a declaratory judgment that defendant's acts, policies, practices and procedures complained of herein violated plaintiff's rights as secured by the Virginia Workers' Compensation Act, Employment Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Public Health Service Act (PHSA) and the Family and Medical Leave Act.

(2) issue an injunction ordering Mullins to be

reinstated to her previous position;

(3) order Brandon Oaks to make whole Mullins who has been adversely affected by the policies and practices described herein by providing appropriate back pay and reimbursement for lost pension, social security, experience, training opportunities, and other benefits in an amount to be shown at trial;

(4) award an appropriate measure of front pay;

(5) retain jurisdiction over this action to assure full compliance with the orders of this Court and with applicable law;

(6) order Brandon Oaks to file such reports as this Court may deem necessary to monitor compliance;

(7) award to Mullins her attorney's fees and costs;

(8) award to Mullins compensatory and liquidated damages as provided by statute; award such additional relief as this Court deems just and proper; and

(9) award to Mullins trial by jury upon those issues triable by jury.

Respectfully submitted,

THERESA A. MULLINS

STATE OF VIRGINIA

City of Richmond, to-wit:

Subscribed and sworn to before me this 15th day of July, 1994, by Theresa A. Mullins, plaintiff.

Bonnie O. Hartley
Notary Public

My commission expires:
2/29/96

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Ave., S.W.
Roanoke, VA 24011-1602
(703) 982-3711
Of Counsel for Plaintiff

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105 N. COLORADO STREET
P.O. BOX 279
(703) 389-2349
FAX (703) 389-9560

B. PURNELL EGGLESTON
OF COUNSEL

November 3, 1993

Lou-Ann D. Joyner, Clerk
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, VA 23220

In Re: Theresa Ann Mullins v. Brandon Oaks Retirement Center; D/Injury: 09/05/93

Dear Ms. Joyner:

This firm has been retained to represent the interests of the claimant, Theresa Ann Mullins, in the above-styled matter. This accident appears compensable and we request that the Commission please forward to us a copy of the Employer's First Report of Accident in the near future.

Please accept this as a claim for benefits under the Workers' Compensation Act.

By copy of this letter to the employer, we request that they please forward to my attention a Memorandum of Agreement at their earliest convenience.

Thank you for your time and attention to this matter.

Very truly yours,

JOLLY, PLACE, FRALIN & PRILLAMAN, P.C.

William H. Fralin, Jr.

cmh

c: Theresa A. Mullins
Rob Bianco, Brandon Oak Retirement Center

EXHIBIT
1

LEWIS-GALE CLINIC, INC.

Sick Certificate

Name THERESA MULLINS Date 3/2/94

Address

To whom it may concern:

This is to certify that the above patient was under my professional care from 10/7/93

to PRESENT inclusive.

Remarks MRS NOW RETURN TO WORK. SHOULD WEAR BRACE WHEN DOING HEAVY WORK

Phone: 776-2016

Dr. [signature]

Address LEWIS-GALE CLINIC

EXHIBIT

2

March 7, 1994

Dear Mr. Craven:

There are no day shift openings available for CNA's at Brandon Oaks at this time

Sincerely,
Karen Hill
Resident Care Coordinator

EXHIBIT
3

1 depend on the nature of the job that she was able to find
2 whether it truly would be no restrictions or just with that
3 one restriction. If the job that she found involved heavy
4 work, then I would have wanted her for the next several
5 weeks or so to continue to wear the wrist brace only during
6 that part of the job that required heavy lifting.
7 Q But there were no restrictions on the type
8 of employment.
9 A No, I didn't place any on her, at that point
10 anyway.
11 Q She was free for any basic job that she
12 could find.
13 A That's correct.
14 MR. NATT: All right. That's all the
15 questions that I have, Doctor. Mr. Grimes may have
16 some.
17
18 CROSS-EXAMINATION
19
20 BY MR. GRIMES:
21 Q Dr. Harris, what was your diagnosis of
22 Ms. Mullins?
23 A A hyperextension injury to her left thumb.
24 In other words, the left thumb was bent backwards far enough

1 and violently enough that it sprained the joint and
2 stretched the nerves.
3 Q Mr. Natt has asked you some questions about
4 two particular office notes. Would you tell me generally
5 about her course of treatment.
6 A Yes, sir. We began by splinting her. I
7 think, in fact, Dr. Castern began by splinting her just for
8 a simple strain. After that didn't really seem to be
9 successful, mainly because I felt like even with the splint
10 on she was able to still use her hand some and was using it
11 more than I would have liked, we casted her, put her in a
12 cast. That seemed to bring about an improvement in some
13 aspects of it but, of course, resulted in some stiffness and
14 some weakness as you would expect on removing a cast. We
15 then began on a course of physical therapy, including
16 regular physical therapy and then progressing to an increase
17 in more strength-type training.
18 Because of numbness in her thumb, initially
19 I was entertaining a diagnosis of carpal tunnel syndrome.
20 But we did some nerve conduction studies and that became
21 less likely as a diagnosis. Therefore, we were left with
22 probably just stretching of the nerves to her thumb at the
23 time of the injury as the only satisfactory explanation for
24 why her thumb continued to have a numb feeling.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
Plaintiff	)	
v.	)	Law No. 9500055400
VIRGINIA LUTHERAN HOMES, INC.	)	
Defendant	)	

PLAINTIFF'S MEMORANDUM OF OBJECTIONS

COMES NOW the plaintiff, Theresa A. Mullins, by counsel, and objects to the trial court's granting of the motion to strike at trial of this matter on July 20, 1995, and to entry of the final judgment order awarding judgment to defendant, Virginia Lutheran Homes, Inc., for reasons stated *ore tenus* on July 20, 1995, and for the following reasons:

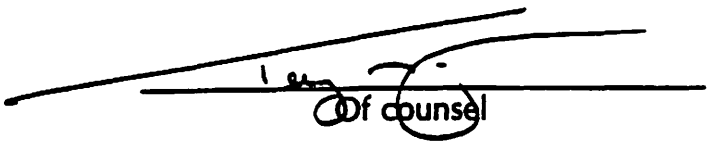
1. With respect to plaintiff's claim for retaliatory discharge in violation of Va. Code § 65.2-308 (1950), as amended, the trial court stated that the evidence supports a finding that plaintiff's employment was terminated by Virginia Lutheran Homes for three possible reasons: (1) personal animus by Virginia Lutheran Homes; (2) exhaustion of plaintiff's sick leave; or (3) retaliatory discharge in violation of the Virginia Worker's Compensation Act. The trial court opined that because Virginia Lutheran Homes could have terminated plaintiff's employment for one of three reasons, the jury could not find that plaintiff's employment was terminated in retaliation solely for filing a Worker's Compensation claim in violation of the Virginia Worker's Compensation Act. In so doing, the trial court invaded the province of the jury. The question of whether plaintiff

was terminated in retaliation for filing a Worker's Compensation in violation of the Act is a quintessential question to be resolved by the trier of fact. Moreover, the evidence was plainly sufficient to support such a finding.

2. With respect to plaintiff's claim for violation of Virginia Public Policy, plaintiff submits that the trial court erred by finding as a matter of fact that the plaintiff was not an individual with a disability, and the trial court erred by ruling that Virginia law required, at the time plaintiff's cause of action accrued, proof of a certain minimum number of employees. *See generally*, Lockhart v. Commonwealth Education Systems, 247 Va. 98, 439 S.E.2d 328 (1994).

Respectfully submitted,

THERESA A. MULLINS



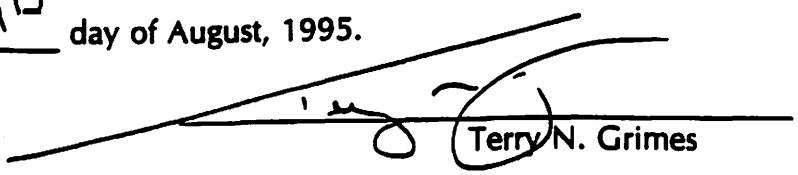
Of Counsel

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Avenue
Roanoke, VA 24011-1602

Of Counsel for Plaintiff

CERTIFICATE OF MAILING

The undersigned does hereby certify that a true copy of the foregoing Memorandum of Objections was mailed to Edward A. Natt, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Suite 1, Roanoke, VA 24018, counsel for defendant, this 4th day of August, 1995.



Terry N. Grimes

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
	)	
Plaintiff	)	FINAL ORDER
	)	
v.	)	Law No. 9500055400
	)	
VIRGINIA LUTHERAN HOMES, INC.,	)	
	)	
Defendant	)	

On the 20th day of July, 1995, came the Plaintiff, in person, and by counsel, and came the Defendant, Virginia Lutheran Homes, Inc., by it duly authorized representative, and by counsel, upon the pleadings, proceedings and orders previously filed in this matter, and announced ready for trial.

WHEREUPON, came a jury, to-wit: Virginia W. Candler, Margaret S. Andrews, Jerry P. Day, Hilda H. Christian, Christina A. Lewis, Linda S. Greene and John R. Graybill who were duly selected according to law and sworn to well and truly try the issues between the parties, and a true verdict render according to the law and the evidence.

WHEREUPON, the Plaintiff presented her evidence, and rested. The Defendant then moved the Court to strike the Plaintiff's evidence, for the reasons stated orally on the record. The Court, for the reasons stated on the record, granted the Defendant's motion to strike the Plaintiff's evidence. It is, therefore, ADJUDGED and ORDERED, that for the reasons stated on the record, the Defendant's Motion to Strike be, and it is hereby granted and this matter is hereby dismissed.

The Clerk is directed to mail or otherwise deliver certified copies of this Order to counsel of record and nothing further to be done, the Clerk is directed to strike the matter from the docket and place it among the ended files.

Enter this 7th day of September, 1995.

Judge

I Request entry of this Order:

Edward A. Natt, Esq.
OSTERHOUDT, FERGUSON, NATT,
AHERON & AGEE, P.C.
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
(703) 774-1197
VSB #1104

Seen and Objected to for the reasons stated on the Record and for reasons stated in memorandum of objection to be filed herein

Terry N. Grimes, Esquire
112 W. Kirk Avenue
Roanoke, Virginia 24011
(703) 982-3711

:\wp50\steph\vlh.Fo:sse08/18/95

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Law Nos. 95-554 and 94-878
	)	
VIRGINIA LUTHERAN HOMES, INC.	)	
	)	
Defendant	)	

NOTICE OF APPEAL

Plaintiff Theresa A. Mullins hereby appeals to the Supreme Court of Virginia from the orders of the court entered in the above-referenced matters on September 7, 1995.

A transcript or statement of facts, testimony and other incidents of the case will be filed.

CERTIFICATE

1. The name and address of the appellant is Theresa A. Mullins, 904 Camelot Drive, Apt. 8, Salem, Virginia, 24153.

2. The name, address and telephone number of counsel for the appellant is Terry N. Grimes, Esquire, P.C., 112 W. Kirk Avenue, Roanoke, Virginia, 24011-1602, (540) 982-3711.

3. Then name and address of the appellee is Virginia Lutheran Homes, Inc., 3804 Brandon Avenue, S.W. Roanoke, Virginia, 24018.

4. The name, address and telephone number of counsel for the appellee is Edward A. Natt, Esquire, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric

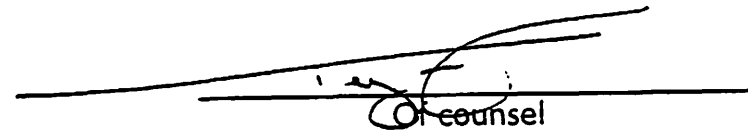
Road, S.W., Suite 1, Roanoke, Virginia 24018, (540) 774-1197.

5. Counsel for appellant has ordered from the court reporter who reported the case the transcript for filing as required by Rule 5A:8(a).

6. A copy of this notice of appeal has been mailed by first class mail, postage prepaid, to all opposing counsel and to the clerk of The Supreme Court of Virginia, this 5th day of October, 1995.

Respectfully submitted,

THERESA A. MULLINS



Of counsel

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Avenue
Roanoke, VA 24011-1602

Of Counsel for Plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS, Plaintiff v. VIRGINIA LUTHERAN HOMES, INC., Defendant	)	MOTION TO CONSOLIDATE Law Nos. 94-878 and 95-554

COMES NOW plaintiff, Theresa A. Mullins, by counsel, and states as follows:

1) Two motions for judgment have been filed herein. The first (Law No. 94000878) presents claims for retaliatory discharge (Count One) and violation of the Employment Retirement Income Security Act of 1974 (ERISA) and the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (Count Two).

2) The second motion for judgment (Law No. 95000554) presents a claim for termination of employment in violation of public policy.

3) These matters were tried in a single trial by jury on July 20, 1995. A final order has been entered in Law No. 95-554, and an interlocutory order has been entered in Law No. 94-878 pending resolution of the ERISA and COBRA claims.

4) For purposes of appeal and otherwise, it is appropriate for the Court to enter an order consolidating these matters.

WHEREFORE, plaintiff respectfully requests entry of an order consolidating these matters and assigning a single case number (Law No. 95000554) for purposes of maintenance of the record.

Respectfully submitted,

THERESA A. MULLINS

By _____ Of Counsel

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Ave., S.W.
Roanoke, VA 24011-1602
Counsel for Plaintiff

CERTIFICATE OF MAILING

I, Terry N. Grimes, do hereby certify that a true copy of the foregoing Motion to Consolidate was hand-delivered this 6th day of November, 1995, to Edward A. Natt, Esquire, PO Box 20068, Roanoke, VA 24018, counsel for defendant.

_____

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
Plaintiff	)	
v.	)	Law Nos. 94-878 and 95-554
VIRGINIA LUTHERAN HOMES, INC.,	)	
Defendant	)	

ORDER OF CONSOLIDATION

On the 6th day of November, 1995, came the parties, by counsel, pursuant to a Motion to Consolidate two files, namely, Law Nos. 94000878 and 95000554.

UPON CONSIDERATION WHEREOF, it is hereby ORDERED that the above-referenced matters are hereby consolidated. The clerk is directed to consolidate the files and assign Law No. 95000554 to all future pleadings concerning these proceedings.

The clerk is directed to mail, or otherwise deliver, certified copies of this order to counsel of record.

And this cause is continued.

ENTER: November 6, 1995

Clifford P. Weckstein
Judge

I ask for this:

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Avenue
Roanoke, Virginia 24011
(540) 982-3711
Counsel for Plaintiff

Seen:
Mr. Natt has told the Court, by telephone, that he does not object to entry of this Order. With his consent and pursuant to Rule 1:13, his endorsement is dispensed with.
Edward A. Natt, Esquire
PO Box 20068
Roanoke, VA 24018
Counsel for Defendant

Judge

A COPY, TESTE ARTHUR B CRUSH III, CLERK
By _____ Deputy Clerk

20

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
	)	
Plaintiff	)	ORDER
	)	
v.	)	LAW NO. 94-878
	)	
VIRGINIA LUTHERAN HOMES, INC.,	)	95-554
	)	
Defendant	)	

CAME THE PARTIES hereto and represented unto the Court that all matters in controversy relating to Count II herein, relating to ERISA and COBRA, have been resolved. It is, therefore, ADJUDGED and ORDERED that Count II of the Motion for Judgment be, and the same is hereby dismissed with prejudice.

And nothing further remaining to be done herein, it is hereby ADJUDGED and ORDERED that this matter be and the same is hereby dismissed from the docket.

ENTER this 26th day of February, 1996.

Michael E. Walkenshaw

I Ask For This:

Edward A. Natt

Edward A. Natt, Esq.
OSTERHOUDT, FERGUSON, NATT,
AHERON & AGEE, P.C.
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
(540) 774-1197
VSB #1104

Seen:

Terry N. Grimes, Esquire
King, Fulghum, Snead,
Nixon & Grimes, P.C.
112 W. Kirk Avenue
Roanoke, VA 24011-1602
(540) 982-3711

z:\wp50\steph\vlh.Ord:sse09/28/95

COPY, TESTE: ARTHUR S. [illegible]

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ROANOKE

THERESA A. MULLINS,	)	
Plaintiff	)	
v.	)	Law No. 95-554
VIRGINIA LUTHERAN HOMES, INC.,	)	
Defendant	)	

NOTICE OF APPEAL

Plaintiff Theresa A. Mullins hereby appeals to the Supreme Court of Virginia from the final order of the court entered in the above-referenced matter on February 26, 1996.

A transcript of the trial of the case was filed January 5, 1996.

CERTIFICATE

1. The name and address of the appellant is Theresa A. Mullins, 904 Camelot Drive, Apt. 8, Salem, Virginia, 24153.

2. The name, address and telephone number of counsel for the appellant is Terry N. Grimes, Esquire, P.C., 112 W. Kirk Avenue, Roanoke, Virginia 24011-1602, (540) 982-3711.

3. The name and address of the appellee is Virginia Lutheran Home, Inc., 3804 Brandon Avenue, S.W., Roanoke, Virginia 24018.

4. The name, address and telephone number of counsel for the appellee is Edward A. Natt, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Suite 1, Roanoke, Virginia 24018, (540) 774-1197.

5. Counsel for appellant has ordered from the court

reporter who reported the case the transcript for filing as required by Rule 5A:8(a).

6. A copy of this notice of appeal has been mailed by first class mail, postage prepaid, to all opposing counsel and to the clerk of The Supreme Court of Virginia, this 7th day of March, 1996.

Respectfully submitted,

THERESA A. MULLINS

By _____
Of Counsel

Terry N. Grimes, Esquire
KING, FULGHUM, SNEAD, NIXON & GRIMES, P.C.
112 W. Kirk Ave., S.W.
Roanoke, VA 24011-1602
Counsel for Plaintiff

1 the Workers' Compensation Act was
2 marked Plaintiff's Exhibit One for
3 identification.)
4
5 BY MR. GRIMES:
6 Q Mr. Fralin, you are being shown what has
7 been marked for identification as Exhibit One. Do you
8 recognize that document?
9 A Yes, I do.
10 Q Would you tell the Jury what it is?
11 A It is an application for benefits under
12 the Workers' Compensation Act and a request for hearing.
13 Q And what is an application for benefits?
14 A Like in most areas of the law, nothing is
15 self-executed --
16 MR. NATT: Your Honor, I don't mind going
17 through a history of what Workers' Comp is and
18 all of that, but this is a case -- it is
19 irrelevant to the issues at hand, that is, was
20 she discharged because she filed a Workers'
21 Comp.
22 I love listening to Mr. Fralin, but I
23 don't know that it is relevant to why we are
24 here.

1 THE COURT: I will overrule the objection
2 this time.
3 MR. GRIMES: Yes, sir.
4
5 BY MR. GRIMES:
6 Q Mr. Fralin, your letter refers to a claim
7 for benefits under the Virginia Workers' Compensation
8 Act. Did you file a claim for benefits?
9 A Yes, I did. This is it.
10 Q All right. And when was this letter
11 mailed, again?
12 A November 3rd, 1993.
13 Q When, then, Mr. Fralin, was the claim for
14 Workers' Compensation Benefits filed, if you know, sir?
15 A I am not sure. It would be -- if I could
16 refer to my --
17 Q All right. What do you have?
18 A It was filed November 5th, 1993.
19 MR. GRIMES: We move into evidence
20 Exhibit One, Your Honor.
21 THE COURT: It is admitted.
22
23 (Plaintiff's Exhibit One and
24 entered into the Record.)

1 A Not that I recall in the letter that I
2 wrote him.
3 Q And you don't know what their position in
4 regard to this claim was of your own first-hand
5 knowledge?
6 A Yes. They denied the claim. That is why
7 we went to the hearing.
8 Q Do you know why they denied it?
9 A I do not know why they denied it.
10 Q There are any number of reasons one can
11 deny a claim, aren't there?
12 A Yes.
13 Q You can deny it because you don't think
14 it was an accident that was arising out of the course of
15 employment, right?
16 A You could.
17 Q You could deny potentially because you
18 might think there is a preexisting condition?
19 A You could.
20 Q You could deny based upon wanting to
21 determine the extent of the injuries and whether all of
22 the medical bills were related to the injury?
23 A That would not be a basis for denying the
24 claim.

1 by her treating physician following the injury, there
2 was no medical causation between the claimant's
3 employment and her current medical condition, the
4 claimant has failed to market her remaining work
5 capacity and that she has failed to seek employment
6 since leaving the employer, and any other defenses
7 available under the Virginia Workers' Compensation Act
8 may also be raised. That is what their Answers to
9 Interrogatories indicated.
10 Q But in your discussion, did you focus on
11 anything? Those are very general statement.
12 A True.
13 Q Did you focus on anything in your
14 conversations with --
15 A I have some notes from when I talked to
16 Tom Miller on the 15th of May. I don't think that date
17 is right.
18 Q Okay.
19 A That would be following -- let me see
20 when the award was entered.
21 Q It was following the order?
22 A It would be following the hearing date
23 which was May 17th. So, that would be two days before
24 the hearing. I did talk to Tom Miller about his Answers

1 to Interrogatories.

2 Q Did you discuss what the real issues in

3 the case were?

4 A Yes. I mean, yes, obviously.

5 Q And from those conversations what was the

6 issue in the case?

7 A Well, frankly, it seemed to be a

8 compensable case to me. I didn't understand why we were

9 going to a hearing and what the problem was.

10 Q And did Virginia Lutheran Homes ever say

11 it wasn't a compensable case?

12 A Sure they did, when they refused to pay

13 the claim or send the memorandum of agreement so we

14 could get an award entered.

15 Q But, you have already said that there are

16 a number of reasons --

17 MR. GRIMES: Your Honor, I missed the

18 last part of the witness' answer. Could I have

19 that repeated?

20 THE COURT: Is that an objection,

21 Mr. Grimes?

22 MR. GRIMES: My objection is before the

23 next question, and I couldn't hear the tail end

24 of his answer.

1 THE COURT: If you remember the end of
2 your answer, Mr. Fralin.
3 MR. FRALIN: I really don't. Maybe we
4 could rephrase the question.
5 THE COURT: Go ahead, Mr. Natt.
6 MR. NATT: Okay.
7
8 BY MR. NATT:
9 Q Do you know of the specific -- whether or
10 not Virginia Lutheran Homes contested whether or not the
11 case was compensable, not the amount of compensation or
12 whether she was disabled or the extent of her
13 disability, but whether or not it was a case under which
14 she was covered?
15 A They did. I requested a memorandum of
16 agreement in my first letter to Mr. Bianco, and I
17 received nothing back. I had to go through the entire
18 procedure before the award that we ultimately agree to.
19 Q You don't know that he denied it, you
20 just never got anything back from him?
21 A Well, let me look again at the
22 correspondence. I don't think I ever got anything from
23 Lutheran Homes.
24 Q You did not?

1 A What I am looking for is something from
2 the insurance company.
3 Q Well, let me ask you this --
4 A At that point, the Interrogatories had
5 been answered and, obviously, they were denying the
6 claim for the reasons that were set forth in the answers
7 to interrogatories.
8 Q Your entire contact was through the
9 insurance carrier or through counsel for Lutheran Homes?
10 A That is true.
11 Q So, you don't know of your own personal
12 knowledge what the position of the employees and the
13 staff at Virginia Lutheran homes were other than the
14 fact that some interrogatories were signed?
15 A No, I do not.
16 MR. NATT: Thank you. That is all I
17 have.
18 THE COURT: Mr. Grimes?
19
20 REDIRECT EXAMINATION
21
22 BY MR. GRIMES:
23 Q Mr. Fralin, just briefly, I am concerned
24 now that the Jury may be confused about the -- between a

THERESA A. MULLINS

was called as a witness and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRIMES:

Q Ms. Mullins, once you are seated, look towards Judge Weckstein and state your name for the Record.

A Theresa Ann Mullins.

Q Where do you live, Ms. Mullins?

A At 904 Camelot Drive, Apartment 8, Salem, Virginia.

Q For the Record, what is your date of birth and your age?

A It is 3-16-61, and I am 34.

Q Ms. Mullins, did there come a time when you went to work for something commonly known as Brandon Oaks?

A It was February the 15th, 1993.

Q Let me show you a document, if I can. It is just behind Tab Four. It will be your employment

1 Benefits.

2 Q How did you get that document?

3 A It was given to us in a packet on our

4 first day of employment, which was February 15, 1993.

5 Q Did you have sort of an orientation on

6 your first day?

7 A We had a whole week of it.

8 Q A week of orientation?

9 A Yes, sir.

10 MR. GRIMES: Your Honor, I move to have

11 it as Exhibits Nine and Ten.

12 MR. NATT: No objection.

13 THE COURT: They are admitted.

14

15 (Plaintiff's Exhibits Nine and Ten

16 were admitted into evidence.)

17

18 BY MR. GRIMES:

19 Q Ms. Mullins, tell the Jury in your own

20 words what you did at Brandon Oaks on a day-to-day

21 basis?

22 A I would take care of the residents that

23 needed showers and could not do them by themselves. I

24 would assist them.

1 I would assist them in their clothing, any
2 personal needs that they could not do on their own.
3 I would supervise them while they were
4 eating. We had a small dining room. I would take their
5 temperature, their blood pressure.
6 I did a lot of typing, a lot of filing. I
7 did a little bit of everything. I even worked the
8 switch board some to relieve the girl.
9 Q During the several months you worked at
10 Brandon Oaks, what shifts did you work?
11 A All of them, 7:00 to 3:00, 3:00 to 11:00,
12 and 11:00 to 7:00.
13 Q Who was your supervisor?
14 A My immediate supervisor would be Louise
15 Hill; but, my charge nurse, I worked -- on 7:00 to 3:00,
16 my immediate supervisor was always Charlotte Odde.
17 Q All right. I want to take you back in
18 time, Ms. Mullins, to September 5, 1993. Who was your
19 supervisor at that time?
20 A Charlotte Odde and Louise Hill.
21 Q Excuse me?
22 A And Louise Hill.
23 Q What happened that day?
24 A I went in about a quarter 'til 7:00 and

1 went for nursing report. And the head nurse for 11:00
2 to 7:00 informed me that Louise Farley had been running
3 a temperature during the night.
4 And the rule is, if you are running a
5 temperature, you do not come out of the room because of
6 the other residents.
7 I immediately went and took her
8 temperature, and she was still running a temperature.
9 And I asked her to please lay in bed, that I would be
10 right back to help her.
11 MR. NATT: Judge, I don't want to cut
12 Ms. Mullins short. I don't know the purpose and
13 the relevance of going through all of the
14 incident which occurred.
15 We do not deny that Ms. Mullins' thumb
16 was injured as a result of attempting to catch
17 Ms. Farley. All the background, unless there is
18 some additional relevance to the case at hand, I
19 think is insignificant.
20 THE COURT: Having heard the opening
21 statements of both attorneys, I will give the
22 Plaintiff reasonable latitude.
23 Go ahead, Mr. Grimes.
24

1 BY MR. GRIMES:

2 Q Ms. Mullins, what we want to know about

3 is the falling incident involving Ms. Farley.

4 A Okay. I had left her room and on the

5 process of going back into her room -- her bathroom was

6 on the left-hand side, and as you passed the bathroom

7 was her bed.

8 As I was walking into her room, I caught

9 a glimpse of her out of the corner of my eye and I

10 turned and I looked. She was in the process of holding

11 onto the sink and falling.

12 She was recuperating from one fractured

13 hip, and I knew that if she would fall again she would

14 fracture either the same hip or the other hip.

15 I immediately ran up behind her and had

16 my hands like this, and I grabbed her under her arm

17 pits. She was very hard of hearing, and I was trying to

18 let her know that I had her because she was hollering

19 for help. And I was trying to let her know that I had

20 her and I was not going to let her fall.

21 In the process of all of it, I guess she

22 finally realized that I had her. And when I had her

23 like this, she let her weight down; and when she did, my

24 thumb extended back. And she stayed on my hand for

1 minutes until I yelled for Charlotte Odde because there
2 was only two of us.
3 She come running down the hall and I was,
4 like, just please help me; she is on my hand, and I am
5 afraid -- I was afraid of dropping Louise. And, I did
6 not want to drop her.
7 Q What did you and Charlotte do?
8 A Charlotte immediately asked me which
9 hand. I told her my left hand. She immediately removed
10 her from my left hand and Charlotte took that side. We
11 tried to get Louise to stand up, and she couldn't. So,
12 we had to practically drag her back to her chair.
13 Q All right. Is that how the incident
14 ended?
15 A No. Charlotte immediately took me to the
16 nurses' station after we got Louise seated. And she
17 took a rubber glove, put ice in it, and she examined my
18 hand and she put ice on my hand.
19 She immediately got out an accident
20 report. And it happened to be on Labor Day weekend.
21 And Ms. Hill did not work on the weekends unless she
22 would come in to do work that she did not have time
23 during the week.
24 Q Did Louise Hill show up for some reason?

1 A Yes, she did. She suddenly appeared --
2 she would come in the backdoor; and when she came in,
3 Charlotte Odde and myself proceeded to show her my hand
4 and explained to her in detail what had happened to our
5 patient, Louise.
6 And Ms. Hill, she checked it and she said
7 she felt like it was just a sprain and for me just to
8 keep ice on my hand.
9 I asked her if I could leave to go to the
10 doctor. I wanted to check it out. I felt like it might
11 be broken.
12 Q What did Ms. Hill say?
13 A She said, "No." She said she thought --
14 she examined it again. She felt like it was just a
15 sprain. And she said that when my shift ended at 3:00,
16 if I felt like I needed to go to the Doctor, for me to
17 go to the doctor then.
18 Q That evening did you wind up going to the
19 Emergency Room?
20 A Yes, immediately after work.
21 Q Which hospital?
22 A Lewis-Gale.
23 Q Was there any pain associated with this
24 injury?

1 A Excruciating, it was a lot of pain.
2 Q Do you recall who you saw at the E.R.
3 A I do not recall his name.
4 Q What did the E.R. doctor do?
5 A He examined my hand. He x-rayed my hand.
6 He put a metal splint on my thumb, and he wrapped it in
7 a bandage and informed me to go the next morning to
8 occupational medicine.
9 Q All right. Did you go to work the next
10 day?
11 A No. It was my scheduled day off.
12 Q Would that have been Labor Day?
13 A Monday, yes.
14 Q Did you go to work on Tuesday morning?
15 A Yes, I did.
16 Q At your normal time?
17 A Yes, sir.
18 Q That morning, did you have conversation
19 with Louise Hill?
20 A Yes, I did. I saw Louise in the hallway.
21 She asked me if I did eventually go to the doctor about
22 my hand. I showed her my hand, and I showed her the
23 splint. And I told her what the doctor had said because
24 I had been on Sunday to the emergency room and on Monday

1 to occupational medicine. And her comment to me --

2 MR. NATT: Again, I am going to object,

3 Your Honor, because it is hearsay at this point,

4 as to what Ms. Hill said.

5 THE COURT: It is not hearsay under Raven

6 Red Ash, 114 Virginia 103 at 112.

7 Overruled.

8

9 BY MR. GRIMES:

10 Q What did Ms. Hill say?

11 A Her comment to me was, "Why didn't you

12 just let her fall instead of getting hurt."

13 Q How did you react to that comment?

14 A I was outraged. I was angry. I could

15 not believe that a registered nurse was telling this to

16 me.

17 Q Did you then have a conversation with

18 that man seated to your left, Rob Bianco?

19 A Yes, I did.

20 Q Who is Mr. Bianco?

21 A Administrator, I believe, of Brandon

22 Oaks, executive, I believe.

23 Q Somebody high up?

24 A High up.

1 Q And what did Mr. Bianco tell you?

2 A I passed Mr. Bianco in the hall. And he

3 stopped and asked me about my hand. I showed him my

4 hand, and he asked me if I made it a habit of catching

5 people falling.

6 And I was kind of stunned for a person in

7 his position to say that.

8 THE COURT: Ms. Mullins, your opinions --

9 THE WITNESS: Okay.

10 THE COURT: -- are not proper testimony.

11 THE WITNESS: All right.

12

13 BY MR. GRIMES:

14 Q All right. Ms. Mullins, let's move on.

15 Did you finish working that day?

16 A Yes, I did.

17 Q Over the next few days and weeks, did you

18 continue to work at Brandon Oaks?

19 A Yes, sir.

20 Q Were you able to do your duties?

21 A I did them to the best of my ability. On

22 the unit that I worked on, the majority of the patients

23 could mainly do almost everything for themselves. A lot

24 of times, I would just have to be in the bathroom with

1 them to make sure they did not fall.

2 So, a lot of the residents I had, they

3 understood what was going on, so they did help me. I

4 helped them, and they helped me; but, yes.

5 Q Did you enjoy your work there?

6 A Oh, I loved my work.

7 Q Over the next few weeks, did you have

8 occasion to see doctors from time to time?

9 A Yes, sir, at every scheduled appointment.

10 Q And which hospital or clinic were you

11 going to?

12 A Lewis-Gale Hospital.

13 Q All right. Now, I want to draw your

14 attention to October of 1993. Did you have any

15 conversation with Louise Hill then about light-duty?

16 A Yes, I asked her if there was light-duty

17 due to the fact that the doctor wanted to put me on

18 light-duty. And her comment was there was no

19 light-duty.

20 Q Ms. Mullins, while you were going to the

21 doctors from time to time, did you keep Brandon Oaks

22 apprised of your treatment and your progress?

23 A Yes, sir. Every time I went to the

24 doctor -- Brandon Oaks is about five minutes from

1 BY MR. GRIMES:

2 Q Ms. Mullins, I am showing you what has

3 been marked for identification as Plaintiff's Exhibit

4 11. Do you recognize that document?

5 A Yes, I do.

6 Q What is it?

7 A It is a certificate from Doctor Harris.

8 Q How long did Doctor Harris want you out

9 of work?

10 A This was dated on October the 4th, and it

11 says, "No work with left hand until further notice."

12 MR. GRIMES: Your Honor, we move into

13 evidence Exhibit 11.

14 THE COURT: Any objection, Mr. Natt?

15 MR. NATT: No, Your Honor.

16 THE COURT: It is admitted.

17 MR. GRIMES: Your Honor, this is Tab 18

18 for the Court's records.

19

20 (A letter dated December 2nd was

21 Marked Plaintiff's Exhibit 12

22 for identification.)

23

24

1 BY MR. GRIMES:

2 Q Ms. Mullins, I am showing you what has

3 been marked for identification as Exhibit 12, I believe.

4 Do you recognize that document?

5 A Yes, I do.

6 Q What is it.

7 A It was a letter dated December the 2nd.

8 Q Where were you when you received that

9 letter?

10 A I was at home. I was at home.

11 Q The letter is signed by a Michael Furrow,

12 healthcare administrator on behalf of Brandon Oaks. Did

13 you know Mr. Furrow?

14 A Yes, I did.

15 Q What was the content of the letter? You

16 don't need to read it, but what was the purpose of the

17 letter?

18 A It was -- the purpose of it was to let me

19 know that --

20 MR. NATT: Your Honor, the letter speaks

21 for itself.

22 THE COURT: I sustain the objection to a

23 question what was the purpose of the letter.

24 MR. GRIMES: I understand, Your Honor.

1 Q As of that date, December 3, 1993, how
2 long had you been out of work under Doctor Harris'
3 order?
4 A Since the end of October. It was October
5 the 27th or 28th.
6 Q The last sentence of that letter
7 indicates that you can call your supervisor if you have
8 any questions. Did you have a question or two?
9 A Yes, I did. As soon as I got myself
10 together, I immediately got on the phone with Louise
11 Hill.
12 Q And did you talk with Louise Hill?
13 A Yes.
14 Q And what did Ms. Hill tell you?
15 A She indicated --
16 MR. NATT: Again, I understand the
17 Court's going to overrule my objection, but I
18 want to note it for the Record. I object on the
19 basis of hearsay.
20 THE COURT: The general rule is the
21 relevant declarations of an Agent are admissible
22 against his principle provided they are within
23 the scope of his authority and made in the
24 course of the matter to which they refer or in

1 BY MR. GRIMES:
2 Q You called Ms. Hill and she said
3 something.
4 A I asked her what did this mean about my
5 sick leave being up as of December the 6th. And her
6 comment was that -- and the policy, they only had a
7 certain number of days.
8 THE COURT: Ms. Mullins, are you now
9 saying what Ms. Hill told you?
10 THE WITNESS: Yes.
11 THE COURT: Because you --
12
13 BY MR. GRIMES:
14 Q That is what we are asking you --
15 A Okay.
16 Q -- not what went on in your mind.
17 A All right.
18 Q That is what the Judge wants to know,
19 what Ms. Hill told you, not what you were thinking.
20 A Okay. Ms. Hill informed me that there
21 was a certain number of sick days set aside, and after
22 your sick days are used up, you no longer have a job.
23 My question was, I was not sick. I was
24 hurt. I was trying to recuperate.

1 THE COURT: Mr. Grimes, it is time for
2 you to ask another question because what
3 Ms. Mullins --
4 MR. GRIMES: I understand.
5
6 BY MR. GRIMES:
7 Q All right. Was there any conversation --
8 Strike that. Did Ms. Hill tell you that your injury was
9 going to be treated just the same as an illness?
10 A Yes.
11 Q Was that basically the extent of that
12 conversation?
13 A Basically, yes.
14 Q Now, let's go to the next day. What day
15 would that have been, if you recall?
16 A It would be Monday, which would be
17 December the 6th?
18 Q All right. The telephone conference was
19 when, on December 6th?
20 A The telephone conversation was December
21 the 3rd, the day I received this.
22 Q Okay.
23 A And December 6th is when I went to see
24 her.

1 Q Did you meet with Louise Hill on December
2 6th?
3 A Yes, I did.
4 Q And did you take someone with you?
5 A My mother.
6 Q Did you have a conversation with Louise
7 Hill on December 6th.
8 A Yes.
9 Q Did you have a conversation about the
10 matters addressed in the letter?
11 A Yes.
12 Q What did Louise Hill tell you that day?
13 A The exact same thing that was stated to
14 me on Friday, that my injury was being treated as an
15 illness and my -- I had used up, according to the
16 letter, all of my sick time and that since I was not
17 able to come back to work on that date, I was
18 terminated.
19 Q Then did you leave the premises of
20 Brandon Oaks?
21 A Yes, I did.
22 Q Over the course of the next few days and
23 weeks, did you continue under the care and treatment of
24 Doctor Harris?

1 A I asked her to.
2 Q And why did she write what she wrote
3 there, if you know?
4 A I am not really sure.
5 Q And why did you ask her to write
6 anything?
7 A I wanted it in writing that there was no
8 position there for me.
9 Q Is that what Louise Hill told you?
10 A Yes.
11 Q Did you have a conversation with someone
12 at Brandon Oaks about a week later?
13 A Yes, I did.
14 Q Who did you talk with?
15 A I called Louise Hill back.
16 Q And what did you ask her?
17 A I asked her for a job.
18 Q What did she say?
19 A She said there was no place there for me.
20 MR. GRIMES: Your Honor, I move into
21 evidence Exhibit 15.
22 THE COURT: Without objection, it is
23 admitted.
24

1 this note up?
2 A I saw him on the date that he gave me
3 that note.
4 Q On November 4th?
5 A Yes, sir.
6 Q I am going to show you a letter date
7 December 2nd, which is your Exhibit 12. First of all,
8 let me ask you, you have alleged that you were
9 discharged, I guess, terminated, right?
10 A I was terminated.
11 Q Who terminated you?
12 A Louise Hill and according to this letter,
13 "All your extended medical leave will expire as of
14 December the 6th, 1993."
15 Q No, no, no. Did Louise Hill terminate
16 you, or did Michael Furrow terminate you?
17 A I never talked to Michael. It was Louise
18 Hill.
19 Q And when did Louise Hill terminate you?
20 A As of December 6th, 1993.
21 Q And what did she tell you on that date?
22 A That I had used up all of my sick time
23 and that my job was terminated.
24 Q And she used the word "terminated"?

1 Q And the first sentence says, "We hope
2 your injury is healing, and you will be able to return
3 to work in the near future."?
4 A Yes.
5 Q That is what the letter says, isn't it?
6 A Yes.
7 Q When you had your conversation with
8 Louise Hill on December 6th, was anyone else present?
9 A My mother.
10 Q And I want you to tell me exactly what
11 Louise Hill told you that day as best you can remember,
12 using the exact words?
13 A The exact words, there was no difference
14 between me being off from work recovering from a
15 work-related injury and sick time, and there was no
16 position there for me at that time because my job was
17 terminated because I had used up all my sick leave.
18 Q And your testimony is that she said your
19 job was terminated?
20 A Terminated.
21 Q Did she use that word "terminated"?
22 A Yes, sir.
23 Q Are you positive of that?
24 A I know she used it once, possibly twice

1 because --

2 Q During that conversation?

3 A Yes. -- I kept asking, "Why?"

4 Q And the reason she gave was because you

5 had used up your medical leave?

6 A My sick leave.

7 Q Your sick leave?

8 A Yes.

9 Q March 7th, 1994 --

10 A Yes, sir.

11 Q -- you were happy to be released from the

12 doctor?

13 A After six months, yes, sir.

14 Q You were ready to go back to work?

15 A Yes, sir.

16 Q Okay.

17 A I was scared, but I was ready.

18 Q The doctor writes a note and says you may

19 return to work?

20 A Yes.

21 Q You took that note and immediately went

22 to Brandon Oaks?

23 A Yes, sir.

24 Q When you walked into the front door of

1 Brandon Oaks, tell me what happened.
2 A The receptionist, Melody, was working; and
3 I asked her where Louise Hill was and she said that the
4 last time she talked to her, she was in Rob Bianco's
5 office.
6 Q Okay. So, keep going. Tell me what you
7 did.
8 A So, I went to Rob Bianco's office. When
9 you go into his office it is like a desk there for his
10 secretary and then his office is over to the left, and
11 that is where the copy machine is at.
12 And I looked around, and there was Louise
13 Hill at the copy machine.
14 Q And?
15 A I told her that I had a doctor's note
16 releasing me from -- to go back to work, and I wanted to
17 know if I could get a job. Then she informed me that I
18 had to fill out another application. I proceeded to do
19 that.
20 Q You are following exactly along what
21 transpired? You are not leaving anything out, right?
22 A We talked at the copy machine. I gave
23 her the doctor's note because she stood right there and
24 made a copy of it.

1 and you take this application, which is Exhibit 14, is
2 just what you took back to Ms. Hill, right?
3 A She was standing there when I finished,
4 and I handed it to her.
5 Q And you handed it to her completely
6 filled out?
7 A Yes.
8 Q And then what happened?
9 A I did leave the "position applying for"
10 open.
11 Q Why?
12 A I wasn't sure what to put there. So, I
13 asked Ms. Hill -- I did put CNA, and I asked her what
14 else should I put; and she said put down what you worked
15 before, and I put personal care 7:00 to 3:00.
16 Q That is not what it asks here. It asks
17 what job are you seeking, position applied for, and that
18 is what you filled in?
19 A Yes, sir.
20 Q It doesn't say what job I had before?
21 A I did what Ms. Hill told me to do.
22 Q So, when you filled that out, what did
23 you tell Ms. Hill?
24 A I handed it to her, and she looked at it

1 and she says, "I do not have a position here for you."
2 Q Did she qualify that by saying on the
3 7:00-to-3:00 shift in the CNA Unit?
4 A No, sir, that is when I informed her that
5 I had done payroll in the past. I could do that. I
6 could work the switchboard because I knew they were
7 looking for somebody. I would take any available shift.
8 It did not matter to me. I just wanted my job back.
9 And, she said there was no position there for you and
10 she was saying it to me.
11 Q Was anyone else present when this was
12 said?
13 A There could have been somebody else in the
14 office, but I was so upset I don't know.
15 Q If -- in the office or by the copier?
16 A The copier is in the middle of an office.
17 When you walk in, there is a desk, there is a copier and
18 there are two or three offices to the right, and
19 Mr. Bianco's office is to your left. It is like a big
20 room.
21 Q It is like a work room. It is not really
22 an office?
23 A No, it is an office.
24 Q It is an office?

1 A Yes.
2 Q Now, tell me what happened after that on
3 that day?
4 A I asked Ms. Hill to please put it in
5 writing, that there was no position there for me; and
6 that is when she proceeded to write this.
7 Q She wrote Exhibit 15?
8 A Yes, she did.
9 Q Is that what you asked her to write?
10 A No, it's not.
11 Q Why didn't you go back and say, Louise,
12 this is not what I asked you. I asked you to say that
13 there is no position for me and you've qualified it?
14 Why didn't you ask her to do that?
15 A I was extremely upset, and I wanted to
16 leave.
17 Q But, you never came back and asked her to
18 rewrite this, even after you had calmed down?
19 A No, sir.
20 Q You testified you called her a week later
21 and asked for a job?
22 A Yes, sir.
23 Q Did you ask her to rewrite the letter a
24 week later?

1 A No, sir.
2 Q Why didn't you a week later, if it wasn't
3 what you wanted?
4 A To be really truthful, I didn't really
5 think twice about it at that time.
6 Q You didn't think twice about it?
7 A At that time.
8 MR. NATT: If I might have one moment,
9 Your Honor.
10 That is all that I have, Your Honor.
11 THE COURT: Mr. Grimes, Redirect
12 Examination?
13 MR. GRIMES: No Redirect, Your Honor.
14 THE COURT: Ms. Mullins, you may step
15 down.
16
17 (The witness was excused from the
18 witness stand.)
19
20 THE COURT: Members of the Jury, yes, we
21 will break for lunch. As we do so, let me
22 caution and remind you not to discuss the case
23 among yourselves and not to discuss the case
24 with anyone else.

1 hearing the testimony of Doctor Harris.
2 And Mr. Grimes, for the benefit of the
3 Jury, what is the date?
4 MR. GRIMES: The deposition was taken on
5 July 17, 1995. The deponent was Steven G.
6 Harris, M.D.
7 THE COURT: And the deposition was taken
8 where?
9 MR. GRIMES: The deposition was taken via
10 telephone. Doctor Harris, I believe, was at his
11 office.
12 MR. NATT: That is correct.
13 THE COURT: And Mr. Natt will play the
14 part of Mr. Natt, and Mr. Grimes will play the
15 part of Mr. Grimes.
16 THE COURT: Mr. Natt goes first. This is
17 the Plaintiff's evidence.
18
19 (The July 17, 1995, deposition of
20 Steven G. Harris, M.D., was read
21 in into the Record.)
22
23 THE COURT: Thank you. That concludes
24 the testimony of Doctor Harris.

1 Ms. Mullins must then re-apply in order to be considered
2 for another available position. Do you see that
3 language in the second paragraph?
4 A Yes.
5 Q My question to you is this: As far as
6 you know, was that policy applied to anyone else at
7 Brandon Oaks during the course of your employment?
8 A No.
9 Q Only Ms. Mullins?
10 A Yes.
11 MR. GRIMES: Thank you. That is all I
12 have.
13 THE COURT: Mr. Natt?
14
15 CROSS EXAMINATION
16
17 BY MR. NATT:
18 Q Ms. Hearn, were there any other
19 individuals during your employment at Brandon Oaks which
20 would have fallen under this policy that you know of?
21 A I don't understand what you mean.
22 Q Were there any other people who had gone
23 out on Workers' Comp or injury and had used up all their
24 time?

1 REDIRECT EXAMINATION

2

3 BY MR. GRIMES:

4 Q Ms. Hearn, you testified that the

5 supervisor had the discretion to declare the leave as

6 authorize or unauthorized; is that your testimony?

7 A Yes.

8 Q Can you think of any reason why Ms. Hill

9 would have declared Ms. Mullins' leave as unauthorized?

10 A No.

11 Q Now with respect to this extended sick

12 leave which appears on Page 25 of the policy, it

13 specifically provides that that applied to extended

14 illnesses, correct?

15 A Yes.

16 Q And there is on Page 31, another policy

17 that provides -- that pertains to Workers' Compensation?

18 A Yes.

19 Q Well, let's go ahead and read the

20 Workers' Compensation policy if you would. It is on the

21 top of Page 31?

22 A Do you want me to read it out loud?

23 Q Yes.

24 A "If an employee is accidentally injured

1 Q Why would Ms. Hill have said we have no
2 position for you on December 7th when your daughter
3 wasn't even able to come back to work?
4 A According to this.
5 Q Where does this say -- and this is the
6 December 2nd letter -- where does it say we have no
7 position for you?
8 A The letter states that she did not return
9 to --
10 Q Now, I am not asking you what the letter
11 says. I am asking you what Ms. Hill told you on that
12 date.
13 A Ms. Hill said that Theresa Mullins' job
14 was terminated. She had no job and no position.
15 Q Did she tell you why her job was
16 terminated?
17 A Due to my daughter's injury. They said
18 it was medical and injury.
19 Q They said she has a medical -- she's --
20 A Well, that she was on sick leave.
21 Q She was still on sick leave?
22 A She was hurt. She wasn't sick. She was
23 hurt.
24 Q Now, I am not trying to badger you, but I

1 motion. I will strike the Plaintiff's evidence
2 on the retaliatory discharge claim and enter
3 summary judgment for the Defendant on that
4 motion.
5 Ms. Mullins, your lawyer did an outstanding
6 job in putting on the evidence in the light best
7 for you. I strike the evidence because I would
8 be compelled to set aside a verdict if the Jury
9 rendered a verdict in your favor in a claim
10 under Virginia Code Section 65.2-308.
11 The Jury could only reach the conclusion
12 that discharge was quote, solely because the
13 employee intends to file or has filed a claim
14 under this title or has testified or is about to
15 testify in any proceeding under this tile,
16 closed quote, by speculation, by picking and
17 choosing among alternative explanations that the
18 Plaintiff has offered.
19 The Jury could not find based upon
20 circumstantial evidence or any other evidence by
21 the greater weight of the evidence that the sole
22 basis for discharge was that precluded and
23 prohibited by Code Section 65.2-308.
24 Ms. Mullins' evidence suggestions that

ASSIGNMENT OF ERROR

I. WHERE A NURSING HOME EMPLOYEE SEVERELY INJURED HER FOREARM WHILE PREVENTING THE FALL OF AN ELDERLY RESIDENT, THEREBY TRIGGERING A WORKER'S COMPENSATION CLAIM, AND WHERE MULLINS' SUPERVISOR AND THE NURSING HOME ADMINISTRATOR TOLD MULLINS THAT SHE SHOULD HAVE AVOIDED INJURY BY LETTING THE ELDERLY RESIDENT FALL, AND WHERE THE NURSING HOME THEN FIRED MULLINS AFTER SHE FILED A WORKER'S COMPENSATION CLAIM, THE DISTRICT COURT ERRED BY GRANTING THE NURSING HOME'S MOTION TO STRIKE AT TRIAL

BRANDON OAKS

TCN

APPLICATION FOR EMPLOYMENT
(PLEASE PRINT CLEARLY)

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications *and* may assist us in possible future upgrading.

A subsidiary of Virginia Lutheran Homes, Inc.

3804 Brandon Ave., SW, Roanoke, VA 24018, (703) 776-2600

PERSONAL

Date 3-7-94

Name Mullins (Last) Theresa (First) A (Middle) Social Security No. 221-94-0073

Present Address 904 Campbell Dr #4 (No. Street) Salem (City) Va (State) 24153 (Zip) Telephone No. 344-6559

Are you legally eligible for employment in the U.S.A.? yes State age if under 18 or over 70

Position(s) applied for CNA / Personal Care 7-3 Rate of pay expected $ 5.50 per ~~week~~ hr.

Would you work Full-Time ✓ Part-Time Specify days and hours if part-time

What method of transportation will you use to get to work? Car

Were you previously employed by us? yes If yes, when? Feb 15, 1993 - Dec 6, 1993

List any friends or relatives working for us (Name(s))

Have you ever been convicted of a crime? no If yes, describe in full

Are there any experiences, skills, or qualifications which you feel would especially fit you for work with our organization? typing, CPR, Filing, Data Entry, CNA

If your application is considered favorably, on what date will you be available for work? 19

In case of emergency notify: Robert Reid (Name) Boyfriend (Relationship) 344-6559 (Telephone (Residence #)) (Business #)

RECORD OF EDUCATION

School	Name and Address of School	Course of Study	Circle Last Year Completed	Did You Graduate?	Last Diploma or Degree
High	Salem High		1 2 3 4	☑ Yes ☐ No	GED
College			1 2 3 4	☐ Yes ☐ No	
Other (Specify)			1 2 3 4	☐ Yes ☐ No	

MILITARY SERVICE RECORD

Were you in the U.S. Armed Forces? Yes No ✓ If yes, what Branch?

Dates of duty: From (Month Day Year) To (Month Day Year) Rank at discharge

List duties in the service including special training

List below all present and past employment, beginning with your most recent.

Name and Address of Company and Type of Business	From Mo. Yr.	List your job title and describe in detail the type of work you did.	Weekly Starting Salary	Reason For Leaving	Name and Title of Supervisor
Check Reference					
	To Mo. Yr.		Weekly Last Salary		
Telephone ( )					

Name and Address of Company and Type of Business	From Mo. Yr.	List your job title and describe in detail the type of work you did.	Weekly Starting Salary	Reason For Leaving	Name and Title of Supervisor
	To Mo. Yr.		Weekly Last Salary		
Telephone ( )					

Name and Address of Company and Type of Business	From Mo. Yr.	List your job title and describe in detail the type of work you did.	Weekly Starting Salary	Reason For Leaving	Name and Title of Supervisor
	To Mo. Yr.		Weekly Last Salary		
Telephone ( )					

May we contact the employers listed above?_____ If not, indicate which one(s) you do not wish us to contact:_____

PERSONAL REFERENCES (Not Former Employers or Relatives)

Name and Occupation	Address	Phone Number
Robert Reed Hairdresser	404 Carnegie Dr #4 Salem Va	344-6559
Sherrie Cullivan Kmart	Lakeside Pl Va	989-7437

State and Federal laws prohibit discrimination based on race, color, national origin, sex, religion, or handicap.

CONDITIONS OF EMPLOYMENT

I give Brandon Oaks the right to make a thorough pre-employment investigation and release all persons, companies, or corporations from liability for supplying such information as may be requested. I understand any false statements made in connection with this application could be sufficient grounds for immediate discharge.

3-7-94 (Date) [signature] (Applicant's Signature)

Willing to take drug test if needed

DO NOT WRITE BELOW THIS LINE

NTERVIEW COMMENTS:

nterviewed By:_____ Date:_____

FOR OFFICE USE ONLY

Possible Departments _____ Department _____

Possible Positions _____ Position _____

Date of Hire _____

Approved _____ Department Head _____ Administration

BRANDON OAKS

December 2, 1993

Theresa Mullins
904 Camelot Rd.
Apt. 8
Salem, Virginia 24153

Dear Theresa,

We hope your injury is healing and you will be able to return to work in the near future. The Personnel Policy of Virginia Lutheran Home states: that a fulltime employee who has an extended illness will be given their accrued sick and vacation leave, plus accrued personal leave days. In addition, 30 calendar days leave of absence may be added.

If the employee is unable to return to work after this leave has expired, the position will be filled by another qualified applicant. The employee must re-apply in order to be considered for another available position.

All of your extended medical leave will expire as of December 6, 1993. Contact us as soon as possible, when you are able to return to work and can present a signed medical release from your attending physician. You may contact your supervisor, if you have any questions.

Sincerely,

Michael A. Furrow
Health Care Administrator

MAF/ja

3804 Brandon Avenue, SW, Roanoke, Virginia 24018 (703) 776-2600, Fax (703) 776-2620