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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, *et al*., on behalf of themselves and all others similarly situated, Plaintiffs, vs. BANNER HEALTH NETWORK, *et al*., Defendants.	**Case No. CV2012-007665** **PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENT TO PLAINTIFFS' MOTION FOR NEW TRIAL RE BREACH OF CONTRACT** **(The Honorable Dawn Bergin)**

Defendants claim Plaintiffs' motion should be denied because it relies upon reasoning in a Court of Appeals opinion that was "reversed" by the Arizona Supreme Court. Without citing a single authority, Defendants state that a reversed opinion is "no longer good law, no longer has precedential value, and is no longer authoritative on any issue." Defs' Supp. at 2:19-20. This is contrary to well-established law and common sense: "Merits questions may be independent of each other; reversal on one merits ground may

leave the decisions reached on other grounds intact." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010); *cf. Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991) ("A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever.").

The Court of Appeals' opinion in this case was reversed, not vacated. *Cf.* Michael D. Moberly, *This is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J.App.Prac. & Process 231, 252 (2012) ("[T]he Arizona Supreme Court may vacate an opinion with which it disagrees (as opposed to, for example, simply reversing the lower court's decision) in order to discourage litigants from relying on the opinion in subsequent cases."). Indeed, "if the Arizona Supreme Court disagrees with the reasoning in a court of appeals opinion, it not only can vacate the opinion, but it can also order that the opinion be 'depublished.'" *Id.* at 261.

A quick search on Westlaw turns up hundreds of Arizona opinions, including many from the Arizona Supreme Court itself, where the courts relied upon prior opinions that were "reversed on other grounds." *E.g.*, *State v. Beaty*, 158 Ariz. 232, 239-40, 762 P.2d 519, 526-27 (1988). These opinions confirm that, as noted above, "reversed" means something distinctly different from "vacated."

Knowing this was going to be an issue, in a recent motion for reconsideration Defendants urged the Arizona Supreme Court to "vacate" rather than "reverse" the Court of Appeals in this matter. The Court refused their request, and this came after oral argument where the Court was made acutely aware that "law of the case" would be an issue upon remand in this case.

The Arizona Supreme Court's decision—reinstating the affirmative defense of accord and satisfaction in favor of closed-lien Defendants—was the exclusive basis for

reversal and left intact "the decisions reached on other grounds" by the Court of Appeals. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010). Accordingly, the Court of Appeals' opinion became binding precedent for those remaining grounds and, "[i]t remains so until this court, in [another] published opinion, refuses to follow it or it is vacated by our supreme court." *Francis v. Ariz. Dept. of Transp.*, 192 Ariz. 269, 963 P.2d 1092, 1094 (App. 1998).

To the extent that the Court of Appeals' opinion concluded that the hospitals breached their Provider Participation Agreements by collecting from AHCCCS patients in violation of federal law and A.C.C. R9-22-702, that is the law of this case. Moreover, such a holding is also consistent with newly published Arizona Supreme Court precedent that construed Provider Participation Agreements in the Medicare Advantage context—holding that entering into the Provider Participation Agreements constituted a waiver of any alleged rights to collect from patients. *United Behavioral Health v. Maricopa Integ. Health Sys.*, 240 Ariz. 118 ¶ 21, 377 P.3d 315 (2016) (observing that "[p]roviders waived their rights to payment from [Medicare Advantage] enrollees in the [provider participation] Agreements and provided uncompensated services to enrollees."). As was argued in Plaintiffs' underlying motions, the same is true in this case.

CONCLUSION

This Court should give the Court of Appeals' opinion due consideration, pursuant to Rules 59 or 60, in overturning Judge Gama's earlier conclusion that the hospitals did not breach their Provider Participation Agreements by collecting from AHCCCS patients in violation of federal law and A.C.C. R9-22-702.

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RESPECTFULLY SUBMITTED this 7th day of October, 2016.

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