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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2014-001316

Unpublished Opinion No. 2015-UP-307
(S.C. Ct. App. filed June 24, 2015)

Allcare Medical, LLC, Respondent,

v.

**Ahava Hospice, Inc. f/k/a Ascension Hospice Inc., Robert A. Williams, and
Lancelot D. Wright, Defendants,
Of whom Ahava Hospice, Inc. f/k/a Ascension Hospice Inc., and Lancelot D.
Wright are the Petitioners**

**AMENDED PETITION FOR REHEARING OF APPELLANT AHAVA
HOSPICE INC.**

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240 (i), SCACR the Appellant Ahava Hospice, Inc. respectfully petitions this Court for a rehearing of Opinion No. 2015-UP-307 dated, June 24, 2015. Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E. 2d 322 (2001). When the Court fails to address some of the arguments raised in the appeal, “a prima facie case for rehearing has been made.” *Covar v. Sallat*, 22 S.C. 265, 272 (1885)

STATEMENT OF THE CASE

In 2008, the plaintiff Allcare Medical entered into a contract with Ascension Hospice to provide durable medical equipment (DME) for hospice patients. *Record p. 40, See Exhibit 1 and Deposition Allcare CEO Ondrej Sliva*. In 2010 Allcare discussed outstanding invoices with Ascension, Robert Williams and Lance Wright. Allcare thru its CEO threatened to remove their equipment from the hospice patients unless Robert Williams and Lance Wright signed personal promissory notes for outstanding invoices. In 2011 Ahava Hospice, Inc. obtained some of Ascension’s hospice patients and employees as Ascension ceased doing business. Ahava did not assume the debt of Ascension Hospice. *Record p. 212, Gray dep. P 19 L. 20-22* Allcare entered into unsuccessful negotiations to provide DME for Ahava Hospice. *Record p. 61, See Sliva Dep. P. 22 L 16-19 and Exhibit 3 Proposed contract*. Ahava never signed a contract with Allcare or agreed to continue using Allcare or pay Ascension’s outstanding debt with Allcare. Allcare subsequently filed suit against Ahava Hospice, Inc. The plaintiff filed a motion for summary judgment, which after oral arguments was granted by Judge Hayes. Defendants appealed Judge

Hayes's order to the Court of Appeals. On appeal this Court affirmed and the petitioner now seeks a rehearing.

ARGUMENT

1. THE COURT APPEALS OPINION FAILED TO ADDRESS THE PETITIONER'S ARGUMENT THAT THE CIRCUIT COURT ORDER SHOULD BE REVERSED SINCE NO CONTRACT EXISTED BETWEEN AHAVA HOSPICE AND ALLCARE MEDICAL

The Court's opinion failed to address the Petitioner's argument that the circuit court order should be reversed since no contract existed between Ahava Hospice and Allcare Medical. In this case there is no breach of contract because there is no written signed agreement between Allcare Medical and Ahava. In addition there were no acceptance of an offer or agreement to terms of contract. The testimony of Ondrej Sliva CEO of Allcare supports the position that no contract exists. Sliva testified as follows:

There were no invoices for Ahava Hospice only invoices for Ascension Hospice. *Record p. 51, Sliva Dep. P. 12 L 22-24*

There was a signed contract with Ascension Hospice only dated March 2008. *Record p. 59, Sliva Dep. P 20 L 21-23*

Allcare unsuccessfully negotiated with Ahava for a contract. *Record p. 61, Sliva Dep. P 22 L 16-19. "I thought we would talk about a new contract for Ahava"*

No contract signed by Ahava. *Record p. 65, Sliva Dep. P 26 L 5-7 Dep. 27 L 8-10*

Allcare never received any payments from Ahava for equipment. *Record p.66-67, Sliva Dep. P 27-28. L25*

Clearly, Allcare did not have a contract with Ahava and the summary judgment order against Ahava Hospice, Inc. should be reversed.

2. THE COURT OF APPEALS OPINION MISAPPREHENDS THE PETITIONER'S ARGUMENT THAT THERE IS A GENUINE ISSUE OF FACT WHETHER OR NOT AHAVA HOSPICE, INC. IS A SUCESSOR IN INTEREST TO ASCENSION HOSPICE.

The Court's Opinion addressing whether there is a genuine issue of fact is confusing and misapprehends the Petitioner's argument. In this case Ahava Hospice is not a successor for liability. The Circuit Court's ruling that Ahava Hospice is a successor company to Ascension Hospice is erroneous and fails to address the issues of fact. There is clearly a genuine question of fact whether Ahava is a mere continuation of Ascension. There are multiple factual issues that would require a jury trial. The ownership is almost entirely different. Only one principal from Ascension was involved with Ahava. *Record p. 200*, Gray Dep. P. 7 L. 10-15. Ahava was an existing corporation prior to obtaining some employees and some patients of Ascension. Ahava was incorporated in January 28, 2010. Ahava did not assume debts of Ascension. *Record p. 212*, Gray dep. P 19 L. 20-22 Ahava and Ascension were separate companies with separate Medicare numbers. *Record p. 306*, Gray Dep. P 113. L. 14-16. Prior to leasing office space in Irmo, South Carolina Ahava had offices in West Columbia and Sumter South Carolina. *Record p. 215*, Gray Dep. P. 22 L 1-4. Ahava did not utilize Ascension equipment but got new property leases and new equipment. *Record p. 213*, Gray Dep. P. 20 L. 1-2; *Record p. 216*, P 23 L. 7-8. Ahava Hospice did not purchase any assets of Ascension Hospice prior to or subsequent to its closing. *Record p. 220*, Gray Dep. P. 27. L. 11-12. Ahava Hospice did not agree to accept or

otherwise assume any liabilities, debts or obligations belonging to or incurred by Ascension Hospice. *Record p. 212*, Gray Dep. P.19 L. 20-22 Ahava Hospice only obtained about 30 or 40 percent of the patients from Ascension Hospice. *Record p. 217*, Gray Dep. P. 24, L 6-12. Ahava is an entirely separate company and not a continuation of Ascension and clearly the facts do not support the summary judgment order but creates a genuine issue of fact for a jury.

3. THE COURT OF APPEALS OPINION MISAPPREHENDS THE PETITIONER'S ARGUMENT THAT THERE IS A GENUINE ISSUE OF FACT OF DURESS.

In this case duress renders Mr. Wright's promissory note void and at a minimum defeats a motion for summary judgment. The facts as considered most favorably to the defendant are as follows: The CEO of Allcare Medical O Sliva stated in his deposition that he threatened to remove essential equipment from Ascension patients at the time Mr. Wright signed the promissory note. *Record p. 52*, See Sliva Dep. P 13 L 21-25. He went on to say he was going to "pull the trigger on pickups" of essential equipment. *Record p. 57*, Sliva dep. p 18 L 19-22 and *Record p. 58*, p. 19 L 1-12. Mr. Sliva clearly coerced Mr. Wright to sign the promissory note based on these threats.

Mr. Wright testified at his deposition " it was a duress situation"... "it was like an under the gun kind of deal with Ondrej said if he don't get something done he was going to pick that patient equipment up so it was a dire situation" "But I felt it was urgent it was dire and he needed me on this deal" *Record p. 147*, Wright p. 42 L. 23-24 "And because it was dire straits". *Record p. 149*, Wright Dep. P. 44 L. 16. Finally Mr. Wright testified, he was under belief that

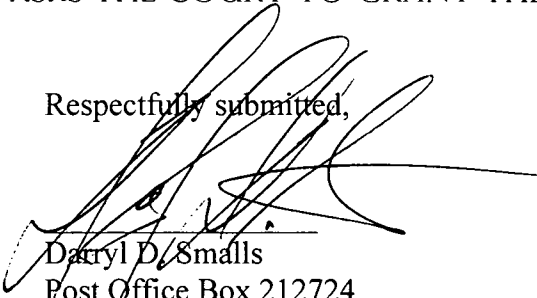
Allcare would pull equipment from the patients who were facing life-threatening illnesses therefore he signed the note. *Record p. 192, Wright Dep. P. 87 L. 10-16.* The facts show that there was coercion and that created a state of mind that Mr. Wright signing the promissory note was not of his free will. Mr. Wright' s testimony creates a genuine question of fact to defeat summary judgment.

CONCLUSION

FOR THE REASONS STATED, PETITIONER ASKS THE COURT TO GRANT THE PETITION FOR REHEARING

July 10, 2015

Respectfully submitted,



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are

Appellants

CERTIFICATE OF SERVICE

I CERTIFY THAT I HAVE SERVED THE PETITION BY DEPOSITING A COPY OF IT
IN THE UNITED STATES MAIL, POSTAGE PREPAID, JULY 9 ADDRESSED TO
ATTORNEY OF RECORD:

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July 9, 2015

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I CERTIFY THAT I HAVE SERVED THE AMENDED PETITION BY DEPOSITING A
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