

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2015-UP-307  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

Ahava Hospice, Inc. f/k/a  
Ascension Hospice Inc.,  
Robert A. Williams, and  
Lancelot D. Wright,  
Defendants,

Petitioners,

Of whom Ahava Hospice,  
Inc. f/k/a Ascension Hospice  
Inc., and Lancelot D. Wright  
are the Petitioners

v.

Allcare Medical, LLC,

Respondent

PETITION FOR A WRIT OF CERTIORARI

**Darryl D. Smalls, Attorney at Law**  
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SEP 22 2015

SC Court of Appeals

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## CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 20, 2015.

### QUESTIONS PRESENTED

1. Did the Court of Appeals fail to address the Petitioners argument that the Circuit Court Order should be reversed since no contract existed between Ahava Hospice and Allcare Medical?

2. Did the Court of Appeals misapprehend the Petitioner's argument that there is a genuine issue of fact whether or not Ahava Hospice, Inc. is a successor in interest to Ascension Hospice and does not follow long standing Supreme Court case law that in determining whether any issue of fact exists, the court construes the facts in the light most favorable to the non-moving party ?

3. Did the Court of Appeals misapprehend the Petitioner's argument that there is a genuine issue of fact whether there was duress in signing the promissory note and does not follow long standing Supreme Court case law in determining whether any issue of fact exists, the court construes the facts in the light most favorable to the non-moving party?

### 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. for breach of contract. 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 the Court of Appeals affirmed and denied the petition for rehearing. The Petitioners now petition for a writ of certiorari.

## ARGUMENT

### **1. The Court of Appeals Opinion failed to address the Petitioners 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 successor in interest to Ascension Hospice and does not follow long standing Supreme Court case law that in determining whether any issue of fact exists, the court construes the facts in the light most favorable to the non-moving party.**

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 factual issues are as follows: 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.

The Court of Appeals decision is contrary to multiple Supreme Court decisions state that in determining whether any triable issue of fact exists, the court construes the facts in the light most favorable to the non-moving party. In deciding a motion for summary judgment, the non moving party is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf and finally to be given the benefit of all favorable legal theories invoked by the evidence so considered. *Williams v.*

*Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976). Based upon South Carolina Supreme Court cases, the order granting summary judgment in this case with multiple issues of fact was an error and should be reversed.

**3. The Court of Appeals Opinion misapprehends the Petitioner's argument that there is a genuine issue of fact whether there was duress in signing the promissory note and does not follow long standing Supreme Court case law in determining whether any issue of fact exists, the court construes the facts in the light most favorable to the non-moving party**

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.

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56.

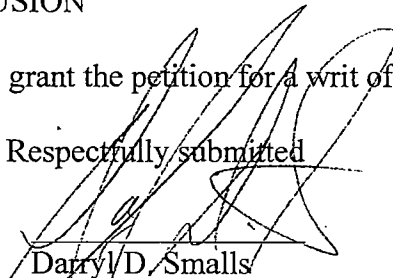
"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citations omitted). As in the trial court, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.* (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). As previously stated the order granting summary judgment in this case with multiple issues of fact was an error and should be reversed.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted

September 18, 2015



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**CERTIFICATE OF SERVICE**

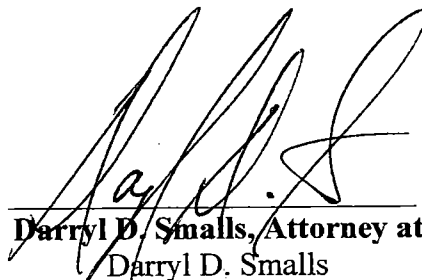
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I CERTIFY THAT I HAVE SERVED THE PETITIONER'S PETITION FOR A  
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ADDRESSED TO ATTORNEY OF RECORD:

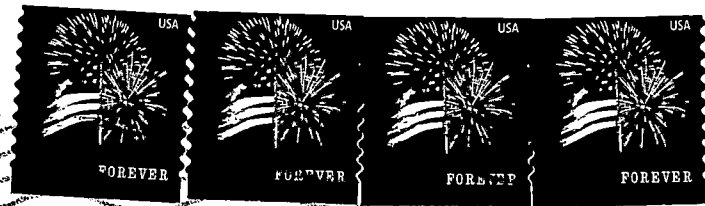
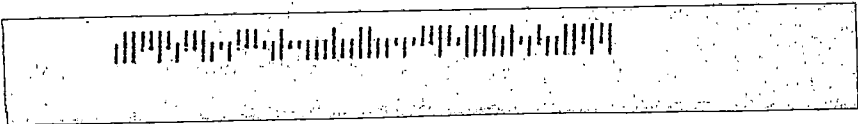
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A handwritten signature in black ink, appearing to read "Darryl D. Smalls", written over a horizontal line.

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