

INDEX

Questions Presented ..... 1

Statement of the Case ..... 1

Arguments

    I.    The Court of Appeals properly affirmed the Trial Court's Order Granting Summary Judgment because no genuine issue of material facts exists as to whether Ahava assumed liability for the contract between Ascension and Allcare.  
          ..... 6

    II.   The Court of Appeals properly affirmed the Trial Court's Order Granting Summary Judgment because no genuine issue of material facts exists as to whether Ahava Hospice merged with Ascension.  
          ..... 6

    III.  The Court of Appeals properly affirmed the Trial Court's Order Granting Summary Judgment because no genuine issue of material facts exists as to whether Lancelot Wright entered into the personal guaranty freely and voluntarily.  
          ..... 8

Conclusion ..... 9

## QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the Trial Court's Order Granting Summary Judgment as whether Ahava assumed liability for the Contract between Ascension and Allcare?
2. Did the Court of Appeals properly affirm the Trial Court's Order Granting Summary Judgment as whether Ahava merged with Ascension?
3. Did the Court of Appeals properly affirm the Trial Court's Order Granting Summary Judgment as to whether Lancelot Wright entered into the personal guaranty freely and voluntarily?

## STATEMENT OF THE CASE

Allcare Medical, LLC ("Allcare") filed suit against Defendants Ahava Hospice, Inc. ("Ahava"), Lancelot Wright ("Wright"), and Robert A. Williams ("Williams") on June 13, 2011. *R. p. 324*. The Complaint alleges a breach of contract claim against Ahava and a separate breach of contract claim against Lancelot Wright and Robert Williams. Defendant Robert A. Williams has not been served in this case and is not a party to this appeal. *R. pp. 324-328*.

Allcare's breach of contract claim against Ahava arises out of Ahava's failure to pay invoices due under a contract that Allcare alleges Ahava assumed when it purchased Ascension Hospice Inc. Allcare's breach of contract claim against Lancelot Wright arises out of Wright's failure to pay money owed to Allcare pursuant to a personal guarantee signed by Wright.

On or about August 12, 2011 Ahava and Wright filed a joint Answer. Ahava denied Allcare's claim for breach of contract on the grounds that it did not assume Ascension's contract with Allcare. *R. pp. 317-318*. Lancelot Wright denied Allcare's breach of contract claim on the grounds that he signed the personal guarantee under

duress. *R. p. 318.*

After the conclusion of written discovery and the depositions of Ahava's 30(b)(6) designee, Lancelot Wright, and Allcare's 30(b)(6) designee, Allcare moved for summary judgment against Ahava and Wright as to liability on the breach of contract claims.

On March 21, 2014 Judge Hayes heard oral argument from both parties and reviewed all pleadings, affidavits, deposition testimony, memoranda of law from both parties, and case law submitted by the parties. *R. pp. 6-39.*

On May 16, 2014 Judge Hayes entered an order granting summary judgment for Allcare on the breach of contract claims against both Ahava and Wright. *R. pp. 1-5.* The Court granted summary judgment as to liability only and there has not yet been a determination of damages. On June 24, 2015, the Court of Appeals filed its opinion affirming Judge Hayes' May 16, 2014 order. On August 20, 2015, the Court of Appeals filed its order denying Petitioners' Petition for Rehearing.

Allcare is in the business of providing durable medical equipment to various health care providers in the southeast. On March 12, 2008, Allcare entered into a valid written agreement with Ascension Hospice whereby Allcare agreed to provide medical equipment and Ascension agreed to pay for the equipment. At the time, Defendant Robert A. Williams was a majority shareholder of Ascension. *R. p. 222, ln. 5-12.* In January 2011, Ascension closed its doors and Ahava took over Ascension's operations and Defendant Robert A. Williams became a shareholder and officer of Ahava. *R. p. 214, ln. 21-22; p. 221, ln. 25 – p. 222, ln. 12; p. 250, ln. 22 – p. 251, ln. 6.*

**Ahava is the successor in interest to Ascension**

The facts set forth below are not in dispute as they were admitted through the

deposition testimony of both Ahava's 30(b)(6) designee and the testimony of Ahava's CEO, Appellant Lancelot Wright.

Ahava designated its corporate compliance officer, Glen Gray, to testify on its behalf. *R. pp. 312-313*. In addition to being Ahava's corporate compliance officer, Mr. Gray is a former employee of Ascension. *R. p. 199, ln. 20-24*. Mr. Gray, an attorney, has twice been reprimanded by the South Carolina Supreme Court. In 2009 the South Carolina Supreme Court suspended Mr. Gray from the practice of law for creating fictitious time entries and expense reimbursements; exhibiting conduct that was "deliberate, purposeful, deceitful, and fraudulent." *R. p. 281, ln. 8 – p. 282, ln. 11*. In 2012 the South Carolina Supreme Court again reprimanded Mr. Gray for submitting an affidavit containing a false statement. *R. p. 283, ln. 22 – p. 285, ln. 12*.

Mr. Gray testified that after Ascension closed its doors, Ahava operated out of Ascension's former office space. *R. p. 215, ln. 5 – ln. 15*. He admitted that Ahava also hired former Ascension employees; used the same office equipment; and kept some of the same corporate cars. *R. p. 220, ln. 20 – p. 221, ln. 15*. He further admitted that Ahava took over the care of 30 to 40 percent of Ascension's patient list. *R. p. 217, ln. 13 – p. 218, ln. 9*.

Mr. Grey's testimony on behalf of Ahava is echoed by the testimony of Ahava's CEO, Appellant Lancelot Wright. Wright testified that in March of 2011 the majority of Ahava's patients and employees were former patients and employees of Ascension. *R. p. 180, ln. 2 – ln. 16*.

Mr. Gray further testified that, in addition to assuming Ascension's patient census and former employees. When presented with checks and bank statements showing that

on multiple occasions following Ascension's closure checks were drawn from Ahava's bank account listing Ascension as the account holder, Mr. Gray admitted that on at least two occasions Ahava issued checks on behalf of Ascension to pay bills to Comdata Corporation. *R. p.263, ln. 8 – p. 266, ln. 12.* Mr. Gray further admitted that in March 2011 Ahava paid over \$52,000.00 to Ascension Hospice. *R. p.259, ln.6 – p. 262, ln. 11.* Despite being designated to testify on these specific issues, Mr. Gray testified that he did not know why these checks were issued. *R. p. 260, ln. 7-13; p. 263, ln. 22 – p. 264, ln. 3.* To date, Ahava has failed to provide any evidence, much less specific evidence, to contradict or otherwise explain why Ahava drew these checks from its account to pay the debts of Ascension.

Ahava did not just use its accounts to pay Ascension debts, it also used its accounts to benefit former Ascension employees and shareholders. Ahava used its resources to pay legal fees for former employees of Ascension and also paid fees to companies with which it had no business relationship, but with whom it shared common shareholders. *R. p. 228, ln. 1 – p. 229, ln. 8; p. 254, ln. 5 – p. 255, ln. 6.* Appellant Wright agreed "it was routine business practice" to "rob[] Peter to pay Paul where if one of [the] companies has money and the other one doesn't you'd just transfer it between [companies]..." *R. p. 160, ln. 14 – ln. 22.* Again, none of these facts are disputed, they were freely admitted in deposition by Ahava's 30(b)(6) designee and Wright.

**Lancelot Wright personally guaranteed Ascension's debt to Allcare**

When Ascension fell further behind in its payments to Allcare, Allcare entered into negotiations with Defendant Lancelot Wright and Defendant Robert A. Williams to secure a personal guarantee. Robert Williams was a shareholder of Ascension and after

Ahava took over Ascension's operations he became a shareholder of Ahava. *R. p. 214, ln. 21-22; p. 221, ln. 25 – p. 222, ln. 12; p. 250, ln. 22 – p. 251, ln. 6.* Lancelot Wright had no ownership interest in Ascension but was a shareholder of Ahava and its current CEO. *R. pp. 125-126.*

As part of negotiations with Allcare, Robert A. Williams and Lancelot D. Wright entered into a written personal guarantee whereby they agreed to be personally responsible for \$200,000.00 of the debt owed to Allcare. In addition, Robert A. Williams and Lancelot D. Wright agreed to pay any costs and attorneys' fees incurred in enforcing the guarantee. These facts are not in dispute as Wright admitted them in his deposition.

As Lancelot Wright testified, he entered into an agreement in which he personally guaranteed to pay up to \$200,000, plus interest, costs and fees of the debt owed to Allcare. *R. p. 144, ln. 25 – p. 145, ln. 5; R. p. 145, ln. 18 – p. 146, ln. 4.* By his own admission, Lancelot Wright failed to make any payments on the personal guarantee. *R. p. 154, ln. 11 – ln. 13; R. p. 189, ln. 18 – 24.* In his petition, Wright does not contest that he signed a personal guarantee and failed to make payments; rather he claims the Court of Appeals erred by failing to reverse the Circuit Court on the grounds that the promissory note was signed under duress.

However, Wright's own admissions at deposition reveal that there is no dispute that he entered into the contract freely and voluntarily. *R. p. 152, ln. 2 - p. 153, ln. 4.* Wright admits that he faced no financial pressure regarding the debt when he signed the personal guarantee. *R. p. 152, ln. 2 - p. 153, ln. 4.* He admits that at the time he signed the personal guarantee he did not owe the underlying debt. *Id.* He admits that when he

signed the personal guarantee he did so with “no other reason” than to help out a friend. Mr. Wright freely and voluntarily signed the personal guarantee. *Id.*

Appellants failed to identify a single reversible error and, for the reasons set forth herein, this Court should affirm the Court of Appeal’s order.

## ARGUMENTS

### **I. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT’S ORDER GRANTING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER AHAVA ASSUMED LIABILITY FOR THE CONTRACT BETWEEN ASCENSION AND ALLCARE**

Allcare does not claim that it entered into a written contract with Ahava; rather, Allcare alleges that Ahava assumed Ascension’s contract with Ahava and thereby became liable for the debt. It is important to note that the Circuit Court did not find that Ahava entered into a contract with Ascension; rather, it held that Ahava merged with Ascension and thereby became liable for Ascension’s contract with Allcare. The Court of Appeals, citing *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) affirmed this finding.

Allcare did not claim it entered into a written contract with Ahava nor did the Court of Appeals find that Allcare entered into a written contract with Ahava; as such, this issue is improperly raised and should be dismissed. To the extent a response is required, Respondent addresses the existence of the contract through merger in the next section.

### **II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT’S ORDER GRANTING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER AHAVA HOSPICE MERGED WITH ASCENSION.**

Contrary to Petitioner's argument, the Court of Appeals' opinion clearly shows that it construed all facts in the light most favorable to Petitioner by directly quoting such language from *McNaughten-McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct.App. 1997).

The facts, in the light most favorable to Petitioner, established that Allcare entered into a valid written contract with Ascension Hospice. When Ascension ceased operations, Ahava merged with Ascension and took over Ascension's business operations. By its own admission, after Ascension ceased operations, Ahava continued to employ many of the same employees, it kept 30 to 40% of Ascension's patients; it operated out of the same office space; used some of the same office equipment; paid Ascension's debts; used the same checking account; used the same vehicles; and shared a common shareholder. *R. p. 215, ln. 5 – ln. 15; p. 220, ln. 20 – p. 221, ln. 15; p. 217, ln. 13 – p. 218, ln. 9; p. 263, ln. 8 – p. 266, ln. 12; p. 259, ln. 6 – p. 262, ln. 11.*

The facts were established by the testimony of Ahava's 30(b)(6) representative. This testimony was submitted to the Court of Appeals and is included in the Record on Appeal. It is difficult to imagine what testimony could be more favorable to a party than the testimony of its own authorized representative.

As set forth in its order, the Court of Appeals reviewed the facts, which necessarily includes the testimony of Petitioner's own representative, in the light most favorable to Petitioner. After reviewing the facts in the light most favorable to Petitioner, the Court of Appeals then applied those facts to the criteria set forth in *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) to affirm the trial court's decision that Ahava assumed Ascension's debts via merger.

As a result, the Courts of Appeals properly affirmed the Circuit Court's entry of summary judgment against Ahava and Respondent respectfully requests that this Court affirm the Court of Appeal's decision.

**III. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER LANCELOT WRIGHT ENTERED INTO THE PERSONAL GUARANTY FREELY AND VOLUNTARILY.**

In order to void a contract for duress, the defendant must prove: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 897 (S.C. 1937). The party claiming duress must show that he suffered improper external pressure or influence that practically destroys his free agency and causes him to enter into a contract not of his own volition. *McAnn v. Doe*, 377 S.C. 373, 660 S.E.2d 505, 507 (S.C. 2008). Duress does not exist if the person has a reasonable alternative to entering the contract and fails to take advantage of the alternative. *Id.*

In examining the facts in the light most favorable to Wright, the Court of Appeals relied on Lancelot Wright's own sworn testimony. Wright admitted that prior to signing the guaranty he was not responsible for any debt owed to Allcare, and that he faced no financial pressure when he signed the contract. *R. p. 152, ln. 2 - p. 153, ln. 4.* Wright admitted that the only reason he entered into the contract was to help out a friend. *Id.*

Wright failed to present any evidence to the Circuit Court or the Court of Appeals to establish his defense of duress. On appeal he cited his own testimony that "I felt it was urgent it was dire and he needed me on this deal." *R. p. 147, ln. 23-24.* The "he" that

Wright refers to is his friend Robert A. Williams. Wright's sworn testimony reveals that he suffered no economic duress. The Court of Appeals, after reviewing the facts in the light most favorable to Wright, properly affirmed the Circuit Court's summary judgment order. Respondent respectfully requests that the Court deny Petitioner's Petition for writ of *certiorari*.

### CONCLUSION

For the reasons stated, Respondent requests the Court to deny Petitioner's Petition for a writ of certiorari.

This the 23<sup>rd</sup> day of October 2015.



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**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
Judge J. Mark Hayes, II, Spartanburg County**

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**Case No.: 2015-001979**

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**Allcare Medical, LLC,**

**Respondent**

**v.**

**Ahava Hospice, Inc. f/k/a Ascension Hospice, Inc., Robert A. Wright and  
Lancelot Wright,**

**Defendants,**

**Of whom**

**Ahava Hospice, Inc. f/k/a Ascension Hospice, Inc. and Lancelot Wright are**

**Appellants**

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**CERTIFICATE OF SERVICE**

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This is to certify that on the 23<sup>rd</sup> day of October, 2015 a true and correct copy of Final Brief of Respondent was served via U.S Mail, sufficient postage prepaid, to all counsel of record addressed as follows:

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