THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Judge J. Mark Hayes II, Spartanburg County

Appellate Case No. 2014-001316

Allcare Medical, LLC, **Respondent**

v.

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

Defendants,

Of whom

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

Appellants

APPELLANTS' FINAL BRIEF

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STATEMENT OF FACTS

Ahava Hospice was formed and organized as a business entity on January 28, 2010. Ahava Hospice provides medical care and treatment for critically ill patients. The company was based and primarily operated of Sumter, South Carolina. The initial owners of Ahava were Tammy McDonald and Charles Sloan, Jr. Ahava is currently maintains licensure with the South Carolina Department of Health and has a Medicare number which it has had from its inception.

In January 2011, the owners of Ahava Hospice, Inc. learned that Ascension Hospice, Inc. ("Ascension") was going out of business. This created an immediate need for uninterrupted hospice care for the patients of Ascension as well as an opportunity for Ahava to expand its service areas into Richland and Lexington Counties.

Discussions with the principals of Ascension took place during which it was confirmed that Ascension would close its doors on January 31, 2011. Ahava entered into further discussions with Ascension concerning its patient census and its plans regarding notification to its patients or their families regarding the closing of Ascension as well as the status of its corporate office building in Irmo, South Carolina. At that time, Ascension leased office space and a fourteen (14) bed inpatient facility, (formerly known as the Ascension Hospice House) from Woodrow Street, LLC. After confirming that Ascension had given notice to Woodrow Street, LLC of its intent to cease business operations and vacate the above-mentioned premises, Ahava entered into negotiations with Woodrow Street, LLC and ultimately agreed to a short-term commercial lease for the former Ascension corporate office building only.

In January 2011, Ascension Hospice had a patient census of 210. Those patients or his/her families were notified of Ascension's closing by social workers employed by Ascension

Hospice. Upon information and belief, the aforementioned social workers advised each patient or his/her family that they had to option to transfer to Ahava Hospice or any other hospice care provider. If the patient or his/her family decided to transfer to Ahava members of the Ascension nursing staff met with that patient or his/her family to complete the admission paperwork. Approximately, 130 patients or their families chose Ahava for hospice care and services.

Given the critical need for continuity of patient care, Ahava interviewed several nurses, certified nurse's assistants and social workers previously employed by Ascension. Employment offers were extended to several, but not all of the employees interviewed. The majority of the offers were extended to former Ascension nurses, due in part, to established patient/family relationships, competency and experience.

On February 1, 2011, Ahava began operating out of the former Ascension site in Irmo, South Carolina. In summary the facts are as follows:

1. Ascension Hospice ceased all business operations on January 31, 2011.

2. Ahava Hospice did not purchase any assets of Ascension Hospice prior to or subsequent to its closing.

3. Ahava Hospice did not agree to accept or otherwise assume any liabilities, debts or obligations belonging to or incurred by Ascension Hospice.

4. Ahava Hospice has at all times since its inception, operated independently of Ascension Hospice.

5. Upon learning of the closing of Ascension Hospice, Ahava Hospice made inquiries regarding Ascension's patient population and the status of its office lease.

6. Two (2) of the former owners of Ascension were given the opportunity to join the Ahava ownership group. As of this date, only one (1) former Ascension owner is an Ahava shareholder.

SYNOPIS

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 1and 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 have appealed Judge Hayes's order to the Court of Appeals.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure allow the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment

as a matter of law. In determining whether any triable issue of fact exists, the court construes the facts in the light most favorable to the non-moving party. *Laber v. Harvey*, 438 F3d 404 (4th Cir. 2006). 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. *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999). Summary judgment should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *Gillins v. Berkeley Elec. Co-op., Inc.*, 148 F.3d 413, (4th Cir. 1998).

LAW AND ARGUMENT

I. THE CIRCUIT COURT ORDER SHOULD BE REVERSED SINCE NO CONTRACT EXISTED BETWEEN AHAVA HOSPICE AND ALLCARE MEDICAL

Ahava Hospice, Inc. did not Breach a Contract since no contract existed between Ahava and Allcare Medical. There is no contract between Allcare Medical and Ahava Hospice, Inc. This being an action for the breach of contract, the burden was upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). In general, a binding contract requires a manifestation of mutual assent to its terms. *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247

S.E.2d 434, 436 (1978). Terms such as price, time, and place are indispensable to a binding contract and must be set out with reasonable certainty. *Id*

The elements for a breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75124 S.E.2d 602 (1962).In order to recover for breach of contract, a plaintiff must allege and prove (1) the existence of a contract, (2) breach of the contract, and (3) damages caused by the breach. *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

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 tested 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.

II. THE CIRCUIT COURT ORDER SHOULD BE REVERSED SINCE THERE IS A GENUINE ISSUE OF FACT WHETHER OR NOT AHAVA HOSPICE, INC. IS A SUCESSOR IN INTEREST TO ASCENSION HOSPICE.

Ahava Hospice, Inc. is not a successor company to Ascension Hospice and has not assumed the liabilities of Ascension. In *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924), the South Carolina Supreme Court held that in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor,[1] or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) (successor corporation which purchased part of predecessor's assets was not liable for lost shipment by predecessor, where successor did not assume liability for such debts and predecessor remained a live and going concern with substantial assets).

In determining this issue, a court should consider factors such as (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the

predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's. No one factor can be dispositive in this fact-intensive analysis.

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.

III. THE CIRCUIT COURT ORDER SHOULD BE REVERSED SINCE THERE IS A GENUINE ISSUE OF FACT WHETHER THE PROMISSORY NOTE SIGNED BY DEFENDANT WRIGHT IS VOID BECAUSE OF DURESS.

The promissory note signed by Defendant Wright is void because of duress and the Defendant presented sufficient evidence to create a genuine issue of fact. Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition. *Cherry v. Shelby Mut. Plate Glass & Cas. Co.*, 191 S.C. 177, 4 S.E.2d 123 (1939); *Cox & Floyd Grading, Inc. v. Kajima Constr. Servs., Inc.*, 356 S.C. 512, 589 S.E.2d 789 (Ct. App. 2003); *Willms Trucking Co. v. JW Constr. Co.*, 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994).

Corpus Juris Secundum defines duress:

"Duress" may be defined as subjecting a person to a pressure which overcomes his or her will and coerces him or her to comply with demands to which he or she would not yield if acting as a free agent. Some definitions of "duress" contain not only the element of pressure overcoming the victim's will but also the element that the pressure or compulsion consists of improper, wrongful, or unlawful conduct, acts, or threats.

Further, "duress" has been defined as the condition of mind produced by the wrongful conduct of another rendering a person incompetent to contract with the exercise of his or her free will power, or as the condition of mind produced by an improper external pressure destroying free agency so as to cause the victim to act or contract without use of his or her own volition, or as unlawful constraint whereby a person is forced to do some act against his or her will.

17A C.J.S. Contracts § 175 (1999) (footnotes omitted).

The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. *17A Am. Jur. 2d Contracts* § 218 (2004). Freedom of will is essential to the validity of an agreement. Id.

A party claiming "duress" can prevail if he shows that he has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values. Id.

In order to establish that a contract was procured through duress, three things must be proved: (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 (1937). If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. *In re Nightingale's Estate*, 182 S.C. at 547, 189 S.E at 898; *Willms Trucking Co.*, 314 S.C. at 179, 442 S.E.2d at 202. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. *Willms Trucking Co.*, 314 S.C. at 179, 442 S.E.2d at 202.

Whether or not duress exists in a particular case is a question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced. Id.; see also *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co.*, 273 S.C. 784, 260 S.E.2d 178 (1979) (stating whether or not duress was present is a question ordinarily determined on a case by case basis). Duress is a defense to an otherwise valid contract. *17A Am. Jur. 2d Contracts* § 218. Duress renders a contract voidable at the option of the oppressed party. *Santee Portland Cement Corp.*, 273 S.C. at 784, 260 S.E.2d at 178.

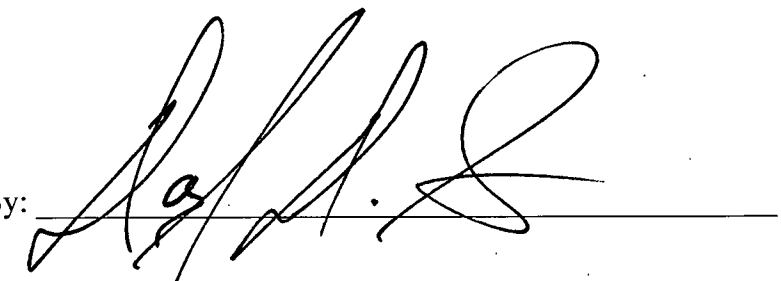
In this case duress renders Mr. Wright's promissory note void and at a minimum defeats a motion for summary judgment. The facts as considered most favorably to the defendant are as follows: The CEO O Sliva stated in his deposition that he threatened to remove essential equipment from Ascension patients 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

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. *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999). Based upon the above referenced facts, law and arguments this defendant respectfully request that this court reverse the decision of the Circuit Court since there is clearly genuine issues of fact which defeat this motion for summary judgment.

By: 

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CERTIFICATE OF COUNSEL

The undersigned certified that Appellants' Final Brief complies with Rule 211(b) SCACR.

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PROOF OF SERVICE

I certify that I have served the Appellants' Final Brief on Alexandre N. MacClenahan by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2014 addressed to, Alexandre N. MacClenahan, 870 Cleveland Street, Unit 1D, Greenville, South Carolina 29601.

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