

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY **RECEIVED**
Court of Common Pleas
Judge J. Mark Hayes, II, Spartanburg County JAN 06 2015

Case No.: 2014-001316

SC Court of Appeals

Allcare Medical, LLC,

Respondent

v.

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

Defendants,

Of whom

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

Appellants

FINAL BRIEF OF RESPONDENT

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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.

The Circuit Court scheduled the hearing for Allcare’s Motion for Summary Judgment on March 18, 2014 in front of the Honorable J. Mark Hayes, II. Prior to the hearing, Allcare’s counsel served defense counsel with a memorandum of law in support

of summary judgment. Defense counsel requested the court postpone the hearing so that he could prepare a response brief. Allcare's counsel consented to the request and the Court rescheduled the hearing for March 21, 2014. On March 21, 2014 Judge Hayes heard oral argument from both parties and reviewed all pleadings, affidavits, deposition testimony, memoranda of law, 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. Ahava and Wright now appeal Judge Hayes' Order Granting Summary Judgment. For the reasons set forth herein, this Court should affirm the Circuit Court's ruling and deny Appellants' appeal.

FACTUAL SUMMARY

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.* 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 on the following matters:

1. [Ahava]'s policies procedures, and guidelines relating to the payment of invoices.
2. The terms and conditions of any agreements with [Allcare].
3. The facts and allegations contained in the pleadings of this case.
4. Lancelot Wright's compensation from Ahava.
5. Lancelot Wright's compensation from Ascension.
6. Robert Williams' compensation from Ahava.
7. Robert Williams' compensation from Ascension.
8. Any payments made by Ahava to Lancelot Wright.
9. Any payments made by Ascension to Lancelot Wright.
10. Any payments made by Ahava to Robert Williams.
11. Any payments made by Ascension to Robert Williams.
12. Any payments made by Ahava to Ascension.
13. The owners of Ahava.
14. The shareholders of Ahava.
15. The purchase of Ascension.
16. Ahava's financial accounts.
17. All documents produced in discovery.

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. Gray'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 Ahava in addition to assuming Ascension's patient census and former employees, it also paid Ascension's debts after Ascension ceased operations.

At deposition, Mr. Gray initially denied that Ahava used the same checking account as Ascension. *R. p. 211, ln. 21 – p. 212, ln. 22.* 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.*

Both Robert Williams and Lancelot Wright led Allcare to believe that Ahava was going to take over Ascension and continue the contractual relationship with Allcare. As part of the negotiations, 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:

Q: Pursuant to this contract, right, you and Tony Williams promised to pay Allcare Medical \$200,000 with interest at the yearly rate of 6 percent as specified below? Do you see that right there?

A: Correct, yeah.

R. p. 144, ln. 25 – p. 145, ln. 5.

Q: --it says, if lender prevails in a lawsuit to collect on this note, borrower will pay lender's costs and lawyer's fees in an amount the court finds to be reasonable. Did I read that correctly?

A: Yes.

Q: And that's part of your agreement under this promissory note?

A: Correct.

R. p. 145, ln. 18 – p. 146, ln. 4.

Q: Did you make any payments, you personally, Lance?

A: No.

R. p. 154, ln. 11 – ln. 13.

Q: The payments made – or the total amount owed not including interest according to my client and what we'll present at trial – and this is not including interest or my fees or costs or anything – is \$244,467.91. Do you have any reason to dispute that that's the amount owed?

A: No.

R. p. 189, ln. 18 – 24.

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. By his own admission, Lancelot Wright failed to make any payments on the personal guarantee. Interestingly, on appeal, Wright does not contest that he signed a personal guarantee and failed to make payments; rather he claims Judge Hayes erred by failing to find 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. Wright testified as follows:

Q: And, again, to be clear, when you signed this contract, this promissory note that's Exhibit 1 –

A: Correct.

Q: -- you were not facing any financial pressure regarding that debt were you?

A: No.

Q: Before you signed it you didn't owe the debt did you?

A: No. No.

Q: You wanted to help out a friend, right?

A: Right.

Q: And that's the reason why you signed this, was to help out [Robert A. Williams]?

A: Correct.

Q: All right. And for no other reason?

A: I had no other reason besides him being a friend.

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. He admits that at the time he signed the personal guarantee he did not owe the underlying debt. 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.

Appellants failed to identify a single reversible error and, for the reasons set forth herein, this Court should affirm Judge Hayes' Order Granting Summary Judgment.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court must apply the same standard applied by the circuit court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *John v. Milliman*, 392 S.C. 116, , 708 S.E.2d 766 (S.C. 2011) citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (S.C. 2002).

Rule 56 provides that summary judgment may only be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” S.C. R. Civ. P. 56(c). The facts and inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990). The moving party carries the burden of clearly establishing that no genuine issue of material fact exists. *Froneberger v. Smith et al.*, 406 S.C. 37, 45, 748 S.E.2d 625, 629 (S.C. App. 2013) citing *Miller v. Blumenthal Mills, Inc.* 365 S.C. 204, 220, 616 S.E.2d 722, 730 (S.C. App. 2005). Once that initial burden is met, the non-moving party **must provide specific facts** showing that a genuine issue of material fact exists for trial. *Id.* (emphasis added). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Byerly v. Connor*, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (S.C. 1992).

ARGUMENT

I. THE COURT SHOULD AFFIRM THE CIRCUIT COURT’S ORDER GRANTING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER AHAVA HOSPICE 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. Moreover, the Circuit Court did not find that Ahava entered

into a contract with Ascension. Rather, the Circuit Court held that Ahava merged with Ascension and thereby became liable for Ascension's contract with Allcare. Therefore, Appellant improperly raised the first issue on appeal and it should be dismissed. To the extent a response is required, Respondent addresses the existence of the contract through merger in its second Issue on Appeal set forth below.

II. THE COURT SHOULD AFFIRM THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER AHAVA HOSPICE MERGED WITH ASCENSION.

Allcare entered into a valid written contract with Ascension Hospice. As set forth above, when Ascension ceased operations, Ahava merged with Ascension and took over Ascension's business operations. It employed the same personnel, treated the same patients, used the same office space, maintained common shareholders and paid some of Ascension's debts. *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.*

In order to establish a company as a "successor in interest" that is liable for the debts of a predecessor company, a party must show at least one of the following:

1. There was an agreement to assume such debts; or
2. The circumstances surrounding the transaction warrant a finding of consolidation or merger of the two corporations; or
3. The successor company was a mere continuation of the predecessor; or
4. The transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

Simmons v. Mark Lift Industries, 366 S.C. 308, 312, 622 S.E.2d 213 (2005) citing *Brown*

v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924).

In *Holloway v. John E. Smith's Sons Co.*, the United States District Court for the District Court of South Carolina found that a merger existed under the mere continuation theory when the business operated out of the same address, retained many of the same employees, continued in the same business with the same customers, and had common shareholders and officers. *Holloway* 432 F. Supp. 454, 456 (D.S.C 1977). Similarly, the South Carolina Supreme Court found that successor liability through merger exists when the buyer and seller share common officers and directors. *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 657 S.E.2d 67, 70 (S.C. 2007). Both the *Holloway* and the *Walton* cases address the exact situation presented in this matter.

In this case, Ahava is clearly a mere continuation of Ascension and the circumstances warrant a finding of merger. 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*. If it looks like a merger, acts like a merger and sounds like a merger it must be a merger.

Since Ahava merged with Ascension it became liable under the contract with Allcare. As a result, the Circuit Court properly entered summary judgment against Ahava and Respondent respectfully requests that this Court affirm the summary judgment order.

III. THE COURT SHOULD AFFIRM THE CIRCUIT 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 recover under a claim for breach of contract, the Allcare must show that a valid binding contract existed, that Wright failed to comply with the contract; and that Allcare suffered damage as a proximate result of Defendant's breach. *Fuller v. Easter Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

Lancelot Wright admits he entered into a written contract with Plaintiff whereby he agreed to personally guarantee \$200,000 of Ascension's debt, plus interest, costs and attorneys' fees. *R. p. 144, ln. 25 – p. 145, ln. 5; p. 145, ln. 18 – p. 146, ln. 4*. Mr. Wright also admits that he made no payments on the note and that the current principal balance owed exceeds \$200,000. *R. p. 154, ln. 11 – ln. 13; p. 189, ln. 18 – 24*. Wright does not contest that he entered into a valid contract with Allcare; rather, he claims that the contract is void because he entered into it under duress.

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, Judge Hayes relied on Wright's own sworn testimony, and this Court should do the same. As set forth hereinabove, 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's own testimony reveals that he did not enter into the personal guarantee under duress. Entering into a contract under no financial pressure with the sole reason to help out a friend does not give rise to a defense of duress. If it did, every person who co-signed a loan for a friend could avoid liability simply by claiming duress.

At the summary judgment hearing, Wright failed to present any evidence that would give rise to a valid defense of economic duress. On appeal, Wright still fails to present any evidence that he suffered from duress. In fact, he cites 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. Surely the defendant's own sworn testimony presents the facts in the most favorable light possible for his position. Wright's sworn testimony reveals that he suffered no economic duress and that the Circuit Court properly entered summary judgment against him.

CONCLUSION

In deciding a motion for summary judgment, the Court must examine the facts in the light most favorable to the non-moving party. The Circuit relied on the sworn testimony of both Ahava's designee and Wright in reaching its decision. It is difficult to imagine a more favorable light to view the facts than relying on a party's own admissions.

Ahava's admissions at deposition reveal that there is no genuine issue of material fact that it merged with Ascension and assumed liability of the contract with Ahava. It is undisputed that neither Ascension nor Ahava paid the monies owed under the contract with Allcare. Therefore, the circuit properly entered summary judgment against Ahava and Respondent respectfully requests that this Court affirm the lower court's order.

Wright's admissions also reveal that there is no genuine issue of material fact that he breached his contract with Allcare. Wright admitted that he signed the personal guarantee and that he failed to make any payments to Allcare. Wright's defense that the contract is void because he signed it under duress is not supported by the facts. Wright admitted that he freely and voluntarily entered into the contract. He admits owed no money to Allcare, that he faced no financial pressure to sign the guarantee and that the only reason he agreed to the contract was to help out his friend. This does not support a defense of duress. As such, the Circuit Court properly entered summary judgment against Wright and Respondent respectfully requests that this Court affirm the lower court's order.

This the 5TH day of January 2015.



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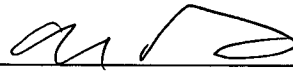
Of whom

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Appellants

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of January, 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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