

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

PHARMERICA PHARMACEUTICAL SERVICES, INC.	: AUGUST TERM, 2001
v.	: No. 3198
ELIZABETH HOMES, INCORPORATED,	:
U.R. CHOICE, INCORPORATED	:
a/k/a EDGEWOOD HOMES, and	: Superior Court Docket
MCCALLUM PLACE, INCORPORATED	No. 3471 EDA 2004
	:

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**OPINION**

**ALBERT W. SHEPPARD, JR., J. .... January 25, 2005**

This Opinion is submitted relative to defendants’ appeal of this court’s Order of December 2, 2004, denying defendants’ post trial motion. That post trial motion sought to reverse bench trial findings for plaintiffs in the amount of \$30,667.28 against Elizabeth Homes, Incorporated and in the amount of \$17,110.59 against U. R. Choice, Incorporated a/k/a Edgewood Homes.

For the reasons discussed, it is respectfully submitted that this court’s findings should be affirmed.

## **Background**

The plaintiff, Pharmerica Pharmaceutical Services, Incorporated (“Pharmerica”) sued seeking payment for pharmacy services provided to the defendants. Defendants, Elizabeth Homes, Incorporated (“Elizabeth”), U. R. Choice, Incorporated a/k/a Edgewood Homes (“Edgewood”) and McCallum Place, Incorporated (“McCallum”), were the owners and operators of personal care facilities.

Pharmerica entered into a Provider Agreement for pharmacy services with each of the defendants. The three Agreements called for plaintiff to sell prescription drugs and medications for defendants’ patients and for defendants to pay for them. The patients were billed directly; however, defendants were obliged to keep plaintiff advised of changes in the party responsible for the patients. Since most of the patients were incapable of handling their business affairs the defendants were charged with remitting the patients’ insurance payments.

At some point the accounts at all three nursing homes had become delinquent and the plaintiff was considering a suspension of deliveries.

A meeting was held between Beth Lieberman (“Lieberman”) for defendants and Edward Scott (“Scott”) for Pharmerica. The legal ramifications of this meeting constitute the gravaman of this lawsuit. In any event, following the meeting, Pharmerica continued to supply prescription drugs. Unfortunately, defendant made only one payment and failed to pay the outstanding invoices. This lawsuit ensued.

A bench trial was conducted on May 28, 2004. Both Scott and Lieberman testified. This court entered a finding for Pharmerica in the amount of \$47,777.87 and against Elizabeth and Edgewood. The court found no liability on the part of McCallum.

At the end of June, new counsel entered their appearance for defendants and sought leave to file post trial motions *nunc pro tunc*. This court granted defendants' request.

Post trial motions were filed and argued. Further, a stipulation was approved which apportioned the liability as follows:

Elizabeth Homes	\$30,667.28
U. R. Choice (Edgewood)	\$17,110.59

On December 2, 2004 this court denied defendants' post trial motion. This appeal followed.

### **Discussion**

The issue presented is whether an oral agreement was reached by the parties which modified the Provider Agreements. Pharmerica claimed that the defendants guaranteed to pay the delinquent invoices in consideration for Pharmerica's agreement not to suspend the supply of medicine. The defendants denied that any such guarantee had been given.

The Provider Agreements could be modified by a subsequent oral agreement if the conduct of the parties demonstrates clearly an intent to waive the requirement that amendments be written, and provided that the modification was based on valid consideration and is proved by clear, precise and convincing evidence. *Pellegrene v. Luther*, 403 Pa. 212, 169 A.2d 298 (1961); *Accu-Weather v. Prospect Communications*, 435 Pa. Super. 93, 644 A.2d 1251 (1994).

Here, the question turned on an assessment of the contradictory testimony of Lieberman and Scott relative to the meeting between them. This court found the testimony of Scott credible and controlling. His testimony was that the oral modification calling for the defendants to guarantee payment of past bills was specific and direct. The considerations for the oral

modification were Pharmerica's promise to continue supplying medicine notwithstanding the delinquencies of the then outstanding invoices. (Trial Transcript 5/28/04; pp 19-22, 24, 29-30).

It is clear that Pharmerica relied on the modification in that it continued to supply medicine. Further, it is noted that the defendants accepted the pharmaceuticals and, indeed, made one payment. It is submitted that this conduct of the parties demonstrated intent by the parties to deem the modification as definite. It was not surmise or conjecture.

In summary, then, this court found Scott a credible witness and accepted as definite the modification agreement pursuant to which the defendants agreed to pay for the pharmaceuticals.

### **Conclusion**

For the reasons discussed, this court respectfully submits that its finding for plaintiff and denial of defendants post trial motion should be affirmed.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**