THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2012-CP-07-3595
Appellate Case No. 2013-002674

Charles Gary, ... Respondent,

v.

Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Low Country Medical Transport, Low Country Medical Transport, Inc., Eugene A. Kirkland, and American Medical Response, Inc. (d/b/a Access2Care) ..... Defendants

Of whom American Medical Response, Inc. (d/b/a Access2Care) is, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Argument

The Trial Court was incorrect in holding that AMR's NEMT broker contract with SCDHHS imposed on AMR a contractual duty to provide "safe" NEMT transportation, and that such established an ***absolute nondelegable*** duty. In granting Respondent partial summary judgment, the Trial Court first held that AMR owed Respondent a duty of care based upon "its contract with the Health Department" which required that "all trips are completed safely and on-time." (R. ___; Order entered 12/3/13 at pp. 7-8). The effect of the Trial Court's holding was to impose on AMR a duty to guarantee absolute safety on the hundreds of thousands of NEMT trips it administered.

The Trial Court then concluded that AMR breached its duty of care to Respondent "when Low Country Medical's ambulance ran off the road." (R. ___; Id. at p.9). This equates to the conclusion that because the accident occurred, AMR breached the duty imposed by its contract. Significantly, aside from the fact that an accident occurred, the Trial Court made no other finding that AMR had breached any of the requirements of its contract with SCDHHS. Rather, the Trial Court concluded that Kirkland, the driver of the ambulance, was negligent, and that AMR was liable for that negligence. (R. ___; Id. at p. 10).

Kirkland, however was employed by Low Country, who, in turn, was merely an independent contractor of AMR. In order to impose liability on AMR for the negligent actions of an independent contractor, the Trial Court concluded that AMR's duty under its contract with SCDHHS to provide "safe" transportation was an absolute nondelegable duty. (R. ___; Id. at p. 12). Thus, the Trial Court's imposition of liability on AMR rested not only on its interpretation of the contract as imposing a duty on AMR to provide completely "safe" transportation, but also on the elevation of that contractual duty to the status of an absolute

nondelegable duty that would cause AMR to remain liable for the negligent actions of an independent contractor.

The Trial Court erred both in its interpretation of the duty imposed by the contract and its conclusion that this contractual duty was of a nondelegable nature. AMR's contract with SCDHHS, while requiring AMR to take certain steps designed to reasonably provide for safe transportation, did not impose on AMR a duty to provide complete safety and did not impose an absolute nondelegable duty of safety that rendered AMR liable for any negligent actions of an independent contractor. Additionally, it was error for the Trial Court to impose tort liability for a duty it held was contractual in nature. Finally, the Trial Court's grant of partial summary judgment was premature as AMR had been denied the opportunity to engage in meaningful discovery, and it was based upon the Trial Court's incorrect conclusion that an admission in an interrogatory response provided by Low Country alone could be imputed to AMR. These errors, individually and collectively, require reversal.

I. The Trial Court erred in interpreting AMR's contract with SCDHHS as creating a duty to provide completely "safe" transportation, and in holding that the contractual duty owed by AMR supported tort claims.

A. The Trial Court incorrectly interpreted AMR's contract as imposing a duty to provide completely safe transportation.

The Trial Court interpreted the language in the contract regarding "ensuring that all trips are completed safely and on-time" as imposing an absolute duty on AMR "to provide safe and reliable NEMT services." (R. ___; RFP § 3.3.5.1; R. ___; Order entered 12/3/13 at p. 9). Respondent contends that this does not amount to strict liability for any accidents that occur on NEMT trips. (Resp. Brief p. 10). First, Respondent states that the Trial Court considered the cause of the accident – the alleged "over-correction" of the driver. (Id.). Second, Respondent states that the Trial Court's finding was based on "[AMR's] NEMT

Program Responsibilities" and "not just because an accident occurred." (Id. at 10-11). Respondent then concludes that the Trial Court's imposition of liability on AMR was not based on the fact that an accident occurred, but was instead based on the fact that the accident was caused by AMR's subcontractor. (Id. at 11).

Respondent fails to address the issue of the "duty" imposed on AMR by the Trial Court, and instead focuses entirely on the alleged breach of that duty. The initial issue is whether the Trial Court correctly determined and defined the duty imposed on AMR by its contract with SCDHHS. It did not. The duty imposed on AMR by the Trial Court was that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (R. ___; Order entered 12/3/13 at p. 9). This is essentially a duty to provide "safety." The fact that the "unsafe" occurrence here was allegedly the negligence of the driver does not change the overly-broad nature of the duty imposed by the Trial Court. Nor does it change the fact that the duty imposed by the Trial Court would lead to the absurd and unjust results outlined in Appellant's initial brief. See Appellant's Initial Brief at pp. 20-21.

The issue of whether the Trial Court correctly interpreted the contract in determining the duty applicable to AMR is especially significant in this analysis because, as Respondent contends, the Trial Court found AMR liable because its subcontractor caused the accident. (Resp. Brief p. 11). **The imposition of liability on AMR based on the actions of an employee of an independent contractor was possible only because the Trial Court held that AMR's contract created an absolute nondelegable duty to provide "safe" transportation**. (R. ___; Order entered 12/3/13 at p. 12). The Trial Court erred in

interpreting the contract to impose a duty of complete safety. By elevating the duty of safety to an absolute nondelegable duty, the Trial Court further compounded its error.

The correct and logical interpretation of the duty imposed on AMR under its contract with SCDHHS was that AMR take the reasonable steps outlined in that contract to provide for the reasonable safety of the NEMT services it brokered. In interpreting the meaning of a contract, "[i]f its language is plain, unambiguous, and capable of only one **reasonable interpretation,** no construction is required and the **contract's** language determines the instrument's force and effect." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract."Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "Common sense and good faith are the leading touchstones of the inquiry." Id., 265 S.C. at 362, 218 S.E.2d at 434. Additionally, "[a]***ll contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results***." Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 442 (1962) (emphasis added). "Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails."Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." Id.

Respondent disputes AMR's contention that the contract, when viewed in its entirety, imposed only the duty that AMR provide for reasonable safety by complying with the contract's various safety provisions. (Resp. Brief pp. 15-16). Specifically, Respondent points to the contract's provisions requiring that: AMR take steps to make sure passengers use seat belts; drivers do not start vehicles until passengers are secured; vehicles are not overloaded; vehicles are parked safely before unloading; passengers are not left unattended; and that assistance be requested when a passenger's behavior or condition impedes safe operation of the vehicle. (Resp. Brief p. 16, referencing RFP §§ 3.8.3.6.1 through 3.8.3.6.6). Contrary to Respondent's view that these provisions support the Trial Court's interpretation that the contract imposed an absolute duty to provide safe transportation, they do the opposite. These provisions show that the "safety" envisioned in the contract was that AMR ensure that reasonable safety precautions are in place and are followed. If the contract's passing general references to "safety" created an absolute duty to provide safe transportation, there would be no need to include specific safety precautions throughout the contract.

The contract's numerous safety provisions do not amount to a duty to provide complete safety. Rather, the only reasonable construction of the contract, using common sense and a reasonable approach, is that AMR has a duty to meet the various specific provisions applicable to it set forth throughout the contract respecting safety. Significantly, there is no evidence whatsoever that AMR failed to meet any of the contract's specific safety provisions. Therefore, the Trial Court incorrectly interpreted the clear meaning of AMR's contract with SCDHHS by holding it imposed an absolute duty to provide safe transportation as opposed to a duty to take reasonable measures regarding safety respecting the identified actions in the

contract, and this Court should thus reverse the grant of summary judgment on the negligence and loss of consortium claims.

B. The duty allegedly breached by AMR was specifically held by the Trial Court to be a contractual duty and it was error to use a contractual duty to support tort claims.

Respondent contends that the duty of care owed by AMR was based not only on AMR's contract, but also based on AMR engaging in the business of NEMT services in South Carolina. (Resp. Brief pp. 17-19). It is true that the Trial Court held that "[AMR] had a duty of care to [Respondent] arising out of its Contract and operating as broker of NEMT Services" (R. ___; Order entered 12/3/13 at p. 8). However, the duty on which the Trial Court imposed liability as to AMR was the alleged contractual duty.

The Trial Court held that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the health department." (R. ___; Id. at p. 9). The Trial Court later reiterated its holding that "[AMR] had an absolute duty under its contract with the Health Department to provide "safe" Transportation to [Respondent]." (R. ___; Id. at p. 12). This contractual duty was the basis for imposition of liability on AMR.

The only reference to the duty of care imposed by virtue of AMR acting as a broker of NEMT services was the Trial Court's statement that, in addition to its contractual duty, "[AMR] had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations." (R. ___; Id. at p. 9). However, the Trial Court did not find that this duty of compliance with laws and regulations was breached and caused Respondent's injuries. Rather, the duty breached was the contractual duty the Trial Court

imposed on AMR regarding "safe" transportation, and it was error for the Trial Court to use this ***contractual*** duty as a basis for ***tort*** liability.

In response to AMR's argument that where a duty is created solely by contract, no cause of action or negligence will lie, Respondent contends that this is not a breach of contract case, and, rather that it "is predicated on a breach of a duty of care owed by the Defendants which arises out of a contract...." (Resp. Brief p. 20). This is a distinction without a difference. The alleged duty that serves as the bases for the imposition of liability against AMR is the purely alleged contractual duty to provide "safe" transportation. "Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991) (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)). Respondent seeks to distinguish this authority by noting that a contract can create a certain relationship between the parties that causes certain duties to arise by operation of law, irrespective of the contract. (Resp. Brief p. 19-20). However, the Trial Court did not hold that the alleged duty owed to Respondent by AMR arose out of the relationship created by the contract or that the duty to provide "safe" transportation existed irrespective of the contract. Rather, the Trial Court repeatedly referred to the relevant alleged duty as a "contractual duty" or a duty "arising out of its contract." (R. ___; Order entered 12/3/13 at pp. 8, 9, 12). As the claims at issue sound entirely in tort, the Trial Court erred by improperly elevating a contractual duty to a duty that can sustain tort claims.

II. The Trial Court incorrectly concluded that the alleged duty to provide "safe" transportation was an absolute nondelegable duty that allowed AMR to be held liable for the negligence of the independent contractor transportation provider.

The Trial Court's imposition of liability on AMR rests entirely on its ruling that the duty of "safety" imposed by AMR's contract with SCDHHS was an absolute nondelegable duty. As Respondent admits: "the Trial Court found [AMR] liable, because its subcontractor caused the accident." (Resp. Brief p. 11). However, as a general rule, "an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Tel. Co., Inc. v. Globe Comm., Inc., 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) (citing Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978)). Thus, it was necessary to find some exception to this general rule in order to impose liability beyond Kirkland and Low Country to reach AMR. To achieve this result, the Trial Court held "[AMR] had a absolute duty under its contract with the Health Department to provide safe transportation to [Respondent]" and that "[t]he Health Department's NEMT Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transportation services to Medicaid members...." (R. ___; Order entered 12/3/13 at p. 12). Thus, the Trial Court concluded that the duty of complete "safety" it found in the contract was an absolute nondelegable duty that permitted AMR to be held liable for the actions of an independent contractor's employee. Just as the Trial Court misinterpreted the contract in finding a duty of complete "safety," the elevation of this duty to the rare status of an absolute nondelegable duty was in error.

Under the nondelegable duty doctrine, if a person owes another an "absolute duty" which he delegates to an independent contractor, he remains liable for the contractor's

negligence. Rock Hill Tel., 363 S.C. at 391, 611 S.E.2d at 238 ("'A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'") (quoting Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct. App. 1993)); Carson v. Vance, 326 S.C. 543, 550, 485 S.E.2d 126, 130 (Ct. App. 1997) (noting that a nondelegable duty is premised on the existence of "'special legal duties'" that one is "'bound absolutely to perform'") (quoting Wright v. Wright, 50 S.E.2d 540 (N.C. 1948)); Whisenhunt v. Atl. Coast Line. R.R. Co., 195 S.C. 213, 225, 10 S.E.2d 305, 310 (1940) (noting that certain "duties are positive, absolute and personal. They are termed non-delegable duties, and the master cannot evade liability by delegating their performance to another."); Nuckols v. Great Atl. & Pac. Tea Co., 192 S.C. 156, 161-62, 5 S.E.2d 862, 864 (1939) (same).

An absolute, nondelegable duty can be imposed by statute, common law, or contract. See Rock Hill Tel., 363 S.C. at 392, 611 S.E.2d at 238-39. Here, neither Respondent nor the Trial Court assert there is a basis for the imposition of an absolute nondelegable duty based on a statute. Thus, the only possible basis for finding an absolute nondelegable duty in these circumstances is that such a duty is imposed by South Carolina's common law, or it is imposed by AMR's contract with SCDHHS.

The Trial Court held that the absolute nondelegable duty "to provide 'safe' transportation" existed "under [AMR's] contract with the Health Department." (R. ___; Order entered 12/3/13 at p. 12) The Trial Court further stated that SCDHHS' contract "clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport

services." (R. ___; Id.). Thus, it appears that the Trial Court attempted to base the existence of this absolute nondelegable duty on the contract as well as the common law. This ruling, however, directly conflicts with South Carolina's law on this issue.

Neither AMR's contract with SCDHHS, nor South Carolina's common law support the imposition of a nondelegable duty to provide "safe" transportation under these circumstances. As explained in Part I.A. of AMR's Initial Brief and in this Reply Brief, the Trial Court misinterpreted the language in the contract regarding "safe" transportation as imposing a duty on AMR to guarantee complete safety. In addition to this misinterpretation of the duties imposed on AMR under the contract, the Trial Court also misapplied South Carolina's jurisprudence on the nondelegable duty doctrine.

The case of Rock Hill Tel. Co., Inc. v. Globe Comm., Inc., 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005), demonstrates how the reference to "safe" transportation on AMR's contract with SCDHHS does not amount to an absolute nondelegable duty to provide completely safe transportation. In Rock Hill Tel., a utility received a permit from the Department of Transportation to install an underground cable along a highway. The utility hired a contractor to perform that work who, in turn, hired a subcontractor. An accident occurred where a driver struck the subcontractor's backhoe. At issue was whether the utility had a nondelegable duty "to perform the work in a safe manner." Id. The basis for this alleged nondelegable duty was the DOT permit and statutory law that provided that such lines be constructed "so as not to endanger the safety of persons" and the utility's agreement to assume any and all liability the DOT might have in connection with accidents or injuries to persons. The Rock Hill Tel. Court held that this did not impose an absolute nondelegable

duty, but rather, the only duty imposed on the utility was a duty of reasonable care. Id. at 392, 611 S.E.2d at 238.

Similarly, in Rogers v. Norfolk S. Corp., 356 S.C. 85, 94, 588 S.E.2d 87, 91 (2003), the Supreme Court held that while Norfolk Southern had a nondelegable duty to provide the plaintiff with a safe place to work, this duty did not rise to the level of "an absolute responsibility" for safety. Rather, it was only a duty to "exercis[e] reasonable care to that end." Id. The cases of Rock Hill Tel. and Rogers illustrate our courts' reluctance to impose absolute nondelegable duties of safety, and the circumstances of this case do not warrant departing from this view.[1]

Respondent asserts that AMR's role as the broker of NEMT services, and the "control" it exercised over transportation providers supports the imposition of an absolute nondelegable duty. To the contrary, AMR's limited role as the broker of NEMT services and the restrictions placed on AMR by its contract with SCDHHS illustrate the impropriety of imposing an absolute duty of "safety." Specifically, the Trial Court's nondelegable duty ruling completely failed to consider the fact that the contract between AMR and SCDHHS specifically contemplated that AMR was merely the broker for NEMT services and that entities ***other than*** AMR would perform the actual transportation services.

The contract distinguishes between the "broker," who is only responsible for providing "brokerage services," and the "transportation providers" who are responsible for providing

[1]Additionally, in Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 50, 543 S.E.2d 312, 322 (2000), while the Court held that "a hospital owes a nondelegable duty to render competent service to its emergency room patients" it refrained from concluding that this was an **absolute** nondelegable duty. Respondent contends that AMR is asserting that the Simmons case nullified the absolute duty rule and substituted the restatement test for ostensible agency in its place. (Resp. Brief pp. 25-27). This is not AMR's assertion. Rather, AMR cited to Simmons as further support for South Carolina's courts' reluctance to impose **absolute** nondelegable duties, even in a situation involving healthcare.

"transportation services." (R. ___; RFP). This is not a situation where SCDHHS contracted with AMR to provide transportation services, and then, AMR, on its own, chose to delegate that task. Rather, the contract ***specifically prohibits AMR from acting as a transportation provider***. The contract provides that "[t]he Broker **must not provide NEMT services** or make a referral to or subcontract with a transportation provider if the Broker has a financial relationship with the provider or has an immediate family member who has a direct or indirect financial relationship with the provider." (R. ___; RFP at § 2.4.14) (emphasis added).[2] Thus, AMR could not ***delegate*** the transportation services, because AMR was prohibited from performing that task itself.

The nondelegable duty doctrine has no application under these circumstances. The cornerstone of the nondelegable duty doctrine is that if a person owes another an "absolute duty" which he delegates to an independent contractor, he remains liable for the contractor's negligence. Rock Hill Tel., 363 S.C. at 391, 611 S.E.2d at 238 ("'A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'") (quoting Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct. App. 1993)). Here, AMR's contract with SCDHHS specifically prohibited AMR from actually providing the transportation services and specifically contemplated that the separate category of "transportation providers" would perform that function. It is unreasonable and unjust to apply the nondelegable duty doctrine to hold AMR liable for the alleged negligence of

[2]Section 3.3.6 of the contract provides that the only time the Broker may operate vehicles to provide transportation services is in the "very limited circumstances" set forth in 42 C.F.R. § 440.170(a)(4)(ii)(B). (R. ___; RFP § 3.3.6.). The limited exceptions to this rule set forth in 42 C.F.R. 440.170(a)(4)(ii)(B) focus on situations where no qualified provider other than the Broker is available or able to provide the NEMT service.

a transportation provider when AMR was prohibited from performing that service itself and was required to contract with separate transportation providers.

The Trial Court's ruling that AMR's contract and public policy imposed an absolute nondelegable duty to provide "safe" transportation is without factual or legal support. Additionally, as the grant of summary judgment centered on the "safe" provision of NEMT services, and AMR was specifically prohibited from actually providing the transportation services, the nondelegable duty rule is inapplicable under these circumstances. Therefore, as there is no evidence that AMR failed to perform any of the duties actually established by its contract with SCDHHS, and because there is no basis for holding AMR liable for the alleged negligence of the independent contractor Low Country, or Low Country's employee Kirkland, the Trial Court's grant of summary judgment on the negligence and loss of consortium claims as to AMR should be reversed.

III. The grant of partial summary judgment was premature and was erroneously based on an interrogatory response that was neither an admission of negligence nor applicable to AMR.

The Complaint in this matter was filed on October 16, 2012, and AMR had not completed responding to that pleading until the filing of its Amended Answer on December 12. 2012. (R. ___; Compl., Am. Answer). On February 26, 2013, only a little more than two months later, Respondent filed its motion or summary judgment. In that short window of time only limited written discovery was issued and no depositions were taken. As Respondent's summary judgment motion was being considered by the Court, AMR specifically raised the issue that summary judgment was premature because material discovery had not yet taken place. (R. ___; AMR's Supp. Memo. in Opp. at p. 3, Aff. of Cooper Wilson). It was error for the Trial Court to grant partial summary judgment where AMR had been denied the basic

opportunity to conduct meaningful discovery. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); Jones ex. rel. Jones v. Enter. Leasing Co.-S.E., 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009); Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001).

Respondent contends that that AMR has failed to show it attempted to seek discovery. (Resp. Brief. P. 28). Respondent further contends that AMR was "dilatory" in seeking discovery and that AMR has failed to demonstrate the likelihood that additional discovery will be fruitful. (Resp. Brief. Pp. 29-30). These contentions are belied by the fact that Respondent rushed to file a summary judgment motion when the case was only a few months old and by the fact that AMR's counsel filed a Rule 56(f) Affidavit asserting the premature nature of Respondents' request. (R. ___; Aff. of Cooper Wilson). That no witnesses whatsoever had been deposed illustrates the premature nature of summary judgment at this juncture. It would be unreasonable to require AMR to establish the existence of additional evidence when it has been denied this basic aspect of the discovery process.

Respondent bases his claim that basic discovery such as the deposition of witnesses is unnecessary on the alleged "admission" of Low Country in its interrogatory response wherein it stated:

> Upon information and belief, Defendant Kirkland lost control of the vehicle while driving down Old Sheldon Church Road in Hampton South Carolina. Defendant Kirkland realized he was in the wrong lane of travel and while attempting to bring the vehicle back into its proper lane, the ambulance left the highway and struck a tree.

(R. ___; Low County Interrogatory Response). Respondent contends that "in the face of [Low Country's] admission" it was incumbent on AMR to refute this statement. (Resp. Brief p. 30).

Respondent is incorrect in numerous respects. First, this statement is not an admission by Low County, rather it is a response based not on actual knowledge, but rather merely on "information and belief." As such, it is insufficient for consideration under Rule 56. See Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (holding that allegations made upon information and belief do not meet the "personal knowledge" requirements of Rule 56(e) and cannot be utilized on a summary judgment motion). Second, Respondent incorrectly concludes that this statement, even if it were an "admission," definitively establishes negligence. It does not. This statement only raises numerous questions, all of which remain unanswered. Specifically: (a) what caused Kirkland to lose control of the vehicle?; (b) was it reasonable for Kirkland to lose control under those circumstances?; (c) what caused the vehicle to be in the wrong land of travel?; (d) what actions did Kirkland take to bring the vehicle back into its proper lane? ; (e) were those actions reasonable under the circumstances?; (f) what caused the vehicle to leave the highway?; and (g) were Kirkland's actions throughout this process reasonable and consistent with the exercise of due care under the circumstances? Respondent and the Trial Court incorrectly concluded that this interrogatory response, which was not premised on personal knowledge, constituted a complete admission of negligence on Kirkland's part leaving nothing more to be discovered about the incident.

Additionally, even if this response did constitute an admission by Low Country, it is not imputable to AMR. Respondent contends that AMR's assertion that an admission by a party applies only as to the admitting party is not the law of South Carolina. (Resp. Brief p. 30-31). AMR cited the case of Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) for this proposition as that case was cited for this purpose in the case of Richardson v. Donald Hawkins Constr., Inc., 370 S.C. 125, 131, 634 S.E.2d 9 (Ct. App.

2006) rev'd 381 S.C. 347, 673 S.E.2d 808 (2009). It is true that that Richardson case was ultimately reversed. Yet, contrary to Respondent's assertion, that reversal does not "nullify" the principle that an admission by one party applies only to the admitting party. In reversing Richardson, the South Carolina Supreme Court did not hold that all parties are bound by the admissions of a separate party.

The rule that an admission by a party applies only as to the admitting party is the logical result of our rules of civil procedure and evidence as well as basic due process. Rule 33(d) of the South Carolina Rules of Civil Procedure governs the use of interrogatory responses by the trial court and provides that "the answers may be used to the extent permitted by the rules of evidence." South Carolina Rule Civil Procedure 33(d). The admissibility of admissions of a party is addressed within the hearsay rules of the South Carolina Rules of Evidence. Specifically, Rule 801(d)(2) classifies that a party's statement that is "offered ***against that party***" is not within the definition of hearsay, and is therefore admissible. S.C.R.Evid. 801(d)(2) (emphasis added). Thus, a supposed "admission" contained in a party's interrogatory response, can be used at trial **only against the party that actually made it**. Otherwise, it is inadmissible hearsay.

It does not appear that South Carolina's courts have felt it necessary to restate this rule in a situation where a statement in one party's interrogatory response is sought to be used as an admission against a different party. However, in the few courts that have directly addressed this situation, those courts have uniformly held that interrogatory responses may be used **only** against the party making them. See Van Dyke v. Bixby, 448 N.E.2d 353, 356 (Mass. 1983) (holding that statements made by defendants in response to interrogatories was admissible only against the individuals who made the statements); Deyo v. Kilbourne, 84 Cal. App. 3d 771,

780 n.3 (Cal. App. 1978) (holding that "[a]nswers to interrogatories provided by party A are not admissible against party B"); Crabtree v. Measday, 508 P.2d 1317, 1322 (N.M. App. 1973) (holding that, under the ruled of civil procedure, logic and justice dictate that interrogatory responses may only be used against the party who made the answers).

It was improper for the Trial Court to conclude that Low Country's interrogatory response constituted an admission of negligence. This error was only compounded when the Trial Court applied the alleged "admission" to AMR – a separate and distinct party. Due to this error, the Trial Court failed to view the facts and circumstances surrounding the cause of the accident in the light most favorable to AMR, as it was required to do. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). Additional discovery, including, at the very least, the deposition of Mr. Kirkland, allowing all parties to determine the actual facts surrounding this accident is clearly necessary. The grant of partial summary judgment was premature and should be reversed.

Conclusion

For the foregoing reasons, as well as those asserted in AMR's initial brief, this Court should reverse the order of the Trial Court granting partial summary judgment in favor of Respondent. Moreover, this Court should find that the AMR's contract with SCDHHS does not impose upon it an absolute nondelegable duty, or other duty, to provide "safe" non-emergency medical transportation that equates to an imposition of strict liability for any and all accidents that may occur, and this matter should be remanded to the Trial Court for further proceedings consistent with this ruling.

SIGNATURE PAGE ATTACHED

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