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.

Appellant's Return to Petition for Rehearing

Appellant American Medical Response, Inc. (d/b/a Access2Care) ("AMR") hereby submits this return to Respondent Charles Gary's ("Respondent") petition for rehearing. In *Gary v. Askew, et al.*, Op. No. 5406 (S.C. Ct. App. filed June 1, 2016) (Shearouse Adv. Sh. No. 22 at pp. 14-33) ("Op. No. 5406"), a Panel of this Court correctly held that the circuit court erred in finding that AMR owed an absolute, nondelegable duty to provide safe transportation to Respondent. Op. No. 5406 at p. 21. Specifically, the Panel held that "the circuit court misinterpreted the nature of AMR's duties and responsibilities under the Contract and, as a result, erred in holding AMR owed an absolute, nondelegable duty to provide safe transportation to

[Respondent]." *Id.* at p. 25. Respondent's petition should be denied because the Panel correctly determined that the circuit court failed to support its conclusion with public policy considerations necessary to support the imposition of an absolute, nondelegable duty. *Id.* at p. 30. Additionally, Respondent's petition should be denied because the Panel correctly determined that the circuit court's "narrow interpretation" of "selected portions of sections 3.3.5 and 3.3.15" of the Contract "failed to give effect to the parties' intent as expressed in the Contract as a whole" with regard to the duties and responsibilities of AMR under that agreement. *Id.* at p. 29.

Argument

I. The Panel correctly held that public policy considerations *do not support* the imposition of a nondelegable duty.

In Opinion No. 5406, the Panel correctly noted that the nondelegable duty doctrine "'is a species of vicarious liability for the fault of another based not on the delegator's fault but *on policy considerations.*'" *Id.* at p. 22 (quoting Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431, 453 (1996) (emphasis added). The Panel further noted that South Carolina's courts have found a nondelegable duty to exist on only a limited number of cases, and that the "decisions regarding whether to apply the nondelegable duty doctrine are *primarily grounded in public policy considerations*." *Id.* at p. 23, 30 (citing *Simmons v. Toumey Reg'l Med. Ctr. (Simmons II)*, 341 S.C. 32, 42-43, 50, 533 S.E.2d 312, 317-18, 322 (2000). (emphasis added). The Panel then noted that the circuit court "failed to mention any policy considerations that led it to reach [the conclusion that public policy imposed a nondelegable duty on AMR]. *Id.* at p. 30. In addition to noting the absence of public policy support for the circuit court's conclusion, this Panel held that "public policy does not favor finding a nondelegable duty in this case." *Id.*

Respondent contends that the circuit court "relied on the extensive control AMR had over its NEMT service providers" to support its conclusion that "public policy demands" the imposition of an absolute, nondelegable duty on AMR. (Petition for Rehearing at p. 2). Specifically, Respondent cites to AMR's contractual obligation to ensure that transportation providers comply with various passenger safety requirements such as the use of seatbelts, not exceeding vehicle capacity, parking so that passengers do not need to cross streets, and requesting dispatcher assistance if passenger behavior or other conditions impede safety. (*Id.* at p. 2-3). Respondent then asserts that the circuit court's conclusion was that because AMR exercised such "extensive control," "public policy dictates" the imposition of an absolute, nondelegable duty. Respondent is incorrect.

The circuit court's order makes no mention whatsoever of the sections now cited by Respondent. (R. 17-31). Moreover, such do not create a "public policy" dictating the imposition of an absolute, nondelegable duty of complete safety on these trips. As this Panel correctly concluded, the control AMR exercised over transportation providers "pales in comparison" to that which the hospital in *Simmons II* exercised over its emergency room physicians, and did not amount a level warranting the imposition of a nondelegable duty. Op. No. 5406 at p. 31.

As this Panel correctly held, neither Respondent nor the circuit court offered any "legislative, judicial, or regulatory expression of public policy" that would support the imposition of a nondelegable duty on AMR under these circumstances. *Id.* at p. 30. To the contrary, this Panel listed multiple reasons why public policy *does not* favor finding a nondelegable duty in this case, and Respondent has made no attempt to refute these findings. *Id.* at p. 30-31. Therefore, this Panel correctly held that public policy did not support the imposition of a nondelegable duty on AMR in this matter.

II. The Panel properly viewed the Contract's provisions in their entirety and correctly concluded that the Contract did not make AMR the insurer of absolute safety on NEMT trips.

The Panel's Opinion correctly concluded that "the circuit court misinterpreted the nature of AMR's duties and responsibilities under the Contract." Op. No. 5406 at p. 25. Respondent asserts that "the circuit court relied on the Contract as a whole" when it held that AMR owed an absolute, nondelegable duty to provide safe NEMT services, and Respondent further asserts that this Panel incorrectly "isolated on § 3.3.5.2" in overruling the circuit court. (Petition for Rehearing at p. 4). However, contrary to Respondent's assertions, this Panel correctly determined that the circuit court placed undue emphasis on sections 3.3.5 and 3.3.15, and this Panel's Opinion illustrates its complete and proper interpretation of the Contract. Op. No. 5406 at p. 25.

Respondent cites to various provisions of the Contract dealing with duties such as minimizing waiting and riding times for people with special needs, taking corrective steps when poor service is identified by SCDHHS, and promptly reporting accidents and injuries to SCDHHS. (Petition for Rehearing at pp. 4-5). Respondent then improperly and summarily concludes that when these provisions are coupled with section 3.3.5 and 3.3.15, they impose on AMR "a non-delegable duty to provide safe transportation services to Medicaid members." (*Id.* at p. 5). This argument is unavailing.

With regard to section 3.3.5, the Panel correctly noted that this section must be read with the immediately following sections 3.3.5.1 and 3.3.5.2, which illustrated that AMR was not guaranteeing complete safety of the NEMT services. Rather, AMR's duty was to verify that trips were completed in a safe and timely manner, and, when they were not, take the appropriate corrective actions. Op. No. 5406 at p. 26. As noted in the Opinion, Respondent's overemphasis on section 3.3.5.1's language "ensuring that all trips are completed safely and on-time" was

inconsistent with section 1.2 and 1.3, and that, when read together, these sections show that the parties to the Contract did not intend that section 3.3.5's language result in AMR serving as the insurer of passenger safety on all trips. *Id.* at p. 27. This is further illustrated by the fact that section 3.3.7 required AMR to make sure that the transportation providers obtained and maintained adequate insurance coverage.

With regard to section 3.3.15's reference to the "delivery of courteous, safe, timely[,] and efficient transportation services," the Panel correctly concluded that this was a transportation provider-related requirement and not a broker requirement. *Id.* at p. 28. The Contract created a relationship where AMR served only as a "broker" between SCDHHS and the entities that actually provided the NEMT services (the "transportation providers"). The contract set forth AMR's obligations as a "broker" providing "brokerage services." (R.94 at § 1.1). These obligation were separate and apart from the obligations of the ultimate "transportation providers" who provided "transportation services." The distinction between the broker and the ultimate transportation provider is evidenced by, among other things, the contract's provision that "only in very limited circumstances" may a broker also act as a transportation provider. (R. 102 at § 3.3.6). As the panel noted, "[g]iven that AMR could not provide transportation services itself ... it [is] illogical to read the Contract as imposing an absolute duty upon AMR to provide safe transportation." Op. No. 5406 at p. 28).

AMR's specific responsibilities focused upon: establishing policies and procedures facilitating the scheduling of transportation; operating a call center with trained employees to field calls, verifying member eligibility, and scheduling the needed transportation; establishing a network of trained transportation providers that was sufficient to handle the anticipated volume; and implementing a system to track and resolve complaints. Notably, Respondent presented no

evidence that AMR violated any of these specific provisions. Nothing within these "core services" suggests an intent to impose a duty guaranteeing complete safety. Therefore, the Panel correctly concluded that nothing in the contract indicates the parties intended for AMR to serve as the insurer of absolute safety for every NEMT trip, and Respondents' petition should be denied.

Conclusion

Based on the foregoing, this panel should deny Respondent's petition for rehearing.

Respectfully Submitted,

By: _____

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Columbia, South Carolina
June 29, 2016

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for American Medical Response, Inc. (d/b/a Access2Care), do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Appellant's Return to Petition for Rehearing

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June 29, 2016

The Honorable Jenny Abbott Kitchings
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RE: Charles Gary v. Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Lowcounty Medical Transport, Low County Medical Transport, Inc., Eugene A. Kirkland, and American Medical Response, Inc., d/b/a Access2Care
C/A No. 2012-CP-07-43595
Appellate Case No. 2013-002674
Our File No. 27717/01501

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Return to Petition for Rehearing in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. By copy of this letter to counsel of record, we are serving them with a copy of this Return.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: Joseph Dawson III, Esquire
H. Cooper Wilson III, Esquire
Cory Fleming, Esquire
Erin DuBose Dean, Esquire