

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

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Opinion No. 5406 (S.C.Ct.App. filed June 1, 2016)

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**RECEIVED**

SEP 19 2016

S.C. SUPREME COURT

Charles Gary ..... Petitioner,

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, ..... Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## **CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 17, 2016.

### **QUESTIONS PRESENTED**

1. Whether the Court of Appeals erred when it failed to consider the public policy reasons the trial court relied on to find that American Medical Response Inc. owed a nondelegable duty to the Petitioner?
2. Whether the Court of Appeals erred when it reversed the trial court's findings that American Medical Response Inc. owed the Petitioner a nondelegable duty to provide safe transportation services under its nonemergency medical transportation contract?

### **STATEMENT OF THE CASE**

The Petitioner Charles Gary filed this lawsuit on October 16, 2012, alleging Negligence, Negligence Per Se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress against the Defendants and AMR in this case, resulting from a single ambulance accident where he was injured and his wife was killed. The Defendants are Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Low Country Medical Transport ("LCMT"), Low Country Medical Transport Inc., (LCMT and Low Country Medical Transport Inc. collectively referred to herein as "Low Country Medical Transport"), and Eugene A. Kirkland filed its Answer on November 30, 2012. American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care" or "AMR"), filed its Answers to the Petitioner's Complaint on November 21, 2012, and thereafter filed an Amended Answer on December 12, 2012. The Defendants and AMR's Answers alleged that they were not liable for the damages Mr. Gary suffered resulting from the accident.

On February 26, 2013, the Petitioner filed a motion for Summary Judgment. The Trial Court held a motions hearing on May 14, 2013, to decide the Petitioner's Summary Judgment Motion on three of his causes of action pursuant to Rule 56, South Carolina Rules of Civil Procedure. After issuing a Summary Judgment Order on August 20, 2013, the Defendants and AMR timely filed Motions to Reconsider the Trial Court's Order. The Court held a subsequent hearing on November 12, 2013, pursuant to the Defendants and AMR's Motions for Reconsideration.

On December 3, 2013, the Trial Court entered its Order on Reconsideration modifying its August 20, 2013, Order affirming its decision on Negligence and Loss of Consortium but reconsidering its ruling on the Petitioner's Negligent Infliction of Emotional Distress claim. AMR timely filed and served its Notice of Appeal on December 13, 2013.

The Court of Appeals heard oral arguments on July 15, 2015, to determine if AMR could escape liability for the negligent actions of a subcontractor because it owed the Petitioner an absolute, nondelegable duty to provide safe transportation pursuant to its contract with the South Carolina Department of Health and Human Services (SCDHHS) and public policy. The Court of Appeals issued its decision on June 1, 2016. The AMR Court reversed the trial court finding that AMR did not owe a nondelegable duty to provide safe transportation to Gary pursuant to both the Contract and public policy. Gary v. Askew, Op. No. 5406 (S.C.Ct.App. filed June 1, 2016).

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision to determine if AMR owed Charles Gary a nondelegable duty to provide safe transportation pursuant to its Contract with SCDHHS and public policy.

## ARGUMENT

### I. THE COURT OF APPEALS MISAPPREHENDED THE TRIAL COURT'S RULING REGARDING THE PUBLIC POLICY CONSIDERATIONS TO IMPOSE A NON DELEGABLE DUTY ON AMR.

This Court should grant the Petitioner's Petition for Writ of Certiorari on the question of whether the Court of Appeals erred when it reversed the circuit court's decision finding that "SCDHHS's Contract 'clearly indicate[d] that public policy and its Contract' imposed a nondelegable duty upon AMR." Gary v. Askew, Op. No. 5406 (S.C.Ct.App. filed June 1, 2016). (App. to Pet. Cert. 0435). Instead, the Court of Appeals found that the circuit court, however, "failed to mention any policy considerations that led it to reach this conclusion." *Id.* (App. to Pet. Cert. 0435 - 0453). The circuit court held that "[t]he The Health Department's [Non Emergency Medical Transportation ("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 transport services to Medicaid members, pursuant to a significant number of control measures and protocols." (App. to Pet. Cert. 0031). The circuit court relied on the extensive control AMR had over its NEMT service providers to conclude that public policy demands that AMR be held liable for the actions of its subcontractors. The NEMT Contract provided for the following:

The Broker must ensure transportation providers comply with the following passenger safety requirements:

3.8.3.6.1 Passengers must have their seat belts buckled at all times while they are inside the vehicle. The driver must assist passengers who are unable to fasten their own seat belts.

3.8.3.6.2 The driver must not start the vehicle until all passenger seat belts have been buckled.

3.8.3.6.3 The number of persons in the vehicle, including the driver, must not exceed the vehicle manufacturer's approved seating capacity.

3.8.3.6.4 Upon arrival at the destination, the vehicle should be parked or stopped so that passengers do not have to cross streets to reach the entrance of their destination.

3.8.3.6.5 Drivers must not leave passengers unattended.

3.8.3.6.6 If passenger behavior or other conditions impede the safe operation of the vehicle, the driver must park the vehicle in a safe location out of traffic and notify their dispatcher to request assistance.

(App. to Pet. Cert. 0133 - 0134, § 3.8.3.6, Passenger Safety Requirements).

The circuit court concluded that because AMR had extensive control over its NEMT service providers that public policy dictates that "Access2Care [could not] walk away from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another." (App. to Pet. Cert. 0031).

Public policy has been aptly described by one of our judges as 'a wide domain of shifting sands.' . . . Gage, J., in McKendree v. So. States Life Ins. Co., 112 S.C. 335, 99 S.E. 806. The term in itself imports something that is uncertain and fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people. Story on Contracts (5th Ed.) § 675; 23 A. & E. Ency. (2d Ed.) 456. For that reason it has frequently been said that the expressive (sic) public policy is not susceptible of exact definition. But for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions. [Citations Omitted]. . . . 'It is the duty of the Legislature to make laws and of the court to expound them, \* \* \* the subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity.'

Brown v. Drake, 275 S.C. 299, 270 S.E.2d 130 (1980).

Here, the circuit court reasoned that public policy should be applied to find a nondelegable duty, because under the NEMT Contract, Access2Care was responsible for operating a call center; vetting and scheduling NEMT trip requests; hiring NEMT providers, training them,

and certifying their compliance with federal and state laws; monitoring NEMT service providers; providing an education program for members; and providing high quality, courteous, and safe transportation service to Medicaid members. These responsibilities ranged from ensuring drivers wore a nametag to verifying the financial stability of all contracted transportation providers. (App. to Pet. Cert. 0128 - 0134, 0118 - 0127, § 3.8.2, Driver Requirements, § 3.7, Transportation Provider Network). Therefore, this Court should grant the Petitioner's Petition for Writ of Certiorari on the public policy question.

**II. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S FINDINGS THAT AMERICAN MEDICAL RESPONSE INC. OWNED THE PETITIONER A NONDELEGABLE DUTY TO PROVIDE SAFE TRANSPORTATION UNDER ITS NONEMERGENCY MEDICAL TRANSPORTATION CONTRACT.**

Alternatively, this Court should grant the Petitioner's Petition for Writ of Certiorari on the question of whether the Court of Appeals erred because it did not consider the circuit court's reliance upon the Contract regarding AMR's duties and responsibility. The Court of Appeals isolated on § 3.3.5.2 Fulfillment of All Trip Request, to find that "AMR's duty was only to track each trip and follow up to verify it was completed safely and on time; and if a trip was not, then to make the appropriate arrangements by 'aid[ing] trip recovery process'" to limit AMR duties. Gary v. Askew, Op. No. 5406 (S.C.Ct.App. filed June 1, 2016). Rather, the circuit court relied on the Contract as a whole which squarely placed a duty on AMR to ensure and assure safe transportation services. Access2Care's duties and responsibilities under the NEMT Contract included, but were not limited to the following examples:

The Broker must assure that transportation services are provided which

comply with the following minimum service delivery requirements and which must be delineated in all transportation service agreements:

The Broker must minimize the waiting and riding times beyond what is required to reach the destination or trip termination from a medical service for persons with special needs. This special population includes dialysis, disabled or impaired individuals, the medically fragile members of Adult Day Health Care, medically fragile children and certain other persons and must take into particular account the physical or medical condition of the rider following certain treatment or activity.

(App. to Pet. Cert. 0115, § 3.6.9 Other Procedures and Responsibilities for NEMT Scheduling)

The Broker must ensure that high quality services are provided and must immediately take necessary and corrective steps when representatives of SCDHHS identify inappropriate, undesirable, or otherwise poor service.

(App. to Pet. Cert. 0100, § 2.4.8 General Broker Requirements).

The Broker must promptly report to SCDHHS accidents, injuries, and incidents that have occurred in conjunction with a scheduled trip if a Member was present in the vehicle.

(App. to Pet. Cert. 0105, § 3.3.8 Accidents, Injuries, and Incidents).

The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. SCDHHS expects the Broker to provide trip coverage twenty-four (24) hours a day, seven (7) days a week.

Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine the real-time location of members, verification of member delivery to the medical service, vehicle location and disposition and to aid trip recovery processes. The functionality of tracking tools and methods must be explained operationally and approved by SCDHHS.

(App. to Pet. Cert. 0104, § 3.3.5 Fulfillment of All Trips Requests).

The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and

delivery of courteous, safe, timely and efficient transportation services. The monitoring Plan should address how the Broker will collect and verify the accuracy of performance data obtained from the NEMT providers.

(App. to Pet. Cert. 0107 - 0108, § 3.3.15 Monitoring Plan)

The Broker must provide assurance that the transportation providers meet health and safety standards for vehicles maintenance, operation, and inspection; driver qualifications and training; member problem and complaint resolution; and the delivery of courteous, safe, and timely transportation services.

(App. to Pet. Cert. 0139, § 3.12.1.1 Quality Assurance, Corrective Action Plans).

The requirements of the NEMT Contract imposed on AMR go beyond an administrative role and duty for NEMT services, but impose a nondelegable duty to provide safe transportation services to Medicaid members. Therefore, this Court should grant the Petitioner's Petition for Writ of Certiorari to determine if AMR had a nondelegable duty.

### CONCLUSION

For the foregoing reasons, the Respondent Charles Gary respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,



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September 15, 2016

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

**PROOF OF SERVICE**

I certify that I have served the **Petition for Writ of Certiorari** upon all counsel of record and the Clerk of the South Carolina Court of Appeals by depositing a copy of the same in the United States Mail, postage prepaid, on September 15, 2016, addressed as follows:

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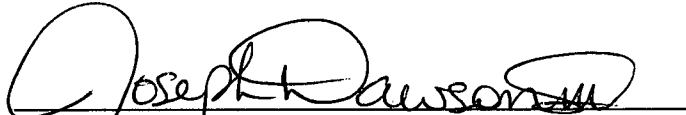
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