

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

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

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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.

**APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI
VOLUME I OF II**

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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
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RECORD ON APPEAL

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SC Court of Appeals

**RECORD ON APPEAL
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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,

PLAINTIFF,

vs.

HATTIE M. ASKEW, WILL OUTLAW,
AND DEBORAH 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

2013 AUG 20
ORDER GRANTING
SUMMARY JUDGMENT TO THE
PLAINTIFF ON HIS NEGLIGENCE, LOSS
OF COMPANIONSHIP OF SPOUSE,
AND NEGLIGENT INFLECTION OF
EMOTIONAL DISTRESS
CAUSES OF ACTION.

The Plaintiff Charles Gary filed this lawsuit on October 16, 2012, alleging Negligence, Negligence Per Se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Inflection of Emotional Distress against the defendants in this case, resulting from a single ambulance accident.

This Court held a motions hearing on May 14, 2013, to decide the Plaintiff Charles Gary's Summary Judgment Motion on three of his causes of action pursuant to Rule 56, South Carolina Rules of Civil Procedure. The Plaintiff argues that he is entitled to a judgment as a matter of law on his Negligence, Loss of Companionship of Spouse, and Negligent Inflection of Emotional Distress claims, because the Defendants Hattie M. Askew, individually and d/b/a Low Country Medical Transport ("LCMT"), Low Country Medical Transport Inc., (LCMT and Low Country Medical Transport Inc. collectively

*I gave and except
for Will Outlaw
and Deborah Outlaw.*

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referred to herein as "Low Country Medical") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants") are liable for the damages he suffered resulting from the single ambulance collision.

Based on the arguments of counsel, pleadings, affidavits, exhibits, memoranda of law, the undisputed record before me, and applicable case law and statutes, I find that there are no genuine issues of material fact in dispute and that Mr. Gary is entitled to judgment as a matter of law on his Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress claims based on the following undisputed facts and conclusions of law.

Charles Gary is a 61-year old bedridden diabetic, amputee, and paraplegic who lost the use of his lower body in 2004, in an unrelated incident. Mr. Gary is unemployed and draws social security. He is also a Medicaid beneficiary in South Carolina. Before this single ambulance accident, Mr. Gary lived at home with his wife, Blondell Gary, who died in the single ambulance accident, complained of herein. Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing, dressing, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities.

On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract ("Contract") with Access2Care to implement the South Carolina Non-Emergency Medical Transportation

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(NEMT) Program.¹ The NEMT Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency medical transportation services in a cost-effective manner to Medicaid members who need access to medical care or services. This Contract was initiated through a competitive request for proposal (RFP) solicitation process to provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina (like Mr. Gary).

Access2Care is a Delaware Corporation, licensed to do business in the State of South Carolina. Pursuant to the RFP and its Contract with the Health Department, Access2Care was tasked with administering the daily functions of the NEMT Program for Medical Transportation for South Carolina's Regions Two and Three. Mr. Gary resides in Region 3. The NEMT Program was a turnkey operation where Access2Care would provide transportation management and administration services to Medicaid members. Access2Care's duties and responsibilities under its Contract included the following examples:

The Broker must ensure that high quality services are provided
Section 2.4.8 General Broker Requirements

The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. *Section 3.3.5 Fulfillment of All Trip Requests*

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. *Section 3.3.8 Accidents, Injuries, and Incidents*

¹ The Defendants do not dispute that the South Carolina Non-Emergency Medical Transportation (NEMT) Program Request for Proposal bid documents is the basis for the Health Department's contract with Access2Care and that there is no separate contract signed after a Request for Proposal process is completed.

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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 . . . driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. *Section 3.3.15 Monitoring Plan*

The Broker must provide assurance that the transportation providers meet health and safety standards . . . complaint resolution; and the delivery of courteous, safe, and timely transportation services. *Section 3.12 Quality Assurance*

The NEMT Contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." *Section 3.11.1 Complaints*. The Contract imposed certain duties on Access2Care to ensure, in particular, the safety of its members.

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation providers to provide transportation services to eligible Medicaid recipients. On August 17, 2011, Access2Care began to provide NEMT services to eligible Medicaid recipients in South Carolina. While under Contract with the Health Department, Access2Care entered into a contract with Low Country Medical Transport Inc., and/or LCMT titled "Access2Care Transportation Solutions Subcontractor Agreement" so that Access2Care could dispatch Low Country Medical as part of its

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NEMT network.²

On January 31, 2012, Access2Care scheduled Low Country Medical to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical's ambulance was transporting Mr. Gary and his wife home after his medical appointment. Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree on Old Sheldon Church Road in Yemassee, South Carolina.

The collision caused injuries to Mr. Gary and killed his wife.

Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, with injuries resulting from the crash.

CONCLUSIONS OF LAW

Reviewing the Plaintiff's motion for summary judgment in a light most favorable to the Defendants, I find that there are no genuine issues of material fact in dispute based on the legal theories presented by the Plaintiff; and therefore, the Defendants are liable for the Plaintiff's injuries and damages as a matter of law. "Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

² Low Country Medical has been in the business of transporting individuals to and from medical facilities since 2004. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved Low Country Medical Transport Inc.'s, corporate status in South Carolina. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. The LCMT continued to operate until Low Country Medical Transport Inc.'s, reinstatement by the South Carolina Secretary of State four and half years later.

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issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Platt v. CSX Transportation, 379 S.C. 249 665 S.E.2d 631 (Ct.App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Id.* "Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt supra.

"Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003). The Defendants argue that Summary Judgment is premature, because no dispositions have been taken and several factual questions remain to be developed in discovery. While questions may remain, they are not material to the causes of action raised in the Plaintiff's motion for summary judgment. The Defendants have failed to show a genuine issue of fact in dispute regarding the events that occurred on the date of the accident except hypotheticals.³ It is improbable that further discovery will mitigate the facts surrounding this single ambulance accident in the Defendants' favor. Therefore, summary judgment is appropriate in this case.

³ The Defendants argue that summary judgment is not appropriate, because it was not clear why Kirkland ran off the road in this single ambulance accident. The Defendants cannot defeat a summary judgment motion by simply raising a hypothetical question and then offering the absence of an answer as the defense to the question. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

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NEGLIGENCE

Access2Care, Low Country Medical, and Eugene A. Kirkland (Kirkland) are liable for injuries Mr. Gary suffered when Low Country Medical's ambulance ran off the road and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, under the Plaintiff's Negligence Cause of Action. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009). "The existence of a duty owed is a question of law for the courts." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). I find as a matter of law that the Defendants have a duty.

The Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina. It is undisputed that Access2Care scheduled NEMT services for Mr. Gary's January 31, 2012, medical appointment. Access2Care sent Low Country Medical to Mr. Gary's house to transport him to and from his medical appointment. It is undisputed that Kirkland was driving Low Country Medical's ambulance when he lost control of the vehicle and hit a large tree. Kirkland had a clear legal duty to operate the ambulance in a safe manner and avoid dangers.

Moreover, Low Country Medical as a non-emergency medical transportation provider had a duty of care to transport Mr. Gary safely, while he was in its custody and control. "Under the doctrine of respondeat superior, the employer is liable for the acts of

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an employee acting within the scope of employment." Austin v. Specialty Trans. Services, 358 S.C. 298, 594 S.E.2d 867 (Ct.App. 2004). "The doctrine of respondeat superior provides that the employer, as the employee's master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment." James v. Kelly Trucking, 377 S.C. 628, 661 S.E.2d 329 (2008). Low Country Medical owed a duty of care to Mr. Gary when it agreed to transport Mr. Gary as an Access2Care NEMT service provider via its employee driver.

Equally, Access2Care had a duty of care to Mr. Gary arising out of its Contract and operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's Contract with the Health Department required Access2Care to be "... responsible for fulfilling all verified trip requests and ensuring that all trips are **completed safely** and on-time." *Health Department Contract Section 3.3.5 Fulfillment of All Trip Requests*. Moreover, Access2Care's Contract with the Health Department stated in Section 3.3.15 Monitoring Plan that:

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.

In this case, Access2Care scheduled NEMT service for Mr. Gary for a medical appointment he had on January 31, 2012. Access2Care dispatched Low Country

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Medical to Mr. Gary's home in Yemassee, South Carolina. Access2Care had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department. In addition, Access2Care had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations. The Defendants clearly owed Mr. Gary a duty of care when they agreed to provide NEMT services to him for a fee.

Access2Care, Low Country Medical, and Kirkland breached their duty of care to Mr. Gary when Low Country Medical's ambulance ran off the road. "A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). It is undisputed that Low Country Medical's driver failed to maintain the ambulance on the road safely, which resulted in injuring Mr. Gary. The Defendants' breach of their duty of care caused Mr. Gary to suffer multiple fractured ribs and pelvic bones, among other injuries and damages from the accident.

Kirkland's breach of his duty of care to Mr. Gary was the proximate cause of Mr. Gary's injuries and damages. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.* "Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Vinson, *supra*. I find that the unique facts of this

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case are susceptible to only one inference. The evidence clearly shows that Low Country Medical's ambulance, which was driven by Kirkland its employee, ran off the road and struck a tree seriously injuring Mr. Gary and killing his wife. The undisputed evidence in this case is susceptible to only one inference. Kirkland's negligent act was the proximate cause of Mr. Gary's injury, because it was the natural and continuous sequence of events that produced his injuries and without it, the injury would not have occurred. Therefore, the Defendants' conduct was the proximate cause of Mr. Gary's injuries based on the facts articulated herein, because they are vicariously liable.

Access2Care adamantly rejects the notion that it is vicariously liable for injuries Mr. Gary sustained when its subcontractor caused the single-ambulance accident. Access2Care asserts that Low Country Medical's independent contractor status is an absolute bar to its liability. In the alternative, Access2Care contends that the doctrine of Apparent Agency controls and summary judgment is not appropriate because Mr. Gary has failed to make a showing of the elements for Apparent Agency. I disagree with both assertions.

"Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958). However, '[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.'" Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

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"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability. . . ." Smith v. Regional Medical Center, 394 S.C. 110, 713 S.E.2d 656 (Ct.App. 2011). South Carolina Courts have found a non-delegable duty to exist at common law and by statute. For instance, the South Carolina Supreme Court noted, "a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons v. Tourney Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); citing, Simmons, 330 S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 654 (1997). The South Carolina Court of Appeals found in Durkin that:

The performance of duties assumed by Respondents by the rental agreement and those imposed by the [Residential Landlord and Tenant Act] may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor. [Citation Omitted]. . . . ("[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in

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making such repairs or improvements by employing an independent contractor to do the work. . . .").

Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

The general proposition is clear; a principal cannot insulate himself from liability that has been assumed by agreement through the employment of an independent contractor.

See Durkin supra.⁴

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. The 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 transport services to Medicaid members, pursuant to a significant number of control measures and protocols. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty concluded:

The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001)..

Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care cannot walk away

⁴ The Simmons I Court quoted Dean Prosser stating, "A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. . . . [T]he cases of "nondelegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. . . . It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another.

Alternatively, the doctrine of non-delegable duty is not predicated on the Apparent Agency Doctrine. "Under the apparent agency doctrine, the injured patient must establish that (1) the hospital consciously or impliedly represented the physician to be its agent, (2) the patient relied upon the representation, and (3) the patient changed his position to his detriment in reliance on the representation." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II). Conversely, "[a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998) (Simmons I). Mr. Gary's non-delegable duty argument is not based on his mental state or perceptions regarding who was responsible for his care. Rather, Mr. Gary's claim is predicated on Acces2Care's non-delegable duty to ensure all trips are completed safely and on time. The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable Duty Doctrine, but simply concluded that it was not necessary in the case at hand.⁵ Therefore, Access2Care's argument that this Court should deny the Plaintiff's motion, because he has not proved the elements for Apparent Agency is misplaced.

LOSS OF CONSORTIUM/COMPANIONSHIP OF SPOUSE

⁵ The Simmons II Court held in its conclusion that "[w]e could remand the apparent agency issue to the Court of Appeals for its consideration and ordinarily would find that an appropriate disposition. However, we conclude it is unnecessary to remand this case to the Court of Appeals because the parties have raised both issues to us on the merits and because the analyses of apparent agency and nondelegable duty are so closely intertwined in this instance. Although closely related, each is a viable theory an injured patient may assert. Accordingly, we also reverse the grant of summary judgment to Toumey Regional on the ground of apparent agency in both respondents' cases." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

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Since I have determined that the Defendants are liable under Mr. Gary's Negligence Cause of Action, I equally find that the Defendants have violated Mr. Gary's right to the companionship, aid, society, and services of his wife Blondell. It is undisputed that Mr. Gary and his wife were riding in an ambulance dispatched by Access2Care, owned by Low Country Medical, and driven by Kirkland, when it suddenly ran off the shoulder of Old Sheldon Church Road and hit a tree killing Mrs. Gary. Mr. Gary, a paraplegic survived the accident with injuries, but he lost his wife, his primary caregiver, and sole means of support in the accident. In South Carolina, "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." S.C. Code Ann. § 15-75-20. "[C]laims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence.

Mr. Gary is a bedridden paraplegic. Prior to the accident, Mrs. Gary assisted Mr. Gary with all of his daily activities including bathing him, dressing him, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. It is clear, based on my earlier findings that Mrs. Gary's death was caused by the negligence of the Defendants. Therefore, Mr. Gary is entitled to compensatory damages against the Defendants for the loss of his wife's companionship, aid, society, and services.

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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

I also find that Mr. Gary has suffered severe emotional distress, shock, and wounded feelings, because he experienced his wife's death in a single ambulance accident caused by the negligence of the Defendants. The Defendants' tortious actions have caused Mr. Gary to suffer negligent infliction of emotional distress. "In order to prevail on this cause of action, a plaintiff must show that: (a) the negligence of the defendant caused death or serious physical injury to another; (b) the plaintiff bystander was in close proximity to the accident; (c) the plaintiff and the victim are closely related; (d) the plaintiff contemporaneously perceived the accident; and (e) the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony." Doe v. Greenville County, 375 S.C. 63, 651 S.E.2d 305 (2007).

As stated above, the Defendants' negligence in failing to keep the ambulance under proper control resulted in the ambulance running off the road and hitting a large tree. It is undisputed that this act caused Blondell Gary's death. Mr. Gary was in close proximity to the accident when it occurred. The Defendants do not dispute that Mr. Gary was in the back of the ambulance strapped to a stretcher. It is unquestioned that Mr. Gary was closely related to Blondell Gary, because they were married. Furthermore, Mr. Gary contemporaneously perceived the accident complained of herein, because he was also a victim of the accident while riding in the same vehicle.

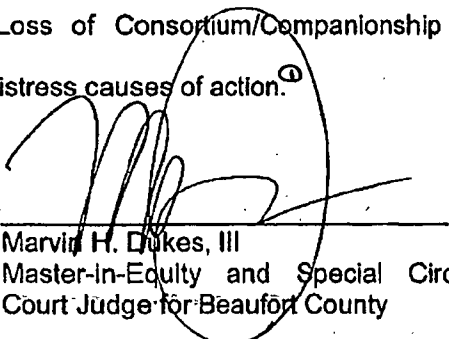
In Kinard, the South Carolina Supreme Court adopted the cause of action negligent infliction of emotional distress. See, Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). In Kinard, Betty Kinard and her daughter were injured

when a load of roof trusses fell from Augusta Sash & Door Co.'s truck and struck the car in which they were riding. Kinard's daughter was severely injured and remained comatose for three months. Betty Kinard experienced severe emotional distress because of the accident. Similarly, Mr. Gary was riding in the same vehicle with his wife, and he has suffered severe emotional distress and shock, because of her death.

Although Mr. Gary has exhibited manifestations of his shock and horror through nightmares, insomnia, anxiety, and depression. There is no evidence in the record to refute Mr. Gary's claims. Therefore, I find as a matter of law that Mr. Gary has met the elements necessary to prevail on his Negligent Infliction of Emotional Distress claim.

IT IS THEREFORE ORDERED that summary judgment be entered for the Plaintiff Charles Gary on his Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress causes of action.^①

AND IT IS SO ORDERED.


Marvin H. Dukes, III
Master-in-Equity and Special Circuit
Court Judge for Beaufort County

Beaufort, South Carolina
8/14, 2013

① except as to outlaws defendants.

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,

PLAINTIFF,

vs.

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

ORDER ON RECONSIDERATION
MODIFYING THE AUGUST 20, 2013,
SUMMARY JUDGMENT ORDER AND
AFFIRMING SUMMARY JUDGMENT FOR
THE PLAINTIFF ON HIS NEGLIGENCE
AND LOSS OF COMPANIONSHIP OF
SPOUSE CAUSES OF ACTIONS

13 DEC -3 PM 1:22
CLERK OF COURT

The Plaintiff 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 in this case, resulting from a single ambulance accident.

This Court held a motions hearing on May 14, 2013, to decide the Plaintiff Charles Gary'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 timely filed Motions to Reconsider this Court's Order. This Court held a subsequent hearing on November 12, 2013, pursuant to the Defendants Motions for Reconsideration. On Reconsideration, the Defendants argue that summary judgment is improper

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and that the Plaintiff is not entitled to a judgment as a matter of law on his Negligence, Loss of Companionship of Spouse, and Negligent Infliction of Emotional Distress claims, because the Defendants Hattie M. Askew, 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") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants" excluding the defendants Will Outlaw and Deboria Outlaw) are not liable for the damages Mr. Gary suffered resulting from the single ambulance collision.

Based on the arguments of counsel, pleadings, affidavits, exhibits, memoranda of law, the undisputed record before me, and applicable case law and statutes on reconsideration, I find that there are no genuine issues of material fact in dispute and that Mr. Gary is entitled to judgment as a matter of law against the Defendants only on his Negligence and Loss of Consortium/Companionship of Spouse claims (not his Negligent Infliction of Emotional Distress claim) based on the following undisputed facts and conclusions of law.

Charles Gary is a 61-year old bedridden diabetic, amputee, and paraplegic who lost the use of his lower body in 2004, in an unrelated incident. Mr. Gary is unemployed and draws social security. He is also a Medicaid beneficiary in South Carolina. Before this single ambulance accident, Mr. Gary lived at home with his wife, Blondell Gary, who died in the single ambulance accident, complained of herein. Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing, dressing, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities.

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On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract ("Contract") with Access2Care to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program.¹ The NEMT Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency medical transportation services in a cost-effective manner to Medicaid members who need access to medical care or services. This Contract was initiated through a competitive request for proposal (RFP) solicitation process to provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina (like Mr. Gary).

Access2Care is a Delaware Corporation, licensed to do business in the State of South Carolina. Pursuant to the RFP and its Contract with the Health Department, Access2Care was tasked with administering the daily functions of the NEMT Program for Medical Transportation for South Carolina's Regions Two and Three. Mr. Gary resides in Region 3. The NEMT Program was a turnkey operation where Access2Care would provide transportation management and administration services to Medicaid members. Access2Care's duties and responsibilities under its Contract included the following examples:

The Broker must ensure that high quality services are provided
Section 2.4.8 General Broker Requirements

The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. *Section 3.3.5 Fulfillment of All Trip Requests*

¹ The Defendants do not dispute that the South Carolina Non-Emergency Medical Transportation (NEMT) Program Request for Proposal bid documents is the basis for the Health Department's contract with Access2Care and that there is no separate contract signed after a Request for Proposal process is completed.

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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. *Section 3.3.8 Accidents, Injuries, and Incidents*

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 . . . driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. *Section 3.3.15 Monitoring Plan*

The Broker must provide assurance that the transportation providers meet health and safety standards . . . complaint resolution; and the delivery of courteous, safe, and timely transportation services. *Section 3.12 Quality Assurance*

The NEMT Contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." *Section 3.11.1 Complaints*. The Contract imposed certain duties on Access2Care to ensure, in particular, the safety of its members:

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation providers to provide transportation services to eligible Medicaid recipients. On August 17, 2011, Access2Care began to provide NEMT services to eligible Medicaid recipients in South Carolina. While under Contract with the Health Department, Access2Care entered into a contract with Low Country Medical Transport Inc., and/or LCMT titled "Access2Care Transportation Solutions. Subcontractor

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Agreement" so that Access2Care could dispatch Low Country Medical as part of its NEMT network.²

On January 31, 2012, Access2Care scheduled Low Country Medical to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical's ambulance was transporting Mr. Gary and his wife home after his medical appointment. Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree on Old Sheldon Church Road in Yemassee, South Carolina. The collision caused injuries to Mr. Gary and killed his wife. Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, with injuries resulting from the crash.

CONCLUSIONS OF LAW

Reviewing the Plaintiffs motion for summary judgment in a light most favorable to the Defendants, I find that there are no genuine issues of material fact in dispute based on the legal theories presented by the Plaintiff; and therefore, the Defendants are liable for the Plaintiff's injuries and damages as a matter of law. "Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and

² Low Country Medical has been in the business of transporting individuals to and from medical facilities since 2004. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved Low Country Medical Transport Inc.'s, corporate status in South Carolina. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. The LCMT continued to operate until Low Country Medical Transport Inc.'s, reinstatement by the South Carolina Secretary of State four and a half years later.

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." Platt v. CSX Transportation, 379 S.C. 249 665 S.E.2d 631 (Ct.App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Id.* "Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt supra.

"Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003). The Defendants argue that Summary Judgment is premature, because no depositions have been taken and several factual questions remain to be developed in discovery. While questions may remain, they are not material to the causes of action raised in the Plaintiffs motion for summary judgment. The Defendants have failed to show a genuine issue of fact in dispute regarding the events that occurred on the date of the accident except hypotheticals.³ It is improbable that further discovery will mitigate the facts surrounding

³ The Defendants argue that summary judgment is not appropriate, because it was not clear why Kirkland ran off the road in this single ambulance accident. The Defendants cannot defeat a summary judgment motion by simply raising a hypothetical question and then offering the absence of an answer as the defense to the question. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

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this single ambulance accident in the Defendants' favor. Therefore, summary judgment is appropriate in this case.

NEGLIGENCE

Access2Care, Low Country Medical, and Eugene A. Kirkland (Kirkland) are liable for injuries Mr. Gary suffered when Low Country Medical's ambulance ran off the road and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, under the Plaintiff's Negligence Cause of Action. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009). "The existence of a duty owed is a question of law for the courts." Simmons v. Tourney Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). I find as a matter of law that the Defendants have a duty.

The Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina. It is undisputed that Access2Care scheduled NEMT services for Mr. Gary's January 31, 2012, medical appointment. Access2Care sent Low Country Medical to Mr. Gary's house to transport him to and from his medical appointment. It is undisputed that Kirkland was driving Low Country Medical's ambulance when he lost control of the vehicle and hit a large tree. Kirkland had a clear legal duty to operate the ambulance in a safe manner and avoid dangers.

Moreover, Low Country Medical as a non-emergency medical transportation provider had a duty of care to transport Mr. Gary safely, while he was in its custody and

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control. "Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment." Austin v. Specialty Trans. Services, 358 S.C. 298, 594 S.E.2d 867 (Ct.App. 2004). "The doctrine of respondeat superior provides that the employer, as the employee's master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment." James v. Kelly Trucking, 377 S.C. 628, 661 S.E.2d 329 (2008). Low Country Medical owed a duty of care to Mr. Gary when it agreed to transport Mr. Gary as an Access2Care NEMT service provider via its employee driver.

Equally, Access2Care had a duty of care to Mr. Gary arising out of its Contract and operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's Contract with the Health Department required Access2Care to be "... responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time." *Health Department Contract Section 3.3.5 Fulfillment of All Trip Requests*. Moreover, Access2Care's Contract with the Health Department stated in Section 3.3.15 Monitoring Plan that:

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.

In this case, Access2Care scheduled NEMT service for Mr. Gary for a medical appointment he had on January 31, 2012. Access2Care dispatched

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Low Country Medical to Mr. Gary's home in Yemassee, South Carolina. Access2Care had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department. In addition, Access2Care had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations. The Defendants clearly owed Mr. Gary a duty of care when they agreed to provide NEMT services to him for a fee.

Access2Care, Low Country Medical, and Kirkland breached their duty of care to Mr. Gary when Low Country Medical's ambulance ran off the road. "A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). It is undisputed that Low Country Medical's driver failed to maintain the ambulance on the road safely, which resulted in injuring Mr. Gary. The Defendants' breach of their duty of care caused Mr. Gary to suffer numerous injuries, including asserted broken bones, lacerations, bruises, and other injuries and damages from the accident.

Kirkland's breach of his duty of care to Mr. Gary was the proximate cause of Mr. Gary's injuries and damages. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.* "Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Vinson, *supra*. I find that the unique facts of this

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case are susceptible to only one inference. The evidence clearly shows that Low Country Medical's ambulance, which was driven by Kirkland its employee, ran off the road and struck a tree seriously injuring Mr. Gary and killing his wife. The undisputed evidence in this case is susceptible to only one inference. Kirkland's negligent act was the proximate cause of Mr. Gary's injury, because it was the natural and continuous sequence of events that produced his injuries and without it, the injury would not have occurred. Therefore, the Defendants' conduct was the proximate cause of Mr. Gary's injuries based on the facts articulated herein, because they are vicariously liable.

Access2Care adamantly rejects the notion that it is vicariously liable for injuries Mr. Gary sustained when its subcontractor caused the single-ambulance accident. Access2Care asserts that Low Country Medical's independent contractor status is an absolute bar to its liability. In the alternative, Access2Care contends that the doctrine of Apparent Agency controls and summary judgment is not appropriate because Mr. Gary has failed to make a showing of the elements for Apparent Agency. I disagree with both assertions.

"Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958). However, '[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.'" Simmons v. Tourney Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability. . . ." Smith v. Regional Medical Center, 394 S.C. 110, 713

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S.E.2d 656 (Ct.App. 2011). South Carolina Courts have found a non-delegable duty to at common law and by statute. For instance, the South Carolina Supreme Court noted, "a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons v. Tourney Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); citing, Simmons, 330 S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 654 (1997). The South Carolina Court of Appeals found in Durkin that:

The performance of duties assumed by Respondents by the rental agreement and those imposed by the [Residential Landlord and Tenant Act] may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor. [Citation Omitted]. . . . ("[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work. . . .").

Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

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The general proposition is clear; a principal cannot insulate himself from liability that has been assumed by agreement through the employment of an independent contractor. See Durkin supra.⁴

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. The 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 transport services to Medicaid members, pursuant to a significant number of control measures and protocols. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty concluded:

The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care cannot 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.

⁴ The Simmons I Court quoted Dean Prosser stating, "A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. . . . (The cases of "nondelegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. . . . It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Tourney Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

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Alternatively, the doctrine of non-delegable duty is not predicated on the Apparent Agency Doctrine. "Under the apparent agency doctrine, the injured patient must establish that (1) the hospital consciously or impliedly represented the physician to be its agent, (2) the patient relied upon the representation, and (3) the patient changed his position to his detriment in reliance on the representation." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II). Conversely, "[a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998) (Simmons I). Mr. Gary's non-delegable duty argument is not based on his mental state or perceptions regarding who was responsible for his care. Rather, Mr. Gary's claim is predicated on Acces2Care's non-delegable duty to ensure all trips are completed safely and on time. The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable Duty Doctrine, but simply concluded that it was not necessary in the case at hand.⁵ Therefore, Access2Care's argument that this Court should deny the Plaintiffs motion, because he has not proved the elements for Apparent Agency is misplaced.

⁵ The Simmons II Court held in its conclusion that "[w]e could remand the apparent agency issue to the Court of Appeals for its consideration and ordinarily would find that an appropriate disposition. However, we conclude it is unnecessary to remand this case to the Court of Appeals because the parties have raised both issues to us on the merits and because the analyses of apparent agency and nondelegable duty are so closely intertwined in this instance. Although closely related, each is a viable theory an injured patient may assert. Accordingly, we also reverse the grant of summary judgment to Toumey Regional on the ground of apparent agency in both respondents' cases." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

LOSS OF CONSORTIUM/COMPANIONSHIP OF SPOUSE

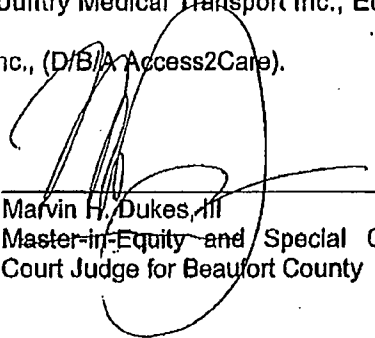
Since I have determined that the Defendants are liable under Mr. Gary's Negligence Cause of Action, I equally find that the Defendants have violated Mr. Gary's right to the companionship, aid, society, and services of his wife Blondell. It is undisputed that Mr. Gary and his wife were riding in an ambulance dispatched by Access2Care, owned by Low Country Medical, and driven by Kirkland, when it suddenly ran off the shoulder of Old Sheldon Church Road and hit a tree killing Mrs. Gary. Mr. Gary, a paraplegic survived the accident with injuries, but he lost his wife, his primary caregiver, and sole means of support in the accident. In South Carolina, "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." S.C. Code Ann. § 15-75-20. "[C]laims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence." Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423 (Ct.App. 2003).

Mr. Gary is a bedridden paraplegic. Prior to the accident, Mrs. Gary assisted Mr. Gary with all of his daily activities including bathing him, dressing him, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. It is clear, based on my earlier findings that Mrs. Gary's death was caused by the negligence of the Defendants. Therefore, Mr. Gary is entitled to compensatory damages against the Defendants for the loss of his wife's companionship, aid, society, and services.

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IT IS THEREFORE ORDERED that summary judgment be entered for the Plaintiff Charles Gary on his Negligence and Loss of Consortium/Companionship of Spouse causes of action against the Defendants Hattie M. Askew, 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).

AND IT IS SO ORDERED.


Marvin H. Dukes, III
Master in Equity and Special Circuit
Court Judge for Beaufort County

Beaufort, South Carolina
12/7, 2013

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

CHARLES GARY,

Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-07-3595

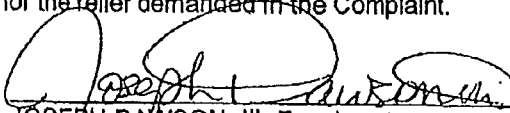
SUMMONS
(JURY TRIAL DEMANDED)

12 OCT 16 PM 3:39
BEAUFORT COUNTY S.C.
CLERK OF COURT

client

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at P.O. Box 1211, Charleston, SC 29402, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.



JOSEPH DAWSON, III, Esquire
Post Office Box 1211
Charleston, South Carolina 29402
Telephone: (843) 207-9004
Facsimile: (843) 207-9005

October 15, 2012
Charleston S.C.

ATTORNEY FOR THE PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

12/09/2016 PM 3:39
CLERK OF COURT
J.C. BEAUFORT S.C.

CHARLES GARY,
PLAINTIFF,

vs.

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

COMPLAINT

(Negligence/Negligence Per Se/Gross Negligence)
(Loss of Consortium/Companionship of Spouse)
(Intentional Infliction of Emotional Distress)

(JURY TRIAL DEMANDED)

The Plaintiff Charles Gary, complaining of the Defendants above named, alleges and would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. The Plaintiff, Charles Gary is a citizen and resident of Beaufort County, South Carolina, (hereinafter called "Plaintiff" or "Gary").
2. Upon information and belief, the Defendant, Low Country Medical Transport Inc., ("LCMT Inc.") is an entity organized and existing under the laws of the State of South Carolina.
3. Upon information and belief, Hattie M. Askew (a/k/a Hattie M. Outlaw), is a citizen and resident of Hampton County, South Carolina (hereinafter "Askew") and is a co-owner, operator, and/or officer of a company that did business as Low Country Medical Transport ("Low Country Medical") in South Carolina. Upon information and

belief, Low Country Medical was formerly known as and is the successor to LCMT Inc., which corporation was dissolved on the date of the accident identified herein.

4. Will Outlaw and Deboria Outlaw are citizens and residents of Bertie County, North Carolina, and they are co-owners, operators, and/or officers of the company that did business as Low Country Medical in South Carolina. Defendants Askew, Will Outlaw, and Deboria Outlaw individually and/or collectively hereinafter referred to as Low Country Medical.

5. Upon information and belief, Eugene A. Kirkland ("Kirkland") is a citizen and resident of Hampton, South Carolina and is an employee of Low Country Medical and/or LCMT Inc.

6. Upon information and belief, American Medical Response Inc., (hereinafter "AMR") is a Delaware Corporation that is authorized to do business in the State of South Carolina. AMR is a broker of non-emergency medical transportation and it dispatched non-emergency medical transportation (NEMT) to eligible Medicaid recipients in South Carolina on the date of the accident identified herein. AMR contracted with LCMT Inc., to provide NEMT services as part of its contractual obligation to provide said services for the South Carolina Department of Health and Human Services.

7. Defendants LCMT Inc., Low Country Medical, Kirkland, and AMR collectively referred to herein as the Defendants.

8. This Court has jurisdiction over the Defendants and over the subject matter of this action.

9. Venue is proper in Court of Common Pleas for Beaufort County.

FACTS

10. The Defendants LCMT Inc., and/or Low Country Medical have been engaged in the business of transporting individuals to and from medical facilities for care and treatment since on or about February 20, 2004. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved LCMT Inc.'s, corporate status in South Carolina. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. Low Country Medical continued to operate until LCMT Inc.'s, reinstatement by the South Carolina Secretary of State four and half years later. Moreover, Low Country Medical maintained LCMT Inc.'s, Class C Non-Emergency Motor Vehicle Carriers' Certificate from the South Carolina Office of Regulatory Staff. Low Country Medical never sought to transfer the Certificate to the successor company or apply for a new one when LCMT Inc., dissolved.

11. The South Carolina Department of Health and Human Services (SCDHHS) entered into a contract with AMR on or about May 25, 2011, and AMR began to provide NEMT services to eligible Medicaid recipients in South Carolina on or about August 17, 2011. The potential value of AMR's five-year contract with SCDHHS was approximately \$162 million. On or about November 22, 2011, AMR asked SCDHHS to approve a \$25 million change order due to a mistake with its bid, seeking to increase its potential contract value to \$187 million over the contract term. SCDHHS denied AMR's \$25 million change order request, and thereafter, AMR filed a notice to terminate its contract with SCDHHS effective February 21, 2012, and began a 60-day transition to exit the State.

12. While under contract with SCDHHS, AMR entered into a contract with LCMT Inc., and/or Low Country Medical to be a provider in its network of Non-Emergency Medical Transportation providers for eligible Medicaid recipients in South Carolina. AMR knew and/or should have known that LCMT Inc.'s, corporate character was dissolved and that Low Country Medical was operating in violation of S.C. Code Ann. § 58-23-10 et seq., because Low Country Medical did not have a certificate to operate as a non-emergency medical transport business in South Carolina.

13. On or about January 31, 2012, AMR scheduled LCMT Inc., and/or Low Country Medical to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. AMR knew and/or should have known that LCMT Inc., was not a corporate entity and/or in good standing with the state of South Carolina and that Low Country Medical was not licensed to transport Mr. Gary.

14. At approximately 11:00 A.M., the Defendants LCMT Inc., and/or Low Country Medical's ambulance was transporting Mr. Gary, who is a paraplegic and his wife home after a medical appointment. Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat with her seat belt secured. The Defendants LCMT Inc., and/or Low Country Medical, through their agent and/or employee Kirkland, was driving the ambulance when suddenly and unexpectedly Kirkland lost control of the vehicle transporting Mr. Gary and his wife on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home.

15. The ambulance ran off the shoulder of the road and struck a large tree causing Mr. Gary to suffer serious, severe, painful and grievous injuries, broken bones, and damages, as more specifically set forth herein and killing his wife.

16. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, where he remained for three weeks due to his injuries and was unable to attend his wife's funeral.

**FOR A FIRST CAUSE OF ACTION
(Negligence/Negligence per Se/Gross Negligence)**

17. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

18. AMR had a duty to employ and dispatch NEMT providers that were competent, safe, and that met its corporate NEMT providers' requirements and credentials; that comply with State law; and that are in good standing with the State of South Carolina. AMR, LCMT Inc., and/or Low Country Medical, and Kirkland, had a duty safely and competently transport Mr. Gary to and from his medical appointment.

19. The LCMT Inc., and/or Low Country Medical, Kirkland, and AMR breached that duty.

20. Mr. Gary's injuries and damages were proximately caused by the negligent, grossly negligent, careless, reckless, willful, and wanton acts and conduct of the Defendants in one or more, or all of the following particulars:

- (a) In failing to keep a proper lookout;
- (b) In failing to keep its ambulance under proper control;
- (c) In driving the vehicle too fast for the conditions then and there existing;

(d) In operating an automobile in utter disregard for the safety of others on the highway;

(e) In failing to exercise the degree of care, which a reasonably prudent person would have exercised under the same or similar circumstances;

(f) In endangering Mr. Gary, by placing the ambulance, a dangerous instrumentality, in the care and under the control of a reckless, careless and incompetent driver;

(g) In operating the ambulance at a rate of speed which was excessive for the circumstances then prevailing;

(h) In failing to properly implement, train, audit, and enforce safety policies, to avoid collisions;

(i) In causing and allowing the ambulance to be operated by a reckless, careless, and incompetent driver;

(j) In dispatching a NEMT provider that was in violation of the Motor Vehicle Carrier laws and that did not meet the requirements and credentials for being a NEMT provider in the network;

(k) In all other particulars as the evidence may show.

21. That by reason of and in consequence of the aforementioned negligent, negligent *per se*, careless, reckless, willful, wanton and grossly negligent conduct of the Defendants, Mr. Gary suffered the injuries and losses complained of.

22. As a direct and proximate result of the aforesaid negligence, negligence *per se*, carelessness, recklessness, willfulness, wantonness, and grossly negligent conduct of the Defendants, Mr. Gary has suffered the following:

- (a) Traumatic and violent injuries to various parts of Mr. Gary's body, which were painful, prolonged, and permanent, to include rehabilitation therapy;
- (b) Medical, doctor and related health care expenses;
- (c) Physical pain and suffering;
- (d) Mental and emotional anguish;
- (e) Disabilities and impairment;
- (f) Loss of enjoyment of life; and
- (g) Such other damages as may be determined during discovery and/or trial.

**FOR A SECOND CAUSE OF ACTION
(Loss of Consortium/Companionship of Spouse)**

23. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

24. Mr. Gary is the former spouse of the late Blondell Gary. Mr. Gary is a paraplegic and his late spouse did not work outside of the home so that she could provide for Mr. Gary's daily care, maintenance, support, companionship, home health care, and household service needs.

25. The Defendants' tortious, reckless, willful, and wanton conduct has caused Mr. Gary damages as a result of the loss of his wife.

26. The Defendants' conduct is/was a tortious violation of the right to companionship, aid, society and services of Mr. Gary's late wife Blondell Gary.

27. Such tortious violation of Mr. Gary's rights has caused and is causing damages to Mr. Gary and are compensable under South Carolina law.

28. Mr. Gary is entitled to damages due to the tortious and reckless conduct of the Defendants.

**FOR A THIRD CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)**

29. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

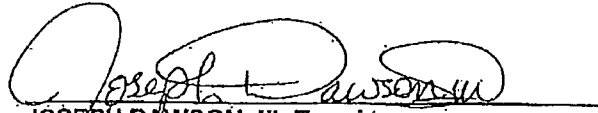
30. Mr. Gary was strapped to a stretcher in the back of the Defendants Low Country and/or LCMT Inc.'s, ambulance when his wife's body was crushed by the impact of the ambulance suddenly and un-expectantly running into a large tree and killing her.

31. Mr. Gary was in close proximity to his wife when the incident occurred, but due to his physical impairment, pain, broken bones, and injuries he sustained in the accident he could not aid, assist, or comfort his wife, while he cried out to her to determine her well-being.

32. Mr. Gary suffered emotional distress with physical manifestations due solely and completely to the outrageous and negligent, willful and reckless conduct of the Defendants which caused the death of his wife.

33. Mr. Gary is entitled to damages due to the emotional distress he suffered witnessing his wife's death due to the tortious and reckless, willful, wanton, and grossly negligent conduct of the Defendants.

WHEREFORE, the Plaintiff Charles Gary prays for judgment against the Defendants in a fair, just and equitable sum for actual damages, consequential damages, punitive damages, special damages, the cost of this action, attorney's fees, prejudgment interest, and for such other and further relief as this Court may deem proper.

A handwritten signature in dark ink, appearing to read "Joseph Dawson, III", is written over a horizontal line.

JOSEPH DAWSON, III, Esquire
Post Office Box 1211
Charleston, South Carolina 29402
Telephone: (843) 207-9004
Facsimile: (843) 207-9005

October 15, 2012
Charleston S.C.

ATTORNEY FOR CHARLES GARY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
Charles Gary, Individually and as	)	C/A No. 2012-CP-07-3596
Personal Representative of the Estate of	)	
Blondell Gary,	)	
	)	
	)	DEFENDANTS AMERICAN
Plaintiff,	)	MEDICAL RESPONSE'S ANSWERS
	)	TO THE PLAINTIFF'S COMPLAINT
Versus	)	
	)	
American Medical Response and Low	)	
Country Medical Transport, Inc.,	)	
	)	
Defendants.	)	

The Defendant, American Medical Response (hereinafter "this Defendant"), hereby answers the Plaintiff's Complaint, subject to any and all affirmative defenses, qualifications, motions and any other pleadings, as follows:

PARTIES AND JURISDICTION

1. Each and every allegation not specifically admitted herein is denied.
2. This Defendant lacks sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.
3. The allegations contained in Paragraphs 2, 3, 4, and 5 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient information upon which to form a belief as to the allegation contained in Paragraphs 2, 3, 4, and 5 of the Plaintiff's Complaint and therefore denies the same.
4. In response to the allegations in Paragraph 6 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing of

the laws of a state other than South Carolina. This Defendant denies all remaining allegations contained in Paragraph 6 of the Plaintiff's Complaint.

5. In response to the allegations contained in Paragraph 7 of the Plaintiff's Complaint, this Defendant admits that it is a Defendant in this case and that the Plaintiff intends to collectively refer to all of the named Defendants as Defendants. The Defendant asserts that it is a separate and distinct entity from the other Defendants.

6. The allegations contained in Paragraphs 8 and 9 in the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that a response is required, this Defendant denies allegations contained in Paragraph 8 and 9 in the Plaintiff's Complaint.

7. The Defendant denies as written the allegations contained in Paragraphs 10, 11, and 12 of the Plaintiff's Complaint.

7. The Defendant denies the allegations contained in Paragraphs 13, 14, and 15 of the Plaintiff's Complaint.

8. This Defendant denies as written in the allegation contained in Paragraph 16 of the Plaintiff's Complaint and craves reference to Charles Gary's medical records for complete and accurate description of the medical care he received.

FIRST CAUSE OF ACTION
(Negligence/ Negligence per se/ Gross Negligence)

7. In response to the allegation in Paragraph 17 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

8. This Defendant denies the allegations contained in Paragraphs 18, 19, and 20 including subparts (a) through (k) Paragraph 21, and 22 including subparts (a) through (g) which are directed towards this Defendant. The remaining allegations contained in Paragraph 18, 19, and 20 including subparts (a) through (k) Paragraphs 21 and 22 including subparts (a) through (g) not directed towards this Defendant therefore no response is required. To the extent a response is required, the Defendant denies all of the allegations contained in Paragraphs 18, 19, and 20, including subparts (a) through (k), Paragraph 21 and 22, including subparts (a) through (g)

SECOND CAUSE OF ACTION
(Loss of Consortium/ Companionship Of Spouse)

9. In response to the allegations contained in Paragraph 23 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

10. This Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27, and 28 of the Plaintiff's Complaint which are directed towards this Defendant. The remaining allegations contained in Paragraph 24, 25, 26, 27, and 28 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent that a response is required, the Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27, and 28 of the Plaintiff's Complaint.

THIRD CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)

11. In response to the allegation in Paragraph 29 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

12. This Defendant denies the allegations contained in Paragraphs 30, 31, 32, and 33 including the WHEREFORE Paragraph of the Plaintiff's Complaint those being the remaining causes of action in the Plaintiff's Complaint.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(No Proximate Cause)**

13. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff's and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff's.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Failure to State a Claim)**

14. The allegations contained in Complaint fails in its entirety to state a claim upon which relief may be granted against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)**

15. That any award or assessment of punitive damages as prayed for by the Plaintiff's would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Intervening Negligence/Negligence of a Third Party)**

16. That, upon information and belief, even if this Defendant was negligent in the manner described in the Complaint, which is specifically denied, whatever injuries and damages, if any, which may have been sustained by the Plaintiff's as a result of the accident were the direct and proximate result of the intervening and superseding

negligence of third parties, for whose conduct this Defendant bears no responsibility. Therefore, the Plaintiffs' are barred from recovery against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Unforeseeable Intervening or Superseding Events)

17. The damages complained of were solely the result of unforeseeable intervening or superseding events over which this Defendant had no control.

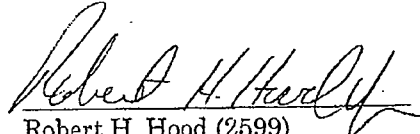
**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Sole, Superseding, and Intervening Negligence)

18. That whatever damages, if any, which may have been sustained by the Plaintiffs' in this action were the result of, were due solely to, caused solely by, and were the direct and proximate result of the intervening, superseding, and unforeseeable negligence of others, over whom this Defendant had no control. Consequently, the Plaintiffs' are barred from recovery against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Reservation and Non-Waiver)

19. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (2599)
Robert H. Hood, Jr. (13491)
H. Cooper Wilson, III (74939)

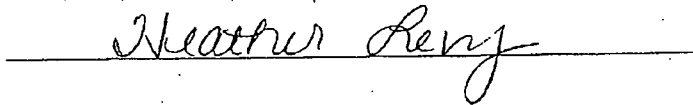
Attorneys for the Defendants
American Medical Response and Low
Country Medical Transport, Inc.

November 19, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒
mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 19 day of November, 2012.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
Charles Gary,	)	C/A No. 2012-CP-07-3595
	)	
Plaintiff,	)	DEFENDANT AMERICAN MEDICAL
	)	RESPONSE, INC. (d/b/a
Versus	)	ACCESS2CARE)'S AMENDED
	)	ANSWER TO PLAINTIFF'S
Hattie M. Askew, Will Outlaw, and	)	COMPLAINT
Deboria Outlaw, Individually and d/b/a	)	(Jury Trial Requested)
Low Country Medical Transport, Low	)	
Country Medical Transport, Inc., Eugene	)	
A. Kirkland, and American Medical	)	
Response, Inc. (d/b/a Access2Care),	)	
	)	
Defendants.	)	

RECEIVED
CLERK OF COURT
JUL 2 2012
P.M. 2:09
JUL 2 2012
P.M. 2:09

The Defendant, American Medical Response, Inc. (d/b/a Access2Care) (hereinafter "this Defendant"), hereby amends its answer to the Plaintiff's Complaint, subject to any and all affirmative defenses, qualifications, motions and any other pleadings, as follows:

PARTIES AND JURISDICTION

1. Each and every allegation not specifically admitted herein is denied.
2. This Defendant lacks sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.
3. The allegations contained in Paragraphs 2, 3, 4 and 5 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient information upon which to form a belief as to the allegation contained in Paragraphs 2, 3, 4 and 5 of the Plaintiff's Complaint and therefore denies the same.

4. In response to the allegations in Paragraph 6 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing of the laws of a state other than South Carolina. This Defendant denies all remaining allegations contained in Paragraph 6 of the Plaintiff's Complaint.

5. In response to the allegations contained in Paragraph 7 of the Plaintiff's Complaint, this Defendant admits that it is a Defendant in this case and that the Plaintiff intends to collectively refer to all of the named Defendants as Defendants. This Defendant asserts that it is a separate and distinct entity from the other Defendants.

6. The allegations contained in Paragraphs 8 and 9 in the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that a response is required, this Defendant denies allegations contained in Paragraphs 8 and 9 in the Plaintiff's Complaint.

7. This Defendant denies as written the allegations contained in Paragraphs 10, 11 and 12 of the Plaintiff's Complaint.

8. This Defendant denies the allegations contained in Paragraphs 13, 14 and 15 of the Plaintiff's Complaint.

9. This Defendant denies as written in the allegation contained in Paragraph 16 of the Plaintiff's Complaint and craves reference to Charles Gary's medical records for complete and accurate description of the medical care he received.

FIRST CAUSE OF ACTION
(Negligence/ Negligence per se/ Gross Negligence)

10. In response to the allegation in Paragraph 17 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

11. This Defendant denies the allegations contained in Paragraphs 18, 19, 20 including subparts (a) through (k), 21, and 22 including subparts (a) through (g) which are directed towards this Defendant. The remaining allegations contained in Paragraph 18, 19, 20 including subparts (a) through (k), 21, and 22 including subparts (a) through (g), are not directed towards this Defendant therefore no response is required. To the extent a response is required, this Defendant denies all of the allegations contained in Paragraphs 18, 19, 20 including subparts (a) through (k), 21, and 22, including subparts (a) through (g) of the Plaintiff's Complaint.

SECOND CAUSE OF ACTION
(Loss of Consortium/ Companionship Of Spouse)

12. In response to the allegations contained in Paragraph 23 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

13. This Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27 and 28 of the Plaintiff's Complaint which are directed towards this Defendant. The remaining allegations contained in Paragraph 24, 25, 26, 27 and 28 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent that a response is required, this Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27 and 28 of the Plaintiff's Complaint.

THIRD CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)

14. In response to the allegation in Paragraph 29 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

15. This Defendant denies the allegations contained in Paragraphs 30, 31, 32 and 33 including the WHEREFORE Paragraph of the Plaintiff's Complaint those being the remaining causes of action in the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

16. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff's and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff's.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Failure to State a Claim)

17. The allegations contained in the Complaint fails in its entirety to state a claim upon which relief may be granted against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

18. That any award or assessment of punitive damages as prayed for by the Plaintiff would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THIS DEFENDANT ALLEGES:

(Intervening Negligence/Negligence of a Third Party)

19. That, upon information and belief, even if this Defendant was negligent in the manner described in the Complaint, which is specifically denied, whatever injuries and damages, if any, which may have been sustained by the Plaintiff as a result of the accident were the direct and proximate result of the intervening and superseding negligence of third parties, for whose conduct this Defendant bears no responsibility. Therefore, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THIS DEFENDANT ALLEGES:

(Unforeseeable Intervening or Superseding Events)

20. The damages complained of were solely the result of unforeseeable intervening or superseding events over which this Defendant had no control.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

THIS DEFENDANT ALLEGES:

(Sole, Superseding, and Intervening Negligence)

21. That whatever damages, if any, which may have been sustained by the Plaintiff in this action were the result of, were due solely to, caused solely by, and were the direct and proximate result of the intervening, superseding, and unforeseeable negligence of others, over whom this Defendant had no control. Consequently, the Plaintiff is barred from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

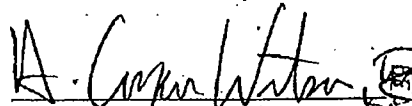
THIS DEFENDANT ALLEGES:

(Reservation and Non-Waiver)

22. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, American Medical Response, Inc. (d/b/a Access2Care), prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (2599)

Robert H. Hood, Jr. (13491)

H. Cooper Wilson, III (74939)

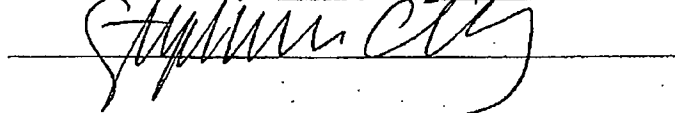
Attorneys for the Defendant
American Medical Response, Inc. (d/b/a
Access2Care)

12/10, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 10 day of December, 2012.



1 State of South Carolina) Court of Common Pleas
 2 County of Beaufort) No.: 2012-CP-07-3595
 3 Charles Gary,)
 4 Plaintiff,) HEARING
 5 vs.)
 6 Hattie M. Askey, Will)
 7 Outlaw, and Deborah)
 8 d/b/a Low Country)
 9 Country Medical)
 10 Transport, Inc., Eugene)
 11 A. Kirkland, and)
 12 American Medical)
 13 Access2care,) November 12, 2013
 14 Defendants.)
 15
 16 Hearing reported by Deborah S. Thomas,
 17 Certified Verbatim Reporter and Notary Public in and
 18 for the State of South Carolina; said hearing held
 19 before the Honorable Marvin H. Dukes, III, Beaufort
 20 County Master in Equity and Special Circuit Court
 21 Judge in accordance with the South Carolina Rules of
 22 Civil Procedure, at the Beaufort County Courthouse,
 23 102 Ribaut Road, Room 212, Beaufort, South Carolina,
 24 on November 12, 2013, at the hour of 2:28 p.m.
 25
 ABACTIS REPORTING SERVICES
 15 Pineapple Drive
 Bluffton, South Carolina 29909
 (803) 206-7390

1 Appearances
 2
 3 Representing the Plaintiff:
 4 JOSEPH DAWSON, III, ESQUIRE
 5 Attorney at Law
 6 P.O. Box 41367
 7 North Charleston, South Carolina 29423
 8 joe@attorneyjosephdawson.com
 9
 10 Representing Defendants:
 11 HARRY COOPER WILSON, III, ESQUIRE
 12 Hood Law Firm, LLC
 13 P.O. Box 1508
 14 Charleston, South Carolina 29401-1508
 15 cooper.wilson@hoodlaw.com
 16
 17 ERIN DUBOSE DEAN, ESQUIRE
 18 Tupper Grimsley & Dean, PA
 19 611 Bay Street
 20 P.O. Box 2055
 21 Beaufort, South Carolina 29901-2055
 22 erindean@tgdpa.com
 23
 24 CORY HOWERTON FLEMING, ESQUIRE
 25 Moss Kuhn & Fleming, PA
 P.O. Drawer 507
 Beaufort, South Carolina 29901
 cory@mossandkuhn.com

ABACTIS REPORTING SERVICES

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ABACTIS REPORTING SERVICES

1 EXHIBIT INDEX
 2 Exhibits: Marked at Page
 3 (None were proffered.)
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ABACTIS REPORTING SERVICES

1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.
3 JUDGE DUKES: Good morning. This is 3
4 Case No. 12-CP-07-3595.
5
6 — seeming the legal argument being relied on by the
7 Plaintiff had something to do with whether Low
8 Country Medical Transport, Inc., was licensed
9 in South Carolina and able to do business in this
10 state. There was a hearing on that matter, and it
11 seemed as though that that argument was abandoned a 11
12 bit. And then it proceeded to the court requesting
13 that the issue of non-delegable duty be briefed by
14 both Plaintiff and the Defendants.
15 Both parties did that, and the court
16 eventually ruled in favor of the Plaintiff granting
17 summary judgment as to American Medical Response and 17
18 all the Defendants and seemingly providing that my
19 client, American Medical Response, Inc., had a
20 non-delegable duty to Mr. Gary.
21 The motion to reconsider here is to deal
22 with that order. Your Honor, as you know, and as
23 all the lawyers know, the issue of non-delegable
24 duty has been heard in South Carolina before. I'm
25 actually from Sumter. And one of the leading cases

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1 on it is the Simmons versus Tuomey Hospital case
2 which is cited actually in both briefs.
3 And it does lay out sort of a bit of an
4 odd scenario of the development of non-delegable
5 duty and whether there is any relationship to
6 apparent agency and whether that is required to have
7 a non-delegable duty.
8 With the court's permission I would
9 certainly want to address that. What I would like
10 to do first is talk a little bit about the
11 relationship between American Medical Response, the
12 State of South Carolina, and Low Country Medical
13 Transport.
14 JUDGE DUKES: All right. Take all
15 the time you need.
16 MR. WILSON: That forms upon my
17 reading of the order and the Plaintiff's memorandum,
18 really the basis of their argument that American
19 Response, Inc., has a duty to Mr. Gary. We do not
20 believe such duty exists, whether it be a duty under
21 contract or even a non-delegable duty.
22 In the plaintiff's memorandum in response
23 to our motion to reconsider on Page 5, it states
24 specifically here again this is not a breach of
25 contract case. Rather this case is predicated on a

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1 breach of duty of care owed by the defendants which
2 arises out of a contract, access to care, entered
3 with the health department to perform nonemergency
4 medical transport services to eligible Medicaid
5 members in South Carolina.
6 I don't think there is any dispute in this
7 case that Mr. Gary was a Medicaid member. We have
8 briefed the issue. This is the contract was between
9 American Medical Response, Inc., and the South
10 Carolina Department of Health and Human Services.
11 As an issue matter, and what we briefed,
12 is we don't believe that contract between A. M. R.
13 and the South Carolina Department of Health and
14 Human Services creates a duty to Mr. Gary nor does
15 it allow Mr. Gary to bring an action in tort against
16 American Medical Response.
17 What I brought today, and Mr. — the
18 attorney for Mr. Gary put in his brief and we do
19 agree that the proposal request from the State of
20 South Carolina to A.M.R. does form the contract.
21 It's a request for proposal that was sent. And it
22 forms the basis of the contract.
23 In order to get a better idea of the true
24 relationships between the parties and to support our
25 argument that the duty is between American Medical

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1 Response and the State we need to look to the
2 contract as far as what American Medical Response is
3 actually supposed to do.
4 Part — and I'm going to try to get
5 through this as fast as I think, Your Honor, but
6 Part 2.03 specifically says —
7 JUDGE DUKES: Now, is this something
8 that I'm supposed to have in front of me? Do we
9 have another — is this part of —
10 MR. WILSON: I believe this has been
11 provided, if not I will hand — I'll hand you each
12 page as I go.
13 JUDGE DUKES: Okay. I don't want
14 to — I don't want to change your flow and mess with
15 your notes.
16 MR. WILSON: That is fine. No. No.
17 That is no problem.
18 JUDGE DUKES: I just wanted to make
19 sure I'm following accurately. So this was in the
20 original motion as well; is that correct?
21 MR. WILSON: And it forms part of the
22 argument set forth by the Plaintiff. And if I read
23 the parts of the order, it dealt with the allegation
24 that A.M.R. guarantees a safe delivery of people
25 riding in the ambulance.

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1 JUDGE DUKES: You mean as far as with 1
2 their contract?

3 MR. WILSON: With their contract with 3
4 the State. And it was that idea which we disagree
5 with, that somehow A.M.R. guarantees safety to a
6 rider. And if there is an accident, that A.M.R. is
7 responsible for the same. So before I get there I
8 at least wanted to set up what the true relationship
9 is.

10 And it's that A.M.R. is a broker for South
11 Carolina. And South Carolina has a number of
12 Medicaid recipients. And if they are unable to get
13 to the doctor or the hospital, they receive
14 transportation. The State awarded a contract, and
15 much has been made about the value of the contract.
16 I'm not sure that has any relevance whatsoever. It
17 was —

18 JUDGE DUKES: I think I took most of 18
19 that out of the proposed order.

20 MR. WILSON: A.M.R. is a broker to 20
21 the State. A.M.R. is responsible for finishing
22 subcontractors to do the work. Point specifically
23 to 2.3 of the contract, general broker requirements.
24 The broker is responsible for identifying,
25 recruiting, and negotiating service agreements with

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transportation providers.

It also talks about the broker must ensure
that high quality services are provided. This is
.248. And must immediately take necessary and
corrective steps when representatives of S.C.
D.H.S.S. identify inappropriate, undesirable, or
otherwise poor service.

And it's that paragraph there that really
is the true relationship. It's not that American
Medical Response is guaranteeing that 100 percent of
the deliveries will be without accident. It's that
they have a responsible to ensure that the
subcontractor, in this case Low Country Medical
Transport, Inc., is doing and following the
guidelines and doing and providing safe services.
It doesn't mean accident-free.

JUDGE DUKES: Well, I don't know if I
meant for my order to focus on this as a guarantee
so much, but go — but, I mean, their relationship I
guess is a little bit similar to a cab company,
right? I mean, a cab company has a franchise
agreement generally with a city or municipality or
county or some government. And — but rarely do
they operate the cabs. Aren't there usually some
people who lease those cabs below them? I mean,

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1 that is the arrangement here, right? These people
2 then contract with the individual drivers. And then
3 they are out there driving around.

4 MR. WILSON: That is true. And I've
5 certainly read similar cases on, you know, cab
6 companies. The difference is here, and what I was
7 relying on, is in the order it states at that access
8 to care had a duty of care to Mr. Gary arising out
9 of its contract operating as a broker N.E.M.T. which
10 is non-emergency transport services.

11 And its quotes that all trip requests and
12 ensuring that all trips are completed safely and on
13 time. A.M.R. certainly is contracted with the State
14 to verify and to work with subcontractors to ensure
15 that they are taking all appropriate steps to
16 provide safe transportation. That their drivers are
17 licensed, that their ambulances are in good shape,
18 that they have ambulances, that their drivers are
19 licensed, that they haven't had more than two
20 collisions in a certain amount of time.

21 And the penalty of that and what A.M.R. is
22 tasked to do is they can be responsible to the State
23 for failing to monitor that issue. That is really
24 what the contract deals with. And it specifically
25 provides a monitoring plan not to ensure safety, but

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1 to ensure that you are monitoring to make — your
2 subcontractor that you have hired.

3 There is a 3.315 lays out the monitoring
4 plan which is set forth in the Plaintiff's
5 memorandum and is also set forth in ours. And we
6 had the idea that it was taken a bit out of context
7 by the attorney for the Plaintiff in saying that the
8 delivery of courteous, safe, timely, and efficient
9 transportation services, you know, guaranteed a safe
10 travel.

11 And, in fact, what A.M.R. is tasked to do
12 is monitor that. And to the extent that it is
13 the — the requirements are not being followed, to
14 report it to the State. In fact, Your Honor, the
15 penalties to A.M.R. don't sound in court. They
16 sound in contract with the State of South Carolina
17 to include the performance guarantee under
18 operational requirements which have been set forth
19 in the Plaintiff's brief regarding — they keep
20 referring to safe delivery.

21 There can be damages assessed to A.M.R. to
22 include a thousand dollars per calendar day per
23 incident in which the broker fails to satisfy any
24 requirement listed in Section 3.3 in the scope of
25 work.

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1 What that means is the State wants to be
2 involved in making sure that you are monitoring your
3 subcontractor. To the extent that you are not, you
4 may be find a thousand dollars per day. That is the
5 contract with the State.

6 And, in fact, another portion of the
7 contract entitled third-party beneficiary, this
8 contract is made solely and specifically among and
9 for the benefit of the parties hereto and their
10 respective successors and assigns, and no other
11 person will have any rights, interests, or claims
12 here under or be entitled to any benefits under or
13 on account of this contract as third-party
14 beneficiary or otherwise.

15 This is a contract between the State and
16 A.M.R. A.M.R. has duties to the State. To the
17 extent that A.M.R. does not have a monitoring plan,
18 they can be responsible to the State.

19 So the initial position of the Defendants
20 is the contract between the State of South Carolina
21 and American Medical Response sets out specifically
22 that they understand that we will be hiring
23 subcontractor. It's part of the contract. It also
24 requires in Part 3.7 that the subcontractors have
25 insurance. To the extent that the State wanted to

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1 make the broker, in this case A.M.R., responsible to
2 any rider in an ambulance could have been set forth.

3 They did the opposite. They said, if you
4 are going to hire a sub, you have to monitor. They
5 must have insurance coverage, which in this case
6 American Medical Response did and which the
7 subcontractor Low Country Medical Transport, Inc.,
8 did as well.

9 If you go and review the purpose of the
10 agreement, I mean, there was apparently over 100,000
11 trips done in South Carolina. And it's broken into
12 regions. Mr. Gary was a member of Region 3. And
13 apparently there are thousands, if not tens of
14 thousands, of trips in Region 3.

15 It would be inequitable any time a
16 subcontractor gets in an accident in one of these
17 thousands, tens of thousands, or over a hundred
18 thousand trips in the state that American Medical
19 Response as the broker be necessarily responsible
20 when the bid from the State put forth no such
21 responsibility.

22 So as an initial matter we don't believe
23 there is a duty. There is a duty between A.M.R. and
24 the State. There is no duty set forth in the
25 contract between American Medical Response and Mr.

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1 Gary. And therefore under that analysis we don't
2 believe that summary judgment as to A.M.R. based on
3 contractual language between A.M.R. and the State is
4 proper.

5 However, moving past that, should you
6 decide that that is proper, which we strongly
7 disagree with, we get into the issue of this
8 non-delegable duty. And it was a case — the Tuomey
9 case that really set out what the State of South
10 Carolina was trying to do.

11 What I first want to do before I touch on
12 that is I've read the order. I've read the
13 Plaintiff's brief. The contract between American
14 Medical Response and Low Country Medical Transport
15 says that they are a subcontractor. The R.F.P.
16 between the State and A.M.R. says they will be
17 hiring subcontractors.

18 I don't know that there has been any — I
19 saw in there something about exercise of control.
20 That would go to an issue of agency, but in South
21 Carolina the issue of actual agency is one — that
22 is a question of fact for the jury. There is a case
23 setting that out that recently came out *****
24 versus Smith, 748 SC 2d 625.

25 And I only bring this up that I don't

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1 believe actual agency has been approved to the
2 extent that the Plaintiff has allegedly put forth
3 evidence of it. The Defendant has certainly put
4 forth a scintilla to suggest that there is no agency
5 relationship, specifically in the affidavit that we
6 provided from a employee of American Medical
7 Response as well as the contract itself.

8 The case specifically says generally
9 agency is a question of fact. Questions of agency
10 ordinarily should not be resolved by summary
11 judgment where there are any facts giving rise to an
12 inference of an agency relationship. That is clting
13 with approval Fernandez versus *****. If there
14 are any facts tending to prove the relationship of
15 agency, it then becomes a question for the jury and
16 the grant of summary judgment is inappropriate.

17 Now, that is — and I presume the attorney
18 for the plaintiff may argue that he doesn't need
19 agency to establish non-delegable duty. And that
20 may be his argument. I want to put out now that if
21 the argument is that Low Country Medical Transport
22 was an agent for American Medical Response, that is
23 a question of fact for the jury at least in this
24 stage when nobody from Low Country has been deposed.
25 Nobody from A.M.R. has been deposed.

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1 And we've satisfied our duty at least with
2 the contract as well as presenting the affidavit
3 from -- and I can find it for you. It's a part of
4 my packet, but an affidavit from a representative of
5 American Medical Response saying that Low Country
6 was a subcontractor.

7 JUDGE DUKES: But, I mean, in the
8 Sumter case that you mentioned --

9 MR. WILSON: Right.

10 JUDGE DUKES: -- there wasn't even a
11 question of agency. They were independent
12 contractors. I mean, isn't that the whole question?

13 MR. WILSON: There is. And so to the
14 extent that we -- we are just conceding that the
15 Plaintiff is not proceeding under agency theory, I
16 can move directly into the independent contractor,
17 non-delegable duty. The only reason I bring it up
18 is because there was a reference in--

19 JUDGE DUKES: I thought the ambulance
20 drivers or ambulance company believed itself to be
21 or at least put itself out to be an independent
22 contractor. At least you all did.

23 MR. WILSON: That's right.

24 JUDGE DUKES: Okay. But I mean
25 in the, of course, hospital case, the Tuomey case,

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1 the doctors are independent contractors.

2 MR. WILSON: That's right.

3 JUDGE DUKES: And in the Tuomey case
4 the patient walked into the hospital, believed they
5 were dealing with the hospital, but in fact the
6 defense was, no, you were dealing with these
7 independent contractors. And the court said, sorry,
8 that doesn't work. If you walk into the hospital,
9 we believe you are dealing with the hospital in a
10 situation like that. Tough, hospital. The hospital
11 is dealing with it.

12 And in this case, you all correct me if
13 I'm wrong because I'm trying to remember the
14 situation, but the Plaintiff contacted your client,
15 believed they were dealing with them. And of course
16 it was -- I don't know how the dispatch works, but
17 the ambulance showed up. And they were in the
18 ambulance. And of course the wreck occurred, but I
19 mean that is -- I don't know if the independent --
20 in both the hospital case and this case as far as I
21 know it was uncontested but that the issue was
22 independent contractor.

23 Is there an issue of -- and maybe I read
24 something in the order that veered off from that,
25 but --

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1 MR. WILSON: Sure. And I only bring
2 it up in the order it says that there was extensive
3 control by access to care. And it seemed as though
4 the Plaintiff was putting forth a theory that if
5 there was extensive control that this all of a
6 sudden created a non-delegable duty. There is no
7 case law in South Carolina that puts forth that
8 theory.

9 So if extensive control is out as it
10 relates to this hearing, that is fine. The Simmons
11 case I do agree with you on what was alleged and
12 what the hospital argued. They were dealing more
13 with apparent agency and what the hospital was
14 doing, what it was holding out to the public that it
15 was doing, what the Plaintiff thought by walking
16 into an emergency room, that the emergency room
17 doctors would therefore be employees.

18 And that somehow he changed his position
19 based on that. Now, that is an apparent agency
20 argument. What the Plaintiff's attorney has argued
21 is that the Tuomey court doesn't require apparent
22 agency to create a non-delegable duty meaning he
23 doesn't have to show that there was apparent agency
24 in order to -- in order for us to have a
25 non-delegable duty.

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1 And as you read the Simmons case that I'm
2 citing, 341 South Carolina 2d 32, you see that the
3 purpose of the case and what the court went to great
4 lengths to lay out is the policy behind hospitals
5 in this state in this country and how that has
6 developed from really only having pro bono services
7 provided by nurses on patients that couldn't afford
8 health care and everybody else got in-home health
9 care.

10 It went from that to now hospitals
11 advertising for your business, setting themselves
12 out as being experts, and recruiting you to come to
13 the hospital. What the court said is under that
14 policy and given the fundamental shift in the role
15 that a hospital plays in our system and the public
16 perception of the hospital, we hold that a hospital
17 holds a non-delegable duty to render competent
18 service to its emergency room patients.

19 So what they did is they set out based on
20 a policy decision specific to that case regarding
21 the roles that hospitals play in our society. And
22 they said specifically, consequently, we believe the
23 better solution grounded primarily in public policy
24 reasons is to impose a non-delegable duty on
25 hospitals.

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1 They didn't even, in fact, impose an
2 absolute duty to impose. They said, we conclude
3 it's not necessary to impose an absolute
4 non-delegable duty on hospitals. Instead in that
5 case they did use apparent agency. They did not
6 impose an absolute non-delegable duty on hospitals.
7 Rather they went back to the policy and grounded
8 under Section 429, the restatement, and basically
9 did an apparent agency analysis as it related to
10 that case.

11 Now, what is a little bit odd admittedly,
12 and I bring it to the court's attention because it
13 is odd, and it's cited in Plaintiff's brief is all
14 though closely related, each is a viable theory an
15 injured patient may assert. And they are talking
16 about the theory of non-delegable duty and they are
17 talking about the theory of the non-delegable duty
18 with apparent agency.

19 Now, to the extent that their argument is
20 based on apparent agency, seeing as there has been
21 no discovery done, there is no evidence that
22 apparent agency rules the day in this case. You
23 know, what Mr. Gary believed by calling a number to
24 A.M.R., that number is there. That is part of the
25 contract between A.M.R. and the State. They are a

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1 broker. They are responsible for ensuring things
2 like Mr. Gary lives in Region 3, that Mr. Gary is a
3 Medicaid member, where Mr. Gary is going, who is
4 going with him. There can only be two — so, yes,
5 they are involved in taking the phone call. That is
6 their role. They are a phone bank for lack after
7 better word that monitors a subcontractor.

8 The ambulance that comes and gets them
9 specifically says Low Country Medical Transport on
10 the side. To the extent that apparent agency is an
11 issue, there is certainly questions of fact whether
12 the Plaintiff can establish the necessary elements
13 to get there.

14 If they want to say, well, the Simmons
15 case doesn't require us to prove apparent agency to
16 establish a non-delegable duty, well, there is
17 certain — there is that argument, but the Simmons
18 case was fact specific as to that case. And they
19 said it's based on the role of hospitals in society.
20 It based on the public perception of hospitals.
21 It's grounded in public policy.

22 Mr. Gary did not walk into a free-standing
23 building owned by American Medical Response and
24 expect to receive health care. He called a
25 telephone number that presumably was provided by a

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1 Medicaid person or maybe by A.M.R. saying I need to
2 go see a doctor.

3 A.M.R., as it does with the other
4 thousands and tens of thousands of cases, sent an
5 ambulance that they subcontracted with, Low Country
6 Medical Transport, to go pick him up. There has
7 been allegations about — jumping forward just
8 briefly, about a breach of the duty by the driver.

9 The evidence that has been presented so
10 far is based on answers to interrogatory by Low
11 Country Medical Transport that was premised on upon
12 information and belief. Well, because the ambulance
13 hit a tree does not — is not per se evidence of a
14 breach.

15 For example, if there was a medical
16 problem associated with Mr. Kirkland, that would be
17 a situation where you certainly have an issue
18 whether there is even a breach of that duty.
19 Mr. Kirkland hasn't been deposed. Mr. Gary hasn't
20 been deposed.

21 They cited an answer to interrogatory to
22 say that somehow Low Country Medical Transport is
23 admitting, for lack of a better word, a breach and
24 fault is inappropriate. There has been — they've
25 never even served discovery on or if they have on

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1 us, we've responded. In their complaint to us we
2 denied any allegations that we were at fault.

3 Because they answered in their
4 interrogatory upon information and belief he drove
5 off the road and overcorrected, that is not enough
6 evidence to grant a summary judgment stage a breach
7 of anything. So we start with the premise that
8 there is no duty. There is no duty in contract. If
9 there is, it's to the State.

10 There is no actual agency because that is
11 a question of fact that is set forth in the case.
12 There is no apparent agency as they've set forth and
13 said that somehow we misconstrued their argument to
14 require them to prove apparent agency. Fine. If
15 they don't want to prove apparent agency, then we
16 will — they can abandon that and go straight to
17 non-delegable duty which gets us back to the reason
18 why we are here that somehow at this stage they have
19 alleged that A.M.R. by contracting with the State to
20 provide services for ambulance has a non-delegable
21 duty to Mr. Gary to guarantee his safe travel.

22 And I use guarantee because, you know, if
23 there is an accident all of a sudden they get
24 summary judgment against A.M.R. I mean, that is
25 that is almost a negligence per se argument against

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1 A.M.R. Your subcontractor got in an accident,
2 therefore you are responsible. That is, infect, a
3 guarantee which is not even close to the intent of
4 the agreement with the State.

5 So to rely on a policy decision related to
6 hospitals which was a case that is 15 pages long
7 over half of which deals with historical relevance
8 of hospitals and citing, you know, Dr. McWilliams'
9 articles and going back to the 1940s and their
10 purpose, and not only their purpose, what they did
11 and what hospitals do do by recruiting more
12 business.

13 And that by walking into a hospital the
14 average person may not know that their doctor is not
15 employed by the hospital. So Simmons what they
16 really did is they didn't grant an absolute
17 non-delegable duty. They said that can be a
18 separate cause of action in the last sentence which
19 admittedly is a bit confusing, but they said in this
20 case they are really going at them on apparent
21 agency and policy, not under a non-delegable duty.

22 So I certainly understand the Simmons
23 case. It has been cited lots of times. It's been
24 arguments in lots of cases that we are involved in.

25 One of the cases that the firm handled was

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1 the Jamison case up in Bamberg where there was a
2 verdict and Texaco had franchise agreements with
3 local gas stations. And the plaintiffs argued that
4 when the person working at a local gas station sold
5 alcohol to a person under the age of 21, somehow
6 that negligence was imputed to Texaco. And they got
7 there we trying to show agency showing that they had
8 a mystery shopper program, showing that text
9 codidn't want to have the employees with tattoos and
10 beers. They wanted their shirts tucked in. They
11 wanted them to wear specific color pants.

12 The Supreme Court of South Carolina said
13 that is a right of Texaco to protect their brand.
14 It doesn't show that they have an agency
15 relationship with the local gas station. And it was
16 argued at the Supreme Court that's the case every
17 time this happens across the country with a local
18 gas station that has a brand associated with Texaco,
19 Shell, or Exxon, that they are going to shut — they
20 are going to figure out a new way to do business.
21 You are going to put them out of business to some
22 degree if they are responsible to every employee of
23 every franchisee across the country.

24 In that case they didn't find agency
25 relationship even with the amount of control with

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1 the mystery shopper program and the brand protection
2 that they were doing. So I don't think the agency
3 at this stage carries the day.

4 And I don't believe that the Simmons case
5 sets forth that hospitals automatically have a
6 non-delegable duty based solely on the duty. It's
7 based on the agency. They said you can plead it two
8 different ways, but we are applying Restatement 429
9 to this case.

10 So I think I would strongly disagree that
11 that case supports the notion that hospitals have
12 non-delegable duties solely because they do rather
13 than because what they — the policy is. So moving
14 forward briefly, I'm sorry to take up so much time.

15 I think I discussed the relationship that
16 the State has with A.M.R. The State drafts the
17 request for proposals. We ***** we know what our
18 responsibilities are, and that is to monitor Low
19 Country Medical Transport ourselves. To the extent we
20 don't, we can be find which to a company is a big
21 deal. A thousand dollars a day, per day. We can
22 lose the contract which Plaintiff's attorney has set
23 forth many times is a big number, over a hundred
24 million dollars.

25 That is a duty for which A.M.R. desires to

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1 protect its interest by ensuring that its subs do
2 what they are supposed to do. It does not say they
3 are responsible if their subs get into an accident,
4 rather it requires their subs to have insurance
5 regardless.

6 At this point in time with no deposition
7 having been taken, with American Medical Response
8 putting forth a scintilla of evidence that shows
9 there was a subcontractor agreement, that they do
10 have a defense to agency, that they do have a
11 defense to apparent agency, and that the issue left
12 with non-delegable duty is one that needs to be
13 developed. There is a defense to it. There is a
14 legal defense, not just the defense attorney say it
15 is. There is a legal defense as a matter of law
16 based on the case law.

17 That there is no non-delegable duty
18 between American Medical Response and Mr. Gary. Is
19 there any doubt that this was a horrific accident?
20 No. It's awful. We've seen the pictures. Mr. Gary
21 lived through it. And I have no doubt that they are
22 going to present a very good case as to all
23 defendants, but at this stage to grant summary
24 judgment against A.M.R. as a matter of law under the
25 theory of non-delegable duty, respectfully in our

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1 opinion is premature.
 2 We have filed our motion to reconsider
 3 under Rules 52 and 59 and any other applicable Rules
 4 of Civil Procedure. I have been long-winded today,
 5 but I would like to at least put on the record that
 6 we have briefed the issue. We briefed the original
 7 motion for summary judgment filed by the Plaintiff
 8 that I believe this court heard.
 9 We submitted a supplemental brief when the
 10 court asked the parties to brief non-delegable duty.
 11 We submitted an objection to the order that was
 12 drafted by the Plaintiff's attorney to the court
 13 that we relied on. We have submitted affidavits.
 14 We have answered timely.
 15 Ironically, there was a motion for
 16 default, but in any event we answered timely. We
 17 have asserted the affirmative defenses that we deem
 18 appropriate timely. We denied the allegations, most
 19 specifically agency. And in making this argument
 20 and for any other issues that may arise in the
 21 future I do rely on all of those briefs and
 22 pleadings to support our argument at that summary
 23 judgment is improper as a matter of law at this
 24 time, that there was no non-delegable duty. And the
 25 issue of agency at this point is one that is a jury

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1 matter based on our presentation of a scintilla of
 2 evidence.
 3 For those reasons I would ask this court
 4 to reconsider their granting of a motion for summary
 5 judgment and actually grant our motion to reconsider
 6 and allow the parties to have some meaningful
 7 discovery in the case.
 8 JUDGE DUKES: All right. Thank you
 9 very much. Did you want to respond individually to
 10 these arguments or do you want me to — it's your
 11 choice.
 12 MR. DAWSON: Your Honor, I think it's
 13 best to let it ride.
 14 JUDGE DUKES: Okay. All right.
 15 MR. DAWSON: So keep going.
 16 JUDGE DUKES: We'll keep ongoing.
 17 MS. DEAN: Thank you. May it please
 18 the court, I'm Erin Dean. I along with Cory Fleming
 19 represent the Defendants Low Country Medical
 20 Transport, Hattie Askew, Eugene Kirkland, Will and
 21 Deboria Outlaw, but they are not subject to the
 22 order that is currently before the court.
 23 Cooper Wilson did an excellent job going
 24 through the issues particularly with A.M.R. With my
 25 followings it really pretty simple, Judge. We

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1 basically have two main problems with the order that
 2 you issued. Primarily it is the finding in your
 3 order on Page 5 that the Defendants' answers to
 4 interrogatories indicates that Eugene A. Kirkland,
 5 the ambulance driver, realized he was in the wrong
 6 lane and he overcorrected causing the ambulance to
 7 run off the road and hit a tree on Old Sheldon
 8 Church Road in Yemassee, South Carolina.
 9 The court recalls when Mr. Dawson
 10 submitted proposed orders you allowed to us have a
 11 dialogue about some of the objections we had or
 12 corrections we wanted made. And at that time I
 13 pointed out on behalf of my Defendants that the
 14 interrogatory was actually answered upon information
 15 and belief.
 16 And if Your Honor will turn to Tab C in my
 17 notebook, Page 3 of 6, it sets out the whole
 18 interrogatory response. I don't want to read that
 19 into the record. The important part of it for
 20 today's discussion is that it says upon information
 21 and belief Defendant Kirkland lost control of the
 22 vehicle.
 23 Are you having trouble finding it?
 24 JUDGE DUKES: No. No. No. Thank
 25 you, though.

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1 MS. DEAN: Okay. You know, the same
 2 architect we had at the original hearing on this is,
 3 you know, no discovery has taken place.
 4 Mr. Kirkland has not been deposed. It is possible
 5 that he had a medical event such that there would
 6 not be an automatic breach of duty.
 7 No doubt he was driving the van. No doubt
 8 that the van hit the tree. How we get there is
 9 questionable. And I don't think that, you know,
 10 this is almost a res ipsa analysis. He hit the tree
 11 therefore he was negligent. I just don't think that
 12 we are there. I think that that is premature.
 13 The other issue that we both have with
 14 this ruling, Your Honor, is on the cause of action
 15 for negligent infliction of emotional distress. And
 16 your order cites the Doe case. I think it is on
 17 Page 15 of your order. And the Doe case has five
 18 elements, the most important of which for our
 19 purposes here today is the last element, that the
 20 Plaintiff's emotional distress manifests itself by
 21 physical symptoms capable of objective diagnosis
 22 and, here is where the bells and whistles go off, be
 23 established by expert testimony.
 24 Your Honor, we don't have any expert
 25 testimony in this case so far. Not saying

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1 Mr. Dawson can't get there eventually. He might.
 2 But we are not there. It's not an option that you
 3 can just ignore Element E. Even if we think he's
 4 made A, B, C, and D, you still have to have the
 5 fifth element in order to prove negligent infliction
 6 of emotional distress, and we don't have that.
 7 Subsequent to the motion Mr. Dawson
 8 submitted medical records, which of course we
 9 objected to. Again, those are statements by
 10 doctors, but it is not expert testimony that is
 11 required under the Doe case. And so we think, Your
 12 Honor, certainly the granting of summary judgment as
 13 to the negligent infliction of emotional distress
 14 cause of action is erroneous.
 15 Finally, there was a characterization of
 16 Mr. Gary's injuries on Page 9 of your order
 17 indicating he suffered multiple fractured ribs and
 18 pelvic bone among other injuries and damages.
 19 Again, we don't have any evidence in the record as
 20 to what he actually suffered from, so we don't think
 21 that is appropriate in the order.
 22 Just boiling it down to a thumbnail, we
 23 don't think there is evidence to prove negligent
 24 infliction of emotional distress at this point.
 25 And, likewise, we don't believe there is evidence to

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1 prove that Mr. Kirkland breached a duty by driving
 2 into the tree which, unfortunately, caused injury to
 3 Mr. Gary and caused the death of Ms. Gary, but I
 4 don't think we have all the evidence we need to show
 5 that that truly was a breach of duty.
 6 And for those reasons we believe the order
 7 granting summary judgment was made in error and
 8 would ask that you grant the Defendants' motion to
 9 reconsider and let us proceed with some discovery
 10 and perhaps come back and revisit these at a later
 11 time. Thank you.
 12 JUDGE DUKES: All right. Thanks.
 13 Mr. Fleming, did you have anything else are you all
 14 on the same team?
 15 MR. FLEMING: What she said. What
 16 she said.
 17 JUDGE DUKES: All right. All right
 18 All right then. I'm happy to hear your response.
 19 MR. DAWSON: Thank you, Your Honor.
 20 What I won't do is say what Mr. Fleming said. I
 21 don't think that is going to get me very far.
 22 JUDGE DUKES: Good choice.
 23 MR. DAWSON: I will try to be
 24 succinct, and I appreciate you allowing me to hear
 25 everything first before I attempt to respond. I

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1 think, Your Honor, first is obviously Mr. Wilson has
 2 had the unenviable task of coming here at the 11th
 3 hour after arguments have been made by other counsel
 4 and not having the benefit of the discussion that
 5 we've had at this table and to the documents that
 6 we've been exchanging.
 7 And therefore he's attempted to
 8 characterize previous events without being here. So
 9 I'm not going to go through each statement that he
 10 has made characterizing the posture of the case as
 11 we've argued it before you, but I will start by
 12 saying at the hearing we had here one of the hotly
 13 contested issues was an interpretation of
 14 non-delegable duty as it relates in South Carolina.
 15 And the arguments then that were being
 16 advanced was non-delegable duty is predicated on the
 17 apparent agency theory. At that time the court said
 18 time out. Stop. Since you guys clearly disagree,
 19 how about educating me more on just that point? You
 20 asked us to brief that issue before you made a
 21 ruling.
 22 And so the issue that we spent some time
 23 on today has been addressed before. Be happy to
 24 address it again by stating what I believe the court
 25 put in its order. And that is Mr. Gary at the

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1 summary judgment stage was not coming in under an
 2 apparent agency theory.
 3 If, in fact, this case goes to trial and
 4 this order is rescinded then obviously all of those
 5 issues are back on the table. We can advance those.
 6 But for the purpose of that summary judgment hearing-
 7 that was not the issue. And the Defendants in the
 8 case at that time tried to argue that in essence you
 9 must have an apparent agency theory which must be
 10 based on facts which they are still in dispute and
 11 therefore the court should reject the entire issue.
 12 We said that is not what the cases say.
 13 So today again we are back on that same issue. We
 14 said at the hearing for purposes of that motion Mr.
 15 Gary was not asserting an apparent agency theory.
 16 It was purely based on a non-delegable duty.
 17 As the court knows, there are probably
 18 four or five instances this court has relied on the
 19 non-delegable duty in finding liability cannot be
 20 escaped because you have allowed someone else to
 21 perform an act for which they breached the duty.
 22 And as Mr. Wilson said, we've exchanged a
 23 lot of memorandums. And one of the ones that I
 24 submitted in a footnote I indicated that there were
 25 numerous instances where the courts have looked to

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1 non-delegable duty. One dealt with a landlord
2 tenant situation where in that instance our courts
3 have said landowners have a non-delegable duty even
4 if they go out and hire an independent contractor to
5 do work in a common area that if someone gets
6 injured they can't escape liability.

7 There is no discussion about apparent
8 agency or some fact-intensive analysis to arrive at
9 whether there is a non-delegable duty or not. It's
10 simply based on a relationship.

11 Another instance is with a common carrier
12 Something falls off a vehicle, no one seeks to say,
13 well, were you relying on that carrier providing
14 that transportation to determine whether or not they
15 actually packed the load. The court said, no,
16 in that instance there is a non-delegable duty.

17 So we advance to the Simmons case where
18 the court once again faced with two different
19 theories did not eviscerate or did not eliminate the
20 non-delegable duty as an element at arriving at that
21 answer. It acknowledged that both exists. And in
22 that case it found there was a non-delegable duty,
23 not because the patient was relying on anything
24 other than the court saying we are not going to
25 allow a situation where a hospital just because it's

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1 hired independent contractors to escape liability
2 when something goes wrong.

3 So in this case we have always said from
4 Day One that A.M.R. has a non-delegable duty because
5 it entered into a contract with the State and it had
6 every opportunity, Your Honor, to reform or make
7 corrections to the very agreement they agreed to
8 that uses very strong words, Your Honor.

9 And you picked up on this the last time we
10 talked about this, in the order that you signed on
11 Page 8 it uses the sentence or the paragraph the
12 broker is responsible for all services provided by
13 transportation providers. Not my words. Not Mr.
14 Gary's words. It's the words that the parties
15 agreed to when they entered into the contract.

16 And, yes, Your Honor, Mr. Wilson has
17 talked about the voluminous amount of calls and
18 trips as it would be impossible to be responsible
19 for all of those trips. The reality of it is
20 in exchange for that responsibility they charged a
21 fee. They are not ignoring that they got paid to be
22 responsible. They are simply saying it unfair for
23 us to be responsible for the sheer number of calls
24 that we would ever get and the fact that now we are
25 calling someone to provide transportation to

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1 someone, we should somehow be shielded from
2 liability if something goes wrong despite the fact
3 that we had an agreement that said we would be
4 responsible.

5 In their argument, no, we should know go
6 look to a parent agency as the basis to determine
7 whether, in fact, we are responsible although we've
8 signed a contract for \$160 million to be
9 responsible.

10 Throughout the contract there is language
11 that echoes that same sentiment. It's not just in
12 one place. And as the court noted before,
13 in numerous places it citing similar or the same
14 language about the safety of the people that are
15 being transported, the way in which they are
16 supposed to be transported.

17 And one of the comments that was made here
18 even in this argument was that — the fact that —
19 let's see if I can find it. That it's almost as if
20 this is a guarantee. Well, Your Honor, nowhere that
21 I've been able to find in your order does it use the
22 word guarantee. So we are, in essence, trying to
23 create an issue for you to now take exception to
24 that you didn't even state.

25 The words that were used throughout your

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1 order are simply the words that appear in the
2 contract. Their words. Not the plaintiff's words.
3 So, no, there has never been a guarantee, but
4 in essence the argument is that because we have a
5 responsibility and because we may be responsible if
6 somehow that responsible is not fulfilled, we may be
7 responsible.

8 And therefore you are imposing some
9 liability on us that is greater than what we
10 Bargained for. The whole point of the broker
11 service is to ensure the safety of the passengers.
12 Therefore they must screen the transportation
13 providers. Therefore they must make sure they are
14 in compliance with all Federal and State rules. And
15 therefore they are responsible for making sure
16 patients are transported safely and on time.

17 Well, if those things weren't truly a
18 responsibility in the contract, why are they in the
19 document? What you are being asked today is to
20 ignore what is in the document and base this on the
21 sheer volume of the calls that we may have. And the
22 fact that that might be too much work, but the work
23 is commiserated with the fee.

24 And therefore no one wants to talk about
25 the fee, but the fee drives the sheer magnitude of

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1 the responsibility to all Medicaid providers in two
2 regions of the state.

3 Your Honor, we've all acknowledged, and
4 he's stated it here today, what they are asking for
5 is more time not to develop facts on this issue.
6 It's to develop the law. Well, there are no more
7 facts to develop on this issue. The issue is
8 squarely before the court. The court has decided as
9 a matter of law there is a non-delegable duty. And
10 based on the document that you entered into, it
11 imposes those responsibilities.

12 On the issue of the driver, Your Honor, as
13 my understanding of the law I file this motion to
14 summary judgment and I state the basis for that
15 motion. If, in fact, the other side has some basis
16 to show that what they claim in their responses to
17 interrogatories and what is obvious on its face
18 there is some different reason for it, they have to
19 bring that forward.

20 What you are hearing today is I have the
21 duty to go find out from their client what they
22 already know the answer to. And the defense today
23 is since I haven't asked, they are not going to ask.
24 And that is all I need to defeat summary judgment.
25 The reality of this case is simple, Your Honor. The

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1 driver ran off the road and hit a tree.

2 What you've heard again today, which is
3 the same thing you heard back in May, was maybe
4 there was some other reason for why he drove off the
5 road. And since we don't know what that other
6 reason might be, that is the basis for defeating
7 summary judgment.

8 And it's still, may be there is some other
9 reason. It might be a medical condition. It might
10 be that there were defective tires. It might be
11 that the last time the vehicle was serviced it was
12 inappropriately serviced. It might be a lot of
13 things.

14 What it is, which is there is no evidence
15 from the other side to defeat summary judgment is
16 that the vehicle ran off the road and hit a tree.
17 That is it. The fact that there might be other
18 reasons for which they have chosen not to go and
19 explore, and based on responses to interrogatories
20 they have not explored is the basis for why now the
21 driver somehow might not be responsible. That is
22 not sufficient to defeat summary judgment in this
23 case.

24 Your Honor, as I see it, and I can go
25 through and unfortunately bore everyone with my

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1 reading skills, looking at your order where you have
2 cited the reasons and/or basis for why you made a
3 decision to show that it was not based on the
4 arguments that are being made, it's based on either
5 the lack of information or evidence brought forth by
6 the Defendants in this case to defeat summary
7 judgment or based on the actual documents that were
8 provided which were experts from the contract that
9 the parties signed. That was the basis for why you
10 granted summary judgment.

11 JUDGE DUKES: How about the expert
12 testimony on the negligent infliction?

13 MR. DAWSON: Your Honor, what I
14 attempted to do, and I don't know whether you
15 actually had a chance to review it or not, I
16 provided you medical records based on Mr. Gary's
17 admission to the Medical University of South
18 Carolina as the basis for the expert testimony
19 in this case.

20 The Defendants are right as to the words
21 at that test. I think the court even cites it in
22 the order. Thank you. And it says just as Ms. Dean
23 read, it says the Plaintiffs' emotional distress
24 manifests itself by physical symptoms capable of
25 objective diagnosis and be established by expert

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1 testimony.

2 The courts don't give any guidance on how
3 that is established. Therefore, what we did in this
4 case was provided the medical records which
5 established it as the basis for meeting that test.
6 The Defendants in this case have objected to that
7 documentation being provided after the fact, all
8 though it asked the court to at least review it
9 in camera because it satisfies two issues that have
10 been raised.

11 One is this particular element and
12 secondly the extent of Mr. Gary's damages. Now,
13 whether the court — and I think at some places you
14 redacted specific references to the types of bones
15 that were injured and simply referred to them
16 generically or you specifically state the particular
17 injuries that were identified in the medical
18 records.

19 And my opinion is irrelevant for purposes
20 of summary judgment because it's acknowledged that
21 he was injured as a result of the accident. And
22 whether we itemize each and every item of damage I
23 don't think is necessary in this case, but
24 in response to your question, Your Honor, that is
25 the basis for satisfying that particular element.

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1 JUDGE DUKES: But it wasn't really
2 testimony, right? It was just the records?
3 MR. DAWSON: That's correct, Your
4 Honor.
5 JUDGE DUKES: Okay. Anything else?
6 MR. DAWSON: No other than, Your
7 Honor, in your order you state part of your reason
8 for granting summary judgment and I believe for not
9 agreeing with them earlier was the lack of evidence
10 on their part or providing anything to refute this
11 particular claim. And so I only add that, Your
12 Honor, as a basis for some of the arguments you are
13 hearing today and that is throughout this case
14 you've heard the same arguments as the basis for why
15 the Defendant should not be liable in negligence and
16 will not hold out on the loss of consortium because
17 obviously that is predicated on the finding of
18 negligence, but it's the lack of information that
19 they are bringing forward as the basis for denying
20 the claim as ***** today.
21 JUDGE DUKES: Thank you. Any very
22 brief responses keeping in mind I've got people
23 in the hallway?
24 MR. WILSON: Judge, I'll be very
25 brief.

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1 JUDGE DUKES: All right.
2 MR. WILSON: Thank you. First I
3 brought up apparent agency, and I'm glad Mr. Dawson
4 said it's not applicable. And I simply agree. So
5 if they are not going forward under apparent agency,
6 then it appears to be a different analysis than was
7 done in the Simmons case.
8 He cites to two cases or two themes
9 that -- where non-delegable duties have been used.
10 One he said was landlord-tenant. One he said was
11 common carrier. In the landlord-tenant case or
12 in one of the cases, the Dirkin versus Hanson case
13 the duty was created by the Landlord-Tenant Act by
14 Statute RLTA.
15 In addition, the Hansons, the defendant,
16 were bound by the South Carolina Residential
17 Landlord-Tenant Act which imposes specific duties
18 upon a landlord. The duty was created by the act.
19 The court also simply allowed the case to proceed.
20 We find an issue of fact exists as to whether
21 respondents breached their duty of care, and
22 therefore allowed it to go to the jury.
23 The case stands for the proposition that,
24 yes, there may be a non-delegable duty, one, based
25 on the statute, but two, it allowed the case to

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1 proceed to the jury and avoid a summary judgment
2 We are simply using it -- that premise to say that
3 it doesn't stand for the proposition by which it's
4 been offered.
5 He also talked about common carriers.
6 Well, let's look at the Jenkins versus Long Motor
7 Lines which has been cited. The duty was to see
8 whether the load was properly secured. That duty --
9 it was the duty of the motor truck carrier under the
10 motor carrier rules and regulations of the South
11 Carolina Public Service Commission. Motor carrier
12 rules and regulations.
13 It was under that and the statute. And,
14 again, in that case it simply allowed them to avoid
15 the granting of summary judgment. Common carrier
16 cited. Landlord-tenant cited. One -- both
17 presumably involve a statutory duty created by the
18 Landlord-Tenant Act or the Common Carrier Act which I
19 read.
20 There is also a case, the Carson versus
21 Vance case. That talks about that a bail bonds man
22 contains use the independent contractor argument to
23 get out of the venue because his runners are his
24 agents. It doesn't establish a necessarily
25 non-delegable duty as advanced by the Plaintiff's

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1 attorney.
2 So therefore they cite, well, other cases
3 have done it. Well, I've now shown you that those
4 other cases don't necessarily stand for the
5 proposition that this case reflects. They simply go
6 back to whether this court is going to make a
7 determination I guess of first impression that a
8 provider or a broker of non-ambulatory care services
9 to Medicare recipients has a non-delegable duty to
10 provide safe care.
11 It doesn't appear anywhere that the case
12 law specifically represents that idea. And the
13 Simmons case that is cited specifically doesn't
14 because that is based upon policy. Finally, they
15 talk about the contract and what the contract says.
16 Well, it's interesting that when the order was
17 drafted by the attorney for the Plaintiff and
18 submitted to this court, 3.315, they start with the
19 broker is responsible for all services.
20 Ironically they didn't include the first
21 sentence. The offeror must include a monitoring
22 plan in the initial proposal. It's the monitoring
23 plan in the proposal that includes the language of
24 delivery of a courteous, safe, timely, and efficient
25 transportation service.

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1 It therefore lists 20 bullet points that
2 we have to do. We have to report an accident. We
3 have to observe Low Country Medical Transport. To
4 the extent we don't and if we are making over a
5 hundred million dollars I would presume that we
6 would want to keep making, therefore we don't want
7 to submit ourself to the possibility of losing the
8 contract and/or being fined.

9 This does not say that we are guaranteeing
10 you safe and timely. And I'm not trying to take out
11 of context what it says. In fact, it's the opposite
12 of what is being taken out of context. The context
13 we are providing a monitoring plan. The context
14 says we can be fined for it. The context says this
15 contract is for the beneficiary of the parties to
16 the contract.

17 The contract says that we are a broker.
18 The contract says we are going to have and they know
19 we are going to have subcontractors. The contract
20 says we are going to process trip requests. And to
21 complete safely, on-time vehicle transportations we
22 have to use tracking tools. We have to verify
23 member delivery to the medical service. We have to
24 verify vehicle location and disposition of 2-A trip
25 recovery processes.

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1 And we have to explain to the State how we
2 are doing that. That is what the contract says.
3 The Defendants are not the ones taking out of
4 context what the contract says. It's the opposite.
5 We brought it here for a reason. We brought the
6 whole thing. It doesn't stand for the proposition
7 that we guarantee a safer travel. And if a driver
8 for a subcontractor hits a tree, that we have a
9 responsibility. The contract doesn't say it. The
10 case law doesn't say it.

11 Whether there is a non-delegable duty is
12 certainly an issue at this time in regards to
13 ambulance care as a first impression. It's at least
14 something that we could develop some, you know,
15 testimony in, discovery responses, something before
16 we set off saying that we are -- summary judgment is
17 granted against us at this stage.

18 And I would also like to add in that I do
19 join in Ms. Dean's arguments regarding intentional
20 infliction of emotional distress and the loss of
21 consortium just as we are on the record the case law
22 is specific about testimony.

JUDGE DUKES: All right.

MR. WILSON: Thank you.

JUDGE DUKES: Thanks.

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1 MS. DEAN: Just one sentence thought
2 to close with.

JUDGE DUKES: All right.

3 MS. DEAN: Just want to read to you
4 something that is cited in my brief which is from
5 the case law, Miller versus Blumenthal Mills. It
6 says, even when there is no dispute as to evidence
7 hear facts, but only as to the conclusions or
8 inferences drawn there from summary judgment should
9 be denied.

10 JUDGE DUKES: All right. Thank you.
11 Anything else?

12 MR. DAWSON: Your Honor, I would like
13 to read a couple of things as we are all reading
14 today. And I'm not going to bore you.

JUDGE DUKES: Sure.

15 MR. DAWSON: Let me do this instead.
16 Your Honor, obviously you have the motions that were
17 filed and the basis for the motions for
18 consideration. In one context A.M.R. has cited that
19 the contract can't defeat the basis for the duty. I
20 would invite the court to look at that and look at
21 the cases cited because I don't think they stand for
22 the propositions that they've raised. I've
23 articulated that in my response in the motion that I
24
25

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1 filed in response to the motion that was filed.

2 Your Honor, I would also ask -- and the
3 last time I met with you I unfortunately handed you
4 a rather large notebook.

5 JUDGE DUKES: Should I still have
6 that somewhere?

7 MR. DAWSON: Hopefully it's got a lot
8 of dust on it because you shouldn't read it on a
9 regular basis, but I provided excerpts of the
10 contract. And fortunately for me, the excerpts that
11 I provided to you that are in the record don't just
12 deal with Article or Section 3.15. It deals with a
13 variety of sections. And it speaks to the
14 responsibilities and duties of A.M.R. in this
15 contract.

16 And all though we've only talked about
17 one, which is the only one that has been read, there
18 are several sections that are in the record. There
19 are several sections that are listed in the
20 memorandums I've cited. And I'm now, I guess,
21 second guess myself. I'm not going to read them to
22 you because I don't think that you would enjoy that
23 but there are more than just one. And they all
24 speak to this general theme of responsibility. And
25 that was the basis for why the court issued its

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1 order.
 2 So I would just invite you, and
 3 unfortunately the dust -- get the dust off the book.
 4 I'm not sure if the excerpts that were read here
 5 today are the ones that I provided to the court and
 6 therefore I don't know if they are in the record or
 7 not, but I would invite the court to view that
 8 because all of those particular sections are listed
 9 showing their responsibilities.
 10 JUDGE DUKES: All right. Thank you
 11 all very much.
 12 MR. WILSON: Thank you very much.
 13 JUDGE DUKES: Anything else for the
 14 record before we go off the record? All right. We
 15 will be off the record then.
 16 (Whereupon, the hearing
 17 was concluded at 3:33 p.m.)
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1 Certificate of Reporter
 2
 3 I, Deborah S. Thomas, Certified Verbatim
 4 Reporter and Notary Public in and for the State of
 5 South Carolina, do hereby certify that I reported
 6 the hearing of Charles Gary vs. Hathe M. Askew, et
 7 al on the 12th day of November, 2013; and that the
 8 foregoing 53 pages constitute a true and correct
 9 transcription of the said hearing.
 10
 11 I further certify that I am neither
 12 attorney nor counsel for, nor related to or employed
 13 by, any of the parties connected with this action,
 14 nor am I financially interested in said cause.
 15
 16 I further certify that the original of
 17 said transcript shall be hereafter delivered to the
 18 H. Cooper Wilson, III, ESQUIRE, Hood Law Firm, 172
 19 Meeting Street, Charleston, South Carolina 29401.
 20
 21 In witness whereof I set my hand and seal
 22 this 22th day of November, 2013.
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Deborah S. Thomas, CVRM
 My Commission and Notary Public for the
 expires 1/4/18 State of South Carolina

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2/23/13

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,)
PLAINTIFF,)

vs.)

PLAINTIFF CHARLES GARY'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

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)

TO: H. COOPER WILSON, III ESQ., ERIN D. DEAN, ESQ., COREY FLEMING
ESQ., ATTORNEYS FOR THE DEFENDANTS AMERICAN MEDICAL RESPONSE,
INC. (D/B/A ACCESS2CARE), HATTIE M. ASKEW, WILL OUTLAW AND DEBORIA
OUTLAW INDIVIDUALLY AND D/B/A LOW COUNTRY MEDICAL TRANSPORT,
LOW COUNTRY MEDICAL TRANSPORT, INC., AND EUGENE A. KIRKLAND

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Charles Gary through his
undersigned attorney will move before the presiding Judge of the 14th Judicial Circuit,
within ten (10) days, or as soon as the Plaintiff may be heard, for an order granting the
Plaintiff summary judgment pursuant to Rules 56 of the South Carolina Rules of Civil
Procedure.

This motion for summary judgment is based on the grounds that there is no
genuine issues of material fact and the Plaintiff is entitled to a judgment as a matter of
law on all of its causes of action in its Complaint based on the following grounds:

(1) American Medical Response Inc., (AMR) had a contract with the State of South Carolina Department of Health and Human Services (SCDHHS) to provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina based on specific contractual duties and responsibilities on the date of the incident.

(2) AMR hired Low Country Medical Transport Inc., and/or its successor company, through a Subcontractor Agreement to provide non-emergency medical transportation services under its contract with SCDHHS.

(3) AMR dispatched Low Country Medical Transport to transport Mr. Gary to and from a medical appointment on January 31, 2012, pursuant to its Subcontractor Agreement based on its contract with SCDHHS.

(4) The South Carolina Secretary of State administratively dissolved Low Country Medical Transport Inc., on October 1, 2007.

(5) Low Country Medical Transportation Inc. was and is the entity that possessed the Class C Non-Emergency Motor Vehicle Carriers' Certificate from the South Carolina Office of Regulatory Staff pursuant to state law.

(6) Low Country Medical Transport continued to operate its business pursuant to its predecessor Low Country Medical Transport Inc.'s Class C Non-Emergency Motor Vehicle Carriers' Certificate from October 1, 2007, until it was reinstated by the South Carolina Secretary of State's Office on February 29, 2012.

(7) Low Country Medical Transport did not obtain approval from the South Carolina Office of Regulatory Staff, pursuant to state law to transfer or utilize Low

Country Medical Transport Inc.'s Class C Non-Emergency Motor Vehicle Carrier's Certificate for its use while Low Country Medical Transport Inc., was dissolved.

(8) On January 31, 2012, AMR dispatched Low Country Medical Transport to provide non-emergency medical transportation for Mr. Gary (who is a paraplegic) and his wife to and from his medical appointment. Low Country Medical Transport's employee-driver lost control of the ambulance, ran off the shoulder of the road, and struck a large tree injuring Mr. Gary (who was strapped to a stretcher in the rear of the ambulance) and killing his wife (who was a passenger wearing her seatbelt in the front seat of the ambulance).

(9) The Defendants are liable for the injuries and damages Mr. Gary sustained under the legal theories of Negligence, Negligence per se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress because of the Defendants' conduct.

The motion to dismiss is based upon the pleadings, affidavits, South Carolina Rules of Civil Procedure, applicable case law and statutes, a supporting memorandum to be filed at a later date, and such other matters as may be presented at the hearing on this matter.

CHARLES GARY



JOSEPH DAWSON, III, Esquire

Post Office Box 41367

North Charleston, South Carolina 29423

Telephone: (843) 207-9004

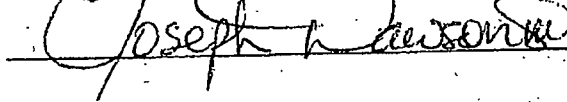
Facsimile: (843) 207-9005

February 23 2013
North Charleston S.C.

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THIS DATE A COPY OF THE FOREGOING WAS SERVED ON
OPPOSING COUNSEL BY MAILING OR HAND DELIVERY IN THE MANNER PRESCRIBED
BY THE APPLICABLE RULES OF CIVIL PROCEDURE.

THIS 22 DAY OF Feb, 2013.



5/14/13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	CASE NO. 2012-CP-07-3595
CHARLES GARY,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	PLAINTIFF'S MEMORANDUM OF LAW
HATTIE M. ASKEW, WILL OUTLAW,	)	IN SUPPORT OF ITS MOTION
AND DEBORIA OUTLAW,	)	FOR SUMMARY JUDGMENT
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	)	

The Plaintiff Charles Gary submits this memorandum of law in support of its Motion for Summary Judgment. Mr. Gary asks this Court to find that the Defendants Hattie M. Askew, 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") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants") are liable for the injuries and damages he sustained as identified in the causes of action addressed herein.

FACTS

Charles Gary is a 61-year old bedridden diabetic, amputee, and paraplegic who lost the use of his lower body in 2004, in an unrelated incident. Mr. Gary is unemployed

and draws social security. He is also a Medicaid beneficiary in South Carolina. Before this single ambulance accident, Mr. Gary lived at home with his wife, Blondell Gary, who died in the single ambulance accident, complained of herein. Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing, dressing, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. See, Exhibit A, Affidavit of Charles Gary.

On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract with Access2Care to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program. The NEMT Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency transportation services in a cost-effective manner to Medicaid members who need access to medical care or services." See, Exhibit B, Health Department Non-Emergency Medical Transportation Services Contract, Section 1.1.¹ This contract was initiated through a competitive request for proposal (RFP) solicitation process to provide non-emergency medical transportation

¹ According to Vicki Johnson, Assistant General Counsel, South Carolina Department of Health and Human Services, the South Carolina Non-Emergency Medical Transportation (NEMT) Program Request for Proposal bid documents, forms the basis for the Health Department's contract with Access2Care. Ms. Johnson also states that "there is no separate contract signed after a Request for Proposal process is completed." See, Exhibit C, E-mail from Vicki Johnson, Assistant General Counsel, South Carolina Department of Health and Human Services, dated June 26, 2012.

services to eligible Medicaid recipients in South Carolina (like Mr. Gary). See, Exhibit B, excerpts from the Health Department Non-Emergency Medical Transportation Services Contract.

Access2Care is a corporation organized and existing under the laws of a state other than South Carolina. Access2Care provides non-emergency medical transportation broker services to governments, among other services. Pursuant to the RFP and its contract with the Health Department, Access2Care was tasked with administering the daily functions of the NEMT Program for Medical Transportation for South Carolina's Regions Two and Three. Mr. Gary resides in Region 3. Access2Care was tasked with "operating a call center and contracting with transportation providers to fulfill the services."² See, Exhibit B, Health Department Non-Emergency Medical Transportation Services Contract.

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation providers (NEMTs) to provide transportation services to eligible Medicaid recipients. On August 17,² 2011, Access2Care began to provide NEMT services to eligible Medicaid recipients in South Carolina.³

² "The Broker must establish a system that ensures high quality and appropriate medical transportation services are provided to South Carolina's Medicaid population. The Broker must pay transportation providers in accordance with the terms of the written service agreement between the Broker and each transportation provider." See, Exhibit B, Health Department Non-Emergency Medical Transportation Services Contract Section 1.2 Intent.

³ The potential value of Access2Care's five-year contract with the Health Department was approximately \$162 million. See, Exhibit D, Non-Emergency Medical Transportation Bid Notice of Award, Reinstatement Notice, dated May 25, 2011. On or about November 22, 2011, Access2Care asked the Health Department to approve a \$25 million change order due to a mistake with its bid, seeking to increase its potential contract value to \$187 million over the contract term. See, Exhibit E, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to

While under contract with the Health Department, Access2Care entered into a contract with Low Country Medical Transport Inc., and/or LCMT titled "Access2Care Transportation Solutions Subcontractor Agreement" so that Access2Care could dispatch Low Country Medical as part of its NEMT network. See, Exhibit G, portion of LCMT Defendants' Response to Plaintiff's Request for Production Number 5. Low Country Medical has been in the business of transporting individuals to and from medical facilities since 2004. See, Exhibit H, Affidavit of Hattie M. Askew, dated May 2, 2013. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved Low Country Medical Transport Inc.'s, corporate status in South Carolina. See, Exhibit I, Department of State, Declaration of Dissolution by Forfeiture, dated October 1, 2007. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. See, Exhibit J, South Carolina Secretary of State Documents. The LCMT continued to operate until Low Country Medical Transport Inc.'s., reinstatement by the South Carolina Secretary of State four and half years later.

Moreover, LCMT maintained Low Country Medical Transport Inc.'s., Class C Non-Emergency Motor Vehicle Carriers' Certificate from the South Carolina Office of Regulatory Staff. See, S.C. Code Ann. § 58-23-240. LCMT neither transferred Low

John R. Stevens, State Procurement Officer, dated November 22, 2011. The Health Department denied Access2Care's \$25 million change order request, and thereafter, Access2Care filed a notice to terminate its contract with the Health Department effective February 20, 2012, and began a 60-day transition to exit the State. See, Exhibit F, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to Melanie Glese, RN, Deputy Director, Medical and Managed Care Services, South Carolina Department of Health and Human Services, dated December 16, 2011.

Country Medical Transport Inc.'s Certificate to LCMT nor applied for a new Certificate when Low Country Medical Transport Inc., was dissolved. "A certificate may be transferred incident to the sale or lease of property or assets owned or used by a regulated motor carrier, provided the approval of the commission for the transfer of the certificate is first obtained and that the certificate itself is not transferred for value or utilized to enhance the value of other property transferred." S.C. Code Ann. § 58-23-340, see also, S.C. Regs. §103-155. The Defendant Askew was unaware the corporation was dissolved; and therefore, continued to use the dissolved company's Certificate. See, Exhibit H, Affidavit of Hattie Askew, dated May 2, 2013.

On January 31, 2012, Access2Care scheduled Low Country Medical to provide non-emergency medical transportation for Charles Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical's ambulance was transporting Mr. Gary, and his wife home after his medical appointment when suddenly and un-expectantly the ambulance ran off the road and struck a large tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home. See, Exhibit A, Affidavit of Charles Gary. The collision caused severe and serious injuries to Mr. Gary and killed his wife. At the time of the accident, the weather conditions were clear and it was daylight. Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat with her seat belt secured. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, where he remained for three weeks due to multiple fractures to his ribs, pelvis, and femur, and other injuries and conditions. See, Exhibit A, Affidavit of Charles Gary.

Charles Gary filed this lawsuit on October 16, 2012, alleging Negligence, Negligence Per Se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Intentional Infliction of Emotional Distress against the Defendants. In a companion case, the Estate of Blondell Gary, has also filed suit in the Hampton County Court of Common Pleas. The Hampton County circuit court has placed the Defendant Access2Care in default for failing to file an Answer to the Estate's Complaint within 30 days. See, Exhibit K, Order of Default in Angel Y. Gary as Personal Representative of the Estate of Blondell Gary v. LowCountry Medical Transport Inc., et al., 2012-CP-25-00402.⁴ In this case, Mr. Gary contends that there are no genuine issues of material fact and that he is entitled to a judgment as a matter of law on the causes of action identified herein for the following reasons.

LAW / ANALYSIS

STANDARD OF REVIEW

"Summary judgment is appropriate where 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." Platt v. CSX Transportation, 379 S.C. 249 665 S.E.2d 631 (Ct.App. 2008). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most

⁴ Mr. Gary has also filed a motion for Default Judgment against the Defendant Access2Care in this case which has not been scheduled for a hearing. See, Exhibit L, Notice of Motion and Motion for Entry of Default Judgment Against American Medical Response Inc. (D/B/A Access2Care) and Supplement to Affidavit of Default of Joseph Dawson, III, Esquire.

favorable to the non-moving party." *Id.* "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Id.*

"Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Platt supra*. "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.* at 112, 410 S.E.2d at 543. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a 'fishing expedition.'" *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

I. THE DEFENDANTS ARE LIABLE FOR MR. GARY INJURIES HE SUSTAINED IN THE SINGLE-AMBULANCE ACCIDENT

Access2Care, Low Country Medical, and Eugene Kirkland (Kirkland) are liable for injuries Mr. Gary suffered when Low Country Medical's ambulance ran off the road and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina. "In order to prevail in a negligence cause of action, the plaintiff must establish: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages." *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct.App. 2007). Access2Care, Low Country Medical, and Kirkland individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina.

"Duty is generally defined as 'the obligation to conform to a particular standard of conduct to the plaintiff.'" Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003). "The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions." Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001). "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003). "The existence of a duty owed is a question of law for the courts." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

In January 2012, Blondell called Access2Care to schedule NEMT services for Mr. Gary's medical appointment. On January 31, 2012, Access2Care sent Low Country Medical to Mr. Gary's house to transport him to and from his medical appointment. It is undisputed that Kirkland was driving Low Country Medical's ambulance when he lost control of the vehicle and hit a large tree. It is unquestioned that Kirkland had a clear legal duty to operate the ambulance in a safe manner and avoid dangers.

Moreover, Low Country Medical as a non-emergency medical transportation provider had a duty of care to transport Mr. Gary safely, while he was in its custody and control. "Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment." Austin v. Specialty Trans. Services, 358 S.C. 298, 594 S.E.2d 867 (Ct.App. 2004). Even if this Court found that Low Country Medical had no duty, "the modern doctrine of respondeat superior imposes liability on a master for the wrongdoing of his servant even though the master himself is not at fault." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct.App. 1991).

A claim of no fault by Low Country Medical cannot shield it from Kirkland's negligent actions.

Modern theory allocates the risk of the servant's negligence to the master, not because he is at fault, but because he is normally in a better position than the servant to respond in damages and is better able than the victim to spread the risk by treating third party liability as a cost of doing business. A rule resting on these policy justifications is clearly a rule of 'no fault' liability. S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct.App. 1986).

Therefore, South Carolina law imputes Kirkland's negligence onto Low Country Medical, because a master-servant relationship exists between them.

"The doctrine of respondeat superior provides that the employer, as the employee's master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment. [Citations Omitted]. Such liability is not predicated on the negligence of the employer, but upon the acts of the employee, whether those acts occurred while the employee was going about the employer's business, and the agency principles that characterize the employer-employee relationship." James v. Kelly Trucking, 377 S.C. 628, 661 S.E.2d 329 (2008). Low Country Medical owed a duty of care to Mr. Gary when it agreed to transport Mr. Gary as an Access2Care NEMT service provider via its employee driver.

Equally, Access2Care had a duty of care to Mr. Gary arising out of its contract and operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's contract with the Health Department required Access2Care to be "... responsible for fulfilling all verified trip requests and ensuring that all trips are

completed safely and on-time." See, Exhibit B, Health Department Contract Section 3.3.5 Fulfillment of All Trip Requests. Moreover, Access2Care's contract with the Health Department stated in Section 3.3.15 Monitoring Plan that:

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. See, Exhibit B, Health Department Contract Section 3.3.15.

In this case, Mr. Gary's late wife called Access2Care to schedule NEMT service for Mr. Gary for a medical appointment he had on January 31, 2012. See, Exhibit A, Affidavit of Charles Gary. Access2Care dispatched Low Country Medical to Mr. Gary's home in Yemassee South Carolina. Access2Care had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department. See, Exhibit B, Health Department Contract Sections 3.3.5 Fulfillment of All Trip Requests and 3.3.15 Monitoring Plan. In addition, Access2Care had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations. See, Exhibit B, Health Department Contract Sections 3.3.15 Monitoring Plan and Section 3.8, Driver and Vehicle Requirements. Access2Care, Low Country Medical, and Kirkland clearly owed Mr. Gary a duty of care when they agreed to provide NEMT services to him for a fee.

Access2Care, Low Country Medical, and Kirkland breached their duty of care to Mr. Gary when Low Country Medical's ambulance ran off the road. "A breach of duty

exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). It is undisputed that Low Country Medical's driver failed to maintain the ambulance on the road safely. As a result, the ambulance ran off the shoulder of Old Sheldon Church Road and struck a tree injuring Mr. Gary. It is undisputed that Mr. Gary did not return home safely but he was injured when Low Country Medical's ambulance ran off the road and hit a tree. Access2Care, Low Country Medical, and Kirkland's breach of its duty of care caused Mr. Gary to suffer multiple fractured ribs and pelvic bones, among other injuries and damages from the accident. Although Access2Care did not own the ambulance, Access2Care stands in the same shoes as Low Country Medical and Kirkland under South Carolina law as if it were its ambulance.

Kirkland's breach of his duty of care to Mr. Gary was the proximate cause of Mr. Gary's injuries and damages. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.* "Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Vinson, *supra*."

The evidence clearly shows that Low Country Medical's ambulance, which was driven by Kirkland its employee, ran off the road and struck a tree seriously injuring Mr. Gary and killing his wife. The undisputed evidence in this case is susceptible to only

one inference. Kirkland's negligent act was the proximate cause of Mr. Gary's injury, because it was the natural and continuous sequence of events that produced his injuries and without it, the injury would not have occurred. Therefore, the question of proximate cause is a matter of law for this court to decide, which this court should do in the affirmative. Moreover, Low Country Medical is liable for the acts of its employee. "Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment." Austin v. Specialty Trans. Services, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004). There is no evidence to suggest that Kirkland was acting outside of his scope of employment.

Conversely, Access2Care denies any liability for Mr. Gary's injuries and damages asserting several affirmative defenses. See, Access2Care's Amended Answer to Plaintiff's Complaint. Ostensibly, the basis for this argument is that Low Country Medical was an independent contractor of Access2Care, pursuant to a contract. However, this assertion cannot be reconciled with the fact that Access2Care had a subcontractor agreement with Low Country Medical and Access2Care controlled its NEMT's means and methods for delivering transportation services. See, Exhibit G, LCMT Defendants' Response to Plaintiff's Request For Production titled "Access2Care Transportation Solutions Subcontractor Agreement" and Exhibit B, Health Department Contract.

"A principal may be held liable to a third person in a civil lawsuit for the fraud, deceit, concealment, misrepresentation, negligence, and other omissions of duty of his agent which occur in the scope of the agent's employment, even when the principal did not authorize, participate in, or know of such misconduct or even when the principal

forbade or disapproved of the act in question." Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

Nevertheless, Access2Care believes it is not responsible for Low Country Medical's negligent conduct, because its Contract with Low Country purportedly states:

In the performance of this Agreement, each party shall be as to the other, an independent contractor and neither party shall have the right or authority, express or implied, to bind or otherwise legally obligate the other. See, Exhibit M, Access2Care's Memorandum in Support of its Motion to Reconsider Order of Default in Angel Y. Gary as Personal Representative of the Estate of Blondell Gary v. LowCountry Medical Transport Inc., et al., 2012-CP-25-00402.

"A true agency relationship may be established by showing evidence of apparent or implied authority, even where the parties have entered an agreement to the contrary. . .

. Under South Carolina law, the terms of a consignment agreement are not conclusive on the question of independent contractor, where there is evidence [beyond] the contract which establishes a true agency relationship. The test to determine agency is whether or not the purported principal has the right to control the conduct of his alleged agent." Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982). Access2Care cannot abrogate its liability for Mr. Gary's injuries by simply incorporating self-serving language in its subcontractor agreements.

Assuming *arguendo* and in a light most favorable to Access2Care, that it has an independent contractor relationship with Low Country Medical, rather than an agency relationship; its independent contractor status is not an absolute bar to liability. "Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958).

However, "[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." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); citing, Simmons, 330 S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 654 (1997). Since Access2Care had a duty of care to Mr. Gary, pursuant to its contract with the Health Department, the same should prevail in this case.

The general rule does not apply here because of Access2Care's contractual duty of care. Therefore, this Court should reject Access2Care's unscrupulous attempt to walk away unscathed in the wake of this tragic event by simply suggesting that it is not responsible for Low Country Medical's tortious acts, while pocketing a fee for the service. The South Carolina Supreme Court in Toumey Regional Medical Center rejected a similar attempt at subterfuge when it said:

We find Tuomey Regional's arguments unpersuasive. The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone

else and then expect to walk away unscathed when things go wrong. A principle that applies in cases of poorly repaired brick floors and sloppily loaded cargo certainly applies to situations in which people must entrust that most personal of things, their physical well-being, to physicians at an emergency room intimately connected with and closely controlled by a hospital. Tourney Regional Medical Center supra.

Access2Care cannot escape liability for Kirkland and Low Country Medical's negligence, because Access2Care has a non-delegable duty to provide NEMT services in a safe manner. "[T]his court noted the 'real effect of finding a duty to be non-delegable is to render not the duty, but the liability, not delegable; the person subject to a non-delegable duty is certainly free to delegate the duty, but will be liable to third parties for any negligence of the delegatee, regardless of any fault on the part of the delegator.'" Nedrow v. Pruitt, 336 S.C. 668, 521 S.E.2d 755 (Ct.App. 1999). Therefore, since Low Country Medical's tortious act via Kirkland's failure to keep the ambulance under proper control was the proximate cause of Mr. Gary's injury, then Access2Care is liable as a matter of law for the negligence of Kirkland and Low Country Medical regardless of any fault on its part.

II. LOSS OF COMPANIONSHIP OF SPOUSE

Access2Care, Low Country Medical, and Kirkland have violated Mr. Gary's right to the companionship, aid, society, and services of his wife Blondell. It is undisputed that Mr. Gary and his wife were riding in an ambulance dispatched by Access2Care, owned by Low Country Medical, and driven by Kirkland, when it suddenly ran off the shoulder of Old Sheldon Church Road and hit a tree killing Mrs. Gary. Mr. Gary, a paraplegic survived the accident with serious injuries, but he lost his wife, his primary caregiver, and sole means of support in the accident. See, Exhibit A, Affidavit of

Charles Gary. In South Carolina, "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." S.C. Code Ann. § 15-75-20. "[C]laims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence. Although loss of consortium is an independent action, case law has held the right of action does not accrue until the loss of the services, society and companionship of the spouse has actually occurred, which has been defined as the point when the spouse sustained the injuries." Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423 (Ct.App. 2003). Blondell's injuries occurred on the date of the accident.

Mr. Gary is a bedridden paraplegic. Prior to the accident, Mrs. Gary assisted Mr. Gary with all of his daily activities including bathing him, dressing him, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. See Exhibit A, Affidavit of Charles Gary. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. It is undisputed that Mrs. Gary's death was caused by the negligence of the Defendants. See Argument I. Therefore, Mr. Gary is entitled to compensatory damages against the Defendants for the loss of his wife's companionship, aid, society, and services.

III. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Mr. Gary has suffered severe emotional distress, shock, and wounded feelings, because he witnessed his wife's death in a single ambulance accident caused by the negligence of the Defendants. See Exhibit A, Affidavit of Charles Gary. The

Defendants' tortious actions have caused Mr. Gary to suffer negligent infliction of emotional distress. "In order to prevail on this cause of action, a plaintiff must show that: (a) the negligence of the defendant caused death or serious physical injury to another; (b) the plaintiff bystander was in close proximity to the accident; (c) the plaintiff and the victim are closely related; (d) the plaintiff contemporaneously perceived the accident; and (e) the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony." Doe v. Greenville County, 375 S.C. 63, 651 S.E.2d 305 (2007). There are no genuine issues of material fact that Mr. Gary does not meet these elements. Therefore, Mr. Gary is entitled to summary judgment as a matter of law on this cause of action.

As stated above, the Defendants' negligence in failing to keep the ambulance under proper control resulted in the ambulance running off the road and hitting a large tree. See, Argument I. It is undisputed that this act caused Blondell Gary's death. Mr. Gary was in close proximity to the accident when it occurred. The Defendants do not dispute that Mr. Gary was in the back of the ambulance strapped to a stretcher. It is unquestioned that Mr. Gary was closely related to Blondell Gary, because they were married. Furthermore, Mr. Gary contemporaneously perceived the accident complained of herein, because he was also a victim of the accident while riding in the same vehicle.

In Kinard, the South Carolina Supreme Court adopted the cause of action negligent infliction of emotional distress. See, Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). In Kinard, Betty Kinard and her daughter were injured when a load of roof trusses fell from Augusta Sash & Door Co.'s truck and struck the car in which they were riding. Kinard's daughter was severely injured and remained

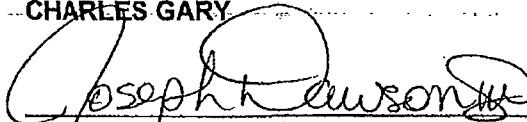
comatose for three months. Betty Kinard experienced severe emotional distress because of the accident. Similarly, Mr. Gary was riding in the same vehicle with his wife. He equally suffers severe emotional distress and shock, because of her death.

Mr. Gary has manifested physical symptoms capable of objective diagnosis and his treating physician at MUSC has documented it. See, Plaintiff's Responses to Discovery, including Dr. Bruce A. Crookes Medical Notes, and Medical Records. Mr. Gary has exhibited manifestations of his shock and horror through nightmares, insomnia, anxiety, and depression. See Exhibit A, Affidavit of Charles Gary.

CONCLUSION

Mr. Gary's Negligence, Loss of Consortium, and Negligent Infliction of Emotional Distress claims present no genuine issues of material fact in dispute against the Access2Care, Low Country Medical, and Kirkland. South Carolina law provides that when the evidence is susceptible to only one conclusion, then as a matter of law the plaintiff is entitled to summary judgment. Mr. Gary's claims are susceptible to only one conclusion, therefore, this Court should grant him the relief he seeks based on the evidence, law, and undisputed facts articulated herein.

CHARLES GARY



JOSEPH DAWSON, III, Esquire
Post Office Box 41367
North Charleston, South Carolina 29423
Telephone: (843) 207-9004
Facsimile: (843) 207-9005

May 14, 2013
North Charleston S.C.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,

PLAINTIFF,

vs.

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

AFFIDAVIT OF
CHARLES GARY

PERSONALLY APPEARED BEFORE ME Charles Gary, who having been duly
sworn, deposes and says as follows:

1. I am a resident of Beaufort County, South Carolina and I reside at 156 Twickenham Road, Yemassee, South Carolina.
2. I am a 61-year old paraplegic who suffers from multiple medical conditions, and I have not had the use of my legs since 2004. I spend most of my day in a medical bed. I am also on Medicaid.
3. Prior to the date of the accident, I lived with my wife Blondell Gary, who did not work outside of the home. She provided for all of my daily activities, to include but not limited to bathing, dressing, meals, cleaning, shopping, managing the home, and caring for my pre-existing medical condition and disabilities.



4. I was completely dependent on Blondell and she was my sole means of comfort, care, support, and maintenance prior to the accident, which caused her death.
5. On January 31, 2012, Blondell and I were riding in Low Country Medical Transport's ambulance returning home after my medical appointment.
6. Blondell scheduled my rides for my medical appointments. She called Access2Care to schedule transportation for my January 31, 2012, medical appointment.
7. Blondell was riding in the front seat of the ambulance and I was strapped to a stretcher in the rear of the ambulance. The ambulance was traveling on Old Sheldon Church Road in Yemassee only a few miles from my home when the ambulance suddenly ran off the road and hit a tree causing me to suffer numerous broken bones, lacerations, bruises, and other injuries.
8. When the ambulance stopped moving, I cried out for my wife but she did not respond and I could not get to her. She died because of the collision with the tree. That was the last day I saw her, because I was in the hospital and could not attend her funeral.
9. As a result of the accident, I was transported to Beaufort Memorial Hospital and then to the Medical University of South Carolina in Charleston, South Carolina for treatment due to my injuries.
10. As a result of the accident and the death of my wife (in addition to recovering from my injuries), I am still having trouble sleeping, nightmares, headaches, memory loss, anxiety, and depression.

FURTHER, THE DEPONENT SAYETH NOTI

CGARX
Charles Gary

Sworn before me this 9th day May 2013

Claudette D. Dawson
Notary Public for South Carolina
My Commission expires on 3-3-2014



State of South Carolina

Request for Proposal

Solicitation Number: 5400002201
Date Issued: September 9, 2010
Procurement Officer: Daniel W. Covey, CPPB
Phone: 803-737-0674
E-Mail Address: dcovey@mimo.sc.gov

DESCRIPTION: Provide Non-Emergency Transportation Services

USING GOVERNMENTAL UNIT: SC Department of Health & Human Services

The Term "Offer" Means Your "Bid" or "Proposal". Unless submitted on-line, your offer must be submitted in a sealed package. Solicitation Number & Opening Date must appear on package exterior. See "Submitting Your Offer" provision.

SUBMIT YOUR SEALED OFFER TO EITHER OF THE FOLLOWING ADDRESSES:

MAILING ADDRESS:
Materials Management Office
PO Box 101103
Columbia SC 29211

PHYSICAL ADDRESS:
Materials Management Office
Capital Center
1201 Main Street, Suite 600
Columbia SC 29201

SUBMIT OFFER BY (Opening Date/Time): 10/25/2010 2:30 PM

(See "Deadline For Submission Of Offer" provision)

QUESTIONS MUST BE RECEIVED BY: 09/21/2010 5:00 PM

(See "Questions From Offerors" provision)

NUMBER OF COPIES TO BE SUBMITTED: One (1) original in hard copy, one (1) electronic copy (See MAGNETIC MEDIA -- REQUIRED FORMAT -- Section II B), five (5) copies in hard copy clearly marked "COPY", one (1) redacted copy in hard copy and one (1) redacted electronic copy (see SUBMITTING CONFIDENTIAL INFORMATION -- Sec. II A and SUBMITTING REDACTED OFFERS -- Sect. 4.)

CONFERENCE TYPE: Pre-Proposal
DATE & TIME: 09/20/2010 11:30 AM

(As appropriate, see "Conferences - Pre-Bid/Proposal" & "Site Visit" provisions)

LOCATION: Materials Management Office
Conference Room
1201 Main Street -- Suite 600
Columbia, SC 29201

AWARD & AMENDMENTS

Award will be posted on 11/22/2010. The award, this solicitation, any amendments, and any related notices will be posted at the following web address: <http://www.procurement.sc.gov>

Unless submitted on-line, you must submit a signed copy of this form with Your Offer. By submitting a bid or proposal, You agree to be bound by the terms of the Solicitation: You agree to hold Your Offer open for a minimum of thirty (30) calendar days after the Opening Date.

(See "Signing Your Offer" and "Electronic Signature" provisions.)

NAME OF OFFEROR

(full legal name of business submitting the offer)

Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror. The entity named as the offeror must be a single and distinct legal entity. Do not use the name of a branch office or a division of a larger entity if the branch or division is not a separate legal entity, i.e., a separate corporation, partnership, sole proprietorship, etc.

AUTHORIZED SIGNATURE

(Person must be authorized to submit binding offer to contract on behalf of Offeror.)

TAXPAYER IDENTIFICATION NO.

(See "Taxpayer Identification Number" provision)

TITLE

(business title of person signing above)

STATE VENDOR NO.

(Register to Obtain S.C. Vendor No. at www.procurement.sc.gov)

PRINTED NAME

(printed name of person signing above)

DATE SIGNED

STATE OF INCORPORATION

(If you are a corporation, identify the state of incorporation.)

OFFEROR'S TYPE OF ENTITY: (Check one)

(See "Signing Your Offer" provision)

☐ Sole Proprietorship

☐ Partnership

☐ Other

☐ Corporate entity (not tax-exempt)

☐ Corporation (tax-exempt)

☐ Government entity (federal, state, or local)



SCB&CB 0001

III. SCOPE OF WORK/SPECIFICATIONS

1.0 BACKGROUND

1.1 OVERVIEW

South Carolina Non-Emergency Medical Transportation (NEMT) Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency transportation services in a cost-effective manner to Medicaid members who need access to medical care or services. Federal requirements regarding transportation services are described in 42 CFR §440.170(a) (4).

This procurement will result in the award of a separate contract for each of three (3) regions within the state. Appendix (A) includes a map defining the three (3) regions and the counties that make up each region. An Offeror may submit a proposal for one or more regions. If an Offeror submits proposals on multiple regions, a Technical Proposal shall be submitted for each region with a separate Price Proposal (both "P-1" and "P-2") for each region. For example, if an Offeror bids on all three regions, the Offeror must submit three Technical Proposals along with a separate "P-1" and "P-2" for each region.) Each of these parts must be separate and complete so that evaluation of one may be accomplished independently of the evaluation of the other.

For purposes of this document, the provider of brokerage services will be referred to as the *Broker*, unless otherwise specified.

An eligible Medicaid member or a Medicaid applicant requesting non-emergency medical transportation must be referred to as the *Member* for purposes of this document, unless otherwise specified.

1.2 INTENT

Through this Request for Proposals (RFP), the South Carolina Department of Health and Human Services (SCDHHS) will contract with up to three Brokers to administer the daily functions of the NEMT Program. Specifically, the Broker(s)

responsibilities will include, but are not limited to, operating a call center and contracting with transportation providers to fulfill the services. The Broker must establish a system that ensures high quality and appropriate medical transportation services are provided to South Carolina's Medicaid population. The Broker must pay transportation providers in accordance with the terms of the written service agreement between the Broker and each transportation provider.

1.3 OBJECTIVE

The objective of this RFP is to procure a qualified broker to improve the efficiency and effectiveness and to administer the core components of the SCDHHS' NEMT Program. SCDHHS is seeking to continuously enhance its ability to provide transportation services through innovative and proven business and technical solutions that meet the requirements specified herein.

Offerors must make stand alone proposals for each proposed region. Offerors must not base their staffing, implementation and facility plans, nor condition their price proposal upon any assumption about receiving awards for any other regions.

1.4 PAST SERVICE VOLUME

For state fiscal year 2008, the state's Brokers, reported that approximately 1,707,311 one-way trips were made throughout South Carolina. These 1,707,311 trips accounted for approximately 24,143,756 point-to-point miles. Appendices B – F include additional service volume data for FY 2008, FY 2009 and partial FY 2010.

For state Fiscal Year 2009, SCDHHS arranged 73 trips outside the South Carolina Medicaid Services Area (SCMSA). See Appendix J for the description of the SCMSA. Appendix O includes additional service volume data for trips arranged outside the SCMSA.

Based on the historical data available, approximately 710,000 members are eligible to receive non-emergency transportation services in any given month (see Appendix G). However, approximately 20,000 unduplicated members a month actually utilize non-emergency transportation services (see Appendix H).

The reports listed in Appendix I include the breakout of eligible members by age group, however the reports include all members regardless of their eligibility for transportation services. The reports also include members that became eligible

2.3 GENERAL BROKER REQUIREMENTS

Throughout the life of the contract:

- 2.3.1 The Broker must have the capacity, requisite experience, and expertise to provide Transportation Broker services in accordance with the provisions and requirements set forth in this RFP. All Offeror's must exhibit this experience and expertise for which they are bidding.
- 2.3.2 The Broker must be accredited by a nationally recognized quality improvement organization which ensures the company is conducting business in a way that conforms to national standards for quality assurance in the health care industry. Such organizations are the Utilization Review Accreditation Commission (URAC) and the National Committee for Quality Assurance (NCQA).
- 2.3.3 The Broker must notify SCDHHS within 30 days of purchase, acquisition, or any other change in its ownership or control affecting a 5% or greater interest, any acquisition by it of a 5% or greater interest in any subsidiary, and any new agreement with, by, or between any affiliates that is relevant to the contract.
 - 2.3.3.1 No employee of the Broker that can influence trip assignments or award work may engage in activities in a related business that may be construed to have a conflict of interest.
- 2.3.4 The Broker must provide assurance of its financial stability and have the financial resources to sustain services for a minimum of ninety (90) days prior to the payment.
- 2.4.5 The Broker is responsible for identifying, recruiting, and negotiating service agreements with transportation providers in order to meet the needs of Medicaid members in the region. This means the Broker must have sufficient provider resources (numbers and types of vehicles and drivers) under agreement so that the failure of any provider to perform will not impede the ability of the Broker to provide NEMT services in accordance with the requirements of the RFP.
- 2.4.6 The Broker must provide selected services to all eligible members in accordance with the Centers for Medicare and Medicaid Services (CMS) and SCDHHS Guidelines in the state plan (the state plan is available for offerors view upon request.)
- 2.4.7 The Broker must develop a process to reimburse in-network and out-of-network transportation providers for transportation services rendered to individuals that become eligible for those services retroactively.

- 2.4.8 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.
- 2.4.9 The Broker must agree, when deemed necessary by SCDHHS, that it will provide additional resources (at no additional cost to SCDHHS) should challenges or problems arise that interfere with the Broker's ability to fulfill any requirements or deliverables indicated in the Scope of Work or the terms and conditions of the Broker's proposal.
- 2.4.10 The Broker must meet or exceed specific, measurable performance standards as required in SCDHHS policies and procedures. All performance guarantees must be measured and reported in accordance with RFP Section 3.17
- 2.4.11 The Broker must comply with the national standards as prescribed by the Health Insurance Portability and Accountability Act of 1996 and the Balanced Budget Act of 1997, and will maintain compliance should new or modified requirements be issued during the contract period.
- 2.4.12 The Broker shall, participate and provide support in all state and federal audits, surveys, and agency monitoring and participant appeals. Support must include, but is not be limited to, producing documentation, gathering data, coordinating formal responses, preparing transmittal letters, and assisting SCDHHS in responding to questions from any entity concerning contracted services.
- 2.4.13 The Broker must have a comprehensive, written fraud and abuse compliance plan that describes the Broker's specific internal controls and policies and procedures designed to prevent and detect fraud and abuse in the administration and delivery of services under this contract and to report suspected or known fraud and abuse activities within two (2) business days of discovery.
- 2.4.14 The 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. See 42 CFR §440.170(4)(ii). As defined in 42 CFR §411.354(a), financial relationship means a direct or indirect ownership or investment interest in any entity that furnishes designated health services or a direct or indirect compensation arrangement with any entity that furnishes designated health services.

3.0 CORE SERVICES

MMO, on behalf of SCDHHS, reserves the right to make adjustments within the general scope of the contract by Change Order on an as needed basis. The overall

Scope of Work and Deliverables required under this RFP may vary from year to year as South Carolina's program changes due to federal and state Medicaid program requirements.

The Broker must perform all tasks related to the provision of NEMT for members. The Broker's primary objective will be to provide NEMT services in accordance with federal and state laws, regulations, policies, interpretations, and procedures. The Broker must perform all the duties below throughout the life of the contract unless otherwise stated, which must be included in the proposal price:

- 1) Maintain adequate staff and facilities.
- 2) Develop and maintain comprehensive policies and procedures.
- 3) Process transportation requests from members, facilities, and other individuals requesting services on behalf of the member.
- 4) Verify member eligibility for Medicaid.
- 5) Operate a telephone call center and develop a call center operations manual.
- 6) Establish an orientation and training program for transportation broker employees.
- 7) Recruit and maintain an adequate transportation provider network.
- 8) Establish an orientation and training program for transportation providers.
- 9) Inform and educate members and facility providers about the NEMT Program and process.
- 10) Develop and implement a complaint tracking and resolution plan.
- 11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
- 12) Provide administrative management oversight.
- 13) Submit management and performance reports.
- 14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
- 15) Protect recipient confidentiality.

The Broker must ensure that all of these functions are performed properly and efficiently.

3.1 IMPLEMENTATION

Implementation encompasses those activities required to ensure a smooth transition from the incumbent Broker to the successful Offeror. This will entail development of a series of SCDHHS-approved plans and performance of

Eastern Standard Time. The purpose of the business office is for the Broker to have a physical presence within the state for conducting business with Medicaid members and transportation providers.

3.2.10.1 The Broker must provide an answering device for use during the periods any of the office(s) are closed to leave messages. The Broker must have the capacity to send and receive facsimiles and e-mail at the business office at all times.

3.2.10.2 The Broker must provide an administrative telephone number that will enable SCDHHS staff to reach the Project Director and key staff directly without going through the call center. The Broker must provide emergency contact numbers for the Project Director and key staff members. At least one key staff member with decision-making authority must be available for emergencies 24 hours a day, 7 days a week.

3.2.11 Administrative Costs:

The Broker must maintain detailed records documenting the administrative costs and expenses incurred pursuant to the contract, for the purpose of monitoring and evaluation by SCDHHS and other State and Federal personnel. The Broker must have the capacity to reproduce documents as requested.

3.3 OPERATIONAL REQUIREMENTS

The Offeror must ensure all elements of this RFP are functional on the Operations start date.

3.3.1 Trip Request Processing:

The Broker will be responsible for receiving member telephone calls and performing intake services that includes caller verification and one call scheduling for transportation services within the SCMSA. The Broker must develop and implement written policies and procedures that detail the transportation scheduling operations to include:

3.3.1.1 Verify the address of the client by using the address provided in the eligibility file.

3.3.1.2 The Broker may accept requests from temporary alternative addresses on an exception basis. Acceptable temporary alternative addresses include, but are not limited to:

3.3.1.2.1 Addresses of a family member or friend when the client is discharged from a hospital or day surgery and requires recovery assistance

3.3.1.2.2 Addresses of shelters

3.3.1.2.3 A nursing home address instead of the actual residence address; and

3.3.1.2.4 Other circumstances approved by SCDHHS

3.3.1.3 Verifying the purpose of the trip is for a Medicaid covered service

3.3.1.4 Determining the appropriate mode of transport and level of service

3.3.1.5 Authorizing transportation services on a per-trip or recurring basis; and

3.3.1.6 Scheduling, grouping and assigning trips individually or as standing orders

3.3.2 Eligibility Verification Process

3.3.2.1 Verify the client's eligibility status relying on a daily data file provided by SCDHHS

3.3.2.2 Verify eligibility, when the client's name is not shown on the daily data file, via one of these methods:

- 1) SCDHHS' Interactive Voice Response System (IVRS). A toll free number is available to providers to call for information regarding client's last Medicaid payment and eligibility verification. The IVRS toll free number is 1-888-809-3040, at no cost to providers.
- 2) South Carolina Web-Based Claims Submission and Eligibility Verification System. This allows the provider to verify eligibility using a web-based tool. Claims may also be submitted via this tool. However, this is not a requirement – it may be used for eligibility verification only. Contact the HIPAA Support Center at 1-888-289-0709 for information or for access to this tool.
- 3) An appropriate SCDHHS external access point (i.e., point of service (POS) device)
 - Companion Technology PAID System
Contact Person: Jane Brown, 803-264-2597
 - Health Data Exchange (HDX)
Contact Person: Brian Gill, 610-219-1859
 - Medifax
Contact Person: Jon Segroves, 800-819-5003
 - Passport Health Communications
Contact Person: Lloyd Baker, 888-661-5657

3.3.2.3 When the client's eligibility cannot be verified as outlined in the steps above, contact designated SCDHHS staff to verify eligibility status.

3.3.3 Service Requests/Disenrollment

The Broker must accept members in the order in which they request NEMT without restriction. The Broker will not discriminate against members requesting NEMT on the basis of health status or need for NEMT services, race, ethnicity, color, national origin or religious affiliation and will not use any policy or practice that has the effect of discriminating on the basis of race, color, ethnicity, national origin or religious affiliation. All network transportation providers must specify the reasons (i.e. repeated no shows, disruptive behavior) for which the Broker may request refusal to provide NEMT to a member. The Broker will be required to demonstrate how the member's continued enrollment seriously impairs the transportation provider's ability to furnish NEMT to the particular member or other members. All requests for disenrollment must be made in writing to SCDHHS for approval.

3.3.4 Retroactive Eligibility:

The Broker must establish a process to pay contracted and non-contracted transportation providers for services rendered to individuals that have eligibility approved retroactively to the time service is rendered (for example, nursing homes that have an ambulance service transport patients to medical appointments prior to that patient having his eligibility approved). The process must include reimbursement for services up to ninety days from the date of service. SCDHHS will approve the process and the rate structure based on the level of service and the region the transportation originates from. The number of members using NEMT services that are enrolled retroactively is estimated to be seven hundredths percent (0.07%) of total enrollment, based on historical retroactive enrollment and historical NEMT transportation utilization rates.

3.3.5 Fulfillment of All Trip Requests:

3.3.5.1 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.

3.3.5.2 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.

- 3.3.6 Broker-Operated Vehicles:** As provided in 42 CFR 440.170(a)(4)(ii)(B), the Broker may only operate vehicles to provide transportation services in very limited circumstances. If the Broker meets any of these limited circumstances, prior to use by the Broker, the vehicles must be inspected and the drivers must be credentialed using the same requirements applied to the transportation providers.
- 3.3.7 Insurance:** In addition to the strict quality assurance standards that the transportation providers must meet, the Broker must ensure transportation providers have insurance coverage. State law and regulations specify minimum insurance requirements for entities involved in the provision of Medicaid Transportation services. The Broker is responsible for ensuring required and adequate coverage is obtained and maintained during term of contract.
- 3.3.8 Accidents, Injuries, and Incidents:** 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. Accidents, injuries, and incidents must be reported to SCDHHS as follows:
- 3.3.8.1 Accident/Incident with Injury:** Notification within 1 hour
- 3.3.8.2 Accident/Incident without Injury:** Notification within 6 hours
- 3.3.9 Trip Recovery:**
The Broker must ensure that each provider is responsive to all vehicle breakdowns, problems or delays in delivering service. The Broker must ensure that the provider has adequate backup vehicles to recover the trips, and ensure that members are not late for their appointments and do not spend excessive time on the vehicles.
- 3.3.10 Notification by Transportation Providers:**
The Broker(s) must ensure that the transportation provider immediately informs Broker of any breakdown, accident or incident as well as any other problems that might cause a delay of more than ten (10) minutes in the trip. Immediately after the Broker is notified of a delay exceeding ten (10) minutes, the Broker must also notify the members or their representatives and the facilities or families at the destination point. If necessary, other transportation should be arranged to ensure appropriate transport.
- 3.3.11 Hazardous Weather Plan:**
The Broker must have a written plan that describes how the Broker will provide transportation for members who need dialysis and other critical medical care during hazardous weather conditions such as, but not limited to, hurricanes, flooding, ice storms, tornado warnings or heavy snowfall.

The Broker must ensure that contracted transportation providers maintain a hazardous weather policy consistent with the Broker's. A copy of the Hazardous Weather plan should be included with proposal.

3.3.12 Communications Plan:

The Broker must have a written plan that describes how the Broker will communicate effectively with members, transportation providers, health care providers, and SCDHHS. The written plan must be sufficiently detailed to enable SCDHHS to determine that business communication with all stakeholders will be performed in a logical sequence and in a timely manner. Each item or step listed in the communication plan must include a description of the processes and protocols to be used to ensure timely, accurate and verifiable communication throughout the transportation enterprise. The plan must include escalation procedures for conflict resolution between all stakeholders and the broker. The escalation process must include specific escalation procedures for members, transportation providers, health care providers, and SCDHHS.

3.3.13 Broker Website

The broker must provide an informational website exclusively for South Carolina Medicaid transportation. The web site must include the procedures required to request transportation, complaint and appeal procedures, and contact information. All website content and functionality will require SCDHHS approval.

3.3.14 Provider Operations Manual:

The Broker will be responsible for the management of overall day-to-day operations necessary for the delivery of non-emergency transportation services and the maintenance of appropriate records and systems of accountability to report to SCDHHS and comply with this RFP.

3.3.14.1 The Broker must submit a provider operations manual detailing all procedures to be used in scheduling and delivery of transportation services. This manual must be submitted to SCDHHS as a part of the response to the RFP. SCDHHS will complete a review within 30 business days after the contract award. The Broker must then incorporate any modifications required by SCDHHS and resubmit the plan for review within 15 business days of receipt.

3.3.14.2 A Broker will not be allowed to begin operations without an approved transportation provider operations manual. This operations manual must be given to all Broker staff and transportation providers and must be incorporated into all training programs for new employees and transportation providers. The manual and any subsequent updates will be made available to

SCDHHS in an electronic format and will require SCDHHS review and approval annually.

3.3.15 Monitoring Plan:

The Offeror must include a Monitoring Plan in the initial proposal. 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.

Monitoring activities must include, but are not limited to:

- On-street observations
- Accident/incident reporting
- Statistical reporting of trips
- On Time Performance Measures
- Ride Time Performance Measures
- A detailed analysis of complaints
- Driver licensure, driving record, experience and training compliance
- Compliance with vehicle requirements
- Member safety, assistance and courtesy
- Completion of driver logs
- Driver communication with dispatcher
- Routine vehicle inspections, maintenance, emergency equipment and breakdowns
- A detailed analysis of 're-routed' trips
- Detailed analysis of cancelled trips
- Gas reimbursement program
- Transportation Providers, including providers of Individual Transportation
- Volunteer Drivers
- Post trip member satisfaction questionnaires for all overnight trips

3.3.15.1 Corrective Actions:

The Broker must have written procedures in place for taking appropriate corrective action whenever inappropriate or substandard services are furnished or when services that should have been furnished were not. In addition, the Broker must have written procedures for taking appropriate action if a transportation provider is out of compliance with federal or State laws or regulations. The Broker must report, not less than monthly, to SCDHHS on monitoring activities, monitoring findings, corrective action taken, and improvements by the transportation provider.

3.3.15.2 Semi-Annual Satisfaction Survey:

As part of the Monitoring Plan, the Broker must conduct member satisfaction surveys regarding Medicaid transportation in the region every six months. The initial six-month period must be the first six months the Broker delivers services under this RFP. The survey must be in a format and use sampling strategies that are provided or approved by SCDHHS. SCDHHS may provide survey questions that are to appear in the survey. All survey questions must be authorized by SCDHHS. Periodic sampling issues must include, but are not be limited to:

- Reservation process
- Confirmation of scheduled trip
- Driver and Broker staff courtesy
- Driver assistance when required
- Overall driver behavior
- Driver safety and operation of the vehicle
- Condition, comfort and convenience of the vehicle
- Punctuality of service; and
- Complaint resolution

The purpose of the survey is to verify the availability, appropriateness and timeliness of the trips provided and the manner in which the Broker's and transportation provider's staff interacted with members. The survey results are to be submitted to SCDHHS no later than 30 business days from the end of each six-month period of actual service operation.

3.3.16 Surveys of Providers

The Broker must conduct periodic surveys of health care provider to determine the perception of the quality of the services and to monitor health care provider abuse of the NEMT Program.

3.3.16.1 Medical Provider Surveys

The Broker must conduct periodic surveys of medical providers to whom members were transported to determine if appointments were actually scheduled, if the member was seen at the designated time, and if the appointment was medically necessary. For the prior operation month, the Broker must submit to the SCDHHS Medicaid Transportation Manager a monthly summary report of member and provider surveys, by the tenth of the next month. The format of the report is to be prior approved by the SCDHHS. Failure to complete these surveys or provide the reports may result in liquidated damages detailed in Section 3.17 of the RFP.

3.3.17 Quality Assurance Review: SCDHHS reserves the right to make quality assurance reviews on services under this contract. These reviews may be conducted in an anonymous manner and without advance notice. The broker will comply with requests from SCDHHS during unannounced reviews.

3.3.18 Hardware/Software

The Broker's computer system must be capable of performing the following functions for daily operations and for SCDHHS audit and billing purposes:

- Recording of member's trip information
- Recording of transportation request denials
- Recording of all trip cancellations
- Recording of all trip re-route request
- Storage of data in a designated data base format
- Daily back-up of database
- Generation of hard copies of data for each authorized trip
- Electronic transmission of authorization data to SCDHHS
- Electronic transmission of authorizations to selected providers
- Extraction of data by member ID number for creation of history file of approvals
- Ability to generate monthly encounter data using the 837P transaction set according to the implementation guide described on the SCDHHS website
- Record all telephone calls at all locations that can be accessed to review conversations about transportation services when required

3.3.19 Contacts with Media:

The Broker works on behalf of SCDHHS. Any interactions with the media must be prior approved by SCDHHS for content and delivery.

must obtain prior approval from SCDHHS Division of Medical Support Services.

3.6.2 Determine the Appropriate Mode of Transport

When free transportation is not available to the member, payment must be authorized for the least costly means of transportation available, from the following options:

- City or County public transportation
- Gas reimbursement program
- NEMT ambulatory transportation
- NEMT wheelchair transportation
- NEMT stretcher transportation
- NEMT Basic Life Support (BLS) ambulance transportation
- Intrastate public conveyance (bus, train, aircraft)

Note: If the Broker's area of operation includes public transit services, the Broker is prohibited from establishing or maintaining service agreements with public transit services which result in fares, payments or rates being charged for members that are greater than those charged to the general public.

Emergency ambulance service is not provided through the NEMT Program. If the request is for emergency ambulance service, the Broker must instruct the caller to dial 911.

The Broker must educate members to call at least 72 hours (3 days) in advance when requesting transportation. If a member requests same day service, the Broker will determine whether there is a need for immediate medical care due to injury or illness through verification with the member's medical provider. However, even if there is no need for immediate medical care, the Broker will make every reasonable effort to accommodate the member's request for transportation.

3.6.3 Travel Requiring An Overnight Stay

The Broker must make travel arrangements for Members and an escort to attend Medicaid covered services requiring an overnight stay. Additional escorts may be allowed based on medical necessity. The Broker must make arrangements and pay for (either directly or by reimbursing the Member) for all travel required including ground transportation, meals, and lodging. Specific requirements unique to overnight trips include:

3.6.3.1 Requests must be initiated by SCDHHS or the Member's MCO

3.5.2.17.4 The average number of calls abandoned daily must be less than two (2) percent.

3.5.2.17.5 The average time on hold before abandonment must be less than 90 seconds.

3.5.2.18 The Broker must provide detailed analysis, on a monthly basis, of the quantity, length, and types of calls received, the amount of time it takes to answer them initially, and the number of calls transferred for each of the separate telephone lines required. The Broker must have a system in place to measure and report on the following call center performance metrics for any time period requested by SCDHHS:

3.5.2.18.1 the number of calls received

3.5.2.18.2 the average speed to answer calls, excluding the initial announcement message

3.5.2.18.3 the average talk time

3.5.2.18.4 the number of calls placed on hold

3.5.2.18.5 the average time on hold for calls placed on hold

3.5.2.18.6 the abandonment rate

3.5.2.18.7 the average time on hold before abandonment

3.5.2.18.8 the number of calls in the queue by 15 minute intervals

3.6

TRANSPORTATION SERVICES AUTHORIZATION

3.6.1 Determine Purpose of NEMT Request

The Broker must determine if the purpose of the request is to transport a member to a medical service that is covered by Medicaid (Fee for Service or Managed Care). For transportation request not covered by Medicaid Fee for Service and the member is enrolled in a Managed Care Organization (MCO), the Broker must deny the request and refer the member to the MCO for transportation services. If the transportation request is for a non-covered service, the Broker must deny the request. A list of covered Medicaid services will be provided to the Broker. The Broker must contact the healthcare provider to whom the client requests NEMT to verify that an appointment exists. The member's freedom of choice of medical provider must be respected. For transportation requests outside the SCMSA, the Broker must obtain prior approval by SCDHHS Division of Physicians Services or the member's MCO if enrolled in an MCO. For overnight transportation request inside the SCMSA, the Broker

- 3.6.3.2 Member communications and confirmation of services must not be subcontracted to another provider or vendor
- 3.6.3.3 Travel arrangements must be flexible and accommodate open ended return travel when required
- 3.6.3.4 May require specialized authority for on duty supervisors to ensure Member's needs are met for urgent requests based on the type of medical service (for example, transplants and specialized surgeries)
- 3.6.3.5 The Broker will prepay for all airline tickets, bus tickets, train tickets and lodging
- 3.6.3.6 The Broker may either arrange prepayment for or reimburse the Member for ground travel and meals
- 3.6.3.7 Reimbursement rates for Members for meals will fall within the guidelines established by the South Carolina State Budget and Control Board for reimbursement of employees.
<http://cg.sc.gov/agencyinfo/disbregs/travel.htm>
- 3.6.3.8 Reimbursement of Members for mileage will be limited to travel between the approved medical facility and the place of lodging and for mileage to and from other locations directly related to day to day living such as trips to and from restaurants and drug stores
- 3.6.3.9 The Broker will distribute satisfaction questionnaires to Members and maintain original responses for all travel that includes overnight lodging
- 3.6.3.10 The Broker must resolve all overnight travel issues for Members in transit within one (1) hour of the time the Member calls.

3.6.4 Other Available Means of Transportation

The Broker must interview the member to determine if other sources of transportation are available to the member. In the event the Broker determines that the member has made reasonable efforts, and does not have other means of transportation, the Broker will arrange for transport.

3.6.5 Geographic Considerations

The Broker for each region is responsible for ensuring the provision of transportation services to all eligible members to or from a stated point of origin or to or from specific Medicaid reimbursable service at the request of the member or person acting on behalf of the member. Transportation must be provided without the collection of any co-payment.

The Broker is not responsible for arranging Medicaid NEMT services for Medicaid members who reside outside the region for which the Broker holds a valid contract. The Broker must refer an eligible member to the Broker covering the member's county of residence. The Broker must arrange travel into and out of other regions when the Medicaid member being transported is a resident of the NEMT region in which the Broker has a contract.

3.6.6 Escorts and Other Passengers

A transportation assistant or other passenger may ride as an escort with a member at no extra charge. The escort is expected to assist the member and the driver as requested. An escort is an individual who is not an employee of a NEMT transporter and whose presence is required to assist a member during transport or while at the place of treatment. An escort is typically a relative, guardian, or volunteer. Up to two minor children may ride with an eligible member, on a space available basis, also at no charge for trips within the SCMSA. For overnight trips, the Broker must make travel arrangements for escorts based on medical necessity. The Broker is expected to allow for the transportation of these extra passengers. Escorts and children must be scheduled when the member makes the trip reservation to ensure adequate space on the vehicle.

Escorts for members under the age of 14 are required. Members age 15 through 17 may request a parent or guardian as an escort. In some cases, the transportation provider may require an escort for an adult passenger. A member age 18 or older who requests an escort must submit a medical certification statement to the Broker. The certification must document that the recipient has a physical or mental disability that would require assistance, such as the following:

- Blindness
- Deafness
- Mental retardation
- Mental illness or diminished capacity
- Physical handicap to a degree that personal assistance is necessary

3.6.6.1.1 The Broker will advise the transportation provider when additional seating is required for other passengers.

3.6.6.1.1.1 The Broker must inform the transportation provider that the provider may not charge the member or anyone else for transporting persons accompanying the member.

3.6.6.1.2 The Broker must assess the needs of the escort to make certain that adequate transportation is arranged; to include the possibility the

escort may be non-ambulatory. The Broker policy and procedure regarding escorts must address the possibility of a special needs escort.

3.6.6.1.3 Newborn children who require transportation and do not yet have an assigned Medicaid number may be transported under their mother's Medicaid number for billing purposes.

3.6.6.1.4 Transportation for the member and the authorized escort will be documented under the member's Medicaid number even if both individuals are Medicaid members. Parents or guardians escorting more than one child must be counted once for the family.

3.6.7 Necessity for Wheelchair Accessible Vehicle

The Broker must determine whether the member requires a wheelchair accessible vehicle. Wheelchair accessible vehicles must only be authorized for members who are non-ambulatory. The broker must determine if there are any special considerations for wheelchair transportation requests to include accommodations for extra wide chairs and exceeding maximum weight limits for standard wheelchair lifts. The Broker must document the lifting capacity of each wheelchair vehicle in its network in order to route trips to providers with the appropriate lift capacity for members.

3.6.7.1 Wheelchair transportation:

For places such as Emergency Rooms at Hospitals and Urgent Care, and any other facilities where frequent discharge pickups are made and where a member's current disability requires the use of a wheelchair but they may not have access to one, the Broker will insure that an adequate number of transportation providers have on hand the necessary wheelchairs and ability to secure the same for the safe provision of transport. For all trip requests, the Broker must assess the member's needs for a wheelchair. Typically trips will involve members being discharged from facilities after an ambulance or other urgent transport. They will be returning home to a nursing home or being transferred between facilities. A wheelchair will be made available for the member's use during the transport only. The provider will be responsible for insuring the return and maintenance of their own property.

3.6.8 Utilization of Services

The Broker may not erect barriers or appear to take any action that impinges on the ability of a member to access transportation service because of issues with prior utilization of NEMT services. SCDHHS will approve or deny any request for an interruption of service and may impose

an alternative means to resolve the underlying issue and ensure transport in the appropriate mode to critical medical care. The Broker may not request disenrollment because of a change in the member's health status, or because of the member's utilization of NEMT services, diminished mental capacity, uncooperative or disruptive behavior resulting from his or her special needs (except when his or her continued enrollment seriously impairs the Broker's ability to furnish services to either this particular member or other members). All requests by the broker for disenrollment must be made in writing to SCDHHS with sufficient documentation outlining the circumstances for the request.

3.6.9 Other Procedures and Responsibilities for NEMT Scheduling

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:

3.6.9.1 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.

Waiting times and rides beyond what is required for the transport are to be controlled to the maximum extent possible for this eligible group. SCDHHS intends to ensure that members with special needs receive benefits and equal access; availability and timeliness without regard to special needs or any other consideration to transport or circumstance.

3.6.9.2 In the case of a parent or guardian of a child falling under the South Carolina state guidelines for child safety/restraint seating; the parent or guardian should provide appropriate car seats for infants and children for all legs of a trip originating at the member's residence. For places, such as Children's and Maternity Hospitals and any other facilities where frequent discharge pickups are made and where a child requiring a car seat may not have one, the Broker will insure that regular providers have on hand the necessary car seat(s) and ability to secure the same for the safe provision of transport. For all trip requests, the Broker must assess

the member's needs for child safety/restraint seating. Typically trips will involve newborns or children brought in by ambulance and subsequently being discharged home or transferred between facilities. The provider will be responsible for insuring the return and maintenance of their own property.

3.6.10 Denial of Service

If, for any reason, there is an issue with the transportation request that results in the denial of service, the reservation process will require an objective method for denial determination and a standardized process for communicating all denials to members.

3.6.10.1 Denial of Service Determination

The reservation process must include an objective and consistent method of correctly determining whether the request for service is approved or denied. The process must include call scripts and a list of corresponding codes available to the Customer Service Representative for coding denials appropriately.

3.6.10.1.1 The broker **must** deny requests for transportation only under the following circumstances:

- The request is made for transportation to a non Medicaid covered service.
- The member does not meet transportation protocol (i.e., a minor without escort, absence of a required car seat)
- Unable to confirm medical appointment with provider
- Ineligible for Transportation Services. (Appendix K)
- The total cost of the member's transportation will clearly be covered by other means, such as Medicare or Medicare part B or a MCO
- The member is suspended or terminated from participation in the program by SCDHHS
- Prior authorization is not supplied by SCDHHS or Member's MCO for overnight stay.

3.6.10.1.2 The Broker **may** deny a request for transportation under the following circumstances:

- Non-Urgent request made without the required three (3) day notice if all reasonable attempts to

accommodate the transportation request have been made

- Incomplete information regarding the pick-up or destination pending verification
- For situations that may require a record of the transportation request, but may not be covered until after service is rendered (i.e. retro-eligibility, Dual eligibility).

3.6.10.2 Denial of Service Communication

3.6.10.2.1 If for any reason there is an issue with the details of the trip resulting in a denial of the request for transportation services, the reservation process must include a standardized process for communicating all denials to members. The written communication of denial of service must include the following key elements:

- Notice to the member within three (3) working days of the denial of service
- The specific reason for the denial
- The process for appealing the decision for denial of service
- All contact information required for appealing the denial of transportation services

3.6.10.2.2 The original notification of denial of service must be mailed or handed to the member and a copy must be maintained in the broker's member file. If the transportation request is being denied because the member does not live in the region covered by the broker, the broker is required to give the member the correct contact number to request services.

3.6.10.2.3 The member will be allowed thirty (30) days to appeal the initial decision. Failure to appeal within thirty (30) calendar days waives the member's right to further appeal. Upon receipt of a timely appeal, the Broker has thirty (30) calendar days to complete the appeals process.

3.6.10.2.4 In the event the Broker is unable to resolve the dispute, the member must be given written, final notice informing the member of his/her right for further appeal to the SCDHHS. The Broker must agree to defend its decision, if necessary, at the time of any administrative hearing on the matter and without cost to SCDHHS. All initial and final notices of

service

appeal must be approved by SCDHHS for content and format prior to program operation. If the member submits an appeal to SCDHHS, the Broker, upon request from SCDHHS, must submit copies of the notices to SCDHHS within two (2) working days of the request.

3.6.10.2.5 At the conclusion of the appeals process, the Broker must implement any corrective action within ten (10) working days following notification by SCDHHS. Corrective action may result in a change of policy or procedures regarding delivery of services.

3.6.11 Trip Assignment

The Broker must document whether the transportation provider accepts or declines the assigned trips. The Broker and transportation provider must mutually agree upon a method of communicating trip referrals. If the transportation provider refuses the trip, the Broker must immediately schedule the trip with another transportation provider, and cancel the first. The Broker must notify the member of the change in transportation provider. Once the trip is accepted by the transportation provider, the Broker will not reassign the trip solely for the convenience of the Broker. If a transportation provider fails to pick up a member for a scheduled trip, the Broker must cancel the authorization for the trip. The Broker must monitor trips assigned to transportation providers to ensure they are not over-booked. Brokers are required to monitor and report the canceled and rerouted trips.

3.7 TRANSPORTATION PROVIDER NETWORK

Members' access to healthcare is highly dependent on a reliable network of professional transportation providers who are paid fairly for their work. The Broker must establish an adequate network of transportation providers to deliver non-emergency transportation services to Medicaid members in each region.

3.7.1 The Broker must establish a network of transportation providers to deliver members to and from covered medical services. In establishing and maintaining the NEMT network, the Broker must consider:

- The anticipated Medicaid enrollment
- Expected utilization of services, taking into consideration the characteristics and health care needs of specific Medicaid populations
- Number and types (training, experience and specialization) of NEMT providers required to furnish the contracted Medicaid services

- The geographic location of providers and members, considering distance, travel time and the means of transportation ordinarily used by members; and
- Requirements for GPS tracking and recording of trip activities

The Broker will negotiate individual service delivery rates with each qualified transportation entity to include Individual Transportation Providers with privately owned vehicles (ITPs). Any negotiated rate must be fully disclosed in the Agreement between the transportation provider and the Broker.

- 3.7.2** The Broker must demonstrate that the transportation provider network provides adequate access in each city or county in the region, based on the number of members and the number of trips provided. If the Broker or SCDHHS identifies insufficient transportation resources in a region, the Broker must, within five (5) working days, develop and implement a provider recruitment plan to develop sufficient resources to meet the transportation needs of the Medicaid members in the geographical areas covered. During this interim period, transportation services must still be delivered utilizing alternate resources. The Broker must develop contingency plans for all regions in the event of changes with contracted NEMT providers.

- 3.7.2.1** If a member requires a level of service that is not available, the Broker must arrange transportation to accommodate the member's needs, to include upgrade to the next level of service.

- 3.7.3** The Broker must have the capability of transporting bariatric patients in each region. In each region, the Offeror must identify at least one transportation provider for bariatric transports.

- 3.7.4** The Broker must maintain a network of transportation providers that is supported by signed standard contracts. All contracts for the provision of transportation services must specify the following minimum requirements and responsibilities for the Broker and transportation provider:

- 3.7.4.1 Scope of services required from the transportation provider
- 3.7.4.2 How the services, activities, and tasks to be performed by the transportation provider will be carried out
- 3.7.4.3 Pickup and delivery requirements
- 3.7.4.4 Broker-provided training on the Broker's policies and procedures
- 3.7.4.5 Procedure for contacting members in advance to notify of the time of pick-up
- 3.7.4.6 Dispatching and delivery of service, with a focus on customer care and satisfaction

- 3.7.4.7 Broker-provided training on SCDHHS policies and requirements for transportation providers, drivers and escorts
- 3.7.4.8 Procedures the Broker will employ to monitor the transportation provider and how noncompliance will be addressed by the Broker
- 3.7.4.9 Contract effective date and duration, termination provision, and renewal options;
- 3.7.4.10 Any financial penalties that may be assessed against providers
- 3.7.4.11 Any incentives that may be available to providers
- 3.7.4.12 Reporting requirements of the transportation providers including specific requirements for driver logs
- 3.7.4.13 Financial terms of the agreement, including billing schedules and terms of payment for the various transportation modes
- 3.7.4.14 Allowances or coverage for no shows and waiting times
- 3.7.4.15 Provider grievance procedures
- 3.7.4.16 Driver, vehicle, and equipment requirements and service standards necessary to carry out the range of services covered
- 3.7.4.17 Required certification of small businesses, minority-owned businesses, and women-owned businesses with the South Carolina Minority Business Affairs
- 3.7.4.18 Health Insurance Portability and Accountability Act (HIPAA) requirements
- 3.7.4.19 Agreement by the transportation provider to be bound by the mandatory terms and conditions of this Contract; and
- 3.7.4.20 Specific provision that allows SCDHHS and other authorized entities to conduct on site reviews of all records pertaining to NEMT transportation, including employee and vehicle records and all processes and procedures used for the execution of transportation services. Site reviews may be announced or unannounced

The Broker must submit a copy of its standard contract agreement with the NEMT providers as part of its proposal. SCDHHS must approve the standard contract and all of its provisions, including liquidated damages and sanctions, in advance. SCDHHS must be notified and approve any amendments to the standard contract agreement excluding rates. The Broker must provide DHHS with copies of all transportation provider contracts when requested.

- 3.7.5 The Broker must have documented standards for selection and retention of transportation providers. The Broker may not discriminate for the participation, payment or indemnification of any transportation provider who is acting within the scope of his or her license or certification under

applicable state law, solely on the basis of that license or certification. The Broker's transportation provider selection criteria cannot discriminate against particular providers that serve high-risk populations. If the Broker declines to include individuals or groups of transportation providers in its NEMT network, the Broker must give the affected transportation provider(s) written notice of the reason for its decision. This will not be construed to require the Broker to:

- Contract with transportation providers beyond the number or type necessary to meet the needs of the members
- Refrain from using different compensation amounts for different NEMT specialties; or
- Refrain from establishing measures that are designed to maintain quality of services while controlling costs consistent with its responsibilities to the Medicaid program.

3.7.6 The Broker is encouraged to utilize public transportation whenever possible if it is cost-effective as well as appropriate for the member and to negotiate service agreements with such entities when appropriate.

3.7.7 The Broker is prohibited from establishing or maintaining service agreements with NEMT providers who have been excluded from the Medicaid program by SCDHHS for fraud or abuse. In accordance with sections 1128(a)(1) and 1932(d)(1) of the Social Security Act, 42 CFR § 438.610, and other applicable statutes and regulations, the Broker must not participate with any individual or entity that has been excluded from participation in federal health care programs. Federal health care programs include Medicare, Medicaid, and all other plans and programs that provide health benefits funded directly or indirectly by the United States. A searchable database of persons excluded from participation can be found at: <http://www.oig.hhs.gov/fraud/exclusions.asp>

Liquidated damages for allowing a provider listed on the exclusion list to transport are shown in Section 3.17.

3.7.8 The Broker must provide procedures to verify the financial stability of all contracted transportation providers in its network. The Broker must also identify how transportation providers' noncompliance with these procedures will be addressed.

3.7.9 Performance Requirements

3.7.9.1 The Broker must terminate a service agreement with a transportation provider when substandard performance is identified, as documented by the Broker and approved by SCDHHS, or when the transportation provider has failed to take satisfactory corrective action within a reasonable time period, as

documented by the Broker and approved by SCDHHS. SCDHHS reserves the right to direct the Broker to terminate any service agreement with a transportation provider when SCDHHS determines it to be in the best interest of the State.

3.7.9.2 Transportation Provider Daily Logs: The Broker must require that the transportation providers' drivers maintain daily logs containing, at a minimum, the following information:

- Date of service
- Driver's name
- Driver's signature
- Member's name
- Member's signature
- Escort full name (if applicable)
- Escort signature (if applicable)
- Vehicle ID number
- Each authorized member's scheduled and actual pick up time
- Member no-show indicator
- Each authorized member's scheduled and actual drop off time
- Actual service level per trip provided
- Mileage for each leg of trip

3.7.10 Trip Manifests: Forty-eight hours prior to the day of the trip, the Broker must provide a trip manifest to the transportation provider. The manifests supplied to transportation providers must have all necessary information for them to perform the trip, including but not limited to: a unique trip identifier for billing purposes, the member's name, the member's phone number, the pick-up address, the destination address (including the name of facility and phone number), the mode of transport, the weight of an individual with medical equipment to ensure safe lifting capacities, the number of additional persons scheduled for the trip (escorts, parents with other minor children), and any special needs or instructions regarding the member, the pick-up location or other passengers. If the Broker sends a trip manifest to a transportation provider less than 48 hours before the pick-up time, they must contact the transportation provider in advance by telephone to confirm that the trip will be accepted. Trip manifests must also provide the driver with information regarding whether door-to-door, hand-to-hand or curb to curb service is required. The Broker will include provisions regarding these requirements in its service agreements with transportation providers. The Broker must provide trip reservation data to

transportation providers that can be used to load trips into the transportation provider's routing and scheduling software.

3.7.11 On-time Performance:

The Broker must have procedures in place to ensure that vehicle availability is adequate to fulfill the required standards of promptness defined in the table below. No more than one-quarter percent (0.25%) of the trips should be missed (provider no-show) in each region per day. No more than ten percent (10%) of trips should be late for member pick up in each region per day. No more than five percent (5%) of trips should be late for member drop off to their appointment in each region per day. Arrival before the scheduled pick-up time is permitted; however, a member must not be required to board the vehicle before the scheduled pick-up time. Member pick-up more than thirty (30) minutes before the scheduled pick up-time and member drop-offs more than forty-five (45) minutes before the scheduled appointment times will be considered outside the on time performance requirement. The transportation provider is not required to wait for the member more than ten (10) minutes after the scheduled pick up time.

3.7.11.1 On-time Performance Requirements

Routine Trip Requests	
A - Leg Pick Up	within 30 minutes of the scheduled pick up time
A - Leg Drop Off	* up to 45 minutes prior to the appointment time and no later than the appointment time
B - Leg Pick Up	** within 30 minutes of the scheduled pick up time OR within one hour of the call requesting pick up for open return times
B - Leg Drop Off	members must be dropped off at their home destination as early as possible and within the normal drive time plus one hour
X - Leg Pick Up	** within 30 minutes of the scheduled pick up time OR within one hour of the call requesting pick up for open return times
X - Leg Drop Off	members must be dropped off as early as possible and within the normal drive time plus one hour
Same Day Trip Requests	
A - Leg Pick Up	within three hours of the call requesting transportation

A - Leg Drop Off	* up to 45 minutes prior to the appointment time and no later than the appointment time
B - Leg Pick Up	** within 30 minutes of the scheduled pick up time OR within one hour of the call requesting pick up for open return times
B - Leg Drop Off	members must be dropped off as early as possible and within the normal drive time plus one hour
X - Leg Pick Up	** within 30 minutes of the scheduled pick up time OR within one hour of the call requesting pick up for open return times
X - Leg Drop Off	members must be dropped off as early as possible and within the normal drive time plus one hour

* Members must not be dropped off prior to the facility opening time

** Members must be picked up prior to the facility closing time

3.7.11.2 The on time performance measure calculations are:

3.7.11.2.1 On time pick up percentage = Number of pickups where the actual pick up time is within thirty (30) minutes of the scheduled pick-up time divided by the total number of pickups for the time period being measured multiplied by 100 (e.g. $9/10 = .9 \times 100 = 90\%$.)

3.7.11.2.2 On time drop off percentage = Number of drop offs where the actual drop off time is less than or equal to the scheduled appointment time and no more than forty-five (45) minutes early divided by the total number of drop offs for the time period being measured multiplied by 100.

3.7.11.3 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:

3.7.11.3.1 Medicaid members must be advised of pick-up times when the transportation request is made.

3.7.11.3.2 The Broker must ensure that members are notified of changes in scheduled pick-up times.

3.7.11.3.3 For the return pick-up from an appointment, the member must contact the broker and the broker will contact the appropriate transportation provider. The transportation provider's vehicle must arrive within one (1) hour from the time the member calls the broker and no later than the close of the business day for the health care provider.

3.7.11.3.4 The Broker may negotiate waiting, pickup and drop-off times with members to maximize multi-loading opportunities. The Broker may authorize the transportation providers to negotiate pick-up time and drop off time to maximize multi-loading opportunities.

3.7.11.3.5 In multi-load situations, the Broker must ensure that no member is forced to remain in the vehicle more than one (1) hour longer than the average travel and level of service loading time for direct transport from point of pick-up to destination.

3.7.11.3.6 The Broker is responsible for ensuring that health care providers are contacted when transportation providers will arrive late for member appointments or pickups.

3.7.12 RIDE TIME PERFORMANCE MEASURE

3.7.12.1 The Broker must have procedures in place to ensure that vehicle availability is adequate to fulfill standards of minimal ride time for the member. The ride time for any member will be limited to the normal drive time from the pickup location to the destination location plus loading and unloading time appropriate for the level of service plus one hour. The additional hour is included to allow for multi load vehicle routing. No more than one percent (1%) of the trips should be outside the ride time requirement in each region per day.

3.7.12.2 The ride time performance measure calculation is: Within Ride Time = Number of trips with actual ride time less than the allowable ride time of one (1) hour plus normal drive time divided by the total number of trips for the time period being measured multiplied by 100. The broker will be required to meet or exceed 99.0% of the total trips within the allowable ride time.

3.7.13 Provider List: The Broker must provide an accurate list of its provider network to SCDHHS quarterly with additions and terminations of providers. Detailed information related to any termination and/or change in network must be described when reporting to SCDHHS.

3.7.13.1 The Broker must provide evidence that a mailing list for contracted providers is maintained and updated on a quarterly basis.

3.7.13.2 The Broker must establish, and maintain the following records and related information in its files for each provider with which the Broker has entered into a service agreement:

3.7.13.2.1 Copy of Broker's executed service agreement for each transportation provider.

3.7.13.2.2 Vehicle records, including at a minimum the following documentation for each vehicle:

- Manufacturer and model
- Model year Vehicle Identification Number
- Odometer reading at the time the vehicle entered service under this contract
- Type of vehicle (passenger van, minibus, wheelchair van or NET stretcher van)
- Capacity (number of passengers)
- License tag number
- Insurance certifications
- Special equipment (e.g. lift)
- Date, odometer reading and description of inspection activity (e.g., verification that vehicle meets RFP vehicle requirements, inspection of equipment such as brakes, tire tread, turn signals, horn, seat belts, air conditioning/heating).

3.7.13.2.3 Records of the initial inspection and all subsequent inspections.

3.7.13.2.4 Driver records, including at a minimum the following documentation for each driver:

- Driver's name, date of birth and social security number
- Copy of the South Carolina driver's license
- Driving record for previous three (3) years obtained from the South Carolina Division of Motor Vehicles
- Training certificates to include First Aid, CPR, Passenger Assistance, and Blood-Borne Pathogens
- Defensive driver training certification
- Documentation of any complaints received about the driver and any accidents or moving violations involving the driver

3.7.13.2.5 The Broker must preserve, and make available to SCDHHS copies of transportation provider records within three (3) days of a written request. The Broker must allow a reasonable number of persons, designated by SCDHHS, to inspect, audit or reproduce such records at the location where the Broker's records are normally maintained, without expense to SCDHHS.

3.7.14 Transportation Provider Solicitation

Transportation providers must not solicit or accept money, goods or additional business from members. Transportation Providers that have websites, may have a link to the Broker's website, however, it must not be used as a marketing tool to Medicaid members.

3.8 DRIVER AND VEHICLE REQUIREMENTS

The Broker must ensure that all vehicles and drivers meet the minimum requirements listed in this section. These requirements must be included in all service agreements with transportation providers. With prior approval from SCDHHS, the Broker may establish additional, non-conflicting requirements for drivers and vehicles.

3.8.1 Compliance with Other State and Local Authorities:

- 3.8.1.1 The Broker must ensure that all transportation provider vehicles and drivers comply with the requirements of SCDHHS and the applicable regulations of the Office of Regulatory Staff (ORS) found at <http://www.regulatorystaff.sc.gov>, and the Department of Health and Environmental Control (DHEC) found at <http://www.scdhec.gov/index.htm>. Individual transportation providers and any other entity providing Medicaid transportation that are not normally subject to ORS regulations, will be required to meet all the ORS requirements for drivers and vehicles listed in the ORS regulations for providers of non-emergency transportation services.
- 3.8.1.2 All vehicles and drivers must comply with the applicable laws, regulations and ordinances of federal, state and local agencies in the jurisdictions in which they operate, including taxicab authorities and ambulance authorities.
- 3.8.1.3 Vehicles must comply with the Americans with Disabilities Act (ADA) Accessibility Specifications for Transportation vehicles, 49 CFR Part 38, Subparts A and B. The Broker must supply all transportation providers with a copy of the ADA vehicle requirements and inspect for compliance. Vehicles must be in compliance with applicable ADA vehicle requirements in order to be approved for use under this program.
- 3.8.1.4 Transportation providers must obtain and keep on file copies of required permits and licenses from the counties and cities in which they operate.
- 3.8.1.5 All transportation providers must maintain a physical office, address and phone number in South Carolina.

- 3.8.1.6 All incorporated transportation providers must be registered with the South Carolina Secretary of State.
- 3.8.1.7 The Broker must ensure that transportation providers maintain sufficient liability insurance as required by South Carolina law and regulations.

3.8.2 Driver Requirements:

- 3.8.2.1 The Broker must ensure all drivers of vehicles transporting Medicaid members meet the following additional or enhanced requirements:
 - 3.8.2.1.1 All drivers at all times during their employment must be at least 18 years of age and have a current valid driver's license to operate the transportation vehicle to which they are assigned.
 - 3.8.2.1.2 Drivers must have no more than two chargeable accidents or moving violations in the last three years.
 - 3.8.2.1.3 Drivers must not have a driver's license suspension or revocation for moving traffic violations within the previous five years.
 - 3.8.2.1.4 The Broker must require that the transportation provider secure a criminal background check on each driver through the South Carolina Law Enforcement Division (SLED) or the National Crime Information Center (NCIC) (if not a resident of South Carolina for at least 5 consecutive years), prior to employment and annually thereafter. For drivers not residing within the state of South Carolina, criminal background checks equivalent to the SLED check from the driver's state of residence are also required.
 - 3.8.2.1.5 Drivers must not have been convicted of any felony crime and/or misdemeanor related to health care fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; elder abuse; patient abuse in connection with the delivery of a health care item or service; unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and any felony or misdemeanor conviction for child abuse, elderly abuse, domestic violence, criminal sexual conduct, drugs or weapons. A driver cannot be on any state or federal Sex Offender Registry.
 - 3.8.2.1.6 All drivers must be courteous, patient, and helpful to all passengers and be neat and clean in appearance.

- 3.8.2.1.7 No driver will use alcohol, narcotics, illegal drugs or prescription medications that impair his/her ability to perform while on duty and no driver shall abuse alcohol or drugs at any time.
- 3.8.2.1.8 All transportation providers must implement a verifiable 5-panel drug-testing program for drivers. Pre-employment, post-accident, and random drug screens covering more than 50% of the drivers each year shall be mandatory.
- 3.8.2.1.9 All drivers must wear and have visible nametag--with picture--that is easily readable and identifies the employee and the employer. The driver must show the nametag to the member or a facility employee upon arrival to pick up the member.
- 3.8.2.1.10 Drivers must not smoke while in the vehicle, while assisting a member or while in the presence of any member.
- 3.8.2.1.11 Drivers must not wear any type of headphones at any time while on duty, with the exception of hands-free headsets for mobile telephones if this is the company communication device.
- 3.8.2.1.12 If a non curbside pick-up is being made, drivers must identify themselves, show their identification and announce their presence at the entrance of the facility or residence.
- 3.8.2.1.13 Drivers must assist members in the process of being seated and confirm that all seat belts are fastened properly.
- 3.8.2.1.14 Drivers must ensure members in wheelchairs are properly secured prior to departure and at all times while in transit.
- 3.8.2.1.15 Drivers must properly secure all members being moved via wheelchairs to and from pick-up or drop off locations.
- 3.8.2.1.16 Drivers must provide necessary assistance, support, and oral directions to passengers. Such assistance must include whatever is necessary for members with limited mobility as well as movement and storage of mobility aids and wheelchairs.
- 3.8.2.1.17 Before departing the drop-off point, drivers must confirm that the delivered members are safely inside their destination.
- 3.8.2.1.18 Drivers must not touch any member except as appropriate and necessary to assist the member into or out of the

- vehicle, into a seat, to secure the seat belt, or to render first aid or assistance for which the driver has been trained.
- 3.8.2.1.19 Drivers must not solicit or accept money, goods or additional business from members.
- 3.8.2.1.20 Drivers must be familiar with and knowledgeable of the streets and highways of the areas in which they are transporting.
- 3.8.2.1.21 Drivers are expected to follow company and broker guidelines for HIPAA compliance by keeping all members' protected health information (PHI) confidential. It should not be visible to other members/passengers, and drivers must not discuss this information with anyone who is not involved with the member's treatment or connected health care services.
- 3.8.2.2 The Broker must conduct all driver credential reviews prior to implementation, prior to the driver transporting Medicaid members, and at least annually thereafter.
- 3.8.2.3 All drivers must complete and maintain the SCDHHS approved training and/or certification listed below. See Appendix L, Driver Certification and Training Resources for additional information and training guidelines.
- 3.8.2.3.1 Cardiopulmonary Resuscitation (CPR)
- 3.8.2.3.2 First Aid
- 3.8.2.3.3 Defensive Driver
- 3.8.2.3.4 Handling Blood borne Pathogens
- 3.8.2.3.5 Passenger Assistance – transferring, loading, unloading
- 3.8.2.3.6 HIPAA Compliance
- 3.8.2.3.7 Drivers are required to participate in a minimum of twelve (12) hours in-service training on related subjects annually.
- 3.8.2.4 The provider must terminate any driver when substandard performance is identified, as documented by the Broker or at the request of SCDHHS. SCDHHS reserves the right to direct the Broker to terminate any driver when SCDHHS determines it to be in the best interest of the State.
- 3.8.2.5 Drivers who have been terminated from the Medicaid program by SCDHHS for fraud or abuse, in accordance with section 1128(a)(1) and 1932(d)1 of the Social Security Act and 42 CFR § 438.610, and other applicable statutes and regulations must not be permitted to participate in any Federal health care programs. Federal health

care programs include Medicare, Medicaid, and all other plans and programs that provide health benefits funded directly or indirectly by the United States. All transportation providers are responsible for ensuring that no driver or other employee has been excluded from the Medicaid program. A searchable database of persons excluded from participation can be found at <http://www.oig.hhs.gov/fraud/exclusions.asp>.

3.8.3 Vehicle Requirements:

The Broker must ensure all vehicles transporting members meet the following additional or enhanced requirements:

- 3.8.3.1 All vehicles must pass Broker inspection prior to transporting Medicaid members.
- 3.8.3.2 The Broker must inspect all vehicles transporting Medicaid members annually.
 - 3.8.3.2.1 The transportation provider must provide and use a two-way voice communication system (mobile telephone or two-way radio) linking all vehicles used in delivering the services under this Contract with the transportation provider's major place of business. Pagers are not an acceptable substitute.
 - 3.8.3.2.2 All vehicles must be equipped with adequate and functioning heating and air-conditioning systems. Functionality must be defined by temperature readings from the rear of the vehicle, achieving air conditioning to 68 degrees and heating to 72 degrees.
 - 3.8.3.2.3 All vehicles must have functioning, clean and accessible seat belts for each passenger seat position and securement belts for each wheelchair position. Seat belts must be stored off the floor when not in use.
 - 3.8.3.2.4 Each vehicle must comply with all SC Highway Transportation and Safety Department regulations for infant and child safety seats, as appropriate when transporting children under age six.
 - 3.8.3.2.5 Each vehicle must have at least two (2) functional seat belt extensions available.
 - 3.8.3.2.6 Each vehicle must be equipped with at least one seat belt cutter within easy reach of the driver. Exceptions to this requirement must be approved in advance by SCDHHS.
 - 3.8.3.2.7 All non-integrated vehicle access assistant devices, not specifically covered by ADA regulations, must meet

minimum safety standards set by the Broker and approved by SCDHHS.

- 3.8.3.2.8 All vehicles must have an accurate speedometer and odometer.
- 3.8.3.2.9 All vehicles must have two exterior rear view mirrors, one on each side of the vehicle.
- 3.8.3.2.10 All vehicles must be equipped with an interior mirror for monitoring the passenger compartment.
- 3.8.3.2.11 The exterior of the vehicle must be clean, free of broken mirrors or windows, excessive grime, major dents or paint damage that detract from the overall appearance of the vehicle.
- 3.8.3.2.12 The interior of the vehicle must be clean, free from torn upholstery, floor or ceiling covering; free from damaged or broken seats; and free from protruding sharp edges. The interior must also be free of dirt, oil, grease and litter.
- 3.8.3.2.13 Vehicles will be free of hazardous debris or unsecured items and will be operated within the manufacturers safe operating standards at all times.
- 3.8.3.2.14 To comply with HIPAA requirements, the word "Medicaid" may not be displayed on the vehicle or in the name of the business.
- 3.8.3.2.15 The vehicle license number, the Broker's toll-free phone number and a local phone number for the broker must be prominently displayed on the interior of each vehicle. This information and the complaint procedures must be clearly visible and available in written format in each vehicle for distribution to members upon request.
- 3.8.3.2.16 Smoking is prohibited in all vehicles at all times.
- 3.8.3.2.17 All vehicles must have the following signs posted in all vehicle interiors, easily visible to the passengers:
 - 3.8.3.2.17.1 "NO SMOKING"
 - 3.8.3.2.17.2 "ALL PASSENGERS MUST USE SEAT BELTS"
- 3.8.3.2.18 Vehicles must carry an information packet containing vehicle registration, insurance card, a copy of the form used for the latest broker inspection, and accident procedures and forms.

- 3.8.3.2.19 Vehicles must be equipped with a first aid kit that adequately meets the maximum number of passengers according to OSHA standards.
- 3.8.3.2.20 Vehicles used for the transportation of Medicaid members must include GPS systems, which at a minimum, are capable of recalling the location of the vehicle for specific periods of time.
- 3.8.3.2.21 Insurance coverage for all vehicles must be in force at all times during the contract period in accordance with state and local regulations and contract requirements.
- 3.8.3.2.22 Vehicles must be equipped with a "spill kit" including: liquid spill absorbent, latex gloves, hazardous waste disposal bags, scrub brush, disinfectant and deodorizer.
- 3.8.3.3 **Annual Inspection Plan:** The Broker must verify by an annual inspection that all vehicles used by its transportation providers meet the requirements of this RFP and that safety and passenger comfort features are in good working order.
- 3.8.3.4 **Broker Issued Inspection Sticker:** Upon completion of a successful inspection by the Broker, a sticker must be affixed to each transportation provider vehicle. The Broker must secure the sticker of approval on the outside of the passenger side rear window in the lower right corner. The sticker must include the license plate number and vehicle identification number. Records of all inspections must be maintained as described in Section 3.14
- 3.8.3.5 **Non-compliance:** Any vehicle or driver found out of compliance with this these contract requirements or any State or Federal regulations may be removed from service immediately by the Broker with authorization from SCDHHS. Once the Broker verifies and documents that the deficiencies have been corrected, the vehicle or driver may be reinstated. Any deficiencies and actions taken must be documented and become a part of the vehicle's and the driver's permanent records.
- 3.8.3.6 **Passenger Safety Requirements:** 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.

3.8.3.7 Prior to Implementation:

The final plan, forms, inspection sticker and a list of trained inspectors must be submitted by the Broker to SCDHHS 60 days prior to the commencement of transportation services and must include the names of all employees who are authorized to inspect the vehicles on behalf of the Broker.

3.8.4 Requirements for Stretcher Vans:

- 3.8.4.1 Stretcher van service is an alternative mode of non-emergency transportation for pre-authorized trips. For the purpose of this procurement, the term ambulette will not be used. It is provided to an individual who cannot be transported in a taxi or wheelchair van and who does not need the medical services of an ambulance. Stretcher van service does not provide emergency medical transport and does not include any medical monitoring, medical aid, medical care or medical treatment during transport. A driver and an assistant must staff the vehicle, which is specifically designed and equipped to provide non-emergency transportation of individuals on an approved stretcher. A stretcher van is used for an individual who:
 - 3.8.4.1.1 Needs routine transportation to or from a non-emergency medical appointment or service; and
 - 3.8.4.1.2 Is convalescent or otherwise non-ambulatory and cannot use a wheelchair; and
 - 3.8.4.1.3 Does not require medical monitoring, medical aid, medical care or medical treatment during transport. Self-administered oxygen is permitted as long as the oxygen tank is secured safely.

- 3.8.4.1.4 The driver and assistant must confirm that all restraining straps are fastened properly and that the stretcher, stretcher fasteners and anchorages are properly secured.
- 3.8.4.1.5 The assistant must be seated in the passenger compartment while the vehicle is in motion and must notify the driver of any sudden change in the passenger's condition.
- 3.8.4.1.6 The stretcher van vehicle must not be used:
 - 3.8.4.1.6.1 for emergency medical transportation;
 - 3.8.4.1.6.2 to transport a passenger who requires basic or advanced life support;
 - 3.8.4.1.6.3 to transport a passenger who has in place any temporary invasive device (including a saline lock) or equipment such as an intravenous administration device or an airway maintenance device;
 - 3.8.4.1.6.4 to transport a passenger who requires close observation or medical monitoring;
- 3.8.4.2 The Broker must ensure all stretcher van assistants transporting Medicaid members meet all of the requirements listed in the ORS regulations as well as all additional or enhanced driver requirements listed in driver requirements section 3.8.2.
 - 3.8.4.2.1 The Broker must ensure all stretcher van vehicles and stretcher equipment transporting members meet the following additional or enhanced requirements:
 - 3.8.4.2.2 Stretchers must be one of two styles (excerpted from GSA Federal Specifications KKK-A-1822E, June 1, 2002):
 - 3.8.4.2.2.1 Style 1: Elevating wheeled cot with a minimum length of 191/75 (cm/in), a minimum width of 56/22, and a maximum bed height when collapsed of 38/15 measured to the top of a positioned 8/3 thick mattress.
 - 3.8.4.2.2.2 Style 2: Elevating wheeled cot with additional front roll in wheels with a minimum length of 200/79 (cm/in), a minimum width of 56/22, a maximum bed height when collapsed of 13/33 measured to the top of a positioned 8/3 thick mattress.
 - 3.8.4.2.3 Length and width measurements must be taken at the metal framing, excluding joint fittings. Stretchers must have a polyester foam mattress at least 8 cm (3 inches) thick or an equivalent mattress covered with vinyl coated, nylon fabric or other non-porous fabric conforming to FMVSS 302, or

equivalent, and restraint straps. At least three strap-type restraining devices (chest, hip, and knee) must be provided per stretcher to prevent longitudinal or transverse dislodgement of the patient during transit. Additionally, the head of the stretcher must be furnished with upper torso (over the shoulder) restraints that mitigate forward motion of the patient during severe braking or in a frontal impact accident. Restraining straps must incorporate metal-to-metal quick release buckles, be not less than 51 mm (2 inches) wide, and fabricated from nylon or other materials easily cleaned and disinfected.

3.8.4.2.4 The stretcher fasteners and anchorages must be a crash-stable side or center mounting cot fastener assembly with a quick release latch. It must secure the Style 1 or Style 2 wheeled stretcher to the van body. The installed stretcher fastener device for wheeled stretchers must be tested to comply with a 2200 lb. Pull test in accordance with AMD (Ambulance Manufacturers Division of the National Truck Equipment Association) Standard 004, Litter Retention System. Additional stretcher related hardware is permitted, provided the patient compartment exit/entry is not encumbered with the stretcher in place. The furnished devices must have a bright colored finish, if the device presents a tripping hazard in the entry/exit area when the stretcher is removed. (excerpted from GSA Federal Specifications KKK-A-1822E, June 1, 2002)

3.8.4.2.5 If the passenger needs a scoop, reeves or chair stair stretcher, the provider must supply it.

3.8.4.2.6 Self-administered oxygen must be secured in accordance with AMD Standard 003, "Oxygen Tank Retention System Test."

3.8.4.3 The following requirements for sanitary conditions and supplies apply to all stretcher vehicles in accordance with recommendations and standards established by the Centers for Disease Control and Prevention:

3.8.4.3.1 The interior of the stretcher vehicle, including all storage areas, equipment, and supplies must be kept clean and sanitary.

3.8.4.3.2 Waterless antiseptic hand wash must be available on the unit

- 3.8.4.3.3 Following transport and before being occupied by another passenger, all contaminated surfaces must be cleaned and disinfected using a method recommended by the Centers for Disease Control. Cleaning and disinfection supplies must be carried on each vehicle.
- 3.8.4.3.4 All soiled supplies and used disposable items must be stored or disposed of in plastic bags, covered containers or compartments provided for this purpose. Red or orange bags must be used for regulated waste.
- 3.8.4.3.5 Clean stretcher linen or disposable sheets and pillowcases or their equivalent must be available in the vehicle and when used in the transport of a patient, must be changed after each use.
- 3.8.4.3.6 Clean stretcher linen or disposable sheets and pillowcases or their equivalent must be available in the vehicle and when used in the transport of a patient, must be changed after each use.
- 3.8.4.3.7 Blankets, pillows, mattresses, and rain cloths, used in the vehicle must be intact and kept clean and in good repair.

3.9 PAYMENT TO TRANSPORTATION PROVIDERS

The Broker must provide payment to each transportation provider based on authorized services rendered. The Broker must pay transportation providers in accordance with the terms of the written service agreement between the Broker and each transportation provider. Full payment of undisputed invoices for all authorized trips must be made to the transportation providers within thirty (30) calendar days of the Broker's receipt of an undisputed invoice.

3.9.1 The Broker Must:

- 3.9.1.1 Validate that all transportation services paid for were properly authorized and actually rendered;
- 3.9.1.2 Transmit to SCDHHS encounter data for all trips made by Medicaid members in the region in accordance with SCDHHS specifications;
- 3.9.1.3 Develop safeguards against fraudulent activity by the transportation service providers and Medicaid members and fulfill SCDHHS' reporting requirements regarding such activity. All suspected abuse must be reported to SCDHHS fraud and abuse hotline within twenty-four (24) hours.
- 3.9.1.4 Provide monthly reports to SCDHHS summarizing the claims payment processing that will include but is not limited to, the

number of days for claim payment and the number of days between services rendered and the submission of claims to be paid.

3.10 EDUCATION PROGRAM

3.10.1 Initial Information and Education:

The Broker must develop adequate NEMT training materials and organize training events to ensure contracted providers and healthcare providers who access the system on behalf of the member understand their responsibilities, rules associated with transportation reservations, service delivery expectations, changes related to any policies or procedures, billing procedures, reimbursement methodology, and overall program structure. The cost of any mailings is to be borne by the Broker and should be provided for as an administrative expense.

3.10.2 The Broker must provide a training program for all transportation providers with which he/she has entered into a service agreement under this RFP. At a minimum, the training program must include:

- Overview of NEMT Program and division of responsibilities between Broker and transportation provider
- Vehicle requirements; to include GPS tracking equipment and use
- Procedures for handling accidents, moving violations and vehicle breakdowns
- Driver qualifications
- Driver conduct
- The use of escorts and/or companions
- Scheduling procedures during regular operating hours, including criteria for determining the most appropriate mode of transportation for the member
- "After hours" scheduling procedures
- Procedures for handling requests for "urgent care"
- Criteria for trip assignment
- Dispatching and delivery of services
- Procedures for obtaining reimbursement for authorized trips
- Driver customer service standards and requirements during pickup, transport and delivery
- A review of the transportation provider manual
- Required communication with members
- Required communication with health care providers
- Required communication with Broker
- Billing Procedures

- The disposition of all complaints is communicated to the initiating entity
- The disposition of substantiated complaints is communicated to the entity the complaint was logged against
- Corrective action required based on the complaint is verified to have been implemented
- Complaints are closed appropriately and all entities are notified of the final disposition of the complaint

3.11.6 Complaint Closure

Complaints will be closed only after appropriate action is taken to resolve the complaint. The close process must include documented communication to the entity initiating the complaint and the entity the complaint was logged against to include any corrective action taken and the final disposition of the complaint. Complaints that are not closed within 5 business days will require immediate notification to SCDHHS.

3.11.7 Complaint Performance Measures

The broker must accurately record all complaints and the activity taken to investigate the underlying cause of the complaint as well as the immediate action taken to resolve the complaint. At a minimum, the following performance measures will be tracked as a percentage of total volume:

- 3.11.7.1 Complaints against providers
- 3.11.7.2 Complaints for provider timeliness
- 3.11.7.3 Complaints for provider service quality (to include driver behavior, vehicle issues.).
- 3.11.7.4 Complaints of Broker service quality (call center operator behavior, other Broker employee behavior).

3.12 QUALITY ASSURANCE

3.12.1 Corrective Action Plans

The Broker must establish and maintain corrective action plans addressing findings resulting from complaints, SCDHHS monitoring activities, federal reviews, or other reviews conducted during the term of the contract. The Broker must implement corrective action plans in accordance with time frames established by SCDHHS and/or CMS.

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

3.12.1.2 The Broker must develop and maintain an ongoing quality assurance plan to support the provision of high-quality transportation services to the Medicaid member community. At a minimum, the quality assurance plan must include the following elements:

- a) Key indicators of quality related to scheduling and delivery of transportation services;
- b) A description of how the Broker plans to monitor these key indicators;
- c) A description of how the Broker will develop, implement, and evaluate corrective actions or modifications to overall operations as necessary to address quality concerns;
- d) A description of how the Broker will monitor the quality of the transportation;
- e) A description of the staffing resources responsible for the quality assurance plan and quality assurance activities;
- f) Samples of all reports related to quality assurance and performance monitoring, along with descriptions of their use and who is responsible for reviewing them.

3.12.1.3 This quality assurance plan must be submitted to SCDHHS for review and approval at least thirty (30) working days prior to the start of transportation operations. The Broker must incorporate within ten (10) working days of notification all modifications required by SCDHHS. In no cases will a Broker be allowed to begin operations without an approved quality assurance plan. Thereafter, the quality assurance plan must be reviewed at least annually and any revisions must be submitted to SCDHHS for review and approval at least thirty (30) days prior to implementation.

3.12.1.4 The Broker must ensure that it has an ongoing quality assessment and performance improvement program for the NEMT services it furnishes to members. The Improvement Plan must consider the needs of members and be reviewed and updated periodically as appropriate. The Broker must measure and report to SCDHHS its performance, at a minimum using standard measures required by SCDHHS; submit data as specified by SCDHHS that enables SCDHHS to measure the Broker's performance or perform a combination of the activities indicated above. The Broker must have a mechanism to verify NEMT services were actually provided.

- 3.12.1.5 The Broker must develop criteria and procedures to provide for systematic activities, undertaken by the Broker itself, to monitor and evaluate the services rendered according to predetermined, objective standards, and affect improvements as needed.

3.12.2 Monitoring

SCDHHS monitoring activities will not interfere with the Broker's responsibility to provide transportation to members. SCDHHS staff may ride on trips to monitor service. All of the transportation provider's vehicles must be made available to SCDHHS for inspection at any time. SCDHHS staff will review reports of complaints from members, providers, or any individual or group who contact the Broker regarding the delivery of services under this contract.

3.12.3 Meetings

- The Broker must meet with SCDHHS representatives at SCDHHS offices at least monthly and upon request by SCDHHS to discuss the NEMT program for the region(s) and to answer pertinent inquiries regarding the program, its implementation and its operation.
- The Broker must establish an Advisory Committee in each region served. The Committee must consist of representatives from an adult day health care facility, dialysis center, hospital, or other medical services provider(s), transportation provider(s) and the member community. The Advisory Committee must meet each quarter of the calendar year. The Broker must compile minutes of the meetings and report an appropriate summary. The original report to include minutes of the meetings will be sent to SCDHHS on a quarterly basis and will include a description of the quality of services delivered to members by each representative group, particularly noting patterns or trends.
- The broker may be required to provide representation on transportation related committees and boards and participate in meetings scheduled. Members of the Advisory Committee must be appointed to serve for not more than one calendar year.

3.13 MANAGEMENT AND PERFORMANCE REPORTS

- 3.13.1 The Broker must submit accurate and complete management reports to SCDHHS at requested intervals and on demand using electronic media, as approved by SCDHHS. All underlying calculations for reporting must be submitted to SCDHHS for review and approval. The Broker must provide

From: Vicki Johnson <JOHNVIC@scdhhs.gov>

To: Joseph Dawson <joe@attorneyjosephdawson.com>

Cc:

Date: Tuesday, June 26, 2012 11:30 am

Subject: RE: Non-Emergency Medical Transportation Contract

Attachments:

Mr. Dawson,

The link below will take you to the Budget and Control Board's Procurement site and the solicitation documents that formed the basis of SCDHHS' contract with AMR. In South Carolina, there is no separate contract signed after a Request for Proposals process is completed. I think that this will provide you with the information that you are seeking. Please let me know if you require any additional information.
<http://webprod.cio.sc.gov/SCSolicitationWeb/solicitationAttachment.do?solicitnumber=5400002201>

Thank you,
Vicki

Vicki Johnson
Assistant General Counsel
SCDHHS
PO Box 8206
1801 Main Street
Columbia, SC 29202-8206
803.898.2648

From: Joseph Dawson [mailto:joe@attorneyjosephdawson.com]

Sent: Tuesday, June 26, 2012 11:20 AM

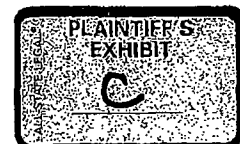
To: Vicki Johnson

Subject: Non-Emergency Medical Transportation Contract

Ms Johnson

Thank you for returning Denise's phone calls over the last several days regarding a request for public information from your office. As Denise indicated, I am looking for a copy of the Non-Emergency Medical Transportation Program contract between the South Carolina Department of Health and Human Services (SCDHHS) and American Medical Response Inc (AMR). I understand that AMR discontinued service in February 2012, but I would like a copy of the contract that was in effect as of January 31, 2012.

I represent a client that was injured in an auto accident while being transported by a transportation provider dispatched by AMR. Please let me know if I need to make this request through some other procedure or office. Thank you for your time and attention to this matter.



Joseph Dawson, III
Attorney at Law
Post Office Box 1211
Charleston, SC 29402
Telephone: (843) 207-9004
Fax: (843) 207-9005

PRIVILEGED AND CONFIDENTIAL: This electronic message and any attachments are confidential property of the sender. The information is intended only for the use of the person to whom it was addressed. Any other interception, copying, accessing, or disclosure of this message is prohibited. The sender takes no responsibility for any unauthorized reliance on this message. If you have received this message in error, please immediately notify the sender and purge the message you received.

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STATE OF SOUTH CAROLINA
MATERIALS MANAGEMENT OFFICE
CAPITAL CENTER
1201 MAIN STREET, SUITE 600
COLUMBIA SC 29201

Notice Regarding Award
Posting Date: May 25, 2011

Solicitation: 5400002201
Description: Non-Emergency Medical Transportation Bid
Agency: Dept of Health & Human Service

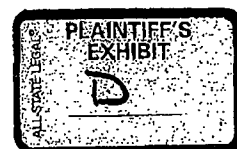
REINSTATEMENT NOTICE
THE INTENT TO AWARD IS HEREBY REINSTATED

Contract Number: 4400003144
Awarded To: AMERICAN MEDICAL RESPONSE INC
6200 S SYRACUSE WAY - SUITE 200
GREENWOOD VILLAGE CO 80111

Total Potential Value: \$162,077,477.00
Maximum Contract Period: May 26, 2011 through May 25, 2016

Item	Description	Unit Price	Total
00007	Medical Trans Reg 2	\$ 46,264,005.00	\$138,792,015.00
00008	Medical Trans Reg 2	\$ 17,021,950.00	\$ 17,021,950.00
00009	Medical Trans Reg 2	\$ 17,475,308.00	\$ 17,475,308.00
00010	Medical Trans Reg 3	\$ 46,581,911.00	\$139,745,733.00
00011	Medical trans Reg 3	\$ 17,138,917.00	\$ 17,138,917.00
00012	Medical Trans Reg 3	\$ 17,595,386.00	\$ 17,595,386.00

Procurement Officer
Daniel W. Covey





November 22, 2011

John R. Stevens, State Contracting Officer
State of Carolina - Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

CHANGE ORDER REQUEST
Solicitation 5400002201
Regions II and III

Dear Mr. Stevens:

American Medical Response, Inc. (AMR) submits this request for a change order in Solicitation 5400002201, the Non-Emergency Transportation Services (NEMTS) (RFP), pursuant to the requirements of the contract with the South Carolina Department of Health and Human Services (SCDHHS) and the SC Procurement Code and Regulations. Specifically, we request an increase in the amount of contract fees of \$11,961,009 for Region II and of \$12,997,734 for Region III for the first 33 months of the contract. Please see Table 1 (Region II) and Table 2 (Region III), attached hereto for detail. The basis of this request is two-fold: 1) a significant increase in the trip volume versus the "Past Service Volume" data in the RFP; and 2) an after discovered bid mistake.

Justification:

AMR was the successful offeror in responding to the NEMTS RFP. The RFP provided, in pertinent part:

RFP Section 1.4 Past Service Volume

For state fiscal year 2008, the state's Brokers reported that approximately 1,707,311 one-way trips were made throughout South Carolina. These 1,707,311 trips accounted for approximately 24,143,756 point-to-point miles. RFP Appendices B - F include additional service volume data for FY 2008, FY 2009 and partial FY 2010.

For state Fiscal Year 2009, SCDHHS arranged 73 trips outside the South Carolina Medicaid Services Area (SCMSA). See Appendix J for the description of the SCMSA. Appendix O includes additional service volume data for trips arranged outside the SCMSA.

The reports listed in Appendix I include the breakout of eligible members by age group, however the reports include all members regardless of their eligibility for transportation services. The reports also include members that became eligible retroactively for the month and members that may be counted twice if they moved from one county to another county within a month. In addition, the annual eligible members for each county include all members that were eligible during any part of the year.



6200 S. Syracuse Way, Suite 200 • Greenwood Village, CO 80111 • (303) 495-1200 •

ROA_0142

Appendix_0145

The above referenced statistical data, except for trips outside the SCMSA and the eligibility information, was provided to SCDHHS by the current brokers. SCDHHS does not guarantee the accuracy of this data. SCDHHS also does not guarantee the service volume will be the same throughout this contract. Discovery of any inaccuracy in this data will not constitute a basis for contract rejection by any Offeror. Further discovery of any inaccuracy in this data will not constitute a basis for renegotiation of any payment rate after contract award. It is the Offeror's responsibility to take into consideration normal volume increases over the contract period.

AMR's proposal certainly took into consideration normal volume increases over the contract period, by assuming a 4.4% annual trip increase. In fact, the trip volume increase is averaging 8.3% per year — almost double what AMR reasonably anticipated (see Table 3 below). Certainly, an increase of over one hundred thousand trips per year over the RFP data is not a "normal volume increase."

RFP Service Volume Issues

AMR actual experience thus far indicates that utilization is running at a rate equal to approximately 61,000 annual trips in Region II and 45,000 trips in Region III more than documented in the RFP service volume projections. (See Table 3 below). This equates to \$5,203,816 in Region II and \$1,859,197 in Region III of the additional contract fees requested. A significant portion of this increase is due to increased ambulance utilization. The RFP data demonstrated a low utilization for ambulance (17 trips annually) for State Fiscal Year 2010 for Regions II and Regions III combined. Since implementation, AMR has aggressively case managed ambulance utilization and is still experiencing trip volumes expected to equal 5,544 ambulance trips per year. This current experience, when adjusted for seasonality, is in line with the data from SFY2008 and adjusting for membership growth. Conversations with multiple ambulance providers have revealed that there are apparently hundreds of unpaid ambulance claims that were never paid from the previous program. Because these trips were never paid, the trip was never completed, so the information was not included in the RFP data resulting in an understated level of ambulance utilization.

Bid Mistake Regarding Mileage Calculation

Appendix B and C of the RFP contain monthly trip counts for multiple fiscal years by trip type and by county. Appendix D of the RFP contains total mileage for multiple fiscal years by trip type and by county. AMR used the data from July to December of 2009 (partial SFY 2010) to accumulate the total trips and total mileage for that period of time. For example, in Region I, for partial SFY2010, the total ambulatory trips for Region I per RFP Appendix B were 216,154, and the total mileage for ambulatory trips for Region I from Appendix D was 2,584,371 miles. Dividing out these two numbers gives us an average mileage per ambulatory trip of 11.96 miles. Following the same process yielded the following results for Regions II and III (Region I included in the table for ease of comparison):

July, 2009 to December 2009	Ambulatory Trips (Appendix B)	Ambulatory Mileage (Appendix D)	Average miles per Trip
Region I	216,154	2,584,371	11.96
Region II	270,187	4,358,859	16.13
Region III	269,330	6,232,127	19.43

Once these mileages were calculated, AMR populated our standard bid template with the data from Region I, using the average mileage of 11.96 miles per ambulatory trip (ambulatory trips are used by way of example – the same process was used for the other trip types). The bid templates were created for Regions II and III by copying the model built for Region I and modifying the data that was different for those regions. Through a clerical error on the part of AMR, the average mileage per trip for Region I remained static in the subsequent templates, resulting in a material understatement of mileage for Regions II and III. The following table summarizes the impact on the number of miles using RFP data (not actual trip experience).

July, 2009 to December 2009	Ambulatory Trips (Appendix B)	Average miles per trip that should have been used	Average miles per trip that were used in our bid	Annual miles understated in the A2C bid
Region I	216,154	11.96	11.96	0
Region II	270,187	18.13	11.96	2,253,359
Region III	269,330	19.43	11.96	4,023,790
Total				6,277,149

The understated miles were derived by multiplying the calculated mileage differential by two times the trip volume (to reflect twelve months of trips). Note that the above numbers reflect miles for ambulatory trips only.

Over the thirty three months of the contract, the mileage error equates to \$6,757,193 in Region II (see Table 1) and \$11,138,537 for Region III (Table 2).

Summary

The above factors result in the total additional contract fees requested for the first thirty three months of the contract as follows; \$11,961,009 for Region II and \$12,997,734 for Region III for the first thirty three months. See Tables 1 and 2 respectively.

The breakdown for each region by contract year is as follows:

Table 4 – Breakdown by Region by Contract Year				
	August 22, 2011 May 25, 2012	May 26, 2012 May 25, 2013	May 26, 2013 May 25, 2014	Total
Region II	\$2,636,578	\$4,611,188	\$4,713,243	\$11,961,009
Region III	\$2,867,606	\$5,010,597	\$5,119,531	\$12,997,734
Combined	\$5,504,184	\$9,621,785	\$9,832,774	\$24,958,743

Of course, we are aware of the language contained in § 1.4 in the RFP quoted above, and as stated above, AMR took trip volume increase into consideration in its bid.

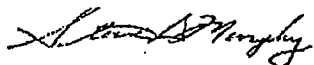
Finally, we point out that when the NEMT contract was implemented with Logisticare five (5) years ago, Logisticare had to come to the State and ask for a change order to increase the price and that change order was granted. We are not setting a precedent in asking for this price increase.

AMR believes that it had and has a reasonable expectation and right to rely on the data provided by the Department, while not having the exact accuracy being guaranteed, to have past volume services at least being reasonably accurate. While the SCDHHS did not guarantee the data, the past service volume was included so that prospective offerors who were not incumbent could have a reasonable and fair opportunity to compete for the contract award. As one of the purposes of the Procurement Code states, the Code exists "to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement." S.C. Code Ann. § 11-35-20(f)(Supp. 2010).

In conclusion, AMR would like to remain a partner with the State and complete this contract successfully. The company cannot continue to sustain these losses. Unless we get an immediate price increase, we will have no choice but to exit the contract. If we are forced to exit the contract, we will work with the State for a timely and orderly transition.

Pursuant to § 11-35-410(B), we specifically request that any and all pricing information that is or will be submitted as part of this request be treated as privileged and confidential information.

Yours truly,



Steven G. Murphy
Senior Vice President, Government and National Services



December 16, 2011

Ms. Melanie "BZ" Giese, RN
Deputy Director, Medical and Managed Care Services
South Carolina Department of Health & Human Services
PO Box 8206
1801 Main Street, J-1116
Columbia, SC 29202

Re: Transition of the Non-Emergency Medical Transportation (NEMT) contract from Region II and III to another transportation broker

Dear Ms. Giese:

We are in receipt of the December 12, 2011 letter from State Procurement Officer John R. Stevens, CPPB, CPM, denying American Medical Response's (AMR) November 22, 2011 Change Order Request. As we have previously discussed with you and the South Carolina Department of Health and Human Services (SCDHHS) staff, one of the options included in our change order request, in the event our request for a change order was denied, was for AMR to work collaboratively with SCDHHS to conduct an orderly and timely transition of the brokerage services for Regions II and III to another contractor of SCDHHS' choosing. Given the fact that the State has denied AMR's change order request, and given the extreme economic consequences that AMR would suffer as a result of continuing to provide services without the benefit of the change order, it is necessary for AMR to work with the State on exercising this option.

Based upon our telephone conversation this past Wednesday morning, December 14th with you, Deirdra Singleton, Vicki Johnson and Zenovia Vaughn, with the consent of SCDHHS, AMR's sixty (60) day transition period will commence Monday, December 19, 2011, and will expire at 11:59 pm, Sunday February 19, 2012. As we explained during our telephone conversation this morning, AMR wishes to work collaboratively with SCDHHS to effectuate a smooth and orderly transition to a provider of the State's choosing. Attached please find our transition plan. AMR's point of contact during the transition will be Shawn Seewald.

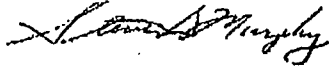
AMR is genuinely sorry that our involvement with South Carolina's NEMT program is ending this way. While we do not agree with the State's decision not to grant AMR's change order request, we understand the need to have an expeditious, orderly transition to a new provider so that the members will not suffer disruption in service, there will be no confusion and the employees of AMR will have the opportunity to be employed by the new contractor, if it so chooses.



6200 S. Syracuse Way, Suite 200 • Greenwood Village, CO 80111 • (303) 495-1200 •

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven G. Murphy". The signature is fluid and cursive, with the first name "Steven" and last name "Murphy" clearly distinguishable.

Steven G. Murphy
Senior Vice President, Government and National Services

Cc: Deirdra Singleton, Esquire
M. Elizabeth Crum, Esquire

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO: 12-CP-07-3595

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- Beaufort County EMS Invoice *
- MUSC Invoice for Admission*
- MUSC- University Medical Associates Invoice. *
- Color Photographs (43) taken by claims representative

*Plaintiff has previously produced these documents with correspondence to the insurance carrier and is in possession of the same. Therefore, Defendant shall not reproduce documents previously produced by Plaintiff.

THE DEFENDANT RESERVES THE RIGHT TO INTRODUCE INTO EVIDENCE ANY DOCUMENTS PRODUCED BY THE PLAINTIFF IN ITS ANSWERS TO INTERROGATORIES AND/OR RESPONSES TO REQUEST FOR PRODUCTION WITHOUT FURTHER NOTICE TO THE PLAINTIFF. THE DEFENDANT ALSO RESERVES THE RIGHT TO SUPPLEMENT ITS ANSWERS TO INTERROGATORIES PRIOR TO TRIAL.

5. Copies of any and all contracts, subcontracts, and/or agreements between the Defendants and American Medical Response Inc., and/or any other party or parties, which may relate to and/or involve the allegations which are the subject matter of the Complaint.

RESPONSE:

Access 2 Care Transportation Solutions Subcontractor Agreement. This document is already in possession of Plaintiff's counsel as produced by AMR.

6. Copies of any and all documents or correspondence between the Defendants and/or its agents and/or any other person, party, or parties which may relate to and/or involve the subject matter of the Complaint.

RESPONSE:

Defendant objects to this Request to the extent it seeks information protected by the attorney-client and/or work product privilege, or material prepared in anticipation of litigation. Subject to and without waiving said objections, certain documents and things known to relate to this matter at this time are listed below:

- Joseph Dawson letter to Hattie M. Askew/LCMT dated February 10, 2012 regarding representation of Charles Gary.
- Joseph Dawson letter to Selective Insurance dated March 13, 2012 regarding Mr. Gary's Medicare, Medicaid and SCHIP Extension Act form.*

RESPONSE:

The Defendant objects to this Request on the grounds that the information sought is not calculated to lead to the discovery of admissible evidence, and that the information is irrelevant as well as intended to harass Defendant.

19. Copies of any and all documents relating to the Defendants' licensure with the South Carolina Office of Regulatory Staff for non-emergency medical transport.

RESPONSE:

This information has been requested and, if in existence, will be supplemented upon receipt of same.

20. Copies of any and all documents, records, and/or maintenance logs for the ambulance which is the subject matter of the Complaint.

RESPONSE:

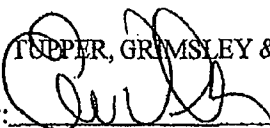
This information has been requested and, if in existence, will be supplemented upon receipt of same.

21. A copy of Eugene A. Kirkland's cell phone records for January/February 2012.

RESPONSE:

This information has been requested and, if in existence, will be supplemented upon receipt of the same.

TUPPER, GRIMSLEY & DEAN, P.A.

By: 

Erin D. Dean
Attorney for the LCMT Defendants
Post Office Box 2055
Beaufort, South Carolina 29901-2055
(843) 524-1116

Beaufort, South Carolina
Dated: January 23, 2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

CIVIL ACTION NO: 12-CP-07-3595

CHARLES GARY,)

PLAINTIFF,)

V.)

HATTIE M. ASKEW, WILL OUTLAW)
DEBORIA OUTLAW, INDIVIDUALLY)
AND D/B/A LOW COUNTRY MEDICAL)
TRANSPORT, LOW COUNTRY)
MEDICAL TRANSPORT, INC., EUGENE)
KIRKLAND, AND AMERICAN)
MEDICAL RESPONSE, INC. (D/B/A)
ACCESS2CARE),)

DEFENDANTS.)

AFFIDAVIT OF HATTIE M. ASKEW

PERSONALLY appeared before me, Hattie M. Askew, who being duly sworn deposes
and says:

1. I am over the age of eighteen (18) and otherwise competent to make this Affidavit.
2. I am the owner of Low Country Medical Transport, Inc.
3. Low Country Medical Transport, Inc. was granted a Class C Non-Emergency Certificate on or about May 31, 2007 from the South Carolina Office of Regulatory Staff (ORS).
4. Pursuant to South Carolina ORS regulations, it mandates all drivers of a Class C Non-Emergency vehicle to possess a Medical Examiner's DOT Card, a current driver's license, a current CPR and First Aid certificate, a mandatory drug screening, and in-service training documentation in order to operate said commercial vehicle.
5. Each and every Low Country Medical Transport, Inc. driver have satisfied the above-referenced requirements and carry the appropriate South Carolina Driver's License. This

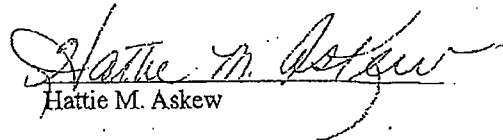


Class A license is regulated by the South Carolina Department of Health and Environmental Control (SCDHEC).

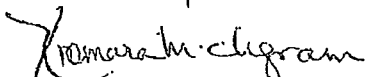
6. The South Carolina ORS Commission has never revoked Low Country Medical Transport Inc.'s Class-C Non-Emergency Certificate for any substantive event pursuant to ORS Regulation 103-240, or any other applicable South Carolina rules and regulations.
7. Unbeknownst to me, the South Carolina Secretary of State administratively dissolved Low Country Medical Transport, Inc. on or about October 1, 2007. The dissolution was due to an unpaid fee.
8. During the time Low Country Medical Transport, Inc. was administratively dissolved, we continued to pay the appropriate fees and were provided renewal decals for our vehicles from the South Carolina ORS.
9. Low Country Medical Transport, Inc. has never requested for a suspension or termination pursuant to ORS Regulation 103-164.
10. On or about November 17, 2010 Low Country Medical Transport, Inc.'s Class C Non-Emergency Certificate was revoked in error, but immediately reinstated by the Commission (see attached Order).
11. Low Country Medical Transport, Inc.'s currently holds a valid status for its South Carolina ORS Class C Non-Emergency Certificate and has always been compliant with maintaining the appropriate license fees and renewal forms as set forth in Article III of Motor Vehicle Carrier Law.
12. The driver, Eugene Kirkland was hired by Low Country Medical Transport, Inc. in June of 2008.

13. In the history of Low Country Medical Transport, Inc., Mr. Kirkland has safely and successfully transported a total of approximately 780 patients per year.
14. Eugene Kirkland was employed by Low Country Medical Transport, Inc. for approximately three and a half (3 ½) years.
15. Mr. Kirkland's personnel file is without incident, nor was he never involved in any other automobile accidents through out his employment with the company.

FURTHER AFFIANT SAYETH NOT.


Hattie M. Askew

SWORN to before me this
2nd day of May, 2013.


Notary Public for South Carolina
My commission expires: 9

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2007-86-T; 2010-295-T - ORDER NO. 2010-791

DECEMBER 3, 2010

IN RE: Application of Low Country Medical	)	ORDER GRANTING
Transport, Inc., 61 Hickory Hill Road,	)	REINSTATEMENT OF
Varnville, South Carolina 29944 (Mailing	)	CERTIFICATE
Address: Post Office Box 912, Varnville,	)	
South Carolina 29911 (District 2) for a	)	
Class C (Non-Emergency) Certificate of	)	
Public Convenience and Necessity	)	
	)	
And	)	
	)	
Petition of the Office of Regulatory Staff for	)	
Commission to Order a Rule to Show Cause	)	
as to Why the Certificates of Public	)	
Convenience and Necessity for Certain	)	
Motor Carriers Should Not be Revoked for	)	
Failure to File Annual Reports and Gross	)	
Receipts Forms	)	

This matter comes before the Public Service Commission of South Carolina (the "Commission") by way of a request filed by Low Country Medical Transport, Inc. ("Applicant") to reinstate Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A. Certificate No. 7798-A was issued to the Applicant pursuant to the authority granted by Commission Order No. 2007-211 (April 3, 2007). This Certificate was later revoked after a hearing by Order No. 2010-772, issued on November 17, 2010, for failure of the Applicant to file an annual report and/or a gross receipts form, as required by the Regulations. The record reflects that an annual report has now been filed.

Since the annual report has been filed, we find and conclude that the Applicant is now in compliance with Commission Regulations, and the previously cancelled Certificate should be reinstated. However this reinstatement is conditioned on further compliance with all other applicable statutes and regulations. Prior to such compliance, regulated motor carrier services shall not be provided by the Applicant.

IT IS THEREFORE ORDERED:

1. That Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A of Low Country Medical Transport, Inc. be, and hereby is, reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.

2. That all operating rights authorized under the Certificate are hereby reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.

3. That prior to compliance with the applicable statutes and the Commission's Rules and Regulations, the motor carrier services authorized by the Certificate shall not be provided.

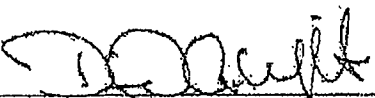
4. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



John E. Howard, Chairman

ATTEST:



David A. Wright, Vice Chairman

(SEAL)

DEPARTMENT OF STATE
COLUMBIA, SOUTH CAROLINA

DECLARATION OF DISSOLUTION BY FORFEITURE

Date of Dissolution OCT 01, 2007

LOW COUNTRY MEDICAL TRANSPORT INC
73 W RAILROAD ST
ESTILL SC 29918

20325252-2

Whereas, Section 33-14-200, of the 1976 Code of Laws of S C, as amended, provides for the dissolution of a corporation by forfeiture if the corporation has failed to

- (1) File its annual report on or before the date on which such report is due, or
- (2) Pay its franchise tax or income tax on or before the date on which such tax is due and payable, or
- (3) Appoint and maintain a registered agent in this State, or
- (4) Notify the office of The Secretary of State of a change in its registered agent or registered office, or
- (5) The corporation's period of duration stated in its Articles of Incorporation expires

AND WHEREAS, IT APPEARS FROM THE RECORDS IN THIS OFFICE, AFTER DUE NOTICE, THAT THE ABOVE NAMED CORPORATION HAS FAILED TO MEET REQUIREMENTS OF NOS 1 AND/OR 2 ABOVE SET FORTH

NOW THEREFORE, UNDER THE AUTHORITY OF SAID ACT, THE CHARTER IS HEREBY DECLARED FORFEITED AND DISSOLVED THIS DATE.

Inquiries concerning this administrative dissolution should be directed to the SC Department of Revenue, Corporate Section, Columbia, SC 29214-0100 or call (803) 898-5705



080111-0174 FILED- 10/01/2007
LOW COUNTRY MEDICAL TRANSPORT, INC
Filing Fee \$0.00 ORIG
Mark Hammond
South Carolina Secretary of State

Mark Hammond
Secretary of State

SOS-2 (Rev 1/28/03) 3119

R.D TXPCI016

816

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

APPLICATION FOR REINSTATEMENT OF
A CORPORATION DISSOLVED
BY ADMINISTRATIVE ACTION

TYPE OR PRINT CLEARLY IN BLACK INK

Pursuant to Section 33-14-220 of the 1976 South Carolina Code of Laws, as amended, the undersigned hereby applies to the Secretary of State for reinstatement of a corporation dissolved by administrative action and for that purpose, submits the following information:

1. The name of the corporation is Low Country Medical Transport Inc
Date of incorporation 2-20-04 Date of dissolution 10/1/2007
2. Complete either "a" or "b", whichever is applicable.
 - a. ☐ Grounds for administrative dissolution did not exist.
 - b. ☒ The grounds for administrative dissolution, which were: Payment of
Fees for delinquent taxes
have now been eliminated.
3. The corporation's name satisfies the requirements of Section 33-4-101 of the 1976 South Carolina Code of Laws, as amended.

Date 2/29/12

Low Country Medical Transport Inc
Name of Corporation

Hattie Askeew
Signature

Hattie Askeew, Pres/owner
Type or Print Name and Office

FILING INSTRUCTIONS

1. Two copies of this form, one of which can be either a duplicate original or a conformed copy must be filed.
2. Filing fee (Payable to the Secretary of State at the time of filing this application) - \$25.00
3. THIS APPLICATION CAN BE FILED ANYTIME AFTER THE EFFECTIVE DATE OF THE CORPORATION'S DISSOLUTION BY ADMINISTRATIVE ACTION AND MUST BE ACCOMPANIED BY A CERTIFICATE FROM THE SOUTH CAROLINA DEPARTMENT OF REVENUE RECITING THAT ALL STATE TAXES, PENALTIES AND INTEREST OWED BY THE CORPORATION HAVE BEEN PAID.

Return to: Secretary of State
1205 Pendleton Street, Suite 525
Columbia, SC 29201

DOM-APP FOR REINSTATEMENT OF CORP DISSOLVED.doc

Form Revised by South
Secretary of State, September 2010.



120229-0034 FILED: 02/29/2012
LOW COUNTRY MEDICAL TRANSPORT, INC.
Filing Fee: \$25.00 ORIG



Mark Hammond

South Carolina Secretary of State

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia SC 29214

Telephone (803) 898-5381 Fax (803) 737-6435 Internet E-Mail Address: Bostonj@sctax.org

February 29, 2012

Hattie Askew
Low Country Medical Transport Inc
61 Hickory Hill Road
Varnville SC 29944

Re: Federal Identification Number 45-39236

Pursuant to South Carolina Code of Laws §17-6-5510, this certifies that Low Country Medical Transport Inc has filed all returns and taxes due with the South Carolina Department of Revenue (SCDOR) for the tax types and periods listed below. All returns and taxes required to be filed and payable to the South Carolina Department of Revenue are current.

This letter does not include taxes that may become due if the taxpayer is issued a proposed assessment, selected for audit, currently under audit, in appeals or litigation with the South Carolina Department of Revenue, or tax liens that may be collected by levy or proceedings in court. The South Carolina Department of Revenue provides this Certificate of Compliance only for returns required to be filed and only for payments made directly to SCDOR.

Taxes

Corporate
Withholding

File Number

1835252-2
1835853-4

Period Covered

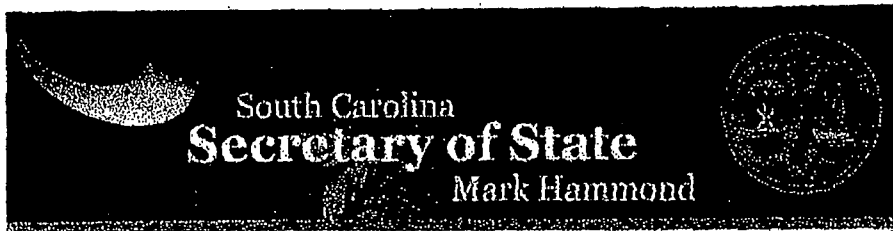
12/31/2010
09/30/2011

If this certificate is required due to an administrative dissolution, a copy of this certificate and an "Application for Reinstatement of a Corporation Dissolved by Administrative Action" must be mailed within 30 days of the date of this letter to the Secretary of State's Office. This application can be obtained from the Secretary of State's website at www.sos.sc.com.

Sincerely,

Jennifer Boston

Jennifer Boston
Tax Compliance Officer



LOW COUNTRY MEDICAL TRANSPORT, INC.

*Note: This online database was last updated on 6/10/2012 6:01:28 PM.
See our Disclaimer.*

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION	SOUTH CAROLINA
/ ORGANIZATION:	Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	HATTIE M ASKEW
ADDRESS:	73 RAILROAD ST
CITY:	ESTILL
STATE:	SC
ZIP:	29918
SECOND ADDRESS:	
FILE DATE:	02/20/2004
EFFECTIVE DATE:	02/20/2004
DISSOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Reinstatement	02/29/2012	REINSTATEMENT	
Forfeiture	10/01/2007	DISSOLUTION BY FOR	
Incorporation	02/20/2004	INCORPORATION	

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

ANGEL Y. GARY as Personal
Representative of the Estate of BLONDELL
M. GARY,

Plaintiff,

vs.

LOWCOUNTRY MEDICAL TRANSPORT,
INC., AMERICAN MEDICAL RESPONSE,
INC., d/b/a, Access2Care, and EUGENE A.
KIRKLAND

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2012-CP-25- 402

FILED
2013 APR -5 AM 10:41
KYLINDA D. HETTLER
CLERK OF COURT
HAMPTON COUNTY, S.C.
Order
BY

This matter came before me on February 21, 2013 at a regularly scheduled Motion's hearing in Hampton County. Present for the Plaintiff were R. Alexander Murdaugh and Austin H. Crosby of Hampton, South Carolina. Present for the Defendant, American Medical Response, d/b/a Access 2 Care (hereinafter "AMR"), was Robert Hood, Jr. of Charleston, South Carolina. The Defendant, AMR, moved pursuant to SCRPC 6(b) and 55(c) and for an Enlargement of Time in which to file an Answer and to set aside the entry of default. For the reasons set forth below the Defendant's Motion is denied.

Background

On December 5, 2012, the Defendant was served via certified mail through their Corporation Service Company in Columbia, South Carolina. The Defendant failed to timely answer and is in default by virtue of its failure to file a timely answer.

Argument

The Defendant claims that it is entitled to an enlargement of time in which to file

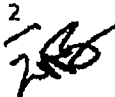
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213



its Answer. The Defendant argues that their Safety and Risk Analyst, Cynthia Stalvey, who serves as the gatekeeper of lawsuits filed against them was sick and out of the office on medical leave from December 5, 2012 until January 15, 2013. The lawsuit in question was served on December 5, 2012, and received in Ms. Stalvey's email account on December 7, 2012, during which time she was hospitalized. In her affidavit, Ms. Stalvey states that when she is scheduled to be out of the office she normally has the responsibility of forwarding lawsuits that are sent to her to another person within the company to process (See Affidavit of Cynthia Stalvey, ¶ 11). This did not happen in this case and is the Defendant's explanation for not timely filing an Answer.

The Defendant further argues that having set forth a reasonable explanation as to why responsive pleadings were not filed, it believes that it can provide sufficient facts to establish compliance with the Wham factors. Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). The standard for granting relief from an entry of default under S.C.R.C.P 55(c) is mere "good cause"; this standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Sundown Operating Company, Inc. v. Intedge Industries, Inc. et. al., 383 S.C. 601, 681 S.E.2d 885, (2009).

First, within days of learning that the Defendant was in default, it had retained counsel and filed a Motion for Enlargement of Time. Second, the Defendant asserts

2


that it has a meritorious agency defense, but presents no evidence to the Court as to such a defense other than the defendant's attorney stating that he believed his client has an agency defense. Lastly, the Defendant argues that the Plaintiff will not be prejudiced by lifting the default.

The Plaintiff argues that the explanation given for the default is not an adequate one given the sophistication and size of Defendant AMR. AMR is a nationwide corporation that is no stranger to the litigation process. AMR provides non-emergency medical transportation in over 2,000 communities across the country. In her affidavit, Ms. Stalvey states that when she is going to be out of the office for an extended period of time she has the responsibility of forwarding suits that are sent to her to another person in the company. (See Affidavit of Cynthia Stalvey, ¶ 11). This did not happen in this case and no sufficient explanation has been given as to why the company did not designate someone else to perform Ms. Stalvey's tasks during her medical leave. Additionally, no explanation has been provided as to why another employee of AMR was not designated to check Ms. Stalvey's email to process law suits that were received while she was out of the office on medical leave. The mere fact that Ms. Stalvey was out on sick leave does not alleviate AMR from its duties of responding to lawsuits brought against them. Furthermore, per Ms. Stalvey's affidavit, AMR was already on notice of the accident in question and had already processed suit papers for a companion case in Beaufort County. Id. at ¶ 8

As to the Wham factors, Plaintiff argues that it will be prejudiced if the Defendant is given an enlargement of time to answer. Additionally, Plaintiff argues that since the Defendant has presented no evidence to this Court of a meritorious defense, other than

3
2/10

defense counsel asserting that it has a valid agency defense, that the Defendant has failed to meet its burden under the Wham factors.

Ruling

The decision to grant a motion filed pursuant to SCRCP 8(b) or 55(c) lies solely within the sound discretion of the trial judge. Harbor Island Owners' Assn. v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The appellate courts cannot substitute their judgment for that of the trial judge and the trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008) (citing Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987)). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 997). In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, "but rather, whether the [trial judge's] determination is supportable by the evidence and not controlled by an error of law." Stark Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 510, 602 S.E.2d 99, 103 (Ct. App. 2004) (citing Pilgrim, 350 S.C. at 640-41, 567 S.E.2d at 528).

It is not necessary for the trial judge to make specific findings in regard to the factors enumerated in Wham. The appellate courts have held the trial judge will not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support in the record for the finding of the lack of good cause."

3/20/08

Melton, 379 S.C. 45, (citing Bage, 373 S.C. at 472, 646 S.E.2d at 161 (citing Dixon v. Besco Engineering, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995))).

This Court finds that the Defendant has not met its burden of proof in showing that it has a meritorious defense. The mere allegations from defense counsel that the Defendant has a valid agency defense is not sufficient to meet the good cause standard enumerated in Wham. The Defendant presented no evidence to this Court as to how they planned to defend the case on the issue of agency other than representing to the Court that they planned to raise the issue of agency. The Defendant did not produce any affidavit to the effect that Lowcountry Medical Transport is not an agent of AMR. Additionally, no testimony was presented by the Defendant that would establish that Lowcountry Medical Transport is not an agent of AMR. The record is completely devoid of any evidence as to the principal agency relationship, or lack thereof, between AMR and Lowcountry Medical Transport. No evidence of a meritorious defense was presented to this Court which would be worthy of a hearing or judicial inquiry. Based on the lack of evidence submitted by the Defendant with regards to a meritorious defense, I find that they are not entitled to an enlargement of time to answer under SCRCP 6(b), nor are they entitled to relief pursuant to SCRCP 55(c).

Therefore, the Defendant's motion is denied.

AND IT IS SO ORDERED.



William H. Seals, Jr.
Circuit Court Judge

March 21, 2013
Melton, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

CHARLES GARY

Plaintiff,

vs.

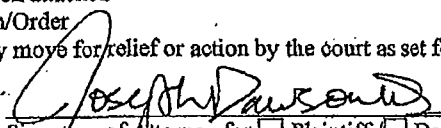
HATTIE M. ASKEW, ET AL

Defendant.

IN THE COURT OF COMMON PLEAS
14TH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-07-3595

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Plaintiff's Attorney: Joseph Dawson, III, Bar No: 13570 Address: P.O. Box 41367, North Charleston, SC 29423 Phone: (843) 207-9004 Fax (843) 207-9005 E-mail: joe@attorneyjosephdawson.com Other:		Defendant's Attorney: H. Cooper Willson, III, Bar No. _____ Address: 172 Meeting Street, Post Office Box 1508, Charleston, SC 29402 Phone: (843) 577-4435 Fax (843) 722-1630 E-mail: cooper.wilson@hoodlaw.com Other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Entry of Default and Default Judgment Estimated Time Needed: 15 mins Court Reporter Needed: ☒ YES ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted _____			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION		JUDGE CODE _____	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,

PLAINTIFF,

vs.

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

PLAINTIFF CHARLES GARY'S
NOTICE OF MOTION AND MOTION
FOR ENTRY OF DEFAULT AND
DEFAULT JUDGMENT AGAINST
AMERICAN MEDICAL RESPONSE
INC., (D/B/A ACCESS2CARE)

DATE CANCELLED 59
BEAUFORT COUNTY, S.C.
JESSIE ANN ROSENEAU
CLERK OF COURT
MAY -9 AM 11:30

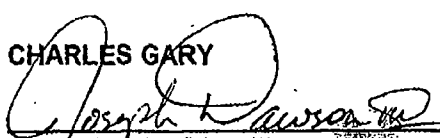
TO: H. COOPER WILSON, III ESQ., ATTORNEY FOR THE DEFENDANT
AMERICAN MEDICAL RESPONSE, INC. (D/B/A ACCESS2CARE)

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Charles Gary through his undersigned attorney will move before the presiding judge of the 14th Judicial Circuit, within ten (10) days, or as soon as the Plaintiff may be heard, for Entry of Default and Default Judgment against the Defendant American Medical Response Inc. (D/B/A Access2Care) (hereinafter "AMR"), for failure to plead or otherwise defend pursuant to the requirements of Rules 5, 12, and 55 of the South Carolina Rules of Civil Procedure.

This motion is made based on the grounds that the Plaintiff served the Summons and Complaint on the Defendant AMR on October 22, 2012, as evidenced by the Proof of Service on file with this Court. More than thirty-five (35) days elapsed before the Defendant AMR served a response on the Plaintiff. See attached Supplemental

Affidavit of Joseph Dawson, III. Pursuant to Rule 55 of the South Carolina Rules of Civil Procedures, the Plaintiff is entitled to an Entry of Default and Default Judgment against the Defendant AMR.

CHARLES GARY



JOSEPH DAWSON, III, Esquire

Post Office Box 41367

North Charleston, South Carolina 29423

Telephone: (843) 207-9004

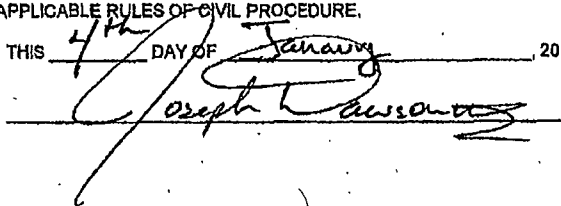
Facsimile: (843) 207-9005

January 4th, 2013
North Charleston S.C.

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THIS DATE A COPY OF THE FOREGOING WAS SERVED ON
OPPOSING COUNSEL BY MAILING OR HAND-DELIVERY IN THE MANNER PRESCRIBED
BY THE APPLICABLE RULES OF CIVIL PROCEDURE.

THIS 4th DAY OF January, 2013.



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,
PLAINTIFF,

VS.

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)

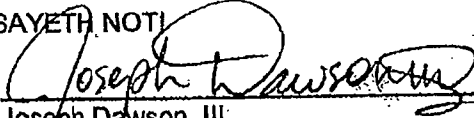
DEFENDANTS

SUPPLEMENT TO
AFFIDAVIT OF DEFAULT

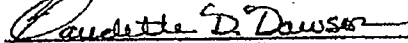
DATE FILED
JAN 13 2013
CLERK OF COURT
JEREMY A. ROSEBAU
BEAUFORT COUNTY, S.C.

PERSONALLY appeared before me, Joseph Dawson, III, who first being duly sworn, deposes and says that he is the attorney for the Plaintiff, in the above-captioned matter. That the attached document marked Exhibit "A" is a copy of the envelope that contained the Defendant, American Medical Response Inc.'s (D/B/A Access2care), Answer to the Plaintiff's Summons and Complaint.

FURTHER THE DEPONENT SAYETH NOT


Joseph Dawson, III

Sworn before me this 10 day Dec 2012


Notary Public for South Carolina
My Commission expires on 3-3-2014

ROA_0170

EXHIBIT "A"

HOOD LAW FIRM LLC

172 Meeting Street
Charleston, South Carolina 29401



12/03/12

350

05 POSTAGE

Joseph Dawson, III, Esquire
Post Office Box 1211
Charleston, SC 29402-1211

JOSE211 294022023-1211 12/02/12
NOTIFY SENDER OF NEW ADDRESS
JOSEPH DAWSON, III ATTORNEY
PO BOX 1211
N CHARLESTON SC 29402-1211



12/03/12

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON

)

Angel Y. Gary, as Personal
Representative of the Estate of Blondell
M. Gary,

) C/A No. 2012-CP-25-402

Plaintiff,

)

Versus

)

Low Country Medical Transport, Inc.,
American Medical Response, Inc., d/b/a,
Access2Care, and Eugene A. Kirkland,

)

)

)

)

)

Defendants.

)

MEMORANDUM IN SUPPORT OF
DEFENDANT AMERICAN MEDICAL
RESPONSE, INC., D/B/A,
ACCESS2CARE'S MOTION TO
RECONSIDER

FILED
8 AM 10:30
NETTLES
COUNTY
CLERK
HAMPTON, S.C.

Pursuant to the South Carolina Rules of Civil Procedure Rules 52 and 59, the Defendant American Medical Response, Inc., d/b/a, Access2Care (hereinafter "this Defendant") respectfully requests the Court grant this Defendant's Motion to Reconsider its ruling on this Defendant's Motion for Enlargement of Time to Answer and to Set Aside the Entry of Default.

STATEMENT OF FACTS

On January 31, 2012, Low Country Medical Transport, Inc. ("Lowcountry") was transporting Charles Gary and his wife Blondell Gary via ambulance in Yemassee, SC. Lowcountry was transporting the Garys to Mr. Gary's medical appointment pursuant to contract between this Defendant and Lowcountry. During the trip, the ambulance travelled off of the road and struck a tree. Mr. Gary was injured and Mrs. Gary was killed.

The Plaintiff filed a Complaint on November 9, 2012. See Exhibit A. This Defendant was served with the Plaintiff's Complaint on December 5, 2012. See Exhibit B, Proof of Service. The Complaint was forwarded to Cynthia Stalvey, the



Safety and Risk Analyst at the corporate offices of American Medical Response, Inc., who acts as the gatekeeper of legal suits that are brought against American Medical Response, Inc. and/or its subsidiaries. However, Mrs. Stalvey became ill on December 5, 2012 and unexpectedly became much worse and was eventually hospitalized for four (4) days. She was away from work on medical leave until Tuesday, January 15, 2013 and had no access to her email, and consequently, the Plaintiff's Complaint, *See Exhibit C, Affidavit of Cynthia Stalvey.*

This Defendant made an appearance on January 14, 2013 by the filing of its Motion for Enlargement of Time to Answer Plaintiff's Complaint. *See Exhibit D.* In its motion, this Defendant asserted its failure to file a timely Answer was excusable in light of Ms. Stalvey's absence from work. This Defendant further asserted that it had a meritorious defense to the Plaintiff's Complaint and it acted with reasonable promptness to file its motion.

This Defendant also served its Answer to the Plaintiff's Complaint on January 14, 2013 and the Clerk filed the same on January 16, 2013, *See Exhibit E.* This Defendant's Answer specifically denied the Plaintiff's allegations including the allegation that Lowcountry was an agent of this Defendant. Specifically, in Paragraph 4 of the Complaint, the Plaintiff alleges:

Lowcountry Medical Transport operates as an agent of American Medical Response, and Lowcountry Medical Transport's actions and the manner in which their work is performed is controlled by the principal company, American Medical Response.

See Exhibit A, Paragraph 4.

In its Answer, this Defendant responded to Paragraph 4 and averred:

[t]his Defendant denies the allegations contained in Paragraphs 4, 5 and 6 of the Plaintiff's Complaint.

See Exhibit E, Paragraph 4.

This Defendant also asserted numerous affirmative defenses including one that alleges the incident was the result of intervening negligence of a 3rd party over whom this Defendant had no control. See Exhibit E, Paragraph 13. Specifically, this Defendant asserted the following affirmative defense:

**FURTHER ANSWERING AND AS AN
AFFIRMATIVE DEFENSE, THIS DEFENDANT
ALLEGES:
(Sole, Superseding, and Intervening Negligence)**

That whatever damages, if any, which may have been sustained by the Plaintiff in this action were the result of, were due solely to, caused solely by, and were the direct and proximate result of the intervening, superseding, and unforeseeable negligence of others, over whom this Defendant had no control. Consequently, the Plaintiff is barred from recovery against this Defendant.

The parties participated in a hearing on this issue on February 21, 2013 and the Plaintiff argued in part that this Defendant's Motion to Enlarge the time to Answer should be denied because it had not presented evidence of a meritorious defense. The Court took the Motion under advisement and on March 4, 2013 advised that it was denying this Defendant's Motion based on the perceived lack of evidence of a meritorious defense. The Plaintiff submitted an Order which was signed by Judge Seals on March 21, 2013. On April 4, 2013, Plaintiff's counsel sent this signed Order to the Clerk of Court for filing and said Order was filed on April 5, 2013.

This Defendant respectfully submits this Motion to Reconsider and provides additional evidence and caselaw to support its meritorious defense and to grant this

Defendant's Motion to Enlarge the time to Answer because this Defendant presented evidence of a meritorious defense and argued the same at the hearing. Further, this Defendant is producing additional evidence of a meritorious defense for the Court's review.

LAW/ANALYSIS

I. The Entry of Default Should be Set Aside Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

A. This Defendant Made a Showing of Good Cause to Set Aside the Entry of Default.

South Carolina Rules of Civil Procedure (SCRCP), Rule 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008). "Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits." Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir.1969). It is within the trial court's discretion whether to grant relief from an entry of default. Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008). In addition, "the extreme sanction of judgment by default is reserved only for cases where the party's noncompliance represents bad faith or a complete disregard for the mandates of procedure and the authority of the trial court." Mobil Oil Co. De Venez. v. Parada Jimenez, 989 F.2d 494, 1993 WL 61863, at *3 (4th Cir.1993) (unpublished table decision). The standard for granting relief from an entry of default is "good cause," and is "less stringent than the excusable neglect standard for setting aside a final judgment on the basis of mistake, inadvertence,

excusable neglect, newly discovered evidence, or fraud." Limehouse v. Hulsey, 397 S.C. 49, 70 723 S.E.2d 211, 221 (Ct.App. 2011). The "good cause" standard requires only that the party seeking relief from default to "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E.2d 703, 706 (2011) (citing Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009)).

Good cause exists for this court to set aside the entry of default in this case. As an initial matter, the Plaintiff served the Complaint on this Defendant via the Corporation Service Company. See Exhibit B. However, upon information and belief, the attorneys for the Plaintiff knew this Defendant was represented by the Hood Law Firm in a parallel case in Beaufort County case involving the same facts and the same incident. The attorneys for the Plaintiff in the current case spoke with the attorney for the Plaintiff in the parallel case prior to serving the Complaint, and upon information and belief, were made aware that Hood Law Firm was handling that matter. That the attorneys for the Plaintiff were aware of the Hood Law Firm's relationship to this Defendant was made apparent when they called the Hood Law Firm the day after the Answer was due and advised that this Defendant was in default. The Hood Law Firm had not made an appearance in the case, nor spoken with the Plaintiff's attorneys prior to that telephone call, yet the Plaintiff's attorneys somehow knew of the relationship and failed to take any steps to notify the Hood Law Firm until it was too late to act.

Pursuant to Rule 5(b)(1), SCRCP "[w]henver under these rules service is to be made upon a party represented by an attorney the service *shall* be made upon

that attorney..." (emphasis added). Despite having knowledge of the undersigned's relationship of this Defendant, Plaintiffs' counsel served this Defendant directly with the Summons and Complaint, thereby violating Rule 5(b)(1) of the SCRPC.

Further, as soon as the Hood Law Firm became aware of the Plaintiffs Motion to seek Default against this Defendant, it took action. First, the Hood Law Firm made this Defendant aware of the Plaintiffs intention to file an Entry of Default. The Hood Law Firm also scheduled and participated in a telephone call with this Defendant to determine why the Complaint was not processed and sent to the Hood Law Firm to respond. During the telephone call, the Hood Law Firm learned how the Complaint was served and why it was not forwarded along the proper channels for handling. This Defendant's attorneys had a lengthy telephone call with the Plaintiffs attorneys and explained Ms. Stalvey's situation as well as the Affidavit which she would sign to that point. The Hood Law Firm filed an Answer which addressed the allegations in the Complaint and filed a Motion for an Enlargement of Time based on the information received from this Defendant related to Ms. Stalvey. The actions of this Defendant and its attorneys were expeditious and straightforward regarding the failure to timely file an Answer.

1. This Defendant's Motion for Relief Was Timely.

This Defendant began aware of the Plaintiffs Complaint in and around January 11, 2013. On January 14, 2013, this Defendant filed an Answer and a Motion for an Enlargement of Time. This Court heard arguments on this point during the February 21, 2013 hearing and based on correspondence from the Court, believed this Defendant's actions were timely. See Exhibit F, Email correspondence from the Court.

2. Plaintiffs Would Not Be Prejudiced if the Court Set Aside the Entry of Default.

"Prejudice to a plaintiff from setting aside a default judgment cannot take the form of mere delay or increased costs; rather, the prejudice must be substantial, facilitating fraud or collusion, resulting in the loss of evidence, or hindering discovery." 49 C.J.S. Judgments § 523, Prejudice to Plaintiff, updated 2012. Prejudice to a Plaintiff includes an analysis by the court as to whether evidence essential to the adjudication of the case on the merits will be affected by setting aside the entry of default. Shannon v. McGee, 2007-UP-543, 2007 WL 7273650 (S.C. Ct. App. Nov. 30, 2007). Prejudice can be shown by a non-defaulting party by if the delay resulted in the loss of evidence, made it more difficult for the non-defaulting party to proceed with trial, or impeded the non-defending party's ability to complete discovery. Pinpoint It Services, LLC v. Atlas It Export Corp., 812 F.Supp.2d 710, 711 (E.D. Virginia 2011). "[M]ere inconvenience is insufficient to constitute prejudice to the non-moving party" and "delay of only a few months generally does not constitute prejudice to the non-moving party." Id.

The Plaintiffs have not demonstrated how they would be prejudiced by setting aside the entry of default and allowing the case to proceed to the merits. There is no indication that any witnesses, pieces of physical evidence, or medical records are unavailable or will be unavailable at the trial of this case. The parties have not engaged in any substantive activities in the case that would impact the Plaintiffs' position if this Defendant was allowed to responsively plead. In fact, the only discovery which has been performed came when this Defendant provided a copy of its insurance policy and sent a proposed Confidentiality Order to the Plaintiff's attorneys. This Defendant requested the Confidentiality Order based on

the proprietary nature of some of its documents, including its contract with Lowcountry. No formal discovery responses have been served and no depositions have been scheduled. The only prejudice the Plaintiff would suffer if this Defendant could participate in this case is that the Plaintiff would have to now present evidence of agency rather than being able to continue with this Defendant in default and unable to defend itself.

This Court heard arguments on this point as well during the February 21, 2018 hearing and based on correspondence from the Court, believes the Plaintiff would suffer no prejudice if this Defendant's Motion was granted. See Exhibit F, Email correspondence from the Court.

3. This Defendant Has a Meritorious Defense to the Allegations Set Forth in Plaintiffs' Complaint.

"To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious."

McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (2008) (emphasis added).

[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at trial. It need only be one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubting evidence.

McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (2008) (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)).

This Defendant's Answer, which denies the Plaintiff's allegation of agency between Lowcountry Medical Transport and American Medical Response, Inc., is an assertion of a meritorious defense as required to set aside an entry of default. See Baker-Jennings Hardware Co. v. Culp, 105 S.C. 418, 90 S.E. 26 (1916). In Baker-Jennings, the Defendant was found to be in default based on their failure to timely

file an Answer. The Defendant appealed and argued: 1) excusable neglect based in part on their attorney becoming ill prior to termination of the prescribed time to file an Answer; and 2) the existence of meritorious defense to the Plaintiff's claims of indebtedness. The Court found excusable neglect based on the argument of the Defendant's attorney regarding why he failed to timely answer the Plaintiff's Complaint. However, the Court stated "a judgment ought not to be opened for excusable neglect alone; there should be a prima facie showing that the judgment is wrong; that the party sued has a good defense to the stated cause of action." Baker-Jennings, 90 S.E. at 26. The Court further reasoned that the best practice to assert a meritorious defense is to file a formal Answer. Id. ("The better practice in such cases is to submit a formal proposed answer, which would have to conform to the law of answers; but that is not always necessary"). The Court also addressed the filing of the Defendant's Affidavit and felt it was not proper. Id. (The allegation of the affidavit is made in the disjunctive. That is bad form; there ought to have been a denial.").

The Baker-Jennings case has been applied in another case involving the entry of default and the Defendant's motion to set aside the same. In Savage v. Cannon, 204 S.C. 473, 30 S.E.2d 70 (1944), the South Carolina Supreme Court affirmed the trial court's vacating a default judgment taken by the Plaintiff. In Savage, the Plaintiff took judgment by default and the Defendant appealed and filed a proposed Answer and an affidavit from the attorney. Savage, 30 S.E.2d at 71. As an initial matter, the Court found excusable neglect in light of the Defendant's attorney attempts to protect his client's interest. Id. at 72.

Of importance to the present case, the Court held the Defendant provided evidence of a meritorious defense by the filing of the Affidavit by the attorney and the filing of an Answer. Id. ("Defendant's attorney stated in his affidavit that from statements made to him by his client, he thought his client had a meritorious defense. This procedure is proper." Gales et al. v. Poe, 107 S.C. 482, 93 S.E. 189 (1917). The Savage Court also commented on the Defendant's submission of an Answer which denied the Plaintiff's claims of indebtedness and found it was proper. Id., ("There was also submitted a proposed answer under oath denying the indebtedness. The submission of the proposed answer was in accordance with the practice suggested in Baker-Jennings Hardware Co. v. Culp, 105 S.E. 418, 90 S.E. 26 (1916), although the Court there stated that this procedure was not exclusive.").

The issue of whether a specific denial of the Plaintiff's Complaint has been analyzed in many courts throughout the country. Numerous jurisdictions recognize that a specific denial of some or all of the allegations of fact from the Plaintiff's Complaint constitutes a meritorious defense sufficient to justify the granting of relief against a judgment in favor of plaintiff. See Hanover F. Ins. Co. v. Street (1937) 234 Ala 537, 176 So 350; Blair v. Blair, (1936) 48 Ariz 501, 62 P2d 1321; Shively v. Kochman (1937) 23 Cal App2d 420, 73 P2d 637; State Bank v. Raymond (1931) 103 Fla 649, 138 So 40; Young v. Young, (1939) 188 Ga 29, 2 SE2d 622; McSwain v. Nash, (1947) 331 Ill App 175, 72 NE2d 717; Falmouth State Bank v. Hayes, (1933) 97 Ind App 68, 185 NE 662; Barto v. Sioux City Electric Co. (1903) 119 Iowa 179; 93 NW 268; Welch v. Mann, (1935) 261 Ky 470, 88 SW2d 1; Grady v. Maurice L. Rothschild & Co., (1920) 145 Minn 74, 178 NW 158; Huffman v. Meriwether, (1947, Mo App) 201 SW2d 469; Eno v. Lampshire, (1922) 108 Neb 265.

187 NW 782; Roth v. Lubarsky Co., (1919) 175 NYS 499; Gallins v. Globe-Rutgers F. Ins. Co., (1917) 174 NC 553, 94 SE 300; Bagby v. Bagby, (1939) 184 Okla 627, 89 P2d 345, 122 ALR 165; Jenkins v. Jones, (1946) 208 SC 421, 38 SE2d 255; Fisk v. Hicks, (1912) 29 SD 399, 137 NW 424, Ann Cas 1914D 971; Bauer v. Bauer, (1946) 184 Tenn 217, 197 SW2d 892.

One jurisdiction actually held that the only way a Defendant could respond to a Complaint was to deny each of the Plaintiff's allegations. See Blair v. Blair, (1936) 48 Ariz 501, 62 P2d 1321("As has been said in connection with an application to open a divorce decree, 'When the plaintiff made specific charges of misconduct against defendant which would justify a divorce, about the only way she could answer such charges was by a general and specific denial of each and every one of them.'").

In the current case, this Defendant filed an Answer which specifically denied the Plaintiff's allegations of agency. This Defendant's Answer also asserted numerous affirmative defenses including that this Defendant was not responsible for the Plaintiff's damages because the incident was caused by an intervening party over which this Defendant had no control. The Plaintiff's central argument against this Defendant is that Lowcountry was an agent of this Defendant. In order to prove agency, the Plaintiff must prove this Defendant had 'control' over Lowcountry. See Fernander v. Thiipen, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982)("The test to determine agency is whether or not the purported principal has the right to control the conduct of his alleged agent.") This Defendant specifically denied that Lowcountry was its agent and asserted an affirmative defense to support its position. The denial of the allegation of agency, and the pleading of an

affirmative defense denying control over the intervening third party, constitute a meritorious defense for this Defendant.

Further, the attorney for this Defendant appeared for a Hearing with this Court where he affirmed that his client had a meritorious defense. As an officer of the Court, this Defendant attorney's statements must be truthful to the best of his knowledge and serve the same purpose as having the same defense attorney file an Affidavit stating his client has a meritorious defense. Under the Baker-Culp and Savage cases, this Defendant complied with the requirements to set aside an entry of default and the Court's original Order denying this Defendant's Motion to Extend the Time to Answer the Complaint should be reversed as a matter of law.

However, even arguendo that this Defendant was required to present an additional evidence of a meritorious defense, this Defendant has such evidence and presents it to this Court for review and consideration. Initially, this Defendant relies on the Affidavit of George Robert Matthew McCormick, the Vice-President of this Defendant, regarding its meritorious defense on the issue of agency. More specifically, Mr. McCormick attests that Lowcountry is an independent contractor and not an agent of this Defendant. See Exhibit G, Affidavit of George Robert Matthew McCormick. The distinction is important because in South Carolina, employers are generally not responsible for the actions of an independent contractor. Duane v. Presley Constr. Co., Inc., 270 S.O. 682, 683, 244 S.E.2d 509, 510 (1978) ("The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor.")

Mr. McCormick's Affidavit is based in part on the contract between this Defendant and Lowcountry which states Lowcountry is an independent contractor.

This Affidavit was not produced with this Defendant's initial Affidavit from Cynthia Stalvey (Exhibit B) because the Affidavit is based on language in the contract which has not been produced. The contract explicitly contains confidential and proprietary language and this Defendant requested that the Plaintiff sign a Confidentiality Order prior to producing or relying on the contract. This Defendant sent a proposed Confidentiality Order to the Plaintiff's attorneys on January 30, 2018, but never received a response. See Exhibits H.

In light of the Court's Order denying this Defendant's Motion for an Enlargement of Time, and the obvious importance of the document to this Defendant's claim it has no agency relationship with Lowcountry, this Defendant will produce the contract to the Court for an *in camera* review in support of its meritorious defense to the Plaintiff's allegations of agency. See Exhibit I, Contract between this Defendant and Lowcountry. The contract defines the relationship between Lowcountry and this Defendant and supports this Defendant's defenses on lack of agency. Specifically, Paragraph 19 of the contract states:

In the performance of this Agreement, each party shall be, as to the other, an independent contractor and neither party shall have the right or the authority, express or implied, to bind or otherwise legally obligate the other.

The South Carolina Supreme Court has held that contractual language carries considerable weight in determining the nature of the parties' relationship. See Kilgore Group v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993). While the presence of the contract, and its language regarding the relationship of the entities, is not dispositive on the issue of agency, it certainly provides this Defendant with a meritorious defense.

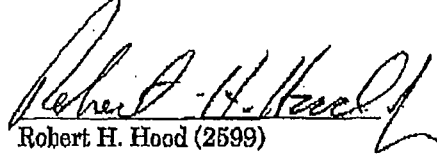
CONCLUSION

This Defendant failed to file an Answer in the required time because one of its employees was away from work on sick leave with no access to her email. Upon learning of the Plaintiff's Complaint, and that their Answer was past due, this Defendant took immediate steps to address the situation. This Defendant's attorneys had numerous telephone conferences with the Plaintiff's attorneys, this Defendant's attorneys filed Motion for Enlargement of Time to Answer Plaintiff's Complaint, this Defendant's attorneys filed Ms. Stalvey's Affidavit, and this Defendant's attorneys filed an Answer which specifically denied the Plaintiff's allegations of agency and asserted affirmative defenses regarding the same. This Defendant and its attorneys have established the good cause necessary to be relieved from default and to be granted an enlargement of time by which to Answer the Plaintiff's Complaint.

As the South Carolina Court of Appeals stated, lawsuits should be decided on the merits. *See In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997)(Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits). This case is no different. While a jury may eventually determine that Lowcountry was an agent of this Defendant and make this Defendant responsible for a portion of the Plaintiff's injuries, justice requires that this Defendant be allowed to present their case and provide evidence on the issue.

This Motion is supported by the applicable laws, statutes and South Carolina Rules of Civil Procedure. This Motion will be further supported by a memorandum of law and affidavits.

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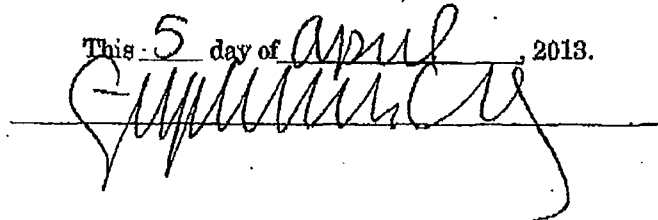
Attorneys for the Defendant
 American Medical Response, Inc., d/b/a,
 Access2Care

April 5, 2013
 Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
 was served on each party or counsel of record by ☐
 mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in
 the manner prescribed by the applicable Rule of Civil
 Procedure.

This 5 day of April, 2013.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
Charles Gary,	)	C/A No. 2012-CP-07-3595
	)	
Plaintiff,	)	DEFENDANT AMERICAN MEDICAL
	)	RESPONSE, INC. (D/B/A
Versus	)	ACCESS2CARE)'S MEMORANDUM
	)	IN OPPOSITION TO PLAINTIFF'S
Hattie M. Askew, Will Outlaw, and	)	MOTION FOR SUMMARY
Deboria Outlaw, Individually and d/b/a	)	JUDGMENT
Low Country Medical Transport, Low	)	
Country Medical Transport, Inc., Eugene	)	
A. Kirkland, and American Medical	)	
Response, Inc. (d/b/a Access2Care),	)	
	)	
Defendants.	)	

The Defendant, American Medical Response, Inc. (d/b/a Access2Care) (hereinafter "this Defendant"), respectfully submits this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment showing the Court as follows.

FACTS

On January 31, 2012, Low Country Medical Transport, Inc. ("Low Country") was transporting Charles Gary and his wife Blondell Gary via ambulance in Yemassee, SC. During the trip, the ambulance traveled off of the road and struck a tree. Mr. Gary was injured and Mrs. Gary was killed. Low Country was transporting Charles and Blondell Gary to Mr. Gary's medical appointment pursuant to contract between American Medical Response, Inc. ("AMR") and Low Country.

Low Country was granted a Class-C non-emergency transport certificate on or about May 31, 2007. See Exhibit A, Affidavit of Hattie M. Askew. Low Country was administratively dissolved in 2007 due to an oversight regarding unpaid fees,

but continued to pay for and receive renewal decals for the Class-C certification. *See id.* During the period of administrative dissolution, the subject vehicle continued to comply with the requirements of the Class-C certification. Additionally, all of Low Country's drivers, including Mr. Eugene Kirkland, are required to and do maintain valid Class-A licenses as required by the South Carolina Department of Health and Environmental Control. *See id.*

LEGAL AUTHORITY

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452 (2001). A motion for summary judgment should 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 a judgment as a matter of law." Rule 56(c), SCRPC. On a summary judgment motion, a court must view facts in the light most favorable to the non-moving party. E.g., *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493 (1994); *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree*, 364 S.C. 316 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412 (1991); *Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1 (Ct.App.2004).

In this case, the Plaintiff filed a Complaint on October 16, 2012 and named American Medical Response, Inc. as a Defendant. *See Exhibit B, Complaint.* The Plaintiff alleges this Defendant is responsible for the Plaintiff's injuries because it had a duty to "employ and dispatch NEMT that were competent, safe, and that met its' corporate NEMT providers' requirements and credentials" *See Exhibit B, Paragraph 18.* This Defendant sent its Answer to this Court on November 19, 2012 for filing with a copy going to the Plaintiff's attorney. (*See Exhibit C, Letter Serving Answer*). The Defendant denied that it breached any alleged duty to the Plaintiff and asserted numerous affirmative defenses. *See Exhibit D, Defendant's Answer.*

The Plaintiff alleges he is entitled to summary judgment as a matter of law because Low Country did not have the proper paperwork from the State of South Carolina to operate ambulatory vehicles. This belief is misplaced. Low Country provides transportation to non-ambulatory clients like the Plaintiff. Low Country hires and utilizes licensed drivers – in this case Mr. Eugene Kirkland – to operate a competent and safe business. The Plaintiff's allegation that the Defendant was somehow negligent for hiring Low Country because they mistakenly failed to pay a licensing fee is disingenuous at best. Further, the Defendant believes that discovery in this case will shed light on the business relationship between the Defendant and Low Country as well as the Low Country's history of operating a competent business.

Summary judgment at this stage is premature in light of the fact that Low Country has the proper credentials to operate a business, and the fact that discovery in the case has barely begun.

ARGUMENT

I. Negligence Per Se

"Negligence per se is negligence arising from defendant's violation of statute." Trivelas v. South Carolina Dept. of Transp., 348 S.C. 125, 134 (Ct. App. 2001). "In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." Hurst v. Sandy, 329 S.C. 471, 478 (Ct. App. 1997). The Plaintiff must then show that violation of the statute in question proximately caused the injury. Seals by Causey v. Winburn, 314 S.C. 416, 418 (Ct. App. 1994) ("After establishing negligence per se, a plaintiff must prove that the violation of the statute was causally linked, both in fact and proximately, to the injury.").

a. Duty Arising From Statute

Generally, while violation of a traffic safety statute can establish negligence per se, a violation of a licensing statute will not. See Hurst v. Sandy, 329 S.C. 471, 478 (Ct. App. 1997); but see Cirosky v. Smathers, 128 S.C. 358 (1924) (operation of a motor vehicle by an unlicensed person under the age of sixteen is negligence per se, but proximate cause must still be established).

The specific statutes in question requiring non-emergency medical transport vehicles to maintain Class-C certificates are S.C. Code § 58-23-10 et. seq. To establish private civil liability for a violation of these statutes, the court must determine their essential purpose. "A statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability."

Dorman v. Aiken Communications, Inc., 303 S.C. 63, 67 (1990). Statutes imposing criminal penalties without provisions for private civil action are generally found to be for the protection of the public welfare.

Here, S.C. Code § 58-23-240 requires that all non-emergency medical transport vehicles maintain Class-C certificates. The driver of a non-emergency transport vehicle is also required to have a Class-A driver's license issued by the State of South Carolina. The regulations further require the non-emergency motor carrier to obtain a certificate from PC&N, which lists several driver and vehicle requirements. S.C. Code of Regulations R. 103-112 & 103-133. Both the S.C. Code and the S.C. Code of Regulations provide for specific criminal penalties for willful violations of these provisions indicating that these provisions are meant for the protection of the public welfare. Further evidence of the Statute's purpose is that the certificate is considered one for "Public Convenience and Necessity." See Exhibit E, Application for Certificate of Public Convenience and Necessity for operation of Motor Vehicle Carrier. Therefore, it is clear that this statute was promulgated for the protection of the general welfare and does not provide for private civil penalties.

b. Proximate Cause

Proximate cause is a legal limitation on liability that requires a finding of causation in fact and legal causation. Seals by Causey, 314 S.C. at 418. Causation in fact requires a finding that "but for" the violation of the statute, the injury would not have occurred. Legal causation requires a finding of foreseeability, that is, "the injury must be the natural and probable consequence of the violation of the statute before the violation can be said to be the proximate cause of the injury." Id.

Here, it is clear that the violation of this statute was not the proximate cause of the Plaintiff's injuries. Compliance with the specific requirements of S.C. Code §

58-23-240 have no foreseeable connection with the driver's ability to properly drive the vehicle. The statute is intended to ensure the vehicle is properly equipped and operated to handle its passengers' medical issues. To apply for a Class-C certificate the driver must, among other things, be CPR certified, trained in assisting persons with disabilities and trained in the use of vehicle safety equipment. S.C. Code of Regulations R. 103-133. The vehicle itself must have seatbelts, proper interior lighting, maps, fire extinguishers, etc. Id. All of these requirements are clearly intended to ensure that the vehicle and operator are able to properly address any medical issues the passenger has during transport. By contrast, other statutes require the driver to have a Class-A license and would ensure the drivers ability to operate the vehicle in a safe manner.

The Plaintiff's alleges that the driver of the vehicle was negligent in his operation of the vehicle, not that the vehicle or driver was improperly equipped to address his medical needs. Further, the vehicle's continued certification during the period it was administratively dissolved proves that the vehicle continued to be in compliance with the specifics of the statute. Low Country currently holds a valid Class-C certificate and has always filed the proper renewal forms and paid the proper licensing fees. See Exhibit A, Affidavit of Hattie M. Askew. Therefore, the Plaintiff cannot show that a violation of S.C. Code § 58-23-240 proximately caused his injuries.

II. Ordinary Negligence

Generally, an employer is not liable for the negligence of its independent contractor. See Alexander v. Seaboard Airline R.Co., 221 S.C. 477 (1952). Low Country is an independent contractor for this Defendant. See Exhibit F, Affidavit of

George Robert Mathew McCormick. Therefore, this Defendant should not be held liable for Low Country's negligence.

A limited exception to the general rule is that "[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." Durkin v. Hansen, 313 S.C. 343, 347 (Ct. App. 1993). In considering the non-delegable duty doctrine, the South Carolina Supreme Court adopted the reasoning of the Restatement (Second) of Torts: Employers of Contractors § 429 (1965) Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 51 (2000). "Under section 429, the plaintiff must show that (1) the [Defendant] held itself out to the public by offering to provide services; (2) the plaintiff looked to the [Defendant], rather than the [independent contractor]; and (3) a person in similar circumstances reasonably would have believed that the [independent contractor] was the Defendant's employee." Id.

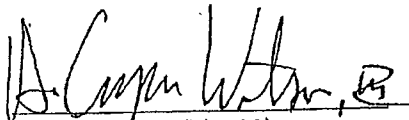
This Defendant is a Medicaid transportation service manager and broker and utilizes its network of subcontractor medical transport companies to dispatch the subcontractor best able to respond to the requests from their clients. Low Country is a transportation provider within this Defendant's network of subcontractors. Low Country owns and operates its own fleet of ambulances where its name is clearly posted. See PLTF Charles Gary Initial Disclosure 0007. Low Country is a corporation formed under the laws of and licensed to business in South Carolina. Therefore, no person would reasonably believe Low Country is an employee of this Defendant. As such, the non-delegable duty doctrine is inapplicable to this case.

Regarding negligent hiring and supervision, the Plaintiff's claims are similarly flawed. To succeed on a negligent hiring and supervision claim, the Plaintiff must show the Defendant "knew or should have known that its employment of a specific person [or entity] created an undue risk of harm to the public." James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008). Here, the driver of the involved vehicle, Mr. Kirkland, maintained his Class-A license, which demonstrates his ability to properly operate non-emergency transport vehicles. See Exhibit A, Affidavit of Hattie M. Askew. Further, Mr. Kirkland "safely and successfully transported a total of 780 patient per year" since he was hired in June of 2008. See id. There is nothing present in Mr. Kirkland's or Low Country's histories to indicate that the hiring of Low Country would create an undue risk of harm to the public. Therefore, Plaintiff's claims as to negligent hiring and supervision should fail.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests the Court deny the Plaintiff's Motion for Summary Judgment.

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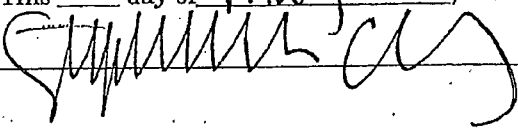
Attorneys for the Defendant
American Medical Response, Inc. (d/b/a
Access2Care)

5/9, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 13 day of May, 2013.

A handwritten signature in black ink, appearing to be "STANLEY C. J.", is written over a horizontal line.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT MAY -2 PM 3:39

CIVIL ACTION NO: 12-CP-07-3595

CHARLES GARY, JERRI ANN ROSENBAU
PLAINTIFF BEAUFORT COUNTY, S.C.
CLERK OF COURT

V.

HATTIE M. ASKEW, WILL OUTLAW
DEBORIA OUTLAW, INDIVIDUALLY
AND D/B/A LOW COUNTRY MEDICAL
TRANSPORT, LOW COUNTRY
MEDICAL TRANSPORT, INC., EUGENE
KIRKLAND, AND AMERICAN
MEDICAL RESPONSE, INC. (D/B/A
ACCESS2CARE),
DEFENDANTS.

AFFIDAVIT OF HATTIE M. ASKEW



PERSONALLY appeared before me, Hattie M. Askew, who being duly sworn deposes

and says:

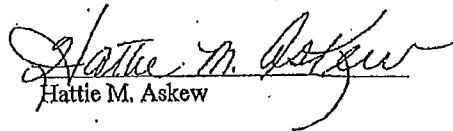
1. I am over the age of eighteen (18) and otherwise competent to make this Affidavit.
2. I am the owner of Low Country Medical Transport, Inc.
3. Low County Medical Transport, Inc. was granted a Class C Non-Emergency Certificate on or about May 31, 2007 from the South Carolina Office of Regulatory Staff (ORS).
4. Pursuant to South Carolina ORS regulations, it mandates all drivers of a Class C Non-Emergency vehicle to possess a Medical Examiner's DOT Card, a current driver's license, a current CPR and First Aid certificate, a mandatory drug screening, and in-service training documentation in order to operate said commercial vehicle.
5. Each and every Low Country Medical Transport, Inc. driver have satisfied the above-referenced requirements and carry the appropriate South Carolina Driver's License. This

Class A license is regulated by the South Carolina Department of Health and Environmental Control (SCDHEC).

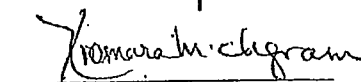
6. The South Carolina ORS Commission has never revoked Low Country Medical Transport Inc.'s Class-C Non-Emergency Certificate for any substantive event pursuant to ORS Regulation 103-240, or any other applicable South Carolina rules and regulations.
7. Unbeknownst to me, the South Carolina Secretary of State administratively dissolved Low Country Medical Transport, Inc. on or about October 1, 2007. The dissolution was due to an unpaid fee.
8. During the time Low Country Medical Transport, Inc. was administratively dissolved, we continued to pay the appropriate fees and were provided renewal decals for our vehicles from the South Carolina ORS.
9. Low Country Medical Transport, Inc. has never requested for a suspension or termination pursuant to ORS Regulation 103-164.
10. On or about November 17, 2010 Low Country Medical Transport, Inc.'s Class C Non-Emergency Certificate was revoked in error, but immediately reinstated by the Commission (see attached Order).
11. Low Country Medical Transport, Inc.'s currently holds a valid status for its South Carolina ORS Class C Non-Emergency Certificate and has always been compliant with maintaining the appropriate license fees and renewal forms as set forth in Article III of Motor Vehicle Carrier Law.
12. The driver, Eugene Kirkland was hired by Low Country Medical Transport, Inc. in June of 2008.

13. In the history of Low Country Medical Transport, Inc., Mr. Kirkland has safely and successfully transported a total of approximately 780 patients per year.
14. Eugene Kirkland was employed by Low Country Medical Transport, Inc. for approximately three and a half (3 ½) years.
15. Mr. Kirkland's personnel file is without incident, nor was he ever involved in any other automobile accidents through out his employment with the company.

FURTHER AFFIANT SAYETH NOT.


Hattie M. Askew

SWORN to before me this
2nd day of May, 2013.


Notary Public for South Carolina
My commission expires: 1

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2007-86-T, 2010-295-T - ORDER NO. 2010-791

DECEMBER 3, 2010

IN RE: Application of Low Country Medical	) ORDER GRANTING
Transport, Inc., 61 Hickory Hill Road,	) REINSTATEMENT OF
Vadiville, South Carolina 29944 (Mailing	) CERTIFICATE
Address: Post Office Box 912, Vainville,	)
South Carolina 29911 (District 2) for a	)
Class C (Non-Emergency) Certificate of	)
Public Convenience and Necessity	)
And	)
Relitton of the Office of Regulatory Staff for	)
Commission to Order a Rule to Show Cause	)
as to Why the Certificates of Public	)
Convenience and Necessity for Certain	)
Motor Carriers Should Not be Revoked for	)
Failure to File Annual Reports and Gross	)
Receipts Forms	)

This matter comes before the Public Service Commission of South Carolina (the "Commission") by way of a request filed by Low Country Medical Transport, Inc. ("Applicant") to reinstate Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A. Certificate No. 7798-A was issued to the Applicant pursuant to the authority granted by Commission Order No. 2007-211 (April 3, 2007). This Certificate was later revoked after a hearing by Order No. 2010-772, issued on November 17, 2010, for failure of the Applicant to file an annual report and/or a gross receipts form, as required by the Regulations. The record reflects that an annual report has now been filed.

Since the annual report has been filed, we find and conclude that the Applicant is now in compliance with Commission Regulations, and the previously cancelled Certificate should be reinstated. However this reinstatement is conditioned on further compliance with all other applicable statutes and regulations. Prior to such compliance, regulated motor carrier services shall not be provided by the Applicant.

IT IS THEREFORE ORDERED:

1. That Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A of Low Country Medical Transport, Inc. be, and hereby is, reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.
2. That all operating rights authorized under the Certificate are hereby reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.
3. That prior to compliance with the applicable statutes and the Commission's Rules and Regulations, the motor carrier services authorized by the Certificate shall not be provided.

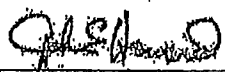
DOCKET NOS. 2007-86-T; 2010-295-T – ORDER NO. 2010-791

DECEMBER 3, 2010

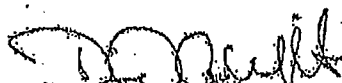
PAGE 3

4. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


John E. Howard, Chairman

ATTEST:


David A. Wright, Vice Chairman

(SEAL)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

CHARLES GARY

Plaintiff(s)

VS.

HATTIE M. ASKEW, WILL OUTLAW, AND
DEBORAH 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)

Defendant(s)

Submitted By: Joseph Dawson, III

Address: P.O. Box 1211

Charleston, SC 29402

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2012-CP - 07-

SC Bar #: 13570

Telephone #: 843-207-9004

Fax #: 843-207-9005

Other:

E-mail: joe@attorneyjosephdawson.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

☐ Contracts ☐ Construction (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- ☐ Notice of File Med Mol (230) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☒ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Administrative Law/Relief ☐ Reinstato Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
☐ Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature:

SCCA / 234 (04/2012)

Date: October 15, 2012

Page 1 of 3

ROA_0201

Appendix_0204

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute,
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

CHARLES GARY,

Plaintiff,

vs.

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

IN THE COURT OF COMMON PLEAS

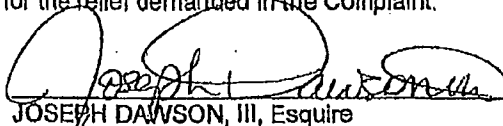
CASE NO. 2012-CP-07-3595

SUMMONS
(JURY TRIAL DEMANDED)

12 OCT 16 PM 3:39
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at P.O. Box 1211, Charleston, SC 29402, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.



JOSEPH DAWSON, III, Esquire
Post Office Box 1211
Charleston, South Carolina 29402
Telephone: (843) 207-9004
Facsimile: (843) 207-9005

October 15, 2012
Charleston S.C.

ATTORNEY FOR THE PLAINTIFF

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3275

PLAINTIFF,

COMPLAINT

(Negligence/Negligence Per Se/Gross Negligence)
(Loss of Consortium/Companionship of Spouse)
(Intentional Infliction of Emotional Distress)

(JURY TRIAL DEMANDED)

DEFENDANTS

PARTIES AND JURISDICTION

1. The Plaintiff, Charles Gary is a citizen and resident of Beaufort County, South Carolina, (hereinafter called "Plaintiff" or "Gary").
2. Upon Information and belief, the Defendant, Low Country Medical Transport Inc., ("LCMT Inc.") is an entity organized and existing under the laws of the State of South Carolina.
3. Upon information and belief, Hattie M. Askew (a/k/a Hattie M. Outlaw), is a citizen and resident of Hampton County, South Carolina (hereinafter "Askew") and is a co-owner, operator, and/or officer of a company that did business as Low Country Medical Transport ("Low Country Medical") in South Carolina. Upon Information and

belief, Low Country Medical was formerly known as and is the successor to LCMT Inc., which corporation was dissolved on the date of the accident identified herein.

4. Will Outlaw and Deboria Outlaw are citizens and residents of Bertie County, North Carolina, and they are co-owners, operators, and/or officers of the company that did business as Low Country Medical in South Carolina. Defendants Askew, Will Outlaw, and Deboria Outlaw individually and/or collectively hereinafter referred to as Low Country Medical.

5. Upon information and belief, Eugene A. Kirkland ("Kirkland") is a citizen and resident of Hampton, South Carolina and is an employee of Low Country Medical and/or LCMT Inc.

6. Upon information and belief, American Medical Response Inc., (hereinafter "AMR") is a Delaware Corporation that is authorized to do business in the State of South Carolina. AMR is a broker of non-emergency medical transportation and it dispatched non-emergency medical transportation (NEMT) to eligible Medicaid recipients in South Carolina on the date of the accident identified herein. AMR contracted with LCMT Inc., to provide NEMT services as part of its contractual obligation to provide said services for the South Carolina Department of Health and Human Services.

7. Defendants LCMT Inc., Low Country Medical, Kirkland, and AMR collectively referred to herein as the Defendants.

8. This Court has jurisdiction over the Defendants and over the subject matter of this action.

9. Venue is proper in Court of Common Pleas for Beaufort County.

FACTS.

10. The Defendants LCMT Inc., and/or Low Country Medical have been engaged in the business of transporting individuals to and from medical facilities for care and treatment since on or about February 20, 2004. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved LCMT Inc.'s, corporate status in South Carolina. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. Low Country Medical continued to operate until LCMT Inc.'s, reinstatement by the South Carolina Secretary of State four and half years later. Moreover, Low Country Medical maintained LCMT Inc.'s, Class C Non-Emergency Motor Vehicle Carriers' Certificate from the South Carolina Office of Regulatory Staff. Low Country Medical never sought to transfer the Certificate to the successor company or apply for a new one when LCMT Inc., dissolved.

11. The South Carolina Department of Health and Human Services (SCDHHS) entered into a contract with AMR on or about May 25, 2011, and AMR began to provide NEMT services to eligible Medicaid recipients in South Carolina on or about August 17, 2011. The potential value of AMR's five-year contract with SCDHHS was approximately \$162 million. On or about November 22, 2011, AMR asked SCDHHS to approve a \$25 million change order due to a mistake with its bid, seeking to increase its potential contract value to \$187 million over the contract term. SCDHHS denied AMR's \$25 million change order request, and thereafter, AMR filed a notice to terminate its contract with SCDHHS effective February 21, 2012, and began a 60-day transition to exit the State.

12. While under contract with SCDHHS, AMR entered into a contract with LCMT Inc., and/or Low Country Medical to be a provider in its network of Non-Emergency Medical Transportation providers for eligible Medicaid recipients in South Carolina. AMR knew and/or should have known that LCMT Inc.'s, corporate character was dissolved and that Low Country Medical was operating in violation of S.C. Code Ann. § 58-23-10 et seq., because Low Country Medical did not have a certificate to operate as a non-emergency medical transport business in South Carolina.

13. On or about January 31, 2012, AMR scheduled LCMT Inc., and/or Low Country Medical to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. AMR knew and/or should have known that LCMT Inc., was not a corporate entity and/or in good standing with the state of South Carolina and that Low Country Medical was not licensed to transport Mr. Gary.

14. At approximately 11:00 A.M., the Defendants LCMT Inc., and/or Low Country Medical's ambulance was transporting Mr. Gary, who is a paraplegic and his wife home after a medical appointment. Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat with her seat belt secured. The Defendants LCMT Inc., and/or Low Country Medical, through their agent and/or employee Kirkland was driving the ambulance when suddenly and unexpectedly Kirkland lost control of the vehicle transporting Mr. Gary and his wife on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home.

15. The ambulance ran off the shoulder of the road and struck a large tree causing Mr. Gary to suffer serious, severe, painful and grievous injuries, broken bones, and damages, as more specifically set forth herein and killing his wife.

16. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, where he remained for three weeks due to his injuries and was unable to attend his wife's funeral.

**FOR A FIRST CAUSE OF ACTION
(Negligence/Negligence per Se/Gross Negligence)**

17. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

18. AMR had a duty to employ and dispatch NEMT providers that were competent, safe, and that met its corporate NEMT providers' requirements and credentials; that comply with State law; and that are in good standing with the State of South Carolina. AMR, LCMT Inc., and/or Low Country Medical, and Kirkland, had a duty safely and competently transport Mr. Gary to and from his medical appointment.

19. The LCMT Inc., and/or Low Country Medical, Kirkland, and AMR breached that duty.

20. Mr. Gary's injuries and damages were proximately caused by the negligent, grossly negligent, careless, reckless, willful, and wanton acts and conduct of the Defendants in one or more, or all of the following particulars:

- (a) In failing to keep a proper lookout;
- (b) In failing to keep its ambulance under proper control;
- (c) In driving the vehicle too fast for the conditions then and there existing;

(d) In operating an automobile in utter disregard for the safety of others on the highway;

(e) In failing to exercise the degree of care, which a reasonably prudent person would have exercised under the same or similar circumstances;

(f) In endangering Mr. Gary, by placing the ambulance, a dangerous instrumentality, in the care and under the control of a reckless, careless and incompetent driver;

(g) In operating the ambulance at a rate of speed which was excessive for the circumstances then prevailing;

(h) In failing to properly implement, train, audit, and enforce safety policies, to avoid collisions;

(i) In causing and allowing the ambulance to be operated by a reckless, careless, and incompetent driver;

(j) In dispatching a NEMT provider that was in violation of the Motor Vehicle Carrier laws and that did not meet the requirements and credentials for being a NEMT provider in the network;

(k) In all other particulars as the evidence may show.

21. That by reason of and in consequence of the aforementioned negligent, negligent *per se*, careless, reckless, willful, wanton and grossly negligent conduct of the Defendants, Mr. Gary suffered the injuries and losses complained of.

22. As a direct and proximate result of the aforesaid negligence, negligence *per se*, carelessness, recklessness, willfulness, wantonness, and grossly negligent conduct of the Defendants, Mr. Gary has suffered the following:

- (a) Traumatic and violent injuries to various parts of Mr. Gary's body, which were painful, prolonged, and permanent, to include rehabilitation therapy;
- (b) Medical, doctor and related health care expenses;
- (c) Physical pain and suffering;
- (d) Mental and emotional anguish;
- (e) Disabilities and impairment;
- (f) Loss of enjoyment of life; and
- (g) Such other damages as may be determined during discovery and/or trial.

**FOR A SECOND CAUSE OF ACTION
(Loss of Consortium/Companionship of Spouse)**

23. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

24. Mr. Gary is the former spouse of the late Blondell Gary. Mr. Gary is a paraplegic and his late spouse did not work outside of the home so that she could provide for Mr. Gary's daily care, maintenance, support, companionship, home health care, and household service needs.

25. The Defendants' tortious, reckless, willful, and wanton conduct has caused Mr. Gary damages as a result of the loss of his wife.

26. The Defendants' conduct is/was a tortious violation of the right to companionship, aid, society and services of Mr. Gary's late wife Blondell Gary.

27. Such tortious violation of Mr. Gary's rights has caused and is causing damages to Mr. Gary and are compensable under South Carolina law.

28. Mr. Gary is entitled to damages due to the tortious and reckless conduct of the Defendants.

**FOR A THIRD CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)**

29. The Plaintiff repeats and re-alleges the allegations contained in the above paragraphs as if fully repeated verbatim herein.

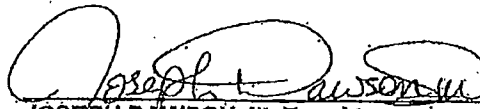
30. Mr. Gary was strapped to a stretcher in the back of the Defendants Low Country and/or LCMT Inc.'s, ambulance when his wife's body was crushed by the impact of the ambulance suddenly and un-expectantly running into a large tree and killing her.

31. Mr. Gary was in close proximity to his wife when the incident occurred, but due to his physical impairment, pain, broken bones, and injuries he sustained in the accident he could not aid, assist, or comfort his wife, while he cried out to her to determine her well-being.

32. Mr. Gary suffered emotional distress with physical manifestations due solely and completely to the outrageous and negligent, willful and reckless conduct of the Defendants which caused the death of his wife.

33. Mr. Gary is entitled to damages due to the emotional distress he suffered witnessing his wife's death due to the tortious and reckless, willful, wanton, and grossly negligent conduct of the Defendants.

WHEREFORE, the Plaintiff Charles Gary prays for judgment against the Defendants in a fair, just and equitable sum for actual damages, consequential damages, punitive damages, special damages, the cost of this action, attorney's fees, prejudgment interest, and for such other and further relief as this Court may deem proper.

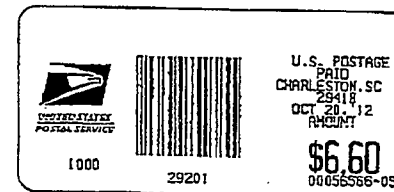
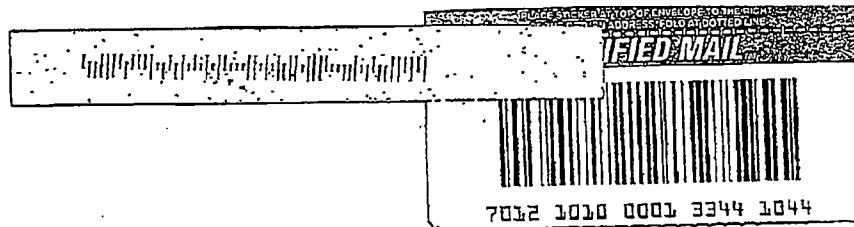


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October 15, 2012
Charleston S.C.

ATTORNEY FOR CHARLES GARY

ROA_0214



Joseph Dawson, III, Esq.
Post Office Box 1211
Charleston, SC 29402

Corporation Service Company
Registered Agent for
American Medical Response Inc.
1703 Laurel Street
Columbia, SC 29201

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MARY AGNES HOOD CRAIG
ROBERT H. HOOD, JR.
(SC & NC)
BARBARA WYNNE SHOWERS
(SC, PA, NJ, TN)
J. BLANTON O'NEAL, IV
CHILTON GRACE SIMMONS
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ELLOREE A. GANES
JAMES B. HOOD

OF COUNSEL
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CHRISTINA M. DICKINSON
C. TYSON NETTLES
(SC & MS)
ELIZABETH W. BALLENTINE
BRIAN E. JOHNSON
H. COOPER WILSON, III
T. HAPPELSCURRY
JEFFREY M. BOGDAN
R. DAVIS RICE
ANNE S. REID
A. WALKER BARNES
BRIAN JAMES KERN
JUSTIN T. BAMBERG

November 19, 2012

Honorable Jerri Ann Roseneau
Beaufort County Clerk of Court
102 Ribaut Rd, Room 208
Beaufort, SC 29902

Re: Charles Gary, Individually and as Personal Representative of the Estate of Blondell
Gary v. American Medical Response and Low Country Medical Transport, Inc.
Claim No. 12167489
HLF File No. 290.005

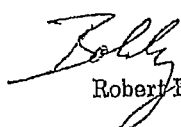
Dear Ms. Roseneau:

Enclosed please find the original and one (1) copy of the Defendant's Answer to Plaintiff's Complaint in the above-referenced matter. Please return a clocked-in copy in the enclosed self-addressed stamped envelope.

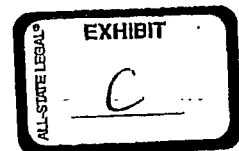
By copy of this letter, I am serving opposing counsel with a copy of the same. Also enclosed is a Notice of Deposition for the Plaintiff, and the Defendant's Interrogatories and Requests for Production to the Plaintiff.

Kind regards,

Yours truly,


Robert H. Hood, Jr.

BHH/sam
Enclosure(s)
cc: Joseph Dawson, III, Esquire



COPY

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Charles Gary, Individually and as
Personal Representative of the Estate of
Blondell Gary,

Plaintiff,

Versus

American Medical Response and Low
Country Medical Transport, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C/A No. 2012-CP-07-3595

) DEFENDANTS AMERICAN
) MEDICAL RESPONSE'S ANSWERS
) TO THE PLAINTIFF'S COMPLAINT

The Defendant, American Medical Response (hereinafter "this Defendant"), hereby answers the Plaintiff's Complaint, subject to any and all affirmative defenses, qualifications, motions and any other pleadings, as follows:

PARTIES AND JURISDICTION

1. Each and every allegation not specifically admitted herein is denied.
2. This Defendant lacks sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.
3. The allegations contained in Paragraphs 2, 3, 4, and 5 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient information upon which to form a belief as to the allegation contained in Paragraphs 2, 3, 4, and 5 of the Plaintiff's Complaint and therefore denies the same.
4. In response to the allegations in Paragraph 6 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing of



the laws of a state other than South Carolina. This Defendant denies all remaining allegations contained in Paragraph 6 of the Plaintiff's Complaint.

5. In response to the allegations contained in Paragraph 7 of the Plaintiff's Complaint, this Defendant admits that it is a Defendant in this case and that the Plaintiff intends to collectively refer to all of the named Defendants as Defendants. The Defendant asserts that it is a separate and distinct entity from the other Defendants.

6. The allegations contained in Paragraphs 8 and 9 in the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that a response is required, this Defendant denies allegations contained in Paragraph 8 and 9 in the Plaintiff's Complaint.

7. The Defendant denies as written the allegations contained in Paragraphs 10, 11, and 12 of the Plaintiff's Complaint.

7. The Defendant denies the allegations contained in Paragraphs 13, 14, and 15 of the Plaintiff's Complaint.

8. This Defendant denies as written in the allegation contained in Paragraph 16 of the Plaintiff's Complaint and craves reference to Charles Gary's medical records for complete and accurate description of the medical care he received.

FIRST CAUSE OF ACTION
(Negligence/ Negligence per se/ Gross Negligence)

7. In response to the allegation in Paragraph 17 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

8. This Defendant denies the allegations contained in Paragraphs 18, 19, and 20 including subparts (a) through (k) Paragraph 21, and 22 including subparts (a) through (g) which are directed towards this Defendant. The remaining allegations contained in Paragraph 18, 19, and 20 including subparts (a) through (k) Paragraphs 21 and 22 including subparts (a) through (g) not directed towards this Defendant therefore no response is required. To the extent a response is required, the Defendant denies all of the allegations contained in Paragraphs 18, 19, and 20, including subparts (a) through (k), Paragraph 21 and 22, including subparts (a) through (g)

SECOND CAUSE OF ACTION
(Loss of Consortium/ Companionship Of Spouse)

9. In response to the allegations contained in Paragraph 23 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

10. This Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27, and 28 of the Plaintiff's Complaint which are directed towards this Defendant. The remaining allegations contained in Paragraph 24, 25, 26, 27, and 28 of the Plaintiff's Complaint are not directed towards this Defendant and therefore no response is required. To the extent that a response is required, the Defendant denies the allegations contained in Paragraphs 24, 25, 26, 27, and 28 of the Plaintiff's Complaint.

THIRD CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)

11. In response to the allegation in Paragraph 29 of the Plaintiff's Complaint, this Defendant reasserts and re-alleges the above Paragraphs as if fully restated herein verbatim.

12. This Defendant denies the allegations contained in Paragraphs 30, 31, 32, and 33 including the WHEREFORE Paragraph of the Plaintiff's Complaint those being the remaining causes of action in the Plaintiff's Complaint.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(No Proximate Cause)**

13. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff's and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff's.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Failure to State a Claim)**

14. The allegations contained in Complaint fails in its entirety to state a claim upon which relief may be granted against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)**

15. That any award or assessment of punitive damages as prayed for by the Plaintiff's would violate this Defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:
(Intervening Negligence/Negligence of a Third Party)**

16. That, upon information and belief, even if this Defendant was negligent in the manner described in the Complaint, which is specifically denied, whatever injuries and damages, if any, which may have been sustained by the Plaintiff's as a result of the accident were the direct and proximate result of the intervening and superseding

negligence of third parties, for whose conduct this Defendant bears no responsibility. Therefore, the Plaintiffs' are barred from recovery against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Unforeseeable Intervening or Superseding Events)

17. The damages complained of were solely the result of unforeseeable intervening or superseding events over which this Defendant had no control.

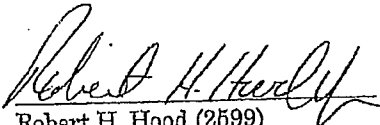
**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Sole, Superseding, and Intervening Negligence)

18. That whatever damages, if any, which may have been sustained by the Plaintiffs' in this action were the result of, were due solely to, caused solely by, and were the direct and proximate result of the intervening, superseding, and unforeseeable negligence of others, over whom this Defendant had no control. Consequently, the Plaintiffs' are barred from recovery against this Defendant.

**FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE, THE
DEFENDANT ALLEGES:**
(Reservation and Non-Waiver)

19. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (2599)
Robert H. Hood, Jr. (13491)
H. Cooper Wilson, III (74939)

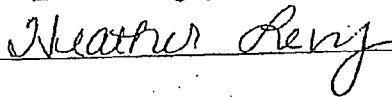
Attorneys for the Defendants
American Medical Response and Low
Country Medical Transport, Inc.

November 19, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 19 day of November, 2012.



PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210
(Mailing address: Post Office Drawer 11649, Columbia, SC 29211)



Phone: (803) 896-5100 Fax: (803) 896-5199

**APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR
OPERATION OF MOTOR VEHICLE CARRIER**

CLASS C - NON-EMERGENCY

Date: _____

Application is hereby made for a Certificate of Public Convenience and Necessity, in accordance with the provision of S.C. Code Ann., § 58-23-10, et seq. (1976), and amendments thereto.

1. Name under which business is to be conducted (corporation, partnership, or sole proprietorship, with or without trade name.)

Street Address of Applicant

Mailing Address of Applicant (if different from street address)

Phone

Fax

Email Address

2. If the Applicant is an LLC or a corporation, a copy of the Certificate of Existence from the South Carolina Secretary of State and the Articles of Incorporation must be attached. (If incorporated outside of SC, attach South Carolina Secretary of State "Foreign Corporation" Certificate.)

3. Select Entity Type: (Check one)

- ☐ Individual Owner/Sole Proprietorship
☐ Partnership - List names and address of all person having an interest in the business.
☐ Corporation - List names and addresses of two principal officers.

Applicant is financially able to furnish the services as specified in this application and submits the following statement of assets and liabilities.

BALANCE SHEET

Balance at Time Application is Filed:

Month _____ Year _____

Assets:

Cash	
Receivables	
Real Estate	
Buildings and Equipment (Net)	
Motor Vehicles (Net)	
Garage Equipment (Net)	
Machinery and Tools (Net)	
Supplies on Hand	
Prepays and Other Assets	
Total Assets *	
<u>Liabilities and Equity:</u>	
Accounts Payable	
Notes Payable	
Mortgages Payable	
Equipment Obligations	
Accrued Salaries and Wages	
Other Accrued Obligations	
Other Liabilities	
Total Liabilities	
Capital Stock	
Retained Earnings	
Total Equity	
Total Liabilities and Equity *	

* Total Assets = Total Liabilities and Equity

PROPOSED RATES AND CHARGES FOR SERVICE

Proposed Rates and Charges (List only maximum charges per mile or trip, and/or hourly rate):

Requested Scope of Authority: Check all counties in which you are requesting permission to operate.
You will only be allowed to operate in those counties checked below. You may request "Statewide" authority if you intend to operate in all counties in South Carolina.

☐ Abbeville	☐ Cherokee	☐ Florence	☐ Lee	☐ Saluda
☐ Aiken	☐ Chester	☐ Georgetown	☐ Lexington	☐ Spartanburg
☐ Allendale	☐ Chesterfield	☐ Greenville	☐ Marion	☐ Sumter
☐ Anderson	☐ Clarendon	☐ Greenwood	☐ Marlboro	☐ Union
☐ Bamberg	☐ Colleton	☐ Hampton	☐ McCormick	☐ Williamsburg
☐ Barnwell	☐ Darlington	☐ Horry	☐ Newberry	☐ York
☐ Beaufort	☐ Dillon	☐ Jasper	☐ Oconee	
☐ Berkeley	☐ Dorchester	☐ Kershaw	☐ Orangeburg	☐ Statewide
☐ Calhoun	☐ Edgefield	☐ Lancaster	☐ Pickens	
☐ Charleston	☐ Fairfield	☐ Laurens	☐ Richland	

DESCRIPTION OF EQUIPMENT

You are not required to own a vehicle to file an application. However, prior to being issued a certificate by ORS, you will be required to have obtained a vehicle.

Maximum Number of Passengers Vehicle is Equipped to Carry: (The number of passengers a vehicle is equipped to carry is based on the number of seatbelts in the vehicle, including the driver's seatbelt.)

- ☐ 1-7 Passengers, including driver
☐ 8-15 Passengers, including driver

MAKE	YEAR & MODEL	VIN#	EMPTY WEIGHT	WHEEL- CHAIR LIFT

INSURANCE QUOTE

This form **MUST BE COMPLETED AND SIGNED** by an **AUTHORIZED INSURANCE COMPANY REPRESENTATIVE**. The insurance quote must be complete, listing current insurance premiums. At the discretion of the Commission, a copy of current insurance policies may be required. Do not provide a copy of insurance policies unless requested. You will not be required to purchase insurance until your application has been approved and an order has been issued by the PSC. **THIS IS ONLY A QUOTE.**

The following insurance quote is for:

Name of Applicant

Address of Applicant

Amount of Premium:

Liability Insurance \$ _____

The above quoted premium is for a term of _____ months.

Minimum Limits - Bodily injury and property damage limits will not be less than the following:

Limits Quoted

Liability Combined Each Occurance	\$ 1,000,000	
Medical Payments per Person	\$ 1,000	

Name of Insurance Company

Home Office Address of Company

I am familiar with the Commission's Rules and Regulations relating to insurance requirements and the above quote meets the minimum insurance limits prescribed. The insurance company making this quote is authorized by the South Carolina Department of Insurance to do business in South Carolina.

Date

Authorized Insurance Company Representative's Signature

NOTICE:

If you wish to self-insure your motor vehicles for liability and property damage, you must comply with S.C. Code Ann. Sections 56-9-60 and 58-23-910. For more information, contact Vickie Coker with the Department of Motor Vehicles at (803) 896-8457.

If you wish to apply as a self-insured for worker's compensation coverage in South Carolina you may do so with the South Carolina Worker's Compensation Commission (WCC) provided that you will be able to: 1) post a surety bond or letter-of-credit with the WCC for a minimum of \$500,000, 2) agree to pay a yearly self-insurance tax, and 3) agree to pay an annual assessment to the South Carolina Second Injury Fund. For more information, contact the WCC Self-Insurance Division at (803) 737-5712 or on the web at www.wcc.state.sc.us/self-insurance.

Exhibit Fit, Willing, and Able (FWA)

Name

U.S.D.O.T No.

ICC No.

1. Is there currently any outstanding judgments against the Applicant?

☐ Yes

☐ No

If Yes, indicate nature of judgement(s) against applicant.

2. Is Applicant familiar with all statutes and regulations, including safety regulations and governing for-hire motor carrier operations in South South Carolina, and does Applicant agree to operate in compliance with these statutes and regulations?

☐ Yes

☐ No

3. Is Applicant aware of the Commission's insurance requirements and the insurance premium costs associated therewith?

☐ Yes

☐ No

Exhibit on Driver Qualifications

1. Applicant understands that drivers must possess at least a current American Red Cross Standard First Aid and CPR Certificate or its equivalent, and records that verify/record such training must be kept on file at the company's primary place of business within South Carolina.

☐ Yes ☐ No

2. Applicant understands that drivers must be in compliance with all OSHA regulations.

☐ Yes ☐ No

3. Applicant understands that drivers must be trained in the use of all vehicle installed safety equipment such as two-way radios, first-aid kits, fire extinguishers, and other equipment as outlined in PSC Regulations.

☐ Yes ☐ No

4. Applicant understands that drivers must be able to physically perform actions necessary to assist persons with disabilities, including wheelchair users.

☐ Yes ☐ No

5. Applicant understands that drivers must wear a professional uniform and photo identification badge that easily identifies the driver and the company for whom the driver works.

☐ Yes ☐ No

6. Applicant understands that drivers must complete twelve (12) hours of in-service training annually in the area of safety, and records that verify/record such training must be kept on file at the company's primary place of business within South Carolina.

☐ Yes ☐ No

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
POST OFFICE DRAWER 11649
COLUMBIA, SOUTH CAROLINA 29211

Applicant is familiar with the provision of S.C. Code Ann. §58-23-10, et seq.(1976), and amendments thereto, and R.103-100 through R.103-241 of the Commission's Rules and Regulations for Motor Carriers (Volume 26, S.C. Code Ann. Regs., 1976), and R.38-400 through R.38-503 of the Department of Public Safety's Rules and Regulations for Motor Carriers (Volume 23A, S.C. Code Ann., 1976) and amendments thereto, and hereby promises compliance therewith.

The Applicant for the Certificate of Public Convenience and Necessity as set forth in the foregoing, swear or affirm that all statements contained in the above application are true and correct.

Applicant's Signature

Title of Applicant (e.g. President, Owner, etc.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

SWORN TO BEFORE ME

This _____ day of _____, 20____

Notary Public

Commission Expires _____

Personal Identification Information

Name of Applicant: _____

Address: _____

Federal Employer
Identification Number: _____

***** Confidential *****

For Internal Use Only

Print Application

) IN THE COURT OF COMMON PLEAS

;

) C/A No. 2012-CP-07-3595

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)

)



PERSONALLY APPEARED BEFORE ME, E.K.M. McCormick, who after

being duly sworn, deposes and says as follows:

1. My name is George Robert Matthew McCormick.
2. I am over the age of 18.
3. I am a resident of Missouri.
4. I have personal knowledge of the matters set forth herein.
5. I am a Vice President at the corporate offices of American Medical

Response, Inc. and acted in that capacity at all times relevant hereto.

6. I am involved in the development and procurement of business opportunities for American Medical Response, Inc.

7. American Medical Response, Inc. is a United States manager and provider of medical transportation to include emergency response and dispatch services and non-emergency transport services.

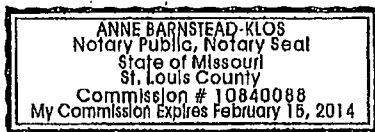
8. American Medical Response, Inc. often works with State governments for the procurement of medical transportation work. If American Medical Response,

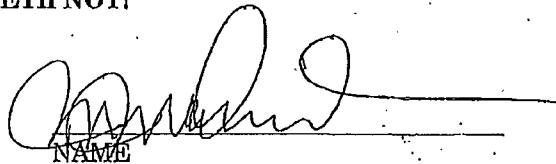
Inc. is awarded a State contract to provide medical transport, they often subcontract with independent medical providers in the various states to provide the medical transportation.

9. American Medical Response, Inc. develops and enters into contractual relationships with the independent medical providers. In this case, American Medical Response, Inc. entered into a subcontract with Low Country Medical Transport to provide non-emergent medical transport in Hampton, Jasper, and Beaufort Counties South Carolina commencing on or about August 21, 2011.

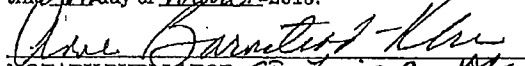
10. Under the express terms of the Subcontractor Agreement with Low Country Medical Transport, each party is deemed an independent contractor, not an agent or employee.

FURTHER THE AFFIANT SAYETH NOT!




NAME

SWORN TO AND SUBSCRIBED before me
this 27th day of March 2013.


NOTARY PUBLIC FOR St. Louis Co., MO
MY COMMISSION EXPIRES: 2/15/14

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2013 MAY 30 PM 12:35

Charles Gary,

JERRI ANN ROSENEAU
BEAUFORT COUNTY S.C. C/A No. 2012-CP-07-9595
CLERK OF COURT

Plaintiff,

Versus

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.)

) DEFENDANT AMERICAN MEDICAL
) RESPONSE, INC. (D/B/A
) ACCESS2CARE)'S SUPPLMENTAL
) MEMORANDUM IN OPPOSITION
) TO PLAINTIFF'S MOTION FOR
) SUMMARY JUDGMENT

The Defendant, American Medical Response, Inc. (d/b/a Access2Care) (hereinafter "AMR"), respectfully submits this Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment showing the Court as follows.

FACTS

AMR is a Delaware corporation, licensed to do business in the State of South Carolina. AMR has a contractual arrangement with the South Carolina Department of Health and Human Services ("SCDHH") whereby it manages a network of independent non-emergency medical transport providers ("NEMT") to transport Medicaid patients from their homes to medical appointments. See Exhibit A, Affidavit of George Robert Mathew McCormick. AMR receives transportation requests, determines which independent NEMT provider will most efficiently provide transport, and schedules that independent NEMT provider for transportation services. As part of its contractual arrangements, both with SCDHH and its independent NEMT providers, AMR requires its independent NEMT

providers to comply with all applicable laws. AMR does not require that its independent NEMT providers work exclusively for AMR to the exclusion of other NEMT opportunities.

Low Country Medical Transport, Inc. ("Low Country") is a South Carolina corporation licensed to do business in the State of South Carolina. Low Country is a member of AMR's independent NEMT provider network and is an independent contractor for AMR. See Exhibit A, Affidavit of George Robert Mathew McCormick. Low Country was administratively dissolved in 2007 due to an oversight and was fully reinstated in 2012. See Exhibit B, Affidavit of Hattie Askew. Low Country owns and operates its own fleet of ambulances and its name is clearly posted on each ambulance. See PLTF Charles Gary Initial Disclosure 0007, Exhibit C.

On January 31, 2012, Low Country was transporting Charles Gary and his wife Blondell Gary via ambulance in Yemassee, SC. During the trip, the ambulance traveled off of the road and struck a tree. Mr. Gary was injured and Mrs. Gary was killed. Low Country was transporting Charles and Blondell Gary to Mr. Gary's medical appointment pursuant to its contract with AMR.

LEGAL AUTHORITY

Rule 56(c), SCRPC, provides that summary judgment shall only be granted when "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 a judgment as a matter of law." Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental

Ctr., 313 S.C. 490, 493 (1994). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518 (Ct.App.2001).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). However, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330 (2009).

ARGUMENT

I. Factual Questions Exist Making Summary Judgment Premature

Several factual questions remain to be developed in discovery, which make summary judgment premature at this time. For instance, the Plaintiff has yet to be deposed. Primarily, the Plaintiff's deposition would potentially address the issues of whether the Plaintiff looked to AMR or to Low Country for his care and transport and whether the community views Low Country as being a separate and distinct entity from AMR. Additionally, representatives from AMR and Low Country need to be deposed in order to establish their respective relationships and the extent of AMR's alleged control over Lowcountry. Finally, representatives from South Carolina Department of Health and Human Services, who would address the alleged "absolute" nondelegable duty as claimed by the Plaintiff, have not been

deposed. The above is a small sampling of factual issues that need to be addressed in the discovery process. As such, summary judgment is premature at this time.

II. Plaintiff's Discussion of Non-Delegable Duties is Imprecise

The Plaintiff's argument addresses three separate issues. First, Plaintiff believes Defendant is mistaken in relying on the South Carolina Supreme Court's ruling in Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32 (2000). Second, the Plaintiff argues that a nondelegable duty exists where the Defendant had a contractual duty to provide safe transport. Finally, Plaintiff seeks an unwarranted expansion of the current limits of the nondelegable duty doctrine.

a. Simmons

It is well-settled and widely understood that Simmons was decided on the issue of nondelegable duty. See Rock Hill Tel. Co., Inc. v. Globe Commc'ns, Inc., 363 S.C. 385, 390 (2005) (citing Simmons and stating that "[t]his Court has recently described the exception-the nondelegable duty doctrine and its legal consequences..."). Moreover, the language of Simmons is clear in that its holding should be applied to nondelegable duties. Simmons, 341 S.C. at 42 ("we are asked to decide whether the Court of Appeals properly imposed a common law nondelegable duty on hospitals with regard to physicians who work in their emergency rooms"); id. at 48 ("We also conclude it is appropriate to find a nondelegable duty in this case because apparent agency in its traditional form requires a representation by the principal (the hospital) and proof of reliance on that representation by the patient.").

It is important to note that similar to the apparent agency theory, the nondelegable duty doctrine is a theory of liability, not an additional duty placed on

a party. Id. at 42 ("The term 'nondelegable duty' is somewhat misleading. A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable."). In holding that a nondelegable duty exists with respect to emergency room physicians, the Court stated that it will not "impose an *absolute* nondelegable duty on Hospitals". Id. at 50 (emphasis in original). The Court held it will only assign nondelegable duty liability where additional requirements are met. To impose this liability, the Court "adopt[ed] the approach expressed in Restatement (Second) of Torts: Employers of Contractors § 429 (1965)." Id. at 50-51¹.

Under section 429, the plaintiff must show that (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. When the plaintiff does so, the hospital will be held vicariously liable for any negligent or wrongful acts committed by the treating physician. The hospital may attempt to avoid liability for the physician's acts by demonstrating the plaintiff failed to prove these factors.

Id. at 51.

The same logic used in Simmons is directly applicable to the case at hand. In Simmons, a man presented to the emergency room, was treated by an independent contractor physician, and was injured as a result of the negligent treatment by the independent contractor. Here, a client requested transport through AMR, that service was provided directly to the client by an independent contractor, Low

¹ One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Simmons, 341 S.C. at 51.

Country, and the Plaintiff alleges that his injuries occurred as a result of the independent contractor's negligence. The major distinguishing characteristic here is that Low Country is more clearly an independent contractor for the Defendant and is recognized by the general public as separate and distinct from the Defendant, whereas the emergency room physician was not. As the Plaintiff has not presented any facts inapposite to this conclusion, we must presume they are in agreement.

Pointedly, the Plaintiff has not shown and will be unable to show that he or any other individual would reasonably believe that Low Country was anything other than an independent contractor. Low Country is a transportation provider within AMR's network of subcontractors. Low Country owns and operates its own fleet of ambulances upon which its name is clearly posted. See PLTF Charles Gary Initial Disclosure 0007, Exhibit C. Low Country is a corporation formed under the laws of and licensed to business in South Carolina. Therefore, no person would reasonably believe Low Country is an employee of AMR. Because the facts of Simmons are so strikingly similar to the case at bar, the Court should apply the same logic and analysis as employed by the Supreme Court.

b. Nondelegable Duty

Generally, a principal is not liable for the negligence of its independent contractor. See Alexander v. Seaboard Airline R.Co., 221 S.C. 477 (1952). A limited exception to the general rule is that "[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." Durkin v. Hansen, 318 S.C. 343, 347 (Ct. App. 1993). The nondelegable duty doctrine has been applied sparingly in South Carolina. See Rock Hill Tel. Co. v. Globe

Commc'ns. Inc., 363 S.C. 385, 391 (2005) (describing only six instances where a nondelegable duty was applied). Further, and as mentioned above, Simmons has a direct bearing on and relevance to the application of the nondelegable duty doctrine and should be applied in this case.

The Plaintiff further contends that "Access2Care had an absolute duty under its contract with the Health Department to provide 'safe' transportation." Plf. Supplemental Memorandum, 8. Plaintiff's contention is unsupported and contradicted by existing South Carolina law. See Rock Hill, 363 S.C. at 391; Young v. S. Carolina Dep't of Disabilities & Special Needs, 374 S.C. 360, 368 (2007) (reversing the trial court on both apparent agency and nondelegable duty where the South Carolina Department of Disabilities and Special Needs controlled a network of Statewide local boards).

In Rock Hill, a utility received a permit from the S. C. Department of Transportation to install underground cable. 363 S.C. at 388. Some or all of the work was subcontracted and a third party was injured by the subcontractor's negligence. Id. The Court held that the language contained in the permit, the statutes, and the regulations only required the utility to use reasonable care; therefore, no absolute, nondelegable duty was implied. Here, the Plaintiff has provided no contractual or statutory language stating that anything more than reasonable care is required. Therefore, a claim that an absolute nondelegable duty was created by this contract should similarly fail.

In Young, the Plaintiff brought a wrongful death and survival action against the Department of Disabilities and Special Needs ("DDSN") and a local disabilities special needs board. 374 S.C. 360. DDSN was responsible for establishing and

organizing a statewide network of local boards. Id. at 866. Statutes placed individual responsibilities on the local boards. Id. The Supreme Court reversed the trial court on both apparent agency and nondelegable duty where there was no evidence of reliance and the trial court took an expansive view the nondelegable duty doctrine. Id. at 868.

Here, the Plaintiff is asking this Court to find a nondelegable duty exists in a nearly identical situation to the one that was reversed in Young. Much like DDSN's statewide network of boards, AMR organizes a network of NEMT providers. Low Country is clearly an independent contractor for AMR and questions remain as to Plaintiff's reliance on AMR and the community's view of AMR. Furthermore, South Carolina certification statutes have placed individual responsibilities on Low Country, separate and apart from its contractual duties to AMR. See S.C. Code § 58-23-240 et. seq. (See Defendant American Medical Response, Inc. (d/b/a Access2Care)'s Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on file with the Court). Based on the Supreme Court ruling in Young, the Plaintiff's claim that there is an absolute, nondelegable duty should fail.

c. Expansion of the Common Law

The Plaintiff has asked this Court to grant a considerable expansion of the existing common law. In addition, the Plaintiff now argues in favor of melding the non-delegable duty and apparent agency analyses. As mentioned above, the nondelegable duty doctrine is a limited theory of liability. The Supreme Court has only identified six situations to which this theory applies. See Rock Hill, 363 S.C. at 391. While this is surely not meant to be a non-exclusive list, it is obvious that the Supreme Court has been reluctant to apply this exception in an expansive manner.

Now, the Plaintiff asks this Court to create new law on the basis of the amount of control exercised over subcontractors. This expansion is unwarranted because 1) the Defendant did not and was not required to maintain "extensive control" over its independent NEMT providers and 2) existing law covers the situation where a principal maintains extensive control over its agent and is inapplicable to this case.

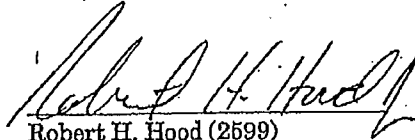
First and foremost, AMR does not and is not required to maintain "extensive control over its NEMT service providers." AMR is responsible for organizing and dispatching numerous separate and distinct independent NEMT providers throughout the State. With each independent NEMT provider, it maintains an arm's length contractual relationship. AMR does schedule NEMT transportation, but by no means does it require its subcontractor's exclusivity as to other NEMT requests. Further, AMR has no interest or hand in the inner workings of its transportation providers other than ensuring they are in compliance with applicable law. Therefore, AMR does not maintain "extensive control over its NEMT service providers."

The proposition that the nondelegable duty doctrine should be expanded to situations where the principal exercises extensive control is unwarranted. Existing agency law covers situations and provides for a theory of liability where a principal maintains substantial control over its independent contractors. See Young, 374 S.C. at 366 (discussing the master-servant relationship and the right to control); see also Jamison v. Morris, 385 S.C. 215, 222-23, 684 S.E.2d 168, 172 (2009) (discussing right to control in the franchise context). Where existing law provides a theory of liability, there is no need to create new law. Therefore, any expansion of the current law is unnecessary.

CONCLUSION

For the foregoing reasons, AMR respectfully requests the Court deny the Plaintiff's Motion for Summary Judgment.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
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Robert H. Hood, Jr. (13491)
H. Cooper Wilson, III (74939)

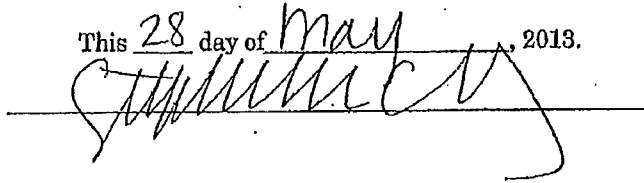
Attorneys for the Defendant
American Medical Response, Inc. (d/b/a
Access2Care)

May 28, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 28 day of May, 2013.



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Charles Gary,

Plaintiff,

Versus

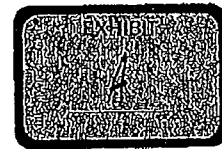
Hattie M. Askew, Will Outlaw, and
Deboria Outlaw, Individually and d/b/a
Low Country Medical Transport, Low
Country Medical Transport, Inc., Eugene
A. Kirkland, and American Medical
Response, Inc. (d/b/a Access2Care),

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 2012-CP-07-8595

AFFIDAVIT OF _____



PERSONALLY APPEARED BEFORE ME, G.R.M. McCormick, who after

being duly sworn, deposes and says as follows:

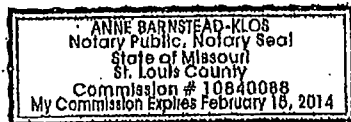
1. My name is George Robert Matthew McCormick.
2. I am over the age of 18.
3. I am a resident of Missouri.
4. I have personal knowledge of the matters set forth herein.
5. I am a Vice President at the corporate offices of American Medical Response, Inc. and acted in that capacity at all times relevant hereto.
6. I am involved in the development and procurement of business opportunities for American Medical Response, Inc.
7. American Medical Response, Inc. is a United States manager and provider of medical transportation to include emergency response and dispatch services and non-emergency transport services.
8. American Medical Response, Inc. often works with State governments for the procurement of medical transportation work. If American Medical Response,

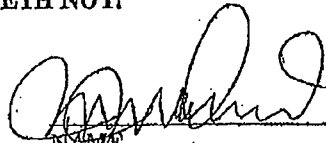
Inc. is awarded a State contract to provide medical transport, they often subcontract with independent medical providers in the various states to provide the medical transportation.

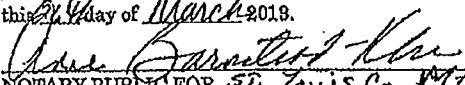
9. American Medical Response, Inc. develops and enters into contractual relationships with the independent medical providers. In this case, American Medical Response, Inc. entered into a subcontract with Low Country Medical Transport to provide non-emergent medical transport in Hampton, Jasper, and Beaufort Counties South Carolina commencing on or about August 21, 2011.

10. Under the express terms of the Subcontractor Agreement with Low Country Medical Transport, each party is deemed an independent contractor, not an agent or employee.

FURTHER THE AFFIANT SAYETH NOT!




NAME

SWORN TO AND SUBSCRIBED before me
this 21st day of March 2013.

NOTARY PUBLIC FOR St. Louis Co., MO
MY COMMISSION EXPIRES: 2/18/14

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)
MAY -2 PM 3:39

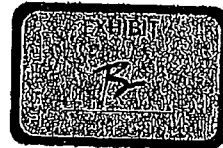
CIVIL ACTION NO: 12-CP-07-3595

CHARLES GARY, JERRI ANN ROSENEAU
PLAINTIFF BEAUFORT COUNTY, S.C.
CLERK OF COURT

V.)

HATTIE M. ASKEW, WILL OUTLAW)
DEBORIA OUTLAW, INDIVIDUALLY)
AND D/B/A LOW COUNTRY MEDICAL)
TRANSPORT, LOW COUNTRY)
MEDICAL TRANSPORT, INC., EUGENE)
KIRKLAND, AND AMERICAN)
MEDICAL RESPONSE, INC. (D/B/A)
ACCESS2CARE),)
DEFENDANTS.)

AFFIDAVIT OF HATTIE M. ASKEW



PERSONALLY appeared before me, Hattie M. Askew, who being duly sworn deposes
and says:

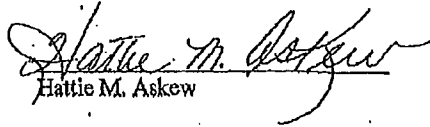
1. I am over the age of eighteen (18) and otherwise competent to make this Affidavit.
2. I am the owner of Low Country Medical Transport, Inc.
3. Low County Medical Transport, Inc. was granted a Class C Non-Emergency Certificate on or about May 31, 2007 from the South Carolina Office of Regulatory Staff (ORS).
4. Pursuant to South Carolina ORS regulations, it mandates all drivers of a Class C Non-Emergency vehicle to possess a Medical Examiner's DOT Card, a current driver's license, a current CPR and First Aid certificate, a mandatory drug screening, and in-service training documentation in order to operate said commercial vehicle.
5. Each and every Low Country Medical Transport, Inc. driver have satisfied the above-referenced requirements and carry the appropriate South Carolina Driver's License, This

Class A license is regulated by the South Carolina Department of Health and Environmental Control (SCDHEC).

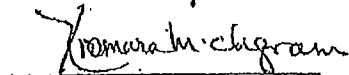
6. The South Carolina ORS Commission has never revoked Low Country Medical Transport Inc.'s Class-C Non-Emergency Certificate for any substantive event pursuant to ORS Regulation 103-240, or any other applicable South Carolina rules and regulations.
7. Unbeknownst to me, the South Carolina Secretary of State administratively dissolved Low Country Medical Transport, Inc. on or about October 1, 2007. The dissolution was due to an unpaid fee.
8. During the time Low Country Medical Transport, Inc. was administratively dissolved, we continued to pay the appropriate fees and were provided renewal decals for our vehicles from the South Carolina ORS.
9. Low Country Medical Transport, Inc. has never requested for a suspension or termination pursuant to ORS Regulation 103-164.
10. On or about November 17, 2010 Low Country Medical Transport, Inc.'s Class C Non-Emergency Certificate was revoked in error, but immediately reinstated by the Commission (see attached Order).
11. Low Country Medical Transport, Inc.'s currently holds a valid status for its South Carolina ORS Class C Non-Emergency Certificate and has always been compliant with maintaining the appropriate license fees and renewal forms as set forth in Article III of Motor Vehicle Carrier Law.
12. The driver, Eugene Kirkland was hired by Low Country Medical Transport, Inc. in June of 2008.

13. In the history of Low Country Medical Transport, Inc., Mr. Kirkland has safely and successfully transported a total of approximately 780 patients per year.
14. Eugene Kirkland was employed by Low Country Medical Transport, Inc. for approximately three and a half (3 ½) years.
15. Mr. Kirkland's personnel file is without incident, nor was he never involved in any other automobile accidents through out his employment with the company.

FURTHER AFFIANT SAYETH NOT.


Hattie M. Askew

SWORN to before me this
2nd day of May, 2013.


Kamara M. Chigam
Notary Public for South Carolina
My commission expires: 1

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NOS. 2007-86-T; 2010-293-T - ORDER NO. 2010-791

DECEMBER 3, 2010

JN RE: Application of Low Country Medical Transport, Inc., 61 Hickory Hill Road, Varnville, South Carolina 29944 (Mailbag Address: Post Office Box 912, Varnville, South Carolina 29911) (District 2) for a Class C (Non-Emergency) Certificate of Public Convenience and Necessity	)	ORDER GRANTING
	)	REINSTATEMENT OF
	)	CERTIFICATE
And	)	
Retention of the Office of Regulatory Staff for Commission to Order a Rule to Show Cause as to Why the Certificates of Public Convenience and Necessity for Certain Motor Carriers Should Not be Revoked for Failure to File Annual Reports and Gross Receipts Forms	)	

This matter comes before the Public Service Commission of South Carolina (the "Commission") by way of a request filed by Low Country Medical Transport, Inc. ("Applicant") to reinstate Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A. Certificate No. 7798-A was issued to the Applicant pursuant to the authority granted by Commission Order No. 2007-211 (April 3, 2007). This Certificate was later revoked after a hearing by Order No. 2010-772, issued on November 17, 2010, for failure of the Applicant to file an annual report and/or a gross receipts form, as required by the Regulations. The record reflects that an annual report has now been filed.

DOCKET NOS. 2007-86-T; 2010-295-T -- ORDER NO. 2010-791
DECEMBER 3, 2010

PAGE 2

Since the annual report has been filed, we find and conclude that the Applicant is now in compliance with Commission Regulations, and the previously cancelled Certificate should be reinstated. However this reinstatement is conditioned on further compliance with all other applicable statutes and regulations. Prior to such compliance, regulated motor carrier services shall not be provided by the Applicant.

IT IS THEREFORE ORDERED:

1. That Class C (Non-Emergency) Certificate of Public Convenience and Necessity No. 7798-A of Low Country Medical Transport, Inc. be, and hereby is, reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.
2. That all operating rights authorized under the Certificate are hereby reinstated, subject to compliance with the applicable statutes and the Commission's Rules and Regulations.
3. That prior to compliance with the applicable statutes and the Commission's Rules and Regulations, the motor carrier services authorized by the Certificate shall not be provided.

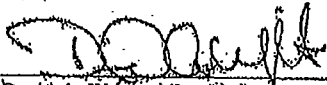
DOCKET NOS. 2007-86-T; 2010-295-T — ORDER NO. 2010-791
DECEMBER 3, 2010
PAGE 3

4. That this Order shall remain in full force and effect until further Order of
the Commission.

BY ORDER OF THE COMMISSION:


John E. Howard, Chairman

ATTEST:


David A. Wright, Vice Chairman

(SEAL)



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,

PLAINTIFF,

vs.

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

PLAINTIFF CHARLES GARY'S
SUPPLEMENTAL MEMORANDUM
OF LAW INSUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT

The Plaintiff Charles Gary submits this supplemental memorandum of law based on arguments this Court heard on May 14, 2013, on the issue of American Medical Response's Non Delegable Duty to Mr. Gary and other matters contained herein. Access2Care proposes to insulate itself from liability, because it uses subcontractors to perform non-emergency medical transportation services to Medicald members.

Mr. Gary asks this Court to consider the information contained herein and find that the Defendants Hattie M. Askew, 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") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants") are liable for the injuries and damages he

sustained on January 31, 2012, because Access2Care has a non-delegable duty to provide Mr. Gary with safe transportation to and from his medical appointment.

FACTS SUPPORTING NON-DELEGABLE DUTY

Access2Care had two contracts relevant to its delivery of Non-Emergency Medical Transportation services to Mr. Gary. On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract with Access2Care to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program.¹ Access2Care was "responsible for identifying, recruiting, and negotiating service agreements with transportation providers in order to meet the needs of Medicaid members in the region." *Health Department Non-Emergency Medical Transportation Services Contract Section 2.4.5, General Broker Requirements*. Access2Care signed a contract with the Health Department to be compensated \$162,077,477.00 to provide NEMT services. The

¹ "The Broker must perform all tasks related to the provision of NEMT for members. The Broker's primary objective will be to provide NEMT services in accordance with federal and state laws, regulations, policies, interpretations, and procedures. The Broker must perform all the duties below throughout the life of the contract unless otherwise stated, which must be included in the proposal price:

- 1) Maintain adequate staff and facilities.
- 2) Develop and maintain comprehensive policies and procedures.
- 3) Process transportation requests from members, facilities, and other individuals requesting services on behalf of the member.
- 4) Verify member eligibility for Medicaid.
- 5) Operate a telephone call center and develop a call center operations manual.
- 6) Establish an orientation and training program for transportation broker employees.
- 7) Recruit and maintain an adequate transportation provider network.
- 8) Establish an orientation and training program for transportation providers.
- 9) Inform and educate members and facility providers about the NEMT Program and process.
- 10) Develop and implement a complaint tracking and resolution plan.
- 11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
- 12) Provide administrative management oversight.
- 13) Submit management and performance reports.
- 14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
- 15) Protect recipient confidentiality.

The Broker must ensure that all of these functions are performed properly and efficiently." *See, Gary Summary Judgment Memorandum of Law, Exhibit B, Health Department Non-Emergency Medical Transportation Services Contract, Section 3.0, Core Services and Footnote 1.*

NEMT Program was a turnkey operation where Access2Care would provide transportation management and administration services to Medicaid members. Access2Care's duties and responsibilities under its contract included the following examples:

The Broker must ensure that high quality services are provided
Section 2.4.8 General Broker Requirements

The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. *Section 3.3.5 Fulfillment of All Trips Requests*

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. *Section 3.3.8 Accidents, Injuries, and Incidents*

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. *Section 3.3.15 Monitoring Plan*

The Broker must provide assurance that the transportation providers meet health and safety standards . . . complaint resolution; and the delivery of courteous, safe, and timely transportation services. *Section 3.12 Quality Assurance*

The NEMT contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." *Section 3.11.1 Complaints.* If Mr. Gary had a complaint regarding Low Country

Medical's service, he would make it to Access2Care not Low Country Medical. Furthermore, the NEMT Program prohibited transportation providers from soliciting additional business from members. The Contract imposed certain duties on Access2Care to ensure, in particular the safety of its members.

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation providers to provide transportation services to eligible Medicaid recipients. Access2Care entered a separate subcontractor agreement with Low Country Medical to provide NEMT services as part of its network. *See, Summary Judgment Memorandum, Exhibit G, LCMT Defendants' Response to Plaintiff's Request For Production titled "Access2Care Transportation Solutions Subcontractor Agreement."* On January 31, 2012, Access2Care dispatched Low Country Medical (a dissolved corporation) to transport Mr. Gary and his wife. Mr. Gary was injured when Low Country Medical's ambulance ran off the road and hit a tree severely injuring Mr. Gary and killing his wife.²

LAW/ANALYSIS

I. NONDELEGABLE DUTY

A. Non-delegable Duty vs. Apparent Agency

Access2Care is vicariously liable for injuries Mr. Gary sustained when Access2Care's subcontractor Low Country Medical caused the single-ambulance accident. For the limited purpose of this memorandum, Access2Care's liability stems

² Low Country Medical argued at the Summary Judgment Motion hearing that summary judgment was not appropriate, because it was not clear why Kirkland ran off the road in this single ambulance accident. "Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993). Therefore, Low Country Medical cannot defeat a summary judgment motion by simply raising a hypothetical question and then offering the absence of an answer as the defense to the question.

from a non-delegable duty not Apparent Agency as advanced by the Defendants. "Under the apparent agency doctrine, the injured patient must establish that (1) the hospital consciously or impliedly represented the physician to be its agent, (2) the patient relied upon the representation, and (3) the patient changed his position to his detriment in reliance on the representation." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II). Conversely, "[a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998) (Simmons I). Mr. Gary's motion is not based on his mental state or perceptions regarding who was responsible for his care. Rather, Mr. Gary's motion is predicated on Acces2Care's non-delegable duty to ensure all trips are completed safely and on time, for which it would have received fees in excess of 160 million dollars during the life of its contract with the Health Department.

Access2Care mistakenly believes that the South Carolina Supreme Court in Simmons II, substituted the Restatement (Second) of Torts: Employers of Contractors § 429 (1965)³ for the non-delegable duty doctrine in South Carolina. See, Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Access2Care claims that Mr. Gary must prove the elements of Section 429 (Apparent Agency) to establish Access2Care's vicarious liability for Low Country Medical's negligent acts. The Simmons II Court did not replace the non-delegable duty doctrine for the Apparent Agency doctrine. Instead, it found the following:

³ "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants." Simmons II, (2001), citing § 429.

We conclude the Court of Appeals properly outlined and applied the public policy considerations in question. Our decision, like those made by other courts that have considered this issue and held hospitals liable under one or more theories, is grounded primarily in those considerations. Given the fundamental shift in the role that a hospital plays in our health care system, the commercialization of American medicine, and the public perception of the unity of a hospital and its emergency room, **we hold that a hospital owes a nondelegable duty to render competent service to its emergency room patients.**

However, we conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an absolute nondelegable duty on hospitals. Simmons II supra.

The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable doctrine, but simply concluded that it was not necessary in the case at hand.⁴ Therefore, Access2Care's argument that this Court should deny the Plaintiff's motion, because he has not proved the elements for Apparent Agency is misplaced.

B. Non Delegable Duty Doctrine

Access2Care signed a contract with the Health Department that required it to ensure "the delivery of courteous, safe, and timely transportation services." See Gary Summary Judgment Memorandum, Exhibit B, Section 3.3.15. "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor. Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978). An exception to the general rule is that "[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."

⁴ The Simmons II Court held in its conclusion that "[w]e could remand the apparent agency issue to the Court of Appeals for its consideration and ordinarily would find that an appropriate disposition. However, we conclude it is unnecessary to remand this case to the Court of Appeals because the parties have raised both issues to us on the merits and because the analyses of apparent agency and nondelegable duty are so closely intertwined in this instance. Although closely related, each is a viable theory an injured patient may assert. Accordingly, we also reverse the grant of summary judgment to Tuomey Regional on the ground of apparent agency in both respondents' cases." Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

Rock Hill v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005). The exemption to the general rule applies here, because the NEMT Contract clearly mandates specific duties and responsibilities for Access2Care.

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability. Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 452 (1996). The real effect of finding a duty to be nondelegable is to render not the duty, but the liability, not delegable. . . ." Smith v. Regional Medical Center, 394 S.C. 110, 713 S.E.2d 656 (Ct.App. 2011). South Carolina Courts have found a non-delegable duty to exist at common law and by statute. For instance, the South Carolina Supreme Court noted, "a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001). In another instance, the South Carolina Court of Appeals found in Durkin that:

The performance of duties assumed by Respondents by the rental agreement and those imposed by the [Residential Landlord and Tenant Act] may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor. [Citation Omitted]. ("The trend of authority is . . . to apply the law of landlord and tenant in determining a landlord's liability for injuries resulting from the use or condition of premises, regardless of the doctrine of independent contract as applied in other cases."). . . ("[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an

independent contractor to do the work. . . ."). Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

The general proposition is clear; a principal cannot insulate himself from liability that has been assumed by agreement through the employment of an independent contractor. See Durkin supra. "Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958). However, '[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.'" Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).⁶

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons v. Toumey Regional Medical Center, 341 S.C. 32,

⁶ The Simmons I Court quoted Dean Prosser stating, "A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. . . . [T]he cases of "nondelegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him.

. . . It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

533 S.E.2d 312 (2000); citing, Simmons, 330 S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 654 (1997).

C. The Non-Delegable Duty Doctrine should apply where the principal exercises extensive control over the service providers.

Access2Care is liable for Low Country Medical's negligent acts to Mr. Gary, because Access2Care had an absolute duty to ensure Mr. Gary's safety and it maintained extensive control over its NEMT service providers. "It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Touney Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998). Access2Care was responsible for administering two-thirds of the State's Medicaid NEMT Program with a potential value in excess of 160 million dollars. 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: See, Section 3.8.2, Driver Requirements and Section 3.7 Transportation Provider Network.

The Health Department's NEMT Contract clearly indicates that public policy and the 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. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty⁶ concluded:

The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

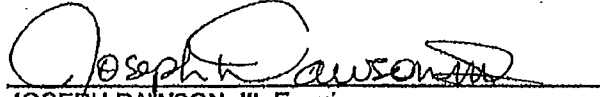
Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care should not be able to walk away from its responsibilities under its NEMT contract where the duties are so important to the Medicaid members and simply transfer it to another.

CONCLUSION

This Court should find that Access2Care has a non-delegable duty to provide safe NEMT services. Therefore, this Court should reject Access2Care's unscrupulous attempt to walk away unscathed in the wake of this tragic event by simply suggesting that it is not responsible for Low Country Medical's tortious acts, while pocketing a fee for the service. This Court should grant Mr. Gary the relief he seeks based on the evidence, law, and undisputed facts.

⁶ "[T]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs." Osborne supra.

CHARLES GARY

A handwritten signature in dark ink, appearing to read "Joseph Dawson, III", is written over a horizontal line.

JOSEPH DAWSON, III, Esquire
Post Office Box 41367
North Charleston, South Carolina 29423
Telephone: (843) 207-9004
Facsimile: (843) 207-9005

May 20, 2013
North Charleston S.C.

4/4/13

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
Charles Gary,) C/A No. 2012-CP-07-3595
Plaintiff,)
Versus) **RULE 56(f) AFFIDAVIT OF**
Hattie M. Askew, Will Outlaw, and) **H. COOPER WILSON, III, ESQUIRE**
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.)

13 JUL 10 PM 2:16
JEROME A. ROSENBERG, JR.
CLERK OF COURT
BEAUFORT COUNTY, S.C.

PERSONALLY APPEARED BEFORE ME, the affiant, H. Cooper Wilson, III,
who after being duly sworn, deposes and says as follows:

1. My name is H. Cooper Wilson, III, and I am one of the attorneys of record for Defendant American Medical Response, Inc. (d/b/a Access2Care), hereinafter ("AMR").
2. I submit this affidavit pursuant to Rule 56(f) of the South Carolina Rules of Civil Procedure and *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003), in opposition to Plaintiff's Motion for Summary Judgment in the above-captioned matter.
3. In that motion, Plaintiff requested that this Court grant summary judgment on the claims set forth in the Complaint.
4. This Motion for Summary Judgment is premature. Material discovery in this case remains outstanding and ongoing.
5. Plaintiff initiated this action on October 16, 2012 by filing the Summons and Complaint in the Court of Common Pleas for Beaufort County.

6. This Defendant timely submitted an Answer and sent the same to this Court on November 19, 2012 for filing. This Defendant received a clocked in copy of its Answer which had a filing date of November 21, 2012.

7. On Tuesday, December 4, 2012, this Defendant was served with a proposed Notice of Entry of Default. The basis of the Motion for Default was that the Plaintiff's attorney said he did not receive a copy of this Defendant's Answer.

8. Immediately thereafter, this Defendant's attorneys communicated with the Plaintiff's attorney regarding his Motion for Default and provided documentation that the Answer was timely filed and served. For unknown reasons, the Plaintiff's attorney indicated he could not consent to withdraw his Motion for Default.

9. This Defendant filed a memorandum in opposition to the Plaintiff's Motion for Default on December 10, 2012.

10. During the time this Motion was being scheduled for a hearing, the Plaintiff's attorney refused to sign a Confidentiality Order regarding this Defendant's production of documents. The Confidentiality Order was based on the form Order from the United States District Court, State of South Carolina.

11. The Plaintiff's attorney filed a Motion to Compel the production of documents. This Defendant agreed to produce the documents if the Plaintiff would sign a Confidentiality Order which he refused. This Defendant was thus forced to file a memorandum in opposition to the Plaintiff's Motion to Compel.

12. During this time, limited discovery including Interrogatories and Requests for Production were served and/or completed as the Plaintiff had an outstanding Motion for Default and an outstanding Motion to Compel.

13. Despite the fact that limited discovery had been performed, the Plaintiff filed a Motion for Summary Judgment on February 23, 2013. This Defendant filed a Memorandum in Opposition to the same.

14. On May 14, 2013, the Court held a hearing on each of these motions. The Court denied the Plaintiff's Motion for Default.

15. The Court indicated an inclination to deny the Plaintiff's Motion for Summary Judgment, but the Plaintiff's attorney indicated he wanted to brief the issue of non-delegable duty. The Plaintiff presented a brief on the issue and this Defendant responded to the same.

16. At this time, there has still been no opportunity to conduct material discovery.

17. This Defendant also noticed the deposition of Plaintiff but the Plaintiff cancelled and/or rescheduled in order to provide a better location for the same. The Plaintiff has yet to be deposed.

18. Despite not having all proper parties in this action, Plaintiff insists on moving forward with summary judgment.

19. AMR cannot properly oppose Plaintiff's Motion for Summary Judgment without an opportunity to conduct written discovery and complete the necessary depositions.

20. Our Supreme Court and Court of Appeals have definitively held that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *See, e.g., 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'Shaughnessy*

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); *Carolina*

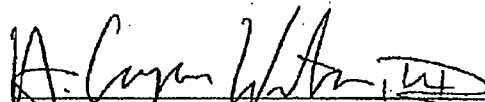
Alliance for Fair Employment v. South Carolina Dep 't of Labor, Licensing, and

Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

21. Counsel for AMR asserts that the parties have not had a full and fair opportunity to complete discovery.

22. Therefore, counsel for AMR submits that this Court should deny Plaintiff's Motion for Summary Judgment

FURTHER THE AFFIANT SAYETH NOT!


H. Cooper Wilson, III

SWORN TO AND SUBSCRIBED before me
this 9th day of July 2013.

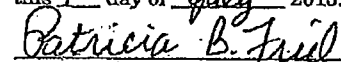

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 04/12/2023

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

CHARLES GARY,
PLAINTIFF,

V.

HATTIE M. ASKEW, WILL OUTLAW
DEBORIA OUTLAW, INDIVIDUALLY
AND D/B/A LOW COUNTRY MEDICAL
TRANSPORT, LOW COUNTRY
MEDICAL TRANSPORT, INC., EUGENE
KIRKLAND, AND AMERICAN
MEDICAL RESPONSE, INC. (D/B.A
ACCESS2CARE),
DEFENDANTS.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 12-CP-07-3595

**LCMT DEFENDANTS' ANSWERS
TO PLAINTIFF'S INTERROGATORIES**

TO: JOSEPH DAWSON, III, ATTORNEY FOR THE PLAINTIFF

NOW COMES the LMCT Defendants, who, pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, hereby issues its Answers to Plaintiff's Interrogatories as follows:

This Response is made solely for the purpose of the above-entitled matter. Each answer and matter contained herein is subject to all appropriate objections (including, but not limited to, competency, relevancy, materiality, propriety and admissibility) which would require the exclusion of the same if the request was asked of, or any statement, answer or matter contained herein were made by, a witness present and testifying in Court. All such objections and grounds are expressly reserved and may be interposed at the time of trial.

Defendants have not yet completed the investigation of the facts relating to this matter, have not completed discovery and have not completed preparation for trial. Accordingly, Defendants reserves the right to supplement, modify, and amend the within responses.

travel and while attempting to bring the vehicle back into its proper lane, the ambulance left the highway and struck a tree. Defendant Kirkland does not recall anything further. Defendants shall supplement its answer accordingly.

10. Please list each individually named Defendant's occupation or jobs (full and/or part-time), and employer's name and address, and reasons for termination and/or leaving employment during the last ten years, starting with each Defendant's present employer.

ANSWER: Defendant objects to this Interrogatory to the extent it seeks information protected by the attorney-client and/or work product privilege, or material prepared in anticipation of litigation. Defendant further objects on the grounds that the time period being requested is excessive, overly broad, unduly burdensome, and the information sought is not calculated to lead to the discovery of admissible evidence. Additionally, the requested information is irrelevant.

11. If you contend that Will Outlaw had no involvement with Low Country Medical Transport and/or Low Country Medical Transport Inc., since its incorporation in 2004, please state with specificity and particularity as follows:
- (a) Identify each and every person having knowledge of any facts that support your contention, including each witness you may or will call at trial to support your contention, with a summary of each witness's expected testimony;
 - (b) State whether the answer is within the personal knowledge of the person answering the interrogatory and, if not, the identity of each person known to have personal knowledge of the answer;
 - (c) Identify each and every fact that supports your contention;
 - (d) Identify each and every document or tangible item of evidence upon which you rely to support your contention.

ANSWER: Defendant objects to this Interrogatory to the extent it seeks information protected by the attorney-client and/or work product privilege, or material prepared in anticipation of litigation. Defendant further objects on the grounds that the time period being requested is excessive, overly broad, unduly burdensome, and the information sought is not calculated to lead to the discovery of admissible evidence. Additionally, the requested information is irrelevant. Subject to and without waiving said objections, Please see Affidavit of Will Outlaw previously produced.

12. If you contend that Deboria Outlaw had no involvement with Low Country Medical Transport and/or Low Country Medical Transport Inc., since its incorporation in 2004, please state with specificity and particularity as follows:

Unknown as to Defendants Will and Deboria Outlaw.

Defendant shall supplement its answer accordingly.

7. List all of the crimes or any nature, excluding minor traffic offenses for which Defendants have been arrested, by dates and offenses, including the sentence imposed, if any.

ANSWER: Upon information and belief, none.

8. If any of the Defendants have ever been involved in court proceedings of any nature other than minor traffic offenses, please state the full title of each suit or nature of claim, the court in which the action was instituted or by or against whom the claim was made, the number of the action, and the nature and disposition of the action or claim.

ANSWER: LCMT Defendants are currently a party to another case as a result of this accident:

- Angel Gary as Personal Representative of the Estate of Blondell Gary v. Lowcountry Medical Transport, Inc., American Medical Response, Inc., d/b/a Access2Care and Eugene A. Kirkland.
Civil Action No.: 2012-CP-25-402.
- As to Hattie Askew, please see attached Hampton County Public Index Print Screen.
- As to Eugene Kirkland, he is currently pursuing a Worker's Compensation claim as a result of this accident.
- Unknown as to Defendants Will and Deboria Outlaw.

Defendant shall supplement its answer accordingly.

9. Describe with particularity exactly what occurred in the five minutes prior to the incident that is the subject of the above action (including a description of how and why the incident occurred), what occurred during the incident, and what occurred during the ten minutes after the accident, including anything said by or to the employees of LCMT.

ANSWER: Defendant objects to this interrogatory to the extent it seeks information protected by the attorney-client and/or work product privilege, or material prepared in anticipation of litigation. Subject to and without waiving said objections, discovery is ongoing and a complete investigation of all facts has not yet been concluded. Subject to and without waiving said objections, Defendant Kirkland was transporting Plaintiff to and from a medical appointment. 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

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,
PLAINTIFF,

vs.

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

PLAINTIFF CHARLES GARY'S
SUPPLEMENTAL MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT
ON ITS NEGLIGENCE CAUSE OF ACTION

The Plaintiff Charles Gary submits this supplemental memorandum of law based on arguments this Court heard on May 14, 2013, on the issue of Defendants' Negligence. At the Summary Judgment Hearing, the Defendants Hattie M. Askew, 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") and Eugene A. Kirkland claimed that they did not know what caused the accident; and therefore, summary judgment was premature. "In order to prevail in a negligence cause of action, the plaintiff must establish: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate

cause of the plaintiffs injury; and (4) the plaintiff suffered an injury or damages." Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct.App. 2007). Low Country Medical and Kirkland have provided responses to the Plaintiff's Interrogatories stating:

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.

See Exhibit "A" Portion of Low Country Medical and Kirkland's Response to Plaintiff's Interrogatories Number 9.

Low Country Medical and Kirkland have admitted that Defendant Kirkland was driving the ambulance when he realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree. Because of the collision, Mr. Gary's wife was killed and he was severely injured. Therefore, Low Country Medical and Kirkland's opposition to this cause of action is not plausible.

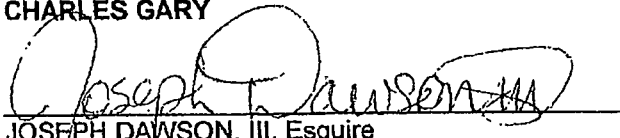
"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Platt v. CSX Transportation, 379 S.C. 249 665 S.E.2d 631 (Ct.App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Id.* "Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt

supra. "Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003).

The Defendants in the case have no factual showing in opposition to this motion. They simply claim summary judgment is premature and further investigations into the facts are need. However, the nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence. See Dawkins supra. South Carolina law provides that when the evidence is susceptible to only one conclusion, then as a matter of law the plaintiff is entitled to summary judgment. Mr. Gary's claims are susceptible to only one conclusion. The Defendants demands for additional time for discovery will not alter the plain-facts of this case.

Mr. Gary asks this Court to consider the information contained herein and find that Mr. Gary's Negligence, Loss of Consortium, and Negligent Infliction of Emotional Distress claims present no genuine issues of material fact. Therefore, this Court should grant him the relief he seeks based on the evidence, law, and undisputed facts.

CHARLES GARY



JOSEPH DAWSON, III, Esquire

Post Office Box 41367

North Charleston, South Carolina 29423

Telephone: (843) 207-9004

Facsimile: (843) 207-9005

July 16, 2013
North Charleston S.C.

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

CHARLES GARY,
PLAINTIFF,

V.

HATTIE M. ASKEW, WILL OUTLAW
DEBORIA OUTLAW, INDIVIDUALLY
AND D/B/A LOW COUNTRY MEDICAL
TRANSPORT, LOW COUNTRY
MEDICAL TRANSPORT, INC., EUGENE
KIRKLAND, AND AMERICAN
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IN THE COURT OF COMMON PLEAS
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Defendants have not yet completed the investigation of the facts relating to this matter, have not completed discovery and have not completed preparation for trial. Accordingly, Defendants reserves the right to supplement, modify, and amend the within responses.

travel and while attempting to bring the vehicle back into its proper lane, the ambulance left the highway and struck a tree. Defendant Kirkland does not recall anything further. Defendants shall supplement its answer accordingly.

10. Please list each individually named Defendant's occupation or jobs (full and/or part-time), and employer's name and address, and reasons for termination and/or leaving employment during the last ten years, starting with each Defendant's present employer.

ANSWER: Defendant objects to this Interrogatory to the extent it seeks information protected by the attorney-client and/or work product privilege, or material prepared in anticipation of litigation. Defendant further objects on the grounds that the time period being requested is excessive, overly broad, unduly burdensome, and the information sought is not calculated to lead to the discovery of admissible evidence. Additionally, the requested information is irrelevant.

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12. If you contend that Deboria Outlaw had no involvement with Low Country Medical Transport and/or Low Country Medical Transport Inc., since its incorporation in 2004, please state with specificity and particularity as follows:

Unknown as to Defendants Will and Deboria Outlaw.

Defendant shall supplement its answer accordingly.

7. List all of the crimes or any nature, excluding minor traffic offenses for which Defendants have been arrested, by dates and offenses, including the sentence imposed, if any.

ANSWER: Upon information and belief, none.

8. If any of the Defendants have ever been involved in court proceedings of any nature other than minor traffic offenses, please state the full title of each suit or nature of claim, the court in which the action was instituted or by or against whom the claim was made, the number of the action, and the nature and disposition of the action or claim.

ANSWER: LCMT Defendants are currently a party to another case as a result of this accident:

- Angel Gary as Personal Representative of the Estate of Blondell Gary v. Lowcountry Medical Transport, Inc., American Medical Response, Inc., d/b/a Access2Care and Eugene A. Kirkland.
Civil Action No.: 2012-CP-25-402.
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From: Dukes, Marvin [mailto:mdukes@bcgov.net]
Sent: Wednesday, July 24, 2013 02:07 PM
To: 'Stephanie Chickey', 'McLeod, Heather', wpj@johnsonslawoffice.com,
joe@attorneyjosephdawson.com, cory@mossandkuhn.com, erindean@tgdpa.com,
Xiomara Ingram (xingram@tgdpa.com)
Cc: 'Bobby Hood, Jr.', 'Cooper Wilson', 'Melinda Accardo'
Subject: RE: Charles Gary v. American Medical Response, Inc. (d/b/a Access2Care), et al., C/A No.
2012-CP-07-3595

Dear Counsel,

Thank you for speaking with me this morning.

I would request that Mr. Dawson please draft an order granting Summary Judgment as requested, including on the non-delegable duty issue.

Among other things, I am particularly persuaded by A2C's agreement and requirement to ensure that all trips (were) completed safely and on time.

Please send the Order in Word format so that I can make changes, if needed.

I would appreciate Defense counsel's comments within 5 days of the proposed Order and will hold it for that.

In the meantime, if there is anything that I can do to assist then parties in reaching a settlement, please let me know.

Best to all,

Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Post Office Drawer 1228
Beaufort, SC 29901
Office: 843.255.5710
Fax: 843.255.9505

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO. 2012-CP-07-3595
CHARLES GARY,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	ORDER GRANTING
	)	SUMMARY JUDGMENT TO THE
HATTIE M. ASKEW, WILL OUTLAW,	)	PLAINTIFF ON HIS NEGLIGENCE, LOSS
AND DEBORIA OUTLAW,	)	OF COMPANIONSHIP OF SPOUSE,
INDIVIDUALLY AND D/B/A LOW	)	AND NEGLIGENT INFLICTION OF
COUNTRY MEDICAL TRANSPORT,	)	EMOTIONAL DISTRESS
LOW COUNTRY MEDICAL	)	CAUSES OF ACTION
TRANSPORT, INC., EUGENE A.	)	
KIRKLAND, AND AMERICAN	)	
MEDICAL RESPONSE, INC. (D/B/A	)	
ACCESS2CARE)	)	
	)	
DEFENDANTS	)	

The Plaintiff 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 in this case, resulting from a single ambulance accident.

This Court held a motions hearing on May 14, 2013, to decide the Plaintiff Charles Gary's Summary Judgment Motion on three of his causes of action pursuant to Rule 56, South Carolina Rules of Civil Procedure. The Plaintiff argues that he is entitled to a judgment as a matter of law on his Negligence, Loss of Companionship of Spouse, and Negligent Infliction of Emotional Distress claims, because the Defendants Hattie M. Askew, 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") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants") are liable for the damages he suffered resulting from the single ambulance collision.

Based on the arguments of counsel, pleadings, affidavits, exhibits, memoranda of law, the undisputed record before me, and applicable case law and statutes, I find that there are no genuine issues of material fact in dispute and that Mr. Gary is entitled to judgment as a matter of law on his Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress claims based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

Charles Gary is a 61-year old bedridden diabetic, amputee, and paraplegic who lost the use of his lower body in 2004, in an unrelated incident. Mr. Gary is unemployed and draws social security. He is also a Medicaid beneficiary in South Carolina. Before this single ambulance accident, Mr. Gary lived at home with his wife, Blondell Gary, who died in the single ambulance accident, complained of herein. Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing, dressing, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death.

On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract ("Contract") with

Access2Care to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program.¹ The NEMT Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency medical transportation services in a cost-effective manner to Medicaid members who need access to medical care or services. This Contract was initiated through a competitive request for proposal (RFP) solicitation process to provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina (like Mr. Gary).

Access2Care is a Delaware Corporation, licensed to do business in the State of South Carolina. Pursuant to the RFP and its Contract with the Health Department, Access2Care was tasked with administering the daily functions of the NEMT Program for Medical Transportation for South Carolina's Regions Two and Three. Mr. Gary resides in Region 3. The NEMT Program was a turnkey operation where Access2Care would provide transportation management and administration services to Medicaid members. Access2Care's duties and responsibilities under its Contract included the following examples:

The Broker must ensure that high quality services are provided
Section 2.4.8 General Broker Requirements

The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. *Section 3.3.5 Fulfillment of All Trip Requests*

The Broker must promptly report to SCDHHS accidents, injuries, and incidents that have occurred in conjunction with a scheduled trip if a

¹ The Defendants do not dispute that the South Carolina Non-Emergency Medical Transportation (NEMT) Program Request for Proposal bid documents is the basis for the Health Department's contract with Access2Care and that there is no separate contract signed after a Request for Proposal process is completed.

Member was present in the vehicle. *Section 3.3.8 Accidents, Injuries, and Incidents*

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 . . . driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. *Section 3.3.15 Monitoring Plan*

The Broker must provide assurance that the transportation providers meet health and safety standards . . . complaint resolution; and the delivery of courteous, safe, and timely transportation services. *Section 3.12 Quality Assurance*

The NEMT Contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." *Section 3.11.1 Complaints*. The Contract imposed certain duties on Access2Care to ensure, in particular, the safety of its members.

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation providers to provide transportation services to eligible Medicaid recipients. On August 17, 2011, Access2Care began to provide NEMT services to eligible Medicaid recipients in South Carolina.² While under Contract with the Health Department, Access2Care entered into a contract with Low Country Medical Transport Inc., and/or LCMT titled "Access2Care Transportation Solutions Subcontractor

² The potential value of Access2Care's five-year contract with the Health Department was approximately \$162 million. Access2Care asked the Health Department to approve a \$25 million change order due to a mistake with its bid, seeking to increase its potential contract value to \$187 million over the contract term. The Health Department denied Access2Care's \$25 million change order request, and thereafter, Access2Care filed a notice to terminate its contract with the Health Department effective February 20, 2012, and began a 60-day transition to exit the State.

Agreement" so that Access2Care could dispatch Low Country Medical as part of its NEMT network.³

On January 31, 2012, Access2Care scheduled Low Country Medical to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical's ambulance was transporting Mr. Gary and his wife home after his medical appointment. Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home. The collision caused severe and serious injuries to Mr. Gary and killed his wife.

Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat with her seat belt secured. Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, where he remained for three weeks due to multiple fractures to his ribs, pelvis, and femur, and other injuries and conditions.

CONCLUSIONS OF LAW

Reviewing the Plaintiff's motion for summary judgment in a light most favorable to the Defendants, I find that there are no genuine issues of material fact in dispute based on the legal theories presented by the Plaintiff; and therefore, the Defendants are liable for the Plaintiff's injuries and damages as a matter of law. "Summary judgment is

³ Low Country Medical has been in the business of transporting individuals to and from medical facilities since 2004. On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved Low Country Medical Transport Inc.'s corporate status in South Carolina. The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. The LCMT continued to operate until Low Country Medical Transport Inc.'s reinstatement by the South Carolina Secretary of State four and half years later.

appropriate where 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." Platt v. CSX Transportation, 379 S.C. 249 665 S.E.2d 631 (Ct.App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Id.* "Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt supra.

"Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003). The Defendants argue that Summary Judgment is premature, because several factual questions remain to be developed in discovery. While questions may remain, they are not material to the causes of action raised in the Plaintiff's motion for summary judgment. The Defendants have failed to show a genuine issue of fact in dispute regarding the events that occurred on the date of the accident except hypotheticals.⁴ It is improbable that further discovery

⁴ The Defendants argue that summary judgment is not appropriate, because it was not clear why Kirkland ran off the road in this single ambulance accident. The Defendants cannot defeat a summary judgment motion by simply raising a hypothetical question and then offering the absence of an answer as the defense to the question. "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

will mitigate the facts surrounding this single ambulance accident in the Defendants' favor. Therefore, summary judgment is appropriate in this case.

NEGLIGENCE

Access2Care, Low Country Medical, and Eugene A. Kirkland (Kirkland) are liable for injuries Mr. Gary suffered when Low Country Medical's ambulance ran off the road and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, under the Plaintiff's Negligence Cause of Action. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009). "The existence of a duty owed is a question of law for the courts." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). I find as a matter of law that the Defendants have a duty.

The Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina. It is undisputed that Access2Care scheduled NEMT services for Mr. Gary's January 31, 2012, medical appointment. Access2Care sent Low Country Medical to Mr. Gary's house to transport him to and from his medical appointment. It is undisputed that Kirkland was driving Low Country Medical's ambulance when he lost control of the vehicle and hit a large tree. Kirkland had a clear legal duty to operate the ambulance in a safe manner and avoid dangers.

Moreover, Low Country Medical as a non-emergency medical transportation provider had a duty of care to transport Mr. Gary safely, while he was in its custody and control. "Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment." Austin v. Specialty Trans. Services, 358 S.C. 298, 594 S.E.2d 867 (Ct.App. 2004). "The doctrine of respondeat superior provides that the employer, as the employee's master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment." James v. Kelly Trucking, 377 S.C. 628, 661 S.E.2d 329 (2008). Low Country Medical owed a duty of care to Mr. Gary when it agreed to transport Mr. Gary as an Access2Care NEMT service provider via its employee driver.

Equally, Access2Care had a duty of care to Mr. Gary arising out of its Contract and operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's Contract with the Health Department required Access2Care to be "... responsible for fulfilling all verified trip requests and ensuring that all trips are **completed safely** and on-time." *Health Department Contract Section 3.3.5 Fulfillment of All Trip Requests*. Moreover, Access2Care's Contract with the Health Department stated in Section 3.3.15 Monitoring Plan that:

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.**

In this case, Access2Care scheduled NEMT service for Mr. Gary for a medical appointment he had on January 31, 2012. Access2Care dispatched Low Country Medical to Mr. Gary's home in Yemassee, South Carolina. Access2Care had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department. In addition, Access2Care had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations. The Defendants clearly owed Mr. Gary a duty of care when they agreed to provide NEMT services to him for a fee.

Access2Care, Low Country Medical, and Kirkland breached their duty of care to Mr. Gary when Low Country Medical's ambulance ran off the road. "A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). It is undisputed that Low Country Medical's driver failed to maintain the ambulance on the road safely, which resulted in injuring Mr. Gary. The Defendants' breach of their duty of care caused Mr. Gary to suffer multiple fractured ribs and pelvic bones, among other injuries and damages from the accident.

Kirkland's breach of his duty of care to Mr. Gary was the proximate cause of Mr. Gary's injuries and damages. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether

particular conclusions are the only reasonable inferences that can be drawn from the evidence." Id. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Vinson, supra. I find that the unique facts of this case are susceptible to only one inference. The evidence clearly shows that Low Country Medical's ambulance, which was driven by Kirkland its employee, ran off the road and struck a tree seriously injuring Mr. Gary and killing his wife. The undisputed evidence in this case is susceptible to only one inference. Kirkland's negligent act was the proximate cause of Mr. Gary's injury, because it was the natural and continuous sequence of events that produced his injuries and without it, the injury would not have occurred. Therefore, the Defendants' conduct was the proximate cause of Mr. Gary's injuries based on the facts articulated herein, because they are vicariously liable.

Access2Care adamantly rejects the notion that it is vicariously liable for injuries Mr. Gary sustained when its subcontractor caused the single-ambulance accident. Access2Care asserts that Low Country Medical's independent contractor status is an absolute bar to its liability. In the alternative, Access2Care contends that the doctrine of Apparent Agency controls and summary judgment is not appropriate because Mr. Gary has failed to make a showing of the elements for Apparent Agency. I disagree with both assertions.

"Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958). However, '[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." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability. . . ." Smith v. Regional Medical Center, 394 S.C. 110, 713 S.E.2d 656 (Ct.App. 2011). South Carolina Courts have found a non-delegable duty to exist at common law and by statute. For instance, the South Carolina Supreme Court noted, "a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); citing, Simmons, 330 S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 654 (1997). The South Carolina Court of Appeals found in Durkin that:

The performance of duties assumed by Respondents by the rental agreement and those imposed by the [Residential Landlord and Tenant Act]-may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor. [Citation Omitted]. . . . ("[A] landlord who undertakes to make repairs or

improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work. . . .").

Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993).

The general proposition is clear; a principal cannot insulate himself from liability that has been assumed by agreement through the employment of an independent contractor.

See Durkin *supra*.⁵

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. The 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 transport services to Medicaid members, pursuant to a significant number of control measures and protocols. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty concluded:

The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).

⁵ The Simmons Court quoted Dean Prosser stating, "A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. . . . [T]he cases of "nondelegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. . . . It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998).

Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care cannot 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.

Alternatively, the doctrine of non-delegable duty is not predicated on the Apparent Agency Doctrine. "Under the apparent agency doctrine, the injured patient must establish that (1) the hospital consciously or impliedly represented the physician to be its agent, (2) the patient relied upon the representation, and (3) the patient changed his position to his detriment in reliance on the representation." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II). Conversely, "[a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998) (Simmons I). Mr. Gary's non-delegable duty argument is not based on his mental state or perceptions regarding who was responsible for his care. Rather, Mr. Gary's claim is predicated on Access2Care's non-delegable duty to ensure all trips are completed safely and on time, for which it would have received fees in excess of 160 million dollars during the life of its contract with the Health Department. The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable Duty Doctrine, but simply concluded that it was not necessary in the case at hand.⁶ Therefore, Access2Care's argument that this

⁶ The Simmons II Court held in its conclusion that "[w]e could remand the apparent agency issue to the Court of Appeals for its consideration and ordinarily would find that an appropriate disposition. However, we conclude it is unnecessary to remand this case to the Court of Appeals because the parties have raised both issues to us on the merits and because the analyses of apparent agency and nondelegable duty are so closely intertwined in this instance. Although closely related, each is a viable theory an injured patient may assert. Accordingly, we also reverse the grant of summary judgment to Tuomey

Court should deny the Plaintiff's motion, because he has not proved the elements for Apparent Agency is misplaced.

LOSS OF CONSORTIUM/COMPANIONSHIP OF SPOUSE

Since I have determined that the Defendants are liable under Mr. Gary's Negligence Cause of Action, I equally find that the Defendants have violated Mr. Gary's right to the companionship, aid, society, and services of his wife Blondell. It is undisputed that Mr. Gary and his wife were riding in an ambulance dispatched by Access2Care, owned by Low Country Medical, and driven by Kirkland, when it suddenly ran off the shoulder of Old Sheldon Church Road and hit a tree killing Mrs. Gary. Mr. Gary, a paraplegic survived the accident with serious injuries, but he lost his wife, his primary caregiver, and sole means of support in the accident. In South Carolina, "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." S.C. Code Ann. § 15-75-20. "[C]laims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence.

Mr. Gary is a bedridden paraplegic. Prior to the accident, Mrs. Gary assisted Mr. Gary with all of his daily activities including bathing him, dressing him, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. It is clear, based on my earlier findings that Mrs. Gary's death was caused by the

Regional on the ground of apparent agency in both respondents' cases." Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000).

negligence of the Defendants. Therefore, Mr. Gary is entitled to compensatory damages against the Defendants for the loss of his wife's companionship, aid, society, and services.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

I also find that Mr. Gary has suffered severe emotional distress, shock, and wounded feelings, because he witnessed his wife's death in a single ambulance accident caused by the negligence of the Defendants. The Defendants' tortious actions have caused Mr. Gary to suffer negligent infliction of emotional distress. "In order to prevail on this cause of action, a plaintiff must show that: (a) the negligence of the defendant caused death or serious physical injury to another; (b) the plaintiff bystander was in close proximity to the accident; (c) the plaintiff and the victim are closely related; (d) the plaintiff contemporaneously perceived the accident; and (e) the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony." Doe v. Greenville County, 375 S.C. 63, 651 S.E.2d 305 (2007).

As stated above, the Defendants' negligence in failing to keep the ambulance under proper control resulted in the ambulance running off the road and hitting a large tree. It is undisputed that this act caused Blondell Gary's death. Mr. Gary was in close proximity to the accident when it occurred. The Defendants do not dispute that Mr. Gary was in the back of the ambulance strapped to a stretcher. It is unquestioned that Mr. Gary was closely related to Blondell Gary, because they were married. Furthermore, Mr. Gary contemporaneously perceived the accident complained of herein, because he was also a victim of the accident while riding in the same vehicle.

In Kinard, the South Carolina Supreme Court adopted the cause of action negligent infliction of emotional distress. See, Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). In Kinard, Betty Kinard and her daughter were injured when a load of roof trusses fell from Augusta Sash & Door Co.'s truck and struck the car in which they were riding. Kinard's daughter was severely injured and remained comatose for three months. Betty Kinard experienced severe emotional distress because of the accident. Similarly, Mr. Gary was riding in the same vehicle with his wife, and he has suffered severe emotional distress and shock, because of her death.

Mr. Gary has manifested physical symptoms capable of objective diagnosis and his treating physician at MUSC has documented it. Mr. Gary has exhibited manifestations of his shock and horror through nightmares, insomnia, anxiety, and depression. There is no evidence in the record to refute Mr. Gary's claims. Therefore, I find as a matter of law that Mr. Gary has met the elements necessary to prevail on his Negligent Infliction of Emotional Distress claim.

IT IS THEREFORE ORDERED that summary judgment be entered for the Plaintiff Charles Gary on his Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress causes of action.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Master-in-Equity and Special Circuit
Court Judge for Beaufort County

Beaufort, South Carolina
_____, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Charles Gary,

2013 AUG -9 PM 12:41

BEAUFORT COUNTY
CLERK OF COURT

Versus

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.

IN THE COURT OF COMMON PLEAS

C/A No. 2012-CP-07-3595

**AMERICAN MEDICAL RESPONSE
INC.'S OBJECTIONS TO THE
PLAINTIFF'S PROPOSED ORDER
AND SUPPLEMENTAL
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

American Medical Response, Inc. ("AMR") hereby submits its objections to the Proposed Order submitted by Plaintiff's counsel on July 26, 2013, regarding Plaintiff's Motion for Summary Judgment. This document should also be treated as a supplemental memorandum opposing Plaintiff's summary judgment motion. AMR incorporates into its objections and this supplemental memorandum all prior arguments and filings, whether made orally or in writing, including but not limited to the following filings:

- (1) AMR's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on May 14, 2013; and
- (2) AMR's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on May 30, 2013.

On July 26, 2013, Plaintiff's counsel provided AMR's counsel with a Proposed Order granting Plaintiff's motion for summary judgment against AMR as to the claims for negligence, loss of consortium, and negligent infliction of emotional distress. The Proposed Order is erroneous in several respects and should not be entered. Plaintiff's motion for summary judgment should be denied.

A. The Proposed Order Incorrectly Concludes that AMR Owed Plaintiff A Legal Duty Which Supports Recovery in Tort.

The Proposed Order erroneously concludes that Plaintiff is entitled to summary judgment against AMR on three of Plaintiff's tort claims: (1) negligence; (2) loss of consortium; and (3) negligent infliction of emotional distress. Each of these tort claims share, as a core element, the requirement that AMR breach a legal duty owed to the Plaintiff. However, the only duty Plaintiff asserts exists as to AMR is a *contractual* duty, not owed to Plaintiff, which Plaintiff asserts was created under the request for proposal issued by the South Carolina Department of Health and Human Services ("SCDHHS"). This contractual duty cannot support Plaintiff's motion for summary judgment on his tort claims.

After laying out the separate non-contractual duties owed by Defendant Kirkland (the driver) and Defendant Low Country Medical Transport (the non-emergency medical transportation ("NEMT") provider), the Proposed Order concludes that AMR "had a duty of care to [Plaintiff] arising out of its Contract and operating as broker of NEMT services." See Proposed Order at p. 8. The Proposed Order specifically references an alleged duty "to provide safe and reliable NEMT services to Medicaid members pursuant to [AMR's] contract with the Health Department...." See Proposed Order at p. 9. Thus, the "duty" on which Plaintiff bases his tort causes of action against AMR is entirely contractual in nature.

The Proposed Order's application of this *contractual* duty as a basis for tort liability is in error.¹ Under South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v. Columbia Lumber &

¹ AMR has previously asserted that it has not "breached any alleged duty to the Plaintiff" and that it is "not liable for the negligence of its independent contractor." See AMR's Memo. in Opp. to Pl.'s Mot. for Summary Judgment, filed 5/14/13, at pp. 3 and 6.

Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). The three claims addressed in the Proposed Order are all based on a theory of negligence. In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. Huggins v. Citibank, N.A., 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). However, South Carolina's courts will not extend the concept of a legal duty of care *in tort liability* beyond reasonable limits. Huggins, 355 S.C. at 333, 585 S.E.2d at 277.

"As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991) (emphasis added). "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." Id. (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)) (emphasis added).

Here, Plaintiff does not assert any contractual claims. Rather, Plaintiff is attempting to improperly elevate an alleged contractual duty to a duty that can sustain tort claims. Plaintiff's subsequent reliance on the non-delegable duty doctrine is therefore also completely misplaced. See Proposed Order at pp. 10-14. As no tort duty existed, whether the nonexistent tort duty is delegable or non-delegable is irrelevant. Therefore summary judgment should be denied.

B. The Proposed Order Misinterprets the Nature of AMR's Contractual Relationship with SCDHHS.

On July 24, 2013, this Court requested that Plaintiff's counsel draft an order "granting Summary Judgment as requested, including on the non-delegable duty issue." See E-mail from Judge Dukes to all counsel dated 7/24/13, attached as Exhibit 1. In this e-mail the Court noted "I am particularly persuaded by [AMR's] agreement and requirement to ensure that all trips (were) completed safely and on time." Id. However, the Court and the Proposed Order are misinterpreting and misstating the nature and requirements of AMR's obligations under its agreement with SCDHHS. Specifically, the Proposed Order misinterprets the Request for Proposal as creating a guarantee by AMR that the NEMT providers it contracts with will *never* have an accident. Thus, the Proposed Order incorrectly attempts to hold AMR strictly liable for any and every accident that results from its NEMT brokerage services.

AMR's agreement with SCDHHS creates a relationship where AMR serves merely as a "broker" between SCDHHS and the entities that actually provide the NEMT services (the "transportation providers"). See SCDHHS Request for Proposal.² The Request for Proposal sets forth AMR's obligations as a "broker" providing "brokerage services." Id. at § 1.1. These obligations are separate and apart from the obligations of the ultimate "transportation providers."³ Under the Request for Proposal's "Core Services," AMR is required to:

² The SCDHHS Request for Proposal is attached as Exhibit B. to Plaintiff's Memo in Support of Summary Judgment.

³ Significantly, the Request for Proposal specifically distinguishes between the "broker" who provides "brokerage services" and the ultimate "transportation providers" who provide "transportation services," and states that that "the Broker may only operate vehicles to provide transportation services in very limited circumstances." See SCDHHS Request for Proposal at § 3.3.6.

- 1) Maintain adequate staff and facilities.
- 2) Develop and maintain comprehensive policies and procedures.
- 3) Process transportation requests from members, facilities, and other individuals requesting services on behalf of the member.
- 4) Verify member eligibility for Medicaid.
- 5) Operate a telephone call center and develop a call center operations manual.
- 6) Establish an orientation and training program for transportation broker employees.
- 7) Recruit and maintain an adequate transportation provider network.
- 8) Establish an orientation and training program for transportation providers.
- 9) Inform and educate members and facility providers about the NEMT Program and process.
- 10) Develop and implement a complaint tracking and resolution plan.
- 11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
- 12) Provide administrative management oversight.
- 13) Submit management and performance reports.
- 14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
- 15) Protect recipient confidentiality

Id. at § 3.0. Therefore, the "core services" AMR provides under this agreement focus upon "brokerage services" whereby AMR serves as a middleman between SCDHHS and the ultimate "transportation providers."

In its attempt to impose liability on AMR under the agreement with SCDHHS, the Proposed Order focuses upon two references in the Request for Proposal to medical transport trips being conducted "safely." See Proposed Order at p. 8-9 (referring to §§ 3.3.5 & 3.3.15). Both of these references are found in section 3.3 of the agreement, which sets forth "Operational Requirements." This same section of

the Request for Proposal contains additional subsections which illustrate there is no absolute guarantee of safety. Specifically, section 3.3.7 requires that AMR ensure that the "transportation providers" obtain and maintain adequate insurance coverage. Additionally, section 3.3.10 requires that AMR ensure that "transportation providers" immediately notify AMR of any accidents, injuries or incidents, and section 3.3.8 requires AMR to promptly report such accidents, injuries or incidents to SCDHHS. Significantly, the fact that the Request for Proposal imposes requirements that the "transportation providers" have insurance, and that all accidents and injuries be reported to AMR, and then relayed to SCDHHS, belies Plaintiff's position that this agreement imposes an absolute duty on AMR to guarantee that an accident will never happen.

The Proposed Order's reliance on section 3.3.15's provisions requiring AMR to have a "monitoring plan" in place to ensure adequate oversight of the "transportation providers" is also misplaced. The "monitoring plan" set forth in the agreement is not a guarantee that an accident will never happen. Rather, it is an agreement to take certain steps that are designed to maintain good service and minimize the likelihood of an accident. Specifically, section 3.3.15 reads in its entirety:

3.3.15 Monitoring Plan:

The Offeror must include a Monitoring Plan in the initial proposal. 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.

Monitoring activities must include, but are not limited to:

- On-street observations
- Accident/incident reporting
- Statistical reporting of trips
- On Time Performance Measures
- Ride Time Performance Measures
- A detailed analysis of complaints
- Driver licensure, driving record, experience and training compliance
- Compliance with vehicle requirements
- Member safety, assistance and courtesy
- Completion of driver logs
- Driver communication with dispatcher
- Routine vehicle inspections, maintenance, emergency equipment and breakdowns
- A detailed analysis of 're-routed' trips
- Detailed analysis of cancelled trips
- Gas reimbursement program
- Transportation Providers, including providers of Individual Transportation
- Volunteer Drivers
- Post trip member satisfaction questionnaires for all overnight trips

See SCDHHS Request for Proposal at § 3.3.15. The purpose of this section is for AMR to observe its subcontractors and monitor whether they are providing a quality, safe product. If the information and the reports indicate otherwise, then AMR is required to take corrective actions against the subcontractor as set forth in Section 3.3.15.1, which reads:

The Broker must have written procedures in place for taking appropriate corrective action whenever inappropriate or substandard services are furnished or when services that should have been furnished were not. In addition, the Broker must have written procedures for taking appropriate action if a transportation provider is out of compliance with federal or State laws or regulations. The Broker must report, not less than monthly, to SCDHHS on monitoring activities, monitoring findings, corrective action taken, and improvements by the transportation provider.

Id. at § 3.3.15.1. Thus, the contractual duties imposed on AMR under its agreement with SCDHHS are to: (a) ensure that the transportation providers have adequate insurance coverage; (b) ensure that all accidents and injuries are promptly reported

through it to SCDHHS; (c) establish a "monitoring plan" designed to minimize the likelihood of an accident or poor service; and (d) take corrective action when any deficiency in service is identified. This agreement neither guarantees that accidents will never occur, nor does it impose absolute liability on AMR where an accident does occur.

Even if the contractual duties created by the SCDHHS agreement caused tort duties to arise based on AMR's relationship with Plaintiff, there is no evidence before this Court which supports the grant of Plaintiff's summary judgment motion. Specifically, there is no evidence that AMR failed to establish or maintain a "monitoring plan." Additionally, there is no evidence that Defendant Kirkland or Defendant LowCountry Medical Transport failed to maintain adequate insurance, failed to maintain the ambulance, or had any history of unsafe driving. Rather, AMR complied with all of its requirements under its agreement with SCDHHS, and its mere role as the broker for the NEMT services does not make it liable for unforeseen negligence by the "transportation provider."

C. The Proposed Order is Incorrect Regarding the Supposed "Absolute" Duty.

The Proposed Order provides that there existed an "absolute duty under its contract with the Health Department to provide 'safe' transportation to Mr. Gary." The Proposed Order cites to Simmons v. Toumey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II) in this regard, and states that "The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable Duty Doctrine, but simply concluded that it was not necessary in the case at hand." This is incorrect. To begin with, as set forth above, there the contractual duty here creates no non-delegable duty. Moreover, the above-quoted language regarding the "Non-

Delegable Duty Doctrine" misstates the law in any event. The South Carolina Supreme Court in Simmons II held there was no "absolute duty," specifically disagreeing with the Court of Appeals on that very point. See Simmons II, 341 S.C. at 44, 533 S.E.2d at 318 ("we do not believe it is necessary, as the Court of Appeals did, to impose an *absolute* nondelegable duty on hospitals") (emphasis in original). Hence, the Proposed Order should not be entered and the Motion for Summary Judgment should be denied.

D. The Proposed Order Contains Unsupported Findings and Fails to Recognize that Summary Judgment is Premature.

AMR agrees mostly with the objections made by Ms. Erin D. Dean, Esquire, counsel for the Co-Defendants, in her e-mail to this Court dated August 1, 2013. AMR objects to any and all "findings of fact" in the Proposed Order which relate to the Plaintiffs' alleged damages, as there has been no discovery as to the nature and extent of Plaintiffs' injuries and damages. One part of the proposed order reads: "The collision caused severe and serious injuries to Mr. Gary and killed his wife." There has been no testimony to indicate what injuries Mr. Gary sustained in the accident such that a classification as fact that the collision caused "severe and serious" injuries is inappropriate. While there is an affidavit of Mr. Gary submitted, there has been no discovery on this point, and AMR has made the point that summary judgment is premature in light of such, and supported this point by affidavit.

Nor is there any expert testimony respecting Mr. Gary's injuries. The Proposed order provides as fact that Mr. Gary "witnessed his wife's death." Mr. Gary was in the rear of the ambulance and, although no deposition testimony has been taken, it is believed he was unable to see Mrs. Gary. His affidavit gives no indication that he "witnessed" her death, so this language is appropriate in the Order.

The proposed order further states that "Mr. Gary has manifested physical symptoms capable of objective diagnosis...." Yet, there is no expert evidence in the record to support these "facts." The MUSC records are not before the Court. Mr. Gary's affidavit states that he is having trouble sleeping, nightmares, headaches, memory loss, anxiety and depression as a result of the accident and the death of his wife." It is inappropriate on the record before this Court, with no supporting expert testimony and before any depositions have been taken, for the Court to make determinations regarding causation and regarding injuries and damages as reflected by the Proposed Order language... AMR specifically notes the statement found on page 9 of the Proposed Order that Plaintiff suffered "multiple fractured ribs and pelvic bones, among other injuries and damages from the accident." There are no medical records before this Court identifying the nature of Plaintiff's injuries, nor is there any expert testimony. In addition to the improper "findings" the Proposed Order contains in this regard, this lack of expert testimony serves as an additional reason why Plaintiff cannot at this juncture prevail on summary judgment for his negligent infliction of emotional distress claim. One of the elements of a claim for negligent infliction of emotional distress is that: "the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony." Doe v. Greenville County, 375 S.C. 63, 651 S.E.2d 305 (2007) (emphasis added). Hence, summary judgment should be denied.

Further, the Proposed Order provides that "Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he overcorrected causing the ambulance to run off the road and hit a tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home." Mr. Kirkland

has not been deposed and the only information regarding the 'cause' of the accident is the SC Highway Department Police report. It has not been authenticated nor have the investigation officers been deposed. Again, summary judgment is premature because discovery is incomplete as no depositions have been taken to date and there are several factual questions which remain to be developed in discovery, including with respect to the facts surrounding this accident. Hence, summary judgment should be denied as premature.

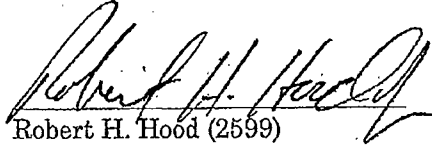
The Proposed Order states, in a footnote, "The Defendants argue that summary judgment is not appropriate, because it was not clear why Kirkland ran off the road in this single ambulance accident. The Defendants cannot defeat a summary judgment motion by simply raising a hypothetical question and then offering the absence of an answer as the defense to the question. 'It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.'" Durkin-v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993)." This is an incorrect conclusion regarding the motion before the court. The Defendant may contest the motion for summary judgment based on the premature nature of such motion, and state that it desires the ability to develop further facts on the issues and has not yet had time to fully develop the evidence that might conflict with Plaintiff's asserted facts. See Rule 56(f), SCRCP. AMR did this. Hence, the motion for summary judgment must be denied at this time.

The Proposed Order also contains a finding that Mrs. Gary had her seat belt secured. The record before the Court does not permit the Court to find this as a fact. The Proposed Order further provides that "Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing,

dressings, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was almost completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death." While the affidavit of Mr. Gary may be supportive of some of this language, these are not stipulated or undisputed facts at this juncture. No depositions have been taken, and AMR has properly contested summary judgment as being premature at this time. AMR objects to all "findings" and "conclusions" based on the premature nature of Plaintiff's motion for summary judgment.

For the reasons stated herein, AMR objects to the Proposed Order submitted by Plaintiff's Counsel and respectfully requests that this Court deny Plaintiff's summary judgment motion in its entirety.

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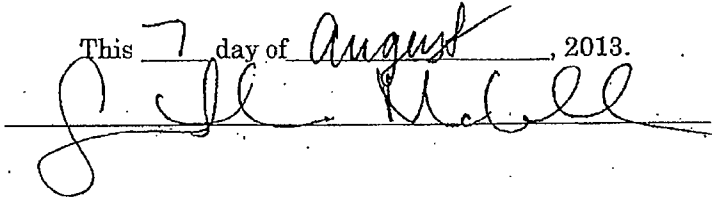
Attorneys for the Defendant
American Medical Response

August 7, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure:

This 7 day of August, 2013.



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Charles Gary,

13 SEP -3 PM 1:15

) IN THE COURT OF COMMON PLEAS

)

BEAUFORT COUNTY, S.C.
CLERK OF COURT

) C/A No. 2012-CP-07-3595

Versus

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.)

) AMERICAN MEDICAL RESPONSE
) INC.'S MOTION TO RECONSIDER,
) ALTER OR AMEND ORDER OF
) AUGUST 20, 2013 AND
) SUPPLEMENTAL MEMORANDUM
) IN OPPOSITION TO PLAINTIFF'S
) MOTION FOR SUMMARY
) JUDGMENT

The Defendant, American Medical Response, Inc. ("AMR") hereby moves this Court, pursuant to Rules 52(b), 50(e), and any other applicable rules of the South Carolina Rules of Civil Procedure, to reconsider, alter or amend its Order filed August 20, 2013 ("the August 20 Order"), which erroneously granted partial summary judgment in favor of the Plaintiff. The grounds for this motion are stated below.

1. AMR hereby incorporates herein all prior arguments and filings in this matter, whether made orally or in writing, including but not limited to the arguments made at the May 14, 2013 hearing and the following filings:

- a. AMR's Answer filed on November 21, 2012;
- b. AMR's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on May 14, 2013;
- c. AMR's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on May 30, 2013; and
- d. AMR's Objections to the Plaintiff's Proposed Order and Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on August 9, 2013

To the extent that the findings of fact and conclusions of law contained in the August 20 Order conflict with the facts, positions, legal arguments, and authorities set forth by AMR in its prior argument and filings, AMR respectfully requests that this Court reconsider such findings.

2. The August 20 Order's partial grant of summary judgment on the claims of negligence, loss of consortium, and negligent infliction of emotional distress was in error because each of these claims requires, as a core element, that AMR breach a duty of care owed to the Plaintiff. However, the only duty owed by AMR found by this Court to exist is a contractual duty this Court concluded was created under AMR's agreement with by the South Carolina Department of Health and Human Services ("SCDHHS") to provide Non-Emergency Medical Transportation ("NEMT") services. A contractual duty, such as the sole duty found by this Court to apply to AMR, cannot support summary judgment on Plaintiff's tort claims.

a. The Trial Court held that Defendant Kirkland and Defendant Low Country owed Plaintiff legal duties to, in the case of Kirkland, operate the ambulance in a safe manner, and, in the case of Low Country under the doctrine of *respondeat superior*, transport Plaintiff safely. {August 20, Order at pp. 7-8}. The Trial Court erred in concluding, as to AMR, that it "had a duty of care to [Plaintiff] arising out of its Contract and operating as broker of NEMT services" that could support summary judgment under Plaintiff's claims. {August 20 Order at p. 8}.

b. Specifically, the Trial Court held that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to [AMR's] contract with the Health Department..." {August 20 Order at p. 9}. Thus, unlike Defendants Kirkland and Low Country, which were found to owe direct duties to Plaintiff based on their roles as driver and employer of the driver of the ambulance, the sole "duty" on which the Trial Court based its summary judgment ruling as to AMR is entirely contractual in nature.

- c. The Trial Court erred by using this *contractual* duty as a basis for tort liability. Under South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). "As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991) (emphasis added). "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." Id. (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)) (emphasis added).
- d. 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. The Trial Court's subsequent reliance on the non-delegable duty doctrine does not rectify this error. As no tort duty existed, whether the nonexistent tort duty is delegable or non-delegable is irrelevant. Therefore, this Court should reconsider its prior ruling and instead deny Plaintiffs motion for summary judgment in its entirety as to AMR.

3. The Trial Court erred by misinterpreting the nature and requirements of AMR's obligations under its agreement with SCDHHS. Specifically, the August 20 Order misinterprets the Request for Proposal as creating a *guarantee* by AMR that the NEMT providers it contracts with will never have an accident. The result of this error is that, solely by virtue of its agreement to broker NEMT services, AMR would be held strictly liable for any and every accident that occurs as a result of services rendered arising from a brokered transaction. Such expansive liability is not supported either by AMR's agreement with SCDHHS or South Carolina law.

- a. The undisputed evidence before this Court established that AMR merely served as the broker, or middleman, between SCDHHS and entities such as Low Country that actually provided the NEMT services. The obligations of the broker under this agreement were separate and apart from the obligations of the transportation providers, and there is nothing in the record indicating that AMR breached any of its obligations

- b. The Trial Court erred in concluding that "[AMR] had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary." (August 20 Order at p. 12). The Trial Court further erred when it concluded that this duty was too important to be transferred to the actual transportation providers. (August 20 Order at pp. 12-13). The August 20 Order improperly relies upon two references in the Request for Proposal to medical transport trips being conducted "safely." (August 20 Order at p. 8) (referring to §§ 3.3.5 & 3.3.15). A full reading of this section of the agreement illustrates that there is no guarantee of safety. Rather, the agreement contemplates liability resting with the transportation provider by requiring that AMR ensure that they obtain and maintain adequate insurance coverage. (§ 3.3.7) Additionally, the fact that absolute safety is impossible is further evidenced by the requirement that AMR ensure that it is immediately notified of any accidents and that it, in turn pass that notification on to SCDHHS. (§§ 3.3.8 & 3.3.10). These requirements belie the Trial Court's conclusion that an absolute duty is imposed on AMR to guarantee that an accident will never happen, and that strict liability is imposed on AMR in the event an accident does occur.
- c. Further, there is no evidence that AMR breached any of its contractual duties. There is no evidence AMR failed to properly monitor Low Country. Additionally, there is no evidence that Defendant Kirkland or Defendant Low Country failed to maintain adequate insurance, failed to maintain the ambulance, or had any history of unsafe driving. Rather, AMR complied with all of its requirements under its agreement with SCDHHS, and its mere role as the broker for the NEMT services does not make it liable for negligence by the "transportation provider."

4. To the extent that the August 20 Order finds AMR *vicariously* liable based on duties owed and breached by the other defendants, it is in further error. After stating that summary judgment against AMR is based solely on its contractual duty under its agreement with SCDHHS, the August 20 Order then erroneously states that AMR is *vicariously* liable. As stated above, there is no duty owed directly by AMR that can support the Plaintiff's tort claims. Additionally, there is no evidence in the record which can support the imposition of vicarious liability against AMR.

- a. It is undisputed that Low County is merely an independent contractor of AMR. "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Tel. Co. v. Globe Communs., Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005).
- b. The Trial Court erred by applying the nondelegable duty doctrine and erroneously concluding that AMR owed an absolute duty to the Plaintiff to provide safe transportation. As discussed above, AMR's agreement with SCDHHS did not guarantee absolute safety, and no such absolute duty exists. Additionally, the Plaintiff has failed to establish the necessary prerequisites to otherwise impose the nondelegable duty doctrine on these facts. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 51, 533 S.E.2d 312, 321 (2000) (requiring a showing that (1) defendant held itself out to the public as offering to provide services; (2) plaintiff looked to the defendant rather than the independent contractor; and (3) persons in similar circumstances reasonably would have believed the independent contractor to be the defendant's employee).

5. Even if AMR owed a duty which supports Plaintiff's tort claims, the Trial Court erred in finding that any such duty was breached by AMR and that any such breach was the proximate cause of any of Plaintiff's damages.

6. The August 20 Order erroneously assumes that no factual issue exists as to the cause of the vehicle accident. Specifically, the Order states that "Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree...." {August 20 Order at p. 5}. The August 20 Order also later incorrectly states that it is "undisputed" that Kirkland "lost control" of the vehicle. {August 20, Order at .p 7}. The interrogatory response to which this refers was from Defendant Low Country Medical Transport, Inc. ("Low Country"), and was not a response or admission ever given by AMR.¹ As this is not a statement or admission attributable to AMR, it cannot serve as the basis for an

¹ Plaintiff never served AMR with any interrogatories in this matter, and, therefore, there are no interrogatory responses attributable to AMR.

"undisputed fact" regarding the cause of the accident. An admission by a party applies only as to the admitting party. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). In its Answer, AMR denied all allegations regarding Kirkland allegedly losing control of the vehicle or relating to the cause of the accident. See AMR's Answer at ¶¶ 7, 8, 10, 12. The Trial Court erred in concluding that the cause of the accident is undisputed, in refusing to allow AMR the opportunity to conduct discovery on this issue, and in failing to view this issue of fact in a light most favorable to the non-moving party. Mr. Kirkland has not been deposed and the only information regarding the 'cause' of the accident is the SC Highway Department Police report. It has not been authenticated nor have the investigation officers been deposed. AMR has made the point that summary judgment is premature in light of such, and has supported this point by affidavit pursuant to Rule 56(f).

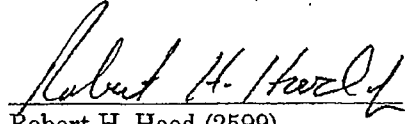
7. With regard to the negligent infliction of emotional distress claim, the August 20 Order erroneously concludes that "[Plaintiff] has exhibited manifestations of his shock and horror through nightmares, insomnia, anxiety, and depression." However, there is no expert evidence in the record to support these "facts." While the August 20 Order then states that "there is no evidence in the record refuting [Plaintiff's] claims," AMR has not been afforded the opportunity to conduct discovery on this and other factual issues. The lack of expert testimony on this issue precludes summary judgment at this time. One of the elements of a claim for negligent infliction of emotional distress is that: "the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony." Doe v. Greenville County, 375 S.C. 63, 67-68, 651 S.E.2d 305, 307

(2007) (emphasis added). Thus, summary judgment on this claim is improper and should have been denied.

8. The August 20 Order erroneously states factual conclusions regarding the extent of Plaintiff's physical injuries. Specifically, the August 20 Order states that Plaintiff "suffer[ed] multiple fractured ribs and pelvic bones, among other injuries and damages from the accident." {August 20 Order at p. 9}. However, there has been no discovery as to the nature and extent of Plaintiffs' injuries and damages. Additionally, there are no medical records before this Court identifying the nature of Plaintiffs' injuries, nor is there any expert testimony. AMR has made the point that summary judgment is premature in light of such, and has supported this point by affidavit pursuant to Rule 56(f).

For the reasons stated herein, AMR respectfully requests that this Court amend its August 20, 2013 Order and instead issue an order denying Plaintiffs Summary Judgment Motion in its entirety.

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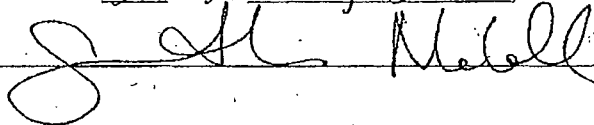
Attorneys for the Defendant
American Medical Response, Inc. (d/b/a
Access2Care)

August 30, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was
served on each party or counsel of record by ☒ mailing,
☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the
manner prescribed by the applicable Rule of Civil
Procedure.

This 30 day of August, 2013.



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CLERK OF COURT
BERNARD COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-07-3595

CHARLES GARY,
PLAINTIFF,

vs.

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

PLAINTIFF CHARLES GARY'S
MEMORANDUM OF LAW IN
RESPONSE TO THE DEFENDANTS'
MOTIONS TO RECONSIDER
SUMMARY JUDGMENT ORDER
DATED AUGUST 20, 2013

The Plaintiff Charles Gary submits this Memorandum of Law in Response to the Defendants Hattie M. Askew, individually and d/b/a Low Country Medical Transport's ("LCMT"), Low Country Medical Transport Inc., (LCMT and Low Country Medical Transport Inc. collectively referred to herein as "Low Country Medical") Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care"), (collectively "Defendants") motions pursuant to SCRCP Rules 52(b),

50(e), 59(e), and any other applicable rules of the South Carolina Rules of Civil Procedure, to reconsider, alter or amend its Order filed August 20, 2013 ("the August 20 Order"). This Court should deny the Defendants' motions for the following reasons.

1. The Plaintiff hereby incorporates herein all prior arguments and filings in this matter, whether made orally or in writing, including but not limited to the arguments made at the May 14, 2013, hearing and asks this Court to review *in camera* pursuant to

the August 8, 2013, Confidentiality Order, excerpts from the Plaintiff's medical records served on the Defendants in response to the Defendants' discovery and that was provided to the Court (and the parties) via email on August 11, 2013.

2. Access2Care's main challenge to this Court's August 20, 2013, Order is that it has no duty in tort to the Plaintiff and that this Court only found a "contractual duty."

Therefore, summary judgment is improper. To the contrary, this Court found that:

Equally, Access2Care had a **duty of care** to Mr. Gary arising out of its Contract and operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's Contract with the Health Department required Access2Care to be ". . . responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time." *Health Department Contract Section 3.3.5 Fulfillment of All Trip Requests.*"

[August 20, 2013, Order at page 8]

Access2Care misstates the nature of the duty of care found by this Court pursuant to the Non-Delegable Duty Doctrine and erroneously attempts to apply inapplicable authority to this Court's ruling as the basis for seeking reconsideration. This Court found that ". . . [a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." citing, Simmons v. Toumey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998). On

page 3 of Access2Care's memorandum of law, it cites three cases for the proposition that: "The Trial Court erred by using this contractual duty as a basis for tort liability." The cited cases are not non-delegable duty cases and they do not abolish the Non-Delegable Duty Doctrine.

a. Access2Care argues that "Under South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v.

Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989)."

Access2Care misstates the ruling of the Kennedy Court and misapplies its application to the case at bar. Kennedy v. Columbia Lumber & Mfg. Co., is a breach of implied warranty of habitability case involving a house sold by a creditor which it acquired by deed in lieu of foreclosure of a mechanics' lien. The subsequent purchaser sued the creditor in contract and tort for defects in the home. The Kennedy Court did not find that "where a duty is created solely by contract no cause of action in negligence will lie."

Instead, the Kennedy Court found that:

The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort. . . Thus, a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The "economic loss" rule will still apply where duties are created solely by contract. In that situation, no cause of action in negligence will lie.

Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989).

The rule of law Access2Care attempts to apply here is misplaced. Access2Care's duty of care to Mr. Gary arises out of its Contract with the South Carolina Department of Health and Human Services ("the Health Department"). In that Contract, Access2Care accepted the responsibility for managing a non-emergency medical transportation

network and "for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time", in exchange for fees in excess of 160 million dollars. Access2Care's acceptance of the Health Department Contract and the provision of non-emergency medical transportation services through its network created the duty of care to Mr. Gary not a separate contract.

"The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions." Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001). "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Murray v. Bank of America, 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003). The South Carolina Supreme Court's decision in Kennedy is not applicable to the facts of this case or the Non-Delegable Duty Doctrine.

b. Access2Care claims that: "As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct.App. 1991) (emphasis added)." This Court's August 20, 2013, Order did not find that a duty arose from an agreement between Mr. Gary and the Defendants. Rather, this Court found that "[t]he Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina." [August 20, 2013, Order at page 7]. The Foxfire Village Court's finding that "... if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct" is inapplicable here, because Access2Care had a duty of care to Mr. Gary to "[deliver courteous], safe, timely and efficient transportation services." [August 20, 2013, Order page 8].

c. Access2Care argues that "[w]here 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." *Id.* (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155,

62 S.E.2d 109 (1950)) (emphasis added). However, the Meddin Court further states that:

On the other hand, where the contract creates a certain relationship between the parties, and certain duties arise by operation of law, irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort. . . . Actions in tort often have their beginning in contractual matters.

The essential distinction is clearly shown in one of the leading cases relied on by counsel, to wit, Atlantic & Pacific R. Co. v. Laird, 164 U.S. 393, 17 S. Ct. 120, 122, 41 L. Ed. 485, wherein the Court quotes with approval a statement to the effect that if "the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort".

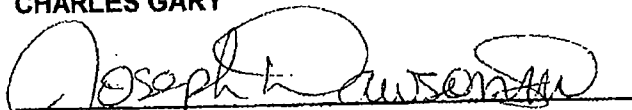
Meddin v. Southern R.-Carolina Div., 218 S.C. 155, 62 S.E.2d 109, 1950 S.C. LEXIS 65 (1950).

Here again, this is not a breach of contract case. Rather this case is predicated on a breach of a duty of care owed by the Defendants which arises out of a contract Access2Care entered into with the Health Department to perform non-emergency medical transport services to eligible Medicaid members in South Carolina. The Defendants are liable for injuries Mr. Gary sustained when Access2Care's subcontractor Low Country Medical caused the single-ambulance accident, resulting in the death of his wife.

Finally, the Defendants argue that this Court should reconsider its ruling on the Plaintiff's Negligent Infliction of Emotional Distress claim, ostensibly due to an alleged lack of evidence in the record. The Defendants do not deny that the Plaintiff has provided them with his medical records through discovery and that these medical records demonstrate the Plaintiff's emotional distress has manifested itself by physical symptoms capable of objective diagnosis and have been established by his treating

physician. Since the Defendants have filed motions to reconsider this Court's Order, the Plaintiff asks this Court to review the Plaintiff's medical records excerpts provided earlier. The Plaintiff requests that the records be reviewed *in camera* pursuant to the Confidentiality Order entered by the Court, dated August 2, 2013, as part of its reconsideration in response to these arguments.

CHARLES GARY

A handwritten signature in cursive script, appearing to read "Joseph Dawson, III", is written over a horizontal line.

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September 13, 2013
North Charleston S.C.

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.

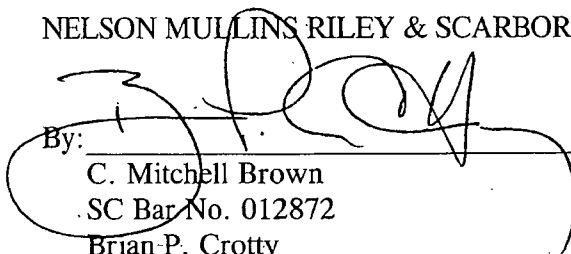
Hattie M. Askew, Will Outlaw, and Deboria Outlaw,
individually and d/b/a Low Country Medical Transport,
Low Country Medical Transport, Inc., Eugene A.
Kirkland, and American Medical Response, Inc. (d/b/a
Access2Care) Defendants

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Marvin H. Dukes III, Circuit Court Judge

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Kirkland, and American medical Response, Inc. (d/b/a
Access2Care), ...
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 Appellant, 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
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SC Court of Appeals

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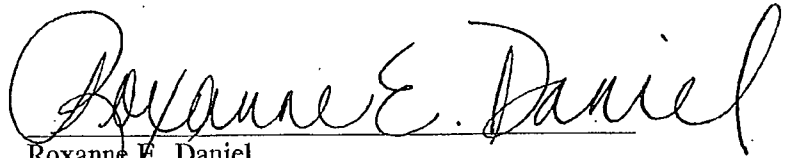
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June 2, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

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Access2Care), ...

Defendants

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

Appellant.

PROOF OF SERVICE

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& Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel
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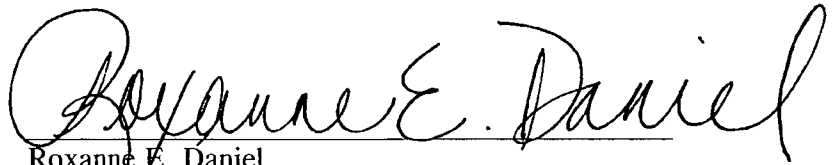
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June 2, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Of whom American Medical Response, Inc. (d/b/a
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JUN 20 2014

SC Court of Appeals

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Statement of Issues

1. Did the Trial Court err in interpreting the contract between Appellant and the South Carolina Department of Health and Human Services for the brokering of non-emergency medical transportation services as creating an absolute duty owed by Appellant to provide "safe" transportation and imposing on Appellant strict liability for all accidents that occurred?
2. Did the Trial Court err in granting summary judgment in tort claims where the alleged duty breached as a basis for those tort claims was only contractual?
3. Did the Trial Court err in holding that Appellant was liable for the negligent actions of its subcontractor because the alleged duty breached was an absolute duty to provide safe transportation that was nondelegable?
4. Was the Trial Court's grant of summary judgment on the negligence and loss of consortium claims premature where the parties had not yet completed material discovery and Appellant was, therefore, denied the opportunity to present a full and complete record to the court?
5. Did the Trial Court err in concluding that there was no genuine issue of material fact in issue regarding the contract's meaning, and regarding the cause of the ambulance accident?

Statement of the Case

This appeal involves a tort action arising from an automobile accident where an ambulance left the road and struck a tree. (R. 36-37; Compl. ¶¶ 14-15). Respondent Charles Gary and his wife Blondell Gary were passengers in the ambulance. (R. 36-37; Id.). Respondent's Complaint was filed on October 16, 2012. (R. 32; Compl.). Appellant, American Medical Response, Inc. ("AMR") was the broker that processed the scheduling of Respondent's request for non-emergency medical transportation ("NEMT"); and was named as a defendant in this action. (R. 34; Compl. ¶ 6). The other defendants were: Low Country Medical Transport, Inc. ("Low Country"), which was the medical transportation company that actually provided the NEMT service; Hattie Askew, Will Outlaw and Deboria Outlaw, who were owners or officers of Low Country; and Eugene Kirkland, who was the ambulance driver employed by Low Country. (R. 33-34; Compl. ¶¶ 3-5).

The Complaint asserted claims for negligence, loss of consortium, and negligent infliction of emotional distress against all of the defendants. (R. 37-40; Compl. ¶¶ 17-33). Appellant filed an Answer on November 21, 2012, and an Amended Answer on December 12, 2012. (R. 42 & 48; Ans. & Am. Ans.).

On February 26, 2013, despite only very limited discovery having occurred, Respondent filed a motion for summary judgment as to all defendants on all claims. (R. 68; Mot. for Sum. Judg.). A hearing on that motion was held on May 14, 2013, and at that hearing Appellant and Respondent both filed memoranda on the summary judgment issue. (R. 72; 186; Pl.'s Memo. in Supp.; AMR's Memo. in Opp.). The Trial Court requested additional briefing, and supplemental memoranda were filed by AMR and

Respondent on May 30, 2013, and June 6, 2013, respectively. (R. 233; 252; AMR's Supp. Memo. in Opp.; Pl.'s Supp. Memo in Supp.). Additionally, on July 10, 2013, AMR's counsel filed a Rule 56(f) Affidavit asserting that summary judgment at this early stage would be premature because material discovery had not yet been conducted. (R. 263; Cooper Affidavit).

On July 24, 2013, the Trial Court requested that Respondent's counsel draft a proposed order granting summary judgment as to all claims. (R. 276; E-mail from Dukes to Counsel). A proposed order was submitted on July 26, 2013. (R. 277; Proposed Order submitted 7/26/13). On August 9, 2013, AMR filed a response objecting to the proposed order on multiple grounds and further supplementing its prior opposition to the summary judgment motion. (R. 293; AMR's Objections to the Proposed Order filed 8/9/13).

On August 20, 2013, the Trial Court entered an Order ("the August 20 Order") granting Respondent's motion for summary judgment as to all claims and all defendants. (R. 1; Order entered 8/20/13). AMR filed a motion to alter or amend the August 20 Order and a hearing on this motion was held on November 12, 2013. (R. 306; 54; AMR's Motion to Alter or Amend filed 9/3/13); Transcript from 11/12/13 hearing). On December 3, 2013, the Trial Court entered a new Order ("the December 3 Order") modifying the August 20 Order. (R. 17; Order entered 12/3/13). The December 3 Order granted Respondent's summary judgment motion as to only the negligence and loss of consortium claims, and denied it as to the negligent infliction of emotional distress claim. Appellant timely filed and served its Notice of Appeal on December 13, 2013.

Statement of the Facts

This appeal involves AMR's role as a broker of transportation services under the South Carolina Non-Emergency Medical Transportation ("NEMT") Program. The NEMT Program provides non-emergency transportation services to Medicaid members who need access to medical care or services. (R. 94; RFP Scope, § 1.1). On September 9, 2010, the South Carolina Department of Health and Human Services ("SCDHHS") issued a Request for Proposal ("RFP") regarding the provision of brokerage services relating to the NEMT Program. (R. 93; RFP). "Brokerage services" under the NEMT Program were described as "operating a call center and contracting with transportation providers to fulfill the services." (R. 94; RFP § 1.2). AMR responded to the RFP and on May 25, 2011, was awarded a five year contract for Regions II and III of South Carolina. (R. 141; Notice Regarding Award).

South Carolina's NEMT Program has a large scale and involves a high volume of non-emergency transportation requests. For example, during fiscal year 2008, brokers under the NEMT Program scheduled approximately 1,707,311 one-way trips throughout the state. (R. 95; RFP § 1.4). In just Regions II and III of South Carolina, 539,517 NEMT trips occurred during the six-month period from July 2009 to December 2009. (R. 142; AMR Change Order Request dated 11/22/11).

It is undisputed that the RFP itself forms the contract that existed between the SCDHHS and AMR regarding the provision of brokerage services relating to the NEMT Program. (R. 55; 19; Transcript of 11/12/13 Hearing at p. 7; Order filed 12/3/13 at p. 3 n.1).

Under this contract, it is clear that AMR was to serve as the “broker,” between SCDHHS and the entities that actually provided the NEMT services (the “transportation providers”). (R. 94; RFP §§ 1.1, 1.2).

The RFP distinguishes between the “broker,” who is only responsible for providing “brokerage services,” and the “transportation providers” who are responsible for providing “transportation services.” (R. 93; RFP). The RFP 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. 97; RFP at § 2.4.14). Section 3.3.6 of the RFP 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).¹ (R. 102; RFP § 3.3.6.).

Section 3.0 of the RFP sets forth the following fifteen “Core Services” AMR, as broker, “must perform throughout the life of the contract”:

- 1) Maintain adequate staff and facilities.
- 2) Develop and maintain comprehensive policies and procedures.
- 3) Process transportation requests from members, facilities, and other individuals requesting services on behalf of the member.
- 4) Verify member eligibility for Medicaid.
- 5) Operate a telephone call center and develop a call center operations manual.
- 6) Establish an orientation and training program for transportation broker employees.
- 7) Recruit and maintain an adequate transportation provider network.

¹ 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.

- 8) Establish an orientation and training program for transportation providers.
- 9) Inform and educate members and facility providers about the NEMT Program and process.
- 10) Develop and implement a complaint tracking and resolution plan.
- 11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
- 12) Provide administrative management oversight.
- 13) Submit management and performance reports.
- 14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
- 15) Protect recipient confidentiality.

(R. 97-98; RFP § 3.0). Section 3.3 of the RFP sets forth various “Operational Requirements” of the contract. These operational requirements include the following:

3.3.5 Fulfillment of All Trip Requests:

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

3.3.5.2 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 to determine the real time location of members ...

3.3.7 Insurance: *In addition to the strict quality assurance standards that the transportation providers must meet, the Broker must ensure transportation providers have insurance coverage. State law and regulations specify minimum insurance requirements for entities involved in the provision of Medicaid Transportation Services. The Broker is responsible for ensuring required and adequate coverage is obtained and maintained during term of contract.*

3.3.8 Accidents, Injuries, and Incidents: *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. Accidents, injuries and incidents must be reported to SCDHHS as follows:

3.3.8.1 Accident/Incident with Injury: Notification within 1 hour

3.3.8.2 Accident/Incident without Injury: Notification within 6 hours

3.3.9 Trip Recovery: The Broker must ensure that each provider is responsive to all vehicle breakdowns, problems or delays in delivering service. The Broker must ensure that the provider has adequate backup vehicles to recover the trips, and ensure that members are not late for their appointments and do not spend excessive time on the vehicles.

3.3.10 Notification by Transportation Providers: The Broker(s) must ensure that the transportation provider immediately informs Broker of any breakdown, accident or incident as well as any other problems that might cause a delay of more than ten (10) minutes in the trip

(R. 99; RFP § 3.3) (emphasis in italics added). Thus, while the contract contains language stating that the broker is responsible for “ensuring all trips are completed safely and on time,” it also contemplates that accidents and delays will occur and sets forth actions that must be taken in such events. (R. 101, 102; RFP §§ 3.3.5, 3.3.8, 3.3.9, 3.3.10). Additionally, the contract requires the broker to ensure that the transportation providers maintain at least the required minimum insurance, and recognizes that the transportation providers must meet strict quality assurance standards. (R. 102; RFP § 3.3.7).

The operational requirements set forth in the contract between AMR and SCDHHS also addressed the "monitoring" of the transportation providers and the establishment of a detailed monitoring plan. Specifically, the contract provided:

3.3.15 Monitoring Plan: The Offeror must include a Monitoring Plan in the initial proposal. 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.

Monitoring activities must include, but are not limited to:

- On-street observations
- Accident/incident reporting
- Statistical reporting of trips
- On Time Performance Measures
- Ride Time Performance Measures
- A detailed analysis of complaints
- Driver licensure, driving record, experience and training compliance
- Compliance with vehicle requirements
- Member safety, assistance and courtesy
- Completion of driver logs
- Driver communication with dispatcher
- Routine vehicle inspections, maintenance, emergency equipment and breakdowns
- A detailed analysis of 're-routed' trips
- Detailed analysis of cancelled trips
- Gas reimbursement program
- Transportation Providers, including providers of Individual Transportation
- Volunteer Drivers
- Post trip member satisfaction questionnaires for all overnight trips

(R. 104; RFP § 3.3.15). This provision of the contract required AMR to monitor the transportation providers with whom AMR subcontracted to confirm the transportation providers provided quality, safe services. If the information and the reports indicated

otherwise, AMR was then required to take certain actions as set forth in Section 3.3.15.1, which reads:

The Broker must have written procedures in place for taking appropriate corrective action whenever inappropriate or substandard services are furnished or when services that should have been furnished were not. In addition, the Broker must have written procedures for taking appropriate action if a transportation provider is out of compliance with federal or State laws or regulations. The Broker must report, not less than monthly, to SCDHHS on monitoring activities, monitoring findings, corrective action taken, and improvements by the transportation provider.

(R. 104-105; RFP § 3.3.15.1).

Section 3.12 of the contract, titled “Quality Assurance,” addressed “corrective action plans.” This section provided that, where corrective action was necessary, amongst other things, “[t]he Broker must provide assurance that transportation providers meet health and safety standards for vehicle maintenance, operation, and inspection; driver qualifications and training; member problem and complaint resolution; and the delivery of courteous, safe, and timely transportation services.” (R. 136; RFP § 3.12.1.1).

On January 31, 2012, Respondent and his wife were being transported in an ambulance returning home from Respondent’s medical appointment. (R. 91; Aff. of Charles Gary ¶ 5). Respondents’ wife had scheduled the trip by calling AMR. (R. 91; Id. ¶ 6). Prior to reaching Respondents’ home, for reasons which have yet to be determined, the ambulance left the roadway and struck a tree. (R. 37; Compl. ¶ 15). As a result of this accident, Respondent suffered injuries and his wife died. (R. 37; Id.)

The NEMT service was provided by Low Country. (R. 91; Aff. of Charles Gary ¶ 5). Low Country was a “transportation provider” who was a subcontractor under

AMR's contract with SCHHS. (R. 233; 57; Aff. of G.R.M. McCormick at ¶¶ 9-10; Tr. of 11/12/13 Hearing at p. 15).

The ambulance was driven by Eugene Kirkland ("Kirkland"), who had been an employee of Low Country since June 2008. (R. 152; Aff. of Hattie Askew ¶ 12). During his three-and-a-half years of employment with Low Country, Kirkland safely transported approximately 780 patients per year, and had never previously been involved in an automobile accident or any other negative employment incident. (R. 153; Id. ¶¶ 13-15).

Respondent filed this suit on October 16, 2012. (R. 32; Compl.). On February 26, 2013, Respondent filed a motion for summary judgment on all claims and against all defendants. (R. 68; Mot. for Sum. Judg.). A hearing on the summary judgment motion was held on May 14, 2013.² Following that hearing, at the request of the Trial Court, the parties submitted additional briefing. (R. 233; 252 AMR's Supp. Memo. in Opp.; Pl.'s Supp. Memo in Supp.).

AMR asserted that summary judgment was premature as there were several factual issues that remained to be developed in discovery. (R. 235; AMR's Supp. Memo. in Opp. at p. 3). On July 10, 2013, AMR's counsel filed a Rule 56(f) Affidavit again asserting that summary judgment at this point would be premature because material discovery had not yet taken place, including the Respondent's deposition. (R. 263; Aff. of Cooper Wilson). In addition to being denied an opportunity to depose Respondent, there had been no depositions of any party or witness in the case. (R. 57; Tr. from 11/12/13 Hearing at p. 16).

² This hearing was not recorded by a court reporter and there is no transcript of this proceeding.

On August 20, 2013, the Trial Court entered an Order granting Respondents' motion for summary judgment on all claims (negligence, loss of consortium, and negligent infliction of emotional distress) and against all defendants. (R. 1; Order entered 8/20/13). Following AMR's filing of a motion to reconsider the August 20 Order, and a hearing on that motion, the Trial Court issued a new Order on December 3, 2013. (R. 306; 54; 17; AMR's Mot. to Reconsider; Tr. of 11/12/13 hearing; Order filed 12/3/13). The December 3 Order modified the prior Order by granting summary judgment only on the negligence and loss of consortium claims, and denying summary judgment as to the negligent infliction of emotional distress claim. (R. 17; Order entered 12/3/13).

With regard to Respondents' negligence and loss of consortium claims, the Trial Court held that "[t]he Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina." (R. 23; Id. at p. 7). As to Kirkland, the Trial Court held that, as the driver of the ambulance, he "had a clear legal duty to operate the ambulance in a safe manner and avoid dangers." (R. 23; Id. at p. 7). As to Low Country, the Trial Court held that it owed "a duty of care to transport [Respondent] safely, while he was in its custody and control." (R. 23-24; Id. at pp. 7-8). As to AMR, the Trial Court held that it owed Respondent a duty "arising out of its Contract and operating as broker of NEMT services." (R. 24; Id. at p. 8). In reaching this conclusion as to AMR, the Trial Court placed special emphasis on sections 3.3.5 and 3.3.15 of the contract. (R. 24; Id. at p. 8). Based on this language and the use of the words "safely" and "safe," the Trial Court concluded 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. 25; Id. at p.

9). The Trial Court then concluded that all of the defendants breached their respective duties “when Low Country Medical’s ambulance ran off the road.” (R. 25; Id. at p. 9).

Significantly, aside from the reference to ambulance trips being “completed safely” Respondent offered no evidence, and the Trial Court made no findings, as to whether AMR failed to perform any of its specific duties set forth in the contract with regard to its “Core Services,” “Operational Requirements,” “Monitoring Activities,” “Driver and Vehicle Requirements,” “Passenger Safety Requirements,” or “Corrective Action Plans.” Rather, the Trial Court concluded that because the “ambulance ran off the road” all of the defendants, including AMR, breached their respective duties of care. (R. 25; Id. at p. 9).

After finding that AMR’s contract with SCDHHS created a duty to provide completely “safe” transportation, the Trial Court then held that AMR could not avoid liability for the breach of this duty by a subcontractor. (R. 26-28; Order filed 12/3/13 at pp. 10-12). Specifically, the Trial Court held that “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. 26; Id. at 12) (emphasis added). After holding that an absolute nondelegable duty was owed by AMR, the Trial Court then held AMR “vicariously” liable for the breach of this duty by the independent contractor. (R. 26-28; Id. at 10-12). This appeal followed. (Notice of Appeal).

Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a circuit court may grant a motion for summary judgment only “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 a judgment as a matter of law.” Rule 56(c), SCRPC. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC. Hooper v. Ebenezer Sr. Servs. & Rehab. Center, 386 S.C. 108, 111, 687 S.E.2d 29, 32 (2009). In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

Argument

I. The Trial Court erred in concluding that AMR’s contract imposed on it a strict duty to provide “safe” transportation, and that this contractual duty supported tort claims.

A. The Trial Court misconstrued the language of the contract as imposing a duty on AMR that equated to strict liability for any and all accidents.

In its December 3 Order, the Trial Court erred by misinterpreting the nature and requirements of AMR’s obligations under its contract with SCDHHS. The Trial Court incorrectly concluded 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. 25; Order entered 12/3/13 at p. 9). The Trial Court then concluded that AMR breached this duty of care “when Low Country Medical’s ambulance ran off the road.” (R. 25; Id.). Stated differently, the Trial Court concluded

that, *because an accident occurred—without any regard for the cause of the accident or any action or omission by AMR—AMR breached its contractual duty.* The imposition of such expansive liability is not supported by either AMR's contract with SCDHHS or by South Carolina law.

AMR's contract with SCDHHS creates a relationship where AMR serves only as a "broker" between SCDHHS and the entities that actually provide the NEMT services (the "transportation providers"). The contract sets forth AMR's obligations as a "broker" providing "brokerage services." (R.94; RFP at § 1.1). These obligations are separate and apart from the obligations of the ultimate "transportation providers" who provide "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; RFP § 3.3.6).

AMR's specific responsibilities focus 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 is sufficient to handle the anticipated volume; and implementing a system to track and resolve complaints. Notably, Plaintiff presented no evidence that AMR violated any of these specific provisions. Further, nothing within these "core services" suggests an intent to impose upon AMR strict liability for anything that could go wrong during the transportation process or the assumption by AMR of a duty guaranteeing safety on all NEMT trips.

In imposing on AMR “an absolute duty under its contract with the Health Department to provide ‘safe’ transportation,” The Trial Court relied upon two references in the contract to NEMT trips being conducted “safely” found in sections 3.3.5 and 3.3.15. (R. 24-25, 28; Order entered 12/3/13 at pp. 8-9, 12). Specifically, section 3.3.5, which addresses “Fulfillment of All Trip Requests” provides that “[t]he Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on time.” (R. 101; RFP § 3.3.5). Similarly, section 3.3.15, which addresses the broker’s monitoring of transportation providers, includes a reference to “delivery of courteous, safe, timely and efficient transportation services.” (R. 104; RFP § 3.3.15). The Trial Court erroneously concluded that the plain meaning of the language above and of the overall contract meant, as a matter of law, that AMR had an “absolute duty” to provide transportation services that are completely “safe.” (R. 28; Order entered 12/3/12 at p. 12). The provisions do not mean this. First, the contract language elsewhere specifically shows an expectation that accidents and injuries in fact will happen on occasion to those being transported. In other words, there is no way to in fact “ensure” safety while transporting someone in a vehicle. Second, it would be an absurd result were the contract to be construed to mean AMR would be liable for injuries and damages to someone being transported by a “transportation provider” under a scenario where the accident was caused by some third party, an act of God, or some other extraneous cause.

Both of the references to “safety” relied upon by the Trial Court are found in section 3.3 of the contract, which sets forth the “Operational Requirements.” This same section of the contract contains additional subsections which illustrate there is no absolute guarantee of safety. Specifically, section 3.3.7 requires that AMR ensure that the

“transportation providers” obtain and maintain adequate insurance coverage. Additionally, section 3.3.10 requires that AMR ensure that “transportation providers” immediately notify AMR of any accidents, injuries or incidents, and section 3.3.8 requires AMR to promptly report such accidents, injuries or incidents to SCDHHS. The fact that the contract requires AMR to ensure that the “transportation providers” have insurance coverage, and that all accidents and injuries be reported to AMR, acknowledges the fact that accidents are inevitable and are clearly contemplated by the parties to the contract.³ Thus, the references to “safety” are not a guarantee that accidents will never happen, nor are they an imposition of absolute liability for accidents that do happen. Therefore, the “plain meaning” of the provisions relied upon by the Trial Court cannot and does not support the Trial Court's conclusions. Rather, the contract as a whole supports the point that AMR has not violated any contract duty, or, failing that, the language of the contract relied upon by the Trial Court is at best ambiguous. Under either scenario, summary judgment was improper.

Actually, AMR's specific duties with respect to accidents are met by its compliance with the monitoring plan set forth in section 3.3.15, which when viewed in its entirety provides:

3.3.15 Monitoring Plan: The Offeror must include a Monitoring Plan in the initial proposal. The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure

³ Similarly, the contracts provisions regarding delays and breakdowns illustrate that the references in sections 3.3.5 and 3.3.15 to the “timely” provision of transportation are not a guarantee that a passenger will never be late. Section 3.3.9 provides that the broker must make sure that the transportation provider has adequate backup vehicles to respond in the event of a breakdown or other delay. Under the reasoning adopted by the Trial Court, AMR would owe an absolute duty to guarantee that patients were never late. That is simply not the case.

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.

Monitoring activities must include, but are not limited to:

- On-street observations
- Accident/incident reporting
- Statistical reporting of trips
- On Time Performance Measures
- Ride Time Performance Measures
- A detailed analysis of complaints
- Driver licensure, driving record, experience and training compliance
- Compliance with vehicle requirements
- Member safety, assistance and courtesy
- Completion of driver logs
- Driver communication with dispatcher
- Routine vehicle inspections, maintenance, emergency equipment and breakdowns
- A detailed analysis of 're-routed' trips
- Detailed analysis of cancelled trips
- Gas reimbursement program
- Transportation Providers, including providers of Individual Transportation
- Volunteer Drivers
- Post trip member satisfaction questionnaires for all overnight trips

(R. 104; RFP § 3.3.15). The purpose of this section is for AMR to observe its subcontractors and monitor whether they are providing a quality, safe product. If the information and the reports indicate otherwise, then AMR is required to take corrective actions against the subcontractor as set forth in Section 3.3.15.1.

Thus, AMR's responsibility to "ensure safe transportation services" is met by actions such as:

- confirming compliance with all applicable state and federal laws and regulations;
- confirming compliance with driver requirements, such as licensure, driving records, training and experience;
- confirming compliance with vehicle requirements;
- observing the transportation providers on-street;
- conducting annual inspections of all vehicles used by transportation providers;
- confirming that transportation providers comply with passenger safety requirements such as the use of seat belts, the observance of seating capacity limits; and
- taking corrective action wherever problems are found.

(R. 104, 124, 125, 131; RFP §§ 3.3.15, 3.8.1, 3.8.2, 3.8.3)⁴.

The law in this state regarding the construction and interpretation of contracts is well settled." Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct App. 2011). "If 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). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning,

⁴ Significantly, AMR's obligations under the contract with SCDHHS are not limited to arranging for transportation providers to provide transportation via ambulances. Rather, the contract provides for a wide range of transportation options to be utilized by the broker, including: mileage reimbursement for private vehicles, public buses, trains, aircraft, as well as various levels of ambulance-type transportation. See 42 C.F.R. § 440.170(a)(4) (discussing the different types of transportation services included in a state's NEMT brokerage program) (R. 108, 109, 118; RFP §§ 3.6.2, 3.6.3.5, 3.6.3.6, 3.7.6). In fact, the contract specifically encourages the broker "to utilize public transportation whenever possible if it is cost effective as well as appropriate for the member." (R. 118; RFP § 3.7.6).

discover the intention of the parties as found within the agreement, and give effect to it."

Id.

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) . A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). "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.

With regard to ascertaining intent, the South Carolina Supreme Court has stated:

[t]he subject matter of the contract and the purpose of its exception are material to the ascertainment of the intention of the parties and the meaning of the terms they use. In construing the contract the Court will ascertain the intention of the parties, and to that end will, as far as possible, determine the situation of the parties, as well as the purposes had in view at the time the contract was made. ***All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results.***"

Bruce, 241 S.C. at 160, 127 S.E.2d at 442 (emphasis added). Additionally, "[w]here 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.

Here, when the contract is viewed in its entirety, it is clear that the parties did not intend to impose upon AMR a “duty” of absolute safety. Rather, the contract, through its numerous provisions regarding safety, imposed only a duty that AMR comply with the specific provisions applicable to it in an effort to facilitate safe transportation. This is the only sensible and reasonable construction of the contract.

In contrast, the Trial Court’s interpretation of the contract as imposing an “absolute duty” to provide “safe” transportation ignores the intent evidenced by the contract as a whole and leads only to absurd consequences and unjust results. This contract involved hundreds of thousands of trips each year. The trips under which the Trial Court imposed an absolute duty of safety include not only ambulance trips, but also those in which a Medicaid member used private transportation and was reimbursed for mileage, trips where public transportation such as a city bus was used, and even airplane transportation. Under the Trial Court’s view of the contract, if AMR arranged for the travel under the NEMT program, it would be liable for any injuries a Medicaid member sustained in any of the following circumstances:

- A car accident while traveling in a privately owned vehicle whose owner was being reimbursed for mileage;
- A train derailment while traveling via train;
- A public bus accident while using public transportation; and
- An airplane crash while traveling using an airline

Imposing liability on AMR in such circumstances would be an absurd and unjust result. The absurdity of the Trial Court’s interpretation is not lessened where the injury occurs while being transported in an ambulance. For example, under the Trial Court’s interpretation, another driver could intentionally run his car into an ambulance on an

NEMT trip, and AMR would be absolutely and strictly liable for any ensuing injuries and damages to those transported in the ambulance. From these examples, it is apparent that the specific language of the contract relied upon by the Trial Court does not in fact have the meaning ascribed to it by the Trial Court.

The only reasonable construction of the contract, using common sense and a sensible approach, is that AMR has a duty to meet the various specific provisions applicable to it set forth throughout the contract respecting safety. And there is no evidence whatsoever, and the Trial Court made no findings whatsoever, that AMR failed to meet its obligations as to any of those specific provisions. Further, even if this construction of the contract is not adopted, at minimum the language relied upon by the Trial Court is ambiguous, and does not mean what he interpreted it to mean. Hence, this Court should reverse the grant of summary judgment on the negligence and loss of consortium claims.

B. The Trial Court erred by holding that the duty owed by AMR, which was entirely contractual in nature, supported tort causes of action.

In addition to misinterpreting the meaning and effect of the contract between AMR and SCDHHS to incorrectly impose on AMR an “absolute duty to provide ‘safe’ transportation,” the Trial Court also erred by basing its grant of summary judgment on the breach of this duty which the Trial Court acknowledged was entirely *contractual* in nature. Respondent’s claims for negligence and loss of consortium both share, as core elements, the requirement that AMR breach a duty of care owed to Respondent.

With respect AMR, the Trial Court stated that the duty of care owed to Respondent arose “out of its Contract and operating as broker of NEMT services.” (R. 24; Order filed 12/2/13 at p. 8). Specifically, the Trial Court held that “[AMR] had a

contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to [AMR's] contract with the Health Department.” (R. 25; Order filed 12/2/13 at p. 9). Kirkland, the driver, and Low Country, the employer of the driver, owe direct duties to Respondent based on the law and principles of tort liability. Yet, the sole “duty” on which the Trial Court based its summary judgment ruling as to AMR was entirely *contractual* in nature, and it was error for the Trial Court to use this *contractual* duty as a basis for *tort* liability.

Under South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. Huggins v. Citibank, N.A., 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). “As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct.” Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991). “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.” Id. (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)). 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.

In addition, Respondent failed to establish, and the Trial Court failed to find, that AMR breached any of its specific obligations under its contract with the State. Specifically, there was no evidence that AMR failed to establish or maintain a

“monitoring plan.” Additionally, there is no evidence that Kirkland or Low Country failed to maintain adequate insurance, failed to maintain the ambulance, or had any history of unsafe driving. Rather, AMR complied with all of its requirements under its contract with SCDHHS, and its mere role as the broker for the NEMT services does not make it liable in tort as a result of actions or omissions by the “transportation provider.” Therefore, the Trial Court’s grant of partial summary judgment against AMR on those claims was in error and should be reversed.

II. The Trial Court erred in holding that AMR owed an absolute nondelegable duty to provide safe NEMT transportation that rendered it liable for the negligent actions of a subcontractor transportation provider.

After finding that AMR’s contract with SCDHHS created a duty to provide completely “safe” transportation, the Trial Court held that AMR could not avoid liability for the breach of this duty by a subcontractor. (R. 26-28; Order filed 12/3/13 at pp. 10-12). Specifically, the Trial Court held that “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. 28; *Id.* at 12). After finding this duty to exist, the Trial Court ruled that AMR was “vicariously liable” for the actions of the independent contractor Low Country. This ruling was in error.

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)). Hence, an application of the general rule to the fact pattern here would mean that AMR is *not* vicariously liable for any alleged negligence by Low Country and its employees.

This general rule is subject to few and narrow exceptions, one of which is the somewhat confusingly-named “nondelegable duty” doctrine.⁵ *Id.* Under this doctrine, if a person owes another an “absolute duty” which he delegates to an independent contractor, he remains liable for the contractor’s negligence. *Id.* (“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)).

A duty is nondelegable only if it is premised on some “absolute duty” owed by the defendant to the plaintiff. See *id.*; *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

⁵ As explained by the Supreme Court in *Simmons v. Tuomey Reg’l Med. Ctr.*, “[t]he term ‘nondelegable duty’ is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the *liability*, not the duty, that is not delegable.” *Simmons*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

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. There is no basis for finding a nondelegable duty under any of these sources here.

First, neither the Trial Court nor the Respondent point to any statute imposing an absolute duty on AMR. Second, there is no public policy which exists warranting the imposition of an absolute duty under common law in this matter. South Carolina's courts have found a nondelegable duty in relatively few scenarios. See Simmons v. Tuomey Reg. Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000). These duties include (1) an employer's duty to its employees to provide them with a reasonably safe work place and equipment, (2) a landlord's duty to his tenants to be sure repairs performed by a contractor are done properly, (3) a common carrier's duty to be sure a shipper properly loads and secures cargo, (4) a bail bondsman's duty to supervise the work of his employees, and (5) a municipality's duty to provide safe streets even when maintenance is undertaken by the state Highway Department. Id. at 43, 533 S.E.2d at 317-18. Only one of these duties is rooted in common law.⁶ Indeed, that duty—an employer's duty to

⁶ A landlord's duty to his tenants is imposed only by statute or contract, not by common law. See Durkin, 313 S.C. at 347-48, 437 S.E.2d at 552-53 (recognizing "[i]t is generally held that the owner of property . . . for whose benefit a work about such property is to be accomplished, is *not* held answerable for the negligence of an independent contractor to whom he has committed the work, to be done without his control in its progress" and noting that a landlord's nondelegable duties are assumed by contract or imposed by statute) (citations and internal quotation marks omitted) (emphasis added).

Similarly, a common carrier's duty to be sure a shipper properly loads and secures cargo on the carrier's truck is a duty imposed by statute and regulation. See Jenkins v. E. L. Long Motor Lines, Inc., 233 S.C. 87, 96-97, 103 S.E.2d 523, 528 (1958) (quoting and relying on the Rules and Regulations of the of the South Carolina Public Service Commission to determine that "[i]t was the duty of Appellant [carrier] to make

provide a safe workplace, even when its employees are working on third-party's property—is in fact *not* an *absolute* duty. Rather, this duty only requires an employer to prevent foreseeable dangers in providing a reasonably safe workplace. *Id.* at 42, 533 S.E.2d at 317 (“An employer has a nondelegable duty to employees to provide a reasonably safe work place.”). For example, in Rogers v. Norfolk S. Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003), the Supreme Court held that Norfolk Southern had a nondelegable duty to provide the plaintiff with a safe place to work. However, this duty did not equate to “an absolute responsibility” for safety. *Id.* at 94, 588 S.E.2d at 91. Rather, it was only a duty to “exercis[e] reasonable care to that end. *Id.*; see also Prisock v. Int. Agric. Corp., 147 S.C. 58, 144 S.E. 579, 585 (1928) (quoting with approval the trial judge’s jury instruction that “[t]he master is only required to furnish a reasonably safe place, having regard to the character of the work to be done and the dangers necessarily incident to it, and the conditions under which it must be done.”).

In contrast to the sole common law nondelegable duty to provide a reasonably safe workplace free from foreseeable dangers, no South Carolina court has ever ruled that a provider of transportation—much less a broker who merely schedules, but does not provide, transportation—owes an absolute and nondelegable duty to the ultimate recipients of the services. Indeed, the South Carolina Supreme Court expressly declined

reasonable inspection to see that the load was properly distributed and if necessary secured in order to prevent unsafe shifting of the load”). Likewise, a bail bondsman’s duty to supervise the work of the bounty hunters he employs is a duty grounded in statute. See Carson v. Vance, 326 S.C. 543, 550, 485 S.E.2d 126, 129-30 (Ct. App. 1997) (basing imposition of nondelegable duty on S.C. Code Ann. § 38-53-10 to 320 (Supp. 1996)). Lastly, a municipality’s duty to provide safe streets is based on statutory, not common law. See Dolan v. Camden, 233 S.C. 1, 103 S.E.2d 328 (1958) (basing holding on statutes expressly stating that the Highway Department is not liable for injuries caused by its repairs to city roads and that the city *is* liable for those injuries).

to impose on hospitals an absolute nondelegable duty to render competent service to its emergency room patients. Simmons, 341 S.C. at 50, 543 S.E.2d at 322 (“[W]e conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an *absolute* nondelegable duty on hospitals.”) (emphasis in original). Rather, the Simmons Court adopted an “ostensible agency” approach, making a hospital liable for the negligence of an independent contractor only if the patient accepted treatment from the physician in the belief the treatment was being rendered by the hospital. Id. If a hospital emergency room does not warrant the imposition of an absolute duty triggering the nondelegable duty doctrine, then the brokerage of non-emergency medical transportation cannot, as a matter of public policy, carry with it such an absolute nondelegable duty.

In addition, neither the Trial Court nor the Respondent can point to a contract between Respondent and AMR imposing on AMR an absolute duty to ensure safety during NEMT trips. See Part I.A., supra. Respondent cannot rely on duties supposedly imposed by AMR’s contract with SCDHHS. Courts considering the nondelegable duty doctrine have expressly held that language similar to the terms of AMR’s contract with SCDHSS *does not* impose a nondelegable duty. See Rock Hill Tel., 363 S.C. at 392, 611 S.E.2d at 238 (holding that a statute requiring utility “not to endanger the safety of persons” and a regulation mandating that “each utility shall exercise reasonable care to reduce the hazards to which . . . the general public may be subjected” merely “impose a duty of reasonable care, not an absolute, nondelegable duty”).

Furthermore, an injured person cannot enforce the terms of a contract between the state and the defendant. In Rock Hill, the state issued a permit to the utility that required the utility to assume any liability the state might have to persons injured as a result of the

utility's operations. See Rock Hill Tel., 363 S.C. at 392, 611 S.E.2d at 238. A person was subsequently injured by the utility's subcontractor. The Supreme Court rejected the argument that the permit's language imposed on the utility a nondelegable duty to perform its work in a safe manner, noting that "the terms in the permit are enforceable only as between the DOT and the utility." Id. at 392, 611 S.E.2d at 238-39.

The Trial Court's ruling that AMR's contract and public policy imposed an absolute nondelegable duty to provide "safe" transportation is thus without factual or legal support. Additionally, because an absolute nondelegable duty does not exist in this instance, AMR is not liable for the alleged negligent actions of the independent contractor Low Country, or Low Country's employee Kirkland, and the Trial Court's grant of summary judgment on the negligence and loss of consortium claims as to AMR should be reversed⁷.

⁷ Putting aside nondelegable duty, no vicarious liability would exist in this independent contractor setting. See, e.g. Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013). There, the Myers Timber Company would "enter[] into timber harvesting contracts with landowners under which it would arrange for a third party to cut timber from the landowner's property and haul it to mills that purchased the timber." Id. at 598-99, 745 S.E.2d at 406. Although Myers Timber Company had some degree of oversight—it would send an employee to the job site to be sure the logging crew stayed on the correct property and kept the site neat—the logging company, not Myers, determined what equipment to use, how to arrange the equipment, and other details of the job. Id. at 599, 745 S.E.2d at 406. One of the logging company's drivers who was transporting a load of logs struck another vehicle and killed two of its passengers. Id. at 599-600, 745 S.E.2d at 407. The estates of the deceased passengers subsequently sued Myers Timber Company on the theory that the logging company and its employee were, in fact, Myers Timber Company's employees. The trial court rejected this argument and the appellate court affirmed. The court noted there was no "evidence Myers had control over" the company actually doing the logging, which "could harvest the timber how it wanted, owned all of the equipment, and was paid based on the end result." Id. at 603, 745 S.E.2d at 409. In addition, "Myers could not directly fire [the logging company's] employees, and [the logging company] paid its own employees, including withholding taxes." Id. The fact that Myers had some ability or even obligation to oversee certain aspects of the logging company's work did not make the logging company or its drivers

III. The Trial Court's grant of summary judgment was erroneous because it was premature and because there were genuine material issues of disputed fact.

At the time that the Trial Court's Order granting summary judgment on the negligence and loss of consortium claim was entered, only minimal discovery had been completed. No parties or witnesses had been deposed, and only initial written discovery had been undertaken by AMR. During the pendency of the summary judgment motion, AMR asserted that summary judgment was premature. (R. 235; AMR's Supp. Memo. in Opp. at p. 3). AMR's counsel filed a Rule 56(f) Affidavit, asserting that summary judgment at this point would be premature because material discovery had not yet taken place, including the Respondents' deposition. (R. 263; Aff. of Cooper Wilson).

Despite the limited record available and the absence of an opportunity to conduct meaningful discovery, the Trial Court granted summary judgment on the negligence and loss of consortium claims over AMR's objections. Such a grant of partial summary judgment contradicts well-settled South Carolina precedent on when a court may properly grant of summary judgment. Accordingly, this Court should reverse.

It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial regarding disputed factual issues. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the

the employees of Myers. Id. Accordingly, the court affirmed the grant of summary judgment in Myers' favor.

application of the law. Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003).

Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. See, e.g., 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’Shaughnessy 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); Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

South Carolina’s courts routinely reject motions for summary judgment as improper when the non-movant has had no opportunity for full and fair participation in discovery. For example, in Baughman, the court reversed a grant of partial summary judgment as premature prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543. There, the trial court had granted defendant’s motion for partial summary judgment because plaintiff’s expert failed to establish the requisite standard of care. Id. at 111, 410 S.E.2d at 543. However, plaintiff argued that further discovery was

necessary prior to granting partial summary judgment to defendants on the issue of liability. Id. at 112, 410 S.E.2d at 543. The South Carolina Supreme Court agreed, holding that the further discovery was needed to properly develop the record on this issue prior to a grant of partial summary judgment. Hence, the Supreme Court reversed based on the fact that plaintiff had not been afforded the full and fair opportunity to conduct discovery on the issue. Id.

This matter is analogous to Baughman. Here, the Trial Court erroneously concluded that no factual issue existed as to the cause of the vehicle accident. Specifically, both the December 3 Order and the preceding August 20 Order state that “Defendant’s Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree....” (R. 21; Order entered 12/3/13 at p. 5; Order entered 8/20/13 at p. 5). Both Orders also incorrectly state that it is “undisputed” that Kirkland “lost control” of the vehicle.” (R. 23, 7; Order entered 12/3/13 at p. 7; Order entered 8/20/13 at p. 7).

The basis for these incorrect factual conclusions was an interrogatory response provided solely by Low Country. (R. 267; Low Country Interrogatory Response). However, Low Country’s interrogatory response is **not binding** on AMR and **does not conclusively establish** the cause of the accident. An admission by a party applies *only as to the admitting party*. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). As this is not a statement or admission attributable to AMR⁸, it cannot serve

⁸ Respondent never served AMR with any interrogatories or requests for admissions in this matter; and, therefore, there are no interrogatory responses or admissions attributable to AMR.

as the basis for an “undisputed fact” regarding the cause of the accident. In fact, under the record that existed on this issue *as to AMR*, the cause of the accident remained undetermined. In its Amended Answer, AMR denied all allegations regarding Kirkland allegedly losing control of the vehicle or relating to the cause of the accident. (R. 49-50; AMR’s Am. Ans. at ¶¶ 7, 8, 10, 12). Hence, AMR via its pleading did not concede anything regarding the cause of the accident, and AMR instead requires the Respondent to meet its burden of proof in that regard. Again, the driver Kirkland has not yet been deposed.

The Trial Court erred in concluding that the cause of the accident was undisputed, in refusing to allow AMR the opportunity to conduct discovery on this issue. Additionally, the Trial Court failed to view the facts and circumstances surrounding the cause of the accident in the light most favorable to AMR. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

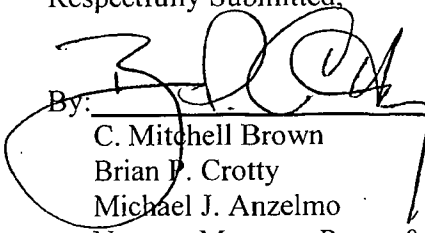
As shown by Argument I.A., *supra*, the Trial Court also erred in finding that the contract, by its clear terms, imposed an “absolute duty” on AMR to “ensure” the safety of the Respondent. Because the contract language relied upon by the Trial Court cannot and does not have the meaning he ascribed to it, it is at best ambiguous. This too creates a genuine issue of material fact preventing a summary adjudication. Thus, this Court should reverse.

Conclusion

Thus, this Court should reverse the order of the Trial Court and remand this matter for further proceedings consistent with this ruling.

Signature Page Attached

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