THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 19 2016
S.C. 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)

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 II OF II

C. Mitchell Brown, Esq.
Brian P. Crotty, Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Robert H. Hood, Jr., Esq.
Hoodlaw Firm, LLC
172 Meeting Street
Post office Box 1508
Charleston, SC 29402
(843) 577-4435
Attorneys for Respondent American Medical Response, Inc. (d/b/a Access2Care)

Joseph Dawson, III
Post Office Box 41367
North Charleston, SC 29423
(843) 207-9004
Attorney for Petitioner

INDEX

1. Record on Appeal. . . . . .0001 – 0326
2. Final Brief of Appellant/Proof of Service . . . . . 0327 – 0368
3. Final Brief of Respondent/Proof of Service . . . . . 0369 – 0409
4. Final Reply Brief of Appellant. . . . . .0410 – 0434
5. Published Opinion No. 5406. . . . . .0435 – 0453
6. Respondent's Petition for Rehearing. . . . . .0454 – 0463
7. Appellant's Return to Petition for Rehearing . . . . . 0464 – 0472
8. Order of the South Carolina Court of Appeals
   Filed June 1, 2016. . . . . .0473 – 0474

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.

PROOF OF SERVICE

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

Pleadings:

FINAL BRIEF OF APPELLANT

Counsel Served:

Attorney for Respondent Charles Gary

Joseph Dawson III, Esquire
Post Office Box 41367
North Charleston, SC 29423

Attorneys for Hattie M. Askew, Eugene Kirkland, Deboria Outlaw, Will Outlaw, and Low Country Medical Transport, Inc.

Cory Fleming, Esquire
Moss Kuhn & Fleming, PA
Post Office Drawer 507
Beaufort. SC 29901

Erin DuBose Dean, Esquire
Tupper Grimsley & Dean, PA
Post Office Box 2055
Beaufort, SC 29901

Roxanne E. Daniel
Administrative Assistant

June 20, 2014

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

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.

FINAL BRIEF OF RESPONDENT CHARLES GARY

Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Respondent Charles Gary

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

LAW / ARGUMENTS

I. THE TRIAL COURT CORRECTLY HELD THAT ACCESS2CARE HAD A DUTY TO PROVIDE SAFE TRANSPORTATION TO RESPONDENT, BECAUSE IT ENGAGED IN THE DELIVERY OF NON EMERGENCY MEDICAL TRANSPORTATION SERVICES 9

II. THE TRIAL COURT CORRECTLY HELD THAT ACCESS2CARE HAD A NON DELEGABLE DUTY TO PROVIDE SAFE NON EMERGENCY MEDICAL TRANSPORTATION SERVICES; AND THEREFORE, IT WAS LIABLE FOR THE TORTIOUS ACTS OF ITS SUBCONTRACTOR WHO PROVIDED NON EMERGENCY MEDICAL TRANSPORTATION TO THE RESPONDENT 20

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT, BECAUSE ACCESS2CARE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE REGARDING THE EVENTS THAT OCCURRED ON THE DATE OF THE ACCIDENT 28

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Am. Bankers Life Assur. Co. v. Frederick, 315 S.C. 97, 100, 431 S.E.2d 636, 639 (Ct.App. 1993) 15

Atlantic & Pacific R. Co. v. Laird, 164 U.S. 393, 17 S. Ct. 120, 122, 41 L. Ed. 485 20

Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001) 9, 19

Baughman v. At&T, 306 S.C. 101, 410 S.E.2d 537 (1991) 29

Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App. 2001) 30

Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) 28

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 9, 32

Duane v. Presley Constr. Co., 270 S.C. 682, 244 S.E.2d 509 (1978) 21

Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct.App. 1993) 22

Foxfire Vill. v. Black & Veatch, 304 S.C. 366, 404 S.E.2d 912 (Ct.App. 1991) 19

Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App. 1997) 12, 14

Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989) 17, 18

Meddin v. S. R.-Carolina Div., 218 S.C. 155, 62 S.E.2d 109 (1950) 19, 20

Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003) 10, 19

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) 13, 22, 25

Platt v. CSX Transp., Inc., 379 S.C. 249, 665 S.E.2d 631 (Ct.App. 2008) 8, 9, 31, 32

Richardson v. Donald Hawkins Constr., Inc., 370 S.C. 125, 634 S.E.2d 9 (Ct.App. 2006) 31

Richardson v. Donald Hawkins Constr., Inc., 381 S.C. 347, 673 S.E.2d 808 (2009) ... 31

Rock Hill Tel. Co. v. Globe Communs., Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) 17, 21

Smith v. Reg'l Med. Ctr., 394 S.C. 110, 713 S.E.2d 656 (Ct.App. 2011) 21

Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998) 23, 24, 26

Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). 10, 23, 26, 27

United Dominion Realty Trust v. Wal-Mart Stores, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct.App. 1992) 13

STATUTES

S.C. Code Ann. § 58-23-240 7

S.C. Code Ann. § 58-23-340 7

S.C. Regs. §103-155 7

OTHER AUTHORITIES

F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts (1997) 23

Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431 (1996) 21

Restatement (Second) of Torts: Employers of Contractors § 429 (1965) 26

Restatement (Second) of Agency (1958) 22

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly interpret the South Carolina Non-Emergency Medical Transportation Program contract between Appellant and the South Carolina Department of Health and Human Services to create a non-delegable duty for the Appellant to provide safe transportation to eligible Medicaid members in South Carolina?

2. Did the Trial Court properly grant summary judgment in tort, where the duty breached by Appellant arose out of its South Carolina Non-Emergency Medical Transportation Program contract with the South Carolina Department of Health and Human Services and Appellant's administration of non-emergency medical services to eligible Medicaid members in South Carolina?

3. Did the Trial Court correctly hold that Appellant was liable for the negligent actions of its subcontractor where the duty breached was a non-delegable duty to provide safe transportation to eligible Medicaid members in South Carolina?

4. Was the Trial Court's grant of summary judgment on the Respondent's negligence and loss of consortium claims premature?

5. Did the Trial Court correctly find that there was no genuine issue of material fact regarding the South Carolina Non-Emergency Medical Transportation Program contract and regarding the cause of the single ambulance accident?

STATEMENT OF THE CASE

The Respondent 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 where he was injured and his wife was killed. The Defendants are Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Low Country Medical Transport ("LCMT"), Low Country Medical Transport Inc., (LCMT and Low Country Medical Transport Inc. collectively referred to herein as "Low Country Medical Transport"), and Eugene A. Kirkland filed its Answer on November 30, 2012. American Medical Response Inc., (D/B/A Access2Care) (hereinafter "Access2Care" or "AMR"), filed its Answers to the Respondent's Complaint on November 21, 2012, and thereafter filed an Amended Answer on December 12, 2012. The Defendants and Appellant's Answers alleged that they were not liable for the damages Mr. Gary suffered resulting from the single ambulance collision.

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

On December 3, 2013, the Trial Court entered its Order on Reconsideration

modifying its August 20, 2013, Order affirming its decision on Negligence and Loss of Consortium but reconsidering its ruling on the Respondent's Negligent Infliction of Emotional Distress claim. The Appellant timely filed and served its Notice of Appeal on December 13, 2013.

STATEMENT OF THE FACTS

At the time of the accident, Charles Gary was 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,[1] who died in the single ambulance accident. 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 completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 4).

Access2Care is a corporation organized and existing under the laws of a state other than South Carolina. Access2Care provides non-emergency medical transportation services to governments, among other services. 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 for

[1] The Estate of Blondell Gary, filed a separate lawsuit in the Hampton County Court of Common Pleas. The Hampton County circuit court has placed Access2Care in default for failing to file an Answer to the Estate's Complaint within 30 days. (R. pp. 161-165, 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).

$162,077,477.00.[2] (R. p. 141, Notice Regarding Award). 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." (R. pp. 93-138, NEMT Contract).

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." (R. p. 94, NEMT Contract, §1.1). 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 the Respondent. (R. pp. 93-138, NEMT Contract).

The NEMT Program was a turnkey operation where Access2Care would provide

[2] Access2Care had a five-year contract with the Health Department. (R. p. 141, 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. (R. pp. 142-145, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to 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. (R. pp. 146-147, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to Melanie Giese, RN, Deputy Director, Medical and Managed Care Services, South Carolina Department of Health and Human Services, dated December 16, 2011).

transportation management and administration services to Medicaid members. 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." (R. p. 96, NEMT Contract, § 2.4.5, General Broker Requirements). Access2Care's duties and responsibilities under its contract included the following:

> 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.

(R. p. 97, § 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. SCDHHS expects the Broker to provide trip coverage twenty-four (24) hours a day, seven (7) days a week.
>
> Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine the real-time location of members, verification of member delivery to the medical service, vehicle location and disposition and to aid trip recovery processes. The functionality of tracking tools and methods must be explained operationally and approved by SCDHHS.

(R. p. 101, § 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.

(R. p. 102, § 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.

(R. pp. 104-105, § 3.3.15 Monitoring Plan)

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

(R. p. 136, § 3.12.1.1 Quality Assurance, Corrective Action Plans).

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." (§ 3.11.1, Complaints). If Mr. Gary had a complaint regarding Low Country Medical Transport's service, he would make it to Access2Care not Low Country Medical Transport. 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 subcontractors 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 separate subcontractor agreement with

Low Country Medical Transport Inc.,[3] and/or LCMT titled "Access2Care Transportation Solutions Subcontractor Agreement" so that Access2Care could dispatch Low Country Medical Transport as part of its NEMT network. (R. pp. 148-150, portion of LCMT Defendants' Response to Plaintiff's Request for Production titled "Access2Care Transportation Solutions Subcontractor Agreement"). Low Country Medical Transport has been in the business of transporting individuals to and from medical facilities since 2004. (R. p. 158, South Carolina Secretary of State Application for Reinstatement of a Dissolved Corporation).

On January 31, 2012, Access2Care dispatched Low Country Medical Transport (a dissolved corporation) to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical Transport'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

[3] 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. (R. p. 157, 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. (R. p. 159, 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 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. (R. pp. 151-153, Askew Aff. ¶ 7).

and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 7). The collision caused injuries to Mr. Gary and killed his wife. (R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.5). 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. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 7). 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 conditions. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 9).

Mr. 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 this case, Mr. Gary contends that there are no genuine issues of material fact in dispute and that this Court should affirm the Trial Court's December 3, 2013, Summary Judgment Order for the following reasons.

LAW / ARGUMENT

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 Transp., Inc., 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 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 TRIAL COURT CORRECTLY HELD THAT ACCESS2CARE HAD A DUTY TO PROVIDE SAFE TRANSPORTATION TO RESPONDENT, BECAUSE IT ENGAGED IN THE DELIVERY OF NON EMERGENCY MEDICAL TRANSPORTATION SERVICES.

A. Access2Care had a duty to provide safe transportation

Access2Care mistakenly believes that the Trial Court misinterpreted its obligations under its Contract with the Health Department to implement the NEMT Program for Medicaid members. The Trial Court correctly found that Access2Care had a duty of care to Mr. Gary, because it had a Contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee, which required it to be ". . . responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time." (R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.8). "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 Am., N.A., 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. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II).

Access2Care suggests that the Trial Court's ruling amounts to strict liability. According to Access2Care, what the Trial Court really meant to say is, "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." (Appellant's Br. p.14). This summary is inconsistent with the Trial Court's Order and findings on the Respondent's Negligence cause of action. First, the Trial Court did give due and complete regard to the cause of the accident. The Trial Court found 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 on Old Sheldon Church Road in Yemassee, South Carolina..

(R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.5).

Access2Care offered no evidence to refute its subcontractor Defendants' admission for the cause of the accident. Moreover the Trial Court noted that Access2Care could not defeat a summary judgment motion by simply raising a hypothetical question regarding the potential cause of the accident and then offer the absence of an answer as the defense to the question. (R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.6, Footnote 3). It is Access2Care who has no regard for the cause of the accident not the Trial

Court.

Second, the Trial Court found that Access2Care breached its duty of care to the Respondent based on its NEMT Program responsibilities, not just because an accident occurred. It appears that Access2Care is suggesting that the Trial Court found it liable for Mr. Gary's damages, because an accident occurred. Rather, the Trial Court found Access2Care liable, because its subcontractor caused the accident. If Access2Care's subcontractor had not caused the accident and Access2Care had no responsibilities under the NEMT Program, then the Trial Court would not have concluded that the elements of Negligence were met. Therefore, Access2Care's hypothetical examples in its Brief, which do not include a finding of Negligence on the part of its subcontractor transportation provider, is not analogous to the facts and law of this case. (See Appellant Br. p.20) The Trial Court found that:

> 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.

(R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013).

> 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.

(R. pp. 104-105, §3.3.15 Monitoring Plan).[4]

It is clear that Access2Care was responsible for scheduling NEMT service for Mr. Gary for a medical appointment he had on January 31, 2012. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 6). Pursuant to its Contract, Access2Care dispatched Low Country Medical Transport to Mr. Gary's home in Yemassee, South Carolina. According to Access2Care's Contract, it had a duty and responsibility to provide courteous, safe, timely, and efficient NEMT services to Medicaid members. Access2Care clearly owed Mr. Gary a duty of care when it decided to administer Region 3 of the NEMT Program and to provide NEMT services to Mr. Gary for a fee. (R. p. 8, Modified Order Granting Mot. Summ. J. Dec. 3, 2013). If Access2Care took exception to the NEMT Program's contract requirements, it should have sought a modification to the agreement to remove all requirements for safe, reliable, and efficient NEMT service. It did not.

B. The NEMT Contract is clear and unambiguous

The terms and provisions of the NEMT Contract are clear and unambiguous; and

[4] Access2Care takes exception to the Trial Court's finding that the language in § 3.3.15, Monitoring Plan supports the conclusion that Access2Care "is responsible for all services provided by transportation providers." Access2care suggests that "[t]he purpose of this section is for AMR to observe its subcontractors and monitor whether they are providing a quality, safe product. . . . 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 . . . ." (Appellant Br. p.17). Furthermore, Access2Care claims that the Respondent presented no evidence that Access2Care violated any of its NEMT Contract requirements. (Appellant Br. p.14). However, Access2Care failed to do what it purports to be its responsibility. In particular, its failure to confirm Low Country Medical Transport's corporate status with the South Carolina Secretary of State's Office and Low Country Medical Transport's licensure with the South Carolina Office of Regulatory Staff. See Footnote 2. Access2Care claims that the Respondent presented no evidence that Access2Care violated any of its NEMT Contract requirements. (Appellant Br. p.14).

therefore, properly decided on summary judgment. "The construction of a clear and unambiguous contract is a question of law for the court." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App. 1997). "The terms in an unambiguous contract are to be given their plain, ordinary, and popular meaning. [Citation Omitted]. If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. [Citation Omitted]. Also, the purport of a written agreement is to be gleaned from the contents of the whole instrument. [Citation Omitted]. In an action at law, our review extends only to the correction of errors of law; and where an action of law presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law." United Dominion Realty Trust v. Wal-Mart Stores, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct.App. 1992). The Trial Court in reviewing the NEMT Contract found that:

> 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.

(R. p. 12, Modified Order Granting Mot. Summ. J. Dec. 3, 2013)

Access2Care mistakenly believes that the Trial Court's Order attempted "to impose upon AMR a **'duty' of absolute safety**" and "that AMR had an 'absolute duty' to provide transportation services that are **completely 'safe.'**" (Appellant's Br. p.20 and p.15). These misleading statements cannot be found in the Trial Court's Order. Therefore this hyperbole cannot form the basis for a legitimate review of the NEMT Contract language vis-à-vis the rules of contract construction. "A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App. 1997). Access2Care cannot create a contract ambiguity by fabricating additional words and phrases that do not exist in the document or the Trial Court's Order. There is simply no ambiguity in the terms or intent of the NEMT Contract and they are clear and unambiguous on their face. Access2Care's duties and responsibilities under the NEMT Contract included but were not limited to the following examples:

> 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.

(R. p. 97, § 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. SCDHHS expects the Broker to provide trip coverage twenty-four (24) hours a day, seven (7) days a week.
>
> Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine the real-time location of members, verification of member delivery to the medical service, vehicle location and disposition

> and to aid trip recovery processes. The functionality of tracking tools and methods must be explained operationally and approved by SCDHHS.

(R. p. 101, § 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.

(R. p. 102, § 3.3.8 Accidents, Injuries, and Incidents).

Access2Care argues that the above-referenced examples demonstrate that the Health Department did not really intend for Access2Care to be ". . . responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time." (R. p. 101, §3.3.5, Fulfillment of All Trip Requests). Instead, Access2Care suggests that the above-referenced language merely "imposed 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." (Appellant Br. p.20). This reasoning defies logic, in light of the fact that the phrase "the Broker is responsible" appears numerous times throughout the NEMT Contract. "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and in determining that intention, we must look to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract's force and effect." Am. Bankers Life Assur. Co. v. Frederick, 315 S.C. 97, 100, 431 S.E.2d 636, 639 (Ct.App. 1993). The language of the NEMT Contract does not bear witness to Access2Care's portrayal of a mere facilitator of services role. The NEMT Contract states:

> 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.

(R. pp. 94-95, § 1.2, Intent).

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.

(R. p. 95, § 1.3, Objective).

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.

(R. pp. 130-131, § 3.8.3.6, Passenger Safety Requirements).

The Intent, Objectives, and Passenger Safety Requirements the NEMT Contract imposes on Access2Care clearly go beyond the passive and indirect role Access2Care espouses it has in the delivery of NEMT services. Access2Care's construction of the contract is absurd in light of the Intent, Objectives, Passenger Safety Requirements, and the $162 million in compensation Access2Care was to receive "in an effort to facilitate

safe transportation."

C. Access2Care's claim that the Trial Court's Order found that its duty to Mr. Gary was entirely contractual in nature is incorrect.

Access2Care mischaracterizes the Trial Court's December 3, 2013, Order by stating that the Trial Court found its duty was "entirely contractual in nature." Therefore, it had no duty in tort to the Plaintiff and summary judgment was improper. To the contrary, the Trial Court found that:

> 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.

(R. p. 7, Modified Order Granting Mot. Summ. J. Dec. 3, 2013).

> 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.'

(R. p. 8, Modified Order Granting Mot. Summ. J. Dec. 3, 2013).

The duty of care found by the Trial Court was based on the Contract and Access2Care's operation of NEMT services. Nevertheless, Access2Care believes that South Carolina law prohibits tort claims, where the duty sounds in contract. To the contrary, "[a]n absolute, nondelegable duty can be imposed by statute, common law, or contract." Rock Hill Tel. Co. v. Globe Communs., Inc., 363 S.C. 385, 611 S.E.2d 235 (2005). Moreover, Access2Care erroneously attempts to apply inapplicable authority to support its position that a duty imposed by contract or common law cannot form the basis for tort

liability.

Access2Care argues that "[u]nder 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)." (Appellant's Br. p.22) 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 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 written agreement between Mr. Gary and Access2Care.

"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 Am., N.A., 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.

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 Vill. v. Black & Veatch, 304 S.C. 366, 404 S.E.2d 912 (Ct.App. 1991) (emphasis added)." The Trial Court's December 3, 2013, Order did not find that a duty arose from a written agreement between Mr. Gary and the Defendants. Rather, the Trial 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." (R. p. 7, Modified Order Granting Mot. Summ. J. Dec. 3, 2013). 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", does not apply in this case, because Access2Care had a duty of care to Mr. Gary to "[deliver courteous], safe, timely and efficient transportation services". (R. p. 8, Modified Order Granting Mot. Summ. J. Dec. 3, 2013).

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. S. R.-Carolina Div., 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, 218 S.C. 155, 62 S.E.2d 109.

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 had with the Health Department to perform non-emergency medical transport services to eligible Medicaid members in South Carolina. Just because Access2Care may have complied with some of the requirements of the NEMT Program, does not absolve it of its responsibility for the tortious acts of its subcontractors. Therefore, this Court should affirm the Trial Court's December 3, 2013, Order finding that Access2Care was liable for injuries Mr. Gary sustained when Access2Care's subcontractor Low Country Medical Transport caused the single-ambulance accident, resulting in the death of his wife.

II. THE TRIAL COURT CORRECTLY HELD THAT ACCESS2CARE HAD A NON DELEGABLE DUTY TO PROVIDE SAFE NON EMERGENCY MEDICAL TRANSPORTATION SERVICES; AND THEREFORE, IT WAS LIABLE FOR THE TORTIOUS ACTS OF ITS SUBCONTRACTOR WHO PROVIDED NON EMERGENCY MEDICAL TRANSPORTATION TO THE RESPONDENT.

The Non Delegable Duty Doctrine

Access2Care states in its Brief that "[a]n absolute, nondelegable duty can be imposed by statute, common law, or contract." It cites Rock Hill Tel. Co., 363 S.C. 385, 611 S.E.2d 235 as its authority, which the Respondent agrees that a nondelegable duty can arise out a contract. However, Access2Care thereafter argues that there is no statute, common law, or public policy that warrants the imposition of an absolute duty, but it ignores its own contract and the fact that the Respondent called it for transportation. Access2Care signed a contract with the Health Department that required it to ensure "the delivery of courteous, safe, and timely transportation services." (R. pp. 104-105, NEMT Contract § 3.3.15, Monitoring Plan). "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Duane v. Presley Constr. Co., 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." Rock Hill Tel. Co., 363 S.C. 385, 611 S.E.2d 235. The exemption to the general rule applies here, because the NEMT Contract clearly mandates specific duties and responsibilities for Access2Care, notwithstanding its relationship with Low Country Medical Transport.

"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. Reg'l Med. Ctr., 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, 346 S.C. 4, 550 S.E.2d 319. 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.'" [5] Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 341 S.C. 32, 533 S.E.2d 312 (2000).

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, 341 S.C. 32, 533 S.E.2d 312; citing, Simmons, 330

---

5 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. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 341 S.C. 32, 533 S.E.2d 312 (2000).

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 gravamen of Access2Care's position in this case is predicated on its use of the term "broker." Access2Care suggests that "[its] 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')." (Appellant's Br. p.14). Access2Care's attempt to marginalize its role as "a broker who merely schedules, but does not provide, transportation" cannot be reconciled with its overall NEMT duties. 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. (R. pp. 125-131, 115-124, § 3.8.2, Driver Requirements, § 3.7, Transportation Provider Network). Mr. Gary called Access2Care when he needed NEMT services and if he had a problem with the service it was Access2Care's responsibility to fix it, no one else.

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. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 351 S.C. 32, 533 S.E.2d 312 (2000).

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 duty[6] 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, 346 S.C. 4, 550 S.E.2d 319.

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

[6] "[South Carolina Courts] 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.

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.

Non-delegable Duty vs. Apparent Agency

Access2Care contends that Simmons II "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." (Appellant's Br. p.27). The Trial Court disagreed and found that Access2Care's liability stems from a non-delegable duty and that Simmons II did not require a finding of Apparent Agency to find liability. "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, 341 S.C. 32, 533 S.E.2d 312.

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. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998). 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)[7] for the non-delegable duty doctrine in South Carolina. See, Simmons, 341 S.C. 32, 533 S.E.2d 312. 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:

> 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.[8]

---

[7] "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, supra.

[8] 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." Id.

Therefore, Access2Care's argument that, "[i]f 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", is a misapplication of South Carolina law and the Non Delegable Duty Doctrine.[9] (Appellant's Br. p.27).

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT, BECAUSE ACCESS2CARE FAILED TO OFFER A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE REGARDING THE EVENTS THAT OCCURRED ON THE DATE OF THE ACCIDENT.

Access2Care claims that Summary Judgment was premature in this case; and therefore, improvidently granted because it lacked opportunity to conduct meaningful discovery on the question of liability. In particular, Access2Care claims that neither Mr. Gary nor its subcontractor's employee (the Defendant driver who caused the accident) were deposed. Access2Care offers no evidence of its attempts to seek discovery (whether written or through notice of deposition) on the issue of Low Country Medical Transport's ambulance running off the road and hitting a tree, which severely injured Mr. Gary and killed his wife.[10] However, Access2Care does admit that it engaged in written

[9] Access2Care contends in Footnote 9 of its Brief that it should not be held vicariously liable for its subcontractor's negligent conduct. Access2Care cites Cherry v. Myers Timber Co., to support this position. Cherry v. Myers Timber Co., 404 S.C. 596, 603, 745 S.E.2d 405, 409 (Ct. App. 2013). While the Court of Appeals in Cherry affirmed the trial court's grant of summary judgment in favor of the defendants, that decision was based on a finding that, "[a]ppellants did not present evidence Myers had control over Levister. Levister could harvest the timber how it wanted, owned all of the equipment, and was paid based on the end result. Myers could not directly fire Levister's employees, and Levister paid its own employees, including withholding taxes." Cherry v. Myers Timber Co., 404 S.C. 596, 603, 745 S.E.2d 405, 409 (Ct.App. 2013). Unlike Cherry, Access2Care had extensive control over Low Country Medical Transport, to include the kind of equipment it used, the employees it hired, and the delivery of service. (R. pp. 124-134, § 3.8, Driver and Vehicle Requirements).

[10] Access2Care served on Respondent its Interrogatories, Request for Production of

discovery with the Respondent prior to the Respondent filing his Motion for Summary Judgment. This discovery did not attempt to address the cause of the accident.

Access2Care cites Baughman v. At&T to contend that Baughman is analogous to the case at bar and is therefore dispositive here. In Baughman, the plaintiff demonstrated a likelihood that further discovery would uncover additional evidence relevant to causation and that the plaintiff was not merely engaged in a fishing expedition. Baughman v. At&T, 306 S.C. 101, 113, 410 S.E.2d 537, 544 (1991). The plaintiff produced a letter from an expert it retained to support its burden of showing a "demonstrated likelihood" that further discovery would uncover additional evidence. The Baughman Court also concluded that ". . . Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims." Id.

In sharp contrast, the Respondent filed this single ambulance accident case on October 16, 2012. All of the Defendants vigorously contest any liability for Mr. Gary's damages. On February 23, 2013, the Respondent filed a Motion for Summary Judgment. The Respondent's motion, which was heard on May 14, 2013, was supported by an affidavit of Mr. Gary and responses to the Respondent's Interrogatories from Access2Care's subcontractor Low Country Medical Transport and its employee

---

Documents, and a Notice of Deposition of Mr. Gary, to depose him in Charleston, South Carolina, along with its Answer. The Respondent notified Access2Care that Mr. Gary was a paraplegic and he could only travel via use of a non-emergency medical vehicle or other special means. Respondent offered and continues to offer to make Mr. Gary available for deposition at his home.

driver Kirkland. Low Country Medical Transport and Kirkland's responses to the Plaintiff's Interrogatories stated:

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

(R. pp. 267-269, Defendant Low Country Medical Transport's Response to Plaintiff's Interrogatories Number 9).

At no time during these proceedings did Access2Care attempt to offer to the Trial Court any evidence, affidavit, letter, or expert it intended to produce to refute Low Country Medical Transport and Kirkland's response to the Respondent's Interrogatory. Furthermore, Access2Care was imprudent and neglectful when it failed to even interview Kirkland after the accident to counter this admission.

Unlike Baughman, Access2Care was dilatory in seeking any discovery pre-suit or otherwise on the issue of what caused the ambulance to run off the road and hit a tree. Moreover, even in its Appellant's Brief to this Court it fails to offer a Baughman like demonstration of the likelihood that further discovery will overcome its subcontractor's statement. Because of the collision, Mr. Gary's wife was killed and he was severely injured. In the face of its subcontractor Low Country Medical Transport's admission, Access2Care did not offer any evidence to refute this statement. Therefore, Access2Care's claim that Summary Judgment was premature or improper, because there were genuine issues of material fact in dispute, is specious at best. Access2Care's case is simply not analogous to Baughman.

Furthermore, it is clear that Access2Care's subcontractor driver 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. Access2Care claims that, ". . . 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.**" (Appellant's Br. p.31). Appellant cites Carrigg v. Cannon, as authority for this statement. See Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App. 2001). However, Carrigg does not stand for this proposition. Rather it was the Court of Appeals in Richardson v. Donald Hawkins Constr., Inc., that concluded "[g]enerally, an **admission** by a party, procedurally or otherwise, applies only to the **admitting party**", and used Carrigg by way of example.[11] Richardson v. Donald Hawkins Constr., Inc., 370 S.C. 125, 634 S.E.2d 9 (Ct.App. 2006), rev'd, 381 S.C. 347, 673 S.E.2d 808 (2009). However, the South Carolina Supreme Court's reversal of Richardson, nullifies Access2Care's attempt to insulate itself from Low Country Medical

[11] In Richardson, the Court of Appeals used Carrigg to suggest "[d]ue process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim . . . ." Richardson supra. In Carrigg, A Charleston County Sheriff's Deputy's vehicle struck a third party while responding to a call without lights and sirens and killed the driver. The deputy was charged and pled guilty to reckless driving. The decedent's representatives sued the Charleston County Sheriff in his official capacity. The Sheriff asserted defenses to liability, however, the trial court found that the Sheriff was collaterally and judicially estopped from contesting liability. On appeal the South Carolina Court of Appeals reversed the trial court, because the Sheriff was not in privity with the deputy in the criminal proceeding.

However, Richardson involves a construction defect case where several parties were sued to include the construction company and two employees. One of the named employees (Taylor) failed to file a timely Answer to the Complaint; and therefore, was held in default. The Court of Appeals reversed the trial court's ruling excluded evidence from Taylor denying the admitted allegation from the Complaint. The Supreme Court reversed the Court of Appeals because "[t]he trial court found that because Taylor was considered to have admitted the allegations of the complaint, his statements denying the same allegations would be unduly prejudicial." Richardson v. Donald Hawkins Constr., Inc., 381 S.C. 347, 673 S.E.2d 808 (2009).

Transport and Kirkland's admission; and therefore, its reliance on Carrigg and Richardson is misleading.

"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 Transp., Inc., 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, 354 S.C. at 70, 580 S.E.2d at 439.

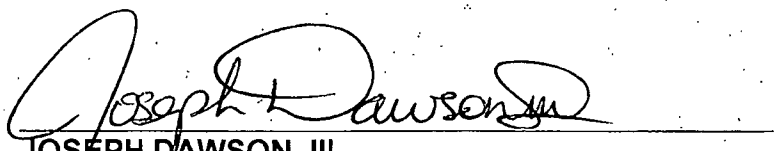
Access2Care's staunch reliance on its general denials in its Amended Answer to the Respondent's Complaint cannot shield it from its failure to offer any evidence to refute the Respondent's evidence in support of its Summary Judgment motion. Access2Care made no factual showing in opposition to this motion. It simply claims summary judgment is premature and further investigations into the facts are needed. 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 Appellant's demands for additional time for discovery will not alter the plain facts of this case.

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 Transport'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.

Respectfully submitted,



JOSEPH DAWSON, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

ATTORNEY FOR RESPONDENT CHARLES GARY

North Charleston, South Carolina
June 9, 2014

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

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 certified that this Final Brief complies with Rule 211(b), SCACR.

June 9, 2014

Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Respondent Charles Gary

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

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.

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent Charles Gary** and **Certificate of Counsel** on all parties to the appeal by depositing a copy of the same in the United States Mail, postage prepaid, on June 11, 2014, addressed to its counsel of record as follows:

C. Mitchell Brown, Esq.
Brian P. Crotty, Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211-1070

Robert H. Hood, Jr., Esq.
H. Cooper Wilson, III, Esq.
Hoodlaw Firm, LLC
172 Meeting Street
Post office Box 1508
Charleston, SC 29402

Erin Dean, Esq.
Tupper, Grimsley & Dean, PA
611 Bay Street
Post Office Box 2055
Beaufort, SC 29901-2055

Cory H. Fleming, Esq.
Moss Kuhn & Fleming, PA
1501 North Street
Post Office Draw 507
Beaufort, SC 29901

Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Respondent Charles Gary

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.

FINAL REPLY BRIEF OF APPELLANT

C. Mitchell Brown
Brian P. Crotty
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Robert H. Hood
Robert H. Hood, Jr.
H. Cooper Wilson, III
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29402
(843) 577-4435

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

Table of Contents

Table of Authorities iii

Argument 1

I. The Trial Court erred in interpreting AMR's contract with SCDHHS as creating a duty to provide completely "safe" transportation, and in holding that the contractual duty owed by AMR supported tort claims. 2

A. The Trial Court incorrectly interpreted AMR's contract as imposing a duty to provide completely safe transportation. 2

B. The duty allegedly breached by AMR was specifically held by the Trial Court to be a contractual duty and it was error to use a contractual duty to support tort claims. 6

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. 8

III. The grant of partial summary judgment was premature and was erroneously based on an interrogatory response that was neither an admission of negligence nor applicable to AMR. 13

Conclusion 17

TABLE OF AUTHORITIES

Page(s)

Cases

Baughman v. AT&T,
306 S.C. 101, 410 S.E.2d 537 (1991) 14

Boone v. Sunbelt Newspapers, Inc.,
347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001) 14

Bruce v. Blalock,
241 S.C. 155, 127 S.E.2d 439 (1962) 4

Carrigg v. Cannon,
347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) 15

Carson v. Vance,
326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997) 9

City of Columbia v. Town of Irmo,
316 S.C. 193, 447 S.E.2d 855 (1994) 17

Crabtree v. Measday,
508 P.2d 1317 (N.M. App. 1973) 17

Dawkins v. Fields,
354 S.C. 58, 580 S.E.2d 433 (2003) 15

Deyo v. Kilbourne,
84 Cal. App. 3d 771 (Cal. App. 1978) 16

Duane v. Presley Constr. Co., Inc.,
270 S.C. 682, 244 S.E.2d 509 (1978) 8

Durkin v. Hansen,
313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993) 9, 12

Ellie, Inc. v. Miccichi,
358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 4

Farr v. Duke Power Co.,
265 S.C. 356, 218 S.E.2d 431 (1975) 4

Foxfire Village, Inc. v. Black & Veatch, Inc.,
304 S.C. 266, 404 S.E.2d 912 (Ct. App. 1991) 7

Gauld v. O'Shaugnessy Realty Co.,
380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008) 14

Jones ex. rel. Jones v. Enter. Leasing Co.-S.E.,
383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009) 14

Koon v. Fares,
379 S.C. 150, 666 S.E.2d 230 (2008) 4

Meddin v. Southern Railway-Carolina Division,
218 S.C. 155, 62 S.E.2d 109 (1950) 7

Nuckols v. Great Atl. & Pac. Tea Co.,
192 S.C. 156, 5 S.E.2d 862 (1939) 9

Richardson v. Donald Hawkins Constr., Inc.,
370 S.C. 125, 634 S.E.2d 9 (Ct. App. 2006) rev'd 381 S.C. 347, 673
S.E.2d 808 (2009) 15, 16

Rock Hill Tel. Co., Inc. v. Globe Comm., Inc.,
363 S.C. 385, 611 S.E.2d 235 (2005) 8, 9, 10, 11, 12

Rogers v. Norfolk S. Corp.,
356 S.C. 85, 588 S.E.2d 87 (2003) 11

Simmons v. Tuomey Reg'l Med. Ctr.,
341 S.C. 32, 543 S.E.2d 312 (2000) 11

Smith-Cooper v. Cooper,
344 S.C. 289, 543 S.E.2d 271 (Ct. App. 2001) 4

Van Dyke v. Bixby,
448 N.E.2d 353 (Mass. 1983) 16

Whisenhunt v. Atl. Coast Line. R.R. Co.,
195 S.C. 213, 10 S.E.2d 305 (1940) 9

Wright v. Wright,
50 S.E.2d 540 (N.C. 1948) 9

Rules

42 C. F. R. § 440.170(a)(4)(ii)(B) 12

S.C. R. Civ. Proc. 33(d) 16

S.C. R. Civ. Proc. 56 15

S.C. R. Civ. Proc. 56(e) 15

S.C. R. Civ. Proc. 56(f) 14

S.C. R. Evid. 801(d)(2) 16

Argument

The Trial Court was incorrect in holding that AMR's NEMT broker contract with SCDHHS imposed on AMR a contractual duty to provide "safe" NEMT transportation, and that such established an ***absolute nondelegable*** duty. In granting Respondent partial summary judgment, the Trial Court first held that AMR owed Respondent a duty of care based upon "its contract with the Health Department" which required that "all trips are completed safely and on-time." (R. 23-24; Order entered 12/3/13 at pp. 7-8). The effect of the Trial Court's holding was to impose on AMR a duty to guarantee absolute safety on the hundreds of thousands of NEMT trips it administered.

The Trial Court then concluded that AMR breached its duty of care to Respondent "when Low Country Medical's ambulance ran off the road." (R. 25; Id. at p.9). This equates to the conclusion that because the accident occurred, AMR breached the duty imposed by its contract. Significantly, aside from the fact that an accident occurred, the Trial Court made no other finding that AMR had breached any of the requirements of its contract with SCDHHS. Rather, the Trial Court concluded that Kirkland, the driver of the ambulance, was negligent, and that AMR was liable for that negligence. (R. 26; Id. at p. 10).

Kirkland, however was employed by Low Country, who, in turn, was merely an independent contractor of AMR. In order to impose liability on AMR for the negligent actions of an independent contractor, the Trial Court concluded that AMR's duty under its contract with SCDHHS to provide "safe" transportation was an absolute nondelegable duty. (R. 28; Id. at p. 12). Thus, the Trial Court's imposition of liability on AMR rested not only on its interpretation of the contract as imposing a duty on AMR to provide completely "safe" transportation, but also on the elevation of that contractual duty to the status of an absolute

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

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

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

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

The Trial Court interpreted the language in the contract regarding "ensuring that all trips are completed safely and on-time" as imposing an absolute duty on AMR "to provide safe and reliable NEMT services." (R. 101; RFP § 3.3.5.1; R. 25; Order entered 12/3/13 at p. 9). Respondent contends that this does not amount to strict liability for any accidents that occur on NEMT trips. (Resp. Brief p. 10). First, Respondent states that the Trial Court considered the cause of the accident – the alleged "over-correction" of the driver. (Id.). Second, Respondent states that the Trial Court's finding was based on "[AMR's] NEMT

Program Responsibilities" and "not just because an accident occurred." (R. 26-27; Id. at 10-11). Respondent then concludes that the Trial Court's imposition of liability on AMR was not based on the fact that an accident occurred, but was instead based on the fact that the accident was caused by AMR's subcontractor. (R. 27; Id. at 11).

Respondent fails to address the issue of the "duty" imposed on AMR by the Trial Court, and instead focuses entirely on the alleged breach of that duty. The initial issue is whether the Trial Court correctly determined and defined the duty imposed on AMR by its contract with SCDHHS. It did not. The duty imposed on AMR by the Trial Court was that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (R. 25; Order entered 12/3/13 at p. 9). This is essentially a duty to provide "safety." The fact that the "unsafe" occurrence here was allegedly the negligence of the driver does not change the overly-broad nature of the duty imposed by the Trial Court. Nor does it change the fact that the duty imposed by the Trial Court would lead to the absurd and unjust results outlined in Appellant's initial brief. See Appellant's Initial Brief at pp. 20-21.

The issue of whether the Trial Court correctly interpreted the contract in determining the duty applicable to AMR is especially significant in this analysis because, as Respondent contends, the Trial Court found AMR liable because its subcontractor caused the accident. (Resp. Brief p. 11). **The imposition of liability on AMR based on the actions of an employee of an independent contractor was possible only because the Trial Court held that AMR's contract created an absolute nondelegable duty to provide "safe" transportation**. (R. 28; Order entered 12/3/13 at p. 12). The Trial Court erred in

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

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

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

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

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

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

Respondent contends that the duty of care owed by AMR was based not only on AMR's contract, but also based on AMR engaging in the business of NEMT services in South Carolina. (Resp. Brief pp. 17-19). It is true that the Trial Court held that "[AMR] had a duty of care to [Respondent] arising out of its Contract and operating as broker of NEMT Services" (R. 24; Order entered 12/3/13 at p. 8). However, the duty on which the Trial Court imposed liability as to AMR was the alleged contractual duty.

The Trial Court held that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the health department." (R. 25; Id. at p. 9). The Trial Court later reiterated its holding that "[AMR] had an absolute duty under its contract with the Health Department to provide "safe" Transportation to [Respondent]." (R. 28; Id. at p. 12). This contractual duty was the basis for imposition of liability on AMR.

The only reference to the duty of care imposed by virtue of AMR acting as a broker of NEMT services was the Trial Court's statement that, in addition to its contractual duty, "[AMR] had a duty to ensure that its NEMT service providers complied with all applicable State and Federal laws and regulations." (R. 25; Id. at p. 9). However, the Trial Court did not find that this duty of compliance with laws and regulations was breached and caused Respondent's injuries. Rather, the duty breached was the contractual duty the Trial Court

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

In response to AMR's argument that where a duty is created solely by contract, no cause of action or negligence will lie, Respondent contends that this is not a breach of contract case, and, rather that it "is predicated on a breach of a duty of care owed by the Defendants which arises out of a contract...." (Resp. Brief p. 20). This is a distinction without a difference. The alleged duty that serves as the bases for the imposition of liability against AMR is the purely alleged contractual duty to provide "safe" transportation. "Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991) (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)). Respondent seeks to distinguish this authority by noting that a contract can create a certain relationship between the parties that causes certain duties to arise by operation of law, irrespective of the contract. (Resp. Brief p. 19-20). However, the Trial Court did not hold that the alleged duty owed to Respondent by AMR arose out of the relationship created by the contract or that the duty to provide "safe" transportation existed irrespective of the contract. Rather, the Trial Court repeatedly referred to the relevant alleged duty as a "contractual duty" or a duty "arising out of its contract." (R. 24, 25, 28; Order entered 12/3/13 at pp. 8, 9, 12). As the claims at issue sound entirely in tort, the Trial Court erred by improperly elevating a contractual duty to a duty that can sustain tort claims.

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

The Trial Court's imposition of liability on AMR rests entirely on its ruling that the duty of "safety" imposed by AMR's contract with SCDHHS was an absolute nondelegable duty. As Respondent admits: "the Trial Court found [AMR] liable, because its subcontractor caused the accident." (Resp. Brief p. 11). However, as a general rule, "an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Tel. Co., Inc. v. Globe Comm., Inc., 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) (citing Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978)). Thus, it was necessary to find some exception to this general rule in order to impose liability beyond Kirkland and Low Country to reach AMR. To achieve this result, the Trial Court held "[AMR] had a absolute duty under its contract with the Health Department to provide safe transportation to [Respondent]" and that "[t]he Health Department's NEMT Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transportation services to Medicaid members...." (R. 28; Order entered 12/3/13 at p. 12). Thus, the Trial Court concluded that the duty of complete "safety" it found in the contract was an absolute nondelegable duty that permitted AMR to be held liable for the actions of an independent contractor's employee. Just as the Trial Court misinterpreted the contract in finding a duty of complete "safety," the elevation of this duty to the rare status of an absolute nondelegable duty was in error.

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

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

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

The Trial Court held that the absolute nondelegable duty "to provide 'safe' transportation" existed "under [AMR's] contract with the Health Department." (R. 28; Order entered 12/3/13 at p. 12) The Trial Court further stated that SCDHHS' contract "clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport

services." (R. 28; Id.). Thus, it appears that the Trial Court attempted to base the existence of this absolute nondelegable duty on the contract as well as the common law. This ruling, however, directly conflicts with South Carolina's law on this issue.

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

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

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

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

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

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

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

"transportation services." (R. 93; RFP). This is not a situation where SCDHHS contracted with AMR to provide transportation services, and then, AMR, on its own, chose to delegate that task. Rather, the contract ***specifically prohibits AMR from acting as a transportation provider***. The contract provides that "[t]he Broker **must not provide NEMT services** or make a referral to or subcontract with a transportation provider if the Broker has a financial relationship with the provider or has an immediate family member who has a direct or indirect financial relationship with the provider." (R. 97; RFP at § 2.4.14) (emphasis added).[2] Thus, AMR could not ***delegate*** the transportation services, because AMR was prohibited from performing that task itself.

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

[2]Section 3.3.6 of the contract provides that the only time the Broker may operate vehicles to provide transportation services is in the "very limited circumstances" set forth in 42 C.F.R. § 440.170(a)(4)(ii)(B). (R. 102; RFP § 3.3.6.). The limited exceptions to this rule set forth in 42 C.F.R. 440.170(a)(4)(ii)(B) focus on situations where no qualified provider other than the Broker is available or able to provide the NEMT service.

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

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

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

The Complaint in this matter was filed on October 16, 2012, and AMR had not completed responding to that pleading until the filing of its Amended Answer on December 12. 2012. (R. 32, 48; Compl., Am. Answer). On February 26, 2013, only a little more than two months later, Respondent filed its motion or summary judgment. In that short window of time only limited written discovery was issued and no depositions were taken. As Respondent's summary judgment motion was being considered by the Court, AMR specifically raised the issue that summary judgment was premature because material discovery had not yet taken place. (R. 235, 263; AMR's Supp. Memo. in Opp. at p. 3, Aff. of Cooper Wilson). It was error for the Trial Court to grant partial summary judgment where AMR had been denied the

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

Respondent contends that that AMR has failed to show it attempted to seek discovery. (Resp. Brief. P. 28). Respondent further contends that AMR was "dilatory" in seeking discovery and that AMR has failed to demonstrate the likelihood that additional discovery will be fruitful. (Resp. Brief. Pp. 29-30). These contentions are belied by the fact that Respondent rushed to file a summary judgment motion when the case was only a few months old and by the fact that AMR's counsel filed a Rule 56(f) Affidavit asserting the premature nature of Respondents' request. (R. 263; Aff. of Cooper Wilson). That no witnesses whatsoever had been deposed illustrates the premature nature of summary judgment at this juncture. It would be unreasonable to require AMR to establish the existence of additional evidence when it has been denied this basic aspect of the discovery process.

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

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

(R. 267; Low County Interrogatory Response). Respondent contends that "in the face of [Low Country's] admission" it was incumbent on AMR to refute this statement. (Resp. Brief p. 30).

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

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

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

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

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

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

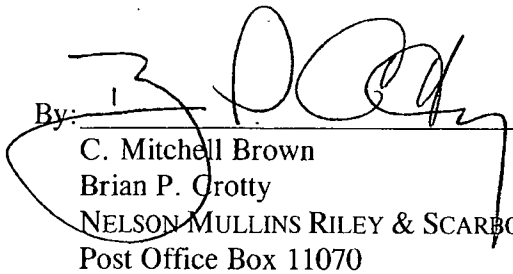
It was improper for the Trial Court to conclude that Low Country's interrogatory response constituted an admission of negligence. This error was only compounded when the Trial Court applied the alleged "admission" to AMR – a separate and distinct party. Due to this error, the Trial Court failed to view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

Conclusion

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

SIGNATURE PAGE ATTACHED

Respectfully Submitted,



By: _____

C. Mitchell Brown
Brian P. Crotty
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Robert H. Hood
Robert H. Hood, Jr.
H. Cooper Wilson, III
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29402
(843) 577-4435

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

Columbia, South Carolina
June 20, 2014

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.

PROOF OF SERVICE

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

Pleadings:

FINAL REPLY BRIEF OF APPELLANT

Counsel Served:

Attorney for Respondent Charles Gary

Joseph Dawson III, Esquire
Post Office Box 41367
North Charleston, SC 29423

Attorneys for Hattie M. Askew, Eugene Kirkland, Deboria Outlaw, Will Outlaw, and Low Country Medical Transport, Inc.

Cory Fleming, Esquire
Moss Kuhn & Fleming, PA
Post Office Drawer 507
Beaufort. SC 29901

Erin DuBose Dean, Esquire
Tupper Grimsley & Dean, PA
Post Office Box 2055
Beaufort, SC 29901

Roxanne E. Daniel
Administrative Assistant

June 20, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 the Appellant.

Appellate Case No. 2013-002674

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 5406
Heard July 15, 2015 – Filed June 1, 2016

REVERSED AND REMANDED

Robert H. Hood, Robert Holmes Hood, Jr., and H. Cooper Wilson, III, of Hood Law Firm, LLC, of Charleston; C. Mitchell Brown, Brian Patrick Crotty, and Michael J. Anzelmo, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, all for Appellant.

Joseph Dawson, III, of North Charleston, for Respondent.

WILLIAMS, J.: In this civil action, American Medical Response, Inc. (AMR) appeals the circuit court's grant of summary judgment in favor of Charles Gary as to his negligence and loss of consortium claims. AMR argues the court erred in (1) holding AMR could not escape liability for the negligent actions of a subcontractor because it owed Gary an absolute, nondelegable duty to provide safe transportation pursuant to its contract with the South Carolina Department of Health and Human Services (SCDHHS) and public policy; and (2) prematurely granting summary judgment in favor of Gary when AMR was not afforded a full and fair opportunity to conduct discovery. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On September 9, 2010, SCDHHS issued a request for proposal (RFP) regarding the provision of brokerage services for the South Carolina nonemergency medical transportation (NEMT) program. The program was designed to provide nonemergency transportation services to Medicaid members who needed access to medical care or services. AMR responded to the RFP, and on May 25, 2011, SCDHHS awarded AMR a five-year contract (the Contract) to provide brokerage services in two of the three SCDHHS regions in South Carolina. The parties agree the RFP bid documents formed the basis of the Contract under which AMR served as a broker for the NEMT program.[1]

The Contract distinguished the broker from the transportation providers, who were responsible for providing the actual transportation services. Under the Contract, AMR was required to recruit qualified transportation providers but could "not provide NEMT services or make a referral to or subcontract with a transportation provider" if it had "a financial relationship with the provider." Moreover, section 3.3.6 of the Contract provided the only time a broker could operate vehicles to provide transportation services was in the "very limited circumstances" set forth in 42 C.F.R. § 440.170(a)(4)(ii)(B) (2012).[2]

As the broker, AMR's responsibilities within the NEMT program included "operating a call center and contracting with transportation providers to fulfill the

---

[1] As the circuit court noted, in South Carolina, the parties do not sign a separate contract after the RFP process is completed.

[2] The limited circumstances outlined in subsection (B) of the regulation primarily involve situations in which no other qualified providers are available or able to provide the NEMT service. *See* § 440.170(a)(4)(ii)(B)(1)–(4). As Gary's counsel conceded during oral argument, none of the exceptions are applicable here.

services," as well as establishing "a system that ensures high quality and appropriate medical transportation services are provided to South Carolina's Medicaid population." AMR was also "responsible for identifying, recruiting, and negotiating service agreements with transportation providers . . . to meet the needs of Medicaid members in the region." Further, AMR was required to "immediately take necessary and corrective steps when representatives of SCDHHS identif[ied] inappropriate, undesirable, or otherwise poor service."

The Contract also required AMR to perform several core brokerage services "throughout the life of the [C]ontract." In particular, AMR was charged with processing transportation requests for members, verifying their eligibility for Medicaid, operating a call center, recruiting and maintaining an adequate transportation provider network, and providing administrative oversight for the NEMT program. Section 3.3 set forth AMR's various operational requirements:

> **3.3.5 Fulfillment of All Trip Requests:**
>
> **3.3.5.1** The [b]roker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. SCDHHS expects the [b]roker 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.

. . . .

3.3.7 Insurance:

In addition to the strict quality assurance standards that the transportation providers must meet, the [b]roker must ensure transportation providers have insurance coverage. State law and regulations specify minimum insurance requirements for entities involved in the provision of Medicaid [t]ransportation [s]ervices. The [b]roker is responsible for ensuring required and adequate coverage is obtained and maintained during term of contract.

3.3.8 Accidents, Injuries, and Incidents:

The [b]roker must promptly report to SCDHHS accidents, injuries, and incidents that have occurred in conjunction with a scheduled trip if a [m]ember was present in the vehicle.

. . . .

3.3.9 Trip Recovery:

The [b]roker must ensure that each provider is responsive to all vehicle breakdowns, problems[,] or delays in delivering service. The [b]roker 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] must ensure that the transportation provider immediately informs [b]roker 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 [b]roker is notified of a delay exceeding ten (10) minutes, the [b]roker 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.

Additionally, section 3.3.15 required AMR to develop a detailed monitoring plan and monitor the transportation providers with whom it subcontracted to confirm they were providing quality and safe services. If information and reports indicated otherwise, then subsection 3.3.15.1 required AMR to take corrective action:

> The [b]roker 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 [b]roker must have written procedures for taking appropriate action if a transportation provider is out of compliance with federal or [s]tate laws or regulations. The [b]roker must report, not less than monthly, to SCDHHS on monitoring activities, monitoring findings, corrective action taken, and improvements by the transportation provider.

Section 3.11.1 provided AMR was "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." Under subsection 3.12.1.1, the quality assurances provision, AMR was required to "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."

On January 31, 2012, Gary and his wife were passengers in an ambulance returning home from Gary's medical appointment. Gary's wife had scheduled the trip by calling AMR, which processed her request for NEMT. Low Country Medical Transport, Inc. (Low Country), a subcontractor under AMR's contract with SCDHHS, provided the NEMT service for Gary and his wife that day. Eugene Kirkland, a Low Country employee, drove the ambulance used to transport the couple. Prior to reaching Gary's home, the ambulance left the roadway and struck a tree. As a result of the accident, Gary suffered injuries and his wife died.

Gary filed the instant lawsuit against AMR and other defendants[3] (collectively "Defendants") on October 26, 2012, asserting claims for negligence, loss of consortium, and negligent infliction of emotional distress. Following limited discovery, Gary filed a motion for summary judgment on all claims against Defendants. The circuit court held a hearing at which the parties filed memoranda on the motion. After the court requested further briefing, AMR and Gary filed supplemental memoranda. Thereafter, AMR's counsel filed an affidavit pursuant to Rule 56(f), SCRCP, asserting summary judgment was premature at that stage because the parties had not conducted material discovery. In the affidavit, AMR's counsel argued AMR could not properly oppose the motion for summary judgment "without an opportunity to conduct written discovery and complete the necessary depositions," specifically noting Gary had not yet been deposed.

The circuit court issued an order granting summary judgment in favor of Gary as to all claims against all Defendants. AMR subsequently filed a motion to alter or amend judgment, and after a hearing on this motion, the circuit court issued a new order modifying its previous order. In its new order, the court granted summary judgment in favor of Gary only as to the negligence and loss of consortium claims, and denied his motion for summary judgment as to the negligent infliction of emotional distress claim.

Regarding Gary's negligence claim, the circuit court held "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." Relying upon sections 3.3.5 and 3.3.15 of the Contract, the court held AMR owed Gary a duty "arising out of its Contract and operating as a broker of NEMT services." Moreover, the court held AMR "had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with [SCDHHS]." The court then concluded all Defendants "breached their duty of care to Mr. Gary when Low Country Medical's ambulance ran off the road."

After finding AMR had an absolute duty to provide safe transportation, the circuit court held that, "[g]iven the duties imposed under the Contract and the extensive control [AMR] had over its NEMT service providers, [AMR] cannot walk away from its responsibilities under its NEMT Contract where the duties are so

---

[3] The other named defendants were Hattie Askew, Will Outlaw, and Deboria Outlaw—both individually and in their capacities as owners and officers of Low Country—as well as Low Country and Kirkland. Because AMR is the sole appellant in this case, we discuss the claims only as they relate to AMR.

important to the Medicaid members and simply transfer it to another." According to the court, SCDHHS's "Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT [p]rogram administrators to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols."

Finally, with respect to Gary's loss of consortium claim, the circuit court stated it was "clear"—based upon its earlier findings—the death of Gary's wife was caused by Defendants' negligence. Therefore, the court found Gary was "entitled to compensatory damages against the Defendants for the loss of his wife's companionship, aid, society, and services." This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in holding AMR liable for the negligent actions of Low Country based upon its finding that AMR owed Gary an absolute, nondelegable duty to provide safe transportation pursuant to the Contract and public policy?

II. Did the circuit court err in granting summary judgment in favor of Gary as to his negligence and loss of consortium claims when AMR was not afforded a full and fair opportunity to conduct discovery?

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of a case that does not require the services of a factfinder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "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 69, 580 S.E.2d at 439. "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). An appellate court reviews a grant of summary judgment by applying the same standard as the circuit court under Rule 56(c), SCRCP. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

> Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show . . . no genuine issue of material

> fact [exists] and . . . the moving party is entitled to judgment as a matter of law.

Id. "Because the construction of a clear and unambiguous contract is a matter of law for the court, we review the [circuit] court's findings of law de novo." *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) (emphasis omitted).

LAW/ANALYSIS

I. Nondelegable Duty

AMR contends the circuit court erred in finding AMR owed an absolute, nondelegable duty to provide safe transportation to Gary pursuant to both the Contract and public policy.[4] We agree.

"The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." *Rock Hill Tel. Co., Inc. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005). "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.'" *Id.* (alteration in original) (quoting *Durkin v. Hansen*, 313 S.C. 343, 347, 437 S.E.2d 550, 552–53 (Ct. App. 1993)). Our supreme court has explained the exception to the rule—the nondelegable duty doctrine—as follows:

> The term "nondelegable duty" is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that

[4] AMR also argues the circuit court erred in concluding its alleged contractual duty to provide safe transportation gave rise to tort claims. According to AMR, the court misconstrued the Contract's language to impose a duty that equated to strict liability for any and all accidents. Although we agree the court erred in construing the Contract, we reject the remainder of AMR's argument. The circuit court found AMR liable under the nondelegable duty doctrine, not a theory of strict liability. Further, contrary to AMR's contentions, the Contract could potentially give rise to tort claims. *See, e.g., Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 14 (2004) ("A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party."). Nevertheless, our focus is solely on the issue of whether AMR owed an absolute, nondelegable duty to Gary.

> 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. Tuomey Reg'l Med. Ctr. (*Simmons II*), 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

As scholars have noted, "nondelegable duty does not describe direct liability in the sense of breach by or fault of the delegator; it is a species of vicarious liability, liability for the fault of another based not on the delegator's fault but on policy considerations." Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 453 (1996). "The difference between direct liability and a nondelegable duty is subtle but important." *Simmons v. Tuomey Reg'l Med. Ctr.* (*Simmons I*), 330 S.C. 115, 123, 498 S.E.2d 408, 412 (Ct. App. 1998), *aff'd as modified*, 341 S.C. at 32, 533 S.E.2d at 312.

> The real effect of finding a duty to be nondelegable is to render not the duty, but the liability, not delegable; the person subject to a nondelegable 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.

McWilliams & Russell, *supra*, at 452.

Our courts have found a nondelegable duty to exist in a limited number of cases:

> 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 [h]ighway [d]epartment, and remains vicariously liable for injuries caused by defective repairs.

Simmons II, 341 S.C. at 42–43, 533 S.E.2d at 317–18 (footnotes omitted). These "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." *Id.* at 44, 533 S.E.2d at 318.

In *Simmons II*, our supreme court added to the list of cases, holding that "a hospital owes a nondelegable duty to render competent service to its emergency room patients." 341 S.C. at 50, 533 S.E.2d at 322. The court, however, declined to impose an absolute, nondelegable duty on hospitals and instead chose to adopt an "ostensible agency" approach, stating as follows:

> 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.

Id. at 50–51, 533 S.E.2d at 322 (citing RESTATEMENT (SECOND) OF TORTS: EMPLOYERS OF CONTRACTORS § 429 (AM. LAW INST. 1965)). Although the court did not limit its decision to cases involving emergency room physicians, the court stated it was limited to "situations in which a patient seeks services at the hospital as an institution[] and is treated by a physician who reasonably appears to be a hospital employee." *Id.* at 52, 533 S.E.2d at 323.

On the other hand, in *Young v. South Carolina Department of Disabilities and Special Needs*, our supreme court held the circuit court erred in finding the Department of Disabilities and Special Needs (DDSN) liable for torts committed by an employee of a local board under the nondelegable duty doctrine. 374 S.C. 360, 368, 649 S.E.2d 488, 492 (2007). The General Assembly created the board at issue in *Young* as part of a statewide network of local boards to serve as "the

administrative, planning, coordinating, and service delivery bod[ies] for county disabilities and special needs services funded in whole or in part by state appropriations to the [DDSN] or funded from other sources under the department's control." 374 S.C. at 366, 649 S.E.2d at 491 (quoting S.C. Code. Ann. § 44-20-385 (2002)). The local board, by statute, was established as a separate entity from DDSN, and the counties promulgated ordinances giving it authority to employ personnel. *Id.* In granting summary judgment in favor of the estate of a disabled child, the circuit court held DDSN liable for torts committed by an employee of the local board under the nondelegable duty doctrine, finding DDSN had been entrusted with important duties and could not delegate those duties to the local board. *Id.* at 363, 368, 649 S.E.2d at 489, 492. Our supreme court reversed, however, and found the nondelegable duty doctrine did not apply because the local board was "established as a separate entity with powers and duties separate from DDSN," and the duties exercised by the board were directly derived from the statutory scheme enacted by the General Assembly. *Id.* at 368, 649 S.E.2d at 492.

Likewise, in *Rock Hill Telephone*, our supreme court held a utility did not have an absolute, nondelegable duty to install an underground cable along a highway in a safe manner. 363 S.C. at 388, 391–92, 611 S.E.2d at 236, 238–39. In that case, the utility needed to establish its initial liability for a subcontractor's negligence prior to seeking equitable indemnification. *Id.* at 391 n.4, 611 S.E.2d at 238 n.4. Thus, the utility argued it had a nondelegable duty to perform the work in a safe manner stemming from language in a permit issued by the South Carolina Department of Transportation (DOT), statutory law, and regulatory law. *Id.* at 391, 611 S.E.2d at 238. In holding the provisions cited did not impose a nondelegable duty on the utility, the court reasoned (1) "the terms in the permit [we]re enforceable only as between the DOT and the utility, not the utility and a remote independent contractor"; and (2) "the statute and the regulation impose[d] a duty of reasonable care, not an absolute, nondelegable duty." *Id.* at 392, 611 S.E.2d at 238–39.

Turning to the instant case, the circuit court appeared to rely heavily upon sections 3.3.5 and 3.3.15 of the Contract—both of which reference trips being conducted safely—in holding AMR owed an absolute, nondelegable duty to provide safe transportation to Gary. Indeed, the circuit court stated Gary's claim was "predicated on [AMR]'s non-delegable duty to ensure all trips are completed safely and on time." We find the circuit court misinterpreted the nature of AMR's duties

and responsibilities under the Contract and, as a result, erred in holding AMR owed an absolute, nondelegable duty to provide safe transportation to Gary.[5]

In interpreting section 3.3.5, the court overlooked an important provision immediately following subsection 3.3.5.1 that clarified the parties' intent regarding the requirement that AMR ensure "all trips are completed safely and on time." Specifically, subsection 3.3.5.2 provided the following:

> 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 aid to trip recovery processes.

Subsections 3.3.5.1 and 3.3.5.2, when read together, demonstrate AMR's contractual duty was not a guarantee—on behalf of Low Country—to all eligible Medicaid members that each trip with Low Country would be safe and timely. Rather, AMR's duty was to track each trip and follow up to verify it was *completed* safely and on time, and if a trip was not, then to make the appropriate arrangements by "aid[ing] trip recovery processes."

A review of other provisions in the Contract further demonstrates the circuit court's interpretation of section 3.3.5 was inconsistent with the parties' intent. For instance, section 1.2 of the Contract, titled "Intent," is rather instructive:

---

[5] Curiously, the circuit court used varying language in announcing the nondelegable duty it found AMR owed Gary. In one instance, the court found AMR had a nondelegable duty "to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols." On the next page of the order, the court stated Gary's claim was based upon AMR's nondelegable duty "to ensure all trips are completed safely and on time." Although the court used different language, each phrasing is consistent with its overall conclusion that AMR had an absolute, nondelegable duty to provide safe transportation to Gary. Further, when asked at oral argument what specific duty AMR owed Gary, Gary's counsel responded that AMR had a duty "to provide safe transportation to and from medical appointments because he is a Medicaid member seeking that service." Thus, for consistency purposes, we analyze whether a nondelegable duty exists based upon this phrasing.

> Through this [RFP,] . . . [SCDHHS] will contract with up to three [b]rokers to administer the daily functions of the NEMT Program. Specifically, the [b]roker(s)' responsibilities will include, but are not limited to, operating a call center and contracting with transportation providers to fulfill the services. The [b]roker must establish a system that ensures high quality and appropriate medical transportation services are provided to South Carolina's Medicaid population. The [b]roker must pay transportation providers in accordance with the terms of the written service agreement between the [b]roker and each transportation provider.

Likewise, section 1.3 provided the objective of the Contract was for SCDHHS "to procure a qualified broker to improve the efficiency and effectiveness and to administer the core components of the SCDHHS's NEMT Program." Thus, when read in context, subsection 3.3.5 merely set forth another administrative duty, not a duty amounting to AMR's guarantee of safety to all eligible Medicaid recipients of the NEMT program. Although the Contract directed AMR to "establish a system that ensures high quality and appropriate medical transportation services are provided," we find the parties did not intend for section 3.3.5 to require that AMR serve as an insurer of passengers' safety during each Low Country trip.

The circuit court next found AMR had a duty to ensure its transportation providers complied with all applicable state and federal laws and regulations, citing section 3.3.15 of the Contract. Section 3.3.15, in pertinent part, provides the following:

> The Offeror must include a Monitoring Plan in the initial proposal. The [b]roker is responsible for all services provided by transportation providers. The [b]roker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable [s]tate and [f]ederal laws and regulations. The [b]roker 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 [p]lan should address how the [b]roker will collect and

> verify the accuracy of performance data obtained from the NEMT providers.

While AMR did, as the circuit court noted, have a contractual duty to ensure Low Country complied with applicable laws and regulations, this duty was irrelevant to the circuit court's ultimate resolution of the issues in this case—the court made no legal or factual findings as to whether AMR breached this duty.[6] To the extent the court relied upon the second and fourth sentences in section 3.3.15 to hold AMR had an absolute duty to provide safe transportation, we find the court erred in overlooking a key portion of the provision and reading it out of context.

Under section 3.3.15, the "delivery of courteous, safe, timely[,] and efficient transportation services" is expressly one of the "transportation provider-related requirements," not a broker requirement. The parties' intention to distinguish the requirements of a "broker" from that of a "transportation provider" is evidenced throughout the Contract. In section 1.2, for example, the parties expressly stated the intent of the Contract was for "the [b]roker's responsibilities [to] include . . . contracting with transportation providers to fulfill the services." AMR, as the broker, could "only operate vehicles to provide transportation services in [the] very limited circumstances" outlined in 42 C.F.R. § 440.170(a)(4)(ii)(B). Because—as Gary's counsel conceded at oral argument—none of those limited circumstances were applicable, the Contract did not permit AMR to provide transportation services to Gary or any other Medicaid member. Given that AMR could not provide transportation services itself, but rather served only as the broker of such services, we find it illogical to read the Contract as imposing an absolute duty upon AMR to provide safe transportation.

As the broker, AMR's duty with respect to section 3.3.15 was only to monitor and ensure Low Country complied with the terms of its subcontract and all transportation provider-related requirements, as well as to "have written procedures in place for taking appropriate corrective action whenever inappropriate or substandard services [we]re furnished" by Low Country. The parties did not intend to shift liability to AMR in this provision. Although certain sentences—when read

---

[6] The only mention of facts pertaining to this particular phrase appears in the second footnote of the order, in which the court briefly noted that Low Country experienced some administrative difficulties with the South Carolina Secretary of State's Office regarding its corporate status. The circuit court, however, did not rule upon whether any actions by AMR or Low Country violated the law or otherwise had anything to do with the accident in this case.

in isolation—may seem to imply that AMR being "responsible for all services provided by the transportation providers" is the equivalent of AMR being liable for all services provided by Low Country, we find such a narrow interpretation is inconsistent with the parties' intent as to this section and the Contract as a whole. The quoted sentences were all part of section 3.3.15's requirement that AMR include a monitoring plan in its initial proposal to address how it would "collect and verify the accuracy of performance data obtained by the NEMT providers" and report back to SCDHHS.

In sum, nothing in the four corners of the Contract indicates the parties intended for AMR to serve as Low Country's insurer of absolute safety for every NEMT trip. *Cf. Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1995) (finding a school board had no nondelegable duty because "[s]chool boards owe their pupils a duty of reasonable care in providing them with safe transportation, but they are not insurers of students' safety"). In fact, section 3.3.7 of the Contract stated AMR was responsible for ensuring transportation providers obtained and maintained the required and adequate insurance coverage throughout the term of the Contract. *Cf. id.* (finding although the appellants argued the school board "should not be allowed to avoid liability by choosing to contract for buses from outside sources," the relevant statutes and regulations "clearly allow[ed] the [s]chool [b]oard to do so, provided the contractors have the necessary insurance coverage and the buses are properly inspected").

Therefore, we hold the circuit court erred by reading selected portions of sections 3.3.5 and 3.3.15 to find the parties intended to impose upon AMR an absolute duty to provide safe transportation because such a narrow interpretation failed to give effect to the parties' intent as expressed in the Contract as a whole. *See Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) ("The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract."); *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008) (stating a contract is "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense"); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498–99, 649 S.E.2d 494, 502 (Ct. App. 2007) ("It is fundamental that[,] in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." (second alteration in original) (quoting *Brady v. Brady*, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952))); *id.* at 500, 649 S.E.2d at 503 ("The court must enforce an

unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully."). The Contract, through its numerous provisions regarding AMR's responsibilities and duties as a broker within the NEMT program, unambiguously imposed no such duty.

We further find the circuit court's error in interpreting the nature and extent of the duties and responsibilities AMR owed under the Contract controlled its analysis of this issue and, thus, led to the erroneous conclusion that AMR owed an absolute, nondelegable duty to provide safe transportation. *Cf. Young*, 374 S.C. at 368, 649 S.E.2d at 492 (noting the local board's status as a separate entity with powers and duties separate from DDSN in holding DDSN owed no nondelegable duty).

While it is difficult to define the exact circumstances under which a nondelegable duty will be found, a review of case law reveals that our courts' decisions regarding whether to apply the nondelegable duty doctrine are primarily grounded in public policy considerations. *See, e.g.*, *Simmons II*, 341 S.C. at 50, 533 S.E.2d at 322 (stating the decision to hold a hospital owes a nondelegable duty to render competent service to emergency room patients, like those made by other courts considering the issue, was grounded primarily in public policy considerations).

In its order, the circuit court stated SCDHHS's Contract "clearly indicate[d] that public policy and its Contract" imposed a nondelegable duty upon AMR. The court, however, failed to mention any policy considerations that led it to reach this conclusion. Further, aside from consistently pointing to the amount of money AMR received under the Contract, a point which the circuit court declined to acknowledge as relevant to this case, Gary failed to offer any policy arguments below supporting the imposition of a nondelegable duty. Specifically, Gary offered no legislative, judicial, or regulatory expression of public policy that would support a finding that AMR owed a nondelegable duty under the Contract. We do not believe a mere passing reference to the general concept of public policy provided a sufficient basis upon which the court could find a nondelegable duty existed. *Cf.* McWilliams & Russell, *supra*, at 453–54 (noting "[n]ondelegable duty is liability without fault and[,] therefore, in our fault-based tort system, is strong medicine, assigned only on the basis of potent policy" (footnote omitted)).

We find public policy does not favor finding a nondelegable duty in this case. First, facilitating and monitoring the *nonemergency* transport of Medicaid patients does not involve inherent danger or qualify as an abnormally dangerous activity. *See* F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 744–45 (4th ed. 2011) ("[One] broad area involving nondelegable duties is where the work involves inherent or intrinsic danger. Similarly, a person engaged

in abnormally dangerous activity is responsible for injuries resulting from that activity even if they are caused by an independent contractor. Vicarious liability in such a case is supported by the underlying policies that justify imposing strict liability for injuries from abnormally dangerous activities on the persons conducting such activities."). Second, notwithstanding Gary's argument, nothing in the record indicates he would not be made whole by Low Country in the event it was found vicariously liable for Kirkland's alleged actions. In fact, under the Contract, AMR receives a fee for ensuring Low Country maintains the amount of insurance coverage that the General Assembly, as a matter of public policy, has determined is sufficient in this state. Third, finding AMR liable for any and all accidents would be in direct contravention of the State's objective for entering into the Contract—for AMR to improve efficiency and effectiveness in administering the NEMT program for SCDHHS—because it would unreasonably increase costs. Fourth, and most importantly, Gary cannot point to a statute, regulation, or provision of the Contract that expressly shifted liability to AMR.

Additionally, to the extent the circuit court relied upon any control AMR had, we find the amount of control AMR exercised over Low Country pales in comparison to that which the hospital in *Simmons II* exercised over its emergency room physicians. Under the Contract, SCDHHS maintained the right to direct AMR to fire transportation providers' drivers for substandard services or failure to comply with various requirements. Thus, AMR's control was still subject to and limited by the ultimate control SCDHHS retained over certain functions. While AMR inspected ambulances to ensure compliance with regulations, it did not furnish any tools or equipment to Low Country. The parties do not dispute the fact that Low Country is an independent contractor. Gary also expressly abandoned any argument for imposing a nondelegable duty in this case under an apparent agency or estoppel theory. Therefore, although AMR did exercise some control over Low Country, we do not believe the level was such that we should impose a nondelegable duty based upon this factor alone.

No controlling authority in South Carolina—or any other jurisdiction—supports the proposition that AMR owed NEMT program recipients a nondelegable duty to provide safe transportation and could be held liable for the alleged negligence of an employee of its subcontractor. *See Whitfield*, 654 So. 2d at 1232 (rejecting appellants' nondelegable duty argument and noting the parties cited no controlling authority, and the court could find none, to support "the proposition that the safe transportation of public school students is a nondelegable duty"). A plain reading of the Contract demonstrates SCDHHS and AMR unambiguously did not intend to create a nondelegable duty, and we are unable to find any substantive policy

reasons to support imposing one in this case.[7] Accordingly, we hold the circuit court erred in finding AMR owed Gary a nondelegable duty to provide safe transportation. Because the nondelegable duty doctrine was the sole basis upon which the circuit court found AMR liable, we reverse the grant of summary judgment in favor of Gary as to his negligence and loss of consortium claims.[8]

II. Full and Fair Opportunity to Conduct Discovery

In light of our resolution of the above issues, we decline to address whether the circuit court erred in prematurely granting summary judgment when AMR was not afforded a full and fair opportunity to conduct discovery. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

---

[7] Even if AMR did owe a nondelegable duty, it would not be absolute. Given that a hospital's nondelegable duty to render competent services to emergency room patients is not absolute, it would be illogical to hold a broker who arranges nonemergency transportation services owes an absolute duty to provide safe transportation to qualified recipients. *Cf. Simmons II*, 341 S.C. at 50, 533 S.E.2d at 322 (concluding it was unnecessary "to impose an *absolute* nondelegable duty on hospitals" to render competent services to emergency room patients).

[8] Unlike the concurrence, we are not prepared to say AMR owed no duty at all to Gary. *See Simmons I*, 330 S.C. at 123, 498 S.E.2d at 412 (noting "[t]he difference between direct liability and a nondelegable duty is subtle but important"). With a stated intent of creating an NEMT system "that ensures high quality and appropriate medical transportation services are provided to South Carolina's Medicaid population," SCDHHS and AMR clearly entered into the Contract for the benefit of eligible Medicaid recipients, a class of which Gary is a member. *See Dorrell*, 361 S.C. at 318, 605 S.E.2d at 14 ("A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party."); *id.* at 318, 605 S.E.2d at 15 ("The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care."). In this case, however, the nondelegable duty doctrine was the sole theory under which Gary pursued his negligence claim. Our holding is, therefore, limited to finding AMR owed no absolute, nondelegable duty to provide safe transportation based upon the Contract or public policy.

CONCLUSION

Based on the foregoing analysis, we **REVERSE** the circuit court's grant of summary judgment in favor of Gary as to his negligence and loss of consortium claims and **REMAND** for further proceedings consistent with this opinion.

HUFF, A.C.J., concurs.

FEW, A.J., concurring: I concur in the result reached by the majority, but not the analysis. I would decide this case on a narrow point—AMR had no duty of due care arising under the Contract or otherwise regarding the manner in which Low Country or its employees drove the ambulance. Because AMR had no duty of due care in the first place, I do not believe it is necessary to discuss nondelegable duty.

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

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.

RESPONDENT'S PETITION FOR REHEARING

Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Respondent Charles Gary

ARGUMENT

Respondent Charles Gary respectfully submits that this Court overlooked or misapprehended the legal grounds and reasoning of the lower court and that either a rehearing should be granted, or the Opinion vacated, on the following grounds.

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

The Court of Appeals misapprehended the circuit court's decision when it found that "in its order, the circuit court stated SCDHHS's Contract 'clearly indicate[d] that public policy and its Contract' imposed a nondelegable duty upon AMR. The court, however, failed to mention any policy considerations that led it to reach this conclusion." Gary v. Askew, Op. No. 5406 (S.C.Ct.App. filed June 1, 2016). The circuit court held that "[t]he 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." (R. p. 28). The circuit court relied on the extensive control AMR had over its NEMT service providers to conclude that public policy demands that AMR be held liable for the actions of its subcontractors. The NEMT Contract provided for the following:

> The Broker must ensure transportation providers comply with the following passenger safety requirements:
>
> 3.8.3.6.1 Passengers must have their seat belts buckled at all times while they are inside the vehicle. The driver must assist passengers who are unable to fasten their own seat belts.
>
> 3.8.3.6.2 The driver must not start the vehicle until all passenger seat belts have been buckled.

> 3.8.3.6.3 The number of persons in the vehicle, including the driver, must not exceed the vehicle manufacturer's approved seating capacity.
>
> 3.8.3.6.4 Upon arrival at the destination, the vehicle should be parked or stopped so that passengers do not have to cross streets to reach the entrance of their destination.
>
> 3.8.3.6.5 Drivers must not leave passengers unattended.
>
> 3.8.3.6.6 If passenger behavior or other conditions impede the safe operation of the vehicle, the driver must park the vehicle in a safe location out of traffic and notify their dispatcher to request assistance.

(R. pp. 130-131, § 3.8.3.6, Passenger Safety Requirements).

The circuit court concluded that because AMR had extensive control over its NEMT service providers that public policy dictates that "Access2Care [could not] walk away from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another." (R. p. 28).

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

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

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

and certifying their compliance with federal and state laws; monitoring NEMT service providers; providing an education program for members; and providing high quality, courteous, and safe transportation service to Medicaid members. These responsibilities ranged from ensuring drivers wore a nametag to verifying the financial stability of all contracted transportation providers. (R. pp. 125-131, 115-124, § 3.8.2, Driver Requirements, § 3.7, Transportation Provider Network).

II. THE COURT OF APPEALS OVERLOOKED THE TRIAL COURT'S FINDINGS OF AMR'S DUTIES AND RESPONSIBILITIES UNDER THE NEMT CONTRACT.

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

> The Broker must assure that transportation services are provided which comply with the following minimum service delivery requirements and which must be delineated in all transportation service agreements:
>
> The Broker must minimize the waiting and riding times beyond what is required to reach the destination or trip termination from a medical service for persons with special needs. This special population includes dialysis, disabled or impaired individuals, the medically fragile members of Adult Day Health Care, medically fragile children and certain other persons and must take into particular account the physical or medical condition of the rider following certain treatment or activity.

(R. p. 112, § 3.6.9 Other Procedures and Responsibilities for NEMT Scheduling)

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

(R. p. 97, § 2.4.8 General Broker Requirements).

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

(R. p. 102, § 3.3.8 Accidents, Injuries, and Incidents).

> The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time. SCDHHS expects the Broker to provide trip coverage twenty-four (24) hours a day, seven (7) days a week.
>
> Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine the real-time location of members, verification of member delivery to the medical service, vehicle location and disposition and to aid trip recovery processes. The functionality of tracking tools and methods must be explained operationally and approved by SCDHHS.

(R. p. 101, § 3.3.5 Fulfillment of All Trips Requests).

> The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. The monitoring Plan should address how the Broker will collect and verify the accuracy of performance data obtained from the NEMT providers.

(R. pp. 104-105, § 3.3.15 Monitoring Plan)

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

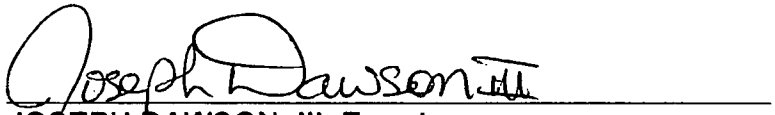
(R. p. 136, § 3.12.1.1 Quality Assurance, Corrective Action Plans).

The requirements of the NEMT Contract imposed on AMR go beyond an administrative role and duty for NEMT services, but impose a non-delegable duty to provide safe transportation services to Medicaid members.

CONCLUSION

For the foregoing reasons, the Respondent Charles Gary respectfully requests that this Court vacate its decision.

Respectfully submitted,



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

ATTORNEY FOR RESPONDENT CHARLES GARY

North Charleston, South Carolina
June 15, 2016

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

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.

PROOF OF SERVICE

I certify that I have served the **Respondent's Petition for Rehearing** upon Appellant American Medical Response, Inc. (d/b/a Access2Care) by depositing a copy of the same in the United States Mail, postage prepaid, on June 15, 2016, addressed to its counsel of record as follows:

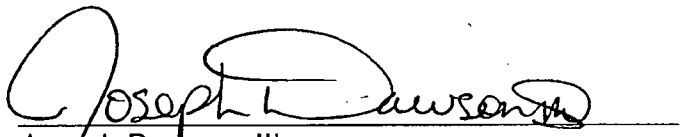
C. Mitchell Brown, Esq.
Brian P. Crotty, Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough LLP

Post Office Box 11070
Columbia, SC 29211-1070

Robert H. Hood, Jr., Esq.
H. Cooper Wilson, III, Esq.
Hoodlaw Firm, LLC
172 Meeting Street
Post office Box 1508
Charleston, SC 29402

Erin Dean, Esq.
Tupper, Grimsley & Dean, PA
611 Bay Street
Post Office Box 2055
Beaufort, SC 29901-2055

Cory H. Fleming, Esq.
Moss Kuhn & Fleming, PA
1501 North Street
Post Office Draw 507
Beaufort, SC 29901



Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Respondent Charles Gary

JOSEPH DAWSON, III

ATTORNEY AT LAW
POST OFFICE BOX 41367
NORTH CHARLESTON, S.C. 29423-41367
Email: joe@attorneyjosephdawson.com

TELEPHONE
(843) 207-9004

FAX NUMBER
(844) 288-7399

June 15, 2016

Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Charles Gary v. American Medical Response, Inc., (d/b/a Access2Care)
Appellate Case No. 2013-002674

Dear Ms. Kitchings:

In accordance with Rules 221 and 240, SCACR, enclosed please find for filing an original and six (6) copies of Respondent's Petition for Rehearing along with the Certificate of Service and check in the amount of $25.00 for the filing fee. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies and returning them to me in the enclosed envelope.

By copy of this letter, I am serving all parties with these documents. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Joseph Dawson, III, Esq.

cc: C. Mitchell Brown, Esq.
Brian P. Crotty, Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211-1070

Robert H. Hood, Jr., Esq.
H. Cooper Wilson, III, Esq.
Hoodlaw Firm, LLC
172 Meeting Street
Post office Box 1508
Charleston, SC 29402

Erin Dean, Esq.
Tupper, Grimsley & Dean, PA
611 Bay Street
Post Office Box 2055
Beaufort, SC 29901-2055

Cory H. Fleming, Esq.
Moss Kuhn & Fleming, PA
1501 North Street
Post Office Draw 507
Beaufort, SC 29901

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

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

Charles Gary, ... Respondent,

v.

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

Defendants

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

Appellant's Return to Petition for Rehearing

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully Submitted,

By: _____

C. Mitchell Brown
Brian P. Crotty
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Robert H. Hood
Robert H. Hood, Jr.
H. Cooper Wilson, III
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29402
(843) 577-4435

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

Columbia, South Carolina
June 29, 2016

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.

PROOF OF SERVICE

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

Pleadings:

Appellant's Return to Petition for Rehearing

Counsel Served:

Attorney for Respondent Charles Gary

Joseph Dawson III, Esquire
Post Office Box 41367
North Charleston, SC 29423

Attorneys for Hattie M. Askew, Eugene Kirkland, Deboria Outlaw, Will Outlaw, and Low Country Medical Transport, Inc.

Cory Fleming, Esquire
Moss Kuhn & Fleming, PA
Post Office Drawer 507
Beaufort. SC 29901

Erin DuBose Dean, Esquire
Tupper Grimsley & Dean, PA
Post Office Box 2055
Beaufort, SC 29901

Lisa P. Whitehurst
Administrative Assistant

June 29, 2016

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

June 29, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

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

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

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

The South Carolina Court of Appeals

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 the Appellant.

Appellate Case No. 2013-002674

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

_____ J.

H B Wilkins

_____ J.

John Cannon Few

_____ A.J.

Columbia, South Carolina

FILED

August 17, 2016

cc:
Joseph Dawson, III, Esquire
C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Robert Holmes Hood, Jr., Esquire
Harry Cooper Wilson, III, Esquire
Robert H. Hood, Esquire
Brian Patrick Crotty, Esquire
The Honorable Marvin H. Dukes, III