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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2012-CP-07-03595
Appellate Case No. 2016-001937

Charles Gary, ... Petitioner, ~~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, ... Respondent. ~~Appellant~~.

~~APPELLANT'S~~ RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

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") {App. 435}, the South Carolina Court of Appeals correctly reversed the circuit court's partial grant of summary judgment in favor of Petitioner Charles Gary ("Petitioner" or "Gary"). That partial grant of summary judgment was based upon the circuit court's erroneous finding that Appellant American Medical Response, Inc.'s ("AMR" or "Appellant") owed an absolute, nondelegable duty to provide safe nonemergency medical transportation ("NEMT") based on the terms of AMR's contract with the South Carolina Department of Health and Human Services ("SCDHHS") ("the NEMT Contract" or "the Contract") and based on public policy. {App. 442}. In reversing the circuit court, the Court of Appeals correctly 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 Gary." {App. 445-46}. More specifically, the Court of Appeals 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. {App. 449}. The Court of Appeals further correctly held that Petitioner failed to offer supporting public policy arguments to the circuit court, and that the circuit court failed to identify any such public policy considerations necessary to support the imposition of an absolute, nondelegable duty in these circumstances. {App. 450}.

This Court should deny the petition for certiorari. None of the factors in Rule 242(b), SCACR, exist to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no conflict with this Court's precedent, no constitutional issue,

and no conflict with the United States Supreme Court on any question of federal law. Petitioner merely recycles arguments made to and rejected by the Court of Appeals without identifying any significant issues or actual inconsistencies with prior decisions of this Court. (Petition for Certiorari at p. 3-7).

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that neither the circuit court nor Petitioner identified any public policy considerations that could support the imposition of a nondelegable duty, and did the Court of Appeals correctly hold that public policy does not favor finding a nondelegable duty in this case?

2. Did the Court of Appeals correctly hold that the circuit court misinterpreted the nature of Appellant's duties and responsibilities under the NEMT Contract, and did the Court of Appeals correctly conclude that, when the Contract was viewed in its entirety, it did not impose upon Appellant an absolute, nondelegeable duty to provide completely safe NEMT trips?

ARGUMENT

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

In Opinion No. 5406, the Court of Appeals 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.*'" {App. 443} (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 Court of Appeals further noted that South Carolina's courts have found a nondelegable duty to exist in only a limited number of circumstances, and that the "decisions regarding whether to apply the nondelegable duty doctrine are *primarily grounded in public policy considerations*." {App. 443, 450} (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 Court of Appeals then concluded that neither the circuit court nor

Petitioner had supported the imposition of an absolute, nondelegable duty with any analysis of public policy considerations. {App. 450}.

In an attempt to create a public policy argument where none previously existed, Petitioner now contends that "[t]he 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 Certiorari at p. 3). Specifically, Petitioner 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.[1] (*Id.* at p. 3-4). Petitioner 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. (*Id.* at p. 4). Petitioner is wholly incorrect and these assertions lack any support in the record.

Contrary to Petitioner's assertions, the circuit court's orders make no mention of the Contract sections Petitioner now cites. {App. 4-34}. Moreover, the Contract sections on which Petitioner now seeks to rely do not create a "public policy" dictating the imposition of an absolute, nondelegable duty of complete safety on these trips. As the Court of Appeals correctly concluded, the amount of control AMR exercised over transportation providers "pales in comparison to that which the hospital in *Simmons II* exercised over its emergency room physicians." {App. 451}. The Court of Appeals noted that AMR's control was "still subject to and limited by the ultimate control SCDHHS retained over certain functions." {*Id.*}. Thus, the Court of Appeals correctly concluded that the level of control exercised by AMR over

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[1] There was no assertion at the circuit court level that any of these provisions were violated by AMR.

nonemergency transportation providers was insufficient to support the imposition of a nondelegable duty. {*Id.*}

More significantly, as the Court of Appeals stressed, 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]" and that Petitioner "failed to offer any policy arguments below supporting the imposition of a nondelegable duty." {App. p. 450}. Specifically, neither Petitioner nor the circuit court offered any "legislative, judicial, or regulatory expression of public policy that would support a finding that AMR owed a nondelegable duty under the Contract." {*Id.*}. Rather, the circuit court and Petitioner offered nothing more than "a mere passing reference to the general concept of public policy" that was insufficient to serve as the basis for the imposition of a nondelegable duty. {*Id.*}.

In contrast, the Court of Appeals listed multiple reasons why public policy ***does not*** favor finding a nondelegable duty in this case, and Petitioner has made no attempt to refute these findings. {App. 450-51}. Specifically, the Court of Appeals considered the ***nonemergency*** nature of the transportation at issue, and found that "facilitating and monitoring the *nonemergency* transport of Medicaid patients does not involve inherent danger or qualify as an abnormally dangerous activity." {App. 450} (emphasis in original). The Court of Appeals then noted that there was nothing in the record to suggest that, in the absence of vicarious liability, Gary would not be made whole by the responsible transportation provider who was required to maintain insurance coverage that the General Assembly, as a matter of public policy, has determined to be sufficient. {App. 451}. The Court of Appeals further concluded that "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." {*Id.*}. Finally, the Court of Appeals noted with significance, "[Petitioner] cannot point to a statute, regulation or provision of the Contract that expressly shifted liability to AMR." {*Id.*}. The petition for certiorari fails to refute or even address these public policy considerations that weigh clearly ***against*** the imposition of a nondelegable duty in these circumstances. Therefore, the Court of Appeals correctly held that public policy did not support the imposition of a nondelegable duty on AMR in this matter, and the petition should be denied.

II. The Court of Appeals 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 Court of Appeals correctly concluded that "the circuit court misinterpreted the nature of AMR's duties and responsibilities under the Contract." {App. 445-46}. Petitioner now 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 that the Court of Appeals incorrectly "isolated on § 3.3.5.2" in overruling the circuit court. (Petition for Certiorari at p. 5). However, contrary to Petitioner's assertions, the Court of Appeals correctly determined that the circuit court placed undue emphasis on sections 3.3.5 and 3.3.15, and Opinion No. 5406 illustrates its complete and proper interpretation of the Contract. {App. 445-46}.

Petitioner 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 Certiorari at pp. 5-7). Petitioner then improperly and summarily concludes that when these provisions are coupled with sections 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. 7). This argument is unavailing.

With regard to section 3.3.5, the Court of Appeals 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. {App. 446-47}. 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.'" {App. 446} (emphasis in original). As noted by the Court of Appeals, Petitioner'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 "subsection 3.3.5 merely set forth another administrative duty" and 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. {App. 446-47}. 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. {App. 449}.

With regard to section 3.3.15's reference to the "delivery of courteous, safe, timely[,] and efficient transportation services," the Court of Appeals correctly concluded that this was a transportation provider-related requirement and not a broker requirement. {App. 448}. 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." {App. 97 at § 1.1}. These obligations 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. {App. 105 at § 3.3.6}. As the Court of Appeals concluded, "[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." {App. 448}.

The case of *Dixon v. Whitfield*, 654 So.2d 1230 (Fla. Dist. Ct. App. 1995), which was cited by the Court of Appeals, illustrates the inapplicability of the nondelegable duty doctrine to these circumstances. The *Dixon* case involved a lawsuit against the Duval County School Board wherein the plaintiff sought to have the Board held vicariously liable for the actions of school bus contractors and operators which led to the death of a student. *Id.* at 1231. The plaintiff asserted that the Board had a nondelegable duty to transport public school children with safety based upon the Florida Constitution's provisions regarding school boards and Florida statutes requiring the Board to provide transportation with "maximum regard for safety." *Id.* at 1232. The Dixon Court rejected this argument stating "the fact that the school board is required by law to provide transportation for its students and is required by law to have maximum regard for safety in so doing, does not translate into a nondelegable duty." *Id.* Rather, the court held that "[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.'" *Id.* Here, just as in *Dixon*, the provisions of the Contract with SCDHHS relating to safety do not translate into a nondelegable duty and do not make AMR the insurer of all transported Medicaid members' safety. As the Court of Appeals held, "[n]o 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." {App. 451}.

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, Petitioner 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 Court of Appeals correctly concluded that "nothing in the four corners of the Contract indicates the parties intended for AMR to serve as [the] insurer of absolute safety for every NEMT trip." {App. 449}. Thus, the petition for certiorari should be denied.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Signature Page Attached

Respectfully Submitted,

By:______________________________

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PROOF OF SERVICE

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

Pleadings: ~~APPELLANT'S~~ RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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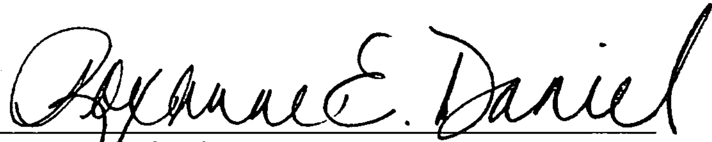

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