

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Appellate Case No.: 2016-001937

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S.C. SUPREME COURT

Charles Gary, Petitioner,

v.

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

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

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE COURT OF APPEALS ERRED WHEN IT FAILED TO CONSIDER THE PUBLIC POLICY REASONS THE TRIAL COURT RELIED ON TO FIND THAT AMERICAN MEDICAL RESPONSE INC. OWED A NONDELEGABLE DUTY TO THE PETITIONER?
2. WHETHER THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT'S FINDINGS THAT AMERICAN MEDICAL RESPONSE INC. OWED THE PETITIONER A NONDELEGABLE DUTY TO PROVIDE SAFE TRANSPORTATION SERVICES UNDER ITS NONEMERGENCY MEDICAL TRANSPORTATION CONTRACT?

STATEMENT OF THE CASE

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

On February 26, 2013, the Petitioner filed a motion for Summary Judgment. The Trial Court held a motions hearing on May 14, 2013, to decide the Petitioner's Summary Judgment Motion on three of his causes of action pursuant to Rule 56, South Carolina Rules of Civil Procedure. After issuing a Summary Judgment Order on August 20, 2013, the Defendants and AMR timely filed Motions to Reconsider the Trial Court's Order. The Court held a subsequent hearing on November 12, 2013, pursuant to the Defendants and AMR's Motions for Reconsideration. On December 3, 2013, the Trial Court entered its Order on Reconsideration modifying its August 20, 2013, Order affirming its decision on Negligence and Loss of Consortium but reconsidering its ruling on the Petitioner's Negligent Infliction of Emotional Distress claim. AMR timely filed and served its Notice of Appeal on December 13, 2013. The Court of Appeals

heard oral arguments on July 15, 2015, to determine if AMR could escape liability for the negligent actions of a subcontractor because it owed the Petitioner an absolute, nondelegable duty to provide safe transportation pursuant to its contract with the South Carolina Department of Health and Human Services (“SCDHHS” or “Health Department”) and public policy. The Court of Appeals issued its decision on June 1, 2016. The AMR Court reversed the Circuit Court finding that AMR did not owe a nondelegable duty to provide safe transportation to Gary pursuant to both the Contract and public policy. Garv v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct.App.2016).

Petitioner petitioned this Court for a writ of certiorari to review the Court of Appeals' decision to determine if AMR owed Charles Gary a nondelegable duty to provide safe transportation pursuant to its Contract with SCDHHS and public policy. This Court granted the Petitioner's petition on August 4, 2017.

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 upon Mrs. Gary. She was his sole means of comfort, care,

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 AMR in default for failing to file an Answer to the Estate's Complaint within 30 days. (App. 0164-0168, 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). The parties to this case have settled their claims and the matter has been dismissed with prejudice.

and support prior to her death caused by the Defendants. (App. 0093-0095, Gary Summ. J. Aff. ¶ 4).

AMR is a corporation organized and existing under the laws of a state other than South Carolina. AMR provides non-emergency medical transportation services to governments, among other services. On or about May 25, 2011, the Health Department entered into a contract with AMR to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program for \$162,077,477.00.² (App. 0144, Notice Regarding Award). Pursuant to the Request for Proposals and its contract with the Health Department, AMR 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. AMR was tasked with "operating a call center and contracting with transportation providers to fulfill the services." (App. 0096-0141, 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. (App. 0097, NEMT Contract, §1.1). This contract was initiated through a competitive request for proposal (RFP) solicitation process to

² AMR had a five-year contract with the Health Department. (App. 0144, Non-Emergency Medical Transportation Bid Notice of Award, Reinstatement Notice, dated May 25, 2011). On or about November 22, 2011, AMR 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. (App. 0145-0148, 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 AMR's \$25 million change order request, and thereafter, AMR 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. (App. 0149-0150, 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).

provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina like Mr. Gary. (App. 0096-0141, NEMT Contract).

The NEMT Program was a turnkey operation where AMR would provide transportation management and administrative services to Medicaid members. AMR was “responsible for identifying, recruiting, and negotiating service agreements with transportation providers in order to meet the needs of Medicaid members in the region.” (App. 0099, NEMT Contract, § 2.4.5, General Broker Requirements). AMR’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.

(App. 0197, § 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.

(App. 0104, § 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.

(App. 0105, § 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.

(App. 0107-108, § 3.3.15 Monitoring Plan)

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

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

The NEMT Contract placed all responsibility to administer the Program on AMR. 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 contact AMR not Low Country Medical Transport. Furthermore, the NEMT Program prohibited transportation providers from soliciting additional business from members. The Contract imposed certain duties on AMR to ensure, in particular, the safety of its members.

The Health Department authorized AMR to hire qualified non-emergency medical transportation subcontractors to provide transportation services to eligible Medicaid recipients. On August 17, 2011, AMR began to provide NEMT services to eligible Medicaid recipients in South Carolina. While under contract with the Health Department, AMR entered into a separate subcontractor agreement with Low Country Medical Transport Inc.,³ and/or LCMT titled

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. (App. 0160, 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. (App. 0162, South Carolina Secretary of

“Access2Care Transportation Solutions Subcontractor Agreement” so that AMR could dispatch Low Country Medical Transport as part of its NEMT network. (App. 0151-0154, 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. (App. 0161, South Carolina Secretary of State Application for Reinstatement of a Dissolved Corporation).

On January 31, 2012, AMR dispatched Low Country Medical Transport 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 and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home. (App. 0093-0095, Gary Summ. J. Aff. ¶ 7). The collision caused injuries to Mr. Gary and killed his wife. (App. 0020-0034, 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. (App. 0093-0095, Gary Summ. J. Aff. ¶ 7). Beaufort County EMS transported Mr. Gary to Beaufort

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. (App. 0154-0157, Askew Aff. ¶ 7).

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. (App. 93-95, 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 the Court of Appeals erred when it reversed the Circuit Court's December 3, 2013, Summary Judgment Order and this Court should affirm the Circuit Court's December 3, 2013, Order for the following reasons.

ARGUMENTS

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO CONSIDER THE PUBLIC POLICY REASONS THE TRIAL COURT RELIED ON TO FIND AMERICAN MEDICAL RESPONSE INC. OWED A NONDELEGABLE DUTY TO THE PETITIONER

The Court of Appeals erred when it reversed the Circuit Court's decision finding that "SCDHHS's Contract 'clearly indicate[d] that public policy and its Contract' imposed a nondelegable duty upon AMR." *Garv v. Askew*, 417 S.C. 232, 789 S.E.2d 94 (Ct.App.2016). (App. to Pet. Cert. 0435). The Court of Appeals found that the Circuit Court, "failed to mention any policy considerations that led it to reach this conclusion." *Id.* (App. 0435 - 0453). To the contrary, the Circuit Court held that "[t]he The Health Department's [Non Emergency Medical Transportation ("NEMT")) Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols." (App. 0031). The Circuit Court relied on the extensive control

AMR had over its NEMT service providers to conclude that public policy demands that AMR be held liable for the actions of its subcontractors. The NEMT Contract provided for the following:

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.

(App. 0097-0098, § 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.

(App. 0098, § 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.

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

The Circuit Court concluded that because AMR had extensive control over its NEMT service providers that public policy dictates that "Access2Care [could not] walk away from its

responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another." (App. 0031). The South Carolina Supreme Court in Simmons opined that:

Commentators have debated whether compensation is a goal of **tort** law, or simply a means by which other goals are accomplished. *See* Hubbard & Felix at 1-26 (discussing **policies** of **tort** law). Regardless, Tuomey Regional's focus on the availability of compensation misses another important aspect of **tort** law: the desire to give parties with crucial duties a keen incentive to do everything possible to avoid violating those duties. 'Immunity fosters neglect and irresponsibility, while liability encourages the exercise of due care.'

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

The Circuit Court correctly found that AMR 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." (App. 0020-0034, 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).

AMR failed to exercise due care when its subcontractor caused the accident. Here, the Circuit Court reasoned that public policy should be applied to find a nondelegable duty, because under the NEMT Contract, AMR was responsible for operating a call center; vetting and scheduling NEMT trip requests; hiring NEMT providers, training them, and certifying their compliance with federal and state laws; monitoring NEMT service providers; providing an education program for members; and providing high quality, courteous, and safe transportation

service to Medicaid members. These responsibilities ranged from ensuring drivers wore a nametag to verifying the financial stability of all contracted transportation providers. (App. 0128-0134, 0118-0127, §3.8.2, Driver Requirements, § 3.7, Transportation Provider Network).

Nevertheless, the Court of Appeals marginalized these control measures and responsibilities because AMR did not actually provide the service. The Court of Appeals held “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.” Garv v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct.App 2016). The Court of Appeal reasoned:

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).

Id.

The Supreme Court in Simmons rejected a similar attempt to marginalize a tortfeasor’s culpability regarding its responsibility for a service by simply arguing that it did not actually provide the service. The Simmons Court held:

We reject Tuomey Regional's insistence that "hospitals may not practice medicine" - a point it has asserted throughout this litigation. It is true that a hospital may not decide that Patient X is to receive a dose of a particular medication twice a day; nor may a hospital order that Patient Y undergo specified tests at 2 p.m. on a particular day. Only licensed physicians may make such decisions. But the "practice of medicine" encompasses a much broader range of actions than those specific directives. It includes innumerable decisions regarding the type and quality of medical equipment, staffing levels, and the renovation or addition of facilities. Hospital and emergency room administrators make countless decisions that intimately affect the "practice of medicine" all day, every day. The contract between Tuomey Regional and Coastal in the present cases illustrates how the hospital, in ways both obvious and subtle, affects and controls the practice of medicine.

Simmons v. Tuomey Reg’l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000).

The Circuit Court found that AMR's "broker" service encompassed a much broader range of activities than simply recruiting qualified transportation providers. The Circuit Court concluded that because AMR had extensive control over its NEMT service providers that public policy dictates that "Access2Care [could not] walk away from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another." (App. 0031). Equally, this Court should find that public policy requires AMR to be responsible for injuries suffered by Medicaid members during the delivery of nonemergency medical transportation services. South Carolina courts have held that:

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).

The Circuit Court articulated clear reasons for finding that public policy dictates AMR had a non-delegable duty to provide safe transportation to Mr. Gary; and therefore, this Court should reverse the Court of Appeals and affirm the Circuit Court's Order.

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

The Court of Appeals disregarded the Circuit Court's findings of fact and conclusions of

law regarding AMR'S duties and responsibilities under its NEMT Contract when it failed to consider the totality of AMR's obligations under the Contract. 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". Garv v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct.App.2016); (see also App. 0107 § 3.3.5.2 Fulfillment of All Trip Request). The Court of Appeals concluded that this interpretation limits AMR duties under the NEMT Contract and ultimately extinguished any liability to the Petitioner. A careful reading of this section would show that it imposes a responsibility on AMR to do three things: 1) fulfill all verified trips, 2) ensure all trips are completed safely and on-time, and 3) verifying the same through tracking tools. The Court of Appeals misconstrued § 3.3.5.2 *Fulfillment of All Trip Request* by limiting AMR's role and responsibility to simply verify that the work was done, but divorcing it from any responsibility for the work itself.

On the other hand, the Circuit Court focused on several provisions of the NEMT Contract that when read together, squarely placed a duty on AMR to ensure and assure safe transportation services to Mr. Gary. It is undisputed that the NEMT Contract provided for the following duties and responsibilities, to include but not limited to:

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 services agreements:

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

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

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

(App. 0100, § 2.4.8 General Broker Requirements).

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

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

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

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

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

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

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

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

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

The Court of Appeals disregarded the plain meaning of provisions like:

- The broker is responsible for all services provided by transportation providers;
- Broker must monitor the transportation providers to ensure . . . delivery of courteous, safe, timely and efficient transportation services; or

- The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time.

The terms and provisions of the NEMT Contract are clear and unambiguous; and therefore, the Circuit Court properly construed them to create a nondelegable duty on AMR.

“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 Circuit 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.

(App. 20-34, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.12).

Despite the Circuit Court’s construction of the NEMT Contract, the Court of Appeals

concluded “[w]e 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.” The Court of Appeals reliance on its perception of the *nature* of AMR’s duties pales in comparison to the actual words of the NEMT Contract. Therefore, the Court of Appeals’ alternative interpretation of the *nature* of the NEMT Contract should be rejected given the rules of contract construction.

AMR 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. v. Globe Communs., Inc., 363 S.C. 385, 611 S.E.2d 235 (2005). The exemption to the general rule applies here, because the NEMT Contract clearly mandates specific duties and responsibilities for AMR, notwithstanding its relationship with Low Country Medical Transport. “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). There is simply no ambiguity in the terms or intent of the NEMT Contract; and therefore, its words should be given their plain meaning.

The core of AMR’s position, which was adopted by the Court of Appeals in this case is its construction of the word “broker.” AMR 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’).” (App. 0347, Appellant’s Br. p.14). AMR’s attempt to diminish its role as “a broker who merely schedules, but does not provide, transportation” cannot be reconciled with its overall NEMT duties. AMR was responsible for administering two-thirds of the State’s Medicaid NEMT Program with a potential value in excess of 160 million dollars. AMR was responsible for operating a call center; vetting and scheduling NEMT trip requests; hiring NEMT providers, training them, and certifying their compliance with federal and state laws; monitoring NEMT service providers; providing an education program for members; and providing high quality, courteous, and safe transportation service to Medicaid members. These responsibilities ranged from ensuring drivers wore a nametag to verifying the financial stability of all contracted transportation providers. (App. 0128-0134, 0118-0127, § 3.8.2, Driver Requirements, § 3.7, Transportation Provider Network). Mr. Gary called AMR when he needed NEMT services, and if he had a problem with the service, it was AMR’s duty and responsibility under the NEMT Contract to fix it, no one else. However, according to the AMR Court, if something more serious occurs like injuries and fatalities, AMR has no duty or responsibility to fix that. That conclusion leads to an absurd result.

When AMR accepted the NEMT Contract with no modifications to the duties and responsibilities sections of the Contract, it assumed full liability for Low Country Medical’s negligent acts to Mr. Gary. The Circuit Court found that AMR had a duty to ensure Mr. Gary’s safety and that it maintained extensive control over its NEMT service providers. Nevertheless, the Court of Appeals found that “[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.” Garv v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct.App.2016).

While South Carolina courts have not specifically addressed the application of nondelegable duty doctrine to non-emergency medical transportation service providers before the case at bar, South Carolina courts have applied the doctrine in other comparable instances. For example:

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).

In addition, the Osborne Court, reviewed several situations where South Carolina Courts have found a nondelegable duty existed justifying the application of the doctrine. For instance:

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

The Osborne Court concluded that “[t]he 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.” Id. Furthermore, this Court in Simmons extended the doctrine to hospital emergency rooms. The Simmons Court held, “[i]t

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).

AMR agreed in its NEMT Contract to be entrusted with important duties to Medicaid members through extensive control over its NEMT service providers. It is clear, AMR’s NEMT Contract is a vitally important to South Carolina’s Medicaid community. Public policy and NEMT Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport services to Medicaid members. Accordingly, AMR should not be able to walk away from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another.

CONCLUSION

This Court should find that NEMT Contract negotiated by AMR imposed a non-delegable duty on it to provide safe NEMT services to Medicaid members. Therefore, this Court should reject AMR’s attempt to escape liability 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 reverse the Court of Appeals and find that public policy dictates that AMR should bear the responsibility of its subcontractor’s tortious acts.

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph L. Dawson III". The signature is written in a cursive style with a horizontal line underneath it.

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September 1, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Appellate Case No.: 2016-001937

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S.C. SUPREME COURT

Charles Gary, Petitioner,

v.

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

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

PROOF OF SERVICE

I certify that I have served the **Petitioner's Brief** upon all counsel of record by depositing
a copy of the same in the United States Mail, postage prepaid, on September 1, 2017, addressed
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