THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 20 2017

S.C. 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,

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 RESPONDENT

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.
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29402
(843) 577-4435

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

Table of Contents

Table of Authorities ii

Statement of Issues 1

Statement of the Case 2

Statement of the Facts 4

Argument 12

I. The Court of Appeals correctly held that the circuit court misinterpreted the nature of AMR's duties and responsibilities under the NEMT Contract, and the Court of Appeals correctly concluded that, when the NEMT Contract was viewed in its entirety, it did not impose upon AMR and absolute, nondelegable duty to provide completely safe NEMT trips 12

A. The Court of Appeals correctly held that the circuit court misconstrued the language of the contract as imposing a duty on AMR that equated to strict liability for any and all accidents 14

B. The Court of Appeals correctly held that AMR did not owe an absolute nondelegable duty to provide safe NEMT transportation that would render it liable for the negligent actions of a subcontractor transportation provider 25

II. The Court of Appeals correctly held that public policy considerations *do not support* the imposition of a nondelegable duty 30

III. The reversal of the grant of summary judgment should be affirmed on the alternative sustaining ground that the circuit court's grant of summary judgment was erroneous because it was premature and because there were genuine material issues of disputed fact 33

Conclusion 39

TABLE OF AUTHORITIES

Page(s)

Cases

Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) 34, 35, 36

Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001) 34

Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962) 22

Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) 34

Carson v. Vance, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997) 26, 27

City of Columbia v. Town of Irmo, 316 S.C. 193, 447 S.E.2d 855 (1994) 39

Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) 34

Crabtree v. Measday, 508 P.2d 1317 (N.M. App. 1973) 38

Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003) 34

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 37

Deyo v. Kilbourne, 84 Cal. App. 3d 771 (Cal. App. 1978) 38

Dolan v. Camden, 233 S.C. 1, 103 S.E.2d 328 (1958) 27

Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 244 S.E.2d 509 (1978) 25

Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993) 26

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 21, 22

Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 713 S.E.2d 318 (Ct. App. 2011) 21

Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975) 22

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) 4, 12, 14, 30, 33

Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008) 34

Jenkins v. E. L. Long Motor Lines, Inc., 233 S.C. 87, 103 S.E.2d 523 (1958) 27

Jones ex. rel. Jones v. Enter. Leasing Co.-S.E., 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009) 34

Koon v. Fares, 379 S.C. 150, 666 S.E.2d 230 (2008) 22

Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002) 34

Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) 34

Lee v. Kelley, 298 S.C. 155, 378 S.E.2d 616 (Ct. App. 1989) 34

Nuckols v. Great Atl. & Pac. Tea Co., 192 S.C. 156, 5 S.E.2d 862 (1939) 26

Prisock v. Int. Agric. Corp., 147 S.C. 58, 144 S.E. 579 (1928) 28

Rock Hill Tel. Co., Inc. v. Globe Comm., Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) 25, 26, 29

Rogers v. Norfolk S. Corp., 356 S.C. 85, 588 S.E.2d 87 (2003) 28

Simmons v. Tuomey Reg'l Med. Ctr. (Simmons II), 341 S.C. 32, 533 S.E.2d 312 (2000) 26, 27, 28, 30, 31

Smith-Cooper v. Cooper, 344 S.C. 289, 543 S.E.2d 271 22

Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000) 17

Van Dyke v. Bixby, 448 N.E.2d 353 (Mass. 1983) 38

Whisenhunt v. Atl. Coast Line. R.R. Co., 195 S.C. 213, 10 S.E.2d 305 (1940) 26

Wright v. Wright, 50 S.E.2d 540 (N.C. 1948) 26

Rules

Rule 33(d), SCRCP 37

Rule 56, SCRCP 37

Rule 56(e), SCRCP 37

Rule 56(f), SCRCP 3, 33

Rule 801(d)(2), SCRE 37, 38

Statutes

S.C. Code Ann. § 15-75-20 35

S.C. Code Ann. § 38–53–10 to 320 (Supp. 1996) 27

Other Authorities

42 C.F.R. § 440.170(a)(4) 19

42 C.F.R. § 440.170(a)(4)(ii)(B) 6

Angel Gary v. Low Country Medical Transport, Inc., et al., Order of Judge Buckner, Civil Action No. 2012-CP-25-00402, Fourteenth Judicial Circuit (filed Jan. 29, 2016) 3, 35

Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431, 453 (1996) 30

Statement of Issues

1. Did the Court of Appeals correctly hold that the circuit court misinterpreted the nature of American Medical Response's duties and responsibilities under the non-emergency medical transportation Contract, and did the Court of Appeals correctly conclude that, when the Contract was viewed in its entirety, it did not impose upon American Medical Response an absolute, nondelegeable duty to provide completely safe non-emergency medical transportation trips?

2. 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?

3. Should the Court of Appeals' reversal of the grant of summary judgment on the negligence and loss of consortium claims be affirmed based on the additional sustaining ground that the grant of summary judgment was premature where the parties had not yet completed material discovery and American Medical Response was, therefore, denied the opportunity to present a full and complete record to the court?

Statement of the Case

This appeal involves a tort action arising from an automobile accident where a vehicle engaged in non-emergency transportation of a Medicaid member to a scheduled medical appointment left the road and struck a tree. (App. 39-40; Compl. ¶¶ 14-15). Petitioner Charles Gary was the Medicaid member being transported and Blondell Gary was also a passenger in the vehicle. (*Id.*). Petitioner's Complaint was filed on October 16, 2012. (App. 35; Compl.). Respondent, American Medical Response, Inc. ("AMR") was the broker that processed the scheduling of Petitioner's request for non-emergency medical transportation ("NEMT"), and was named as a defendant in this action. (App. 37; Compl. ¶ 6). The other defendants were: Low Country Medical Transport, Inc. ("Low Country"), which was the medical transportation company that actually provided the NEMT service; Hattie Askew, Will Outlaw and Deboria Outlaw, who were owners or officers of Low Country; and Eugene Kirkland, who was the driver of the vehicle and was employed by Low Country. (App. 36-37; Compl. ¶¶ 3-5).

The Complaint asserted claims for negligence, loss of consortium, and negligent infliction of emotional distress against all of the defendants. (App. 40-43; Compl. ¶¶ 17-33). AMR filed an Answer on November 21, 2012, and an Amended Answer on December 12, 2012. (App. 45, 51; Ans. & Am. Ans.).

On February 26, 2013, despite only very limited discovery having occurred, Petitioner filed a motion for summary judgment as to all defendants on all claims. (App. 71; Mot. for Sum. Judg.). A hearing on that motion was held on May 14, 2013[1], and at that hearing AMR and Petitioner both filed memoranda on the summary judgment issue. (App. 75, 189; Pl.'s Memo. in Supp.; AMR's Memo. in Opp.). The circuit court requested additional briefing, and

[1] This hearing was not recorded by a court reporter and there is no transcript of this proceeding.

supplemental memoranda were filed by AMR and Petitioner on May 30, 2013, and June 6, 2013, respectively. (App. 236, 255; AMR's Supp. Memo. in Opp.; Pl.'s Supp. Memo in Supp.). Additionally, on July 10, 2013, AMR's counsel filed a Rule 56(f) Affidavit asserting that summary judgment at this early stage would be premature because material discovery had not yet been conducted. (App. 266; Cooper Affidavit).

On July 24, 2013, the circuit court requested that Petitioner's counsel draft a proposed order granting summary judgment as to all claims. (App. 279; E-mail from Judge Dukes to Counsel). A proposed order was submitted by Petitioner's counsel on July 26, 2013. (App. 280; Proposed Order submitted 7/26/13). On August 9, 2013, AMR filed a response objecting to the proposed order on multiple grounds and further supplementing its prior opposition to the summary judgment motion. (App. 296; AMR's Objections to the Proposed Order filed 8/9/13).

On August 20, 2013, the circuit court entered an Order ("the August 20 Order") granting Petitioner's motion for summary judgment as to all claims and all defendants. (App. 4; Order entered 8/20/13). AMR filed a motion to alter or amend the August 20 Order and a hearing on this motion was held on November 12, 2013. (App. 309, 57; AMR's Motion to Alter or Amend filed 9/3/13; Transcript from 11/12/13 hearing). On December 3, 2013, the circuit court entered a new Order ("the December 3 Order") modifying the August 20 Order. (App. 20; Order entered 12/3/13). The December 3 Order granted Petitioner's summary judgment motion as to only the negligence and loss of consortium claims[2], and denied it as to the negligent infliction of

[2] The loss of consortium claim was based on the death of Blondell Gary, who Petitioner alleged was his wife at the time of her death. On January 29, 2016, subsequent to the appeal in this case being fully briefed and argued, it was determined by the circuit court in the related wrongful death action brought in Hampton County on behalf of Blondell Gary's estate that Petitioner was still married to another person at the time that he attempted to marry Blondell Gary, and, therefore, "the purported marriage of Petitioner and Blondell Gary was void from its inception." *See Angel Gary v. Low Country Medical Transport, Inc., et al.*, Order of Judge Buckner, Civil

emotional distress claim. AMR timely filed and served its Notice of Appeal on December 13, 2013.

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 reversed the circuit court's partial grant of summary judgment. Petitioner filed a Petition for Rehearing with the Court of Appeals on June 15, 2016. (App. 454). That petition was denied on August 17, 2016. (App. 473). Petitioner filed for a writ of certiorari in this Court on September 15, 2016. This Court granted a writ of certiorari on August 4, 2017.

Statement of the Facts

This appeal involves AMR's role as a broker of transportation services under the South Carolina Non-Emergency Medical Transportation ("NEMT") Program. The NEMT Program provides non-emergency transportation services to Medicaid members who need access to medical care or services. (App. 97; RFP Scope, § 1.1). The NEMT Program covers a wide array of transportation options for qualifying Medicaid members, including gas reimbursement for private vehicles, City or County public transportation, intrastate public conveyance (bus, train, aircraft), wheelchair transportation, stretcher transportation, ambulatory transportation, and Basic Life Support ambulatory transportation. (App. 110; RFP § 3.6.2).

Action No. 2012-CP-25-00402, Fourteenth Judicial Circuit (filed Jan. 29, 2016). The order by the Hampton County circuit court is currently on appeal before the South Carolina Court of Appeals (Appellate Case No. 2016-000222). AMR, however, never had the opportunity in discovery in this matter to learn of the invalidity of Petitioner's alleged marriage. In its Answer and Amended Answer to Petitioner's Complaint, AMR denied any allegation that included a statement as to the marital status of Petitioner and Blondell Gary. (App. 45, 51). At the time of the circuit court's consideration of Petitioner's summary judgment motion, only minimal discovery had been completed and AMR was without the opportunity to conduct material discovery, including a deposition of Petitioner, which had been noticed by AMR but canceled by Petitioner's counsel. (App. 266-269).

On September 9, 2010, the South Carolina Department of Health and Human Services ("SCDHHS") issued a Request for Proposal ("RFP") regarding the provision of brokerage services relating to the NEMT Program. (App. 96; RFP). "Brokerage services" under the NEMT Program were described as "operating a call center and contracting with transportation providers to fulfill the services." (App. 97; RFP § 1.2). AMR responded to the RFP and on May 25, 2011, was awarded a five year contract for Regions II and III of South Carolina. (App. 144; Notice Regarding Award).

South Carolina's NEMT Program has a large scale and involves a high volume of non-emergency transportation requests. For example, during fiscal year 2008, brokers under the NEMT Program scheduled approximately 1,707,311 one-way trips throughout the state. (App. 98; RFP § 1.4). In just Regions II and III of South Carolina, 539,517 NEMT trips occurred during the six-month period from July 2009 to December 2009. (App. 146; AMR Change Order Request dated 11/22/11). While the total potential value of AMR's NEMT contract was stated as $162,077,477.00, this value should be considered in the context of the number of NEMT trips AMR was to contract to fulfill. (App. 144). When the number of trips that actually occurred in Regions II and III during the six-month period of July 2009 through December 2009 is extrapolated to the contract's full five year term, the number of NEMT trips would be 5,395,170. Thus, the contract's value would amount to only approximately $30 per one-way trip.

It is undisputed that the RFP itself forms the contract that existed between the SCDHHS and AMR regarding the provision of brokerage services relating to the NEMT Program. (App. 58, 19; Transcript of 11/12/13 Hearing at p. 7; Order filed 12/3/13 at p. 3 n.1). Under this contract, it is clear that AMR was to serve as the "broker," between SCDHHS and the entities that actually provided the NEMT services (the "transportation providers"). (App. 97; RFP §§ 1.1, 1.2).

The RFP distinguishes between the "broker," who is only responsible for providing "brokerage services," and the "transportation providers" who are responsible for providing "transportation services." (App. 96; RFP). Under the clear terms of the RFP, a "broker" such as AMR, is actually prohibited from providing the "transportation services," whether through itself or through any related entity. Specifically, the RFP provides that "[t]he Broker must not provide NEMT services or make a referral to or subcontract with a transportation provider if the Broker has a financial relationship with the provider or has an immediate family member who has a direct or indirect financial relationship with the provider." (App. 100; RFP at § 2.4.14). Section 3.3.6 of the RFP provides that the only time the broker may operate vehicles to provide transportation services is in the "very limited circumstances" set forth in 42 C.F.R. § 440.170(a)(4)(ii)(B).[3] (App. 105; RFP § 3.3.6.).

Section 3.0 of the RFP sets forth the following fifteen "Core Services" AMR, as broker, "must perform throughout the life of the contract":

1) Maintain adequate staff and facilities.
2) Develop and maintain comprehensive policies and procedures.
3) Process transportation requests from members, facilities, and other individuals requesting services on behalf of the member.
4) Verify member eligibility for Medicaid.
5) Operate a telephone call center and develop a call center operations manual.
6) Establish an orientation and training program for transportation broker employees.
7) Recruit and maintain an adequate transportation provider network.
8) Establish an orientation and training program for transportation providers.
9) Inform and educate members and facility providers about the NEMT Program and process.

[3] 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.

10) Develop and implement a complaint tracking and resolution plan.
11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
12) Provide administrative management oversight.
13) Submit management and performance reports.
14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
15) Protect recipient confidentiality.

(App. 100-101; RFP § 3.0). Section 3.3 of the RFP sets forth various "Operational Requirements" of the contract. These operational requirements include the following:

> **3.3.5 Fulfillment of All Trip Requests:**
>
> > **3.3.5.1** *The Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time.* SCDHHSW expects the Broker to provide trip coverage twenty-four (24) hours a day, seven (7) days a week.
> >
> > **3.3.5.2** Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine to determine the real time location of members …
> >
> > ***
>
> **3.3.7 Insurance:** *In addition to the strict quality assurance standards that the transportation providers must meet, the Broker must ensure transportation providers have insurance coverage.* State law and regulations specify minimum insurance requirements for entities involved in the provision of Medicaid Transportation Services. The Broker is responsible for ensuring required and adequate coverage is obtained and maintained during term of contract.
>
> **3.3.8 Accidents, Injuries, and Incidents:** *The Broker must promptly report to SCDHHS accidents, injuries, and incidents that have occurred in conjunction with a scheduled trip if a Member was present in the vehicle.* Accidents, injuries and incidents must be reported to SCDHHS as follows:
>
> > **3.3.8.1** Accident/Incident with Injury: Notification within 1 hour
> >
> > **3.3.8.2** Accident/Incident without Injury: Notification within 6 hours
>
> **3.3.9 Trip Recovery:** The Broker must ensure that each provider is responsive to all vehicle breakdowns, problems or delays in delivering service. The Broker

> must ensure that the provider has adequate backup vehicles to recover the trips, and ensure that members are not late for their appointments and do not spend excessive time on the vehicles.
>
> **3.3.10 Notification by Transportation Providers:** The Broker(s) must ensure that the transportation provider immediately informs Broker of any breakdown, accident or incident as well as any other problems that might cause a delay of more than ten (10) minutes in the trip ....

(App. 104-105; RFP § 3.3) (emphasis in italics added). Thus, while the contract contains language stating that the broker is responsible for "ensuring all trips are completed safely and on time," it also contemplates that accidents and delays will occur and sets forth actions that must be taken in such events. (App. 104-105; RFP §§ 3.3.5, 3.3.8, 3.3.9, 3.3.10). Additionally, the contract requires the broker to ensure that the transportation providers maintain at least the required minimum insurance, and recognizes that the transportation providers must meet quality assurance standards. (App. 105; RFP § 3.3.7).

The operational requirements set forth in the contract between AMR and SCDHHS also addressed the "monitoring" of the transportation providers and the establishment of a detailed monitoring plan. Specifically, the contract provided:

> **3.3.15 Monitoring Plan:** The Offeror must include a Monitoring Plan in the initial proposal. The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. The monitoring Plan should address how the Broker will collect and verify the accuracy of performance data obtained from the NEMT providers.
>
> Monitoring activities must include, but are not limited to:
>
> - On-street observations
> - Accident/incident reporting
> - Statistical reporting of trips
> - On Time Performance Measures

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

(App. 107; RFP § 3.3.15). This provision of the contract required AMR to monitor the transportation providers with whom AMR subcontracted to confirm the transportation providers provided quality, safe services. If the information and the reports indicated otherwise, AMR was then required to take certain actions as set forth in Section 3.3.15.1, which reads:

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

(App. 107-108; RFP § 3.3.15.1).

Section 3.12 of the contract, titled "Quality Assurance," addressed "corrective action plans." This section provided that, where corrective action was necessary, amongst other things, "[t]he Broker must provide assurance that transportation providers meet health and safety standards for vehicle maintenance, operation, and inspection; driver qualifications and training; member problem and complaint resolution; and the delivery of courteous, safe, and timely transportation services." (App. 139; RFP § 3.12.1.1).

On January 31, 2012, Petitioner and Blondell Gary, while returning from Petitioner's scheduled medical appointment, were being transported under the NEMT Program. (App. 94; Aff. of Charles Gary ¶ 5). Blondell Gary had scheduled the trip by calling AMR. (App. 94; Id. ¶ 6). Prior to reaching Petitioner's home, for reasons which have yet to be determined, the vehicle left the roadway and struck a tree. (App. 40; Compl. ¶ 15). As a result of this accident, Petitioner suffered injuries and Blondell Gary died. (App. 40; *Id.*).

The NEMT service was provided by Low Country. (App. 94; Aff. of Charles Gary ¶ 5). Low Country was a "transportation provider" who was a subcontractor under AMR's contract with SCHHS. (App. 247, 60; Aff. of G.R.M. McCormick at ¶¶ 9-10; Tr. of 11/12/13 Hearing at p. 15). The ambulance was driven by Eugene Kirkland ("Kirkland"), who had been an employee of Low Country since June 2008. (App. 155; Aff. of Hattie Askew ¶ 12). During his three-an-a-half years of employment with Low Country, Kirkland safely transported approximately 780 patients per year, and had never previously been involved in an automobile accident or any other negative employment incident. (App. 156; *Id.* ¶¶ 13-15).

In granting Petitioner's motion for summary judgment as to the negligence and loss of consortium claims, the circuit court held that "[t]he Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina." (App. 26 ; Order entered 12/3/13 at p. 7). As to Kirkland, the circuit court held that, as the driver of the ambulance, he "had a clear legal duty to operate the ambulance in a safe manner and avoid dangers." (App. 26; *Id.* at p. 7). As to Low Country, the circuit court held that it owed "a duty of care to transport [Petitioner] safely, while he was in its custody and control." (App. 26-27; *Id.* at pp. 7-8). As to AMR, the circuit court held that it owed Petitioner a duty "arising out of its Contract and operating as broker of NEMT services." (App. 27; *Id.* at p.

8). In reaching this conclusion as to AMR, the circuit court placed special emphasis on sections 3.3.5 and 3.3.15 of the contract. (App. 27; *Id.* at p. 8). Based on this language and the use of the words "safely" and "safe," the circuit court concluded that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (App. 28; *Id.* at p. 9). The circuit court then concluded that all of the defendants breached their respective duties "when Low Country Medical's ambulance ran off the road." (App. 28; *Id.* at p. 9).

Significantly, aside from the reference to ambulance trips being "completed safely" Petitioner offered no evidence, and the circuit court made no findings, as to whether AMR failed to perform any of its specific duties set forth in the contract with regard to its "Core Services, "Operational Requirements," "Monitoring Activities," "Driver and Vehicle Requirements," "Passenger Safety Requirements," or "Corrective Action Plans." Rather, the circuit court concluded that because the "ambulance ran off the road" all of the defendants, including AMR, breached their respective duties of care. (App. 28; *Id.* at p. 9).

After finding that AMR's contract with SCDHHS created a duty to provide completely "safe" transportation, the circuit court then held that AMR could not avoid liability for the breach of this duty by a subcontractor. (App. 29-31; *Id.* at pp. 10-12). Specifically, the circuit court held that "AMR had an ***absolute duty*** under its contract with the Health Department to provide safe transportation to [Petitioner]" and that "[t]he Health Department's NEMT Contract clearly indicates that public policy and its Contract impose [sic] a ***non-delegable duty*** on the NEMT Program administrators to provide competent and safe non-emergency medical transportation services to Medicaid members…." (App. 31 ; *Id.* at 12) (emphasis added). After holding that an absolute nondelegable duty was owed by AMR, the circuit court then held AMR "vicariously" liable for the breach of this duty by the independent contractor. (App. 29-31; *Id.* at 10-12). This appeal followed.

The circuit court's grant of partial summary judgment was then reversed by the Court of Appeals in Op. No. 5406. (App. 435). In reversing the circuit court, the Court of Appeals 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 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 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).

Argument

I. The Court of Appeals correctly held that the circuit court misinterpreted the nature of AMR's duties and responsibilities under the NEMT Contract, and the Court of Appeals correctly concluded that, when the NEMT Contract was viewed in its entirety, it did not impose upon AMR and absolute, nondelegable duty to provide completely safe NEMT trips.

The Court of Appeals properly reversed the circuit court's incorrect 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 Petitioner partial summary judgment, the circuit court first held that AMR owed Petitioner a duty of care based upon "its contract with the Health Department" which required that "all trips are completed safely and on-time." (App. 26-27; Order entered 12/3/13 at pp. 7-8). The effect of the circuit court's holding was to impose on AMR a duty to guarantee absolute safety on the ***millions*** of NEMT trips it was to administer.

The circuit court then concluded that AMR breached its duty of care to Petitioner "when Low Country Medical's ambulance ran off the road." (App. 28; *Id.* at p.9). This equates to the conclusion that because the accident occurred, AMR breached the duty imposed by its contract. Aside from the fact that an accident occurred, the circuit court made no other finding that AMR had breached any of the requirements of its contract with SCDHHS. Rather, the circuit court concluded that Kirkland, the driver of the ambulance, was negligent as a matter of law, and that AMR was strictly and absolutely liable for that negligence. (App. 29; *Id.* at p. 10).

Kirkland 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 circuit court concluded that AMR's duty under its contract with SCDHHS to provide "safe" transportation was an absolute, nondelegable duty. (App. 31; *Id.* at p. 12). Thus, the circuit 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 Court of Appeals correctly held that the circuit 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 facilitate the provision of 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.

A. The Court of Appeals correctly held that the circuit court misconstrued the language of the contract as imposing a duty on AMR that equated to strict liability for any and all accidents.

The Court of Appeals correctly concluded 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). Petitioner contends that the Court of Appeals improperly "isolated on § 3.3.5.2" in overruling the circuit court. (Petitioner's Brief at p. 13). 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).

In its December 3 Order, the circuit court incorrectly concluded that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (App. 28; Order entered 12/3/13 at p. 9). The circuit court then concluded that AMR breached this duty of care "when Low Country Medical's ambulance ran off the road." (App. 28; *Id.*). Stated differently, the circuit court concluded that, ***because an accident occurred—without any regard for the cause of the accident or any action or omission by AMR—AMR breached its contractual duty.*** The imposition of such expansive liability is not supported by either AMR's contract with SCDHHS or by South Carolina law, and the Court of Appeals correctly recognized the circuit court's error.

AMR's contract with SCDHHS creates a relationship where AMR serves only as a "broker" between SCDHHS and the entities that actually provide the NEMT services (the "transportation providers"). The contract sets forth AMR's obligations as a "broker" providing "brokerage services." (App. 97; RFP at § 1.1). These obligations are separate and apart from the obligations of the ultimate "transportation providers" who provide "transportation services." The distinction between the broker and the ultimate transportation provider is evidenced by, among other things, the contract's provision that "only in very limited circumstances" may a broker also act as a transportation provider. (App. 105; RFP § 3.3.6). Thus, AMR never had a duty to provide "transportation services" under the Contract. Rather, AMR was specifically prohibited from providing "transportation services" itself. AMR's duty was to arrange for a "transportation provider" (other than itself) to provide the "transportation services." The duty to provide the "transportation services" was, therefore, never delegated by AMR because this was not a service AMR was even permitted to perform.

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 is 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. Further, nothing within these "core services" suggests an intent to impose upon AMR strict liability for anything that could go wrong during the transportation process or the assumption by AMR of a duty guaranteeing safety on all NEMT trips.

In imposing on AMR "an absolute duty under its contract with the Health Department to provide 'safe' transportation," the circuit court relied upon two references in the contract to NEMT trips being conducted "safely" found in sections 3.3.5 and 3.3.15. (App. 27-28, 31; Order entered 12/3/13 at pp. 8-9, 12). Specifically, section 3.3.5, which addresses "Fulfillment of All Trip Requests" provides that "[t]he Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on time." (App. 104; RFP § 3.3.5). Similarly, section 3.3.15, which addresses the broker's monitoring of transportation providers, includes a reference to "delivery of courteous, safe, timely and efficient transportation services." (App. 107; RFP § 3.3.15). The circuit court erroneously concluded that, based on this isolated language, as a matter of law, AMR had an "absolute duty" to provide transportation services that are completely "safe." (App. 31; Order entered 12/3/12 at p. 12).

As the Court of Appeals correctly concluded, the references to safety contained in sections 3.3.5 and 3.3.15 do not create an absolute duty to provide completely safe transportation. First, other provisions in the contract specifically shows an expectation that accidents and injuries in fact will happen on occasion to those being transported. In other words, there is no way to "ensure" safety while transporting someone in a vehicle. Second, it would be an absurd result were the contract to be construed to mean AMR would be liable for injuries and damages to someone being transported by a "transportation provider" under a scenario where the accident was caused by some third party, an act of God, or some other extraneous cause. Yet, the circuit court's ruling would extend that far. The Court of Appeals correctly reversed.

Both of the references to "safety" in the contract relied upon by the circuit court are found in section 3.3, which sets forth the "Operational Requirements." This same section of the contract contains additional subsections which illustrate ***there is no*** absolute guarantee of safety by AMR. Specifically, section 3.3.7 requires that AMR ensure that the "transportation providers" (as opposed to AMR) obtain and maintain adequate insurance coverage. Additionally, section 3.3.10 requires that AMR ensure that "transportation providers" immediately notify AMR of any accidents, injuries or incidents, and section 3.3.8 requires AMR to promptly report such accidents, injuries or incidents to SCDHHS. The fact that the contract requires AMR to ensure that the "transportation providers" have insurance coverage, and that all accidents and injuries be reported to AMR, acknowledges the fact that accidents are inevitable and are clearly contemplated by the parties to the contract.[4] Thus, the references to "safety" are not a guarantee that accidents will never happen and that all trips will be safe, nor are they an imposition of absolute liability on AMR for accidents that do happen. Therefore, the "plain meaning" of the provisions relied upon by the circuit court cannot and does not support the circuit court's conclusions. Rather, the contract as a whole supports the point that AMR has not violated any contractual duty, or, failing that, the language of the contract relied upon by the circuit court is, at best, ambiguous. Under either scenario, summary judgment was improper. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 151-152, 533 S.E.2d 597, 601 (Ct. App. 2000) (holding that in determining the rights and obligations of parties to a contract, the contract must be read and interpreted as a whole and the court will not read a clause in isolation).

Sections 1.2 and 1.3 of the Contract, respectively titled "Intent" and "Objective" illustrate the circuit court's overreliance on the reference to safety in sections 3.3.5 and 3.3.15. Specifically, Section 1.2 provides:

> Through the [RFP,] ... [SCDHHS] will contract with up to three Brokers to administer the daily functions of the NEMT Program. Specifically, the Broker(s)' responsibilities will include, but are not limited to, operating a call center and contracting with transportation providers to fulfill the services. The Broker must establish a system that ensures high quality and appropriate medical transportation

[4] Similarly, the contracts provisions regarding delays and breakdowns illustrate that the references in sections 3.3.5 and 3.3.15 to the "timely" provision of transportation are not a guarantee that a passenger will never be late. Section 3.3.9 provides that the broker must make sure that the transportation provider has adequate backup vehicles to respond in the event of a breakdown or other delay. Under the reasoning adopted by the circuit court, AMR would owe an absolute duty to guarantee that patients were never late. That is simply not the case.

> 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. 97-98; RFP § 1.2). Similarly, section 1.3 provides that the objective of the Contract was "to procure a qualified broker to improve efficiency and effectiveness and to administer the core components of the SCDHHS' NEMT Program." (App. 98; RFP § 1.3).

AMR's specific duties with respect to accidents are set forth in section 3.3.15, which establishes a "Monitoring Plan." When read in its entirety, section 3.3.15 provides:

> **3.3.15 Monitoring Plan:** The Offeror must include a Monitoring Plan in the initial proposal. The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient transportation services. The monitoring Plan should address how the Broker will collect and verify the accuracy of performance data obtained from the NEMT providers.
>
> Monitoring activities must include, but are not limited to:
>
> - On-street observations
> - Accident/incident reporting
> - Statistical reporting of trips
> - On Time Performance Measures
> - Ride Time Performance Measures
> - A detailed analysis of complaints
> - Driver licensure, driving record, experience and training compliance
> - Compliance with vehicle requirements
> - Member safety, assistance and courtesy
> - Completion of driver logs
> - Driver communication with dispatcher
> - Routine vehicle inspections, maintenance, emergency equipment and breakdowns
> - A detailed analysis of 're-routed' trips
> - Detailed analysis of cancelled trips
> - Gas reimbursement program
> - Transportation Providers, including providers of Individual Transportation

- Volunteer Drivers
- Post trip member satisfaction questionnaires for all overnight trips

(App. 107; RFP § 3.3.15). The purpose of this section is for AMR to observe its subcontractors and monitor whether they are providing a quality, safe product. If the information and the reports indicate otherwise, then AMR is required to take corrective actions against the subcontractor as set forth in Section 3.3.15.1. Thus, AMR's responsibility to "ensure safe transportation services" was met by actions such as:

- confirming compliance with all applicable state and federal laws and regulations;

- confirming compliance with driver requirements, such as licensure, driving records, training and experience;

- confirming compliance with vehicle requirements;

- observing the transportation providers on-street;

- conducting annual inspections of all vehicles used by transportation providers;

- confirming that transportation providers comply with passenger safety requirements such as the use of seat belts, the observance of seating capacity limits; and

- taking corrective action wherever problems are found.

(App. 107, 127-128, 134; RFP §§ 3.3.15, 3.8.1, 3.8.2, 3.8.3)[5]. There was no finding that AMR failed to take any of these actions.

---

[5] AMR's obligations under the contract with SCDHHS are not limited to arranging for transportation providers to provide transportation via ambulances. Rather, the contract provides for a wide range of transportation options to be utilized by the broker, including: mileage reimbursement for private vehicles, public buses, trains, aircraft, as well as various levels of ambulance-type transportation. *See* 42 C.F.R. § 440.170(a)(4) (discussing the different types of transportation services included in a state's NEMT brokerage program) (App. 110, 112, 121; RFP §§ 3.6.2, 3.6.3.5, 3.6.3.6, 3.7.6). In fact, the contract specifically encourages the broker "to utilize public transportation whenever possible if it is cost effective as well as appropriate for the member." (App. 121; RFP § 3.7.6).

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. (Petitioner's Brief at pp. 13-15). Petitioner then improperly and summarily concludes that these provisions "create a nondelegable duty on AMR." (*Id.* at p. 15). This argument is unavailing. Contrary to Petitioner's view that these provisions support the circuit 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, monitoring, or reporting throughout the contract.

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). As previously stated, 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 contract's prohibition against AMR acting as a transportation provided establishes the importance of this distinction. (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 correct and logical interpretation of the duty imposed on AMR under its contract with SCDHHS was that AMR had a duty to take the reasonable steps outlined in that contract to provide for the reasonable safety of the NEMT services it brokered. The law in this state regarding the construction and interpretation of contracts is well settled. *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Id.*

However, where an agreement is ambiguous, the court should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract."

Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "Common sense and good faith are the leading touchstones of the inquiry." *Id.*, 265 S.C. at 362, 218 S.E.2d at 434.

With regard to ascertaining intent, the South Carolina Supreme Court has stated:

> [t]he subject matter of the contract and the purpose of its exception are material to the ascertainment of the intention of the parties and the meaning of the terms they use. In construing the contract the Court will ascertain the intention of the parties, and to that end will, as far as possible, determine the situation of the parties, as well as the purposes had in view at the time the contract was made. ***All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results***."

Bruce, 241 S.C. at 160, 127 S.E.2d at 442 (emphasis added). Additionally, "[w]here one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Id.*

The Court of Appeals correctly concluded that, when the contract is viewed in its entirety, it is clear that the parties did not intend to impose upon AMR a "duty" of absolute safety. (App. 448). Rather, as the Court of Appeals held, "[t]he Contract, through its numerous provisions regarding AMR's responsibilities and duties as a broker within the NEMT program, ***unambiguously*** imposed no such duty." (App. 450 (emphasis added)). When properly viewed in its entirety, the contract imposed only a duty that AMR comply with the specific provisions applicable to it in an effort to facilitate safe transportation. This is the only sensible and reasonable construction of the contract.

In contrast, the circuit court's interpretation of the contract as imposing an "absolute duty" to provide "safe" transportation ignored the intent evidenced by the contract as a whole and leads only to absurd consequences and unjust results. This contract involved hundreds of thousands of trips each year and potentially millions of trips over the five-year contractual term. The trips under which the circuit court imposed an absolute duty of safety include not only non-emergency ambulance trips, but also those in which a Medicaid member used private transportation and was reimbursed for mileage, trips where public transportation such as a city bus was used, and even airplane transportation. Under the circuit court's view of the contract, if AMR arranged for the travel under the NEMT program, it would be liable for any injuries a Medicaid member sustained in any of the following circumstances:

- A car accident while traveling in a privately owned vehicle whose owner was being reimbursed for mileage;
- A train derailment while traveling via train;
- A public bus accident while using public transportation; and
- An airplane crash while traveling using an airline

Imposing liability on AMR in such circumstances would be an absurd and unjust result. The absurdity of the circuit court's interpretation is not lessened where the injury occurs while being transported in an ambulance. For example, under the circuit court's interpretation, another driver could intentionally run his car into an ambulance on an NEMT trip, and AMR would be absolutely and strictly liable for any ensuing injuries and damages to those transported in the ambulance. From these examples, it is apparent that the specific language of the contract relied upon by the circuit court does not in fact have the meaning ascribed to it by the circuit court.

Additionally, the overall value of the NEMT contract does nothing to elevate the nature and extent of AMR's duties thereunder. Petitioner makes repeated reference to the high value of the five-year contract. The Court of Appeals noted this as well as the fact that even the circuit court "declined to acknowledge this as relevant to this case." (App. 450). Not only is the value of the contract irrelevant, were it relevant it serves only to expose the fallacy of Petitioner's argument. The large value of the contract was necessitated by the extremely large volume of NEMT trips in Regions II and III. When that value is divided by a reasonable extrapolation of the number of possible trips[6] over the entire five year term, AMR would receive approximately $30 per trip, from which it would have to pay not only its costs, but also the actual transportation provider. This level of compensation hardly supports the position that it justifies the imposition of an absolute nondelegable duty of complete safety.

The only reasonable construction of the contract, using common sense and reading the contract as a whole, is that AMR had a duty to meet the various specific provisions applicable to it set forth throughout the contract respecting safety. And there is no evidence whatsoever, and the circuit court made no findings whatsoever, that AMR failed to meet its obligations as to any of those specific provisions.[7] Hence, the Court of Appeals properly reversed the circuit court's

[6] The actual number of NEMT trips in Regions II and III for the six month period of July 2009 to December 2009 was 539,517 trips. (App. 146). When this is extrapolated to the contract's full five year term, the number of NEMT trips over the entire five years would be 5,395,170.

[7] As the Court of Appeals noted, while AMR had "a contractual duty to ensure that the transportation provider complied with applicable laws and regulations, this duty was irrelevant to

grant of partial summary judgment based on its misinterpretation of the duties imposed on AMR under the NEMT contract, and this Court should affirm that reversal.

B. The Court of Appeals correctly held that AMR did not owe an absolute nondelegable duty to provide safe NEMT transportation that would render it liable for the negligent actions of a subcontractor transportation provider.

After finding that AMR's contract with SCDHHS created a duty to provide completely "safe" transportation, the circuit court held that AMR could not avoid liability for the breach of this duty by a subcontractor. (App. 29-31; Order filed 12/3/13 at pp. 10-12). Specifically, the circuit court held that AMR "had an absolute duty under its contract with the Health Department to provide safe transportation to Mr. Gary" 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…." (App. 31; *Id.* at 12). After finding this duty to exist, the circuit court ruled that AMR was "vicariously liable" for the actions of the independent contractor Low Country. The Court of Appeals reversed this finding and instead held that "[t]he Contract, through its numerous provisions regarding AMR's responsibilities and duties as a broker within the NEMT program, unambiguously imposed no such duty." (App. 450).

The reasoning and ruling of the Court of Appeals was correct. As a general rule, "an employer is not vicariously liable for the negligent acts of an independent contractor." *Rock Hill Tel. Co., Inc. v. Globe Comm., Inc.*, 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) (citing *Duane v. Presley Constr. Co., Inc.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978)). Hence, an application of the general rule to the fact pattern here would mean that AMR is ***not*** vicariously liable for any alleged negligence by Low Country and its employees.

---

the circuit court's ultimate resolution of the issues in this case—the court made no legal or factual finding as to whether AMR breached this duty." (App. 448).

This general rule is subject to few and narrow exceptions, one of which is the somewhat confusingly-named "nondelegable duty" doctrine.[8] *Id.* Under this doctrine, if a person owes another an "absolute duty" which he delegates to an independent contractor, he remains liable for the contractor's negligence. *Id.* ("'A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'") (quoting *Durkin v. Hansen*, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct. App. 1993)).

A duty is nondelegable only if it is premised on some "absolute duty" owed by the defendant to the plaintiff. *See id.*; *Carson v. Vance*, 326 S.C. 543, 550, 485 S.E.2d 126, 130 (Ct. App. 1997) (noting that a nondelegable duty is premised on the existence of "'special legal duties'" that one is "'bound absolutely to perform'") (quoting *Wright v. Wright*, 50 S.E.2d 540 (N.C. 1948)); *Whisenhunt v. Atl. Coast Line. R.R. Co.*, 195 S.C. 213, 225, 10 S.E.2d 305, 310 (1940) (noting that certain "duties are positive, absolute and personal. They are termed non-delegable duties, and the master cannot evade liability by delegating their performance to another."); *Nuckols v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 161-62, 5 S.E.2d 862, 864 (1939) (same).

An absolute, nondelegable duty can be imposed by statute, common law, or contract. *See Rock Hill Tel.*, 363 S.C. at 392, 611 S.E.2d at 238-39. There is no basis for finding a nondelegable duty under any of these sources here.

First, neither the circuit court nor the Petitioner point to any statute imposing an absolute

---

[8] As explained by the Supreme Court in *Simmons v. Tuomey Reg'l Med. Ctr.* (*Simmons II*), 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) "[t]he term 'nondelegable duty' is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the *liability*, not the duty, that is not delegable."

duty on AMR. Second, there is no public policy which exists warranting the imposition of an absolute duty under common law in this matter. South Carolina's courts have found a nondelegable duty in relatively few scenarios. *See Simmons II*, 341 S.C. at 42, 533 S.E.2d at 317. These duties include (1) an employer's duty to its employees to provide them with a reasonably safe work place and equipment, (2) a landlord's duty to his tenants to be sure repairs performed by a contractor are done properly, (3) a common carrier's duty to be sure a shipper properly loads and secures cargo, (4) a bail bondsman's duty to supervise the work of his employees, and (5) a municipality's duty to provide safe streets even when maintenance is undertaken by the state Highway Department. *Id.* at 43, 533 S.E.2d at 317-18. Only one of these duties is rooted in common law.[9] Indeed, that duty—an employer's duty to provide a safe workplace, even when its employees are working on a third-party's property—is in fact ***not*** an ***absolute*** duty. Rather, this duty only requires an employer to prevent foreseeable dangers in

---

[9] A landlord's duty to his tenants is imposed only by statute or contract, not by common law. *See Durkin*, 313 S.C. at 347-48, 437 S.E.2d at 552-53 (recognizing "[i]t is generally held that the owner of property . . . for whose benefit a work about such property is to be accomplished, is *not* held answerable for the negligence of an independent contractor to whom he has committed the work, to be done without his control in its progress" and noting that a landlord's nondelegable duties are assumed by contract or imposed by statute) (citations and internal quotation marks omitted) (emphasis added).

Similarly, a common carrier's duty to be sure a shipper properly loads and secures cargo on the carrier's truck is a duty imposed by statute and regulation. *See Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 96-97, 103 S.E.2d 523, 528 (1958) (quoting and relying on the Rules and Regulations of the of the South Carolina Public Service Commission to determine that "[i]t was the duty of Appellant [carrier] to make reasonable inspection to see that the load was properly distributed and if necessary secured in order to prevent unsafe shifting of the load"). Likewise, a bail bondsman's duty to supervise the work of the bounty hunters he employs is a duty grounded in statute. *See Carson v. Vance*, 326 S.C. 543, 550, 485 S.E.2d 126, 129-30 (Ct. App. 1997) (basing imposition of nondelegable duty on S.C. Code Ann. § 38–53–10 to 320 (Supp. 1996)). Lastly, a municipality's duty to provide safe streets is based on statutory, not common law. *See Dolan v. Camden*, 233 S.C. 1, 103 S.E.2d 328 (1958) (basing holding on statutes expressly stating that the Highway Department is not liable for injuries caused by its repairs to city roads and that the city *is* liable for those injuries).

providing a reasonably safe workplace. *Id.* at 42, 533 S.E.2d at 317 ("An employer has a nondelegable duty to employees to provide a reasonably safe work place."). For example, in *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003), the Supreme Court held that Norfolk Southern had a nondelegable duty to provide the plaintiff with a safe place to work. However, this duty did not equate to "an absolute responsibility" for safety. *Id.* at 94, 588 S.E.2d at 91. Rather, it was only a duty to "exercis[e] reasonable care to that end. *Id.*; *see also Prisock v. Int. Agric. Corp.*, 147 S.C. 58, 144 S.E. 579, 585 (1928) (quoting with approval the trial judge's jury instruction that "[t]he master is only required to furnish a reasonably safe place, having regard to the character of the work to be done and the dangers necessarily incident to it, and the conditions under which it must be done.").

In contrast to the sole common law nondelegable duty to provide a reasonably safe workplace free from foreseeable dangers, no South Carolina court has ever ruled that a provider of transportation—much less a broker who merely schedules, but does not provide, transportation—owes an absolute and nondelegable duty to the ultimate recipients of the services. Indeed, the South Carolina Supreme Court expressly declined to impose on hospitals an ***absolute*** nondelegable duty to render competent service to its emergency room patients. *Simmons II*, 341 S.C. at 50, 543 S.E.2d at 322 ("[W]e conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an *absolute* nondelegable duty on hospitals.") (emphasis in original). Rather, the *Simmons II* Court adopted an "ostensible agency" approach, making a hospital liable for the negligence of an independent contractor only if the patient accepted treatment from the physician in the belief the treatment was being rendered by the hospital. *Id.* If a hospital *emergency* room does not warrant the imposition of an absolute duty triggering the nondelegable duty doctrine, then the brokerage of *non-emergency* medical transportation ***cannot***, as a matter of public policy, carry with it such an absolute nondelegable duty.

In addition, neither the circuit court nor the Petitioner can point to a contract imposing on AMR an absolute duty to ensure safety during NEMT trips. Petitioner cannot rely on duties supposedly imposed by AMR's contract with SCDHHS. *See* Part I.A., *supra.* Courts considering the nondelegable duty doctrine have expressly held that language similar to the terms of AMR's contract with SCDHSS ***does not*** impose a nondelegable duty. *See Rock Hill Tel.*, 363 S.C. at 392, 611 S.E.2d at 238 (holding that a statute requiring utility "not to endanger the safety of persons" and a regulation mandating that "each utility shall exercise reasonable care to reduce the hazards to which . . . the general public may be subjected" merely "impose a duty of reasonable care, not an absolute, nondelegable duty"). Furthermore, an injured person cannot enforce the terms of a contract between the state and the defendant. In *Rock Hill,* the state issued a permit to the utility that required the utility to assume any liability the state might have to persons injured as a result of the utility's operations. *See Rock Hill Tel.*, 363 S.C. at 392, 611 S.E.2d at 238. A person was subsequently injured by the utility's subcontractor. The Supreme Court rejected the argument that the permit's language imposed on the utility a nondelegable duty to perform its work in a safe manner, noting that "the terms in the permit are enforceable only as between the DOT and the utility." *Id.* at 392, 611 S.E.2d at 238-39.

The circuit court's ruling that AMR's contract and public policy imposed an absolute nondelegable duty to provide "safe" transportation is thus without factual or legal support, and was properly reversed by the Court of Appeals. Additionally, because an absolute nondelegable duty does not exist in this instance, AMR is not liable for the alleged negligent actions of the independent contractor Low Country, or Low Country's employee Kirkland. As was noted by the Court of Appeals, "to the extent the circuit court relied upon any control AMR had, we find the amount of control AMR exercised over LowCountry pales in comparison to that which the hospital in *Simmons II* exercised over its emergency room physicians." (App. 451). Additionally, the Court of Appeals held that Petitioner "expressly abandoned any argument for imposing a nondelegable duty in this case under an apparent agency or estoppel theory. (*Id.*) Thus, the Court of Appeals properly reversed the circuit court's grant of partial summary judgment based on the inapplicability of the nondelegable duty rule and this Court should affirm that reversal.

II. **<u>The Court of Appeals correctly held that public policy considerations *do not support* the imposition of a nondelegable duty</u>**.

In Opinion No. 5406, the Court of Appeals correctly held that the nondelegable duty doctrine "'is a species of vicarious liability for the fault of another based not on the delegator's fault but <u>*on policy considerations.*</u>'" (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 <u>*primarily grounded in public policy considerations*</u>." (App. 443, 450) (citing *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. (Petitioner's Brief at pp. 8-9). Specifically, Petitioner cites to the Intent and Objective sections of the Contract and to the provisions of the contract requiring AMR 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.[10] (*Id.* at p. 9). 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 pp.9-10). 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 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

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

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, "[Petitioner] cannot point to a statute, regulation or provision of the Contract that expressly shifted liability to AMR." (*Id.*). Petitioner's Brief fails to refute 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 that decision should be affirmed by this Court.

III. **The reversal of the grant of summary judgment should be affirmed on the alternative sustaining ground that the circuit court's grant of summary judgment was erroneous because it was premature and because there were genuine material issues of disputed fact.**

In Opinion No. 5406, because it had already held that the circuit court misinterpreted the nature of the duties imposed on AMR under the contract and held that AMR did not have a nondelegable duty to provide safe transportation, the Court of Appeals chose not to address the issue of whether the circuit court's grant of summary judgment was premature because AMR had not yet had not been afforded a full and fair opportunity to conduct discovery. (App. 452). This issue provides an alternative sustaining ground for the Court of Appeals' reversal of the circuit court.

At the time that the circuit court's order granting summary judgment on the negligence and loss of consortium claim was entered, only minimal discovery had been completed. No parties or witnesses had been deposed, and only initial written discovery had been undertaken by AMR. During the pendency of the summary judgment motion, AMR asserted that summary judgment was premature. (App. 238; AMR's Supp. Memo. in Opp. at p. 3). AMR's counsel filed a Rule 56(f) Affidavit, asserting that summary judgment at this point would be premature because material discovery had not yet taken place, including the Petitioner's deposition. (App. 266; Aff. of Cooper Wilson).

Despite the limited record available and the absence of an opportunity to conduct meaningful discovery, the circuit court granted summary judgment on the negligence and loss of consortium claims over AMR's objections. Such a grant of partial summary judgment contradicts well-settled South Carolina precedent on when a court may properly grant of summary judgment. Accordingly, the premature nature of the circuit court's grant of summary judgment provides this Court with an alternative sustaining ground for the Court of Appeals' reversal.

It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial regarding disputed factual issues. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003). Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *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); *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

The recent developments in the related wrongful death action brought in Hampton

County on behalf of Blondell Gary's estate (*Angel Gary v. Low Country Medical Transport, Inc., et al.*, Civil Action No. 2012-CP-25-00402, Fourteenth Judicial Circuit), illustrate that further discovery was both necessary and warranted. One of the two claims on which summary judgment was granted was the loss of consortium claim. The loss of consortium claim was based on the death of Blondell Gary, who Petitioner alleged was his wife at the time of her death. Under S.C. Code Ann. § 15-75-20, a loss of consortium claim only arises where a plaintiff has damages "arising from an intentional or tortious violation of the right to the companionship, aid, society and services ***of his or her spouse***." (emphasis added). Thus, to establish a loss of consortium claims, Petitioner must have actually been married to Blondell Gary on the date of the accident. However, on January 29, 2016, subsequent to the appeal in this case being fully briefed and argued, it was determined by the circuit court in the related wrongful death action that Petitioner was still married to another person at the time that he attempted to marry Blondell Gary, and, therefore, "***the purported marriage to Blondell Gary was void from its inception***." *See Angel Gary v. Low Country Medical Transport, Inc., et al.*, Order of Judge Buckner, Civil Action No. 2012-CP-25-00402, Fourteenth Judicial Circuit (filed Jan. 29, 2016) (emphasis added). AMR never had the opportunity in discovery in this matter to learn of the invalidity of Petitioner's alleged marriage. Significantly, in its Answer and Amended Answer to Petitioner's Complaint, AMR denied any allegation that included a statement as to the marital status of Petitioner and Blondell Gary. (App. 45, 51).

South Carolina's courts routinely reject motions for summary judgment as improper when the non-movant has had no opportunity for full and fair participation in discovery. For example, in *Baughman*, the court reversed a grant of partial summary judgment as premature prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543. There, the trial court had granted defendant's motion for partial summary judgment because plaintiff's expert failed to establish the requisite standard of care. *Id.* at 111, 410 S.E.2d at 543. However, plaintiff argued that further discovery was necessary prior to granting partial summary judgment to defendants on the issue of liability. *Id.* at 112, 410 S.E.2d at 543. The South Carolina Supreme Court agreed, holding that the further discovery was needed to properly develop the record on this issue prior to a grant of partial summary judgment. Hence, the Supreme Court reversed based on the fact that plaintiff had not been afforded the full and fair opportunity to conduct discovery on the issue. *Id.*

This matter is analogous to *Baughman.* Here, the circuit court erroneously concluded that no factual issue existed as to the cause of the vehicle accident. Specifically, the December 3 Order states that "Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree...." (App. 24; Order entered 12/3/13 at p. 5). The December 3 Order also incorrectly states that it is "undisputed" that Kirkland "lost control" of the vehicle. ...." (App. 26; Order entered 12/3/13 at p. 7).

The basis for these incorrect factual conclusions was 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.

(App. 272-271[11]; Low County Interrogatory Response No. 9). As an initial matter, this statement by Low Country is not an admission at all. By its own terms, it is not on actual knowledge, but

[11] These pages were inadvertently placed in the Record on Appeal in reverse order and this placement was carried over to the Appendix in this matter.

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). Additionally, even if this response constituted an "admission" by Low Country, it does not definitively establishes negligence. Rather, it 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 lane 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? The circuit court incorrectly concluded that this interrogatory response, which was not premised on personal knowledge, constituted a complete admission of negligence on Low Country'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 **<u>not binding</u>** on AMR. An admission by a party applies ***only as to the admitting party***. This rule 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." S.C.R.Civ.P. 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 ***<u>against that party</u>***" 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, the few courts that have directly addressed this situation 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).

Thus, as Low Country's response is not a statement or admission attributable to AMR[12], it cannot serve as the basis for an "undisputed fact" regarding the cause of the accident. In fact, under the record that existed on this issue *as to AMR*, the cause of the accident remained undetermined. In its Amended Answer, AMR denied all allegations regarding Kirkland allegedly losing control of the vehicle or relating to the cause of the accident. (App. 52-53; AMR's Am. Ans. at ¶¶ 7, 8, 10, 12). Hence, AMR, via its pleading, did not concede anything regarding the cause of the accident, and AMR instead requires the Petitioner to meet its burden of proof in that regard.

[12] Petitioner never served AMR with any interrogatories or requests for admissions in this matter, and, therefore, there are no interrogatory responses or admissions attributable to AMR.

It was improper for the circuit court to conclude that Low Country's interrogatory response constituted an admission of negligence. This error was only compounded when the circuit court applied the alleged "admission" to AMR – a separate and distinct party. Due to this error, the circuit 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).

In addition to the fact that AMR was denied the opportunity to conduct necessary discovery, as shown in section I.A., *supra*, the circuit court also erred in finding that the contract, by its clear terms, imposed an "absolute duty" on AMR to "ensure" the safety of the Petitioner. Because the contract language relied upon by the circuit court cannot and does not have the meaning he ascribed to it, it is at best ambiguous. This too creates a genuine issue of material fact preventing a summary adjudication. Thus, this Court should affirm the Court of Appeals' reversal of the grant of summary judgment.

<u>Conclusion</u>

For the foregoing reasons, as well as those asserted in AMR's briefing to the Court of Appeals and in opposition to the Petition for a Writ of Certiorari, this Court should affirm the Court of Appeals' reversal of the circuit court's grant of partial summary judgment. Moreover, this Court should affirm the Court of Appeals' finding that AMR's contract with SCDHHS does not impose upon it an absolute nondelegable 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 circuit court for further proceedings consistent with these rulings.

Signature Page Attached

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.
J. Collier Jones
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29402
(843) 577-4435

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

Columbia, South Carolina
October 20, 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

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

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

Pleadings: AMERICAN MEDICAL RESPONSE INC. (D/B/A ACCESS2CARE)'S BRIEF OF RESPONDENT

Counsel Served:

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

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

Robert H. Hood, Esquire
J. Collier Jones, Esquire
HOOD LAW FIRM, LLC
172 Meeting Street
Charleston, SC 29401

Meredith S. Keane
Meredith S. Keane

October 20, 2017