THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

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

Charles Gary, ... Respondent,

v.

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

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

FINAL BRIEF OF APPELLANT

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Statement of the Case

This appeal involves a tort action arising from an automobile accident where an ambulance left the road and struck a tree. (R. 36-37; Compl. ¶¶ 14-15). Respondent Charles Gary and his wife Blondell Gary were passengers in the ambulance. (R. 36-37; Id.). Respondent's Complaint was filed on October 16, 2012. (R. 32; Compl.). Appellant, American Medical Response, Inc. ("AMR") was the broker that processed the scheduling of Respondent's request for non-emergency medical transportation ("NEMT"), and was named as a defendant in this action. (R. 34; Compl. ¶ 6). The other defendants were: Low Country Medical Transport, Inc. ("Low Country"), which was the medical transportation company that actually provided the NEMT service; Hattie Askew, Will Outlaw and Deboria Outlaw, who were owners or officers of Low Country; and Eugene Kirkland, who was the ambulance driver employed by Low Country. (R. 33-34; Compl. ¶¶ 3-5).

The Complaint asserted claims for negligence, loss of consortium, and negligent infliction of emotional distress against all of the defendants. (R. 37-40; Compl. ¶¶ 17-33). Appellant filed an Answer on November 21, 2012, and an Amended Answer on December 12, 2012. (R. 42 & 48; Ans. & Am. Ans.).

On February 26, 2013, despite only very limited discovery having occurred, Respondent filed a motion for summary judgment as to all defendants on all claims. (R. 68; Mot. for Sum. Judg.). A hearing on that motion was held on May 14, 2013, and at that hearing Appellant and Respondent both filed memoranda on the summary judgment issue. (R. 72; 186; Pl.'s Memo. in Supp.; AMR's Memo. in Opp.). The Trial Court requested additional briefing, and supplemental memoranda were filed by AMR and

Respondent on May 30, 2013, and June 6, 2013, respectively. (R. 233; 252; AMR's Supp. Memo. in Opp.; Pl.'s Supp. Memo in Supp.). Additionally, on July 10, 2013, AMR's counsel filed a Rule 56(f) Affidavit asserting that summary judgment at this early stage would be premature because material discovery had not yet been conducted. (R. 263; Cooper Affidavit).

On July 24, 2013, the Trial Court requested that Respondent's counsel draft a proposed order granting summary judgment as to all claims. (R. 276; E-mail from Dukes to Counsel). A proposed order was submitted on July 26, 2013. (R. 277; Proposed Order submitted 7/26/13). On August 9, 2013, AMR filed a response objecting to the proposed order on multiple grounds and further supplementing its prior opposition to the summary judgment motion. (R. 293; AMR's Objections to the Proposed Order filed 8/9/13).

On August 20, 2013, the Trial Court entered an Order ("the August 20 Order") granting Respondent's motion for summary judgment as to all claims and all defendants. (R. 1; Order entered 8/20/13). AMR filed a motion to alter or amend the August 20 Order and a hearing on this motion was held on November 12, 2013. (R. 306; 54; AMR's Motion to Alter or Amend filed 9/3/13); Transcript from 11/12/13 hearing). On December 3, 2013, the Trial Court entered a new Order ("the December 3 Order") modifying the August 20 Order. (R. 17; Order entered 12/3/13). The December 3 Order granted Respondent's summary judgment motion as to only the negligence and loss of consortium claims, and denied it as to the negligent infliction of emotional distress claim. Appellant timely filed and served its Notice of Appeal on December 13, 2013.

Statement of the Facts

This appeal involves AMR's role as a broker of transportation services under the South Carolina Non-Emergency Medical Transportation ("NEMT") Program. The NEMT Program provides non-emergency transportation services to Medicaid members who need access to medical care or services. (R. 94; RFP Scope, § 1.1). On September 9, 2010, the South Carolina Department of Health and Human Services ("SCDHHS") issued a Request for Proposal ("RFP") regarding the provision of brokerage services relating to the NEMT Program. (R. 93; RFP). "Brokerage services" under the NEMT Program were described as "operating a call center and contracting with transportation providers to fulfill the services." (R. 94; RFP § 1.2). AMR responded to the RFP and on May 25, 2011, was awarded a five year contract for Regions II and III of South Carolina. (R. 141; Notice Regarding Award).

South Carolina's NEMT Program has a large scale and involves a high volume of non-emergency transportation requests. For example, during fiscal year 2008, brokers under the NEMT Program scheduled approximately 1,707,311 one-way trips throughout the state. (R. 95; RFP § 1.4). In just Regions II and III of South Carolina, 539,517 NEMT trips occurred during the six-month period from July 2009 to December 2009. (R. 142; AMR Change Order Request dated 11/22/11).

It is undisputed that the RFP itself forms the contract that existed between the SCDHHS and AMR regarding the provision of brokerage services relating to the NEMT Program. (R. 55; 19; Transcript of 11/12/13 Hearing at p. 7; Order filed 12/3/13 at p. 3 n.1).

Under this contract, it is clear that AMR was to serve as the "broker," between SCDHHS and the entities that actually provided the NEMT services (the "transportation providers"). (R. 94; RFP §§ 1.1, 1.2).

The RFP distinguishes between the "broker," who is only responsible for providing "brokerage services," and the "transportation providers" who are responsible for providing "transportation services." (R. 93; RFP). The RFP provides that "[t]he Broker must not provide NEMT services or make a referral to or subcontract with a transportation provider if the Broker has a financial relationship with the provider or has an immediate family member who has a direct or indirect financial relationship with the provider." (R. 97; RFP at § 2.4.14). Section 3.3.6 of the RFP provides that the only time the Broker may operate vehicles to provide transportation services is in the "very limited circumstances" set forth in 42 C.F.R. § 440.170(a)(4)(ii)(B).[1] (R. 102; RFP § 3.3.6.).

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

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

[1] The limited exceptions to this rule set forth in 42 C.F.R. 440.170(a)(4)(ii)(B) focus on situations where no qualified provider other than the Broker is available or able to provide the NEMT service.

8) Establish an orientation and training program for transportation providers.
9) Inform and educate members and facility providers about the NEMT Program and process.
10) Develop and implement a complaint tracking and resolution plan.
11) Participate in hearings when issues involve the Broker, as determined by SCDHHS.
12) Provide administrative management oversight.
13) Submit management and performance reports.
14) Develop a turnover plan for transition of the contract to another broker or SCDHHS.
15) Protect recipient confidentiality.

(R. 97-98; RFP § 3.0). Section 3.3 of the RFP sets forth various "Operational Requirements" of the contract. These operational requirements include the following:

3.3.5 Fulfillment of All Trip Requests:

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

3.3.5.2 Fulfillment of all verified trip requests and ensuring that all trips are completed safely and on-time must include verification of the delivery of transportation services through the use of tracking tools and cost effective methods to determine to determine the real time location of members ...

***

3.3.7 Insurance: *In addition to the strict quality assurance standards that the transportation providers must meet, the Broker must ensure transportation providers have insurance coverage.* State law and regulations specify minimum insurance requirements for entities involved in the provision of Medicaid Transportation Services. The Broker is responsible for ensuring required and adequate coverage is obtained and maintained during term of contract.

3.3.8 Accidents, Injuries, and Incidents: *The Broker must promptly report to SCDHHS accidents, injuries, and incidents that*

> *have occurred in conjunction with a scheduled trip if a Member was present in the vehicle.* Accidents, injuries and incidents must be reported to SCDHHS as follows:
>
> > **3.3.8.1** Accident/Incident with Injury: Notification within 1 hour
> >
> > **3.3.8.2** Accident/Incident without Injury: Notification within 6 hours
>
> **3.3.9 Trip Recovery:** The Broker must ensure that each provider is responsive to all vehicle breakdowns, problems or delays in delivering service. The Broker must ensure that the provider has adequate backup vehicles to recover the trips, and ensure that members are not late for their appointments and do not spend excessive time on the vehicles.
>
> **3.3.10 Notification by Transportation Providers:** The Broker(s) must ensure that the transportation provider immediately informs Broker of any breakdown, accident or incident as well as any other problems that might cause a delay of more than ten (10) minutes in the trip ....

(R. 99; RFP § 3.3) (emphasis in italics added). Thus, while the contract contains language stating that the broker is responsible for "ensuring all trips are completed safely and on time," it also contemplates that accidents and delays will occur and sets forth actions that must be taken in such events. (R. 101, 102; RFP §§ 3.3.5, 3.3.8, 3.3.9, 3.3.10). Additionally, the contract requires the broker to ensure that the transportation providers maintain at least the required minimum insurance, and recognizes that the transportation providers must meet strict quality assurance standards. (R. 102; RFP § 3.3.7).

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

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

Monitoring activities must include, but are not limited to:

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

(R. 104; RFP § 3.3.15). This provision of the contract required AMR to monitor the transportation providers with whom AMR subcontracted to confirm the transportation providers provided quality, safe services. If the information and the reports indicated

otherwise, AMR was then required to take certain actions as set forth in Section 3.3.15.1, which reads:

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

(R. 104-105; RFP § 3.3.15.1).

Section 3.12 of the contract, titled "Quality Assurance," addressed "corrective action plans." This section provided that, where corrective action was necessary, amongst other things, "[t]he Broker must provide assurance that transportation providers meet health and safety standards for vehicle maintenance, operation, and inspection; driver qualifications and training; member problem and complaint resolution; and the delivery of courteous, safe, and timely transportation services." (R. 136; RFP § 3.12.1.1).

On January 31, 2012, Respondent and his wife were being transported in an ambulance returning home from Respondent's medical appointment. (R. 91; Aff. of Charles Gary ¶ 5). Respondents' wife had scheduled the trip by calling AMR. (R. 91; Id. ¶ 6). Prior to reaching Respondents' home, for reasons which have yet to be determined, the ambulance left the roadway and struck a tree. (R. 37; Compl. ¶ 15). As a result of this accident, Respondent suffered injuries and his wife died. (R. 37; Id.)

The NEMT service was provided by Low Country. (R. 91; Aff. of Charles Gary ¶ 5). Low Country was a "transportation provider" who was a subcontractor under

AMR's contract with SCHHS. (R. 233; 57; Aff. of G.R.M. McCormick at ¶¶ 9-10; Tr. of 11/12/13 Hearing at p. 15).

The ambulance was driven by Eugene Kirkland ("Kirkland"), who had been an employee of Low Country since June 2008. (R. 152; Aff. of Hattie Askew ¶ 12). During his three-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. (R. 153; Id. ¶¶ 13-15).

Respondent filed this suit on October 16, 2012. (R. 32; Compl.). On February 26, 2013, Respondent filed a motion for summary judgment on all claims and against all defendants. (R. 68; Mot. for Sum. Judg.). A hearing on the summary judgment motion was held on May 14, 2013.[2] Following that hearing, at the request of the Trial Court, the parties submitted additional briefing. (R. 233; 252 AMR's Supp. Memo. in Opp.; Pl.'s Supp. Memo in Supp.).

AMR asserted that summary judgment was premature as there were several factual issues that remained to be developed in discovery. (R. 235; AMR's Supp. Memo. in Opp. at p. 3). On July 10, 2013, AMR's counsel filed a Rule 56(f) Affidavit again asserting that summary judgment at this point would be premature because material discovery had not yet taken place, including the Respondent's deposition. (R. 263; Aff. of Cooper Wilson). In addition to being denied an opportunity to depose Respondent, there had been no depositions of any party or witness in the case. (R. 57; Tr. from 11/12/13 Hearing at p. 16).

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

On August 20, 2013, the Trial Court entered an Order granting Respondents' motion for summary judgment on all claims (negligence, loss of consortium, and negligent infliction of emotional distress) and against all defendants. (R. 1; Order entered 8/20/13). Following AMR's filing of a motion to reconsider the August 20 Order, and a hearing on that motion, the Trial Court issued a new Order on December 3, 2013. (R. 306; 54; 17; AMR's Mot. to Reconsider; Tr. of 11/12/13 hearing; Order filed 12/3/13). The December 3 Order modified the prior Order by granting summary judgment only on the negligence and loss of consortium claims, and denying summary judgment as to the negligent infliction of emotional distress claim. (R. 17; Order entered 12/3/13).

With regard to Respondents' negligence and loss of consortium claims, the Trial Court held that "[t]he Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina." (R. 23; Id. at p. 7). As to Kirkland, the Trial Court held that, as the driver of the ambulance, he "had a clear legal duty to operate the ambulance in a safe manner and avoid dangers." (R. 23; Id. at p. 7). As to Low Country, the Trial Court held that it owed "a duty of care to transport [Respondent] safely, while he was in its custody and control." (R. 23-24; Id. at pp. 7-8). As to AMR, the Trial Court held that it owed Respondent a duty "arising out of its Contract and operating as broker of NEMT services." (R. 24; Id. at p. 8). In reaching this conclusion as to AMR, the Trial Court placed special emphasis on sections 3.3.5 and 3.3.15 of the contract. (R. 24; Id. at p. 8). Based on this language and the use of the words "safely" and "safe," the Trial Court concluded that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (R. 25; Id. at p.

9). The Trial Court then concluded that all of the defendants breached their respective duties "when Low Country Medical's ambulance ran off the road." (R. 25; Id. at p. 9).

Significantly, aside from the reference to ambulance trips being "completed safely" Respondent offered no evidence, and the Trial Court made no findings, as to whether AMR failed to perform any of its specific duties set forth in the contract with regard to its "Core Services, "Operational Requirements, "Monitoring Activities, "Driver and Vehicle Requirements," "Passenger Safety Requirements," or "Corrective Action Plans." Rather, the Trial Court concluded that because the "ambulance ran off the road" all of the defendants, including AMR, breached their respective duties of care. (R. 25; Id. at p. 9).

After finding that AMR's contract with SCDHHS created a duty to provide completely "safe" transportation, the Trial Court then held that AMR could not avoid liability for the breach of this duty by a subcontractor. (R. 26-28; Order filed 12/3/13 at pp. 10-12). Specifically, the Trial Court held that "AMR had a ***absolute duty*** under its contract with the Health Department to provide safe transportation to [Respondent]" and that "[t]he Health Department's NEMT Contract clearly indicates that public policy and its Contract impose a ***non-delegable duty*** on the NEMT Program administrators to provide competent and safe non-emergency medical transportation services to Medicaid members...." (R. 26; Id. at 12) (emphasis added). After holding that an absolute nondelegable duty was owed by AMR, the Trial Court then held AMR "vicariously" liable for the breach of this duty by the independent contractor. (R. 26-28; Id. at 10-12). This appeal followed. (Notice of Appeal).

Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a circuit court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Hooper v. Ebenezer Sr. Servs. & Rehab. Center, 386 S.C. 108, 111, 687 S.E.2d 29, 32 (2009). In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

Argument

I. The Trial Court erred in concluding that AMR's contract imposed on it a strict duty to provide "safe" transportation, and that this contractual duty supported tort claims.

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

In its December 3 Order, the Trial Court erred by misinterpreting the nature and requirements of AMR's obligations under its contract with SCDHHS. The Trial Court incorrectly concluded that "[AMR] had a contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to its contract with the Health Department." (R. 25; Order entered 12/3/13 at p. 9). The Trial Court then concluded that AMR breached this duty of care "when Low Country Medical's ambulance ran off the road." (R. 25; Id.). Stated differently, the Trial Court concluded

that, ***because an accident occurred—without any regard for the cause of the accident or any action or omission by AMR—AMR breached its contractual duty.*** The imposition of such expansive liability is not supported by either AMR's contract with SCDHHS or by South Carolina law.

AMR's contract with SCDHHS creates a relationship where AMR serves only as a "broker" between SCDHHS and the entities that actually provide the NEMT services (the "transportation providers"). The contract sets forth AMR's obligations as a "broker" providing "brokerage services." (R.94; RFP at § 1.1). These obligations are separate and apart from the obligations of the ultimate "transportation providers" who provide "transportation services." The distinction between the broker and the ultimate transportation provider is evidenced by, among other things, the contract's provision that "only in very limited circumstances", may a broker also act as a transportation provider. (R. 102; RFP § 3.3.6).

AMR's specific responsibilities focus upon: establishing policies and procedures facilitating the scheduling of transportation; operating a call center with trained employees to field calls, verifying member eligibility, and scheduling the needed transportation; establishing a network of trained transportation providers that is sufficient to handle the anticipated volume; and implementing a system to track and resolve complaints. Notably, Plaintiff presented no evidence that AMR violated any of these specific provisions. Further, nothing within these "core services" suggests an intent to impose upon AMR strict liability for anything that could go wrong during the transportation process or the assumption by AMR of a duty guaranteeing safety on all NEMT trips.

In imposing on AMR "an absolute duty under it contract with the Health Department to provide 'safe" transportation," The Trial Court relied upon two references in the contract to NEMT trips being conducted "safely" found in sections 3.3.5 and 3.3.15. (R. 24-25, 28; Order entered 12/3/13 at pp. 8-9, 12). Specifically, section 3.3.5, which addresses "Fulfillment of All Trip Requests" provides that "[t]he Broker is responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on time." (R. 101; RFP § 3.3.5). Similarly, section 3.3.15, which addresses the broker's monitoring of transportation providers, includes a reference to "delivery of courteous, safe, timely and efficient transportation services." (R. 104; RFP § 3.3.15). The Trial Court erroneously concluded that the plain meaning of the language above and of the overall contract meant, as a matter of law, that AMR had an "absolute duty" to provide transportation services that are completely "safe." (R. 28; Order entered 12/3/12 at p. 12). The provisions do not mean this. First, the contract language elsewhere specifically shows an expectation that accidents and injuries in fact will happen on occasion to those being transported. In other words, there is no way to in fact "ensure" safety while transporting someone in a vehicle. Second, it would be an absurd result were the contract to be construed to mean AMR would be liable for injuries and damages to someone being transported by a "transportation provider" under a scenario where the accident was caused by some third party, an act of God, or some other extraneous cause.

Both of the references to "safety" relied upon by the Trial Court are found in section 3.3 of the contract, which sets forth the "Operational Requirements." This same section of the contract contains additional subsections which illustrate there is no absolute guarantee of safety. Specifically, section 3.3.7 requires that AMR ensure that the

"transportation providers" obtain and maintain adequate insurance coverage. Additionally, section 3.3.10 requires that AMR ensure that "transportation providers" immediately notify AMR of any accidents, injuries or incidents, and section 3.3.8 requires AMR to promptly report such accidents, injuries or incidents to SCDHHS. The fact that the contract requires AMR to ensure that the "transportation providers" have insurance coverage, and that all accidents and injuries be reported to AMR, acknowledges the fact that accidents are inevitable and are clearly contemplated by the parties to the contract.[3] Thus, the references to "safety" are not a guarantee that accidents will never happen, nor are they an imposition of absolute liability for accidents that do happen. Therefore, the "plain meaning" of the provisions relied upon by the Trial Court cannot and does not support the Trial Court's conclusions. Rather, the contract as a whole supports the point that AMR has not violated any contract duty, or, failing that, the language of the contract relied upon by the Trial Court is at best ambiguous. Under either scenario, summary judgment was improper.

Actually, AMR's specific duties with respect to accidents are met by its compliance with the monitoring plan set forth in section 3.3.15, which when viewed in its entirety provides:

> **3.3.15 Monitoring Plan:** The Offeror must include a Monitoring Plan in the initial proposal. The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure

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

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

(R. 104; RFP § 3.3.15). The purpose of this section is for AMR to observe its subcontractors and monitor whether they are providing a quality, safe product. If the information and the reports indicate otherwise, then AMR is required to take corrective actions against the subcontractor as set forth in Section 3.3.15.1.

Thus, AMR's responsibility to "ensure safe transportation services" is met by actions such as:

- confirming compliance with all applicable state and federal laws and regulations;
- confirming compliance with driver requirements, such as licensure, driving records, training and experience;
- confirming compliance with vehicle requirements;
- observing the transportation providers on-street;
- conducting annual inspections of all vehicles used by transportation providers;
- confirming that transportation providers comply with passenger safety requirements such as the use of seat belts, the observance of seating capacity limits; and
- taking corrective action wherever problems are found.

(R. 104, 124, 125, 131; RFP §§ 3.3.15, 3.8.1, 3.8.2, 3.8.3)[4].

The law in this state regarding the construction and interpretation of contracts is well settled." Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct App. 2011). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning,

[4] Significantly, AMR's obligations under the contract with SCDHHS are not limited to arranging for transportation providers to provide transportation via ambulances. Rather, the contract provides for a wide range of transportation options to be utilized by the broker, including: mileage reimbursement for private vehicles, public buses, trains, aircraft, as well as various levels of ambulance-type transportation. See 42 C.F.R. § 440.170(a)(4) (discussing the different types of transportation services included in a state's NEMT brokerage program) (R. 108, 109, 118; RFP §§ 3.6.2, 3.6.3.5, 3.6.3.6, 3.7.6). In fact, the contract specifically encourages the broker "to utilize public transportation whenever possible if it is cost effective as well as appropriate for the member." (R. 118; RFP § 3.7.6).

discover the intention of the parties as found within the agreement, and give effect to it." Id.

However, where an agreement is ambiguous, the court should seek to determine the parties' intent., Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001) . A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "Common sense and good faith are the leading touchstones of the inquiry." Id., 265 S.C. at 362, 218 S.E.2d at 434.

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

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

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

Here, when the contract is viewed in its entirety, it is clear that the parties did not intend to impose upon AMR a "duty" of absolute safety. Rather, the contract, through its numerous provisions regarding safety, imposed only a duty that AMR comply with the specific provisions applicable to it in an effort to facilitate safe transportation. This is the only sensible and reasonable construction of the contract.

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

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

Imposing liability on AMR in such circumstances would be an absurd and unjust result. The absurdity of the Trial Court's interpretation is not lessened where the injury occurs while being transported in an ambulance. For example, under the Trial Court's interpretation, another driver could intentionally run his car into an ambulance on an

NEMT trip, and AMR would be absolutely and strictly liable for any ensuing injuries and damages to those transported in the ambulance. From these examples, it is apparent that the specific language of the contract relied upon by the Trial Court does not in fact have the meaning ascribed to it by the Trial Court.

The only reasonable construction of the contract, using common sense and a sensible approach, is that AMR has a duty to meet the various specific provisions applicable to it set forth throughout the contract respecting safety. And there is no evidence whatsoever, and the Trial Court made no findings whatsoever, that AMR failed to meet its obligations as to any of those specific provisions. Further, even if this construction of the contract is not adopted, at minimum the language relied upon by the Trial Court is ambiguous, and does not mean what he interpreted it to mean. Hence, this Court should reverse the grant of summary judgment on the negligence and loss of consortium claims.

B. The Trial Court erred by holding that the duty owed by AMR, which was entirely contractual in nature, supported tort causes of action.

In addition to misinterpreting the meaning and effect of the contract between AMR and SCDHHS to incorrectly impose on AMR an "absolute duty to provide 'safe' transportation," the Trial Court also erred by basing its grant of summary judgment on the breach of this duty which the Trial Court acknowledged was entirely ***contractual*** in nature. Respondent's claims for negligence and loss of consortium both share, as core elements, the requirement that AMR breach a duty of care owed to Respondent.

With respect AMR, the Trial Court stated that the duty of care owed to Respondent arose "out of its Contract and operating as broker of NEMT services." (R. 24; Order filed 12/2/13 at p. 8). Specifically, the Trial Court held that "[AMR] had a

contractual duty and responsibility to provide safe and reliable NEMT services to Medicaid members pursuant to [AMR's] contract with the Health Department." (R. 25; Order filed 12/2/13 at p. 9). Kirkland, the driver, and Low Country, the employer of the driver, owe direct duties to Respondent based on the law and principles of tort liability. Yet, the sole "duty" on which the Trial Court based its summary judgment ruling as to AMR was entirely ***contractual*** in nature, and it was error for the Trial Court to use this ***contractual*** duty as a basis for ***tort*** liability.

Under South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. Huggins v. Citibank, N.A., 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). "As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct." Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 266, 375, 404 S.E.2d 912, 918 (Ct. App. 1991). "Where the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." Id. (citing Meddin v. Southern Railway-Carolina Division, 218 S.C. 155, 62 S.E.2d 109 (1950)). As the claims at issue sound entirely in tort, the Trial Court erred by improperly elevating a contractual duty to a duty that can sustain tort claims.

In addition, Respondent failed to establish, and the Trial Court failed to find, that AMR breached any of its specific obligations under its contract with the State. Specifically, there was no evidence that AMR failed to establish or maintain a

"monitoring plan." Additionally, there is no evidence that Kirkland or Low Country failed to maintain adequate insurance, failed to maintain the ambulance, or had any history of unsafe driving. Rather, AMR complied with all of its requirements under its contract with SCDHHS, and its mere role as the broker for the NEMT services does not make it liable in tort as a result of actions or omissions by the "transportation provider." Therefore, the Trial Court's grant of partial summary judgment against AMR on those claims was in error and should be reversed.

II. The Trial Court erred in holding that AMR owed an absolute nondelegable duty to provide safe NEMT transportation that rendered it liable for the negligent actions of a subcontractor transportation provider.

After finding that AMR's contract with SCDHHS created a duty to provide completely "safe" transportation, the Trial Court held that AMR could not avoid liability for the breach of this duty by a subcontractor. (R. 26-28; Order filed 12/3/13 at pp. 10-12). Specifically, the Trial Court held that "AMR had a absolute duty under its contract with the Health Department to provide safe transportation to [Respondent]" and that "[t]he Health Department's NEMT Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transportation services to Medicaid members...." (R. 28; Id. at 12). After finding this duty to exist, the Trial Court ruled that AMR was "vicariously liable" for the actions of the independent contractor Low Country. This ruling was in error.

As a general rule, "an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Tel. Co., Inc. v. Globe Comm., Inc., 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) (citing Duane v. Presley Constr. Co., Inc., 270 S.C.

682, 683, 244 S.E.2d 509, 510 (1978)). Hence, an application of the general rule to the fact pattern here would mean that AMR is ***not*** vicariously liable for any alleged negligence by Low Country and its employees.

This general rule is subject to few and narrow exceptions, one of which is the somewhat confusingly-named "nondelegable duty" doctrine.[5] Id. Under this doctrine, if a person owes another an "absolute duty" which he delegates to an independent contractor, he remains liable for the contractor's negligence. Id. ("'A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'") (quoting Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct. App. 1993)).

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

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

S.C. 156, 161-62, 5 S.E.2d 862, 864 (1939) (same).

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

First, neither the Trial Court nor the Respondent point to any statute imposing an absolute duty on AMR. Second, there is no public policy which exists warranting the imposition of an absolute duty under common law in this matter. South Carolina's courts have found a nondelegable duty in relatively few scenarios. See Simmons v. Tuomey Reg. Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000). These duties include (1) an employer's duty to its employees to provide them with a reasonably safe work place and equipment, (2) a landlord's duty to his tenants to be sure repairs performed by a contractor are done properly, (3) a common carrier's duty to be sure a shipper properly loads and secures cargo, (4) a bail bondsman's duty to supervise the work of his employees, and (5) a municipality's duty to provide safe streets even when maintenance is undertaken by the state Highway Department. Id. at 43, 533 S.E.2d at 317-18. Only one of these duties is rooted in common law.[6] Indeed, that duty—an employer's duty to

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

Similarly, a common carrier's duty to be sure a shipper properly loads and secures cargo on the carrier's truck is a duty imposed by statute and regulation. See Jenkins v. E. L. Long Motor Lines, Inc., 233 S.C. 87, 96-97, 103 S.E.2d 523, 528 (1958) (quoting and relying on the Rules and Regulations of the of the South Carolina Public Service Commission to determine that "[i]t was the duty of Appellant [carrier] to make

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

In contrast to the sole common law nondelegable duty to provide a reasonably safe workplace free from foreseeable dangers, no South Carolina court has ever ruled that a provider of transportation—much less a broker who merely schedules, but does not provide, transportation—owes an absolute and nondelegable duty to the ultimate recipients of the services. Indeed, the South Carolina Supreme Court expressly declined

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reasonable inspection to see that the load was properly distributed and if necessary secured in order to prevent unsafe shifting of the load"). Likewise, a bail bondsman's duty to supervise the work of the bounty hunters he employs is a duty grounded in statute. See Carson v. Vance, 326 S.C. 543, 550, 485 S.E.2d 126, 129-30 (Ct. App. 1997) (basing imposition of nondelegable duty on S.C. Code Ann. § 38–53–10 to 320 (Supp. 1996)). Lastly, a municipality's duty to provide safe streets is based on statutory, not common law. See Dolan v. Camden, 233 S.C. 1, 103 S.E.2d 328 (1958) (basing holding on statutes expressly stating that the Highway Department is not liable for injuries caused by its repairs to city roads and that the city *is* liable for those injuries).

to impose on hospitals an absolute nondelegable duty to render competent service to its emergency room patients. Simmons, 341 S.C. at 50, 543 S.E.2d at 322 ("[W]e conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an *absolute* nondelegable duty on hospitals.") (emphasis in original). Rather, the Simmons Court adopted an "ostensible agency" approach, making a hospital liable for the negligence of an independent contractor only if the patient accepted treatment from the physician in the belief the treatment was being rendered by the hospital. Id. If a hospital *emergency* room does not warrant the imposition of an absolute duty triggering the nondelegable duty doctrine, then the brokerage of *non-emergency* medical transportation ***cannot***, as a matter of public policy, carry with it such an absolute nondelegable duty.

In addition, neither the Trial Court nor the Respondent can point to a contract between Respondent and AMR imposing on AMR an absolute duty to ensure safety during NEMT trips. See Part I.A., supra. Respondent cannot rely on duties supposedly imposed by AMR's contract with SCDHHS. Courts considering the nondelegable duty doctrine have expressly held that language similar to the terms of AMR's contract with SCDHSS ***does not*** impose a nondelegable duty. See Rock Hill Tel., 363 S.C. at 392, 611 S.E.2d at 238 (holding that a statute requiring utility "not to endanger the safety of persons" and a regulation mandating that "each utility shall exercise reasonable care to reduce the hazards to which . . . the general public may be subjected" merely "impose a duty of reasonable care, not an absolute, nondelegable duty").

Furthermore, an injured person cannot enforce the terms of a contract between the state and the defendant. In Rock Hill, the state issued a permit to the utility that required the utility to assume any liability the state might have to persons injured as a result of the

utility's operations. See Rock Hill Tel., 363 S.C. at 392, 611 S.E.2d at 238. A person was subsequently injured by the utility's subcontractor. The Supreme Court rejected the argument that the permit's language imposed on the utility a nondelegable duty to perform its work in a safe manner, noting that "the terms in the permit are enforceable only as between the DOT and the utility." Id. at 392, 611 S.E.2d at 238-39.

The Trial Court's ruling that AMR's contract and public policy imposed an absolute nondelegable duty to provide "safe" transportation is thus without factual or legal support. Additionally, because an absolute nondelegable duty does not exist in this instance, AMR is not liable for the alleged negligent actions of the independent contractor Low Country, or Low Country's employee Kirkland, and the Trial Court's grant of summary judgment on the negligence and loss of consortium claims as to AMR should be reversed[7].

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[7] Putting aside nondelegable duty, no vicarious liability would exist in this independent contractor setting. See, e.g. Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) . There, the Myers Timber Company would "enter[] into timber harvesting contracts with landowners under which it would arrange for a third party to cut timber from the landowner's property and haul it to mills that purchased the timber." Id. at 598-99, 745 S.E.2d at 406. Although Myers Timber Company had some degree of oversight—it would send an employee to the job site to be sure the logging crew stayed on the correct property and kept the site neat—the logging company, not Myers, determined what equipment to use, how to arrange the equipment, and other details of the job. Id. at 599, 745 S.E.2d at 406. One of the logging company's drivers who was transporting a load of logs struck another vehicle and killed two of its passengers. Id. at 599-600, 745 S.E.2d at 407. The estates of the deceased passengers subsequently sued Myers Timber Company on the theory that the logging company and its employee were, in fact, Myers Timber Company's employees. The trial court rejected this argument and the appellate court affirmed. The court noted there was no "evidence Myers had control over" the company actually doing the logging, which "could harvest the timber how it wanted, owned all of the equipment, and was paid based on the end result." Id. at 603, 745 S.E.2d at 409. In addition, "Myers could not directly fire [the logging company's] employees, and [the logging company] paid its own employees, including withholding taxes." Id. The fact that Myers had some ability or even obligation to oversee certain aspects of the logging company's work did not make the logging company or its drivers

III. The Trial Court's grant of summary judgment was erroneous because it was premature and because there were genuine material issues of disputed fact.

At the time that the Trial Court's Order granting summary judgment on the negligence and loss of consortium claim was entered, only minimal discovery had been completed. No parties or witnesses had been deposed, and only initial written discovery had been undertaken by AMR. During the pendency of the summary judgment motion, AMR asserted that summary judgment was premature. (R. 235; AMR's Supp. Memo. in Opp. at p. 3). AMR's counsel filed a Rule 56(f) Affidavit, asserting that summary judgment at this point would be premature because material discovery had not yet taken place, including the Respondents' deposition. (R. 263; Aff. of Cooper Wilson).

Despite the limited record available and the absence of an opportunity to conduct meaningful discovery, the Trial Court granted summary judgment on the negligence and loss of consortium claims over AMR's objections. Such a grant of partial summary judgment contradicts well-settled South Carolina precedent on when a court may properly grant of summary judgment. Accordingly, this Court should reverse.

It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial regarding disputed factual issues. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003); Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the

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the employees of Myers. Id. Accordingly, the court affirmed the grant of summary judgment in Myers' favor.

application of the law. Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003) .

Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. See, e.g., Jones ex. rel. Jones v. Enter. Leasing Co.-S.E., 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009); Gauld v. O'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).

South Carolina's courts routinely reject motions for summary judgment as improper when the non-movant has had no opportunity for full and fair participation in discovery. For example, in Baughman, the court reversed a grant of partial summary judgment as premature prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543. There, the trial court had granted defendant's motion for partial summary judgment because plaintiff's expert failed to establish the requisite standard of care. Id. at 111, 410 S.E.2d at 543. However, plaintiff argued that further discovery was

necessary prior to granting partial summary judgment to defendants on the issue of liability. Id. at 112, 410 S.E.2d at 543. The South Carolina Supreme Court agreed, holding that the further discovery was needed to properly develop the record on this issue prior to a grant of partial summary judgment. Hence, the Supreme Court reversed based on the fact that plaintiff had not been afforded the full and fair opportunity to conduct discovery on the issue. Id.

This matter is analogous to Baughman. Here, the Trial Court erroneously concluded that no factual issue existed as to the cause of the vehicle accident. Specifically, both the December 3 Order and the preceding August 20 Order state that "Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree...." (R. 21; Order entered 12/3/13 at p. 5; Order entered 8/20/13 at p. 5). Both Orders also incorrectly state that it is "undisputed" that Kirkland "lost control" of the vehicle. ...." (R. 23, 7; Order entered 12/3/13 at p. 7; Order entered 8/20/13 at p. 7).

The basis for these incorrect factual conclusions was an interrogatory response provided solely by Low Country. (R. 267; Low County Interrogatory Response). However, Low Country's interrogatory response is **not binding** on AMR and **does not conclusively establish** the cause of the accident. An admission by a party applies ***only as to the admitting party***. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). As this is not a statement or admission attributable to AMR[8], it cannot serve

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

as the basis for an "undisputed fact" regarding the cause of the accident. In fact, under the record that existed on this issue *as to AMR*, the cause of the accident remained undetermined. In its Amended Answer, AMR denied all allegations regarding Kirkland allegedly losing control of the vehicle or relating to the cause of the accident. (R. 49-50; AMR's Am. Ans. at ¶¶ 7, 8, 10, 12). Hence, AMR via its pleading did not concede anything regarding the cause of the accident, and AMR instead requires the Respondent to meet its burden of proof in that regard. Again, the driver Kirkland has not yet been deposed.

The Trial Court erred in concluding that the cause of the accident was undisputed, in refusing to allow AMR the opportunity to conduct discovery on this issue. Additionally, the Trial Court failed to view the facts and circumstances surrounding the cause of the accident in the light most favorable to AMR. City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994).

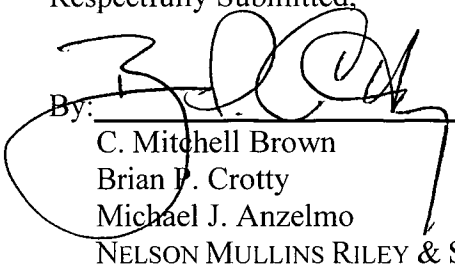
As shown by Argument I.A., *supra*, the Trial Court also erred in finding that the contract, by its clear terms, imposed an "absolute duty" on AMR to "ensure" the safety of the Respondent. Because the contract language relied upon by the Trial Court cannot and does not have the meaning he ascribed to it, it is at best ambiguous. This too creates a genuine issue of material fact preventing a summary adjudication. Thus, this Court should reverse.

Conclusion

Thus, this Court should reverse the order of the Trial Court and remand this matter for further proceedings consistent with this ruling.

Signature Page Attached

Respectfully Submitted,



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