THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2012-CP-07-3595

Charles Gary, ... Respondent,

v.

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

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

FINAL BRIEF OF RESPONDENT CHARLES GARY

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

Attorney for Respondent Charles Gary

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF THE FACTS

At the time of the accident, Charles Gary was a 61-year old bedridden diabetic, amputee, and paraplegic who lost the use of his lower body in 2004, in an unrelated incident. Mr. Gary is unemployed and draws social security. He is also a Medicaid beneficiary in South Carolina. Before this single ambulance accident, Mr. Gary lived at home with his wife, Blondell Gary,[1] who died in the single ambulance accident. Mrs. Gary did not work outside of the home, instead she assisted Mr. Gary with all of his daily activities including bathing, dressing, preparing meals, shopping, cleaning the house, and caring for his pre-existing medical conditions and disabilities. Mr. Gary was completely dependent on Mrs. Gary. She was his sole means of comfort, care, and support prior to her death caused by the Defendants. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 4).

Access2Care is a corporation organized and existing under the laws of a state other than South Carolina. Access2Care provides non-emergency medical transportation services to governments, among other services. On or about May 25, 2011, the State of South Carolina Department of Health and Human Services (the "Health Department") entered into a contract with Access2Care to implement the South Carolina Non-Emergency Medical Transportation (NEMT) Program for

[1] The Estate of Blondell Gary, filed a separate lawsuit in the Hampton County Court of Common Pleas. The Hampton County circuit court has placed Access2Care in default for failing to file an Answer to the Estate's Complaint within 30 days. (R. pp. 161-165, Order of Default in Angel Y. Gary as Personal Representative of the Estate of Blondell Gary v. LowCountry Medical Transport Inc., et al., 2012-CP-25-00402).

$162,077,477.00.[2] (R. p. 141, Notice Regarding Award). Pursuant to the RFP and its contract with the Health Department, Access2Care was tasked with administering the daily functions of the NEMT Program for Medical Transportation for South Carolina's Regions Two and Three. Mr. Gary resides in Region 3. Access2Care was tasked with "operating a call center and contracting with transportation providers to fulfill the services." (R. pp. 93-138, NEMT Contract).

The NEMT Program pays for transportation of eligible Medicaid members to medical care or services, which are covered under the Medicaid Program. The NEMT Program is intended to provide non-emergency medical transportation services in a cost-effective manner to Medicaid members who need access to medical care or services." (R. p. 94, NEMT Contract, §1.1). This contract was initiated through a competitive request for proposal (RFP) solicitation process to provide non-emergency medical transportation services to eligible Medicaid recipients in South Carolina like the Respondent. (R. pp. 93-138, NEMT Contract).

The NEMT Program was a turnkey operation where Access2Care would provide

[2] Access2Care had a five-year contract with the Health Department. (R. p. 141, Non-Emergency Medical Transportation Bid Notice of Award, Reinstatement Notice, dated May 25, 2011). On or about November 22, 2011, Access2Care asked the Health Department to approve a $25 million change order due to a mistake with its bid, seeking to increase its potential contract value to $187 million over the contract term. (R. pp. 142-145, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to John R. Stevens, State Procurement Officer, dated November 22, 2011). The Health Department denied Access2Care's $25 million change order request, and thereafter, Access2Care filed a notice to terminate its contract with the Health Department effective February 20, 2012, and began a 60-day transition to exit the State. (R. pp. 146-147, Letter from Steven G. Murphy, Senior Vice President, Government and National Services, American Medical Response, Inc. to Melanie Giese, RN, Deputy Director, Medical and Managed Care Services, South Carolina Department of Health and Human Services, dated December 16, 2011).

transportation management and administration services to Medicaid members. Access2Care was "responsible for identifying, recruiting, and negotiating service agreements with transportation providers in order to meet the needs of Medicaid members in the region." (R. p. 96, NEMT Contract, § 2.4.5, General Broker Requirements). Access2Care's duties and responsibilities under its contract included the following:

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

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

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

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

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

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

> The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and delivery of courteous, safe, timely and efficient

> transportation services. The monitoring Plan should address how the Broker will collect and verify the accuracy of performance data obtained from the NEMT providers.

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

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

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

The NEMT Contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." (§ 3.11.1, Complaints). If Mr. Gary had a complaint regarding Low Country Medical Transport's service, he would make it to Access2Care not Low Country Medical Transport. Furthermore, the NEMT Program prohibited transportation providers from soliciting additional business from members. The Contract imposed certain duties on Access2Care to ensure, in particular the safety of its members.

The Health Department authorized Access2Care to hire qualified non-emergency medical transportation subcontractors to provide transportation services to eligible Medicaid recipients. On August 17, 2011, Access2Care began to provide NEMT services to eligible Medicaid recipients in South Carolina. While under contract with the Health Department, Access2Care entered into a separate subcontractor agreement with

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

On January 31, 2012, Access2Care dispatched Low Country Medical Transport (a dissolved corporation) to provide non-emergency medical transportation for Mr. Gary to and from his medical appointment. At approximately 11:00 a.m., Low Country Medical Transport's ambulance was transporting Mr. Gary, and his wife home after his medical appointment when suddenly and un-expectantly the ambulance ran off the road

[3] On October 1, 2007, the South Carolina Secretary of State's Office administratively dissolved Low Country Medical Transport Inc.'s, corporate status in South Carolina. (R. p. 157, Department of State, Declaration of Dissolution by Forfeiture, dated October 1, 2007). The South Carolina Secretary of State reinstated it on February 29, 2012, after the date of the accident. (R. p. 159, South Carolina Secretary of State Documents). The LCMT continued to operate until Low Country Medical Transport Inc.'s., reinstatement by the South Carolina Secretary of State four and half years later.

Moreover, LCMT maintained Low Country Medical Transport Inc.'s., Class C Non-Emergency Motor Vehicle Carriers' Certificate from the South Carolina Office of Regulatory Staff. See, S.C. Code Ann. § 58-23-240. LCMT neither transferred Low Country Medical Transport Inc.'s Certificate to LCMT nor applied for a new Certificate when Low Country Medical Transport Inc., was dissolved. "A certificate may be transferred incident to the sale or lease of property or assets owned or used by a regulated motor carrier, provided the approval of the commission for the transfer of the certificate is first obtained and that the certificate itself is not transferred for value or utilized to enhance the value of other property transferred." S.C. Code Ann. § 58-23-340, see also, S.C. Regs. §103-155. The Defendant Askew was unaware the corporation was dissolved; and therefore, continued to use the dissolved company's Certificate. (R. pp. 151-153, Askew Aff. ¶ 7).

and struck a tree on Old Sheldon Church Road in Yemassee, South Carolina, only a few miles away from their home. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 7). The collision caused injuries to Mr. Gary and killed his wife. (R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.5). Mr. Gary was strapped to a stretcher in the back of the ambulance and his wife was riding in the front passenger seat with her seat belt secured. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 7). Beaufort County EMS transported Mr. Gary to Beaufort Memorial Hospital. He was later transferred to the Medical University of South Carolina, where he remained for three weeks due to his injuries and conditions. (R. pp. 90-92, Gary Summ. J. Aff. ¶ 9).

Mr. Gary filed this lawsuit on October 16, 2012, alleging Negligence, Negligence Per Se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Intentional Infliction of Emotional Distress against the Defendants. In this case, Mr. Gary contends that there are no genuine issues of material fact in dispute and that this Court should affirm the Trial Court's December 3, 2013, Summary Judgment Order for the following reasons.

LAW / ARGUMENT

STANDARD OF REVIEW

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Platt v. CSX Transp., Inc., 379 S.C. 249, 665 S.E.2d 631 (Ct.App. 2008). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to

the non-moving party." Id. "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Id.

"Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt supra. "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.* at 112, 410 S.E.2d at 543. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a `fishing expedition." Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

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

A. Access2Care had a duty to provide safe transportation

Access2Care mistakenly believes that the Trial Court misinterpreted its obligations under its Contract with the Health Department to implement the NEMT Program for Medicaid members. The Trial Court correctly found that Access2Care had a duty of care to Mr. Gary, because it had a Contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee, which required it to be ". . . responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time." (R. pp. 17-31, Modified Order Granting Mot. Summ. J. Dec. 3, 2013, p.8). "The duty of care is that standard of conduct the law requires of an

actor to protect others against the risk of harm from his actions." Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001). "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003). "The existence of a duty owed is a question of law for the courts." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000) (Simmons II).

Access2Care suggests that the Trial Court's ruling amounts to strict liability. According to Access2Care, what the Trial Court really meant to say is, "because an accident occurred—without any regard for the cause of the accident or any action or omission by AMR—AMR breached its contractual duty." (Appellant's Br. p.14). This summary is inconsistent with the Trial Court's Order and findings on the Respondent's Negligence cause of action. First, the Trial Court did give due and complete regard to the cause of the accident. The Trial Court found that:

> Defendant's Answers to Interrogatories indicate that Eugene A. Kirkland (the ambulance driver) realized he was in the wrong lane and he over-corrected causing the ambulance to run off the road and hit a tree on Old Sheldon Church Road in Yemassee, South Carolina.

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

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

Court.

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

> The NEMT Contract placed all responsibility to administer the Program on Access2Care. For instance, "[t]he Broker is responsible for receiving and responding to all complaints about NEMT services under this contract, whether oral or written, from members, transportation providers, health care providers, facilities, SCDHHS or other sources." *Section 3.11.1 Complaints.* The Contract imposed certain duties on Access2Care to ensure, in particular, the safety of its members.

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

> The Broker is responsible for all services provided by transportation providers. The Broker must ensure adequate oversight of transportation providers and ensure that they comply with all applicable State and Federal laws and regulations. The Broker must monitor the transportation providers to ensure compliance with the terms of their subcontracts and ensure compliance with all transportation provider-related requirements of this RFP including driver requirements, vehicle requirements, complaint resolution and delivery of courteous, *safe,* timely and efficient transportation services.

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

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

B. The NEMT Contract is clear and unambiguous

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

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

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

> Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. The Health Department's NEMT Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty concluded:
>
> The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001).
>
> Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care cannot walk away from its responsibilities under its NEMT Contract where the duties are so important to the Medicaid members and simply transfer it to another.

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

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

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

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

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

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

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

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

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

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

> Specifically, the Broker(s)' responsibilities will include, but are not limited to, operating a call center and contracting with transportation providers to fulfill the services. The Broker must establish a system that ensures high

> quality and appropriate medical transportation services are provided to South Carolina's Medicaid population. The Broker must pay transportation providers in accordance with the terms of the written service agreement between the Broker and each transportation provider.

(R. pp. 94-95, § 1.2, Intent).

> The objective of this RFP is to procure a qualified broker to improve the efficiency and effectiveness and to administer the core components of the SCDHHS' NEMT Program. SCDHHS is seeking to continuously enhance its ability to provide transportation services through innovative and proven business and technical solutions that meet the requirements specified herein.

(R. p. 95, § 1.3, Objective).

> The Broker must ensure transportation providers comply with the following passenger safety requirements:
>
> 3.8.3.6.1 Passengers must have their seat belts buckled at all times while they are inside the vehicle. The driver must assist passengers who are unable to fasten their own seat belts.
>
> 3.8.3.6.2 The driver must not start the vehicle until all passenger seat belts have been buckled.
>
> 3.8.3.6.3 The number of persons in the vehicle, including the driver, must not exceed the vehicle manufacturer's approved seating capacity.
>
> 3.8.3.6.4 Upon arrival at the destination, the vehicle should be parked or stopped so that passengers do not have to cross streets to reach the entrance of their destination.
>
> 3.8.3.6.5 Drivers must not leave passengers unattended.
>
> 3.8.3.6.6 If passenger behavior or other conditions impede the safe operation of the vehicle, the driver must park the vehicle in a safe location out of traffic and notify their dispatcher to request assistance.

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

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

safe transportation."

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

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

> The Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina. It is undisputed that Access2Care scheduled NEMT services for Mr. Gary's January 31, 2012, medical appointment. Access2Care sent Low Country Medical to Mr. Gary's house to transport him to and from his medical appointment.

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

> Equally, Access2Care had a **duty of care** to Mr. Gary **arising out of** its Contract **and** operating as broker of NEMT services. Access2Care had a contract with the Health Department to provide eligible Medicaid members with NEMT services for a fee. Access2Care's Contract with the Health Department required Access2Care to be '. . . responsible for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time.'

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

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

liability.

Access2Care argues that "[u]nder South Carolina law, where a duty is created solely by contract, no cause of action in negligence will lie. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989)." (Appellant's Br. p.22) Access2Care misstates the ruling of the Kennedy Court and misapplies its application to the case at bar. Kennedy v. Columbia Lumber & Mfg. Co., is a breach of implied warranty of habitability case involving a house sold by a creditor which it acquired by deed in lieu of foreclosure of a mechanics' lien. The subsequent purchaser sued the creditor in contract and tort for defects in the home. The Kennedy Court did not find that "where a duty is created solely by contract no cause of action in negligence will lie." Instead, the Kennedy Court found that:

> The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort. . . Thus, a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The "economic loss" rule will still apply where duties are created solely by contract. **In that situation**, no cause of action in negligence will lie.

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

The rule of law Access2Care attempts to apply here is misplaced. Access2Care's duty of care to Mr. Gary arises out of its Contract with the Health Department. In that Contract, Access2Care accepted the responsibility for managing a non-emergency medical transportation network and "for fulfilling all verified trip requests and ensuring that all trips are completed safely and on-time", in exchange for fees in excess of 160 million dollars. Access2Care's acceptance of the Health Department Contract and the

provision of non-emergency medical transportation services through its network created the duty of care to Mr. Gary not a separate written agreement between Mr. Gary and Access2Care.

"The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions." Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct.App. 2001). "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct.App. 2003). The South Carolina Supreme Court's decision in Kennedy is not applicable to the facts of this case or the Non-Delegable Duty Doctrine.

Access2Care claims that: "As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct." Foxfire Vill. v. Black & Veatch, 304 S.C. 366, 404 S.E.2d 912 (Ct.App. 1991) (emphasis added)." The Trial Court's December 3, 2013, Order did not find that a duty arose from a written agreement between Mr. Gary and the Defendants. Rather, the Trial Court found that "[t]he Defendants individually and collectively owed the Plaintiff a duty of care when they decided to engage in the business of NEMT services in South Carolina." (R. p. 7, Modified Order Granting Mot. Summ. J. Dec. 3, 2013). The Foxfire Village Court's finding that, ". . . if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct", does not apply in this case, because Access2Care had a duty of care to Mr. Gary to "[deliver courteous], safe, timely and efficient transportation services". (R. p. 8, Modified Order Granting Mot. Summ. J. Dec. 3, 2013).

Access2Care argues that "[w]here the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." *Id.* (citing Meddin v. S. R.-Carolina Div., 218 S.C. 155, 62 S.E.2d 109 (1950) (emphasis added). However, the Meddin Court further states that:

> On the other hand, where the contract creates a certain relationship between the parties, and certain duties arise by operation of law, irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort. . . . Actions in tort often have their beginning in contractual matters.
>
> The essential distinction is clearly shown in one of the leading cases relied on by counsel, to wit, Atlantic & Pacific R. Co. v. Laird, 164 U.S. 393, 17 S. Ct. 120, 122, 41 L. Ed. 485, wherein the Court quotes with approval a statement to the effect that if "the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort".

Meddin, 218 S.C. 155, 62 S.E.2d 109.

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

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

The Non Delegable Duty Doctrine

Access2Care states in its Brief that "[a]n absolute, nondelegable duty can be imposed by statute, common law, or contract." It cites Rock Hill Tel. Co., 363 S.C. 385, 611 S.E.2d 235 as its authority, which the Respondent agrees that a nondelegable duty can arise out a contract. However, Access2Care thereafter argues that there is no statute, common law, or public policy that warrants the imposition of an absolute duty, but it ignores its own contract and the fact that the Respondent called it for transportation. Access2Care signed a contract with the Health Department that required it to ensure "the delivery of courteous, safe, and timely transportation services." (R. pp. 104-105, NEMT Contract § 3.3.15, Monitoring Plan). "The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Duane v. Presley Constr. Co., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978). An exception to the general rule is that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." Rock Hill Tel. Co., 363 S.C. 385, 611 S.E.2d 235. The exemption to the general rule applies here, because the NEMT Contract clearly mandates specific duties and responsibilities for Access2Care, notwithstanding its relationship with Low Country Medical Transport.

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability. Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 452 (1996). The real effect of finding a duty to be nondelegable is to render not the duty, but the liability, not delegable. . . ." Smith v. Reg'l Med. Ctr., 394 S.C. 110, 713 S.E.2d 656 (Ct.App. 2011). South Carolina Courts have found a non-delegable duty to exist at common law and by statute. For instance, the South Carolina Supreme Court noted, "a hospital owes a common law nondelegable duty to render competent service to its emergency room patients such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." Osborne, 346 S.C. 4, 550 S.E.2d 319. In another instance, the South Carolina Court of Appeals found in Durkin that:

> The performance of duties assumed by Respondents by the rental agreement and those imposed by the [Residential Landlord and Tenant Act] may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor. [Citation Omitted]. ("The trend of authority is . . . to apply the law of landlord and tenant in determining a landlord's liability for injuries resulting from the use or condition of premises, regardless of the doctrine of independent contract as applied in other cases."). . . ("[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work. . . .").

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

The general proposition is clear; a principal cannot insulate himself from liability that has been assumed by agreement through the employment of an independent

contractor. See Durkin supra. "Traditionally, employers have avoided vicarious liability for the torts of their employees, which agency law imposes through the doctrine of respondeat superior, by acting through independent contractors. Restatement (Second) of Agency § 250 (1958). However, '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" [5] Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 341 S.C. 32, 533 S.E.2d 312 (2000).

Access2Care had an absolute duty under its contract with the Health Department to provide "safe" transportation to Mr. Gary. Under South Carolina law, "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Simmons, 341 S.C. 32, 533 S.E.2d 312; citing, Simmons, 330

---

5 The Simmons I Court quoted Dean Prosser stating, "A different approach, manifested in several of the exceptions to the general rule of nonliability [for independent contractors], has been to hold that the employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. . . . [T]he cases of "nondelegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him.

. . . **It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another**." Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 341 S.C. 32, 533 S.E.2d 312 (2000).

S.C. at 123, 498 S.E.2d at 412; see also F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 654 (1997).

The gravamen of Access2Care's position in this case is predicated on its use of the term "broker." Access2Care suggests that "[its] contract with SCDHHS creates a relationship where AMR serves only as a "broker" between SCDHHS and the entities that actually provide the NEMT services (the 'transportation providers')." (Appellant's Br. p.14). Access2Care's attempt to marginalize its role as "a broker who merely schedules, but does not provide, transportation" cannot be reconciled with its overall NEMT duties. Access2Care was responsible for administering two-thirds of the State's Medicaid NEMT Program with a potential value in excess of 160 million dollars. Access2Care was responsible for operating a call center; vetting and scheduling NEMT trip requests; hiring NEMT providers, training them, and certifying their compliance with federal and state laws; monitoring NEMT service providers; providing an education program for members; and providing high quality, courteous, and safe transportation service to Medicaid members. These responsibilities ranged from ensuring drivers wore a nametag to verifying the financial stability of all contracted transportation providers. (R. pp. 125-131, 115-124, § 3.8.2, Driver Requirements, § 3.7, Transportation Provider Network). Mr. Gary called Access2Care when he needed NEMT services and if he had a problem with the service it was Access2Care's responsibility to fix it, no one else.

Access2Care is liable for Low Country Medical's negligent acts to Mr. Gary, because Access2Care had an absolute duty to ensure Mr. Gary's safety and it maintained extensive control over its NEMT service providers. "It is difficult to suggest any criterion by which the nondelegable character of such duties may be determined,

other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998), aff'd and modified, 351 S.C. 32, 533 S.E.2d 312 (2000).

The Health Department's NEMT Contract clearly indicates that public policy and the contract impose a non-delegable duty on the NEMT Program administrators to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols. The Osborne Court, reviewing the instances where South Carolina Courts have found a non-delegable duty[6] concluded:

> The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.

Osborne, 346 S.C. 4, 550 S.E.2d 319.

Given the duties imposed under the NEMT Contract and the extensive control Access2Care had over its NEMT service providers, Access2Care should not be able to

[6] "[South Carolina Courts] have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs." Osborne supra.

walk away from its responsibilities under its NEMT contract where the duties are so important to the Medicaid members and simply transfer it to another.

Non-delegable Duty vs. Apparent Agency

Access2Care contends that Simmons II "adopted an 'ostensible agency' approach, making a hospital liable for the negligence of an independent contractor only if the patient accepted treatment from the physician in the belief the treatment was being rendered by the hospital." (Appellant's Br. p.27). The Trial Court disagreed and found that Access2Care's liability stems from a non-delegable duty and that Simmons II did not require a finding of Apparent Agency to find liability. "Under the apparent agency doctrine, the injured patient must establish that (1) the hospital consciously or impliedly represented the physician to be its agent, (2) the patient relied upon the representation, and (3) the patient changed his position to his detriment in reliance on the representation." Simmons, 341 S.C. 32, 533 S.E.2d 312.

Conversely, "[a] nondelegable duty is essentially an exception to the general rule that principals are not liable for the torts of independent contractors." Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 498 S.E.2d 408 (Ct.App. 1998). Mr. Gary's motion is not based on his mental state or perceptions regarding who was responsible for his care. Rather, Mr. Gary's motion is predicated on Acces2Care's non-delegable duty to ensure all trips are completed safely and on time, for which it would have received fees in excess of 160 million dollars during the life of its contract with the Health Department.

Access2Care mistakenly believes that the South Carolina Supreme Court in Simmons II, substituted the Restatement (Second) of Torts: Employers of Contractors §

429 (1965)[7] for the non-delegable duty doctrine in South Carolina. See, Simmons, 341 S.C. 32, 533 S.E.2d 312. Access2Care claims that Mr. Gary must prove the elements of Section 429 (Apparent Agency) to establish Access2Care's vicarious liability for Low Country Medical's negligent acts. The Simmons II Court did not replace the non-delegable duty doctrine for the Apparent Agency doctrine. Instead, it found the following:

> We conclude the Court of Appeals properly outlined and applied the public policy considerations in question. Our decision, like those made by other courts that have considered this issue and held hospitals liable under one or more theories, is grounded primarily in those considerations. Given the fundamental shift in the role that a hospital plays in our health care system, the commercialization of American medicine, and the public perception of the unity of a hospital and its emergency room, **we hold that a hospital owes a nondelegable duty to render competent service to its emergency room patients**.
>
> However, we conclude it is **not necessary**, as the Court of Appeals did in **the cases at hand, to impose an absolute nondelegable duty on hospitals**. Simmons II supra.

The Simmons II Court did not nullify the absolute duty rule created under the Non-Delegable doctrine, but simply concluded that it was not necessary in the case at hand.[8]

---

[7] "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants." Simmons II, supra.

[8] The Simmons II Court held in its conclusion that "[w]e could remand the apparent agency issue to the Court of Appeals for its consideration and ordinarily would find that an appropriate disposition. However, we conclude it is unnecessary to remand this case to the Court of Appeals because the parties have raised both issues to us on the merits and because **the analyses of apparent agency and nondelegable duty are so closely intertwined in this instance**. Although closely related, **each is a viable theory an injured patient may assert**. Accordingly, we also reverse the grant of summary judgment to Tuomey Regional on the ground of apparent agency in both respondents' cases." Id.

Therefore, Access2Care's argument that, "[i]f a hospital *emergency* room does not warrant the imposition of an absolute duty triggering the nondelegable duty doctrine, then the brokerage of *non-emergency* medical transportation *cannot,* as a matter of public policy, carry with it such an absolute nondelegable duty", is a misapplication of South Carolina law and the Non Delegable Duty Doctrine.[9] (Appellant's Br. p.27).

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Platt v. CSX Transp., Inc., 379 S.C. 249, 665 S.E.2d 631 (Ct.App. 2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Id. "Summary judgment is not appropriate where further inquiry into . . . the facts is desirable to clarify the application of the law . . . . However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Platt supra. "Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins, 354 S.C. at 70, 580 S.E.2d at 439.

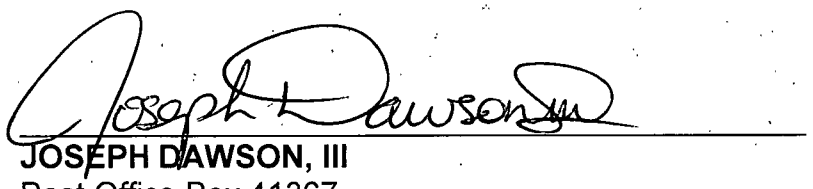
Access2Care's staunch reliance on its general denials in its Amended Answer to the Respondent's Complaint cannot shield it from its failure to offer any evidence to refute the Respondent's evidence in support of its Summary Judgment motion. Access2Care made no factual showing in opposition to this motion. It simply claims summary judgment is premature and further investigations into the facts are needed. However, the nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence. See Dawkins supra. South Carolina law provides

that when the evidence is susceptible to only one conclusion, then as a matter of law the plaintiff is entitled to summary judgment. Mr. Gary's claims are susceptible to only one conclusion. The Appellant's demands for additional time for discovery will not alter the plain facts of this case.

CONCLUSION

This Court should find that Access2Care has a non-delegable duty to provide safe NEMT services. Therefore, this Court should reject Access2Care's unscrupulous attempt to walk away unscathed in the wake of this tragic event by simply suggesting that it is not responsible for Low Country Medical Transport's tortious acts, while pocketing a fee for the service. This Court should grant Mr. Gary the relief he seeks based on the evidence, law, and undisputed facts.

Respectfully submitted,



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

ATTORNEY FOR RESPONDENT
CHARLES GARY

North Charleston, South Carolina
June 9, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2012-CP-07-3595

Charles Gary, ... Respondent,

v.

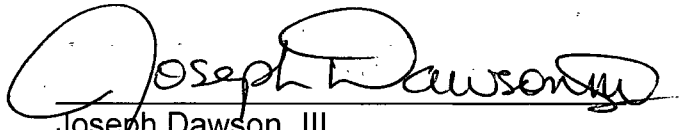
Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and d/b/a Low Country Medical Transport, Low Country Medical Transport, Inc., Eugene A. Kirkland, and American Medical Response, Inc. (d/b/a Access2Care) . . . . . Defendants

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

CERTIFICATE OF COUNSEL

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

June 9, 2014



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

Attorney for Respondent Charles Gary