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COURT OF APPEALS

STATE OF NEW YORK

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APPLEWHITE, ET AL.,

Respondents,

-against-

No. 86

ACCUHEALTH, INC., ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
May 30, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

DRAKE A. COLLEY, ESQ.  
CORPORATION COUNSEL OF THE CITY OF NEW YORK  
Attorneys for City of New York  
100 Church Street  
New York, NY 10007

MATTHEW GAIER, ESQ.  
KRAMER, DILLOF, LIVINGSTON & MOORE  
Attorneys for Respondents  
217 Broadway  
New York, NY 10007

David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: No. 86, Applewhite.  
2 Counselor, would you like any rebuttal  
3 time?

4 MR. COLLEY: With the Chief Judge's kind  
5 permission, the City would like to reserve five  
6 minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Five minutes. Sure.  
8 Go ahead, counsel, start.

9 MR. COLLEY: Thank you very much, Your  
10 Honor.

11 Good afternoon. May it please the court,  
12 Drake Colley for the City.

13 Before the court this afternoon are two  
14 issues. The first is whether the provision of  
15 emergency ambulance transport is a governmental  
16 function, and - - -

17 CHIEF JUDGE LIPPMAN: Let me - - - let me  
18 ask you, counsel, what are the - - - the policy  
19 issues in relation to whether it's governmental or  
20 proprietary? How does it affect the city? What's  
21 your frame of reference for all of this?

22 MR. COLLEY: Well, I don't think that I  
23 could state it any better than this court did in  
24 Laratro where it recognized that - - - that a large  
25 judgment can be devastating to municipalities. And I

1 would like to remind the court that New York City is  
2 fairly wealthy, but this - - - your decision is going  
3 to impact on - - -

4 JUDGE SMITH: Yeah, but it can be  
5 devastating to private parties, too, can't it?

6 MR. COLLEY: Yeah, but private parties are  
7 not in the same position as public parties - - -

8 JUDGE ABDUS-SALAAM: But what about public  
9 hospitals, Mr. Colley? What about public hospitals  
10 that are in the same - - -

11 MR. COLLEY: Yeah, well, public hospitals  
12 have been held to be proprietary, and so I don't  
13 think that they really have - - -

14 CHIEF JUDGE LIPPMAN: What - - - what - - -

15 JUDGE ABDUS-SALAAM: Is the City being  
16 bankrupted by lawsuits against public hospitals?

17 MR. COLLEY: I think that that's a real  
18 possibility, but that's something that this court has  
19 already addressed and it's not properly - - -

20 CHIEF JUDGE LIPPMAN: Counsel, but what's  
21 the distinction? What we're trying to get at is,  
22 clearly just the fact that - - - that you're  
23 vulnerable to judgment is not in and of itself  
24 dispositive. What - - - what about this function?  
25 What - - - what is it that's different than - - -

1 than the hospital, or what is it that's different  
2 about the City performing this function as opposed to  
3 a private entity performing this function?

4 MR. COLLEY: One of the most important  
5 distinctions is that the City is the provider of last  
6 resort. When a hospital in the private sector  
7 decides to close, like St. Vincent's did in Manhattan  
8 last year, the City can't do that. We have to step  
9 up to the plate and continue to provide services even  
10 - - - and even for private hospitals that don't  
11 decide to fold, but they can withdraw at any moment.

12 CHIEF JUDGE LIPPMAN: But how do we  
13 distinguish - - - but what percentage is private  
14 today of the ambulance-type response?

15 MR. COLLEY: In New York City, I'm not  
16 exactly sure of the numbers, and I wouldn't want to  
17 make a mis - - -

18 CHIEF JUDGE LIPPMAN: Thirty, something  
19 like that if - - -

20 MR. COLLEY: That sounds about right, but I  
21 wouldn't want to make a misrepresentation to the  
22 court.

23 JUDGE READ: Could - - -

24 MR. COLLEY: But I'd like to say that that  
25 itself is a reflection of the budget concerns of the

1 City. The City would love to - - -

2 CHIEF JUDGE LIPPMAN: But what's the - - -  
3 but how do you answer, though, the - - - the question  
4 as to why, when it's private, is it proprietary, and  
5 when it's public, is it government, you know what I  
6 mean, doing the same function? How do we - - - how  
7 do we intellectually balance those two?

8 MR. COLLEY: Well, there are several  
9 answers for that. Unlike a private tortfeasor, the  
10 government's objective is not profit maximization.  
11 And I could also say that this is - - -

12 JUDGE PIGOTT: How does that - - - I don't  
13 - - - I'm missing your - - - I guess I'm missing your  
14 point. I mean, if a person is injured, you would not  
15 seriously argue to a jury we don't - - - we don't  
16 have the money so - - - so just no cause to this  
17 plaintiff and - - - and we'll all go home. You would  
18 be arguing, as you're going to, I assume, that this  
19 is ministerial, it's like the police, we owed no duty  
20 other than what we did, which was to show up and  
21 transport and therefore there's no - - - there's no  
22 liability; as opposed to being proprietary, where you  
23 have an obligation - - - almost a quasi-contractual  
24 one - - - where you said you were going to deliver  
25 these services, you either did or didn't or did them

1 negligently, and that's the issue, right?

2 MR. COLLEY: Yes. To the extent that what  
3 Your Honor is saying is that the public - - - the  
4 public duty rule applies here, that's exactly what  
5 we're saying. And we're saying that because the  
6 public duty rule applies, plaintiffs have not  
7 established a special duty, and so we don't even  
8 reach the issue of governmental immunity in this  
9 case.

10 JUDGE GRAFFEO: Well, all these - - - all  
11 these EMT situations arise from a 911 call, correct?

12 MR. COLLEY: That's absolutely right, Your  
13 Honor.

14 JUDGE GRAFFEO: Is that contested in this  
15 case, whether that's governmental or not?

16 MR. COLLEY: No. As a matter of fact, I  
17 believe plaintiffs conceded, as they must - - -

18 JUDGE GRAFFEO: So they all - - -

19 MR. COLLEY: - - - in view of Laratro - - -

20 JUDGE GRAFFEO: So - - -

21 MR. COLLEY: I'm sorry.

22 JUDGE GRAFFEO: So these - - - these EMT  
23 visits all emanate from that governmental function?

24 MR. COLLEY: It is a governmental function,  
25 and there are three - - -

1 CHIEF JUDGE LIPPMAN: Well - - -

2 MR. COLLEY: - - - different things that  
3 are - - -

4 JUDGE GRAFFEO: And there's - - - and  
5 there's a decision, then, as to whether EMTs are sent  
6 out or a hospital ambulance is sent out. Who makes  
7 that determination? The person who takes the 911  
8 call based on availability?

9 MR. COLLEY: It's - - - it's absolutely  
10 based on availability. In this particular case, I  
11 believe that they wanted to send an advance life  
12 support team, but none was available. So they sent a  
13 basic life support team. And upon arrival, the basic  
14 life support team called for backup and a 9 - - - and  
15 an advance life support team - - -

16 JUDGE ABDUS-SALAAM: Which ambulance took  
17 the child to the hospital?

18 MR. COLLEY: I believe it was the ALS team.

19 JUDGE ABDUS-SALAAM: No, it was the BLS  
20 team. It was the basic life support team, the one  
21 that first arrived.

22 MR. COLLEY: Well, in any event, it was  
23 after - - - it was after the ALS team arrived and  
24 performed stabilization interventions.

25 CHIEF JUDGE LIPPMAN: But let me ask you a

1 question. Is it - - - is your argument that it's an  
2 allocation of resources issue? Is that - - - is that  
3 it, that - - - go ahead.

4 MR. COLLEY: I think there are two ways to  
5 answer your question, I think, depending on what your  
6 question actually is. If you're asking whether or  
7 not the City's or this municipality or any  
8 municipality's decision to incorporate private  
9 ambulances into their 911 system, yeah, that's a  
10 budgetary constraint. That's - - -

11 CHIEF JUDGE LIPPMAN: No, what I'm - - -  
12 what I'm saying is when you say you're - - - you're  
13 the last resort, you have to answer the call, but - -  
14 -

15 MR. COLLEY: We have to.

16 CHIEF JUDGE LIPPMAN: - - - but you only  
17 have so many resources. Rather than - - - I guess  
18 I'm reframing your argument, and let me know if - - -  
19 if I'm right. You're - - - you're not necessarily  
20 saying, gee, I'm going to get big judgments against  
21 me. Aren't you saying really that - - - that you  
22 have limited resources, that you have a function that  
23 you must undertake, and how you allocate your  
24 resources that are finite, to some degree, impacts on  
25 the nature of the function of a government entity?

1 Is that the argument? I'm just trying to get in my  
2 head - - -

3 MR. COLLEY: That is the argument. The  
4 reason that I - - -

5 CHIEF JUDGE LIPPMAN: - - - what - - -

6 MR. COLLEY: - - - that I made reference to  
7 - - - to the impact of large awards is - - - was, at  
8 least I thought, in answer to your question as to  
9 what the policy consideration was, which this court -  
10 - -

11 CHIEF JUDGE LIPPMAN: But let me ask you a  
12 question.

13 MR. COLLEY: - - - outlined in Laratro.

14 CHIEF JUDGE LIPPMAN: In this particular  
15 case where you had the - - - whatever it is, the BLS,  
16 or whatever it's called, and the - - - and the ALS,  
17 was there no ALS available when the BLS came?

18 MR. COLLEY: That's absolutely right.

19 CHIEF JUDGE LIPPMAN: Would you have sent -  
20 - - or did the dispatcher make a decision - - - would  
21 the dispatcher, if they had unlimited resources, have  
22 sent the - - - the ALS in this case, or is that - - -  
23 we just don't know?

24 MR. COLLEY: Well, I don't - - - I can't -  
25 - - I don't know that we can say for sure, but I

1 think that the record indicates that they wanted to  
2 send an ALS team and there was none available.

3 CHIEF JUDGE LIPPMAN: But that's what I  
4 mean by allocation of resources. So sometimes you're  
5 making choices as a government - - -

6 MR. COLLEY: We have to. You know, Your  
7 Honor, we wish we could have an - - - an EMT on every  
8 corner, but we can't. Okay, we are limited by  
9 budgetary constraints that are the result of - - - of  
10 legislative decisions.

11 CHIEF JUDGE LIPPMAN: So my question to you  
12 would be, how does that impact on the person who's  
13 depending upon you for some - - - their very life in  
14 some circumstances? How does those choices that you  
15 make or have to make impact on the person who needs  
16 you? And obviously, in this context, how does it  
17 impact on whether you can be sued in a proprietary  
18 role or in a governmental role? You follow the drift  
19 of what I'm saying?

20 MR. COLLEY: Yes, I - - - well, I hope that  
21 I do, and I'm going to try to - - -

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 MR. COLLEY: I'm going to try to answer it.  
24 There are any number of functions that the government  
25 performs that actually private individuals also

1 perform, but there's a distinction between the way  
2 the law and this court's jurisprudence treats private  
3 individuals, private corporations, and government  
4 entities. And I think that this probably dates back  
5 to the days of - - - or at least you can be - - - you  
6 can trace it to the vestiges of sovereign immunity.  
7 In any event, when sovereign immunity was - - - was  
8 lifted, the court specifically noticed that the  
9 relinquishment of sovereign immunity didn't place the  
10 government on a parity with private individuals - - -

11 JUDGE SMITH: Can you give some examples -  
12 - -

13 MR. COLLEY: - - - and private  
14 corporations.

15 JUDGE SMITH: Can you give some examples of  
16 things where, even though - - - where government and  
17 private businesses are performing the same function  
18 but they have different - - - one has immunity, the  
19 other doesn't?

20 MR. COLLEY: Yeah. I would refer the court  
21 to page 19 of our brief, but off - - - off the top of  
22 my head, there are a couple. One is in the provision  
23 of police services. There are - - - there are  
24 private police organizations along with, of course,  
25 government. And presumably, if a private police

1 officer were to be called to a scene of - - - you  
2 know, where he's needed or she is needed, the scene  
3 of a crime, they would not receive the benefit of  
4 governmental immunity. The same holds true of - - -  
5 like I said, on page 19, we list a number of cases,  
6 Mon and several other cases where - - - where a  
7 distinction has been made - - -

8 JUDGE PIGOTT: If you look at a case like  
9 DeLong - - -

10 MR. COLLEY: Erie County.

11 JUDGE PIGOTT: Right. Would this - - -  
12 even assuming a governmental duty here, at some  
13 point, does - - - does that duty become special when  
14 - - - when you start administering CPR and/or doing  
15 other things such as that?

16 MR. COLLEY: No. That's - - - that's  
17 plaintiff's argument, and our - - - and we don't  
18 accept that not even a little bit. We're saying that  
19 it's one function; it's the rescue function.

20 JUDGE PIGOTT: Well, let's assume for a  
21 minute a different set of facts where there's a child  
22 who's - - - and your ambulances show up and as  
23 they're - - - as they're taking the child up, they  
24 drop her, and as a result, she's seriously injured.  
25 Is that - - - is that immune from suit?

1 MR. COLLEY: That would probably fall under  
2 what this court has called positive direction and  
3 control. That's one of the three means that a  
4 special relationship can be created under - - -

5 JUDGE PIGOTT: And why is this not in that  
6 neighborhood?

7 MR. COLLEY: Well, the reason for that is  
8 that, first and foremost, if you look at Pelaez and  
9 if you look at - - - you know, it's factually  
10 distinguishable.

11 JUDGE PIGOTT: I know, but look at - - -  
12 look at what they did do here, and why is that not  
13 something that ought to be - - -

14 MR. COLLEY: In a phrase, we did not make  
15 matters worse. If you were to - - -

16 JUDGE PIGOTT: Well, that's your argument,  
17 but I mean - - -

18 MR. COLLEY: That's - - - and it's - - -

19 JUDGE PIGOTT: Well, that's - - - that's  
20 what you tell a jury, isn't it? I mean, that's not a  
21 matter of law.

22 MR. COLLEY: Well, I think it's a question  
23 of how you read - - - how you read Pelaez, but - - -

24 JUDGE READ: Mr. - - -

25 CHIEF JUDGE LIPPMAN: Go ahead, Judge Read.

1                   JUDGE READ: Mr. Colley, could - - - could  
2 the City get out of this business?

3                   MR. COLLEY: I'm sorry?

4                   JUDGE READ: Could the City get out of this  
5 business? For example, could you just decide to send  
6 an ambulance with no EMTs, or could you decide just  
7 to get out of the am - - - get out of the transport  
8 business as well?

9                   MR. COLLEY: I don't know that - - - I  
10 don't know that state law would permit us to do that,  
11 but what we certainly don't want to do is revert to  
12 the days of grab-and-go or scoop-and-run where all we  
13 do is pick up an injured individual, rush them to the  
14 hospital without performing any intervention  
15 whatsoever.

16                   CHIEF JUDGE LIPPMAN: Well, let me follow  
17 up on that one last question. I know your time is  
18 up. How do you parse the different functions? Is -  
19 - - is your argument that you can't really parse  
20 between the issues of getting there on time and that  
21 kind of thing and doing something that's medical or  
22 quasi-medical? Can you - - - can you parse it in  
23 saying - - - I think that was the thrust of one of  
24 the questions is, does at some point it change or is  
25 it - - - even if it's medical care, it's governmental

1 in this - - - in this framework?

2 MR. COLLEY: I don't think that you can  
3 parse it out in a meaningful way, and I think the  
4 facts of this case illustrate that. There's no real  
5 distinction between the dispatcher sending out for a  
6 crew and the - - - in this case, the EMTs sending - -  
7 - or asking the dispatcher to send for an advance  
8 life support team.

9 JUDGE ABDUS-SALAAM: Well, Mr. Colley, once  
10 the - - - once the EMTs got there and they started  
11 performing CPR on this child, you're saying that's  
12 not different than sending an ambulance out?

13 MR. COLLEY: I'm not sure I understand your  
14 question, Your Honor. When we arrived, CPR was  
15 already being performed.

16 JUDGE ABDUS-SALAAM: Yes, but - - - but the  
17 - - -

18 MR. COLLEY: Nurse Russo was performing  
19 one-person CPR.

20 JUDGE ABDUS-SALAAM: But the EMTs who  
21 arrived also joined in that effort to give CPR. And  
22 just to follow up on one of Judge Pigott's questions,  
23 what if they had cracked the child's chest while they  
24 were performing the CPR? Would you say that was a  
25 governmental function?

1 MR. COLLEY: I think that that would - - -  
2 that might arguably fall within the third Pelaez  
3 situation.

4 JUDGE ABDUS-SALAAM: Which would be what, a  
5 proprietary function?

6 MR. COLLEY: A positive direction and  
7 control which we understand is a situation where you  
8 make matters worse - - -

9 CHIEF JUDGE LIPPMAN: So that - - -

10 MR. COLLEY: - - - unlike what happened  
11 here.

12 CHIEF JUDGE LIPPMAN: - - - that would - -  
13 - so that's where you would parse it to the extent  
14 you can is when it takes on that kind of veneer?

15 MR. COLLEY: Yes, that's - - -

16 JUDGE GRAFFEO: That's when you enter the  
17 realm of negligence is when you've created a  
18 situation - - -

19 MR. COLLEY: To the - - -

20 JUDGE GRAFFEO: - - - that exacerbates or  
21 injures the person who you're - - -

22 MR. COLLEY: That's correct - - -

23 JUDGE GRAFFEO: - - - responding to.

24 MR. COLLEY: - - - because our  
25 understanding is that when this court decided Pelaez

1 they did not consider, you know, misfeasance as being  
2 a - - - something that gives rise to a special duty.

3 CHIEF JUDGE LIPPMAN: Okay, counsel. Go  
4 ahead. We'll get - - - you'll have your rebuttal.  
5 Let's hear from your adversary.

6 MR. COLLEY: Thank you.

7 MR. GAIER: May it please the court, my  
8 name is Matt Gaier. I represent the  
9 plaintiffs/respondents.

10 I gotta clarify something right off the  
11 bat. First of all, it's not a matter of ALS versus  
12 BLS, and there's no discretionary function at issue  
13 here, and they haven't argued that. They've conceded  
14 from the get-go that this is a ministerial function.  
15 Therefore, the only question - - - this is not a  
16 McLean case; this is not a McLean issue. Therefore,  
17 the only question that's before - - -

18 CHIEF JUDGE LIPPMAN: This - - - assume  
19 it's not a McLean case. Go ahead. It just - - -  
20 yeah.

21 MR. GAIER: Well, that's - - - they haven't  
22 argued it. I haven't briefed it.

23 CHIEF JUDGE LIPPMAN: Yes. Go ahead.  
24 Agreed. Go ahead.

25 MR. GAIER: The question is whether a

1 special - - - the first question is whether a special  
2 duty is even required in this ministerial situation.

3 CHIEF JUDGE LIPPMAN: Yes. So - - - so let  
4 - - -

5 MR. GAIER: And we were here, argued this -  
6 - -

7 CHIEF JUDGE LIPPMAN: Yeah, but - - -

8 MR. GAIER: - - - back in January.

9 CHIEF JUDGE LIPPMAN: Let me ask - - - let  
10 me ask you the same question I asked your adversary.  
11 What are the policy reasons - - - when you have  
12 government performing a function as a place of last  
13 resort, they have to perform the function, what is  
14 the policy justification in that circumstance,  
15 putting aside what your counsel - - - your adversary  
16 concedes about if you're doing harm and it goes into  
17 another realm, what - - - what are the policy reasons  
18 to justify proprietary versus government?

19 MR. GAIER: Well, first of all, I - - - I -  
20 - -

21 CHIEF JUDGE LIPPMAN: Let me - - - let me  
22 add one thing to the - - - to the mix. It's a  
23 governmental function and it's a governmental  
24 function basically under the umbrella of an emergency  
25 response like the fire department.

1 MR. GAIER: Right.

2 CHIEF JUDGE LIPPMAN: What - - - what are  
3 the policy justifications? Why should we say  
4 proprietary versus governmental?

5 MR. GAIER: Sure. Let's go back to the  
6 basic of why we even have the special duty rule. It  
7 has to with whether a duty of care is owed in the  
8 first place. In most special duty cases, there's a  
9 duty of care not owed to the individual but to the  
10 public at large. Therefore, in a very circumspect,  
11 circumscribed group of cases that this court has  
12 sanctioned, there is a duty of care deemed owed to  
13 the individual when it's otherwise a duty of care  
14 undertaken to the public, like a police case.

15 Now, that doesn't apply to proprietary  
16 because then - - -

17 CHIEF JUDGE LIPPMAN: We - - - we - - -

18 MR. GAIER: - - - the duty of care is owed  
19 to the individual.

20 CHIEF JUDGE LIPPMAN: We understand that,  
21 but let me follow up with a question - - - again a  
22 question that we asked your adversary. Can you parse  
23 the different functions that the government is  
24 performing in this emergency response role from, you  
25 know, getting into the medical side or giving medical

1 assistance - - -

2 MR. GAIER: Yes, I can.

3 CHIEF JUDGE LIPPMAN: - - - or EMS - - -

4 EMSs are not doctors, but how do you - - - what's the  
5 dividing line between the dispatch/emergency response  
6 versus - - -

7 MR. GAIER: Sure.

8 CHIEF JUDGE LIPPMAN: - - - something more  
9 than that?

10 MR. GAIER: And before I give that, I just  
11 want to note this court's long history of decisions  
12 requiring us to parse this by looking at the specific  
13 acts or omissions that are claimed to be negligent.  
14 Here, the acts or omissions claimed to be negligent  
15 on three things: failing to give oxygen, failing to  
16 timely bring her to the hospital, and delaying in  
17 calling the ALS ambulance. Those are all in the  
18 nature of medical care. Medical care - - -

19 JUDGE READ: So - - - so what if - - - what  
20 if they had just, I hadn't heard this before, but  
21 scooped-and-grabbed? What if the service provided  
22 was just transportation and they had come and they  
23 had just taken the child?

24 MR. GAIER: But that's not what it is.

25 It's a - - - these are emergency medical technicians.

1 They provide medical care. EMS - - - I looked up - -  
2 -

3 JUDGE GRAFFEO: Well, how do you - - - how  
4 do you parcel it - - - parcel it out when, say, this  
5 - - - very similar services are done. There's a fire  
6 in an apartment building. The firefighters are going  
7 there; the police are going there; the EMTs are going  
8 there. The firefighters are carrying people out.  
9 The EMTs are stabilizing them and putting them in - -  
10 - in ambulances.

11 MR. GAIER: EMTs - - -

12 JUDGE GRAFFEO: That's a special duty to  
13 every one of those fire victims - - -

14 MR. GAIER: The duty - - -

15 JUDGE GRAFFEO: - - - that come out of the  
16 building?

17 MR. GAIER: The duty of care arises the  
18 moment the healthcare practitioner-patient  
19 relationship is established. This is - - -

20 JUDGE GRAFFEO: So - - - so that - - - so  
21 those are all proprietary, when - - -

22 MR. GAIER: When - - -

23 JUDGE GRAFFEO: - - - when they're doing  
24 that?

25 MR. GAIER: - - - they are engaged - - -

1 when these - - - when the relationship is  
2 established, when they arrive to treat, that's when  
3 the relationship is established. That's the - - -

4 JUDGE GRAFFEO: So the firefighters - - -

5 MR. GAIER: - - - basis of the duty of  
6 care.

7 JUDGE GRAFFEO: - - - are doing a  
8 governmental function, and the EMTs are doing a  
9 proprietary function?

10 MR. GAIER: Let me - - - let me say - - -  
11 give this distinction about that, because - - -

12 JUDGE GRAFFEO: Well, I wish you could  
13 answer that question - - -

14 MR. GAIER: Sure.

15 JUDGE GRAFFEO: - - - because this is at  
16 the heart of the policy - - -

17 MR. GAIER: Sure.

18 JUDGE GRAFFEO: - - - determination we have  
19 to make here.

20 MR. GAIER: And the most important thing  
21 that was brought out was - - -

22 JUDGE SMITH: Your - - - your answer is  
23 yes, isn't it? The EMTs are doing a proprietary  
24 function and the - - -

25 MR. GAIER: Yes, that is my answer, but I'd

1           like to explain why, too.

2                   CHIEF JUDGE LIPPMAN: Explain. Go ahead.

3                   MR. GAIER: First of all, EMTs are  
4 healthcare providers, just like doctors, nurses,  
5 paramedics. And their argument, by the way, that  
6 it's - - -

7                   JUDGE GRAFFEO: They have very limited  
8 scope - - -

9                   MR. GAIER: No.

10                  JUDGE GRAFFEO: - - - under the regs and  
11 the training.

12                  MR. GAIER: No, they have - - - they  
13 provide medical care.

14                  JUDGE GRAFFEO: Well, there's a big  
15 difference between EMTs and paramedics in terms of  
16 training and what their - - -

17                  MR. GAIER: They're all - - -

18                  JUDGE GRAFFEO: - - - what they are, under  
19 regulations, permitted to do.

20                  MR. GAIER: Their argument applies to  
21 paramedics. Their argument applies to doctors who  
22 happen to be in an ambulance. It's the same argument  
23 all the way around. But, yes, it's different in  
24 scope, but they still treat trauma, burns,  
25 respiratory problems, et cetera.

1 CHIEF JUDGE LIPPMAN: Let me ask you - - -  
2 let me ask you question that we asked your adversary.  
3 What - - - what - - - how do you answer the  
4 allocation of resources argument that they have  
5 finite resources, that they're performing this  
6 function - - - let's say you had a disaster case, and  
7 you had - - - there's only so many responders in this  
8 emergency mode, and the decision is made to treat  
9 that one instead of this one and - - - proprietary or  
10 governmental? You follow what I'm saying? That - -  
11 - part of their argument is - - -

12 MR. GAIER: Yes, yes.

13 CHIEF JUDGE LIPPMAN: - - - they have  
14 finite resources and they must do this. How do we  
15 grapple with that policy?

16 MR. GAIER: Well, all right, to the extent  
17 that - - - you're talking now - - - you're giving me  
18 a hypothetical where they're on the scene and they've  
19 got two - - - two EMTs and five people injured, that  
20 kind of a thing?

21 CHIEF JUDGE LIPPMAN: Yeah. You got a mass  
22 disaster and they only have so many EMT - - -

23 MR. GAIER: It's the same thing that  
24 happens in an emergency room. The triage nurse does  
25 the same exact thing and it's no different.

1 JUDGE SMITH: But doesn't - - - but doesn't  
2 - - -

3 MR. GAIER: But there's an important point  
4 that I'm - - -

5 JUDGE SMITH: I mean, maybe I'm not  
6 understanding you right, but I thought the chief  
7 judge's question went to the - - - to the overriding  
8 policy. Isn't there a difference between a city  
9 ambulance - - - a private ambulance which can go out  
10 of business and a city ambulance service which is a  
11 bottomless pocket and - - - and aren't you going to -  
12 - - you just put an undue strain on the taxpayers by  
13 saying that the city ambulance service has to be - -  
14 - have the same kind of liability that a private one  
15 does?

16 MR. GAIER: Well, the question is what is -  
17 - - you can say that about every time a government is  
18 engaged in a proprietary function as well. The  
19 government here - - - by the way, this is an  
20 important point for establishing the proprietary  
21 nature here, and nobody's mentioned this yet, and it  
22 came out in the supplemental briefs. But the City  
23 charges for these services by EMS attendants, by the  
24 EMTs and the paramedics. I mean, in my mind, this is  
25 monumental. I don't understand how they can even

1 argue that this is governmental when they're  
2 charging. And they're not charging a nominal fee.  
3 They're - - -

4 JUDGE READ: What about - - - what about  
5 all the areas of state, Mr. Gaier, where this is only  
6 a government-run function, where there aren't private  
7 - - - private services that do this? Would you  
8 suggest that the rule in New York should be different  
9 - - - in New York City should be different because  
10 they also have private ambulance services, or would  
11 you suggest that it's proprietary everywhere, even if  
12 it's an EMT and a fire department, ambulance, in an  
13 area of the state where there aren't private  
14 providers?

15 MR. GAIER: It's not because there are  
16 private ambulance services here in New York. What  
17 we're talking about is there are private ambulance  
18 services, not only here in the city but all over the  
19 state, of course - - -

20 JUDGE READ: Yeah, but there's some - - -

21 MR. GAIER: - - - but what they're asking  
22 you to do - - -

23 JUDGE READ: - - - areas of the state there  
24 are not.

25 MR. GAIER: - - - is to rule that public

1 ambulance attendants owe no duty of care to their  
2 patients. That would be unheard of in the history of  
3 this state, and that's what the effect of what  
4 they're asking you to do is. And there's no basis.  
5 That's - - -

6 JUDGE GRAFFEO: I think - - - I think - - -

7 MR. GAIER: - - - dangerous policy.

8 JUDGE GRAFFEO: - - - Judge Read's question  
9 is, we do have some small city and rural areas where  
10 there are no hospitals within even an hour of where  
11 some of these communities are. So it's exclusively a  
12 municipal service being - - - being offered. There  
13 is - - - there is no opportunity to have a private  
14 entity perform the - - - perform the same function.

15 MR. GAIER: And very simply, if they're  
16 providing - - - these are people who are qualified  
17 healthcare providers. We're not talking about the  
18 911 system here.

19 JUDGE READ: So that's a proprietary  
20 function in those localities, too?

21 MR. GAIER: It's a proprietary function if  
22 someone is a healthcare provider - - -

23 JUDGE READ: Can those localities go out of  
24 that business then, just decide to go out of that  
25 business?

1 MR. GAIER: I don't think they do go out of  
2 that business. And I don't really understand - - -

3 JUDGE READ: Do they?

4 MR. GAIER: - - - the notion that this is  
5 putting a great strain on - - - you know, you gotta  
6 understand, I'm not the one seeking to change the  
7 law. This is the status quo. This is the way it's  
8 been for decades. In the Schempp case - - -

9 CHIEF JUDGE LIPPMAN: What's your - - -  
10 what's your best case that says this is the status  
11 quo?

12 MR. GAIER: The Schempp case from 1967,  
13 there was - - - the city was liable for the ambulance  
14 attendant's negligence. They didn't even dream of  
15 arguing that there was - - - was a special duty  
16 required. Eleven years ago, in the Fonville case,  
17 where the plaintiff made two claims: one, the 911 -  
18 - - after the 911 call, they arrived late; and two,  
19 once they arrived on the scene, they failed to - - -  
20 to treat properly. Plaintiff appealed saying, wait a  
21 minute, you can't dismiss the whole case; you've got  
22 - - - you've still got negligent treatment. The  
23 City, health and hospitals, Corp Counsel in their  
24 briefs say plaintiff's right; to the extent that  
25 there's negligence after we arrived, that's not

1 covered by special duty. This has always been  
2 understood this way.

3 Now, Mr. Colley may say that, oh, there was  
4 administration of contraindicated medication in that  
5 case. Not true. The - - - those particulars are in  
6 our record on appeal here.

7 JUDGE GRAFFEO: I don't think anybody's  
8 saying there can never be negligence. I think we're  
9 trying to figure out where you draw the line.

10 MR. GAIER: I have a beautiful spot to draw  
11 the line, and it gives everybody a bright line that  
12 everybody can hold on to so that nobody is - - - is  
13 at risk for expanding the liability, which is nothing  
14 that we want to do, and that is when they arrive on  
15 the scene, when it's time to start treatment, when  
16 they're treating, the healthcare provider-patient  
17 relationship is established, and that is when the  
18 duty of care exists to the individual. That's why no  
19 special duty is required. And it's - - - it's - - -

20 JUDGE READ: So at that point, it - - - it  
21 switches from being a governmental function to being  
22 a proprietary function?

23 MR. GAIER: Sure, absolutely. While  
24 they're - - - while they're in transit, like - - -  
25 like Your Honor said, Judge Read, in the last

1 document - - -

2 JUDGE GRAFFEO: And - - - and that's - - -

3 MR. GAIER: - - - they can stop - - -

4 JUDGE GRAFFEO: And that's under - - -

5 MR. GAIER: - - - for doughnuts along the  
6 way.

7 JUDGE GRAFFEO: And that's understood by  
8 all the municipalities across New York State? If we  
9 were to determine that, that's not going to have a  
10 major impact policy-wise on what municipalities  
11 decide to provide?

12 MR. GAIER: Well, this is the way it's  
13 always been, and there are no cases that have ever  
14 held - - - no case has ever held that a special duty  
15 is required for a duty of care to be owed by any  
16 healthcare provider, attend - - - ambulance attendant  
17 or otherwise, to a patient to whom they're treating.  
18 No case has ever held that. This has always been  
19 contemplated. It's not that many cases, quite  
20 frankly. There's not a ton of cases like this.  
21 Granted, on the front end - - -

22 CHIEF JUDGE LIPPMAN: How many - - - how  
23 many - - - do you know, counselor, how many calls  
24 there are in the city of New York on a given day?

25 MR. GAIER: A lot.

1 CHIEF JUDGE LIPPMAN: I know that.

2 JUDGE READ: A lot. Hundreds?

3 CHIEF JUDGE LIPPMAN: We're just trying to  
4 get the dimension. When you say there's not many,  
5 what would you say there?

6 MR. GAIER: I gotta believe there - - -  
7 there's thousands, perhaps, of calls to 911, maybe  
8 hundreds that require a - - -

9 CHIEF JUDGE LIPPMAN: Ambulances going out?

10 MR. GAIER: - - - an assignment of an  
11 ambulance. We know that thirty-five percent of them  
12 go to private ambulances, sixty-five - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. GAIER: - - - to the public ambulances.  
15 The city's rule would have you as follows: when  
16 those thirty-five - - - those thirty-five percent of  
17 the patients that are treated by private ambulance  
18 have a duty of care owed to them, the professional  
19 standards of care apply. The sixty-five percent  
20 treated by public ambulance, no duty of care is owed.

21 CHIEF JUDGE LIPPMAN: What's the rule that  
22 - - - that you propose, counsel?

23 MR. GAIER: The rule that I propose is when  
24 they arrive to treat, that's when the duty to the  
25 patient, to treat within the standards of care, the

1 standards of ambulatory emergency - - -

2 CHIEF JUDGE LIPPMAN: Once they're there -

3 - -

4 MR. GAIER: - - - medical care applies.

5 CHIEF JUDGE LIPPMAN: Once they're there,  
6 it changes.

7 MR. GAIER: Once they're there, it changes.

8 CHIEF JUDGE LIPPMAN: Getting there is - -  
9 - is the - - -

10 JUDGE READ: Getting there is - - -

11 MR. GAIER: Getting there - - -

12 JUDGE READ: - - - getting there is  
13 governmental. The transportation is governmental,  
14 but once they arrive and start to provide any kind of  
15 treatment.

16 MR. GAIER: Yes. And that's - - -

17 JUDGE GRAFFEO: If all they do is pick up  
18 the person and put them on a gurney and take them to  
19 the ambulance?

20 MR. GAIER: If that's all that the patient  
21 requires, sure, but usually the patient requires  
22 more.

23 JUDGE GRAFFEO: What if they do nothing  
24 else? That's all they do - - -

25 MR. GAIER: If - - - if - - -

1 JUDGE GRAFFEO: - - - because they don't  
2 want to get involved in the proprietary function;  
3 that's all they do.

4 MR. GAIER: If the patient required - - -  
5 but - - - but you're not just send - - -

6 JUDGE GRAFFEO: Is that also going to be  
7 actionable?

8 MR. GAIER: We're not sending a bus; we're  
9 sending an ambulance that's supposed to provide  
10 medical care.

11 JUDGE ABDUS-SALAAM: So even if - - -

12 MR. GAIER: So it's not a simple matter.

13 JUDGE ABDUS-SALAAM: Even if the patient  
14 requires oxygen?

15 JUDGE GRAFFEO: Well, they may - - - well,  
16 municipalities may decide to alter that. They may  
17 decide that they don't want to incur the added  
18 liability and they will merely transport.

19 MR. GAIER: They've been doing this for  
20 years, and they've been providing this service all  
21 along. There's no reason to think that they would  
22 change from that.

23 JUDGE ABDUS-SALAAM: If the patient  
24 requires oxygen and the EMT or the EMS service  
25 doesn't give it, that's medical care, right?

1 MR. GAIER: Of course that's medical care -  
2 - -

3 JUDGE ABDUS-SALAAM: Is it - - -

4 MR. GAIER: - - - as is - - - as is  
5 transporting to the hospital when the patient needs  
6 to be taken to the hospital. Look - - - and I'm  
7 going to come back to this - - - they charge 790  
8 dollars for a BLS ambulance, 1,190 dollars for an ALS  
9 ambulance, and they charge the patient - - - and by  
10 the way, the regulation calls them a patient, okay -  
11 - - and their insurance company. I don't see how  
12 this is any different than what the private ambulance  
13 does, what the private hospital does, and what HHC  
14 does in the public hospitals. It's the exact same  
15 thing. They're in the business of providing patient  
16 care for money. These are not nominal charges.  
17 These are serious charges, and it's a business. And  
18 this is distinguished from the fire department, and  
19 it's distinguished from - - - from the police  
20 department. The police officer doesn't charge when  
21 he goes and runs into a building or - - -

22 CHIEF JUDGE LIPPMAN: So I mean, even if  
23 the - - - let me understand the argument. So if the  
24 government, let's say the fire department, runs this  
25 service, if you charge for it, it's proprietary; if



1 some people is that upstate there's a lot of  
2 volunteer fire departments that provide this type of  
3 service. And my thought then is would you then be  
4 arguing that it's the standard of care in the  
5 community?

6 MR. GAIER: Here's the thing. Volunteer  
7 fire departments, volunteer ambulance corps, they're  
8 covered by the Good Samaritan doctrine. You need  
9 gross negligence for that. It's a completely  
10 different standard. It's a completely different  
11 situation. But a duty of care could still be owed  
12 but only for gross negligence in that case.

13 Before - - - I know my time is up - - -

14 CHIEF JUDGE LIPPMAN: But are you saying  
15 the - - - the upstate same service is governed by a  
16 different principle; it's the Good Samaritan law?

17 MR. GAIER: No, it's not a geographic  
18 issue, Judge. It's - - -

19 CHIEF JUDGE LIPPMAN: So what is it?

20 MR. GAIER: It's a volunteer issue. That's  
21 the difference. He said volunteer fire departments.

22 CHIEF JUDGE LIPPMAN: But if that's the  
23 only governmental - - - if that's the only function  
24 that - - - that is in that particular county or  
25 district, that changes it to the volunteers instead

1 of on the government payroll?

2 MR. GAIER: Yeah. Well, the fact that  
3 they're - - -

4 CHIEF JUDGE LIPPMAN: Because, you know,  
5 we've got a make a ruling that applies to everybody,  
6 yeah.

7 MR. GAIER: No. Sure, I understand. No, I  
8 think the fact that they're volunteers is - - - is a  
9 fundamentally different situation because it's a  
10 different standard altogether.

11 But just before - - - I know my time is up,  
12 of course - - -

13 CHIEF JUDGE LIPPMAN: You're finished, but  
14 go ahead, finish your thought.

15 MR. GAIER: But here - - - this is a hugely  
16 important point, I think, because to hold that they  
17 owe no duty - - - to hold that a special duty is  
18 required is to hold that no duty of care is owed by  
19 the healthcare provider to the patient. That would  
20 be phenomenally dangerous policy. It would sanction  
21 substandard care being given to patients of public  
22 ambulance attendants while private ambulance  
23 attendants have to - - - are being held to the  
24 standards of care of professional liability. This is  
25 a species of medical malpractice. And it's - - -

1           it's inconceivable to have this kind of dichotomy,  
2           for one thing, but even worse, to just say no duty of  
3           care is owed. It - - - it would be awful policy.

4                    CHIEF JUDGE LIPPMAN: And just one more - -  
5           - one more question, counsel. I'm just trying to pin  
6           down both of your reasonings. It doesn't matter in  
7           that context whether they have to perform the  
8           function - - -

9                    MR. GAIER: Are you saying - - -

10                   CHIEF JUDGE LIPPMAN: - - - know what I  
11           mean, whether - - - whether - - - I think someone  
12           used the expression a bottomless pit that - - -

13                   MR. GAIER: Last resort? That one?

14                   CHIEF JUDGE LIPPMAN: Last resort. They  
15           must perform it. They have no choice in the - - - in  
16           this legal theory that we're trying to develop,  
17           doesn't matter, right?

18                   MR. GAIER: That has never, you know, been  
19           applied in the circumstance of determining whether  
20           the act is proprietary. This court has been really  
21           clear over the years.

22                   CHIEF JUDGE LIPPMAN: But what about like -  
23           - -

24                   MR. GAIER: If you look at the specific - -  
25           -

1 CHIEF JUDGE LIPPMAN: What - - -

2 MR. GAIER: - - - acts and omissions to  
3 determine that.

4 CHIEF JUDGE LIPPMAN: Well, what about like  
5 - - - like a cop who must - - - must perform certain  
6 duties? He has a different standard, right?

7 MR. GAIER: But that - - - well, the cop is  
8 always going to be governmental. It's - - - it's  
9 always going to be governmental and never going to be  
10 proprietary because that's the - - - owed to the  
11 public at large; it's never owed directly to the  
12 individual.

13 JUDGE GRAFFEO: What do you do with, like,  
14 the city of Albany has firefighters that are EMTs - -  
15 -

16 MR. GAIER: Right.

17 JUDGE GRAFFEO: So if they're - - - if  
18 they're attending to someone who's injured, are they  
19 performing as a firefighter or are they performing as  
20 an EMT?

21 MR. GAIER: All right. Let me - - -

22 JUDGE GRAFFEO: Because you said fire and  
23 police are different.

24 MR. GAIER: I understand.

25 JUDGE GRAFFEO: So you're not - - - you're

1 not paying for the service.

2 MR. GAIER: I understand. So I've got - -  
3 -

4 JUDGE GRAFFEO: You know, if somebody  
5 passes out here in the courtroom, a fire truck comes  
6 and firefighters come in.

7 MR. GAIER: Right. I remember we talked  
8 about this last time. And - - - and the thing is  
9 this. It's a closer call, and here's why. To the -  
10 - - they are providing healthcare, but they're not a  
11 healthcare provider as a primary concern. That's  
12 almost secondary or - - -

13 CHIEF JUDGE LIPPMAN: Are the E - - - but -  
14 - -

15 MR. GAIER: - - - potentially tertiary.

16 CHIEF JUDGE LIPPMAN: But are the EMSs,  
17 healthcare providers as a primary concern?

18 MR. GAIER: Not only primary; it's their  
19 exclusive purpose. They are ambulatory, med - - -  
20 emergency medical care providers. That's solely what  
21 they are, medical care providers.

22 CHIEF JUDGE LIPPMAN: Part of it is - - -  
23 is responding, right? Part of it is responding, and  
24 part of it is this other case?

25 MR. GAIER: Well, you gotta drive there,

1 and the driving there part - - -

2 JUDGE READ: Well, you gotta drive - - -  
3 you gotta drive to the - - -

4 MR. GAIER: - - - we've already talked  
5 about there's no liability.

6 JUDGE READ: You've gotta drive to the  
7 hospital, too.

8 MR. GAIER: Well, sure, but that's part of  
9 - - -

10 JUDGE READ: You respond to the call, you  
11 have to get there, you have to sta - - - you  
12 stabilize the patient or do whatever needs to be  
13 done, and then take them to a - - - to a hospital.

14 MR. GAIER: This is the essence of  
15 ambulatory - - - emergency medical care. It's been  
16 around forever and this is what - - -

17 CHIEF JUDGE LIPPMAN: That's very  
18 interesting. Now let's put your adversary on the  
19 griddle and see what he has to say.

20 MR. GAIER: Thank you, Judge.

21 CHIEF JUDGE LIPPMAN: Okay. Thank you.  
22 Counselor.

23 MR. COLLEY: Thank you. A couple quick  
24 points - - -

25 CHIEF JUDGE LIPPMAN: Counselor - - -

1 JUDGE GRAFFEO: Why - - - why - - -

2 CHIEF JUDGE LIPPMAN: - - - just one

3 information request that I asked your adversary. Do  
4 you know how many calls are there in New York City a  
5 day, you know, that - - - that an ambulance goes out?

6 MR. COLLEY: I don't know per day, but I  
7 can tell you it's 1.3 million per year.

8 CHIEF JUDGE LIPPMAN: 1.3 million, okay.

9 MR. COLLEY: 1.3 million per year, Your  
10 Honor.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. COLLEY: I want to clear up one thing.  
13 We're not healthcare providers as a primary concern.  
14 We perform a rescue function.

15 Going back to your example of a disaster  
16 situation where the fire department, police  
17 department, and EMS respond, the fire department is  
18 there. They're performing a governmental function.  
19 The fact that they may inter - - - interact with an  
20 individual by pulling that person out of the fire  
21 does not convert it to proprietary. The same is true  
22 if a police officer interacts with an individual at  
23 that same scene.

24 JUDGE PIGOTT: I think - - -

25 MR. COLLEY: And I submit - - -

1                   JUDGE PIGOTT: I think Mr. Gaier's point  
2                   though is if you show up at somebody's residence and  
3                   you put in an endotracheal tube and you do it  
4                   negligently, and as a result of that, you pierce the  
5                   - - - the trachea and the person suffers as a result,  
6                   are you immune from suit for that?

7                   MR. COLLEY: No, we're not saying that at  
8                   all. We're not saying that, but we're talking about  
9                   primary - - -

10                  JUDGE PIGOTT: So - - - so you would  
11                  respond in damages for that?

12                  MR. COLLEY: That could - - -

13                  JUDGE PIGOTT: Assuming you're found  
14                  liable.

15                  MR. COLLEY: It - - - it's considered - - -

16                  JUDGE SMITH: How - - - how is that  
17                  different from this case?

18                  MR. COLLEY: I'm sorry?

19                  JUDGE SMITH: How - - - how is Judge  
20                  Pigott's hypothetical different from this case?

21                  MR. COLLEY: I'm not sure I understand what  
22                  your - - -

23                  JUDGE SMITH: You show up - - - you show up  
24                  at someone's residence. You put a tube in his throat  
25                  negligently. You're liable?

1 MR. COLLEY: Well, we could be found  
2 liable. It - - - I mean, this is - - - this is, once  
3 again, taking positive - - -

4 JUDGE SMITH: And you show up and you do -  
5 - - but if you do CPR negligently, you're not liable?

6 MR. COLLEY: If you're - - - I think the -  
7 - - the bright line is whether you make the situation  
8 worse or not. Clearly - - -

9 JUDGE PIGOTT: How is that determined,  
10 though? Don't you need - - - isn't that a factual  
11 determination as to whether you make it worse?

12 MR. COLLEY: Probably. I mean, if you - -  
13 - if you administer - - -

14 JUDGE PIGOTT: So summary judgment would be  
15 ill advised in a situation like that.

16 MR. COLLEY: Under that circumstance, yes,  
17 but that's a different - - - a wholly different case.

18 JUDGE SMITH: If you don't - - - if you  
19 don't make the situation worse, there are no damages,  
20 and every - - - every tort defendant is somebody  
21 who's accused of having made a situation worse.

22 MR. COLLEY: The - - - and in every tort  
23 situation, it comes down to a question of duty.  
24 Without duty, there is no tort liability. And in  
25 this particular case, once again, the government - -

1 - the public duty rule is applicable.

2 CHIEF JUDGE LIPPMAN: Counsel, whose  
3 payroll are the - - - the EMS people on?

4 MR. COLLEY: FDNY.

5 CHIEF JUDGE LIPPMAN: So they're all - - -  
6 so all these people are - - - are fire department  
7 people?

8 MR. COLLEY: They're all fire department  
9 people, and more than that - - -

10 CHIEF JUDGE LIPPMAN: And - - - and your  
11 argument - - - let's understand, your argument is  
12 that makes all the difference, right?

13 MR. COLLEY: No. I'm - - - I'm saying that  
14 the actual function that they perform is what makes  
15 the difference.

16 JUDGE RIVERA: Well, I know - - -

17 JUDGE PIGOTT: What do you think of Mr.  
18 Gaier's argument that you charge for this?

19 MR. COLLEY: They charge to defray  
20 expenses. That does not convert it somehow to  
21 proprietary - - -

22 JUDGE PIGOTT: Well, I know that, but, I  
23 mean, you're saying to this person that you are  
24 tending to, you owe us money.

25 MR. COLLEY: Well, we don't say that at the

1 point we pick them up.

2 JUDGE PIGOTT: I hope not.

3 MR. COLLEY: We rescue them.

4 JUDGE PIGOTT: I hope not, but what I'm  
5 suggesting though is if you've now established a  
6 pretty - - - you know, a pecuniary relationship  
7 there, if no other relationship.

8 MR. COLLEY: And it's not unusual, Judge  
9 Pigott, that - - -

10 JUDGE SMITH: Government doesn't usually  
11 bill its customers.

12 MR. COLLEY: That's not - - - that's not  
13 necessarily true, Your Honor. You have to pay money  
14 if you want to get a driver's license, if you want to  
15 get a license to sell beer in your corner  
16 delicatessen. There's a license and a fee involved  
17 with that.

18 CHIEF JUDGE LIPPMAN: Let me ask you a  
19 question - - -

20 JUDGE ABDUS-SALAAM: But don't they - - -

21 CHIEF JUDGE LIPPMAN: - - - on the fire - -  
22 - fire department again. Are they put on the fire  
23 department payroll because you believe that this is  
24 an emergency function? When you say it's the  
25 function not the - - - could they be on the fire

1 department payroll and have a proprietary function?

2 MR. COLLEY: Well, we don't believe - - -

3 CHIEF JUDGE LIPPMAN: Is that possible?

4 MR. COLLEY: - - - it's a proprietary

5 function irrespective of whose flag they fly under.

6 Prior to it being FDNY, it was HHC, but the function

7 was still the same; it was still a rescue - - -

8 CHIEF JUDGE LIPPMAN: Function is emergency

9 in your - - - from your perspective?

10 MR. COLLEY: It's a - - - it's a rescue

11 function, and that's all it is. If there is any - -

12 -

13 JUDGE ABDUS-SALAAM: But if you have to - -

14 - Mr. Colley, if you have to, in order to rescue the

15 person - - - let's say they're trapped under

16 something, a log falls down on them and their leg is

17 broken and the only way you can get them out is to

18 stabilize the leg first. So you're saying that's not

19 medical treatment?

20 MR. COLLEY: We use the Jaws of Life to pry

21 people out of automobiles. It's still part of the

22 rescue function. That's not - - - that doesn't make

23 it proprietary.

24 And one passing thought, it's not unusual

25 for a police officer - - - at least in New York City

1           it happens maybe once or twice every year. Police  
2           officer is called upon to deliver a baby. Same thing  
3           of a transit - - - New York City transit conductor.  
4           That doesn't change what they do. Our function is  
5           rescue. Any treatment - - -

6                         JUDGE ABDUS-SALAAM: But their main  
7           function - - -

8                         JUDGE RIVERA: But that - - - that's not  
9           even - - - that's in the moment - - -

10                        JUDGE ABDUS-SALAAM: But the officer's  
11           function is not to rescue babies.

12                        JUDGE RIVERA: - - - which is, I think,  
13           different from what - - - what your opponent is  
14           arguing which is this is what they do all the time,  
15           they're - - - he argues they're healthcare providers,  
16           they should be held to the same standard as someone  
17           who's - - - who does this for - - - as a private  
18           matter. And I'm not clear that what - - - your  
19           example addresses that.

20                        MR. COLLEY: No. I'm sorry. I thought  
21           that I had addressed it. And what I'm saying is that  
22           the duty - - - the mission of EMS is to transport  
23           people. There may be some medical interventions that  
24           take place that are incidental to the transport  
25           function.

1                   JUDGE PIGOTT: And they should do those  
2 carefully.

3                   JUDGE RIVERA: But isn't - - - isn't the  
4 duty to stabilize?

5                   MR. COLLEY: They - - - well, they should  
6 do them carefully, but we certainly do want - - -  
7 don't want to discourage them from not doing them at  
8 all. Okay, our mission is to keep the people - - -

9                   JUDGE RIVERA: Isn't the duty to stabilize?

10                  MR. COLLEY: Pardon me?

11                  JUDGE RIVERA: Isn't the duty to stabilize?  
12 Isn't that inherent in that - - -

13                  MR. COLLEY: The duty is to drive - - -

14                  JUDGE RIVERA: - - - you're going to make  
15 some judgment call about the medical service to be  
16 provided to ensure they're ready for transport?

17                  MR. COLLEY: I'm sure that there is a fair  
18 amount of discretion that goes into each - - - and in  
19 fact, every time that a medical intervention takes  
20 place, it further implicates the - - - the transport  
21 function because of the time that they're spending -  
22 - -

23                  CHIEF JUDGE LIPPMAN: But your - - - your  
24 basic argument is their main function is emergency -  
25 - -

1 MR. COLLEY: Yes.

2 CHIEF JUDGE LIPPMAN: - - - and the - - -  
3 and the medical is ancillary - - - ancillary, and  
4 your adversary really is saying the opposite, that  
5 their main function is medical and, I guess, the - -  
6 - the transportation is secondary.

7 MR. COLLEY: My - - - my learned colleague  
8 - - -

9 CHIEF JUDGE LIPPMAN: I mean, is that  
10 really the area that you disagree that there - - -

11 MR. COLLEY: That's - - - that is one of  
12 the main areas where we disagree. My learned  
13 colleague is trying to suggest that there is a new -  
14 - - that this court should create a brand new  
15 relationship - - -

16 CHIEF JUDGE LIPPMAN: What is this - - -

17 MR. COLLEY: - - - as to EMTs.

18 CHIEF JUDGE LIPPMAN: What is the state of  
19 the law today? Your - - - your adversary said the  
20 state of the law is the way - - - it's his position  
21 as - - - what - - - what's your answer to that?

22 MR. COLLEY: He has cited absolutely no  
23 cases in support of that.

24 CHIEF JUDGE LIPPMAN: What do you cite for  
25 your - - - your position? What's your best case or

1 cases?

2 MR. COLLEY: Probably Laratro in this - - -  
3 where this court found that the dispatch function is  
4 clearly governmental in an ambulance situation.

5 CHIEF JUDGE LIPPMAN: Okay.

6 JUDGE ABDUS-SALAAM: That's - - -

7 CHIEF JUDGE LIPPMAN: Nice to see both of  
8 you again.

9 (Court is adjourned)

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I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Applewhite v. Accuhealth, Inc., No. 86 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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