

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

APPLEWHITE,

Respondent,

-against-

No. 11

ACCUHEALTH, INC.,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
January 7, 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.

Appearances:

DRAKE A. COLLEY, ESQ.  
AMY G. LONDON, ESQ.  
NEW YORK CITY LAW DEPARTMENT  
Attorneys for Appellant  
100 Church Street  
6th Floor  
New York, NY 10007

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

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 11, Applewhite. Counsel, would you like  
3 some rebuttal time?

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

7 CHIEF JUDGE LIPPMAN: Five minutes. Sure,  
8 go ahead.

9 MR. COLLEY: May it please the court, good  
10 afternoon, Your Honors. Drake Colley for the City.  
11 And seated with me at counsel table is Amy London.

12 This appeal presents two issues. The first  
13 issue is whether the City's provision of emergency  
14 medical services is a governmental rather than a  
15 proprietary function. And we respectfully submit  
16 that, of course, it is a governmental function.

17 The second issue is whether or not the  
18 plaintiffs can establish the creation of a special  
19 relationship. And we respectfully submit that in  
20 this case and on this record, plaintiffs cannot  
21 demonstrate a special relationship.

22 CHIEF JUDGE LIPPMAN: Let me - - -

23 JUDGE READ: Can you explain - - -

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 JUDGE READ: - - - to me something about

1           how this - - - how the emergency medical services  
2           work? I mean, I understand from the record that  
3           sometimes the private companies are - - - may respond  
4           to these. You con - - - you have Fire Department  
5           employees, some EMSs, and then ambulances, and then  
6           you also have contracts with private companies to  
7           provide the same service. Is that correct?

8                         MR. COLLEY: That's absolutely correct.  
9           And I'd like to explain exactly how that works. EMS  
10          obviously works within the limited resources of a  
11          municipal budget. And in fact, the utilization of  
12          private ambulance services within the 9-1-1 system is  
13          based on governmental decision-making regarding how  
14          to best use those resources.

15                        So in some cases, private ambulances will  
16          operate - - -

17                        CHIEF JUDGE LIPPMAN: So what happens if  
18          it's a private ambulance service and you had the same  
19          set of facts? Would they be - - - could they  
20          possibly be liable?

21                        MR. COLLEY: Well, that's something that  
22          this court has yet to reach, whether a - - - and in  
23          fact, maybe at some point in the future, this court  
24          may reach the question of whether or not a private  
25          ambulance service that's dispatched by 9-1-1 - - -

1 CHIEF JUDGE LIPPMAN: But if we were to  
2 reach the conclusion that they could be, how do you  
3 justify a distinction between the private ambulance  
4 service and, in this case, the City's service?

5 MR. COLLEY: Well - - -

6 CHIEF JUDGE LIPPMAN: I mean, let's assume  
7 for the sake of argument that a private ambulance  
8 service could be held liable. Why - - - if you send  
9 them out and if they're performing the same function,  
10 where's the distinction?

11 MR. COLLEY: Well, once again, the  
12 distinction is that they're not operating within the  
13 municipal budget. So they're a completely different  
14 policy consideration.

15 CHIEF JUDGE LIPPMAN: So it's just by  
16 chance that if you're - - - someone's got a problem,  
17 and you by chance have the - - - a city vehicle  
18 comes, then - - - and they commit exactly the same  
19 acts, if there's a private in that case, they have no  
20 remedy, and if it was by chance a private, then they  
21 would have a remedy? That doesn't make too much  
22 sense.

23 MR. COLLEY: Well, once again, Your Honor,  
24 that's something that this court has yet to reach.  
25 It's not an issue in this case.

1                   JUDGE PIGOTT: Well, when would a special  
2 relationship - - - in this set of facts, when, in  
3 your view, would a special relationship have been  
4 established?

5                   MR. COLLEY: On this set of facts?

6                   JUDGE PIGOTT: Yes.

7                   MR. COLLEY: This set of facts does not  
8 support the establishment of a special relationship  
9 at all.

10                  JUDGE PIGOTT: So if they were giving CPR,  
11 if they were using a defibrillator, if they were  
12 injecting her with something that would help her,  
13 none of those amounts to a special relationship, in  
14 your view?

15                  MR. COLLEY: The way I would best explain  
16 that is that there's no principled basis for the  
17 proposition that a duty automatically attaches simply  
18 because the alleged negligence occurred during a  
19 face-to-face encounter between the person in need - -  
20 -

21                  JUDGE PIGOTT: I understand that. And if a  
22 traffic cop is there, and you're, you know - - -  
23 there's no duty to a specific car. But when you  
24 arrive at somebody's home, and they're in extremis,  
25 and you start providing medical care, in your view,

1 as long as you're wearing a badge from the City, you  
2 still have not established a special relationship  
3 with that patient?

4 MR. COLLEY: Well, it's plaintiff's duty to  
5 establish the special relationship. And to do so - -  
6 -

7 JUDGE PIGOTT: How do you like - - - I  
8 mean, how do you like my proposal? I mean, the fact  
9 that you're there, in the home, providing medical  
10 attention to someone - - - in your view, that's still  
11 not a special relationship?

12 MR. COLLEY: Well, I'd like to dissect your  
13 question, if I may, Your Honor. First and foremost,  
14 EMS does not provide medical service.

15 JUDGE PIGOTT: Well, let's go back to - - -

16 MR. COLLEY: What they provide is - - -

17 JUDGE PIGOTT: - - - my question - - -

18 MR. COLLEY: - - - a transport service.

19 JUDGE PIGOTT: - - - then. You're in the  
20 home. You've got a person in extremis. They need  
21 help. You're the only help that's there, and you're  
22 either doing what you're supposed to be doing, or not  
23 doing what you're supposed to be doing. But in any  
24 event, you're it. You're the person. But you take  
25 the position that because you're from the City,

1           there's no special relationship there.

2                   MR. COLLEY: Unless they can establish that  
3           special relationship using - - -

4                   JUDGE PIGOTT: I'm trying to establish it  
5           for you. I'm trying - - -

6                   JUDGE GRAFFEO: Well, can - - -

7                   JUDGE PIGOTT: - - - to suggest to you that  
8           if you're there - - - if somebody calls for medical  
9           help, and you say help is on the way, and here you  
10          come, and seven minutes later, there you are, and  
11          you've got your tools, you've got your stuff; in your  
12          view, that's not a special relationship?

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

14                   JUDGE GRAFFEO: So could you ever have a  
15          special relationship under the set of facts that  
16          Judge Pigott just gave you?

17                   MR. COLLEY: I would say under the set of  
18          facts that he gave me, no.

19                   JUDGE SMITH: Well - - -

20                   MR. COLLEY: Under a different set of facts  
21          - - -

22                   JUDGE SMITH: - - - if - - -

23                   MR. COLLEY: - - - perhaps.

24                   JUDGE GRAFFEO: If the advanced life  
25          support people came? Because as I understand it, the

1 EMTs don't have the EpiPens, but the advanced life  
2 support folks, paramedics, would be able to do either  
3 the injection or intravenous care?

4 MR. COLLEY: Paramedics are able to  
5 intubate. They're able to administer medication.  
6 They're paramedics; they're not EMTs.

7 JUDGE GRAFFEO: Okay. So if a city - - -  
8 does the City have paramedics?

9 MR. COLLEY: Yes, I believe so.

10 JUDGE GRAFFEO: Okay. So if a paramedic  
11 came in and was trying to incubate (sic), but did it  
12 improperly, would that be a special relationship?

13 MR. COLLEY: Possibly, under one of the  
14 avenues of Pelaez. If they assume - - -

15 JUDGE READ: Well, why wouldn't they be  
16 assuming? If you're trying to intubate somebody, why  
17 aren't - - -

18 MR. COLLEY: If you - - -

19 JUDGE READ: - - - why aren't you assuming  
20 a - - - why aren't you assuming, through your  
21 promises or action, affirmative duty to act?

22 MR. COLLEY: Once again, this would be  
23 under the - - - one of the Pelaez avenues, which is -  
24 - -

25 CHIEF JUDGE LIPPMAN: Are you saying it



1           could have never happened with an EMT, but if it was  
2           a paramedic, it could be? Is that the distinction?

3                       MR. COLLEY: No, that's not what I'm saying  
4           at all.

5                       CHIEF JUDGE LIPPMAN: What are you saying?

6                       MR. COLLEY: What I'm - - -

7                       CHIEF JUDGE LIPPMAN: Is it never medical  
8           treatment when it's an EMT?

9                       MR. COLLEY: It's transport, whether it's  
10          an EMT or whether it's a paramedic. It's not - - -

11                      CHIEF JUDGE LIPPMAN: So in answer to - - -

12                      MR. COLLEY: - - - necessar - - -

13                      CHIEF JUDGE LIPPMAN: - - - Judge Graffeo,  
14          then, there couldn't be liability in the situation -  
15          - - in the other situation, with a paramedic, and  
16          it's more akin to medical treatment?

17                      MR. COLLEY: I'm sorry. I'm not quite  
18          clear on the question.

19                      CHIEF JUDGE LIPPMAN: In Judge Graffeo's  
20          question - - -

21                      MR. COLLEY: Yes.

22                      CHIEF JUDGE LIPPMAN: - - - you answered  
23          well, maybe there could be a - - - if it was a  
24          paramedic, maybe there could be a liability. Which  
25          is it? Is it never? Or does it matter whether it's

1 a BLS or an ALS? You know - - -

2 MR. COLLEY: No, the distinction, Your  
3 Honor, isn't whether it's an ALS or a BLS. The  
4 distinction is the nature of the act that's  
5 performed. In other words, if a - - -

6 JUDGE SMITH: But what if they performed  
7 exactly the same act in a city hospital?

8 JUDGE READ: Yes.

9 MR. COLLEY: I'm - - - if a doctor in a  
10 city hospital?

11 JUDGE SMITH: Or - - - well, or a nondoctor  
12 in a city hospital.

13 MR. COLLEY: Yes, but hospitals are  
14 proprietary, Your Honor, and so that they fall under  
15 - - -

16 JUDGE SMITH: Yes. I guess that's really  
17 my question. What makes that function proprietary  
18 and this one not?

19 MR. COLLEY: Well, a private hospital,  
20 they're not operating under the same budgetary - - -

21 JUDGE SMITH: But a city hospital - - -  
22 public hospital.

23 JUDGE READ: City hospital.

24 MR. COLLEY: Well, this court has, over  
25 many years, determined that the operation of

1 hospitals is a proprietary function.

2 JUDGE SMITH: Okay. So why not - - - why  
3 not the operation of an ambulance service, or at  
4 least the giving of care by an ambulance crew? Why  
5 isn't that proprietary?

6 MR. COLLEY: Once again, I think it depends  
7 on the circumstances. I think that if we're talking  
8 about - - - bringing it back to the immediate  
9 circumstance, this was an EMS crew, EMTs, that  
10 responded to a 9-1-1 call. Their performance is  
11 always dependent upon the environment of the call.  
12 And that's something that they don't have any control  
13 over.

14 JUDGE PIGOTT: Yes, but - - -

15 MR. COLLEY: And all they - - -

16 JUDGE PIGOTT: - - - you tell people call  
17 9-1-1. You've got an emergency, call - - - you've  
18 got a child who may be dying, and you call 9-1-1.  
19 And you seem to say - - - all the City is saying is  
20 we're - - - hey, we're not responsible. I mean,  
21 we're going to be there. But we don't owe you a  
22 special duty of any kind. Your child can die, and  
23 that's not our fault, because you were dumb enough to  
24 call 9-1-1.

25 MR. COLLEY: No, that's not what we're

1 saying, Your Honor. We're saying that provision of  
2 EMT services is a governmental function. And the  
3 only way that liability - - - as this court set forth  
4 in Valdez recently, the only way that this goes  
5 forward, is if the plaintiff can establish a special  
6 duty. And they do it by - - -

7 JUDGE SMITH: What is it exactly that makes  
8 it a governmental function?

9 MR. COLLEY: This is a quintessential  
10 governmental function, Your Honor. I would  
11 respectfully submit - - -

12 JUDGE SMITH: Okay. Well, so makes it a  
13 quintessential governmental function?

14 MR. COLLEY: This is very much akin to the  
15 provision of fire services, police services - - -

16 JUDGE SMITH: Usually you don't have  
17 private companies providing police and fire services.

18 MR. COLLEY: That's absolutely right.

19 JUDGE SMITH: But you do - - - but private  
20 companies can provide ambulance service?

21 MR. COLLEY: On occasion. And once again,  
22 that is basically a function of the City's limited  
23 resources.

24 CHIEF JUDGE LIPPMAN: Let me ask you a  
25 question, though. Is it medical treatment - - - the

1 fact that he's saying that these people are not  
2 performing medical treatment, that's why there's no  
3 duty - - -

4 MR. COLLEY: I'm - - -

5 CHIEF JUDGE LIPPMAN: - - - as opposed to  
6 if they were, whether it's there in a hospital, then  
7 that does create a duty?

8 MR. COLLEY: I'm saying that EMTs do not  
9 provide medical treatment. What they basically do is  
10 they transport an individual from where they're found  
11 to a hospital so that they can receive - - -

12 CHIEF JUDGE LIPPMAN: But what about the  
13 ALS - - -

14 MR. COLLEY: - - - medical treatment.

15 CHIEF JUDGE LIPPMAN: - - - what about the  
16 ALS ambulances? It's the same?

17 MR. COLLEY: I think that they perform the  
18 exact same function, Your Honor.

19 JUDGE SMITH: They provide - - - they give  
20 some kind of, at least, first aid, or some kind of  
21 interim care, don't they?

22 MR. COLLEY: I think that there's a - - -  
23 what they do is they provide stabilization, the same  
24 as an EM - - -

25 JUDGE PIGOTT: What does EMT stand for?

1 MR. COLLEY: Emergency medical technician.

2 JUDGE PIGOTT: And you say they don't  
3 provide medical care?

4 MR. COLLEY: They don't provide medical  
5 care, Your Honor.

6 JUDGE PIGOTT: Why do they call them  
7 medical technicians, then?

8 MR. COLLEY: That I can't answer for you.

9 JUDGE PIGOTT: Why do they call them  
10 emergency medical technicians?

11 MR. COLLEY: Well, I guess because they  
12 respond in an emergency, and they provide transport  
13 services to get you to somewhere where you can - - -

14 CHIEF JUDGE LIPPMAN: What's the difference  
15 between - - -

16 MR. COLLEY: - - - receive medical  
17 treatment.

18 CHIEF JUDGE LIPPMAN: - - - what's the  
19 difference between the people who come with the BLS  
20 and the people who come with the ALS?

21 MR. COLLEY: The difference is a paramedic  
22 versus a nonparamedic.

23 CHIEF JUDGE LIPPMAN: And what's the  
24 difference?

25 MR. COLLEY: Advanced - - -

1 CHIEF JUDGE LIPPMAN: What's the  
2 difference? What does that mean?

3 MR. COLLEY: Oh, well, what it means is  
4 that a paramedic receives more training, and that's  
5 the reason why they're able to administer medication.  
6 That's the reason why they're able to intubate.

7 CHIEF JUDGE LIPPMAN: So they're not doing  
8 medical treatment, either, though, you said?

9 MR. COLLEY: I would respectfully submit  
10 that that does not rise to the level of medical  
11 treatment either. There - - - I'm not saying that  
12 there's no overlap, but there's a major distinction  
13 between what - - -

14 CHIEF JUDGE LIPPMAN: What if you had a  
15 doctor in the ambulance? If the ambulance, if they  
16 weren't EMTs or paramedics. Let's say they were a  
17 medical doctor, would they still not be doing medical  
18 treatment?

19 MR. COLLEY: I would still submit that that  
20 would not - - - that wouldn't make a difference. In  
21 fact, EMS does have doctors occasionally on call.  
22 But that doesn't transport - - - that doesn't - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor.  
24 You'll have rebuttal time. Let's hear from your  
25 adversary.

1 MR. COLLEY: Thank you - - -

2 CHIEF JUDGE LIPPMAN: Thanks.

3 MR. COLLEY: - - - very much, Your Honor.

4 CHIEF JUDGE LIPPMAN: Counselor?

5 MR. GAIER: Your Honors, may it please the  
6 court. My name is Matt Gaier. I represent the  
7 plaintiffs-respondents.

8 CHIEF JUDGE LIPPMAN: What are the  
9 distinctions here, counselor? Is this medical  
10 treatment?

11 MR. GAIER: Of course it's medical  
12 treatment, Your Honor.

13 CHIEF JUDGE LIPPMAN: Is it always medical  
14 treatment?

15 MR. GAIER: Once they arrive on the scene -  
16 - - see, that's the issue with all these special-duty  
17 cases. The reason the whole Cuffy requirements came  
18 into play in the first place was because there was a  
19 duty of care to the public at large. So the court  
20 said - - - and understandably so - - - how can we  
21 hold somebody liable in tort for a violation of a  
22 duty of care, not owed to the individual, but to the  
23 public at large? That doesn't apply when you're  
24 talking about any medical care. Because - - -

25 JUDGE GRAFFEO: Well, if they just - - - if



1           they just came and transported her to the hospital,  
2           would that be medical treatment?

3                     MR. GAIER:   Well, but - - -

4                     JUDGE GRAFFEO:  Is the CPR what you're  
5           calling the medical treatment?

6                     MR. GAIER:  No, no.  It's the entire  
7           process.  It's not - - - they're not simply a station  
8           wagon.  They're there - - - they don't just send  
9           somebody who can pick her up - - -

10                    JUDGE GRAFFEO:  Well - - -

11                    MR. GAIER:  - - - and carry her.  The send  
12           somebody - - -

13                    JUDGE GRAFFEO:  - - - the whole - - - the  
14           whole process - - -

15                    MR. GAIER:  - - - who can do something.

16                    JUDGE GRAFFEO:  - - - the whole process is  
17           medical treatment?

18                    MR. GAIER:  Sure it is.  And that's why I -  
19           - - and emergency medical technicians are trained.  
20           There's a level here - - - there's a hierarchy, if  
21           you will - - -

22                    JUDGE SMITH:  But what if they just - - -  
23           what if the only thing they did wrong was drive too  
24           slow?  Would that be governmental or proprietary?

25                    MR. GAIER:  Drive too slow in an emergency

1 situation? Taking her from one to the other? I  
2 can't - - - it's hard for me to fathom the case,  
3 quite frankly, because they're going to be treating  
4 along the way. It's all - - -

5 JUDGE SMITH: No, no. Well, suppose on the  
6 way to the - - - drive too slow from the hospital?

7 MR. GAIER: Oh. I would - - - well, you  
8 know what, it's not so much that it's a matter - - -

9 JUDGE SMITH: From.

10 MR. GAIER: - - - of governmental per se,  
11 but it's - - - that's subject to the special-duty  
12 requirements, without question.

13 JUDGE READ: Well, they responded - - -

14 JUDGE SMITH: It would be subject to - - -

15 JUDGE READ: - - - too slowly.

16 JUDGE SMITH: - - - special duty. It has  
17 to be governmental, doesn't it?

18 MR. GAIER: Yes - - -

19 JUDGE READ: They responded too slowly.

20 MR. COLLEY: Right.

21 JUDGE READ: Let's say they took - - - they  
22 say they stopped off for a coffee and donuts on the  
23 way to the call; they got there a half hour after the  
24 call was made.

25 MR. GAIER: There's no relationship that

1 exists, you see, at that point. And therefore,  
2 there's no duty of care owed. I have to keep coming  
3 back to the Cuffy requirements - - -

4 JUDGE GRAFFEO: So the minute they walk in  
5 - - -

6 MR. GAIER: - - - and the rationale.

7 JUDGE GRAFFEO: - - - someone's home or  
8 apartment, that establishes a special duty?

9 MR. GAIER: Yes. Well, no, not a special  
10 duty, Your Honors. I don't think it's a special  
11 duty. It's a duty of care.

12 JUDGE SMITH: You said say it changes the  
13 relationship from proprietary to governmental or the  
14 other way around?

15 MR. GAIER: Yes, it does.

16 JUDGE SMITH: From governmental to  
17 proprietary?

18 MR. GAIER: Yes, I understand what you're  
19 saying. And yes, what it does, it establishes a  
20 healthcare provider-patient relationship, which is  
21 the - - -

22 CHIEF JUDGE LIPPMAN: Couldn't there - - -

23 MR. GAIER: - - - essence - - -

24 CHIEF JUDGE LIPPMAN: - - - couldn't there  
25 be - - - couldn't you argue that it's an essential

1 governmental function to have these emergency  
2 services that aren't really medical treatment but  
3 they're just coming and provide this essential  
4 technical kind of assistance? They're not doctors.  
5 Couldn't you argue that you could make a distinction  
6 between the two, between governmental and  
7 proprietary?

8 MR. GAIER: You could argue, but you'd have  
9 no reason to argue that, you see.

10 CHIEF JUDGE LIPPMAN: Why not?

11 MR. GAIER: Because the underlying point -  
12 - - the underlying policy of the Cuffy requirements  
13 of the special-duty rule, is that there's no duty  
14 owed to the individual. In medical malpractice and -  
15 - - medical malpractice being the broad penumbra and  
16 subdivisions by doctor, by hospital, by nurse,  
17 paramedic, EMT - - - the essence is the healthcare  
18 provider-patient relationship. That's what gives  
19 rise to the duty of care. That's what the Cuffy  
20 elements seek to fill - - -

21 JUDGE GRAFFEO: But if - - -

22 MR. GAIER: - - - the void.

23 JUDGE GRAFFEO: - - - some - - - if someone  
24 collapses in this courtroom, chances are it's going  
25 to be the Albany Fire Department that's going to be

1 the first responders here.

2 MR. GAIER: That's right. Okay.

3 JUDGE GRAFFEO: And they may be EMTs as  
4 well. But it's probably firefighters who come in.

5 MR. GAIER: Okay.

6 JUDGE GRAFFEO: Now, that's a proprietary -

7 - -

8 MR. GAIER: Once - - -

9 JUDGE GRAFFEO: - - - that's - - -

10 MR. GAIER: - - - once they arrive - - -

11 JUDGE GRAFFEO: - - - these aren't

12 governmental functions?

13 MR. GAIER: Once they arrive and prepare to  
14 treat and undertake to treat, yes, then you have the  
15 - - - we're talking about a firefighter who, I  
16 presume is going to be trained either as an EMT or a  
17 paramedic.

18 JUDGE GRAFFEO: Right.

19 MR. GAIER: Okay. That's a healthcare  
20 provider. That's when they take on the proprietary  
21 function. It could just as easily have been somebody  
22 from Albany Medical Center in their ho - - - in their  
23 ambulance.

24 JUDGE GRAFFEO: Well, then the only way for  
25 government to avoid liability for every person that

1 places a 9-1-1 call is just not to have 9-1-1  
2 emergency responders?

3 MR. GAIER: Well, no. The 9-1-1 - - -

4 JUDGE GRAFFEO: I'm trying to take your  
5 analysis - - -

6 MR. GAIER: Well, I would think that - - -

7 JUDGE GRAFFEO: - - - to the nth degree  
8 here.

9 MR. GAIER: - - - all can do on this is  
10 attempt to apply the court's analysis. And the first  
11 analysis that I undertook is this governmental/  
12 nongovernmental distinction. And what the court said  
13 most recently in the World Trade Center case is - - -  
14 and going back to the Miller case is - - - you look  
15 at the specific allegations of negligence. That's  
16 important. Because in order to distinguish between  
17 governmental and nongovernmental, that's what you  
18 have to look at.

19 So in that case, where the allegations of  
20 negligence pertained to evaluating risk of terrorism  
21 and how to stop it, that was governmental. Here it's  
22 the provision of medical care, which is traditionally  
23 - - -

24 JUDGE SMITH: Well, what exactly do you say  
25 the EMTs did wrong here?

1                   MR. GAIER:  There's three things.  They  
2                   failed to give oxygen in response to a call for  
3                   difficulty breathing.  They failed - - - once they  
4                   assessed her as having been in cardio-respiratory  
5                   arrest, immediately transport her to the hospital.  
6                   And when they decided that they would, instead, call  
7                   for an ALS ambulance, they delayed for more than six  
8                   minutes in placing that call.

9                   JUDGE SMITH:  So the last one doesn't sound  
10                  obviously like medical care, being too slow to make a  
11                  phone call.

12                  MR. GAIER:  Well, it's part of the medical  
13                  care.  I have a case that I cited from the First  
14                  Department, Nevarez v. Health & Hospitals, where the  
15                  patient's at Union Hospital, and they delayed in  
16                  calling an ambulance to transfer her to Jacoby where  
17                  she needed to be to deliver the baby, and that was  
18                  negligence, and it was a medical malpractice case.  
19                  That was - - -

20                  CHIEF JUDGE LIPPMAN:  Counselor, how many -  
21                  - -

22                  MR. GAIER:  - - - medical negligence.

23                  CHIEF JUDGE LIPPMAN:  - - - how many times  
24                  a day, do you think, let's say, in the City of New  
25                  York, that you have an ambulance coming that's from

1 calling 9-1-1? Probably, you know, every ten minutes  
2 there's an ambulance going somewhere, right?

3 MR. GAIER: Perhaps.

4 CHIEF JUDGE LIPPMAN: So in each one of  
5 those circumstances, the City - - - it's a  
6 proprietary function, once they enter the house and  
7 they do anything?

8 MR. GAIER: Once they enter the house and  
9 they - - -

10 CHIEF JUDGE LIPPMAN: Or don't do anything;  
11 let's put it that way.

12 MR. GAIER: Right. Once they enter the  
13 house, they've created the healthcare provider-  
14 patient relationship, and the duty of care exists to  
15 do it properly. That's - - - see, that's the bright  
16 line that we can all rely upon as to when the duty of  
17 care arises.

18 CHIEF JUDGE LIPPMAN: But what does  
19 "properly" mean?

20 MR. GAIER: Pardon me?

21 CHIEF JUDGE LIPPMAN: What does "properly"  
22 mean?

23 MR. GAIER: Well, "properly" is - - - this  
24 is - - - we're talking about - - - we're not talking  
25 about general negligence her, you know. We're



1 talking about professional negligence. We're talking  
2 about medical malpractice. And there's - - -

3 CHIEF JUDGE LIPPMAN: But they're not  
4 doctors. You acknowledge that?

5 MR. GAIER: Okay. But still, nurses are  
6 not doctors, but they're still - - -

7 CHIEF JUDGE LIPPMAN: Are can there be  
8 people who give - - -

9 MR. GAIER: - - - malpractice.

10 CHIEF JUDGE LIPPMAN: - - - quasi-medical  
11 treatment, let's take like the EMTs, where they know  
12 how to do certain things, but they're not schooled as  
13 a doctor is, could there be people who could give any  
14 kind of treatment and - - - or give a minimal level  
15 of treatment, and yet not veer into being categorized  
16 as medical?

17 MR. GAIER: Well, I want make sure I got  
18 the question right.

19 CHIEF JUDGE LIPPMAN: A more technical kind  
20 of - - - things that they know how to do, but they're  
21 not trained the way a doctor is?

22 MR. GAIER: Well, it's still medical. But  
23 it's not the degree of a doctor. What happens is - -  
24 -

25 CHIEF JUDGE LIPPMAN: So you mean, they're

1 just held to a lesser standard?

2 MR. GAIER: Well, it's a different  
3 standard. It's a lesser standard in that the doctor  
4 is the highest level - - - the medical doctor is the  
5 highest level; paramedic is below that; and an EMT is  
6 below that; each one. But they each have  
7 professional standards of care that apply.

8 JUDGE PIGOTT: Your - - -

9 MR. GAIER: That's what's critical here.

10 JUDGE PIGOTT: Your argument, as I  
11 understand it, because I think what the purpose of  
12 this motion was, is that you do not deserve to come  
13 to court to argue whether or not what these  
14 individuals did in terms of the care and treatment of  
15 this person was negligent or not. They want to say  
16 you can't get even that far, because it's simply a  
17 governmental function.

18 And what you're trying to do, if I  
19 understand it right, is say no, we're past that  
20 threshold. Now we'll have a trial on the issues of  
21 whether or not the care and treatment was negligent  
22 or not. That's a whole separate argument.

23 MR. GAIER: That's correct.

24 JUDGE PIGOTT: But the one here is simply  
25 to get you into the courtroom, if possible. They're

1           arguing you can't go to court on this, because it's  
2           simply a governmental function.

3                   MR. GAIER: Well, there's actually two  
4           aspects of it. I mean, the one is, I'm saying it's  
5           nongovernmental, therefore you don't even look at the  
6           special-duty rule of Cuffy. But to the extent,  
7           obviously, if the court disagrees with me on this,  
8           there's still an issue of fact that we would get to  
9           the courtroom on. But I don't think - - -

10                   JUDGE SMITH: Where do - - - sorry.

11                   JUDGE GRAFFEO: If one of our court  
12           officers provides emergency care to someone in the  
13           courtroom here, is that a governmental or proprietary  
14           function, under your analysis?

15                   MR. GAIER: I - - - well, it's interesting.  
16           It would not be proprietary and it would not be  
17           medical, unless the court officer is here and he's  
18           trained as an EMT and here for that purpose, no,  
19           absolutely not.

20                   CHIEF JUDGE LIPPMAN: Well, but we do have  
21           officers who are trained as EMTs - - -

22                   JUDGE GRAFFEO: We do have EMTs.

23                   CHIEF JUDGE LIPPMAN: - - - obviously.

24                   MR. GAIER: And is - - - if that's their  
25           purpose - - - if, in other words, what I'm saying is,

1 if OCA requires that certain court officers be  
2 trained as EMTs - - - see, and I don't know this  
3 because I don't know the OCA rules - - - but if  
4 certain officers are required to be trained as EMTs,  
5 and be in every courtroom for that purpose, and then  
6 they undertake and they do so improperly, sure; then  
7 he's a healthcare provider, and that relationship has  
8 been established.

9 CHIEF JUDGE LIPPMAN: Does it make a  
10 difference that there, there's not someone from the  
11 public calling 9-1-1, but rather within the court  
12 structure, the clerk calls and says, oh, we have a  
13 problem here, can the court officer come? Or the  
14 court officer is standing in the courtroom and sees  
15 it.

16 MR. GAIER: I don't think - - -

17 CHIEF JUDGE LIPPMAN: Does that make a  
18 difference?

19 MR. GAIER: No, I don't think that's  
20 dispositive. I think the issue has got to be - - -  
21 and this is the way to avoid - - - you know, the  
22 risks that come along with expansion of municipal  
23 liability - - - this is not an expansion. We're  
24 talking about municipal liability, just like private  
25 liability, that it's always been here. And it's just

1 to look at the relation of the healthcare provider-  
2 patient relationship. That's the safest way to come  
3 down with a bright-line rule that prevents any risk  
4 of expansion and that has a clear duty of care that  
5 is incumbent upon the healthcare provider in that  
6 particular case.

7 You know, the City has attempted to  
8 distinguish a couple of cases that have existed. The  
9 Kowal case from the Second Department, K-O-W-A-L, is  
10 saying well, there they intubated improperly and  
11 caused a problem. They said in the Fonville case,  
12 which I've relied on heavily for various reasons - -  
13 - they represent, by the way, that there was a  
14 contraindicated medication given. That's actually  
15 not true. The bills of particulars of that case are  
16 in this record on appeal. That didn't happen. It's  
17 the same allegations as in this case: failing to  
18 transport; failing to properly treat.

19 But interestingly, just three weeks ago,  
20 the Second Department - - - and I'm concerned because  
21 I think there's been a good deal of confusion in this  
22 area, and I think that this Applewhite case in the  
23 Appellate Division helped add to the confusion. And  
24 this case called Kupferstein - - -

25 JUDGE READ: You said "add to" or

1 "answered"?

2 MR. GAIER: Add to.

3 JUDGE READ: Add to, okay.

4 JUDGE SMITH: Even though you think we  
5 should affirm it?

6 MR. GAIER: I think you should affirm it,  
7 but on different grounds.

8 JUDGE SMITH: Um-hum.

9 JUDGE READ: Yes, well, they found - - -  
10 they found governmental function, right?

11 MR. GAIER: Yes, they found as to  
12 governmental function. They said they weren't going  
13 to address misfeasance/nonfeasance, then they wanted  
14 to address misfeasance/nonfeasance. I got kind of  
15 confused, I've got to tell you, by the Appellate  
16 Division's decision. But the result was good.

17 The thing is, this Kupferstein case - - -  
18 and I sent copies to the court and to the adversary,  
19 and they're well aware of it, because they were on it  
20 - - - now here's what happened in the Kupferstein  
21 case. You have a similar situation. A BLS ambulance  
22 come; they delay. An ALS ambulance come; they delay.  
23 Then, while transporting down the elevator, based on  
24 a phone call to a doctor, they administer Versed, but  
25 they never checked the vital signs first. The

1 patient goes into cardio-pulmonary arrest.

2 Citing Applewhite in the Appellate  
3 Division, the Second Department says the Cuffy  
4 requirements have to be satisfied and therefore, this  
5 patient's out, even - - - now, here's the thing that  
6 you don't see from the decision that I found in the  
7 record in appeal, which I have with me. The  
8 plaintiff's expert submitted an affidavit - - - an  
9 EMT - - - that says that it was a departure to give  
10 Versed without checking the vital signs, and that's  
11 what led to the cardio-pulmonary arrest.

12 So what we have here, now, is a situation,  
13 following Applewhite, where they actually give the  
14 wrong drug improperly, and as a result, cause the  
15 injury, and they've got to somehow have Cuffy.

16 JUDGE SMITH: Would it be fair to say, in  
17 this case, that the special relationship theory,  
18 which the Appellate Division found, is weaker than  
19 the proprietary theory you're going on?

20 MR. GAIER: I think so. I think that it's  
21 unnecessary. That's the most important thing. It's  
22 un - - -

23 JUDGE SMITH: It's kind of tough to find  
24 reliance here, isn't it?

25 MR. GAIER: Well - - - okay. I think you

1 can find reliance in two respects. First of all,  
2 just on the technical matter, and this court has  
3 ruled on this regarding summary judgment motions  
4 before, they didn't satisfy their burden on that  
5 issue, because all they went on was the attorney  
6 affidavit saying she had no choice.

7 JUDGE SMITH: Well, how do you - - - how do  
8 you prove nonreliance, except by inference from the  
9 situation?

10 MR. GAIER: They should have asked her at  
11 her deposition, did you have access to a car; was  
12 there somebody you could have called; it's only two  
13 miles away; you worked there; how would you have  
14 gotten her there? There's no evidence of any of  
15 that. So I don't think they satisfied their burden  
16 of proof.

17 JUDGE SMITH: Apart of burden of proof,  
18 what do you got on reliance?

19 MR. GAIER: Alright, I got this. There's a  
20 six-minute delay in calling the ALS. She certainly  
21 could have done that herself. She called 9-1-1 twice  
22 to ask for an ambulance. Had the guy told her, I'm  
23 going to call ALS, but I'm going to wait six minutes,  
24 all she had to do was call herself, and she would  
25 have saved her daughter six minutes of deprivation of



1 oxygen. So - - -

2 JUDGE READ: Well, are you arguing - - -  
3 are you arguing, or aren't you arguing, essentially,  
4 that they implicitly made the judgment that it was  
5 better to wait for the second ambulance rather than  
6 to transport her to the hospital, and she relied on  
7 that?

8 MR. GAIER: You know, it's kind of  
9 interesting. They made a determination - - - you  
10 used the word "judgment", that I'm - - - I want to be  
11 careful here, obviously. But here's the thing. If  
12 it's nongovernmental, as I say it is, the judgment  
13 becomes irrelevant.

14 JUDGE READ: Right.

15 MR. GAIER: Although, I got to tell you,  
16 there is a connection - - - I once researched this  
17 going back some years ago - - - there's a connection  
18 between this whole discretionary judgment rule in the  
19 government cases and in medical malpractice cases,  
20 the defense known as error of judgment. And it all  
21 derives from the same concepts.

22 So there is something there. And  
23 theoretically, when this case goes to trial, the City  
24 could up a defense saying it was a judgment call as  
25 to whether to call ALS or take her to the hospital.

1 But that's for the jury to decide.

2 CHIEF JUDGE LIPPMAN: Bottom line is, your  
3 main argument is, once they step into the house, once  
4 they do something or inappropriately do nothing, it's  
5 got - - - it's a proprietary function?

6 MR. GAIER: Correct. Once they arrive to  
7 treat, the relationship is established - - -

8 CHIEF JUDGE LIPPMAN: A medical  
9 relationship and - - -

10 MR. GAIER: - - - and that's the basis of  
11 the duty. That's the - - -

12 CHIEF JUDGE LIPPMAN: - - - end of story,  
13 and forget about special duty, as far as - - -

14 JUDGE GRAFFEO: Were there only two EMTs  
15 here?

16 MR. GAIER: There were two EMTs.

17 JUDGE GRAFFEO: And how many were engaged  
18 in providing the CPR?

19 MR. GAIER: Well, the nurse was already  
20 there. The nurse who administered the drug was  
21 providing CPR when they arrived. Then EMT Israel  
22 (ph.) comes in, and she does chest compressions while  
23 the nurse is doing this. And then EMT Mueller (ph.),  
24 as the evidence reads, stands around watching for a  
25 while.

1                   JUDGE GRAFFEO: That's who - - - that's who  
2 went to make the phone call.

3                   MR. GAIER: That who goes to make the phone  
4 call and get the stretcher.

5                   JUDGE READ: What's the status of any other  
6 defendants in this case? Is everybody else out of  
7 the case?

8                   MR. GAIER: Yes. There was only - - -  
9 there was only the Accuhealth and the nurse, and they  
10 had the same policy. They declared bankruptcy. That  
11 case had settled before I got involved.

12                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
13 Thanks.

14                   MR. GAIER: Thank you, Your Honors.

15                   CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

16                   MR. COLLEY: A couple quick things, Your  
17 Honor. In the first place, the last statement from  
18 counsel was not accurate. Accuhealth did file for  
19 bankruptcy. In fact, their insurer went bankrupt.  
20 However, Nurse Russo settled and plaintiffs received  
21 a settlement from - - - what, a million dollars, I  
22 believe, from Nurse Russo.

23                   With reference to counsel's pointing out  
24 Kupferstein, which he did mail to us, which we  
25 obviously we were aware of, because it was Ms.

1 London's case, two things. First of all, we view  
2 Kupferstein as being the Second Department's  
3 revisitation of Kowal and Fonville. I think that  
4 they have rethought this, and this is reflected in  
5 the Kupferstein case.

6 And one last thing about Kupferstein. The  
7 plaintiffs in that case did not argue that the  
8 medication made the decedent worse.

9 With reference to Judge Pigott's question,  
10 when can a special duty arise? A special duty can  
11 arise when an affirmative act on behalf of a  
12 governmental employee makes the situation worse.  
13 Once again, if a contraindicated medication was  
14 administered or if, for exa - - - an extreme example,  
15 if they're transporting a person from a stretcher and  
16 they drop - - -

17 JUDGE SMITH: Well, about - - -

18 MR. COLLEY: - - - the person.

19 THE COURT: - - - the theory that the EMT  
20 implicitly told her, don't worry, I'm going to call  
21 right away, and therefore she didn't call herself?  
22 Isn't that reliance?

23 MR. COLLEY: It's not detrimental reliance  
24 for a couple reasons. First of all, there's no  
25 evidence in the record whatsoever, that plaintiffs

1 had another means to provide oxygen or to get - - -

2 JUDGE SMITH: But they had - - -

3 MR. COLLEY: - - - take her to the  
4 hospital.

5 JUDGE SMITH: - - - but they had a  
6 telephone.

7 MR. COLLEY: They had a telephone. Okay.  
8 But you need a little bit more than that to get  
9 someone from the apartment to the hospital.

10 They had no emergency vehicle with lights  
11 or sirens that could - - -

12 JUDGE READ: They could have gotten in a  
13 taxi?

14 MR. COLLEY: If they had one - - -

15 JUDGE READ: They could have gotten a taxi?

16 MR. COLLEY: - - - standing at the ready.

17 And in the Bronx - - -

18 JUDGE PIGOTT: Well, the questions of fact

19 - - -

20 MR. COLLEY: - - - it's very unlikely that

21 - - -

22 JUDGE PIGOTT: - - - I suppose - - -

23 MR. COLLEY: - - - that would be the case.

24 JUDGE PIGOTT: Mr. Colley, I always forget  
25 the name of this case, but there was a case out of

1 the Fourth Department where a woman was waiting for  
2 the - - - she called 9-1-1, and the police said don't  
3 go anywhere, we're on our way, and they had the wrong  
4 address, and she was killed. And we found a special  
5 relationship in that situation where she did nothing  
6 and they did nothing, because they didn't get there.

7 Isn't this similar in regard to the timing  
8 of when things happened? And isn't that a question  
9 of fact?

10 MR. COLLEY: Your Honor, I'm not familiar  
11 enough with that case to answer that. But what I  
12 would like to say is that on the point of once they  
13 enter the house, that actually makes no difference  
14 whatsoever. And in fact, I would point this court to  
15 its decision in Pelaez, where there was no special  
16 duty found when the nurse actually visited the home,  
17 gave information about the dangers of lead paint.  
18 This court found there was no special duty. And  
19 there was also face-to-face interaction in both Kovit  
20 and in Lazan, where the police officers spoke to the  
21 drivers in those respective cases, and instructed  
22 them to move their vehicles. The no special duty was  
23 found there, even though that was face-to-face.

24 And my last point is this. EMT's entire  
25 function is to - - - is rescue and transport.

1 Stabilization is incidental to that function. And in  
2 this case and in every case, their mission is to try  
3 to keep the person alive. It could be Applewhite - -  
4 -

5 JUDGE SMITH: Is there any doubt, though -  
6 - - I mean, suppose they had called - - - just called  
7 a hospital, a private hospital. The City never gets  
8 involved. The hospital sends an ambulance, and from  
9 then on, the facts are exactly as they are in this  
10 case. Any doubt that the plaintiffs would have a  
11 claim?

12 MR. COLLEY: That is a completely different  
13 situation, Your Honor. And I don't think - - - once  
14 again - - -

15 JUDGE SMITH: The only - - -

16 MR. COLLEY: - - - a hospital - - -

17 JUDGE SMITH: - - - the only thing  
18 different - - - the only thing different about it is  
19 the identity of the party that sent the ambulance.

20 MR. COLLEY: It's not - - - it's not  
21 governmental. And that's the basis of the public  
22 duty.

23 JUDGE SMITH: So in - - - but in my case,  
24 the complaint would survive. If it was a private  
25 entity, the complaint would survive?

1 MR. COLLEY: I would think so.

2 CHIEF JUDGE LIPPMAN: And if it was the  
3 City calling a private entity, you're not sure?

4 MR. COLLEY: Well, once again there's  
5 something - - -

6 CHIEF JUDGE LIPPMAN: Calling a private  
7 ambulance?

8 MR. COLLEY: Well, this - - - if the City -  
9 - - if the individual dispa - - - calls 9-1-1 and the  
10 ambulance that's dispatched by the 9-1-1 operator - -  
11 -

12 CHIEF JUDGE LIPPMAN: It's private.

13 MR. COLLEY: - - - is private, once again,  
14 that's something that this court has not yet reached.

15 JUDGE READ: I assume in your - - -

16 MR. COLLEY: So we don't know - - - pardon?

17 JUDGE READ: I assume in your contracts  
18 with the private ambulance services, you require them  
19 to have insurance against this kind of thing?

20 MR. COLLEY: It sounds reasonable. I  
21 really have no knowledge whatsoever.

22 Unless the court has any further questions,  
23 the City will rest on their submissions.

24 CHIEF JUDGE LIPPMAN: Okay. Thank you,  
25 counsel. Thank you both.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. COLLEY: Thank you.

(Court is adjourned)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Applewhite v. Accuhealth, Inc., No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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

Agency Name: eScribers

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

Date: January 14, 2013