CASE No. W2016-02499-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
WESTERN SECTION AT JACKSON

Frederick Copeland,
Plaintiff/Appellant

Healthsouth/Methodist Rehabilitation Hospital, LP and
MedicOne Medical Response of Tennessee, Inc.
Defendants/Appellees

On Appeal from the Shelby County Circuit Court
(Shelby County Circuit Court No. CT-000196-16)

APPELLANT'S MAIN BRIEF ON APPEAL

Donald K. Vowell
The Vowell Law Firm
6718 Albunda Drive
Knoxville TN 37919
(865) 292-0000
(865) 292-0002 fax
Attorney for Frederick Copeland, Appellant

David E. Gordon (#9973)
Erin L. Hillyard (#26373)
Attorneys for the Plaintiff
1850 Poplar Crest Cove, Suite 200
Memphis TN 38119
901-818-4889
Attorney for Frederick Copeland, Appellant

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References to the parties and contracts. In this statement of the issues, and throughout the brief, the parties, and the two agreements that are involved in the case, are described and referred to as follows:

- The Plaintiff, Frederick Copeland, was a 77-year-old inpatient at a rehabilitation hospital in Memphis, Tennessee, where Mr. Copeland was recovering from total knee replacement surgery.
- The Defendant HealthSouth Methodist Rehabilitation Hospital Limited Partnership [HealthSouth or the Hospital] is a limited partnership operating the medical rehabilitation hospital in Memphis, Tennessee, where Mr. Copeland was a patient. (The Hospital is not a participant in the appeal.)
- The Defendant MedicOne Medical Response of Tennessee, Inc. [MedicOne] is a corporation engaged in the business of transporting convalescent medical patients from the Hospital to medical appointments, and back, pursuant to contract with the Hospital.
- Contract 1: The Hospital and MedicOne entered into a "Medical Transportation Services Agreement" whereby MedicOne agreed to transport or transfer Hospital patients, including ambulatory, wheelchair, and stretcher patients, and including both emergency and non-emergency patients. This agreement is sometimes referred to as the MTSA.
- Contract 2: The Hospital, MedicOne, and Mr. Copeland entered into an agreement, signed by all three parties, on a standard form provided by MedicOne, by which MedicOne was to transport Mr. Copeland from the Hospital to a medical appointment for a follow-up appointment with his orthopedic surgeon and then back to the Hospital. The transportation under this contract was set up, arranged, and paid for by the Hospital.

Statement of the Issues Presented for Review

1. Whether this Court, in *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977) , intended to hold that only "professional service contracts" can be found unenforceable as contrary to public policy in Tennessee.

2. Whether the court below erred in upholding the trial court's ruling that only contracts for "professional" services can be found void or unenforceable as contrary to public policy under this court's decision in *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977) .

3. Whether the court below was correct in holding that this Court established a seventh criterion in *Olson v. Molzen*, a criterion that the court below called the "professional service criterion," to supplement or supersede the six criteria actually listed in *Olson v. Molzen*.

4. Whether the court below erred in finding that this Court did not expressly overrule *Schratter v. Development Enterprises, Inc.*, 584 S.W.2d 459 (Tenn. Ct. App. 1979) , in *Crawford v. Buckner*, 839 S.W.2d 754 (Tenn. 1992).

5. Whether the court below erred in observing that "the exceptions adopted in *Olson* have generally been restricted to those situations involving professional services, such as legal services, medical treatment, and home-inspections."

6. Whether the business of transporting and/or escorting convalescent patients from a hospital to medical appointments and back to the hospital, by wheelchair van over public roadways, for a profit, pursuant to contract with the hospital, and where the transportation was set up, arranged, and paid for by the hospital, affects or involves the public interest, and is therefore unenforceable under *Olson*.

Statement of the Case

Frederick Copeland, the Plaintiff, filed the Complaint in this action on Jan. 19, 2016, followed by an Amended Complaint. (Complaint, 1TR 1[1]; Amended Complaint 1TR 112) The Amended Complaint alleged that Mr. Copeland was an inpatient at a medical rehabilitation hospital operated by HealthSouth, that HealthSouth engaged MedicOne to transport Mr. Copeland to and from a medical appointment at OrthoMemphis on Dec. 2, 2014, and that MedicOne was negligent in transporting

[1] This is a reference to Vol. 1 of the technical record, page 1. The other references in the record follow the same format. There are five volumes in the technical record. The fourth volume is the deposition of James Holmes, the driver of the MedicOne wheelchair van. This fourth volume is labelled "Vol. 4" and may be referred to as "Deposition" or the deposition volume.

him from the medical appointment. In particular, the Amended Complaint alleged that MedicOne was negligent in failing to assist Mr. Copeland in re-entering the medical transportation vehicle (wheelchair van) on his attempted return from the medical appointment, and in failing to train the driver in the proper transfer of patients to and from a medical transportation vehicle. The Amended Complaint alleged that Mr. Copeland fell and was severely injured while attempting to re-enter the medical transportation vehicle, and that his injuries were proximately caused by the alleged negligence of MedicOne. (Amended Complaint, 1TR 112)

Subsequent pleadings established that Mr. Copeland was 77 years old, that he had been in the rehabilitation hospital to recover from total knee arthroplasty (total knee replacement) following his release from the surgical hospital, and that HealthSouth had engaged MedicOne to take Mr. Copeland for a return visit to his orthopedic surgeon. (Affidavit of Plaintiff, 1TR 92-93; Plaintiff's "Memorandum in Response to Motion to Dismiss," 1TR 51-52)

MedicOne filed a "Motion to Dismiss or in the Alternative for Summary Judgment," claiming that MedicOne was not liable because the standard form contract that its driver required Mr. Copeland to sign before being transported included an exculpatory clause absolving MedicOne of its liability for negligence. (1TR 26) MedicOne filed an affidavit of its records custodian (Crystal Reeves) in support of the motion, with the standard form contract attached. (Affidavit, 1TR 22-25) The Plaintiff filed a response to that motion (1TR 49) together with the affidavit of counsel (1TR 88) and the affidavit of the Plaintiff (1TR 92), establishing that the

Plaintiff fell while attempting to re-enter the MedicOne vehicle after his medical appointment, and that the MedicOne employee did not assist him in getting into the vehicle. (1TR 88-93) MedicOne filed a Reply in further support of its "Motion to Dismiss or in the Alternative for Summary Judgment" (1TR 94) with a Supplemental Affidavit of Crystal Reeves ("Executive Senior Vice President") attached as Ex. A, stating that its wheelchair van drivers, such as Mr. Holmes, the one employed to transport the Plaintiff, are not EMTs or Paramedics, and "have no licensing beyond a driver's license." (Supplemental Affidavit of Crystal Reeves ¶6, 5TR)

The Plaintiff then filed a motion to continue the hearing on the "Motion to Dismiss or in the Alternative for Summary Judgment," for the limited purpose of taking the deposition of the driver of the MedicOne wheelchair van. The trial court allowed the continuance and the deposition was taken. The Plaintiff filed the deposition on Sept. 14, 2016. (Deposition of James Holmes, 4TR 1-62, with exhibits 1-4)

After the deposition was taken, the Plaintiff filed a Sur-Reply Memorandum to MedicOne's Motion, with several attached exhibits. (2TR 127-200) The relevant exhibits are as follows:

- Ex. A., the "run report" (Contract 2) (2TR 142) (Somehow only the second page of the "run report" is included at this point in the record on appeal, but both pages are included in at least two other places in the record on appeal. See Deposition of James Holmes, (4TR Ex. 1 and 2), and the Affidavit of Records Custodian, Ex. A and B (1TR 24 and 25). The exhibit sticker at 2TR 142 states "Ex. 2." That is because it is a photocopy of Ex. 2 of Mr. Holmes deposition.)
- Ex. C., James Holmes Deposition Excerpts (2TR 168-179)

- Ex. D, Affidavit of David E. Gordon (2TR 180)
- Ex. E, Medical Transportation Services Agreement (2TR 184)
- Ex. F, MedicOne's Responses to First Request for Admission (2TR 194)

MedicOne then filed its Response to the Plaintiff's Sur-Reply Memorandum, with several attached exhibits. (2TR 201) The relevant exhibits are as follows:

- Ex. A, James Holmes Deposition Excerpts (2TR 217)
- Ex. B, Regulations, Ground Invalid Vehicle Standards (2TR 231)
- Ex. C, Regulations, Ambulance Safety, etc. (2TR 234)

The Court heard oral argument on the Motion to Dismiss or in the Alternative for Summary Judgment on Oct. 7, 2016, at which time it announced that it would grant MedicOne's motion for summary judgment, and dismiss the case as to MedicOne. (3TR 248-250 and 259-300) An Order dismissing the case was subsequently entered on Nov. 7, 2016. (3TR 245) The Order specifically stated that it was entered as a final judgment as to MedicOne pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. (3TR 245) The Plaintiff filed his notice of appeal from this order on Nov. 29, 2016. (3TR 306-311)

The Court of Appeals affirmed the trial court's dismissal of the action by its Opinion and Judgment filed Aug. 10, 2017. The Plaintiff's Rule 11 Application for Permission to Appeal was filed on Oct. 9, 2017 (sent by Federal Express on Oct. 6, 2017). This Court granted permission to appeal by order entered Dec. 8, 2017.

Statement of Facts

On Dec. 2, 2014, Frederick Copeland, 77 years old, was an inpatient at the HealthSouth rehabilitation hospital in Memphis, where he was recuperating from total knee replacement surgery. He had a follow-up appointment with his orthopedic surgeon that day. The Hospital set up and arranged for MedicOne, a medical transportation company, to transport Mr. Copeland to the appointment and then back to the Hospital via "wheelchair van." (Copeland Affidavit ¶3, 1TR 92; Affidavit of Records Custodian, Wheelchair Van/Transportation Run Report/Wheelchair Van Transportation Agreement, 1TR 22-25, Ex. A and B; Holmes Deposition, 4TR, Ex. 1 and 2; Sur-Reply, Ex. A, 2TR 142; Plaintiffs' Memorandum, 1TR 51-52; Medical Transportation Services Agreement, Ex. E to Plaintiff's Sur-Reply Memorandum, 2TR 184-185)

The Hospital set up and arranged the transportation pursuant to an agreement that it had with MedicOne known as the "Medical Transportation Services Agreement." (Copeland Affidavit ¶3, Medical Transportation Services Agreement, Ex. E to Plaintiff's Sur-Reply Memorandum, 2TR 184-185) In this Medical Transportation Services Agreement, sometimes referred to in this brief as the "MTSA" or "Contract 1," MedicOne agreed to transport or transfer Hospital patients, including ambulatory, wheelchair, and stretcher patients, and including both emergency and non-emergency patients with a point of origin at Hospital. (MTSA, Recitals, 2TR 184) The MTSA obligated MedicOne to provide these services on a 24-7 basis and to meet scheduled non-emergency requests within 60 minutes of

the Hospital's request. (MTSA § 1.2 Timing of Services and §1.2.a Scheduled/Non-Emergency Requests, 2TR 184-185) The MTSA prohibited MedicOne from discriminating in the provision of these services on any unlawful basis and also allowed MedicOne to directly invoice the hospital when it was not possible to bill the patient. ((MTSA §1.3 Nondiscrimination, 2TR 185, MTSA §4.1 Billing and Collecting for Covered Services, 2TR 186-187)

The transportation of the Plaintiff in this case was a non-emergency transport with "point of origin" at the Hospital under the MTSA. (MTSA, Recitals, 2TR 184) MedicOne dispatched a wheelchair van and a driver or "Technician" named James Holmes to transport the Plaintiff. (Holmes Depo. 19-20, Holmes Ex. 1, 4TR) Mr. Holmes had graduated from high school in 2002, and had not attended college. (Holmes Depo., 8, 4TR) He had worked at a grocery store and at a nursing home as a floor tech, but did not receive any training there. He then worked for a wheelchair van company called Tennessee Carriers for three years, where his only training was on-the-job training. He then worked as a temp at a warehouse loading and unloading trucks, before being hired as a wheelchair van driver by MedicOne. (Holmes Depo. 9-13, Ex. 1 4TR)

Mr. Holmes testified that he did not receive any training at all when he began working at MedicOne, other than a CPR course: "I didn't really get any training at MedicOne because as I came in, I already pretty much knew, so, I mean, I do remember being with the supervisor, you know, just basically showing them that I knew what I was doing and that was before they put me out there to work." He

explained that "Just pretty much they tell you to make sure the patient is strapped down correctly and securely, that's pretty much it." (Holmes Depo. 15-17, 4TR) The wheelchair van has a lift machine that lifts the wheelchair and patient into the van. Once the wheelchair and patient are lifted into the van, Mr. Holmes would hook up the wheelchair and strap the patient in. (Holmes 53-54, 4TR) Although he knew how to load patients with the lift machine, he did not have any training in helping patients who were on walkers and specifically he did not have any training in assisting a person in getting into a vehicle from a walker. (Holmes 41, 46, 4TR) MedicOne admitted that its wheelchair van drivers, such as Mr. Holmes, are not EMTs or Paramedics, and "have no licensing beyond a driver's license."

> 6. As the Executive Senior Vice President of MedicOne, I can also state that MedicOne wheelchair van drivers are not EMTs or Paramedics. Wheelchair van drivers have no licensing beyond a driver's license and are not expected to provide healthcare services to persons that they transport.

(Reeves Supplemental Affid. ¶6, 5TR)

Mr. Holmes testified that his responsibility as a wheelchair van driver was to pick up patients who were sick or convalescing and take them to their doctor's appointments or dialysis treatments. (Holmes 20-21, 4TR) He agreed that it was his responsibility to transport them safely and to see that they safely enter and exit the vehicle (Holmes 20-21, 4TR), but he admitted that he had no training whatsoever in getting an ambulatory patient into the front seat of the vehicle. He initially explained that since all of his patients were in wheelchairs, he had no reason to learn how to get ambulatory patients into wheelchairs. (Holmes 16-19, 4TR) But he

later acknowledged that it was "customary" for patients to sometimes get in the wheelchair van with a walker instead of a wheelchair: "Yes, sir. It didn't happen a lot but it did happen a few times." (Holmes 40, 4TR) He could not recall any discussion about patient safety at MedicOne. He did not get any kind of training manual at MedicOne, never had any meeting to discuss safety issues, and never met a safety engineer or other person in charge of safety. He didn't even know anyone at MedicOne who might have been in charge of safety. (Holmes 16-19, 4TR)

Mr. Holmes explained the procedure that he followed in doing his job. He would get a call with the information about a given run, and he would fill in the particulars on a one-page "wheelchair run ticket" for each trip, including the passenger's name, his own name in the box for "MedicOne Technician Name," the date, the pick-up location, and the destination location. The front side of the "wheelchair run ticket" is headed "Wheelchair Van/Transportation Run Report/Transportation Information" and the back side is headed "Wheelchair Van Transportation Agreement." Mr. Holmes referred to this "front-and-back" form as the "run ticket" or "wheelchair run ticket." The front side of the "wheelchair run ticket" included a section headed "Payment Information" with a space to list the "Facility Responsible for Bill." In Mr. Copeland's case, HealthSouth North [the Hospital] was listed as the "Facility Responsible for Bill." (Holmes 24-31, Ex. 1 and 2, 4TR)

ɔrmation

Contract Services: Facility Responsible for Bill
[illegible]
Credit Card Type (circle one)
Visa MasterCard AmEx Discover

The front page of MedicOne's "wheelchair run ticket" also includes a section headed "Payment Guarantee and Disclosures," with a signature line for both the "passenger" and the Contract Facility who is to be responsible for payment. When it's representative signed the agreement, HealthSouth, the Hospital, as the "contracted facility," authorized the transportation and reimbursement at the pre-arranged rate:

Payment Guarantee and Disclosures

MedicOne Medical Response (MedicOne) is NOT covered by Medicare or Medicaid. MedicOne wheelchair vans are not an ambulance and no care will be given by the MedicOne Technician. I agree and accept full responsibility for charges incurred and agree to pay in full at time of service. In the event that collection action is necessary, I agree to pay all costs incurred, to include all legal fees. If I am from a contracted facility, I authorize transport and reimbursement at the pre-arranged rate.

Passenger Signature	Date
[signature]	12-1-14

I authorize Payment for the transport and services rendered. Please submit invoice to the above contracted facility.

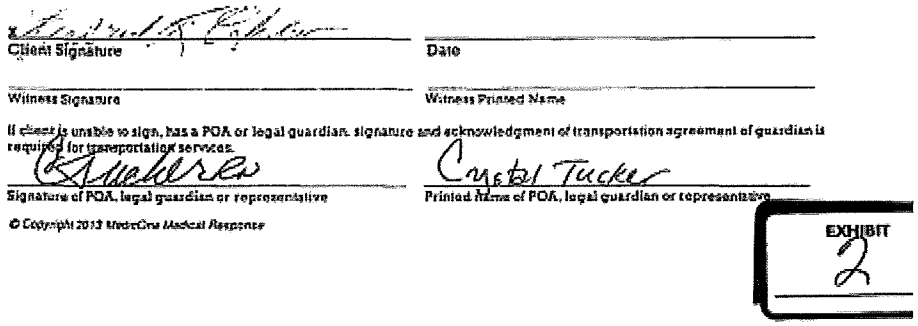
Contract Facility Representative Signature	Title	Date
[signature]	[illegible]	12-2-14

EXHIBIT 1

(Holmes, Ex. 1, 4TR)

The back side of the "wheelchair run ticket" stated that the "Client" desires to engage MedicOne to "transport Client in a wheel chair accessible vehicle," and that there were "inherent risks associated with such transportation which pose a risk of harm or injury." The back side stated that the Client "voluntarily enters into this Transportation Agreement…to induce MedicOne to transport Client in a wheel chair accessible vehicle." The back side also states that "Client agrees to comply

with the [sic] MedicOne's written code of conduct, which is posted in MedicOne's vehicles," and "Client agrees to comply with requests of the driver of MedicOne's vehicle at all times." The back side also included an exculpatory clause that stated that the Client releases MedicOne from all claims of negligence, but not gross negligence or willful misconduct. The back side has a signature line for the Client and also one for the "POA, legal guardian, or representative." Crystal Tucker, R.N., signed the agreement on both sides for HealthSouth:


Client Signature

Date

Witness Signature

Witness Printed Name

If client is unable to sign, has a POA or legal guardian, signature and acknowledgment of transportation agreement of guardian is required for transportation services.

Signature of POA, legal guardian or representative

Crystal Tucker

Printed Name of POA, legal guardian or representative

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EXHIBIT 2

(Holmes 24-31, Ex. 1 and 2, 4TR, Holmes 24-31, Ex. 1 and 2, 4TR)

Mr. Holmes testified that he was trained to "make sure" that the patient signed the agreement. He explained that he would have the patient sign before he would transport them, stating that this was usually before they left the building: "When we pick them up usually before we leave the building, we have them sign or before we leave wherever I'm picking them up from, we get them to sign." (Holmes 26-27 4TR) He added that if the patient didn't sign the form he would not transport them: "...if they refused to sign, then we couldn't take them." (Holmes 27, 4TR) He then testified that it was "pretty much take it or leave it":

Q: It was pretty much take it or leave it?

A: Yeah.

(Holmes 27, 4TR)

Mr. Holmes testified that he did not have any instruction on what to say to the patient about the "run report." He would just ask them to sign the paper: "Once I got them and presented them with the sheet, I would just ask them could they sign it and that's pretty much it." He didn't know that the patient was waiving his right to make a negligence claim by signing the "run ticket." He said that he had never had a patient refuse to sign the form. He testified that he did get questions about the form, but "I basically couldn't tell them too much but that they required a signature before we transported them to their next destination." He testified that he did not have the authority to modify the form in any way. He also testified that as far as he knew, nobody at MedicOne was designated to answer patient questions about the form. He explained that he did not have any training as to the language used in the "run ticket" and that if Mr. Copeland had asked a question about it, he would not have been able to answer it. He further explained that it was the company's policy to have the patient sign one "run ticket" for the trip to the doctor and another one for the return trip. (Holmes 28-36, 4TR)

Mr. Holmes identified the "run ticket" that he used for the Plaintiff's trip to the doctor as Ex. 1 and 2 to his deposition (front and back). He said that he did not recall getting the Plaintiff's signature for the return trip, because he usually did that after the patient got back into the van, and that in this case, the Plaintiff "never made it into the van." (Holmes 28-33, 4TR)

Mr. Holmes explained that when he was dispatched to pick up Mr. Copeland, he was not told anything about the patient's medical condition. (Holmes 24, 4TR) He testified that he did not know that Mr. Copeland had recently had surgery, or that he had had any problem with his leg. (Holmes 36, 4TR) On the day he picked up Mr. Copeland, he was working without a partner, as was his usual practice. (Holmes 36-40, 4TR) He explained that he was MedicOne's only wheelchair van driver and that he would to go to work at seven in the morning and might work until six or seven in the evening. (Holmes 50-51, 4TR)

He testified that when he arrived at the Hospital to pick up Mr. Copeland, he would have parked at the "ambulance entrance" and would have gone inside and asked for Mr. Copeland, and at that time he would get signature of the Hospital's representative on the "wheelchair run report." In this case, he went to Mr. Copeland's room to get him. He found Mr. Copeland in his wheelchair, and he "wheeled" him from his room to the exit. He explained that "I think he had a walker, I'm not sure if it was a walker, I think it was a walker and he used his walker and stood up and he walked out and that's when he got in the van." Mr. Holmes testified that he opened the passenger door of the van to let Mr. Copeland get in. (Holmes 36-40, 4TR)

Mr. Holmes then folded the walker and put it into the back of the van. As mentioned above, Mr. Holmes explained that it was "customary" for patients to sometimes get in the wheelchair van with a walker instead of a wheelchair: "Yes, sir. It didn't happen a lot but it did happen a few times." He said that he did not

discuss with the Plaintiff whether it was okay to use the walker. (Holmes 40, 4TR) He testified that he didn't have any training in assisting a person to get into the vehicle from a walker. (Holmes 41-42, 4TR) He was at the Hospital for nineteen minutes, according to the "run report." (Holmes 42, 4TR)

The Plaintiff got into the van and Mr. Holmes drove him to OrthoMemphis to see his doctor. (Holmes 42-43, 4TR) The record is not clear as to when the Plaintiff signed the agreement, but at some point, he signed it on both sides. (Holmes 54-55; Holmes Ex. 1 and 2, 4TR) The Hospital representative (Crystal Tucker RN) also signed the agreement on both sides, on the front side as the "Contract Facility Representative" and on the back side as the "POA, legal guardian, or representative." (Holmes 54-55; Holmes Ex. 1 and 2, 4TR)

When they arrived at OrthoMemphis, Mr. Holmes, the technician/driver, opened the door of the wheelchair van for Mr. Copeland, got the walker out of the back, and unfolded it for him. Mr. Copeland then got out of the van and the technician/driver went on another run while the Mr. Copeland was at the doctor's office. When the technician/driver came back to pick up Mr. Copeland for the return trip, he went inside the doctor's office to where Mr. Copeland was, and walked out of the building with him, with Mr. Copeland walking with his walker: "...I went actually in to where he was and walked all the way down with him." (Holmes 36-44, 4TR) The technician/driver then opened the passenger door of the van, and stood behind the Mr. Copeland as he attempted to get into the van. The van had a running board for passengers to step up onto before getting into the van (seen below).

(Supplemental Affidavit of Crystal Reeves (MedicOne), Ex. 1, 5TR; Holmes 46-48, Ex. 4)

The technician/driver testified that Mr. Copeland grabbed onto the door and stepped up onto the running board, and "as he was stepping up, I'm guessing his knee or something malfunctioned or went out and he started to fall..." (Holmes 45, 47, 4TR) The technician/driver explained that he "kind of tried to catch him with – I did catch him because I really didn't want his head to hit the ground so I caught

him and I caught him by his head and kind of laid him down..." (Holmes 45, 4TR) The technician/driver noticed that Mr. Copeland's leg was bleeding and that he had blood on his pants leg. Some people were walking in and the technician/driver asked them to get the nurse: "I said yeah, could you all get the nurse because I didn't want to move him." He explained that he wasn't trained and "Right, I didn't want to touch him, I didn't know if I should move him or let him lay there..." (Holmes 45, 4TR)

Mr. Copeland lay on the ground for 2-3 minutes and then the nurses came and picked him up and carried him into the building. The technician/driver went into the building and stayed with Mr. Copeland while the nurses cut his pants off to see what was going on, and re-wrapped his leg. The technician/driver said that unless he was mistaken, the Hospital called a MedicOne ambulance to take Mr. Copeland to the hospital. (Holmes 45-49, 4TR)

Standard of Review

The standard of review for this case, in which the trial court granted summary judgment, is stated by the Tennessee Supreme Court, as follows:

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare–Memphis Hosp.,* 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 250 (Tenn. 2015), *cert. denied,* 136 S. Ct. 2452, 195 L. Ed. 2d 265 (2016)

The Supreme Court further articulated the standard of review to be applied on summary judgment decisions in a pre-*Rye* case, as follows:

> The standard of review for a trial court's grant of summary judgment is de novo with no presumption of correctness. *See Guy v. Mut. of Omaha Ins. Co.,* 79 S.W.3d 528, 534 (Tenn.2002); *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn.1995). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Byrd v. Hall,* 847 S.W.2d 208, 211 (Tenn.1993). The party seeking summary judgment has the burden of persuading the court that its motion satisfies these requirements. *See Byrd,* 847 S.W.2d at 211; *Downen v. Allstate Ins. Co.,* 811 S.W.2d 523, 524 (Tenn.1991). When considering a summary judgment motion, courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *See Guy,* 79 S.W.3d at 534; *Byrd,* 847 S.W.2d at 215. Summary judgment should therefore be granted only when the facts and conclusions to be drawn from the facts permit a reasonable person to reach but one conclusion. *See Guy,* 79 S.W.3d at 534; *Carvell,* 900 S.W.2d at 26.
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> *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)

Argument

1. Whether There Is, Or Should Be, a Tennessee Rule of Law That Exculpatory Clauses Can be Struck Down Only in Contracts for "Professional Services"

In *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977), this Court held that exculpatory clauses in contracts that affect the public interest are invalid and will not be upheld or enforced. The Court recognized that this was an exception to the usual rule that parties may contract that one shall not be liable for his negligence to another. *Olson*, at 430. The Tennessee Supreme Court expressly based its decision

on the California Supreme Court's decision in *Tunkl v. Regents of University of California,* 60 Cal.2d, 383 P.2d 441 (Cal. 1963), and expressly adopted the six criteria or characteristics that the California court listed for determining whether a given contract affected the public interest. The California court noted that "[t]he view that the exculpatory contract is valid only if the public interest is not involved represents the majority holding in the United States." *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 97, 383 P.2d 441, 443 (1963), note 6. The California court further explained that "In one respect, as we have said, the decisions are uniform. The cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.'" *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 96, 383 P.2d 441, 443 (1963).

After finding that "the exculpatory clause which affects the public interest cannot stand," the California court went on to note that what constituted the "public interest" could not be easily stated or defined nor could it be narrowly circumscribed:

> The social forces that have led to such characterization are volatile and dynamic. No definition of the concept of public interest can be contained within the four corners of a formula. The concept, always the subject of great debate, has ranged over the whole course of the common law; rather than attempt to prescribe its nature, we can only designate the situations in which it has been applied. We can determine whether the instant contract does or does not manifest the characteristics which have been held to stamp a contract as one affected with a public interest.

Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98, 383 P.2d 441, 444 (1963).

The California court then noted that in spite of the difficulty of precise definition of the "public interest," the courts have "revealed a rough outline" of what types of

contracts will involve the public interest, and would be held invalid, noting that the invalid transactions exhibit "some or all" of the six characteristics set forth above. The Tennessee Court likewise noted the difficulty of precise definition and stated that the "public interest" could not be narrowly circumscribed, noting that the public policy of Tennessee is to be found in its constitution, statutes, judicial decisions and applicable rules of the common law, and that "However, where there is no declaration in the Constitution or the statutes, and the area is governed by common law doctrines, it is the province of the courts to consider the public policy of the state as reflected in old, court-made rules." *Crawford v. Buckner*, 839 S.W.2d 754, 759 (Tenn. 1992). The determination of what constitutes "public policy" is not to be determined by "rigid test," but instead by reference to the "totality of the circumstances of any given case against the backdrop of current societal expectations." *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 236, 60 A.3d 1, 24 (Md. App. 2013).

But in the years since the *Olson* decision, various panels of the court of appeals have made a number of confusing and conflicting rulings alluding to, suggesting or even making outright findings that this Court held in *Olson* that exculpatory clauses can be struck down only in contracts for professional services. We think that these courts have lost sight of what this Court really said, both in *Olson* and in the later decision in *Crawford v. Buckner*, and have relegated themselves to using a "rigid test" and have forgotten that "No definition of the concept of public interest can be contained within the four corners of a formula."

The trial court listed most, if not all, of those cases, some ten in all, one stating that "the exceptions adopted in *Olson* have *generally been restricted* to those situations involving professional services, such as legal services, medical treatment, and home-inspections," one stating that "[t]he application of the [*Olson*] criteria, however, is to be *limited to* situations involving a contract with a professional person, rather than a tradesman," one stating that "[i]n general, application of factors used to determine if exculpatory clause violates public policy is *limited to* circumstances involving a contract with a professional, as opposed to a 'tradesmen in the marketplace," and one stating that "[a]pplication of the *Olson* criteria should be *limited to* situations involving a contract with a professional person, rather than a tradesman," etc. Opinion below, *Copeland v. HealthSouth/Methodist Rehab. Hosp., LP*, 2017 WL 3433130, at *3 (Tenn. Ct. App. Aug. 10, 2017) (emphasis added) The court below then made its own contribution to the confusion, holding that *Olson* included a "professional service criterion." Opinion below, at *4.

But neither the court below, nor the courts making the other ten decisions, made any effort to come to grips with the fact that, although the defendant in *Olson* happened to be a professional, none of the six factors even mentions whether or not the contract was with a "professional." Although the defendant in *Olson* was a professional, this Court did not state in *Olson* that the sweep of the case was limited to "professionals" or that there was a "professional service criterion." Yet this is the rule that numerous panels of the court of appeals are applying. To add to the confusion, the court below even specifically declined to recognize that this Court, in

Crawford v. Buckner, 839 S.W.2d 754, 759 (Tenn. 1992), expressly overruled one of the decisions of the court of appeals holding that the *Olson* standard was limited to professional service contracts. Opinion below, at *4. In *Crawford v. Buckner*, this Court considered *Schratter v. Dev. Enterprises, Inc.*, 584 S.W.2d 459, 460–61 (Tenn. Ct. App. 1979), a decision in which the court of appeals concluded that it was "constrained" not to apply the Olson standard "since the Supreme Court limited its decision's application to professional service contracts..." *Schratter v. Dev. Enterprises, Inc.*, 584 S.W.2d 459, 460–61 (Tenn. Ct. App. 1979). In *Crawford v. Buckner*, 839 S.W.2d 754, 759 (Tenn. 1992), this court expressly overruled the *Schratter* decision, specifically noting that the Court of Appeals in *Schratter* had felt "constrained" to hold that the exculpatory clause in a tenant's lease barred his recovery, because of the court's "belief that this Court had limited the *Olson* standard to professional service contracts." The Supreme Court ruled that this "belief" was inapposite, and expressly overruled *Schratter,* and its holding that the *Olson* standard was limited to professional service contracts, as follows:

> Accordingly, we hold that under the facts here, the lease clause limiting the residential landlord's liability for negligence to its tenants is void as against public policy. As a result, we expressly overrule the intermediate court decision in *Schratter v. Development Enterprises, Inc.,* 584 S.W.2d 459 (Tenn.App.1979), and any other prior decision, but only to the extent they conflict with this holding.

Crawford v. Buckner, 839 S.W.2d 754, 760 (Tenn. 1992).

But in spite of the apparently clear language from this Court that *Crawford v. Buckner* had "expressly overruled" *Schratter*, the court below somehow ruled that it had not:

> Relying on the emphasized language, Appellant contends that the Tennessee Supreme Court "expressly overturned" the "professional service" requirement for applicability of *Olson*. *We disagree. We do not read the Crawford opinion to overturn or negate the professional service criterion discussed in Olson*; rather, the *Crawford* Court merely recognized that, even in the absence of professional services, if the exculpatory agreement contemplates matters of great necessity or public policy, a reviewing court may apply the *Olson* factors. In other words, the absence of a professional service contract will not, *ipso facto*, negate application of *Olson*.
>
> Opinion below, at *4 (Tenn. Ct. App. Aug. 10, 2017) (emphasis added)

This aspect of the decision below is particularly hard to fathom. We think that this Court very clearly "expressly overruled" any perceived professional service limitation that may have been thought to exist. If there had somehow been a professional service limitation in *Olson*, it was pretty plainly removed when this Court, in *Crawford*, expressly overruled *Schratter*, striking down an exculpatory clause in a residential lease as being "void as against public policy." The defendant in *Crawford* was a landlord, obviously not a "professional." We can think of no better proof that this Court did not intend for *Olson* to include a "professional service criterion."

In *Olson,* the Tennessee Supreme Court dealt with an osteopath, a kind of physician, a "professional," who attempted to utilize an exculpatory agreement to shield himself from liability for negligence in performing abortions. But as we read *Olson,* although the holding was, as always, limited to the facts of the case, an osteopath performing abortions, we do not think that the Court intended to announce rules only for osteopaths, or only for osteopaths performing abortions, or only for physicians, or only for physicians performing abortions, or only for

"professionals" performing abortions, or only for "professionals" in general. We think that the precedental value of *Olson* would extend, not just to professional service contracts, but to any and all contracts affecting or involving the public interest, whether professional or not, to be determined by reference to the six listed criteria. Although the actor in *Olson* was an osteopath, obviously a type of "professional," the question decided was whether the exculpatory provision "affects the public interest," not whether one of the contracting parties was a "professional." *Olson v. Molzen*, 558 S.W.2d at 431. The fact that the defendant was a "professional" was merely one of the facts of the case. To say that the reach of *Olson* is limited to professionals would be to render the six criteria nugatory, and erase them from the case. And we do not see any such limitation written into the *Olson* opinion.

The Court of Appeals has itself struck down exculpatory clauses in several cases where the defendant was not a "professional." For example, in 1997, the Court of Appeals held that an attempted exculpatory clause in a home construction loan agreement was contrary to public policy, and thus unenforceable, based on the factors enumerated in *Olson*. *Lomax v. Headley Homes,* 1997 WL 269432, at *7–9 (Tenn. Ct. App. May 22, 1997). This was not a professional service contract, yet the exculpatory clause was struck down. And in 2007, the Court of Appeals struck down an exculpatory agreement in an employment agreement. Applying the *Olson* criteria, the Court of Appeals held that the relationship of employer and employee affected the public interest and that the exculpatory agreement was therefore void.

Maggart v. Almany Realtors, Inc., 2007 WL 2198204, at *4 and 7 (Tenn. Ct. App. July 26, 2007), *aff'd on other grounds,* 259 S.W.3d 700 (Tenn. 2008). Again, this was not a "professional service contracts," yet the exculpatory provision was struck down. But in spite of holdings like these, the belief that *Olson* only applies to "professional service contracts" is still very much alive in some panels of the Court of Appeals.

The trial court squarely hinged its decision on the fact that MedicOne's driver/technician was, at least allegedly, not a "professional," without considering or even mentioning the *Olson* factors. The court below noted Mr. Copeland's argument that the trial court did not mention the *Olson* criteria, and "conceded" that the trial court did not "specifically reference" the *Olson* criteria, but held that the trial court had been justified in "declin[ing]" to apply the *Olson* criteria because it had made an "initial finding" that the "transportation services" provided by MedicOne were not "professional services," and having made that "initial finding," there was no reason to apply the *Olson* factors:

> Mr. Copeland first contends that the trial court erred because its order, granting Appellee's motion for summary judgment, does not apply (or even mention) the *Olson* factors. While we concede that the trial court does not specifically reference *Olson*, a close reading of its ruling, including the oral ruling that was incorporated, by reference, into the final order, clearly indicates that the trial court declined to apply *Olson* based on its initial finding that the transportation services provided by MedicOne were not professional services, i.e., medical services. (emphasis added)
>
> Opinion below, at *4.

So, according to the court below, where the actor is not a "professional," there is no occasion to apply the *Olson* factors. The trial court then attempted to justify its

finding that Mr. Holmes was not a "professional" even though he made his living driving the wheelchair van, and certainly seemed to be a professional driver/technician. The court's answer was that although Mr. Holmes may have been a professional, it is only *some* professional services that would trigger the *Olson* exception. The court noted Mr. Copeland's argument that the "driver" or "Technician" was transporting patients as a profession, and that he "very much seems to be a professional driver or attendant," but then the court stated that "[w]hile we concede that Mr. Holmes made his living driving the MedicOne wheelchair van, this fact (pursuant to the foregoing case authority) does not, *ipso facto*, mean that he is a professional so as to trigger the application of the *Olson* criteria." (Opinion below, *4)

Rather than the usual definition of "professional" the court below applied a "very narrow definition of 'professional,'" a definition that would not include professional drivers and wheelchair van attendants or technicians. The court attributed this "very narrow definition" of "professional" to this Court, stating that it was "the definition set out in *Olson*." Opinion below, *4. In this "very narrow definition," one not found in any dictionary, and, at least to our eye, not found in *Olson*, one is a "professional" only if he operates in an area of public interest, pursues a profession subject to licensure by the state, holds himself out as an expert, and engages in a practice that is regulated by the state.

The court below then asserted that this Court had not "expressly overruled" the professional service requirement for applicability of *Olson* in *Crawford v. Buckner*.

The court began by quoting *Crawford v. Buckner*, and even bolded the key language:

> Despite the finding that some of the public interest criteria were present, the intermediate court in *Schratter* felt constrained to hold that the exculpatory provision in the tenant's lease barred his recovery, **because of their belief that this Court had limited the *Olson* standard to professional service contracts.** *Schratter*, 584 S.W.2d at 461.
>
> *Crawford*, 584 [sic] S.W.2d at 757 (emphasis in original)
>
> Opinion below *4

The court below then said that "Relying on the emphasized language, Appellant contends that the Tennessee Supreme Court 'expressly overturned' the 'professional service' requirement for applicability of Olson." *Id.* The court below then stated "We disagree." *Id.*

We think that the court below is plainly wrong in its disagreement, because this Court, in *Crawford v. Buckner*, very plainly said that "[a]s a result, we *expressly overrule* the intermediate court decision in *Schratter v. Development Express*, 584 S.W.2d 459 (Tenn. App. 1979), and any prior decision, but only to the extent they conflict with this holding." *Crawford v. Buckner*, 839 S.W.2d at 760 (emphasis added). We think that the clear meaning of this Court's decision is that the intermediate court's "belief" that this Court had limited the *Olson* standard to professional service contracts was unfounded. The contract at issue in *Crawford v. Buckner* was a residential lease agreement, not a professional service contract. And this Court noted that "[t]he plaintiff here contends that the exculpatory provision in her lease falls squarely within the criteria set forth in *Olson*." Crawford, 839 S.W.2d

at 757. This Court further noted that "[a]s a result, the plaintiff argues that we should overrule *Schratter* and hold that the exculpatory provision in her lease is void as against public policy." *Id.* This Court then evaluated the six *Olson* criteria, and found that the contract affected the public interest, and struck down the exculpatory clause. It was not a professional service contract yet the exculpatory clause was nonetheless struck down.

With the *Crawford* decision, we thought that this Court had done away with any belief that exculpatory clauses would be struck down only in professional service, but the belief has nonetheless somehow persisted. The case at bar is a prime example, where the court went so far as to state that *Olson* contained a "professional service criterion," even after *Crawford*. Opinion below, at *4 The court below put its own unique gloss on the question, with what we found to be a puzzling interpretation of *Crawford*:

> We do not read the *Crawford* opinion to overturn or negate the *professional service criterion* discussed in *Olson*; rather the *Crawford* Court merely recognized that, even in the absence of professional services, if the exculpatory agreement contemplates "matters of great necessity or public policy," a reviewing court may apply the *Olson* factors.
>
> Opinion below, at *4 (emphasis added).

According to the court below, in *Olson* this court laid down a "professional service criterion." And according to the court below, the *Crawford* decision did not negate the "professional service criterion," but "merely recognized that, even in the absence of professional services, if the exculpatory agreement involves a matter of great necessity or public policy, a reviewing court may apply the *Olson* factors." *Id.*

The court below concluded by stating that "In other words, the absence of a professional service contract will not, *ipso facto*, negate application of *Olson*." (Opinion below, at *5) We did not see such a complicated mechanism in *Olson* and *Crawford*.

We think that the reason that the court below struggled so much is that it is mixing up two entirely separate concepts, one being the concept of being a "professional" and the other being the concept of whether something, professional or otherwise, affects the public interest. The *Olson* criteria are listed as follows:

> (a.) It concerns a business of a type generally thought suitable for public regulation.
>
> (b.) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> (c.) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> (d.) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
>
> (e.) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
>
> (f.) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. 32 Cal.Rptr. at 37-38, 383 P.2d at 445-446.
>
> We think these criteria are sound and we adopt them.
>
> *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977)

None of the six criteria mention any requirement that the defendant must be a professional. The inquiry, at least as stated by this Court, is not whether the contract is a professional service contract, but whether the contract affects the public interest. We think that some of these contracts that affect the public interest will be professional contracts and that some of them will not. Why would the state of Tennessee have a public policy that only "professional service contracts" affect the public interest, when there are obviously other kinds of contracts that affect the public interest? We do not believe that this was what the Court intended in *Olson* and *Crawford*.

The confusion over the alleged "professional service criterion" directly caused or at least contributed to the erroneous decision by the Court below. The case at bar provides this Court with an excellent opportunity to set the record straight on this key subject in Tennessee tort law.

2. The Significance of the Distinction Between "Professionals" and "Tradesmen in the Marketplace"

The idea that the principles of *Olson* should be applied only to professionals stems from the fact that the defendant in *Olson* was a professional, and from the Court's statements in *Olson* that "[t]he rules that govern tradesmen in the market place are of little relevance in dealing with professional persons who hold themselves out as experts and whose practice is regulated by the state" and "[a] professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he or she is not answerable for his or her own negligence." *Olson v. Molzen*, 558 S.W.2d 429, 430 (Tenn. 1977) The Court

similarly stated that "We do not approve the procurement of a license to commit negligence in professional practice." *Olson v. Molzen*, 558 S.W.2d 429, 432 (Tenn. 1977)

This Court, in *Crawford v. Buckner*, 839 S.W.2d 754, 760 (Tenn. 1992), later specifically recognized that the *Olson* principles were not limited to "professionals" or "professional service contracts." But the idea that the principles of Olson are limited to "professional service contracts" has persisted, as discussed above, with the Court of Appeals in some of the cases listed by the court below stating that the application of the *Olson* criteria is to be "limited to situations involving a contract with a professional person, rather than a tradesman." See, e.g., *Thrasher v. Riverbend Stables, LLC*, 2009 WL 275767, at *3 (Tenn. Ct. App. Feb. 5, 2009)

Certainly, exculpatory clauses should be struck down in certain professional contracts, and may even be said to be "particularly offensive" in professional service contracts: "Particularly offensive in Tennessee are exculpation contracts executed by persons in professional vocations." *Childress By & Through Childress v. Madison Cty.*, 777 S.W.2d 1, 3–4 (Tenn. Ct. App. 1989). But that is not to say that they should be struck down *only* in professional contracts. There are many contracts that affect the public interest that do not involve professionals, as discussed above. It should also be recognized that the universe of contracts cannot be neatly divided into the two categories of "professional" and "tradesman." In reality, there is a wide range of contracts that involve neither professionals nor tradesmen, and many of these contracts affect the public interest. One example would be residential

apartment leases, such as the Court dealt with in *Crawford v. Buckner*, 839 S.W.2d 754, 756–60 (Tenn. 1992). If it were only "professional service contracts" that could be invalidated because they violate public policy, the exculpatory clause in the residential lease in *Crawford v. Buckner* could not have been invalidated, because a residential lease is obviously not a professional service contract. In *Crawford v. Buckner* the Supreme Court held that the agreement in question, although not a "professional service contract," very much affected the public interest, and struck down its exculpatory clause. The Court thus corrected the erroneous "belief" that *Olson* was limited to professional service contracts.

With the realization that the distinction as to whether the defendant is a "professional" or a "tradesman in the marketplace" is not of crucial importance, we nonetheless take a moment to consider whether a wheelchair van operator transporting and accompanying a medical patient from a hospital to a doctor's appointment is either a "professional" or "tradesman in the marketplace." A "tradesman" is "one who runs a retail store: SHOPKEEPER" or "a workman in a skilled trade: CRAFTSMAN." [Webster's New Collegiate Dictionary (1975)] A tradesman is one "performing hands-on tasks to create or repair a product." A wheelchair van operator, neither creating nor repairing anything, nor running a retail store, thus would not seem to be a tradesman, so a rule that tradesmen are permitted to utilize exculpatory contracts would not seem to help MedicOne here.

As for whether a wheelchair van operator is a "professional," we note that the driver or "Technician" is operating the van, picking up medical patients and

transporting them to medical appointments, as his way of making a living. He very much seems to be a professional driver or attendant. At any rate, if "tradesman" and "professional" were the only two choices, the MedicOne's driver/technician, and the wheelchair van business in general, would seem much more like a "professional" than a "tradesman in the marketplace." But the key point here is not whether a wheelchair van operator is deemed a "professional," or a "tradesman in the marketplace," or belongs in some other category, but whether the business of a wheelchair van operator, however denominated, affects the public interest. And this question is to be determined, not by rigid rules, or "contained within the four corners of a formula," but by reference to the criteria or characteristics listed in *Olson*. These characteristics will be discussed in the next section of this brief.

3. The Effect of the *Olson* Factors in the Case at Bar

We will now consider the effect of the *Olson* factors in the case at bar. As mentioned above, the overall question is whether the contract at issue affects the public interest. *Olson v. Molzen*, 558 S.W.2d 429, 430-432 (Tenn. 1977) If so, as this Court held in *Olson*, the exculpatory clause is unenforceable. *Id.* The question is to be decided by reference to the six characteristics or criteria that this Court recognized in *Olson*, recognizing that it is not necessary for the transaction to have *all* of the *Olson* characteristics to affect the public interest. It is only necessary that the transaction have "*some*" of the characteristics: "It is not necessary that all be present in any given transaction, but generally a transaction that has some of these characteristics would be offensive." *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977) Having said that, it may be that each of the criteria is established here.

a. It concerns a business of a type generally thought suitable for public regulation

The court below did not appreciate our argument that the wheelchair van business is regulated by the Tennessee Emergency Medical Services Act, but, whether the court below was right or wrong on that point is at least somewhat beside the point, because the crucial question is not whether the business is regulated, but whether it is *suitable* for regulation. Nonetheless, we will take a moment to consider whether the business is actually regulated by the Tennessee Emergency Medical Services Act. The Act mandates that no person, either as owner, agent or otherwise, shall engage in the service of "transporting patients upon the streets, highways or airways within this state" unless that person complies with the Act and its regulations. T.C.A. § 68-140-306. The Act defines "patient" as "an individual who, as a result of physical or mental condition, needs medical attention." (T.C.A. § 68-140-302). We think it is obvious that Mr. Copeland was a "patient." He was a patient in a hospital when he started the trip, he needed "medical attention," and the purpose of the trip was to receive additional "medical attention." He was a "patient" both in the statutory sense and also in the common usage sense. Although not stated in the record, we think it is safe to assume that he was wearing the usual hospital armband when the accident happened. We would go so far as to say that there is no reasonable argument that Mr. Copeland was not a "patient" as defined by the Act. The only remaining question then is whether he was being transported on the streets or highways. Again, we would go so far as to say that there is no reasonable argument that he was not being transported on the

streets or highways. We don't see any reasonable argument that he was not a "patient" who was being transported on the streets or highways of Tennessee, and that MedicOne, the business that was transporting him, was therefore subject to the Act.

But the trial court did mention the statutory definitions, instead choosing to decide the case based upon the provision that states "This part applies to each person providing emergency medical services within the state." The court then stated that Mr. Copeland was being transported for a "non-emergent follow-up appointment," and that for that reason the Act did not apply. Opinion below, at *4 fn. 1. We think that the trial court was mistaken in this judgment. The Act, despite the fact that the word "Emergency" is included in the title, is not limited to "emergency transportation." As discussed above, the Act, according to its definitions, applies to "transporting patients upon the streets, highways or airways within this state" whether emergency or not. Ambulances frequently carry patients in non-emergency situations, for example when they transfer a patient from one hospital to another.

By way of further example, the Act applies to "invalid vehicles," with "invalid vehicle" being defined as a vehicle that is used to transport "persons who are convalescent, or otherwise nonambulatory, and do not require medical treatment while in transit." T.C.A. 68-140-302(15) Definition of invalid vehicle. Invalid vehicles are not used in emergencies, any more than wheelchair vans, yet they are obviously regulated by the Act. But we will not dwell on this point, because the

question is not whether a business is "actually regulated," but instead is whether the business is "suitable" for regulation. See *Olson,* 558 S.W.2d at 431. And even if wheelchair vans are somehow not regulated by the Act, with invalid vehicles actually regulated by the Act, the invalid vehicle business must be suitable for regulation. And if invalid vehicles are *suitable* for regulation the same would seem to be true of wheelchair vans, a very similar business. Moreover, taxicabs and other vehicles for transporting people on the streets are actually regulated. This leaves us with one question: of all types of transportation that are available, including both medical and non-medical transportation, why would wheelchair vans somehow be the only one not suitable for regulation? We think that the first of the *Olson* criteria is easily established.

b. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

We think it is obvious that transporting wheelchair-bound or similar medical patients on the streets and highways of Tennessee, whether emergency or not, is a service of great importance to the public and is often a matter of practical necessity for some members of the public. This is true, perhaps especially true, where the patient is traveling from a hospital to a related medical appointment, and where the hospital itself arranges and pays for the transportation, as was the case here. Tennessee courts have held that a wide variety of services are of great importance to the public, including doctors providing medical services, landlords providing residential housing, home inspectors inspecting private homes, residential construction lenders providing loans, and funeral homes providing funerals.

Tennessee courts have also held that the safety and welfare of employees in the workplace is a matter of great importance to the public. Each of these is also a matter of practical necessity for some members of the public. Courts in other states have held that a charitable research hospital was providing a service of great importance to the public, that restaurants and other places of public accommodation such as retail stores, and innkeepers are performing services of great importance to the public. *Tunkl*, 383 P.2d at 444-445. The Supreme Court of Georgia, following the *Olson* case, held that the practice of dentistry was of great importance to the public. *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393–94, 282 S.E.2d 903, 904–05 (1981). The state of Tennessee has a strong interest in the safety, health and health care of the citizens of the state, including safe and adequate transportation of patients in wheelchair vans, especially where the patient is being transported from a hospital to a medical appointment, and especially where the transportation is set up, arranged, and paid for by the hospital. We think that the second criterion has been satisfied.

c. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

To satisfy this factor, it is necessary that the party hold himself out as willing to perform the service "for any member of the public who seeks it, *or at least for any member coming within certain established standards.*" *Olson*, 558 S.W.2d at 431. (emphasis added) We emphasize the final phrase because that is the phrase that applies to the case at bar. MedicOne, a company in the wheelchair van business, did not offer its services to the public at large because only a small subset of the

population is staying in hospitals or using wheelchairs. Although the Wheelchair Van Transportation Agreement (Contract 2) stated that "MedicOne reserves the right to refuse service to any client at its own discretion" (Holmes Ex. 2 ¶2.d., 4TR Ex. 2¶2.d.), the MTSA (Contract 1) prohibited MedicOne from discriminating against those who requested its services, whether by "age, sex, marital status, race, color religion, ancestry, national origin, disability, handicap, health status, or other unlawful basis." (MTSA §1.3 Nondiscrimination, 2TR 185) Moreover, as a Medicare and Medicaid provider, MedicOne was prohibited from discriminating by force of the Medicare and Medicaid laws and regulations. MedicOne was therefore required both by law and by contract to transport any medical patient who sought transportation, or at least those referred by the Hospital, without discrimination.

In *Tunkl*, the California Supreme Court considered a hospital that only accepted certain patients, those being certain patients who might qualify for its research and training facilities. The court noted that this selectivity "does not negate its public aspect or the public interest in it":

> The hospital, likewise, holds itself out as willing to perform its services for those members of the public who qualify for its research and training facilities. While it is true that the hospital is selective as to the patients it will accept, such selectivity does not negate its public aspect or the public interest in it. The hospital is selective only in the sense that it accepts from the public at large certain types of cases which qualify for the research and training in which it specializes. But the hospital does hold itself out to the public as an institution which performs such services for those members of the public who can qualify for them.

Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 102, 383 P.2d 441, 447 (1963).

MedicOne, like the research hospital in *Tunkl*, is a company that must provide its services to anyone who qualifies for them. The third characteristic is thus established.

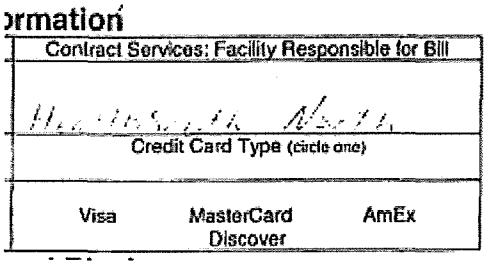
d. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

The question here is whether MedicOne possessed a "decisive advantage in bargaining strength" compared to Mr. Copeland, taking into account the "essential nature of the service" and the "economic setting of the transaction." The court below briefly discussed some of these issues in connection with *Wofford v. M.J. Edwards & Sons Funeral Home, Inc.*, 490 S.W.3d 800 (Tenn. Ct. App. 2015), where the Court of Appeals considered the validity of an arbitration clause in a contract with a funeral home where the plaintiff was "faced with a difficult decision" that would have delayed a funeral and had "no realistic choice but to acquiesce" in signing the contract because otherwise it would have been "akin to asking her to 'swap horses in midstream.'" *Wofford*, 490 S.W.2d at 816. The court below did not appreciate Mr. Copeland's argument that he too would have been left with a "difficult decision" and would have been asked to "swap horses in midstream," if he had refused to sign MedicOne's agreement, because his medical treatment would have been interrupted or delayed. The court below stated that "no such 'trust relationship,' 'emotional decision,' or 'important social consideration' exist in the instant case," and that there was no "preexisting relationship of trust between Mr. Copeland and Appellee," and no "crisis," and nothing "akin to the 'difficult decision' contemplated by the

plaintiff in *Wofford*." According to the court below, this was mere non-emergent, ordinary transportation, just a matter of an ordinary citizen getting himself from one part of town to another. According to the court below, there was nothing essential about the transportation, there was nothing about the "economic setting" that would have put Mr. Copeland at a disadvantage, and nothing to give MedicOne an advantage in bargaining strength. Mr. Copeland could have just called a taxi or Uber or he could have rescheduled his medical appointment (much like one would reschedule his haircut). Opinion below, at *5. The trial court did not seem to have any concern that this would have "interrupted the course of the patient's treatment," to use the language of this Court in *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996) The court did not seem to have any realization that rescheduling an appointment with a medical specialist might take several days or a week or longer. Nor did the court seem to appreciate the importance of the follow-up appointment with one's orthopedic surgeon following total knee replacement. Besides the interruption in treatment and the delay in treatment in its own right, the delay might have resulted in extending the stay in the rehabilitation hospital, which could result in additional cost and, at least in some cases, might cause problems in getting the bill approved for insurance payment. In short, the court below seems to have made the value judgment that arranging a funeral for a dead person is more important than getting medical treatment for a live person, even critical knee replacement treatment, which could affect a patient's ability to walk for the rest of his or her life. The judgment of the court below seems to be that delay

in a funeral would be contrary to Tennessee public policy, but delay in medical treatment would not be. We would not make that judgment and we would not attempt to decide which was more important. They are both important in their own way. We would simply suggest that both are sufficiently important to affect the public interest.

Mr. Copeland was not in a funeral home. He was in a rehabilitation hospital where he was recovering from major surgery, a total knee replacement. He had a follow-up appointment with the orthopedic surgeon who had performed the knee replacement. It was essential for him to get to this appointment. The record is undisputed that it was the Hospital, not the 77-year-old patient, that set up, arranged and paid for the transportation. (We think it is apparent that it was likewise the Hospital who selected the means of transportation, that is, calling for a wheelchair van rather than Uber or a taxi.) The Wheelchair Van Transportation Agreement (Contract 2) identified HealthSouth North as the "Facility Responsible for Bill":

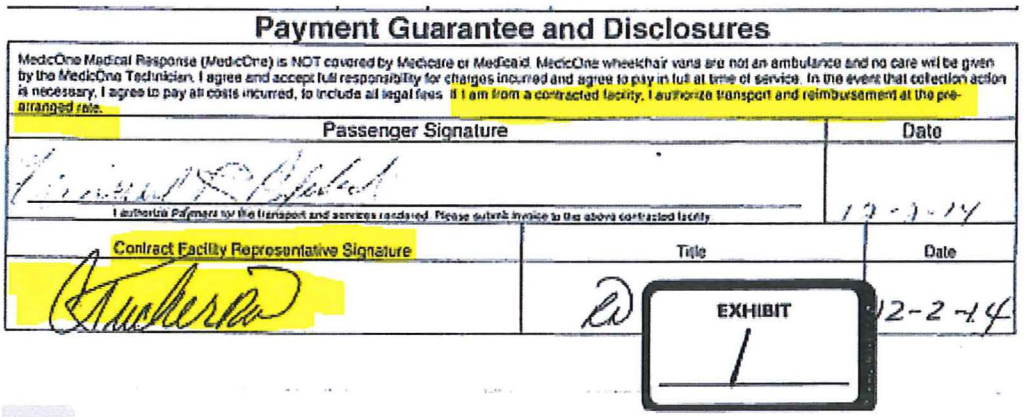

ormation

Contract Services: Facility Responsible for Bill

Credit Card Type (circle one)

Visa MasterCard AmEx Discover

The Hospital representative signed the agreement as the "Contract Facility," authorizing the transportation and reimbursement at the "pre-arranged rate":



Payment Guarantee and Disclosures

MedicOne Medical Response (MedicOne) is NOT covered by Medicare or Medicaid. MedicOne wheelchair vans are not an ambulance and no care will be given by the MedicOne Technician. I agree and accept full responsibility for charges incurred and agree to pay in full at time of service. In the event that collection action is necessary, I agree to pay all costs incurred, to include all legal fees. If I am from a contracted facility, I authorize transport and reimbursement at the pre-arranged rate.

Passenger Signature	Date
I authorize Payment for the transport and services rendered. Please submit invoice to the above contracted facility.	12-1-14

Contract Facility Representative Signature	Title	Date
		12-2-14

EXHIBIT 1

(Holmes Ex. 1, 4TR)

The wheelchair van, set up, arranged and paid for by the Hospital, arrived, and the contract, apparently already signed by the Hospital representative, was presented to Mr. Copeland at some point not established in the record. The contract was, as the MedicOne driver explained, "pretty much take it or leave it." Either sign the paper or we won't take you to the doctor. Mr. Holmes, the MedicOne driver/Technician, did not explain to Mr. Copeland that he was signing an exculpatory agreement. The driver testified that he didn't know that the patient was waiving his right to make a negligence claim by signing the "run ticket," and he could not have answered any questions about the form. (Holmes 28-36, 4TR)

As the California Supreme Court explained in *Tunkl*, "[i]n this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk..." The court continued, "[s]ince the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence." *Tunkl*, 383 P.2d at 447. The court explained, "[i]n insisting that the patient accept the provision of waiver in the contract, the hospital certainly

exercises a decisive advantage in bargaining." The court continued: "The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital," and then added that "[t]he admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract." *Tunkl, Id.* Nor did the front seat of the wheelchair van, or the waiting room at the Hospital, contain a bargaining table where the Hospital's patients could debate the terms of the transportation that the Hospital had arranged for them.

When Mr. Holmes arrived to take Mr. Copeland to his appointment, the 77-year-old Mr. Copeland could have, at least in theory, carefully read the "run report"/agreement and somehow figured out that it contained an exculpatory clause (this was not explained to him) and could have somehow figured out what an exculpatory clause was. He could not have learned this from the driver/Technician because the driver/Technician did not himself know that his patients were waiving their right to make a negligence claim and could not have answered any questions about the form. (Holmes 28-36, 4TR) Had he known that the agreement included something called an "exculpatory clause," Mr. Copeland could have called a lawyer referral service or otherwise somehow come up with an attorney, and refused to sign the agreement, and demanded that the Hospital provide transportation without an exculpatory clause. Or he could have changed hospitals, switching to one that would not force him to sign an exculpatory contract if he had to go to the doctor.

In theory, he could have somehow arranged his own wheelchair van, at his own expense, although there is no assurance that the rest of the wheelchair van operators in Memphis did not also use exculpatory clauses. But the reality of this situation, given the fact that the medical appointment was essential to Mr. Copeland's well-being, and in the existing economic setting, with Mr. Copeland being a patient at the Hospital, with the transportation being set up and paid for by the Hospital, and the MedicOne driver being prepared to simply leave Mr. Copeland sitting there in his wheelchair, or leaning on his walker, if he didn't sign the agreement, we do not see how the court below could have failed to conclude that MedicOne had a "decisive advantage of bargaining strength."

The court below commented that Mr. Copeland could have just called a taxi or Uber, and said "In fact, Mr. Copeland has alleged no medical necessity requiring transportation by wheelchair van." Opinion below, at *4. In making these observations, the trial court seems to be substituting its judgment for that of Hospital and the other medical professionals who were actually involved in Mr. Copeland's treatment. It is undisputed that Mr. Copeland was in a wheelchair when Mr. Holmes picked him up, that he made his way to the wheelchair van part-way by wheelchair, the rest by walker, and that both the wheelchair and the walker went with him. (Mr. Holmes loaded them into the wheelchair van.) And it was the Hospital, not Mr. Copeland, who set up and arranged the transportation. We think that it is a fair inference from the facts in the record that it was the Hospital and/or its medical professionals, and not Mr. Copeland, who decided that it was necessary

or advisable to transport Mr. Copeland by wheelchair van (besides just being good common sense). It is established that "[w]hen considering a summary judgment motion, courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)

In stating that Mr. Copeland could have just called a taxi overlooks the undisputed proof in the record that it was the Hospital who arranged the transportation. To decide the case on this basis would require the court to assume, with no evidence, that the Hospital or its doctors were wasting money when they called for a wheelchair van, and that Mr. Copeland could have somehow loaded his wheelchair and his walker into the back of a taxi by himself, or loaded them onto a bus, and then hauled both of them from the street into the doctor's office, perhaps balancing the walker on his lap as he maneuvered the wheelchair.

The court's "taxi" example is ironically unsatisfactory, because if Mr. Copeland had called a taxi, the taxi would not have been able to avoid liability by use of an exculpatory clause. It has long been held that common carriers, such as trains, buses and taxis may not avoid liability for their negligence by the use of exculpatory agreements. See, e.g., *Carolina, C. & O. Ry. Co. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S.W. 591, 594 (1914) ("It is well settled that a railroad company cannot, by contract, secure exemption from liability for damages caused by its negligence, in derogation of its duty to the public as a common carrier..." See also *Moss v. Fortune*, 207 Tenn. 426, 429, 340 S.W.2d 902, 904 (1960) ("a common carrier

may not, by contract, exempt itself from liability for a breach of duty imposed on it for the benefit of the public....")

As for the court's statement that Mr. Copeland's refusal to sign the agreement would not result in any "crisis" (Opinion below, at *5) we have not seen any case where it is necessary to prove a "crisis" in order to avoid an exculpatory contract. We do not know where the court below came up with that terminology. We saw no crisis in the home inspection cases or in the residential lease agreement cases, yet the exculpatory clauses in those cases were struck down. Rather than being a question of "crisis," the question is whether Mr. Copeland would have been asked to "swap horses in midstream" or would have been "faced with a difficult decision" had he decided to terminate the relationship, or whether it would have been "problematic." *Wofford*, 490 S.W.2d at 816.

Finally, as for the statement of the court below that there was no "important social consideration" in the instant case, it almost appears that the court didn't seem to appreciate the fact that Mr. Copeland was a patient in a hospital, that he was recuperating from knee replacement surgery, that he was in a wheelchair, that he used the wheelchair to get to the wheelchair van, and that the hospital had ordered the wheelchair van for him. Essentially, in making this judgment, the court below seems to be utilizing a very grudging view of the situation that is out of step with Tennessee public policy.

e. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may

pay additional reasonable fees and obtain protection against negligence.

The fifth *Olson* characteristic is that, in exercising its "superior bargaining power," the party confronts the public with a "standardized adhesion contract of exculpation," and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. *Olson*, 558 S.W.2d at 431. It is admitted that the contract was MedicOne's standardized form contract and that MedicOne did not offer an option to pay additional fees to obtain protection from negligence. The only remaining question is whether the contract was an "adhesion contract of exculpation." The Tennessee Supreme Court has held that an adhesion contract is a "standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). The Supreme Court added that courts generally agree that the distinctive feature of a contract of adhesion is that "the weaker party has no realistic choice as to its terms." *Id.* The Court went on to determine that the contract at issue was indeed a contract of adhesion, pointing to the fact that it was a standardized form contract prepared by the contracting party with superior knowledge of the subject matter (the rendition of medical services), and was essentially offered on a "take it or leave it basis." Had the patients not signed, the provider would not have continued rendering medical service to them, and, although the patient "could have refused to

sign the arbitration agreements and sought out another physician in the area," that would have "interrupted the course of the patient's treatment." *Id.*

But having found that the contracts were contracts of adhesion, this Court in *Buraczynski* noted that this was not dispositive of the enforceability of the contracts, because it is only contracts of adhesion that are "beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable" that are unenforceable. *Id.* The court proceeded to find that the contracts there at issue, although they were contracts of adhesion, were nevertheless enforceable, because they were not "unconscionable, oppressive, or outside the reasonable expectations of the parties." *Buraczynski v. Eyring*, 919 S.W.2d at 321.

Before going any further, we note that it is not necessary that the contract be an *unenforceable* contract of adhesion in order to be a characteristic of an unenforceable contract under the *Olson* public interest analysis. It is only necessary that the contract be a contract of adhesion without more. Having said that, when we apply the *Buraczynski* contract of adhesion criteria to the case at bar, we see that here we likely have an *unenforceable* contract of adhesion. This would provide an alternative means to find the contract here at issue to be unenforceable, either as an unenforceable contract of adhesion under *Buraczynski* or as an agreement affecting the public interest under *Olson*. At any rate, the question of whether the contract is one of adhesion is merely one of the *Olson* characteristics. As discussed elsewhere in this brief, it is not necessary to establish each of the *Olson* characteristics; it is enough to establish only some of them.

The Court of Appeals found the agreement in *Wofford* to be an unenforceable contract of adhesion. In doing so, the court stated that "the analysis in *Buraczynski* rests on one critical finding—that the relationship between doctor and patient is unique and built on trust." *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, 490 S.W.3d 800, 815 (Tenn. Ct. App. 2015). The court also noted that "[b]ecause of this unique relationship and the exigency in which the services may be needed, the *Buraczynski* court found that it would be problematic for the patient to terminate the relationship and seek another medical professional to perform the desired services." *Wofford*, 490 S.W.2d at 816. The court also noted that the plaintiff there, like the patient in *Buraczynski*, would have been "faced with a difficult decision" had she decided to terminate the relationship. *Id.* Moreover, said the court, "because of the actions that had already taken place, Ms. Wofford had 'no realistic choice but to acquiesce' in signing the Contract." *Id.* Otherwise, the Court noted, it would have been "akin to asking her to 'swap horses in midstream.'" *Id.*

Every one of these considerations is present in the case at bar. With this important transportation being set up, arranged and paid for by the hospital, it should be recognized that the relationship between hospital and patient is "unique and built on trust" similar to the relationship between doctor and patient. Where a patient's own hospital arranges transportation to his or her orthopedic surgeon, for further treatment of the very condition that the patient is hospitalized for, we think that arrangement is one that is "built on trust." Like it was for the plaintiff in *Wofford*, it would have been "problematic" for Mr. Copeland to terminate the

relationship with MedicOne and seek another wheelchair van or transportation service. The problematic element would have begun with the fact that Mr. Copeland would likely have missed his appointment and his treatment would have been interrupted and delayed. It should be agreed that missing or postponing the follow-up post-surgery appointment with your knee replacement surgeon would be highly undesirable, just as undesirable, in its own way, as postponing a funeral. To say the least, this would have posed, if not a "crisis," at least a "difficult decision" for Mr. Copeland, or a "problematic" situation.

The record is not clear exactly where Mr. Copeland was when he signed the "run report," that is, whether he signed it in the hospital or whether he signed it after he made his way to the wheelchair van, but it is clear that he made his way to the vehicle part-way by wheelchair, and the rest of the way by walker and then climbed into the vehicle. Even if one has never been had knee replacement surgery or been consigned to a walker, it should be recognized that this would have been a significant investment of effort. Whether the contract was presented to Mr. Copeland inside the hospital or after he got himself into the vehicle, it is clear that making his way back to his room in the hospital, and attempting to re-schedule his appointment, and somehow finding an alternative wheelchair van company, would have been a difficult and problematic change of horses in midstream, with the attendant delay and interruption of medical treatment and possible adverse consequences. According to the court below, 77-year-old hospital patients who have just had knee replacement surgery should be required to make their own way in the

world, carrying their walkers on their wheelchairs, loading and unloading them into the taxi on their own, and find their way to the doctor's office and back on their own. But under the circumstances, we think that Mr. Copeland had "no realistic choice but to acquiesce."

We conclude this section with perhaps the most important point in *Buraczynski*, as it relates to the case at bar. As mentioned above, the Supreme Court stated in *Buraczynski* that "[f]inally, and perhaps most importantly, the agreements did not change the doctor's duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but merely shifted the disputes to a different forum." *Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996). The case at bar is thus on vastly different ground than *Buraczynski.* The provision here at issue was not a mere shift to a different forum, which the Court allowed in *Buraczynski*, but was the elimination of the provider's duty to use reasonable care in handling patients, exactly what the Court was most concerned about in *Buraczynski.* And as mentioned above, to establish the fifth characteristic under the *Olson* public interest exception, it is not necessary to establish that the contract is an unenforceable contract of adhesion, that is, one that is "unconscionable, oppressive, or outside the reasonable expectations of the parties." It is enough to establish that it is a contract of adhesion, with nothing more.

f. As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

The sixth and final Olson characteristic is that as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject

to the risk of carelessness by the seller or his agents. Mr. Copeland, having specifically agreed to "comply with the [sic] MedicOne's written code of conduct" and to "comply with the requests of the driver of MedicOne's vehicle at all times, would certainly seem to fit this criterion:

2. Client agrees to the following terms and conditions with regard to the transportation services provided by MedicOne:
   a. Client agrees to comply with the MedicOne's written code of conduct, which is posted in MedicOne's vehicle.
   b. Client agrees to comply with requests of the driver of MedicOne's vehicle at all times.
   c. Client agrees to keep all seatbelts and restraining devices fastened and tightened
   d. MedicOne reserves the right to refuse service to any client at its own discretion

(Holmes Ex. 2, 4TR)

Mr. Copeland, a customer of MedicOne, being escorted by the MedicOne driver/Technician, and being transported in the MedicOne wheelchair van, was certainly subject to the risk of carelessness by its driver/Technician, from the time the Technician picked him up to the time he was discharged at the doctor's office, and again from the time the Technician picked him up at the doctor's office to the time he was discharged back at the Hospital. Just as the patient was placed under the control of the doctor in *Olson*, and subject to his negligence, so was Mr. Copeland placed under the control of MedicOne and its wheelchair van technician, and subject to his negligence. The sixth and final characteristic is therefore present here.

* * *

Although it is not necessary to establish each of the six *Olson* characteristics to invalidate an exculpatory clause, we think that all six characteristics are present here, as they were in *Olson*. Whether all or only some of the characteristics are present, the effect is enough to establish that the contract here, for transportation of

a patient by wheelchair van from the hospital where he is a patient to an important medical appointment, and back, with the transportation being set up, arranged, and paid for by the hospital, affects the public interest and is unenforceable.

4. The Cases in Which Exculpatory Clauses Have Been Upheld

To provide context for this Court's consideration of these questions, we will briefly discuss the types of cases where exculpatory clauses have been held enforceable, with the objective of showing that these cases bear no similarity to the case at bar. Tennessee cases upholding exculpatory clauses include a white-water rafter who fell while disembarking from an allegedly dilapidated school bus [*Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730, 731 (Tenn. Ct. App. 2005)], a patient using a vibrating belt machine at a beauty spa [*Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 189 (Tenn. 1973)], and a man who fell off a rented horse [*Moss v. Fortune*, 207 Tenn. 426, 429, 340 S.W.2d 902, 904 (1960)].

The Court explained in *Henderson v. Quest Expeditions* that white-water rafting, a recreational activity, was not a service of "great importance to the public" or a matter of "practical necessity," observing that "[t]here is no necessity that one go white-water rafting." *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730, 731–33 (Tenn. Ct. App. 2005). The Court added that "[i]n fact, many jurisdictions have recognized that such recreational sporting activities are not activities of an essential nature which would render exculpatory clauses contrary to the public interest." *Id.* The Court cited cases from other states holding that health club services were "not essential," that "voluntary participation in recreational and sports activities [skiing] does not implicate the public interest," and that "sky diving

and other private recreational businesses generally do not involve services which are necessary to the public such that exculpatory contract would be invalidated." *Id.* (internal citations omitted)

Courts in other states have upheld exculpatory clauses in other recreational activities, including snow skiing [*Platzer v. Mammoth Mountain Ski Area,* 104 Cal.App.4th 1253, 1259–1260, 128 Cal.Rptr.2d 885 (Cal. App. 2003)]; parachute jumping [*Paralift, Inc. v. Superior Court* (*Levin*), 23 Cal.App.4th 748, 756–758, 29 Cal.Rptr.2d 177 (Cal. App. 1993)], aerial sightseeing tours [*Booth v. Santa Barbara Biplanes, LLC,* 158 Cal. App. 4th 1173, 1179–80 (Cal. App. 2008), 70 Cal. Rptr. 3d 660, 664–65 (Cal. App. 2008)], white-water rafting [*Franzek v. Calspan Corp.*, 78 A.D.2d 134, 434 N.Y.S.2d 288 (1980)], and auto racing [*Gore v. Tri-Cty. Raceway, Inc.*, 407 F. Supp. 489 (M.D. Ala. 1974)].

The general rationale for these decisions, based on the *Tunkl* characteristics, has been stated as follows: "There are many ways to go on a sightseeing tour, whether it be by plane, hot air balloon, boat, or bus. Appellant cites no authority that a recreational airplane ride is an essential service affecting the public interest that comes within the purview of *Tunkl." Booth v. Santa Barbara Biplanes, LLC,* 158 Cal. App. 4th 1173, 1179–80, 70 Cal. Rptr. 3d 660, 664–65 (2008).

The California Court of Appeals further explained the rationale, applying the *Tunkl* factors in a parachute jumping case, pointing out several distinctions that were "readily apparent." First, the court stated that parachute jumping is not subject to the same level of public regulation as is the delivery of medical and

hospital services. Second, the court stated that the *Tunkl* agreement [related to medical treatment] was executed in connection with services of great importance to the public and of practical necessity to anyone suffering from a physical infirmity or illness. Recreational parachute jumping, on the other hand, said the court, is "not an activity of great importance to the public and is a matter of practical necessity to no one." Finally, the court stated that because of the essential nature of medical treatment, the consuming party in *Tunkl* had little or no choice but to accept the terms offered by the hospital. The court added that the defendant biplane company had no decisive advantage in bargaining power over plaintiff by virtue of offering any "essential services," finding that when referring to "essential services" the court in *Tunkl* clearly had in mind "medical, legal, housing, transportation or similar services which must *necessarily* be utilized by the general public." Purely recreational activities, said the court, such as sport parachuting can hardly be considered "essential." *Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 342–43, 214 Cal. Rptr. 194, 199 (Ct. App. 1985).

In contrast to recreational river rafting, parachute jumping, or an aerial sight-seeing tour, transportation of patients from hospitals to medical appointments, and back, is a matter of great importance to the public, and a matter of practical necessity for people who are hospitalized.

5. Conclusion

Although this Court appears to have ruled in *Olson* and *Crawford* that exculpatory clauses can be struck down in any contract that affects the public interest, numerous panels of the Court of Appeals seem to be under the impression

that they are only permitted to strike down exculpatory clauses in one species of contract, the "professional service contract." No rational basis has been stated as to how the "professional service contract" could be the only species of contract that affects the public interest. But, as shown by the cases listed by the court below, various panels of the court of appeals have made rulings, on some ten occasions, alluding to, suggesting or even making outright findings that this Court held in *Olson* that exculpatory clauses can be struck down only in contracts for professional services.

The court below went so far as to state that there is a "professional service criterion" to be found in *Olson*. But *Olson* did not list or even mention any "professional service criterion." As for the six criteria that were listed in *Olson,* none of them even mentioned the idea that the defendant must be a "professional." A "professional service criterion" would be a seventh criterion. And, as stated by the court below, this seventh criterion would be a "super-criterion," one that would trump all of the others. As stated in *Olson*, it is not necessary that all six criteria be present to strike down an exculpatory clause, but instead, a transaction that has "some of these characteristics" would be offensive. But, as stated by the court below, the "professional service criterion" would be a threshold or "super-criterion"– if it is not met, the court would reflexively uphold the exculpatory clause, without even bothering to look at the other criteria. The Plaintiff believes that this incorrect and erroneous belief that this Court, in *Olson*, intended to implement a "professional

service criterion" directly caused or at least contributed to the decisions of the trial court and the court below.

It appeared, at least to us, that after *Crawford*, any belief that *Olson* principles were limited to "professional service contracts" had been done away with. But given the numerous confusing and conflicting decisions by the court of appeals, including the ruling by the court below, it very strongly appears that it is going to take another decision by this Court to actually do away with the belief. The case at bar gives the Court the ideal opportunity to do so. We think what is needed is a clear exposition by this Court that no "professional service criterion" was intended in *Olson*, and that the question to be decided is not whether a contract is a "professional service contract," but whether the contract, of whatever species, affects the public interest.

We think it is clear that when a hospital sets up, arranges and pays for transportation for one of its sick or injured medical patients from the hospital to a medical appointment, and back to the hospital, that the public interest is affected. As the Court stated in *Olson*, for the public interest to be affected it is not necessary that all of the characteristics be present in any given transaction. A transaction that has "some of these characteristics" would be offensive. Having said that, it does appear that all of the characteristics are present in the case at bar, or certainly enough of them are present, and in sufficient magnitude, to establish that the transaction affects the public interest and that the exculpatory clause should be held unenforceable.

For the reasons stated herein, the Plaintiff requests the Court to reverse the trial court's grant of summary judgment herein, and remand for trial and other proceedings.

Respectfully submitted,

Donald K. Vowell (#6190)
Attorney for the Plaintiff,
Frederick Copeland
6718 Albunda Drive
Knoxville, TN 37919
865/292-0000
865/292-0002 fax
don@vowell-law.com

David E. Gordon (#9973)
Attorney for the Plaintiff
1850 Poplar Crest Cove,
Suite 200
Memphis TN 38119
901/818-4889
davidg@davidgordonlaw.com

Certificate of Service

The undersigned certifies that a copy of the foregoing has been served on the parties listed below, as follows:

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[ ] Email
[ ] Facsimile
[ ] Federal Express

Date: Jan. 25, 2018

Donald K. Vowell

Bruce McMullen (#18126)
Mary Wu (#31339)
Attorneys for HealthSouth/Methodist Rehabilitation Hospital Limited Partnership
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
First Tennessee Building, Suite 2000
165 Madison Ave.
Memphis, TN 38103

Diana Comes (#30112)
Butler Snow
Attorney for MedicOne Medical Response of Tennessee, Inc.
P.O. Box 171443
Memphis, TN 38187-1443