

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No.: 2011-CP-42-1329

Michael J. Ferola, #291941, ..... Appellant,

v.

South Carolina Department of Corrections  
and Shawn Johnson, 297078, ..... Respondents.

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BRIEF OF RESPONDENT  
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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## COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court below commit a reversible error in granting summary judgment in favor of the Respondent South Carolina Department of Corrections (SCDC) on the grounds that Appellant Ferola failed to present any evidence of gross negligence to give rise to liability under the South Carolina Tort Claims Act, where the undisputed facts in the Record on Appeal demonstrate that Lt. Lott did not have any involvement with the altercation between Appellant Ferola and Inmate Shawn Johnson, Lt. Lott did not have any communications with Inmate Johnson which would have led to and/or precipitated the altercation which allegedly occurred on October 19, 2010, and no agent or officer of the South Carolina Department of Correction had any reason to suspect an altercation would occur between Appellant Ferola and Inmate Johnson?

2. Should the Circuit Court's grant of summary judgment be affirmed on the alternative sustaining ground that any duty owed by Respondent SCDC to protect Appellant Ferola from fellow inmate violence was owed to the public at large and not to Ferola individually?

## COUNTERSTATEMENT OF THE CASE

This is an action brought by a state prison inmate, Appellant Michael J. Ferola, against Respondent South Carolina Department of Corrections (hereinafter “the Department” or “SCDC”) under the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq., to recover damages from the Department for personal injuries suffered as a result of an altercation between Appellant Ferola and a fellow inmate by the name of Shawn Johnson.

The appellant in this action initially made allegations against numerous defendants including the South Carolina Attorney General and Shawn Johnson, who was a fellow inmate at the South Carolina Department of Corrections. The record does not reflect that Shawn Johnson was ever served with this action.

In an Order dated May 31, 2012, the individual defendants were dismissed, and pursuant to the South Carolina Tort Claims Act, the South Carolina Department of Corrections was substituted as a defendant. (Lower Court’s Order dated May 31, 2012.) Furthermore, appellant’s claim concerning his classification at SCDC was dismissed in the May 31, 2012 Order. (Lower Court’s Order dated May 31, 2012.)

On November 1, 2012, the South Carolina Department of Corrections filed a Motion for Summary Judgment, asserting that there was no genuine issue of material fact and that the Department was entitled to judgment as a matter of law on the grounds that (a) the Department was immune from liability under the applicable exceptions to liability set forth in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60, and that, in

the alternative, (b) liability was barred by the public duty doctrine. The court below held a hearing on the Department's Motion for Summary Judgment on February 8, 2013, at which time the arguments of counsel were heard, and evidence was received from the parties.

In an Order dated March 15, 2013, and filed March 18, 2013, The Honorable J. Derham Cole, Circuit Court Judge, presiding, concluded that the Department's Motion for Summary Judgment should be granted, and dismissed the Appellant's Complaint with prejudice. (Lower Court's Order dated March 15, 2013.)

On March 27, 2013, the Appellant filed a Notice of Appeal.

### STATEMENT OF FACTS

Appellant Ferola claims that on October 19, 2010, while an inmate at the MacDougall Correctional Institution in Ridgeville, South Carolina, he was assaulted by a fellow inmate by the name of Shawn Johnson. (Complaint; Lower Court's Order dated March 15, 2013, p. 1.) Appellant, by way of his Complaint, appears to allege that the altercation occurred as a result of some communication between Corrections Officer Lt. Lott and Inmate Johnson whereupon Lt. Lott allegedly told Johnson that Appellant Ferola was a confidential informant; however, contrary to appellant's allegations, Lt. Lott had no knowledge that appellant was acting as a confidential informant, and at no time made any statements to Inmate Johnson concerning appellant's cooperation with contraband officer Lt. Hartzog. (Lower Court's Order dated March 15, 2013, p. 2; Affidavit of Lott.) There is no competent or admissible evidence that any communication occurred between Lt. Lott and Inmate Johnson concerning appellant's cooperation as an informant, and further, there is absolutely no evidence in the record that any such communication prompted and/or induced the altercation between Appellant Ferola and Inmate Johnson on October 19, 2010. (Lower Court's Order dated March 15, 2013, p. 2; Affidavit of Lott.) Also absent from the record, is evidence that any agent or officer of SCDC had any reason to suspect that an altercation would occur between Appellant Ferola and Inmate Johnson.

In his initial brief, Appellant states that "in the instant case there exist the fact of whether Lt. Lott had knowledge the assault would occur" as the basis of his appeal.

However, that assertion is totally unfounded and not supported by the record. The record below clearly demonstrates that Lt. Lott did not have any prior knowledge that the appellant was acting as a confidential informant for Officer Hartzog. (Lower Court's Order dated March 15, 2013, p. 2; Affidavit of Lott.) Furthermore, the record below confirms that Lt. Lott did not communicate any information to Shawn Johnson to prompt an assault on the appellant.

In granting the Department's Motion for Summary Judgment, the Circuit Court reasoned that "there is no evidence whatsoever from which the court could infer that Lt. Lott had anything to do with the altercation that occurred between the plaintiff and Shawn Johnson." (Lower Court's Order dated March 15, 2013, p. 3; Affidavit of Lott.) The court further stated that Ferola failed to present any facts which could "reasonably infer that Lt. Lott had communications with Shawn Johnson which would have led to and/or precipitated the altercation...Further, there is absolutely no evidence in the record from which it could be reasonably inferred that any agent or officer of the South Carolina Department of Corrections had any reason to suspect that an altercation would occur between the plaintiff and Shawn Johnson." (Lower Court's Order dated March 15, 2013, p. 3 Affidavit of Lott.) The lower court properly concluded that "there is absolutely no evidence of any acts and/or omissions which would amount to gross negligence to give rise to liability under the South Carolina Tort Claims Act." (Lower Court's Order dated March 15, 2013, p. 3; Affidavit of Lott.)

## ARGUMENT

### Standard of Review

When reviewing a grant of summary judgment, appellate courts, including this Court, apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. “In determining whether any triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Thus, “[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753, *cert. denied*, 552 U.S. 888 (2007).

The purpose of summary judgment is to expedite the disposition of cases not needing the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment should be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799 (Ct. App.), *cert. denied*, 2009 S.C. LEXIS 336 (S.C. June 9, 2009); *accord, Wallace v. Day*, 390 S.C. 69, 73, 700 S.E.2d 446, 448 (Ct. App. 2010). Summary judgment is completely appropriate when a properly supported

motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Regional Med. Center*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537, 545 (1990) (citations omitted). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Id.*

Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), come forward with specific facts showing that there is a genuine issue for trial. *Baughman v. AT&T*, 410 S.E.2d at 545.

To the extent that SCDC seeks to have this Court affirm the decision of the lower court on the alternative sustaining ground that Ferola's action is barred by the public duty doctrine, i.e., on the basis of the absence of a duty owed to Ferola individually as opposed to the public at large, the question of whether an actionable duty exists is a question of law for the court to determine. *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010); *Doe v. Greenville County School Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

- I. The lower court properly concluded that SCDC is exempt from liability under the South Carolina Tort Claims Act, since the competent evidence in the record on appeal fails to raise a triable issue of fact that SCDC was grossly negligent,**

**and since there is no causal connection between the altercation involving the Appellant and Inmate Johnson and any acts and/or omissions of the South Carolina Department of Corrections.**

The South Carolina Tort Claims Act provides for a limited waiver of governmental immunity, but it also contains a list of exceptions to this waiver. S.C. Code Ann. § 15-78-60. The limitations and exemptions set forth in the Act should receive a liberal construction in favor of limiting the liability of the State, S.C. Code Ann. § 15-78-20(f); *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999); *Baker v. Sanders*, 301 S.C. 170, 173, 391 S.E.2d 229, 232 (1990). The burden of establishing an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense. *E.g.*, *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 386, 608 S.E.2d 573, 578 (2005); *Strange v. South Carolina Dep't of Highways & Public Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994).

The relevant exceptions exempting a governmental entity from liability are listed in S.C. Code Ann. § 15-78-60. In this case, the following exceptions were pleaded by the Respondent as affirmative defenses immunizing it from liability for negligence:

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection;

(20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons;

(21) the decision to or implementation of release, discharge, parole, or furlough of any persons in the custody of any governmental entity, including but not limited to a prisoner, inmate, juvenile, patient, or client or the escape of these persons;

(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner;

S.C. Code Ann. § 15-78-60(4), (5), (6), (20), (21) & (25) (emphasis added).

Under the rule of construction adopted by South Carolina courts, all of these exceptions to liability pleaded by SCDC must be read in light of the gross negligence standard set forth in subsection twenty-five (25). In view of the gross negligence standard, only if SCDC is shown to have been grossly negligent, can it be held liable. *See, e.g., Steinke v. South Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. at 396-397, 520 S.E.2d at 154 (“[T]he better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception.”); *Jackson v. South Carolina Dep't of Corrections*, 301 S.C. 125, 127-128, 390 S.E.2d 467, 469 (Ct.App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377

(1990).

The appellant has failed to present even a scintilla of evidence tending to prove gross negligence on the part of SCDC. South Carolina courts have defined “gross negligence” as “the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do.” *Hollins v. Richland County School Dist. One*, 310 S.C. 486, 427 S.E.2d 654 (1993); *Etheredge v. Richland Sch. Dist. 1*, 341 S.C. 307, 534 S.E.2d 275 (2000). Gross negligence is the failure to exercise even a slight degree of care. *Clyburn v. Sumter County Sch. Dist. #17*, 317 S.C. 50, 451 S.E.2d 885 (1994); *Jackson v. South Carolina Dep’t of Corrections*, 301 S.C. at 126-127, 390 S.E.2d at 468. Thus, where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. *Etheredge v. Richland Sch. Dist. 1*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998); *Anderson v. Ballenger*, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932); *Etheredge v. Richland Sch. Dist. 1*, 499 S.E.2d at 242; *Jackson v. South Carolina Dep’t of Corrections*, 301 S.C. at 126, 390 S.E.2d at 468.

“While gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the matter becomes one of law for the court.” *Etheredge v. Richland Sch. Dist. 1*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); *Proctor v. Department of Health & Environmental Control*, 368 S.C. 279, 294-295, 628 S.E.2d 496, 504 (Ct. App. 2006).

In this case, the appellant has failed to present any competent evidence of gross

negligence on the part of SCDC. It is undisputed that Ferola was involved in an altercation with Inmate Johnson and Inmate Johnson was charged with striking a fellow inmate without a weapon. It is undisputed that Ferola received medical care following the altercation. Furthermore, it is undisputed that SCDC had no knowledge or reason to know that the altercation would occur. Contrary to appellant's allegations, Lt. Lott had no knowledge that the appellant was acting as a confidential informant, and at no time made any statements to Inmate Johnson and/or any other inmate concerning appellant's cooperation with contraband officer Lt. Hartzog. (Lower Court's Order dated March 15, 2013, p. 2; Affidavit of Lott.) Furthermore, Lt. Lott had no information or reason to suspect that an altercation would occur between the appellant and Inmate Johnson. (Affidavit of Lott.)

There is no evidence any communication occurred concerning appellant's cooperation between Lt. Lott and Inmate Johnson, and further, there is absolutely no evidence in the record that any such communication prompted and/or induced the altercation between Appellant Ferola and Inmate Johnson on October 19, 2010. (Lower Court's Order dated March 15, 2013, p. 2; Affidavit of Lott.) Also absent from the record, is evidence that any agent or officer of SCDC had any reason to suspect that an altercation would occur between Appellant Ferola and Inmate Johnson.

Appellant Ferola has utterly failed to present any competent or admissible evidence to establish that the altercation in question occurred as a result of any act and/or omission on the part of SCDC or its staff; appellant has therefore failed to present facts

sufficient to support a claim under the South Carolina Torts Claims Act.

## **II. Liability is barred by the public duty doctrine.**

In South Carolina, “[t]he public duty rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties because the duty is owed to the public at large rather than to anyone individually.” *Wells v. City of Lynchburg*, 331 S.C. 296, 306, 501 S.E.2d 746, 751-752 (Ct. App. 1998). Where the duty is owed to the public in general, a public official or entity is not liable to the individual who may have been “incidentally injured” by the failure to perform the duty. *Id.*, 331 S.C. at 307, 501 S.E.2d at 752, quoting *Jensen v. Anderson County Dep’t of Social Services*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). “South Carolina has followed the public duty rule since 1940,<sup>1</sup>] and this rule remains the law of South Carolina today.” *Edwards v. Lexington County Sheriff’s Department*, 386 S.C. at 291, 688 S.E.2d at 129.

The public duty doctrine negates an essential element in a cause of action based on negligence, namely the existence of a legal duty of care owed by the defendant to the plaintiff. *Edwards v. Lexington County Sheriff’s Dept.*, 386 S.C. at 291, 688 S.E.2d at 128; *Doe v. Greenville County Sch. Dist.*, 375 S.C. at 72, 651 S.E.2d at 309. A plaintiff alleging negligence on the part of a governmental actor or entity, such as the Department, “may rely either on a duty created by statute or one founded on the common law.” *Edwards v. Lexington County Sheriff’s Dept.*, 386 S.C. at 290, 688 S.E.2d at 128; *Arthurs*

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<sup>1</sup> The South Carolina Supreme Court adopted the “public duty rule” in *Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940).

*ex rel. Estate of Munn v. Aiken County*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). When the duty is created by statute, it is referred to as a “special duty,” whereas when the duty is founded on common law, it is referred to as a legal duty arising from “special circumstances.” *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. at 290, 688 S.E.2d at 128.

The public duty rule is distinguishable from immunity. Immunity is an affirmative defense that conditionally admits the plaintiff's case, but asserts immunity as a bar to liability, while “the public duty rule is a negative defense which denies an element of the plaintiff's cause of action [, namely] the existence of a duty of care to the individual plaintiff.” *Wells v. City of Lynchburg*, 331 S.C. at 307, 501 S.E.2d at 752. Since the public duty rule is not grounded in immunity but rather in duty, it has not been affected by the enactment of the South Carolina Tort Claims Act. *Arthurs v. Aiken County*, 346 S.C. at 105, 551 S.E.2d at 583.

An exception is recognized to the public duty rule where the plaintiff can establish that the defendant owed a special duty of care to the plaintiff. *Wells v. City of Lynchburg*, 331 S.C. at 306, 501 S.E.2d at 752. A special duty of care may be created by statute or some other special circumstance. *Id.*

In general, South Carolina courts “have been reluctant to find special duties statutorily imposed.” *Tanner v. Florence County Treasurer*, 336 S.C. 552, 562, 521 S.E.2d 153, 158 (1999). There is a presumption that a statute creating or defining duties of public office creates no duty of care towards individual members of the general public.

*Bank of New York v. Sumter County*, 387 S.C. 147, 157, 691 S.E.2d 473, 478 (2010), citing *Arthurs v. Aiken County*.

In this case, the appellant has not asserted that any statute imposes a special duty on the corrections officers at the South Carolina Department of Corrections to protect individual inmates from harm at the hands of other inmates. Absent a statute that imposes a special duty, such a duty must be shown to have arisen through some other special circumstance.

It is well established in South Carolina that there is no general common law duty to control the conduct of another or to warn a third person or potential victim of danger. *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. at 291, 688 S.E.2d at 128; *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Although there are five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant, none of these exceptions apply to the present case. *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. at 291, 688 S.E.2d at 128; *Faile v. S. C. Dep't of Juvenile Justice*, 350 S.C. at 334, 566 S.E.2d at 546.

In the context of this case, Ferola would have to show that under the factual circumstances of this case (a), the Department had a special relationship to him, (b) the Department had a special relationship to the injurer, namely Inmate Johnson, (c) the

Department voluntarily undertook a duty to protect Ferola, or that (d) the Department negligently or intentionally created the risk of harm to Ferola.

With regard to (a), “[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the other which gives to the other a right to protection.” *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. at 334 n. 5, 566 S.E.2d at 546 n. 5, quoting Restatement (Second) of Torts, § 315(b) (1965). No special relationship existed between Ferola and the Department. Ferola was not treated any differently from any of the other inmates housed at the facility. No special promises of protection were made to Ferola by the Department, nor did the Department know of any potential threat or harm to Ferola’s safety. The Department did not voluntarily assume any additional duties of protection for the benefit of Ferola over and beyond the level of protection being provided to all the general population inmates.

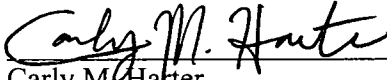
There is no evidence that the Department voluntarily undertook any duty to provide Ferola with additional protection beyond that provided to all inmates in the general prison population. Also, there is no evidence that SCDC negligently or intentionally created a danger to Ferola. For instance, this is not a case where the Department deliberately brought Ferola into close contact with Inmate Johnson despite knowledge that Johnson posed a risk of harm to Ferola. Rather, the evidence indicates that the Department in this case had no reason to believe that Johnson posed any threat to Ferola.

Therefore, the gross negligence claim of Appellant Ferola against SCDC is barred by the public duty doctrine, as no special duty was imposed by any statute, and no special duty of protection or control arose under the factual circumstances of this case.

**CONCLUSION**

In view of the arguments and authorities set forth above, Respondent South Carolina Department of Corrections respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

  
\_\_\_\_\_  
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June 25, 2013  
Greenville, South Carolina

**DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-1329

Michael J. Ferola, #291941

Appellant,

v.

South Carolina Department of Corrections  
and Shawn Johnson, 297078

Respondents.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL**

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Respondent proposes the following be included in the Record on Appeal:

1. Order of May 31, 2012;
2. Order of March 15, 2013;
3. Complaint;
4. Answer;
5. Affidavit of Christopher Lott;
6. Defendants' Notice of Objections and Response to Plaintiff's Interrogatories to Defendant Hartzog;
7. Inmate Grievance Form, Grievance #: MacD 140-10.

I certify that this designation contains no matter which is irrelevant to this appeal.

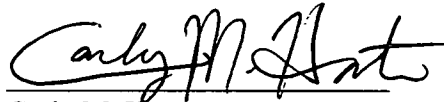
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JUL 01 2013

**SC Court of Appeals**

Respectfully submitted,

A handwritten signature in cursive script, reading "Carly M. Harter". The signature is written in black ink and is positioned above a horizontal line.

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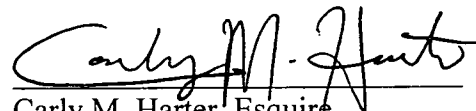
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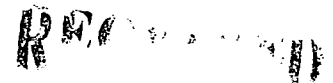
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I certify that I have served the Brief of Respondent and Designation of Matter on Michael J. Ferola, #291941, by depositing a copy of same in the United States Mail, postage prepaid, on June 26, 2013, addressed to Michael J. Ferola, #291941, Evans Correctional Institution, 610 Highway 9 West, Bennettsville, South Carolina 29512.

June 26, 2013



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