THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

Fatima Karriem, through her court-appointed guardian, Phillip Simmons.,.....Appellant,

v.

Sumter County Disabilities and Special Needs Board,.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an Order of the Court of Common Pleas for Sumter County, South Carolina granting summary judgment to the Respondent, Sumter County Disabilities and Special Needs Board.

On April 24, 2008, the Appellant filed a Summons in Complaint against the Sumter County Disabilities and Special Needs Board. The Appellant's Complaint alleged both common law and statutory causes of actions involving negligence and gross negligence. On November 11, 2008, the Sumter County Disabilities and Special Needs Board filed its Answer. On March 16, 2012, the Sumter County Disabilities and Special Needs Board filed a motion for summary judgment that contained no basis for its motion other than stating that no genuine issues of material fact existed. At that time, no memoranda or affidavits accompanied the Sumter County Disabilities and Special Needs Board's motion for summary judgment. On July 9, 2012, a hearing on the Sumter County Disabilities and Special Needs Board's motion for summary judgment was held before the Honorable Clifton B. Newman. On the day of the hearing, the Respondent provided a Memorandum in Support of its Motion for Summary Judgment, which contained the basis of its Motion for Summary Judgment. In anticipation of the Sumter County Disabilities and Special Needs Board's motion for summary judgment, the Appellant prepared a Memorandum in Opposition to the motion for summary judgment. Following the arguments at the July 9, 2012 hearing, the Appellant provided the Court with a Supplemental Brief in Response to the Sumter County Disabilities and Special Needs Board's Summary Judgment arguments, and the Sumter County Disabilities and

Special Needs Board was permitted to file a Reply Brief to the Appellant's Supplemental Brief.

On October 3, 2012, the Sumter County Disabilities and Special Needs Board served an Order, signed by the Honorable Clifton B. Newman, granting summary judgment to the Sumter County Disabilities and Special Needs Board on the Appellant. The court in granting the motion for summary judgment concluded that no genuine issues of material fact existed that demonstrated that the Sumter County Disabilities and Special Needs Board or its employees, agents, and /or servants acted in a negligent or grossly negligent manner. As a result of the court's ruling, the Appellant filed a Notice of Appeal on October 31, 2012 appealing the court's order.

FACTS

Fatima Karriem is a severely handicapped female, who has mental retardation functioning in the profound range intellectually and the severe range adaptively, cannot talk, and requires constant monitoring, assistance, and supervision. Fatima has a history of aggressive behavior, and has a very large personal space zone and can be very shy and skittish when others approach her closely. [R. at page 153-155]. For approximately a ten (10) year period prior to April 25, 2006, Fatima had been a client/patient of the Respondent, and was always under the care, supervision, custody, and control of the Respondent's employees, while she was at their facility in Sumter County. [R. at page 153-155].

On or about April 25, 2006, Fatima was attending the day program at the Respondent's facility, and was under the care, supervision, custody, and control of the Respondent's employees when she was seated outside in the loading and unloading area of the Respondent's facility. [R. at p.153-155]. While she was seated outside in the

loading and unloading area of the Respondent's facility, she was approached from behind by another consumer at the Respondent's facility, became startled, stood up from her seat and began to run away, and as she was running, she tripped and fell over a water hose that was lying on a sidewalk in the loading and unloading area of the Respondent's facility. [R. at page 60-61]. As a result of her fall, Fatima suffered cuts to her face and a broken arm. At the time of her fall at the Respondent's facility, the Respondent's employee attempted to examine Fatima, but was unable to examine her. [R. at p. 61]. Following Fatima's fall, the Respondent's employees provided no additional medical assistance and made no attempts to contact anyone about Fatima's fall or injuries.

After Fatima fell on April 25, 2006, she was transported home, where she lives with her uncle, Phillip Simmons, from the Respondent's facility. [R. at page 61]. After arriving home, Fatima began acting uncharacteristically, and appeared to be in distress. [R. at page 61]. Due to Fatima's abnormal and uncharacteristic behavior, Phillip Simmons sought medical attention for Fatima, and learned from her medical providers that she had suffered radial/ulnar shaft fractures of her right arm, which required surgical intervention and further medical treatment. [R. at page 61]. At no time was Phillip Simmons ever informed by the Respondent that Fatima had fallen and may have been injured.

On April 27, 2006, Phillip Simmons contacted the Respondent in an attempt to discover the cause of Fatima's broken arm and to inquire about her daily activities. At this time, Phillip Simmons was notified by the Respondent that Fatima had fallen on or about April 25, 2006 at the Respondent's facility. The Respondent provided no reason or excuse to Mr. Simmons for their failure to contact him regarding Fatima's fall.

STANDARD OF REVIEW

Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law. *Bates v. City of Columbia,* 301 S.C. 320, 391 S.E.2d 733 (Ct. App.1990). In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in the nonmoving party's favor and the nonmoving party must be accorded the benefit of all favorable inferences that might reasonably be drawn from the record. *Id.* citing, Grooms v. Marlboro County Sch. Dist., 307 S.C. 310, 312, 414 S.E.2d 802, 803 (Ct. App. 1992).

ARGUMENT

I. DID THE TRIAL COURT ERR IN FAILING TO APPLY A NEGLIGENCE STANDARD AS OPPOSED TO APPLYING A GROSS NEGLIGENCE STANDARD IN THE PRESENT CASE?

The Respondent argues that a gross negligence standard should apply to the present case; however, South Carolina law states that in premises liability cases involving the State or an agency of the State, a negligence standard is applied. The testimony of the Respondent's employees regarding the facts and circumstances surrounding Fatima's fall along with Fatima's mental capacity, physical limitations, and propensity to be skittish and to become startled clearly present genuine issues of material fact in regards to whether or not the Respondent acted negligently in maintaining its facility.

According to South Carolina Code Ann. § 15-78-40, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages,

contained herein." South Carolina Code § 15-78-60 provides exceptions to the State of South Carolina's waiver of immunity. Nowhere in South Carolina Code § 15-78-60 is there an exception to the State's waiver of immunity to properly maintain its premises in a safe condition.

In Hughes v. Children's Clinic, P. A., 269 S.C. 389, 397-98, 237 S.E.2d 753, 756-57 (1977), a child suffered serious injuries when he fainted in a doctor's office and fell into a mirror fastened to the wall behind him. In Hughes, the South Carolina Supreme Court determined that the child was clearly an invitee on the Defendant's premises, and the Defendant, therefore, owed the child the duty of exercising reasonable or ordinary care for his safety and was liable for any injury resulting from the breach of this duty. Id. This degree of care must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. Id. This duty is an active or affirmative duty. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him. 65 C.J.S. Negligence s 63(45). Moreover, it has been stated that . . . it is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable, or foreseen. It is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range. . . . It was, therefore, a jury question whether the defendant had provided reasonably safe premises, and a reasonably safe installation upon the premises, for the use of the child invitee, . . . Orr v. First National Stores, Inc., 280 A.2d 785 (Me.1971), 50 A.L.R.3d 1202, 1213. (emphasis supplied)

The Hughes' Court held that it was certainly foreseeable that the mirror, if shattered or broken by one of the children-patients, could cause severe injury to the child. The evidence in Hughes showed that the mirror was unsafe and created an unreasonable risk of harm to the defendant's patients, including the plaintiff. Id. As such, the jury was justified in concluding under the particular facts and circumstances of this case that the mirror was an inherently dangerous condition on the defendant's premises. Id.

The reasoning espoused in Hughes is applicable in the present case. Fatima Karriem was clearly an invitee; therefore, the Respondent owed Fatima a duty to keep the premises in a reasonably safe condition. Like the child in Hughes, the Respondent's degree of care owed to Fatima Karriem must be commensurate with the particular circumstances involved, including her age, capacity, and known propensities to be skittish and to become easily startled.

In his deposition, Scotty Merritt, who was employed as the floor supervisor by the Respondent at the time of Fatima's fall and was familiar with Fatima's condition, testified that Fatima was non-verbal, could be aggressive, could become startled, and was not able to appreciate her surroundings like a normal person. [R. at page 162-165]. During his deposition, he added that Fatima needed to be monitored, could not be left alone, and had different safety concerns than an ordinary person. [R. at p. 165, lines 1-25 and p. 171, lines 1-21]. Joyce Jackson, who was also employed at the Respondent's facility at the time of Fatima's fall and provided a 30(b)(6) deposition [R. at page 156-157.], also testified that she was aware that Fatima had problems when individuals were in her personal space and this could cause her to become startled. [R. at page 176, lives

7-10]. Clearly, the Respondent's employees were aware of Fatima's limitations and her supervision requirements and that these were different from that of an average individual.

The Respondent's former employee, Scotty Merritt, also testified that he completed an Incident Report following Fatima's fall. In the incident report, Mr. Merritt acknowledged that the water hose was not being used and should have been stored away. [R. at page 159]. Mr. Merritt testified that all landscaping work in the area where Fatima fell had been completed, that the water hose was not being used at the time of Fatima's fall, that the water hose was not being used when he arrived after Fatima's fall, and that the water hose did not need to be left out if it was not being used. [R. at page 166-169]. Additionally, Mr. Merritt testified that the water hose was a trip hazard for not only Fatima, but that it could be a trip hazard for him as well. [R. at page 170, lines 3-25]. Despite recognizing that the water hose was a trip hazard, Mr. Merritt did not remove the water hose from the area following Fatima's fall. [R. at page 172, lines 1-23].

The testimony of Scotty Merritt regarding the storage of the water hose and the hazards that leaving it on the sidewalk presented to consumers at the Respondent's facility was corroborated by Joyce Jackson. In her deposition, Ms. Jackson acknowledged that if the water hose was not being used, then it should have been put away. [R. at page 177-178]. Ms. Jackson also testified that she did not know how long the water hose had been in the loading area. [R. at page 177-178]. When questioned further, Ms. Jackson also agreed that leaving a water hose on a sidewalk creates a trip hazard, which in turn creates a dangerous condition for a consumer at the Respondent's facility. [R. at page 178-179]. Ms. Jackson confirmed that the Incident Report prepared by Scotty Merritt stated that water hoses are to be rolled up and/or put away until needed.

[R. at page 180-181]. Ultimately, Ms. Jackson stated that, in her opinion, if the water hose was not being used, then it needed to be stored away, that leaving the water hose out could present a trip-and-fall hazard, and that leaving the water hose on the sidewalk would make the consumers use of the premises more dangerous than if it were put away. [R. at page 187].

The application of a negligence standard to the facts of this case is illustrated by several cases involving the State and/or State agencies and premises liability claims asserted by Plaintiffs injured on the State's premises. In South Carolina, the victim of sexual abuse on another's premises may bring suit under a premises liability theory. Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct.App.1994). In Burns, a resident at a rehabilitation center who was sexually assaulted by another resident brought a negligence suit against the Commission for the Blind. Id. at p.78. The jury returned a verdict in the victim's favor. On appeal, the Commission for the Blind argued the trial court erred in refusing to charge the jury on premises liability. Id. at p.80. This court agreed, stating that the relationship between the Commission and the victim was "analogous to that of a business invitee, [and] imposes liability on the Commission, if at all, similar to that of an owner of a business." Id. This court specifically held that "this is a premises liability case and, therefore, the judge should have charged the jury on premises liability, as limited by the South Carolina Tort Claims Act." Id.

Similarly, in Creech v. S. Carolina Wildlife & Marine Res. Dept., 328 S.C. 24, 27, 491 S.E.2d 571, 572 (1997), the Plaintiff fell from a public dock at Steamboat Landing in Charleston County. The dock had railing on only one side, and the Plaintiff fell from the

other side. Id. at p.27. The Plaintiff fell approximately ten feet and suffered numerous injuries. Id. The Court, applying the negligence standard, held that the there was ample evidence that the County had been warned that the lack of safety rails on the dock could present a danger to people fishing from the dock and could expose the County to potential liability. Id at p.30.

Based upon the reasoning set forth in the cases cited above a negligence standard should have been applied by the lower court, the facts of this case clearly demonstrate the existence of genuine issues of material fact regarding whether or not the Respondent was negligent in maintaining its facility, and support a denial of the Respondent's Motion for Summary Judgment.

II. DID THE TRIAL COURT ERR IN FINDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED THAT DEMONSTRATED THAT THE RESPONDENT WAS GROSSLY NEGLIGENT IN PROTECTING, SUPERVISING, AND MONITORING FATIMA KARRIEM?

In the event that a gross negligence standard is applied to some or all of the Appellant's claims, there are clearly genuine issues of material fact that the Respondent was grossly negligent in monitoring, supervising, and protecting Fatima Karriem given her mental and physical limitations and propensities to be skittish and to become startled when approached from behind.

The South Carolina Supreme Court has defined gross negligence in a number of ways. In Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932), the South Carolina Supreme Court held that it was "the failure to exercise slight care." In subsequent cases, it has been defined as "the intentional, conscious failure to do

something which it is *incumbent* upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) (Emphasis supplied). The South Carolina Supreme Court has also stated that "[g]ross negligence is a relative term, and means the *absence of care that is necessary under the circumstances.*" Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629 (1952) (Emphasis supplied).

"Gross negligence is ordinarily a mixed question of law and fact." Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (citing Clyburn v. Sumter County School Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994)). "When the evidence supports but one reasonable inference, it is solely a question of law for court, otherwise it is an issue best resolved by the jury.... In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Id.* at 332, 566 S.E.2d at 545.

In Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993), the South Carolina Supreme Court held that whether the School District exercised "slight care" in sending a note home from school with an eleven year old girl informing the girl's mother that her daughter's bus privileges had been suspended was a question for the jury.[1] Specifically, the South Carolina Supreme Court held that it was for the jury to determine whether the School District's failure to ensure that the girl's mother received actual notice of her daughter's bus suspension constituted gross

[1] In Hollins, an 11 year old girl was killed while crossing a highway on her way home from school. Prior to her death, the girl's bus privileges had been suspended and a note had been given to the girl by her principal, but the note was never provided to the girl's mother.

negligence. In footnote two (2) of the Hollins opinion, the South Carolina Supreme Court distinguished the factual circumstances of Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) that were held to constitute "slight care." The basis for the Court's distinction in addressing whether a jury question existed in determining whether the School District exercised "slight care" dealt with the young age of the girl who was killed in Hollins, as opposed to high school ages of the Plaintiffs in Richardson.

As stated in the Hicks opinion cited above, in determining whether or not an entity has exercised slight care, consideration must be given to the factual circumstances of a particular case. This reasoning and analysis was applied in the Hollins decision, which held that the age of an individual was to be considered in determining whether slight care was exercised under the circumstances. Like the South Carolina Supreme Court's consideration of the child's age in Hollins, the lower court must consider the particular circumstances involved, including Fatima Karriem's age, her mental capacity, and her overall limitations, in determining whether or not the Sumter County Disabilities and Special Needs Board exercised slight care in monitoring, protecting, and supervising Fatima Karriem. As stated in the Respondent's Memorandum in Support of Summary Judgment, the Respondent acknowledged that Fatima has a number of physical and mental limitations as well as special supervision requirements. The Respondent knew Fatima could be easily startled and was skittish, yet they allowed her to be approached from behind by another consumer in an area that presented perils in her surroundings that she could not appreciate. [R. at page 153-155]. Specifically, Fatima was in an area that was used for loading and unloading vehicles, was or had been undergoing some landscaping, and had an item, such as a water hose, that was not properly stored and was

lying about. By the Respondent's own admission, this created a fall hazard not only for Fatima, but for others as well. [R. at page 159].

These are certainly factual circumstances that should have been considered by the lower court in determining whether slight care was exercised by the Respondent in supervising, monitoring, and protecting Fatima Karriem from harm given all of her physical and mental limitations. For instance, Scotty Merritt testified that Fatima was non-verbal, could be aggressive, could become startled, and was not able to appreciate her surroundings like a normal person. [R. at page 162-165]. He added that Fatima needed to be monitored, could not be left alone, and had different safety concerns than an ordinary person. [R. at page 165, lines 7-21 and page 171, lines 1-21.].

Joyce Jackson also testified that she was aware that Fatima had problems when individuals were in her personal space and that this could cause her to become startled. [R. at page 176, lines 7-10]. The Respondent's employees, by their own admission, were aware of and had personal knowledge of Fatima's limitations, her supervision requirements, her propensities to become startled when her personal space was invaded, yet the Respondent and the Respondent's employees had Fatima Karriem along several other customers at the facility in the loading and unloading area of the Respondent's facility, where landscaping work was being performed or had been performed and where equipment was lying about and not properly stored. This clearly presents genuine issues of material fact as to whether the Respondent was grossly negligent in supervising, monitoring, and protecting Fatima Karriem given her mental and physical limitations and propensities.

It is certainly forseeable that if a water hose is left lying about and is not properly stored, then someone could trip and fall and injure themselves. This is especially true for individuals with the physical limitations, mental capacity, and the propensity to become startled like Fatima Karriem. It is also clear that the Respondent's employees knew that the water hose was on the sidewalk in a high traffic area, that the area where Fatima was seated was or had been undergoing recent landscaping, that the water hose was not being used, that leaving the water hose on the sidewalk created a dangerous condition, and that consumers and other individuals at the Respondent's facility would likely encounter this condition. This also creates genuine issues of material fact as to whether the Respondent's employees exercised "slight care" in supervising, monitoring, and protecting Fatima Karriem.

In his deposition, Scotty Merritt testified that he completed an Incident Report. Mr. Merritt testified that all landscaping in the area where Fatima fell had been completed, that the water hose was not being used at the time of Fatima's fall, that the water hose was not being used when he arrived after Fatima's fall, and that the water hose did not need to be left out if it was not being used. [R. at page 166-168]. Additionally, Mr. Merritt testified that the water hose was a trip hazard for not only Fatima, but that it could be a trip hazard for him as well. [R. at page 170, lines 7-25]. Despite recognizing that the water hose was a trip hazard, Mr. Merritt did not remove the water hose from the area following Fatima's fall. [R. at page 172, lines 1-23].

As stated earlier in the Appellant's brief, Scotty Merritt's testimony regarding the storage of the water hose and the hazards that leaving it on the sidewalk presented to consumers at the Defendant's facility was corroborated by Joyce Jackson. Ms. Jackson

acknowledged that if the water hose was not being used, then it should have been put away. [R. at page 177-178]. Ms. Jackson also testified that she did not know how long the water hose had been on the sidewalk in the loading area. [R. at page 177-178]. When questioned, Ms. Jackson also agreed that leaving a water hose on a sidewalk creates a trip hazard, which in turn creates a dangerous condition for a consumer at the Respondent's facility. [R. at page 178-179]. She confirmed that the Incident Report prepared by Scotty Merritt stated that water hoses are to be rolled up and/or put away until needed. [R. at page 180-181]. Ultimately, Ms. Jackson stated that in her opinion if the water hose was not being used, then it needed to be stored away, that leaving the water hose out could present a trip-and-fall hazard, and that leaving the water hose on the sidewalk would make the consumers' use of the premises more dangerous than if it were put away. [R. at page 187].

In addition to her testimony regarding the storage of the water hose that caused Fatima's fall, Ms. Jackson testified that the incident report documenting Fatima's fall was not properly completed, that Fatima's family should have been contacted, but were not, and that these steps should both have been completed in accordance with the Defendant's policies and procedures. [R. at page 182-185].

Based upon the facts and circumstances surrounding the Respondent's knowledge of Fatima Karriem's mental and physical limitations and propensities combined with the facts and circumstances surrounding her fall and her injuries, there is clearly evidence that the Respondent acted in a grossly negligent manner in supervising, monitoring, and protecting Fatima Karriem, and, therefore, the Respondent's Motion for Summary Judgment should have been denied.

CONCLUSION

For the foregoing reasons, the Appellant requests that lower courts grant of Summary Judgment be reversed and remanded for trial.

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PROOF OF SERVICE

I, John R. Moorman, of counsel for the appellant, Fatima Karriem, through her court-appointed guardian, Phillip Simmons, certify that I have served the within Final Brief of Appellant on the Respondent, Sumter County Disabilities and Special Needs Board by personally serving a copy of the same on their attorney of record, G. Murrell Smith, Jr., Esq., 126 N. Main Street, Sumter, South Carolina 29150.

I further certify that all parties required by Rule to be served have been served.

This 17th day of September, 2013.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR.

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