ORIGINAL

+THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Clifton B. Newman, Circuit Court Judge

Appellate Case No.: 2012-213321

Fatima Karriem.....Appellant

v.

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

FINAL BRIEF OF RESPONDENT

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OVERVIEW

This is a case under the Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, concerning an alleged lack of supervision of a Disability and Special Needs Board patient who became startled and tripped over a garden hose. Plaintiff appeals the grant of summary judgment for the Defendant.

Fatima Karriem, who has intellectual disability, functioning in the profound range intellectually and the severe range adaptively, was a daytime patient at the facility of the Defendant Sumter County Disability and Special Needs Board. She was there for development of social skills and abilities to perform basic tasks on her own, among other reasons. She was a "Stage III" patient, which means she must be within visual contact of a staff member every thirty (30) minutes. While at the facility, she accompanied several other patients and two staff members to an outside area used for leisure and playing games. Another patient startled Fatima, who jumped up from her chair and ran. She tripped over a neatly coiled hose in the grass by the shrubbery and broke her arm. Yard maintenance, including watering, was going on at or around the time of the fall.

To all appearances, the only injury was a small cut to the lip. Nevertheless, the facility's nurse three times attempted to examine her. Three times she refused to be examined.

At some point after she arrived home, she came out of her room with a towel wrapped around her arm. This alerted her uncle and guardian, Phillip Simmons, that something was wrong. He removed the towel and discovered a small bruise and slight swelling. By the time he got her to Doctor's Care, however, the swelling had become great. She had a broken arm.

Her uncle sued in her behalf, charging negligence. Defendant answered, asserting the South Carolina Tort Claims Act as a defense, among others. The case dragged on for more than four-and-a-quarter years before the hearing on the Defendant's Motion for Summary Judgment. After numerous roster meetings and the Plaintiff's failure to take even a single deposition during the entire term of the first scheduling order, the Judge issued another scheduling order, and the Plaintiff still did not take any discovery depositions until the week of the rescheduled, final discovery deadline.

Each party submitted memoranda on the day of the hearing. At the conclusion of the hearing, the judge allowed the Plaintiff ten days to submit any supplemental memorandum, and the Defendant ten days after that to submit any reply memorandum. These memoranda were timely filed. The circuit judge granted Defendant's motion, finding that the Tort Claims Act precluded recovery.

Plaintiff timely filed notice of appeal.

STATEMENT OF THE CASE

This is a case alleging a lack of supervision under the South Carolina Tort Claims Act. It began with a Complaint filed in the Sumter County Court of Common Pleas on April 24, 2008. (ROA pp. 12-15). Defendant's Answer specifically pled the South Carolina Tort Claims Act. (ROA p. 18, ¶ 18). A hearing on Defendant's motion for summary judgment was held before the Hon. Clifton B. Newman on July 9, 2012, more than four (4) years later. Defendant's motion, filed March 16, had been pending for almost four months prior to the hearing. (ROA pp. 57-58). The Court granted the Plaintiff additional time after the hearing to file any memoranda it wished to file. (ROA P. 56, lines 1-2). Plaintiff's final memorandum was filed July 19, 2012, and Defendant's

Reply Memorandum was filed on July 27. (ROA pp. 59-143). By Order dated September 24, 2012 (hereinafter, "Order"), the court granted Defendant's motion. (ROA pp. 1-11).

In the interim between the 2008 filing of the complaint, and the 2012 hearing on the motion, numerous roster meetings were scheduled. (ROA Appendix pp. 01-05). A Consent Scheduling Order was filed on December 17, 2009, setting a date certain for trial of October 1, 2010. (ROA Appendix p. 07). That order required all depositions of fact/damages witnesses to be completed by March 31, 2010, and all depositions of experts to be completed by September 15, 2010. (*Id.* p. 1). (Neither party named any experts). On November 21, 2011, the Court issued an order that discovery was to be completed by March 9, 2012. (ROA Appendix pp. 09-10). The Plaintiff took her first depositions on March 6.[1]

STATEMENT OF FACTS AND PROCEDURAL FACTS

As noted above, Fatima Karriem, who has intellectual disability, functioning in the profound range intellectually and the severe range adaptively, was a daytime patient at the facility of the Defendant Sumter County Disability and Special Needs Board. While at the facility on April 25, 2006, about 1:30 p.m., the Plaintiff was one of several consumers, under the direct supervision of two direct care staff, that were sitting in a covered loading and unloading area for leisure and playing games. (ROA p. 2.) *See also* ROA p. 117, lines 5-22; ROA p. 128, line 4-p. 129, line 25). Another patient startled her.

[1] Plaintiff did not argue below that she should be granted additional time for discovery.

(ROA p. 2). *See also* ROA p. 132. She jumped up from her chair and ran.[2] (ROA p. 2; ROA p. 132). She tripped over a neatly coiled hose and broke her arm. Yard maintenance, including watering, was going on at or around the time of the fall.

To all appearances, the only injury was "a small nick on her upper lip." (ROA p. 3.) *See also* ROA p. 133. Nevertheless, the facility's nurse three times attempted to examine her. (ROA p. 3; ROA p. 133.) Three times she refused to be examined. (ROA p. 3; ROA p. 133.)

Nor did her uncle/guardian, Phillip Simmons, notice anything wrong with her when she arrived home. (ROA, p. 3). Two hours after she arrived home, she came out of her room with a towel wrapped around her arm. (*Id., see also* ROA p. 77, lines 14-21). This alerted her uncle that something was wrong. (ROA p. 88, lines 6-10). He removed the towel and discovered a small bruise and slight swelling. (ROA p. 3; ROA p. 88, lines 6-10). By the time he got her to Doctor's Care, however, the swelling had become great. *Id.*

The Patient.

Treatment goals. Fatima was at the Respondent's facility for, among other reasons, development of social skills and abilities to perform basic tasks on her own. (ROA pp. 91-111, *passim.*)

> **Assessment results summary:** According to SCDSNB Skills Assessment Fatima has strength in the following areas: some personal care skills, some self-esteem skills, some

[2] It is a minor point, but Appellant continuously refers to Fatima having been approached "from behind." Appellant cites no evidence to the approach having been from behind. All that Respondent has found in the Record is that another customer came close to her and startled her.

Respondent mentions this only because Appellant further refers throughout its principal Brief to Respondent's knowledge that Fatima could become startled if "approached from behind."

> cognitive/independent living skills, some personal responsibility and self-direction skills, some social skills and positive Interactions w/others skills, some coping skills, some community living and peer relationships. Fatima has a weakness in the following areas: medication management, most cognitive/independent living skills, most social skills and positive interactions w/others skills, most health and nutrition skills, most community living and peer relationships skills

(*Id.*, p. 2) (emphasis added). *See also id.* (emphasis added):

> **Proposed Needs & Actions:** Fatima will work on a goal to improve social skills. The goal will read as follows: Fatima will interact with staff in a planned activity with 80% success for three consecutive months. Fatima will also work on a personal care goal. Goal will read as follows: I will learn to pick out the contents of a first aid kit that I use to treat a minor injury with 80% success for two consecutive months. Fatima's group will go on an outing at least once a week.

The Level of Supervision Required. As the circuit judge properly found, Fatima was a "Stage III" patient, which means she must be within visual contact of a staff member every thirty (30) minutes. (ROA p. 2.) There was ample evidence supporting the trial judge's finding. (ROA p. 123.) "She is on accountability level III within same room or nearby, outside of visual supervision for 30 minute periods." (*Id.*) For example, "if they went to the canteen, and if they're not back, you know, they [the staff member responsible for her at the time] have to see them before that 30 minutes is up." (ROA p. 115, lines 16-18).

This is in contrast to certain other patients who required greater supervision. "Whereas, somebody who requires constant visual supervision, may not be able to

recognize any [dangers], or it may just be that that person needs total care; and if they do, then somebody has to be there to provide it." (ROA, p. 114, lines 7-11).[3]

The Level of Supervision Provided to Fatima at the Time Was Greater than the Required Level. It is indisputable that Fatima was provided significantly more supervision than required at the time. She was in visual contact of two (2) staff members.

Plaintiff's repeated attempts to create evidence to the contrary were decisively and unambiguously rejected by the witnesses.

> Q: She would not be someone that you could leave alone by herself?
>
> A: And she wasn't.

(ROA, p. 164, lines 15-17.)

> Q: But, unlike you and I, Fatima requires almost constant supervision.
>
> A: And she was being supervised.

(ROA p. 171, lines 12-14.)

Plaintiff has provided no evidence – none, not a scintilla – that Fatima's level of supervision at the time was below any relevant standard.

The Rest Area

As the circuit court properly found, the area where Fatima had been sitting is a leisure area. ROA p. 6 ("Plaintiff was seated was an area utilized by staff and consumers for leisure time."). This finding is supported by ample and uncontradicted evidence. "Q:

[3] Thus, Appellant is simply wrong when she claims, Init. Br. of Appellant, p. 3, "Fatima Karriem . . . requires constant monitoring, assistance, and supervision." Indeed, Appellant appears to base its entire case on this simply erroneous factual assertion. Appellant does not exactly challenge the lower court's factual finding here, that she was on Level III and that Level III merely requires visual contact by a staff member once every 30 minutes; instead, Appellant simply ignores it. There is not a single mention in her Brief regarding her Level III status.

. . . . Is it considered a leisure area? A: Yes." (ROA p. 182, lines 11-12). They were in that area for "[a] little break time," (ROA p. 129, lines 2-4), to sit "outside for games to — to break the monotony," (*id.*, lines 6-7). It has a "patio area" where they often sat. (ROA, p. 71, lines 3-4). "[T]here's concrete, but then there's also some grassy areas." (ROA p. 119, line 6). "[T]here are flower beds in those grassy areas." (ROA p. 180, lines 17-18). "[T]hey were accustomed to sitting in" that area. (ROA p. 71, line 11).

They sit in chairs on the concrete section and play games. "[I]t was April, might have been a nice day and they were taking a — a short break or something." (ROA p. 179, lines 19-20.) *See also id.*, ROA p. 119 lines 14-15 (stating that it is concrete where they are). "[N]ormally, they're either in rocking chairs or regular chairs that they'll take out. And then when they get ready to go back in, they take those chairs back inside." (ROA p. 221, lines 3-6.)[4]

Appellant is not correct in describing the area as "a high traffic area," Br. of Appellant, p. 15. Again, her attempts to create evidence to that effect were decisively and unambiguously rejected by the witnesses. During the morning "drop-off" period, when patients arrive, and the afternoon "pick-up" period, when they depart, the area is a high traffic area. The rest of the day, however, the area is virtually devoid of traffic, save for the patients and staff coming out for a break and to play games.

> Q: Okay. And because there's a lot of foot traffic through that area?
>
> A: No. It — with the exception of mornings, when they get off, and afternoons, when they're boarding.

[4] *See also* ROA p. 117, lines 7-9,

> Earlier than that, and depending upon the weather, they could be there for leisure. That's a -- because it's covered. Sometimes, depending on the weather, spring, fall, when it's nice outside, they may bring chairs out. Staff is with them and they'll -- they may sit outside.

(ROA p. 179, lines 8-12) (emphasis added). The patients do not sit out there and play games during the drop-off and pick-up periods.

> Q; And what would — would be — the reason consumers are in that area is to get on and off a bus?
>
> 4 A If it's in the morning before 9:00, that's why they're there. From 2:30 in the afternoon on, you know, until they leave, would be why they're there. . . . But they would not be sitting there at 2:30 because it's loading time, nor would they be sitting there before nine o —-yeah, before nine in the morning.

(ROA p. 117, lines 1-15) (emphasis added). The testimony on this point was clear, repeated, and consistent.[5] Plaintiff has provided no evidence – none – to the contrary.

The Hose

The evidence is clear and uncontradicted that the garden hose over which the Appellant tripped was neatly and properly coiled. It was "[j]ust sitting — you know, wrapped in a circle on the on the ground." (ROA p. 168, lines 2-3). "It was not sprawled out. It was wrapped." (ROA p. 167, line 25).

As Appellant concedes, the evidence is also clear and undisputed that the hose was in use at or around the time of the accident. "Respondent's employees had Fatima Karriem along [*sic*] several other customers at the facility in the loading and unloading

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[5] There is much additional testimony to the same effect. For example,

> Q: The area where Fatima was, is -- is -- at the time of her fall, is -- you said that that was a loading area, are there people en--- entering the -- the -- entering and exiting the building there as well?
>
> A: Not during the middle of the day. It would only be in the mornings, when they are arriving, and then in the afternoons, when they are leaving is when you get the traffic. Otherwise that door opens onto -- it takes you into the building nears [*sic*] the seniors area.

(ROA p. 118, lines 12-17) (emphasis added).

area of the Respondent's facility, where landscaping work was being performed or had been performed." (Init. Br. of Appellant, p. 14) (emphasis added).

> Q: Go ahead. I didn't mean to interrupt you.
>
> A: I'm sorry. They were watering because they had just put plants out.
>
> Q: And had they finished using it?
>
> A: Not — I cou —- I couldn't say. I don't know.

(ROA p. 167, lines 8-12) (emphasis added). *See also* Init. Br. of Appellant, p. 9 (stating that "Ms. Jackson also testified that she did not know how long the water hose had been in the loading area.") (citing ROA pp. 177-178).

Whether the hose was there for 5 seconds or 5 minutes or 5 days is unknown. There is simply no evidence in that regard.

The evidence is also clear that the hose was not on the sidewalk. "[I]t was not on the sidewalk." (ROA p. 221, line 11). *See also* ROA p. 222, lines 3-4 ("[T]he hose was — was on the ground near the shrubbery.").[6]

Moreover, "The hose was in a separate area from where Plaintiff was seated." (ROA p. 6.)

[6] Despite all the testimony – and none supporting Appellant's view – Appellant writes throughout its Brief that the hose was on the sidewalk, and that it was in a high-traffic area. At times, Appellant combines both assertions. For example, Appellant writes, "the water hose was on the sidewalk in a high traffic area." Init. Br. of Appellant, p. 15 (emphasis added).

ARGUMENT

I. BACKGROUND LAW

Standards For Summary Judgment

In reviewing a grant of summary judgment, the facts and all reasonable inferences must be viewed in a light most favorable to the non-moving party. *Bankers Trust Co. v. Baten*, 317 S.C. 547, 551, 455 S.E.2d 199, 201 (Ct. App. 1995). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006) (citing *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) and *Small v. Pioneer Mach.*, Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)) (emphasis added). Rather, as explained in *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (emphasis added),

> With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' — that is, pointing out to the [trial] court — that there is an absence of evidence to support the nonmoving party's case." *Celotex* at 325, 106 S. Ct. at 2554, 91 L. Ed. 2d at 275. The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274. (Emphasis in original).
>
> Once moving party carries its initial burden, opposing party must, under Rule 56(e), *"*do more than simply show that there is some metaphysical doubt as to the material facts*"* but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986) (emphasis in original). Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings. *See SSI Medical Services, supra*; *Moody v. McLellan,* 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

Id.

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.

Id. at 116, 410 S.E.2d at 545-46.

> "[B]ald allegations" are insufficient to create a genuine issue of fact. *See Stevens v. Barnard,* 512 F.2d 876, 879 (10th Cir. 1975). There is a total absence of any competent evidence showing either the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of Nassau. Accordingly, we affirm trial court's grant of partial summary judgment on Plaintiffs' claims for property damage.

Id. at 117, 410 S.E.2d at 546.

The Tort Claims Act[7]

A. Substance of the Act, Generally

Section 15-78-200 (entitled, "Exclusive and sole remedy for torts committed by employee of governmental entity while acting within scope of employee's official duty"), provides (emphasis added), "Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort

[7] Appellant expresses surprise that Respondent's Memorandum in Support of its Motion for Summary Judgment was served the day of the hearing and focused on Appellant's failure to meet the requirements of the Tort Claims Act, while Appellant's Memorandum, also served the day of the hearing, focused exclusively on plain negligence. However, given that Appellant's Complaint reads like a list of items expressly subject to the Tort Claims Act, and that Respondent's Answer explicitly raised the defenses of that Act, the surprise is why Plaintiff thought the Tort Claims Act would not be argued. *See* ROA pp. 13-14, ¶¶ 8(a)-(l) (listing alleged duties breached) (reprinted in footnote 14 below); ROA p. 18 ¶ 18 (invoking the Tort Claims Act); ROA p. 45, line 25-p. 46, line 10:

> THE COURT: I notice in your brief you don't address the Tort Claims Act in any way that I noticed scanning the brief, and the cases seem to speak about general negligence. Mr. Smith argues that we're dealing with a different animal than we're dealing with the Tort Claims Act. Unless you, unless you filed a case and demonstrated some exception, some gross negligence, then as a matter of law, summary judgement must be granted. What do you say about all that?
>
> MR. McELVEEN: Right, and I did not anticipate that argument coming today. We had not briefed that side of it.

committed by an employee of a governmental entity while acting within the scope of the employee's official duty." *See also* § 15-78-70(a) ("This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.")

The status of the Respondent as a governmental entity is not challenged in this appeal.[8]

B. Certain Substantive Provisions of Particular Relevance

Four paragraphs of section 15-78-60 are of particular relevance here. The section provides (emphasis added),

> The governmental entity is not liable for a loss resulting from:
>
> . . . .
>
> (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;
>
> . . . .
>
> (16) maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition;
>
> . . . .
>
> (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons;
>
> . . . .

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[8] Any such challenge would be futile. A governmental entity includes political subdivisions and agencies thereof. *See* S.C. Code Ann. §§ 15-78-30(a), (c), (d), (h) (defining "agency," "employee," "governmental entity," and "political subdivision"). The status of the Respondent as a governmental entity is governed by S.C. Code Ann. §44-20-10 *et seq.* Specifically, S.C. Code Ann. §44-20-20 provides for the establishment of local county boards for dealing with individuals with disabilities and special needs.

Moreover, the unappealed ruling is the law of the case. "[T]the circuit court's unappealed finding that AMI and RMI qualified as charitable organizations is the law of the case." *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 137 (Ct. App. 2004) (citing *In re: Morrison*, 321 S.C. 370, 371, 468 S.E.2d 651, 653 (1996)).

(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; . . .

C. Rules of Statutory Construction Re: the Tort Claims Act.

1. Principles of Statutory Construction Generally.

The cardinal rule of statutory construction is to ascertain and effectuate legislative intent. *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008). Intent is to be determined primarily from the plain language of the statute. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). To determine intent, one must also look at the statute as a whole. "Th[at] language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.* A construction is preferred that gives effect to every part of a statute. *Cf. Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 166, 565 S.E.2d 119, 123 (Ct. App. 2002) (rejecting interpretation that would render a statute a nullity.)

2. The Tort Claims Act Is To Be Liberally Construed To Limit Liability.

The South Carolina Tort Claims Act explicitly declares the legislative intent as to how the statute is to be construed. It states, "The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity." § 15-78-200 (emphasis added).

D. Plaintiff Has the Burden of Showing Gross Negligence, which Requires A Showing of the Absence of Even Slight Care. Even Slight Care by the Defendant Suffices to Defeat A Gross Negligence Claim.

As Plaintiff, the Appellant had the burden of proving gross negligence. *See Stewart v. Richland Memorial Hospital*, 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (finding that while a governmental entity has the initial burden of establishing a limitation upon liability or an exception to the waiver of immunity, the plaintiff must prove that the governmental entity has waived immunity).

"Gross negligence, in the context of liability by a governmental entity, is 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; it is the failure to exercise slight care." *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). "'It has been described as a failure to exercise even that care which a careless person would use.'" *Black's Law Dictionary*1057 (7th ed. 1999) (quoting *Prosser and Keeton on the Law of Torts* § 34, at 211-12 (W. Page Keeton ed., 5th ed. 1984)) (emphasis added).[9]

A showing that slight care was taken suffices to defeat a gross negligence claim. "The fact that more might have been done does not negate a finding that [defendant] employees exercised at least slight care." *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004) (citing *Etheredge v. Richland Sch. Dist. One,* 341 S.C. 307, 311-12, 534 S.E.2d 275, 277-78 (2000)).

[9] *See also http://legal-dictionary.thefreedictionary.com/Gross+negligence* (quoting *West's Encyclopedia of American Law* (2d ed. 2008)) (emphasis added) ("'Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both.'")

"'[W]hile gross negligence ordinarily is a mixed question of law and fact when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.'" *Id.* at 245, 608 S.E.2d at 138 (quoting *Etheredge,* 341 S.C. at 310, 534 S.E.2d at 277) (emphasis added).

I. APPLYING THESE STANDARDS, THE PLAINTIFF FAILED TO MAKE OUT A CASE SUFFICIENT TO WITHSTAND SUMMARY JUDGMENT.[10]

A. Plaintiff's Claim Fails As A Matter Of Negligence/Premises Liability Law, Independently Of The Tort Claims Act.

In the lower court, argument focused primarily on the South Carolina Tort Claims Act. (The Tort Claims Act was specifically raised by the Respondent in its Answer. (ROA p. 18, ¶ 18)). Defendant reserves his arguments relevant to the Act for later sections of this Brief, as the Court may choose to resolve this case more simply. Plaintiff/Appellant has failed to make out even a case for plain negligence, or for "premises liability."

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[10] As a pre-emptive matter, were Plaintiff to complain in its Reply Brief that summary judgment should generally not be granted until a party has had a full and fair opportunity to complete discovery, *see e.g., Doe v. Batson*, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 1999), *affirmed in part, vacated in part, remanded, Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001), any such claim would be barred here, as it was not raised below. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991),

> [Plaintiffs] argue summary judgment was premature before completion of discovery. This argument comes too late.
>
> . . . . Plaintiffs at no time asserted to the trial court that outstanding discovery should preclude summary judgment on these nuisance claims. "Generally, a contention of the opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal." 6-Pt. 2 Moore's Federal Practice § 56.24, pp. 56-820 to -821 (2d ed. 1988). Having not been raised to the trial court, this issue is not preserved for appellate review. *See* West's S. C. Digest Appeal & Error, Key No. 169.

Id. at 117, 410 S.E.2d at 546. Any such argument would also be barred as the issue was not raised in Appellant's principal Brief, and thus may not be raised in the Reply Brief. *See, e.g., Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (explaining that an argument in a Reply Brief cannot present an issue to the appellate court that was not addressed in the initial Brief of Appellant.)

Moreover, any such claim would be lacking on the merits. Plaintiff had far more than ample time to complete discovery, as discussed in text above.

Plaintiff does not even claim to have shown that the gardening had been finished at the time of the fall. "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." Init. Br. of Appellant, p. 13 (emphasis added). Taking Plaintiff's allegations at face value, it is obvious that a water hose need not be "stored" while it is being used. Nor may a jury be allowed to award damages based on any "speculative" idea that maybe the gardening had been finished. *Proctor*, 368 S.C. at 292-93, 628 S.E.2d at 503.

B. Plaintiff's Claim Fails As A Matter Of Law Because She Has Failed To Present Any Evidence As To Whom Was Doing The Gardening.

Plaintiff has presented no evidence—none—as to whether the gardening occurring at and around the time of the accident was undertaken by Center employees or by an independent contractor (or contractors).[11] If it was an independent contractor, as it appears to be, Appellant's case must fall: A governmental entity is not liable for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons . . . ." § 15-78-60(20).

[11] Indeed, what evidence there is suggests that the work was performed by independent contractors. As indicated by deposition testimony introduced into the lower court record by Plaintiff, "They were watering because they had just put plants out." ROA p.167. "It was a quiet day, nothing too much was going on other than like I said, they were out working, putting down pine straw and that type of thing." *Id.*, p. 44.

C. Appellant's "Premises Liability" Claim Also Fails Because the Claim Does Not Escape the Act's Provisions, Because Appellant Has Not Met the Requirements of a Premises Liability Claim under the Act, and Because Appellant's "Premises Liability" Claim Is Actually a "Protection, Custody, and Control Claim" which Requires a Showing of Gross Negligence.

Appellant's argument that premises liability actions against governmental entities are governed by the routine, every-day, provisions of premises liability law as applicable to private entities misunderstands the literal language of the Tort Claims Act, the legislative intent behind it, the case law interpreting that Act, and even the very case on which Appellant relies. Appellant quotes a Court of Appeals decision for the proposition 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.'" Init. Br. of Appellant, p. 10 (quoting *Burns v. South Carolina Comm'n for the Blind*, 323 S.C. 77, 80, 448 S.E.2d 589 (Ct. App. 1994) (emphasis added by Respondent)).

Appellant's other premises liability case, *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 237 S.E.2d 753 (1977), is completely inapposite. For one reason, the defendant there was a private party, not a State entity. Additional reasons are provided in the attached footnote.[12]

[12] The case concerned a convex funhouse mirror in a pediatric waiting room. Children were encouraged to look at themselves in the mirror. A child had fainted, and fallen into the mirror, after receiving an injection, incurring severe and permanent eye damage. *Id.* at 396, 237 S.E.2d at 756. Other children had similarly fainted after receiving injections similar to the injection administered to the plaintiff there. *Id.* at 401, 237 S.E.2d at 758. While the glass was originally of a type common in china cabinets in many homes, it had been intentionally heated and curved, the stress and strain causing the glass to become more susceptible to breakage. *Id.* at 396, 237 S.E.2d at 756. The mirror was intentionally left in "an area where sick and weak children passed while going to and returning from the defendant's treatment rooms," *id.*, "an area where it could easily have been broken," *id.* at 397, 237 S.E.2d at 756. Moreover, "it was intentionally placed" as an attraction designed to draw the children towards it. *Id.* at 396, 237 S.E.2d at 756.

After intentionally administering the injection, the doctor there intentionally allowed the child to go to the waiting room where the hazard had been intentionally placed, for the intentional purpose of drawing children towards it. *Id.* at 401, 237 S.E.2d at 758.

As noted above, the Act explicitly and specifically provides that a "governmental entity is not liable for a loss resulting from"

> (16) maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition;

§ 15-78-60.

Moreover, opinions regarding parks, open spaces, and other premises specifically mentioned in the Tort Claims Act routinely apply the Act and its "limit[ed]" premises liability (unlike *Burns* and *Hughes*, which did not concern a space listed in the Tort Claims Act), consistently go against Appellant's position. *E.g.*, *Fickling v. City of Charleston*, 372 S.C. 597, 609-10, 643 S.E.2d 110, 117 (Ct. App. 2007) (emphasis added) (slip and fall on a sidewalk; allowing case to proceed to a jury because "(1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; [and] (2) the condition had existed for a while."); *Major v. City of Hartsville*, 398 S.C. 257, 728 S.E.2d 52, (Ct. App. 2012) (slip and fall on a grassy area near a sidewalk, affirming summary judgment pursuant to the Tort Claims Act); *Vaughan v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006) (slip and fall on a sidewalk, where the defect was not caused by a third party; finding the reasonable time requirement was met because officials had known of the defect for at least ten years). Similarly, in

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A brittle funhouse mirror designed to be an attraction is vastly different from a coiled hose lying neatly in the grass. Moreover, in *Hughes*, the hazard was intentionally placed and left for years, was designed to attract people towards it, and the plaintiff was made susceptible to falling into it by the affirmative act of the defendant in giving him the shot that caused his fainting and the defendant's instigation of the child's movement to the area where the hazard lay.

Moreover, the plaintiff there provided an expert to testify that the mirror was "inherently dangerous." Plaintiff here provided no such expert. Nor could an expert credibly testify that a coiled garden hose is like a brittle funhouse mirror.

Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997), the County had been explicitly warned of the danger, and much more than a reasonable time had passed after the warning. "Here, there was ample evidence that County had been warned the lack of safety rails could present a danger to people fishing from the dock and could expose County to potential liability."[13] *Id.* at 32, 491 S.E.2d at 575.

Moreover, Appellant's claim that the nature of Respondent's patients imposes on Respondent a heightened duty to protect them from run-of-the-mill hazards brings the case squarely within paragraph 25 of section 15-78-60. That paragraph provides that no liability shall attach for any loss resulting from any

> (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; . . .

Appellant practically admits that her claim about the garden hose is actually a claim about monitoring, supervising, and protecting. *See, e.g.*, Init. Br. of Appellant, p. 14 (complaining that having Fatima where landscaping work was being or had been performed, etc., "presents genuine issues of material fact as to whether the Respondent

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[13] The Court found important that

> Among other evidence, there is: (1) a letter to the public works construction superintendent noting a problem with the lack of safety rails at the dock at Steamboat Landing; (2) a memo from Rogers authorizing the construction superintendent to contact the Wildlife Department concerning the guardrail problem so that County and Wildlife Department could discuss the issue and make recommendations for improvement; (3) a letter from Rogers to Representative Holt, the Chairman of the Wildlife and Environmental Committee, stating "Charleston County has recommended that handrails be placed in reference piers and boat ramps . . ."

Id. at 29, 491 S.E.2d at 574. Moreover, the warnings dated back to 1987. *Id.* Thus, "there was ample evidence that County had been warned" of the danger. *Id.* at 32, 491 S.E.2d at 575.

was grossly negligent in supervising, monitoring, and protecting Fatima Karriem given her mental and physical limitations and propensities"); *id.*, p. 15 (similarly complaining that the presence of the water hose creates an issue of material fact as to whether Respondent was culpable for gross negligence in "supervising, monitoring, and protecting" Fatima).[14] In short, Appellant argues that Respondent had a duty to keep its premises exceedingly neat and tidy because of its custody and control of patients like Fatima.

Further, when a governmental entity asserts various exceptions to the waiver of immunity, a court is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard. *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 395-96, 520 S.E.2d 142, 153-54

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[14] The Complaint reads almost as a list of items covered by Section15-78-60 of the South Carolina Tort Claims Act. The duties allegedly breached by the Respondent, according to the Complaint, are:

a. Protecting Fatima's health and/or safety; and/or

b. Protecting Fatima from any unreasonable risk of harm to her life, physical and mental health, and/or safety; and/or

c. Monitoring Fatima to insure compliance with the Defendant's duty to provide her a safe environment; and/or

d. Providing timely medical treatment to Fatima upon her fall and resulting injuries at the Defendant's facility; and/or

e. Properly notifying Fatima's guardian about her fall and resulting injuries; and/or

f. Complying with the standard of care applicable to Fatima's monitoring at the Defendant's facility; and/or

g. Exercising reasonable and appropriate care toward Fatima, a mentally, physically, and developmentally challenged woman with disabilities and special needs; and/or

h. Following and complying with the Defendant's internal policies, procedures, and/or rules; and/or

i. Properly hiring, retaining, training, and/or supervising personnel who were qualified to administer the special needs, services, and supervision of Fatima while under the care, custody, and/or control of the Defendant as a client/patient.

ROA pp. 13-14 (emphasis added).

(1999).[15] Thus, the premises liability claim here must be interpreted in light of the gross negligence standard. It cannot seriously be maintained that leaving a water hose out contemporaneously with gardening amounts to gross negligence.[16]

Finally, because "The provisions of this chapter . . . must be liberally construed in favor of limiting the liability of the governmental entity," § 15-78-200, the Court should choose whichever theory best excludes liability. The Legislature did not state that the provisions "may be" or "should usually be" construed in favor of limiting liability; the Legislature stated that the provisions "must be" construed in favor of limiting liability.

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[15] The Supreme Court further explained,

> This Court and the Court of Appeals previously have recognized that the correct approach, when a governmental entity asserts various exceptions to the waiver of immunity, is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard. *Duncan v. Hampton County School Dist. # 2*, 335 S.C. 535, 517 S.E.2d 449, 1999 S.C. App. LEXIS 74, *10 (S.C. Ct. App. 1999) (Shearouse Adv. Sh. No. 17 at 61) (reading discretionary immunity exception in light of exception to immunity in which governmental entity exercises its duty in a grossly negligent manner, such that discretionary immunity will not protect the government if it exercises that discretion in a grossly negligent manner); *Etheredge v. Richland School Dist. 1,* 330 S.C. 447, 463, 499 S.E.2d 238, 246 (Ct. App. 1998) (when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard), *cert. granted on other grounds*, April 8, 1999. The principles expressed in *Duncan* and *Etheredge* are drawn from *Jackson v. South Carolina Dep't of Corrections,* 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990).

Steinke, 336 S.C. at 395-96, 520 S.E.2d at 153-54 (emphasis added).

[16] *See* ROA p. 48, line 17–p. 49, line 7:

> THE COURT: I mean, a water hose is almost part of the common, everyday fabric of life around these parts.
>
> . . . .
>
> THE COURT: I mean, everyone has a water hose somewhere.
>
> MR. SMITH: And especially in April 25th is when this accident happened. I think that's right. . . . . I mean, you know, you can't come in and have people do lawn work at night. They got to do it, do it during the day. And, you know, they're out there. You know, again we're dealing with slight, you know, the slight care standard. And so if they're out there and you got two people watching, you know, you can't anticipate everything that's going to happen, you know?

D. Appellant's Claim that Respondent Failed to Prevent Ms. Karriem from Being Startled Fails on Numerous Grounds.

Appellant seems to suggest that Respondent was grossly negligent in allowing Ms. Karriem to become startled. Appellant suggests the Respondent should have provided sufficient security to prevent any other patients from approaching and startling her. This claim comes squarely within paragraph 25 of section 15-78-60, which denies liability for any cause of action stemming from

> (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; . . .

§ 15-78-60(25) (emphasis added).

Her claim fails for many reasons. First, the claim is lacking on the merits – Ms. Karriem was supposed to be looked at by one (1) staff member every 30 minutes, and there were two (2) staff members supervising her at the time. Providing additional security for every patient would be cost-prohibitive, and detrimental to the patients. Part of the goal of treatment for the mentally disabled is to help them learn to do what they can for themselves, not to smother them.[17] Moreover, gross negligence requires the lack of even slight care. Two staff members accompanying her is more than slight care. Even if more could have been done – and assuming, contrary to all logic, that more should have been done – the evidence is more than ample to prove that at least slight care was provided.

Second, Appellant's claim that the proper care and treatment of Ms. Karriem required additional security is at core a medical malpractice claim. How many staff

[17] Having additional staff would not have prevented her from being startled.

would be ideal, if money were no object? How many staff suffice to meet the minimal standards? How far should a skittish patient be separated from other patients? These are all, at core, claims about the proper treatment of patients who need some supervised interaction with others, and specifically with other peers, not just with staff.[18] The claim of inadequate medical treatment is also without merit. As a claim of improper medical treatment, it is a medical malpractice claim. Such claims generally require expert testimony, *Jernigan v. King*, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993); *David v. McLeod Regional Medical Center*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006); and Plaintiff has provided no medical expert.

So too for any claim that the special nature of the Respondent's patients required Respondent to keep its premises extraordinarily neat and tidy. It is a medical claim about improper supervision, custody, control, etc. of the patients/clients, and thus is barred both by the requirements of a medical malpractice claim and the protections the Legislature afforded state entities via the Tort Claims Act.[19]

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[18] In this respect, the present case is unlike cases involving bedridden patients in hospitals, for example, who are assaulted by another patient: their care and treatment does not centrally involve interacting with other patients. Here, the interactions are part of the treatment.

[19] Appellant might argue in its Reply Brief that the claim is not barred as a medical malpractice claim, in that the *Hughes* case Appellant cited establishes that injuries from hazards on the property of medical providers are not medical malpractice claims. There, the landlord of a medical practice (not the physicians nor the physicians' association) was held liable for an accident that occurred when a brittle, convex, funhouse mirror shattered. 269 S.C. at 401 n.1, 237 S.E.2d at 760 n.1. Appellant argued in its principal Brief that the child patients there were analogous to Respondent's patients, who were in some ways child-like. A critical difference, however, is that the children there were not being treated for the condition (or "symptom" or "disease," etc.) of being children. Here, the very medical problem for which they were being treated was the "child-like" and associated problems stemming from their special needs. Thus, any claims about the proper landscape for their treatment – or any claims specifically that their special needs requires a special landscape – are again medical malpractice issues. One would need to establish the prevailing standard – do other facilities send someone around the property every five minutes to look for hazards?, and the like.

E. All the Above Is Controlled by This Court's Decision in *Pack*. It Is Similarly Controlled by This Court's Decision in *Baughman*.

As in *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 608 S.E.2d 134 (Ct. App. 2004), here, there is absolutely no evidence in the record demonstrating that Respondent was grossly negligent. The *Pack* Court determined that summary judgment was proper after finding that employees acted with at least slight care. 362 S.C. at 246, 608 S.E.2d at 138. As in this case, the plaintiff in *Pack* argued the defendants could have done more to address a juvenile's behavior problems before the juvenile acted out. *Id.* However, the court determined "[t]he fact that more might have been done does not negate a finding that [defendant] employees exercised at least slight care." *Id.* (citing *Etheredge*, 341 S.C. at 311-12 (holding that where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether gross negligence exception to Tort Claims Act was applicable)).

Here, the evidence is that the hose was neatly wrapped. That, in and of itself, is "slight care."[20] Moreover, at the time, the Plaintiff was under the simultaneous supervision of two (2) staff members, when she needed be under the supervision of only one (1), and even by that single staffer, merely for a visual check every thirty (30) minutes. That is far more than required, and thus doubly far from gross negligence.

[20] A coiled water hose attached to a spigot in April in South Carolina is simply not gross negligence. The fact that it was coiled rather than loose is itself proof of "slight care." Moreover, here there is no claim, and can be no credible claim, that the neatly wrapped hose was left attached to a spigot for years or months; it was at or around the time watering was occurring. *Compare* the present case *with Vaughan v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006) (officials had known of the danger for at least ten years); *Creech v. South Carolina Wildlife & Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (officials had been warned of the hazard for approximately a decade).

All the above is similarly controlled by the Court's prior decision in *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

> There is a total absence of any competent evidence showing either the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of Nassau. Accordingly, we affirm trial court's grant of partial summary judgment on Plaintiffs' claims for property damage.

Id. at 117, 410 S.E.2d at 546. So too here. There is a total absence of any evidence showing a lack of slight care. That independently suffices to require summary judgment for the Defendant. There is substantial and undisputed evidence that at least slight care was provided. That also independently suffices to require summary judgment for the Defendant.

F. Appellant's Claims re: the Lack of Proper Care and of Immediate Notice to Plaintiff's Guardian Fail for Reasons Identical to the Above.

Appellant also argues that Respondent should have alerted Plaintiff's guardian "in accordance with the Defendant's policies and procedures." Init. Br. of Appellant, p. 16 (citing ROA pp. 182-185) (emphasis added). However, the Tort Claims Act expressly precludes liability resulting from the

> (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;

§ 15-78-60(4). Thus, Appellant's claim must fail.

The claim is also lacking on the substantive merits, and Plaintiff claimed no damages resulting from the failure to immediately call Plaintiff's father following the apparently harmless slip and fall.

The claim of inadequate medical treatment is also without merit. As a claim of improper medical treatment, it is a medical malpractice claim. The principle that experts are generally required in medical malpractice has been affirmed numerous times by South Carolina courts. Additionally, the Court of Appeals clarified the issue, stating "on a defendant's motion for summary judgment, there will usually be no genuine issue of material fact unless the plaintiff presents expert testimony on a standard of care and its breach by the defendant." *Jernigan v. King*, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993). This is in accord with the Supreme Court's view that in South Carolina, "medical malpractice actions require a greater showing than generic allegations and conjecture." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). Thus, "summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Id.*, 367 S.C. at 250, 626 S.E.2d at 5.

Finally, both of these two claims fail substantively, and do so for reasons entirely independent of the special protections provided by the Tort Claims Act and by the expert testimony requirement in medical malpractice claims. The record shows that after the fall, no injury was apparent except "a small nick on her upper lip." (ROA p. 133). Nevertheless, the nurse attempted three times to examine the Appellant; three times the Appellant refused to be examined. *Id.* Shortly thereafter, "she got up [from her chair] and walked toward a staff [member] that had her back turned and scratched the staff on the back," *id.*, an indication that all was well. It would not be an efficient use of staff time, and it would unduly worry parents/guardians, if the staff were to phone them every time a patient fell and seemed unhurt.

CONCLUSION

For the reasons stated, and such other reasons as may be apparent to the Court, the judgment of the circuit court should be affirmed.

Respectfully submitted,

9/30, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2012-213321

Fatima Karriem, through her court-appointed guardian
Phillip Simmons.....Appellant,
vs.
Sumter County Disabilities and Special
Needs Board.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent hereby certifies that the Respondent's Brief complies with SCACR 211(b).

RESPECTFULLY SUBMITTED.

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October 3, 2013

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Proof of Service

I certify that I have served upon Appellant three copies of the Respondent's Final Brief by depositing the same today in the United States mail, postage prepaid, addressed to:

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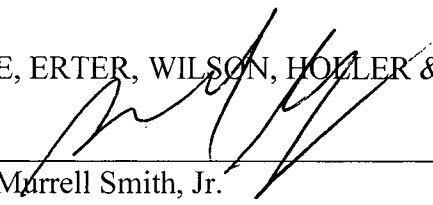

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