THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2011-CP-46-4508

Elizabeth Hope Rainey, as the Appointed Guardian ad Litem to Owen C., a minor .... Appellant

v.

Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center; South Carolina Department of Social Services and Bruce Bryant, as the Constitutional Office of the Sheriff of York County, the York County Sheriff's Department, and York County ... Respondents.

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TABLE OF CONTENTS

Table of Authorities v

Statement of Issues on Appeal viii

Statement of the Case 1

Standard of Review 4

Argument

I. THE CIRCUIT COURT ERRED IN CONCLUDING CAROLINAS MEDICAL CENTER'S SOCIAL WORKERS OWED NO DUTY TO PATIENT OWEN C.

A. South Carolina law governing construction of a tort duty is clear. 5

B. The Circuit Court's Order inaccurately stated the duty Appellant asserted in her negligence claim against CMC. 8

C. Alternatively, CMC social workers voluntarily undertook a duty to perform a psychosocial assessment of Owen C.'s home environment 10

II. APPELLANT PRESENTED EVIDENCE ON ALL REMAINING ELEMENTS OF HER NEGLIGENCE CLAIM AGAINST CMC.

A. CMC breached its intra-admission assessment duty to Owen C. 11

i. The standard of care required CMC personnel to investigate specific issues and complete certain documents 11

ii. Appellant produced evidence that CMC breached its assessment and communication duties in several ways. 16

B. CMC's breaches of duty were a proximate cause of Owen C.'s injuries. 20

Conclusion 28

TABLE OF AUTHORITIES

South Carolina

Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (2003)................. 6

Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) 20

Brockbank v. Best Capital Corp, 341 S.C. 372, 534 S.E.2d 688 (2000) 4

Burnett v. Family Kingdom, Inc., 387 S.C. 183, 691 S.E.2d 170 (Ct. App. 2010) 20

Carolina Alliance for Fair Employment v. South Carolina Department of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) 4

Cody P. v. Bank of America, N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011)... 20, 26, 27

Creighton v. Coligny Plaza Limited Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) 10

Elledge v. Richland/Lexington School District Five, 352 S.C. 179, 573 S.E.2d 789 (2002) 12, 16

Epstein v. Coastal Timber Co., 393 S.C. 276, 711 S.E.2d 912 (2011) 4

Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009) 4

Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005) 20

Jensen v. Anderson County Department of Social Services., 304 S.C. 195, 403 S.E.2d 615 (1991) 5, 6, 10

Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012) 10

Madison v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) 12

Mellen v. Lane, 377 S.C. 267, 659 S.E.2d 236 (Ct. App. 2008) 20, 27

Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997)........... 10

Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007) 5

Moriarity v. Garden Sanctuary Church of God, 534 S.C. 150, 511 S.E.2d 699 (Ct. App.1999) 4

Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010) 5

Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001) 28

Pye v. Aycock, 325 S.C. 426, 480 S.E. 2d 455 (Ct. App. 1997) 4

Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) 6

Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 734 S.E.2d 161 (2012) 5

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) 21

Shepard v. South Carolina Department of Corrections, 299 S.C. 370, 375 S.E.2d 37 (Ct. App. 1989) 26

Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1987) 20

South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) 6

Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414 (Ct. App. 1987) 12

State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) 27

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) 4

Trask v. Beaufort County, 392 S.C. 560, 709 S.E.2d 536 (Ct. App. 2011) 5

Other Jurisdictions

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 4

Gaines v. Cumberland County Hospital System, Inc., 692 S.E.2d 119 (N.C. App. 2010) 24, 26

Henderson v. Gunther, 931 P.2d 1150 (Colo. 1997) 7

Niece v. Elmview Group Home, 929 P.2d 420 (Wash. 1997) 7

Statutes and Court Rules

N.C. Gen. Stat. § 7B-308 16

Rule 56, SCRCP 4

Rule 702, SCRE 12

S.C. Code Ann. § 63-7-310 5

Secondary Source

Restatement (Second) of Torts § 323 .... 10, 11

STATEMENT OF ISSUES ON APPEAL

1. Whether a specialty children's hospital accepting transfer of an infant who was a suspected child abuse victim had a duty to assess the child's family environment for risks to the infant's safety and to communicate its assessment to other decision makers involved in discharging the infant from the hospital?
2. Whether Appellant presented evidence that the hospital breached its assessment and communication duties proximately causing Owen C.'s permanent injuries?

STATEMENT OF THE CASE

Three-month old Owen C. was home alone with his father Michael Carduff on December 4, 2009, when Owen C. got real stiff, turned red, and appeared to be straining. (York County DSS 00237). Michael and Owen C.'s mother Kayla Lythgoe took Owen C. to the emergency room at Piedmont Medical Center ("PMC"). When reporting on Owen C.'s condition, Michael and Kayla told PMC doctors "we thought he was dead." (PMC Medical Chart, York County DSS 00143). After triage and an examination, Owen C. was transferred to Carolinas Medical Center's Levine Children's Hospital ("CMC") in Charlotte, North Carolina. Owen C. was admitted to CMC during the morning hours of December 5, 2009, and medical tests were performed to determine the cause of his physiological symptoms. A computed tomography ("CT") scan revealed a subdural hematoma, i.e. bleeding on his brain. (CMC History and Physical, CMC (12.05.09) 0061); Discharge Summary, CMC (12.05.09) 003).

CMC activated procedures for care of a suspected child abuse victim by notifying the York County division of the South Carolina Department of Social Services ("DSS") and utilizing a "CHS[1] Suspected Abuse and Neglect" form. (Rainey v. Carolina Medical Center 000155). CMC policy also required the hospital to consult its on-staff medical social workers. According to CMC policy, the social stability of a patient's home environment is a distinct and independent factor for CMC personnel to consider during a patient's hospitalization, especially at the time of the patient's anticipated discharge. CMC Policy PR 110.03 ("Juvenile Abuse Policy"). During Owen C.'s hospitalization

[1] CHS refers to Carolinas Healthcare System which includes CMC and other medical facilities in North and South Carolina.

from December 5-8, 2009, his family was contacted by CMC social workers Katie Harrison and Laura Newmark. (L. Newmark Dep. 9: 2-17; 162:16-21).

CMC officials were concerned about suspected abuse and posted a sitter in Owen C.'s hospital room. (K. Moore Aff. at 4; CMC (12.05.09) 0065). During the four day period, Owen C.'s grandmother told a CMC nurse that Owen suffered a bruise just weeks earlier while in Michael's care and Michael had no explanation for the injury. After the subdural hematoma was diagnosed, neither parent could explain how the injury happened. Ms. Harrison and Ms. Newmark took very brief notes of their conversations with Michael, Kayla, and a couple other family members but did not interview extended family members. (G. Savarese Aff. at 19).

When a neurosurgeon examined Owen C. the night before his discharge, Owen C. was **medically** cleared for discharge but drew no conclusion on the social environment Kayla and Michael presented for Owen C. (K. Moore Aff. at 3). The following day, Owen C. was discharged to his parents. The required safety plan was not attached to Owen C.'s chart at the time of his discharge. Id. at 4. A few weeks later, Michael was again left alone with Owen C. As he had many times before, Michael "got frustrated with" Owen C. to the point of being "angry" with the infant. (Michael Carduff's York County Sheriff's Office Statement, York County DSS 00176) When Michael left his house to take Owen C. for a car ride, Michael "shook" Owen C. in an effort to get Owen C. to quiet down. (York County DSS 00237). Michael later admitted to police officers he dropped Owen C. down a set of concrete stairs that same night while Owen C. was in his car seat. (York County DSS 00179). Hours later, Michael and Kayla noticed Owen C. was in distress. Instead of crying, Owen C. was suffering from multiple seizures. Id.

Owen C. was again rushed to PMC and later transferred to CMC where he was diagnosed with a new subdural hematoma, retinal hemorrhaging, and persistent seizures. (CMC History & Physical, York County DSS 0045). Doctors determined Owen C. suffered an anoxic brain injury and had a very poor prognosis. He was unable to either see or hear. Owen C. received morphine for his pain and was eventually placed in hospice care. After a period of hospice care, Owen C.'s medical outlook began to improve. He was released from hospice but had suffered serious, permanent injuries. (York County DSS 0045). Michael pled guilty to child abuse and is currently in prison.

On December 1, 2011, Appellant Elizabeth Hope Rainey filed the current suit as Owen C.'s guardian ad litem. The suit alleged negligence claims against CMC, DSS, the York County Sheriff Bruce Bryant, and the York County Sheriff's Office. After a period of discovery, CMC moved for summary judgment on February 26, 2013, and a hearing was held before the Honorable S. Jackson Kimball on April 18, 2013. On May 13, 2013, Judge Kimball issued an order granting CMC summary judgment on the basis that CMC did not have a duty to retain Owen C. in its custody when DSS arranged for the child's discharge. Believing the court misconstrued her duty argument and misapplied South Carolina proximate cause law, Appellant filed a Motion for Reconsideration and supporting memorandum on May 22, 2013. Appellant's motion was heard on August 14, 2013, and Judge Kimball issued a Form 4 order denying Appellant's motion the same day. Appellant timely filed and served a Notice of Appeal on September 10, 2013.

STANDARD OF REVIEW

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997); Pye v. Aycock, 325 S.C. 426, 431, 480 S.E. 2d 455, 457 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp, 341 S.C. 372, 379, 534 SE 2d 688, 692 (2000); Moriarity v. Garden Sanctuary Church of God, 534 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999). On appeal, the court "applies the same standard used by the trial court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING CMC OWED NO DUTY TO PATIENT OWEN C.

A. South Carolina law governing construction of tort duty is clear.

The circuit court erred in granted summary judgment to CMC by concluding the hospital owed Owen C. no duty. The Court's conclusion overlooked South Carolina law governing construction of a tort duty. Negligence is the breach of a duty of care owed to a plaintiff by a defendant. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 251, 734 S.E.2d 161, 163 (2012). Plaintiff bears the burden of establishing that a duty of care is owed to him by the defendant. Trask v. Beaufort County, 392 S.C. 560, 566-67, 709 S.E.2d 536, 539 (Ct. App. 2011). A tort duty is simply "the obligation to conform to a particular standard of conduct toward another." Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) (quoting Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007)).

A legal duty may arise from a number of different sources including a "statute, a contractual relationship, status, property interest, or some other special circumstance." Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). A statutory provision is only one of the sources from which a tort duty may arise. The duty Appellant asserts in her Complaint is not invalid simply because it is not explicitly stated in a statute. Similarly, CMC's duty to report suspected child abuse derived from S.C. Code Ann. § 63-7-310 (1976) does not exclude an assessment and communication duty that Appellant asserts in her Complaint nor does it invalidate the assessment duty. The duty which flows to the Plaintiff and the minor child arises from

the special relationship between the parties, which is a recognized source of tort duty as stated in Jensen.[2]

The existence of a legal duty is closely associated with the relationship between plaintiff and defendant. A court finds a duty when "the parties have some relationship recognized by law" to support the duty asserted. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). Since a tortfeasor's duty "arises from his relationship to the injured party," the circuit court was required to examine any relationship CMC had with Owen C. S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376, 346 S.E.2d 324 (1986). A close relationship or one in which the plaintiff looks to the defendant for assistance supports a duty. Ravan v. Greenville County, 315 S.C. 447, 457, 434 S.E.2d 296, 301-02 (Ct. App. 1993) (quoting S.C. State Ports Auth., 289 S.C. at 377, 346 S.E.2d at 326).

CMC had a relationship with Owen C. that supported a legal duty. CMC accepted Owen C. as a patient as a transfer from Piedmont Medical Center at CMC, a specialized facility "designed to care for the physical and emotional needs of children and their families."[3] CMC provided medical care to Owen C., including assessment of injury and assessment of risk of further injury. The care rendered by medical professionals at CMC included care by physicians, nurses, social workers and others. The testimony of Owen C.'s CMC doctors and social workers shows a close, sustained relationship in which

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[2] Judge Kimball concluded Appellant's "effort to create a common law duty ... ignores basic rules of statutory construction." Order at 8. Appellant is not sure of the Court's meaning. As Appellant discussed in her Motion for Reconsideration, her duty claim was in no way relying on any statutory provision but was instead asserting a common law duty. Pla. Mot. for Reconsideration at 3.

[3] About Us, Levine Children's Hospital, *available at* http://www.levinechildrenshospital.org/ body.cfm?id=6.

CMC personnel had physical contact with Owen C. to perform medical exams, spoke with Owen C.'s family members multiple times over several days, and observed family members interactions with one another and with Owen C. Owen C.'s age and physical condition made him vulnerable and CMC was charged with providing him medical and social services.[4] The hospital recognized some risk to Owen C. because they actually assigned a baby sitter for the duration of his hospital stay. There was a recognized danger and harm to Owen C. that CMC recognized. CMC accepted him as a patient and took it upon themselves to assign a sitter to his room. CMC accepted him as a patient and provided medical testing and documentation. CMC accepted him as a patient and provided a social work assessment. By virtue of the actions of CMC, it is clear, that not only was there a duty in these situations but that CMC accepted this duty.

Several state supreme courts have found a special relationship between hospital and patient in a variety of circumstances. See Niece v. Elmview Group Home, 929 P.2d 420, 424 n. 2 (Wash. 1997) ("the relationship between a hospital and its vulnerable patients is a recognized special relationship"); Henderson v. Gunther, 931 P.2d 1150, 1155 (Colo. 1997) (en banc) ("special relationships such as ... a hospital and a patient have been found to impose a duty of care"). It is well understood that hospital medical staff members owe duties to people they accept as patients. The same principle applies to hospital social work staff members. CMC's duty to care for Owen C. (whether a doctor, nurse, social worker or sitter) in an acceptable manner was not changed by virtue of the status of the provider of care.

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[4] During the hearing on CMC's summary judgment motion, Judge Kimball seemed to agree that CMC owed Owen C. certain duties during his hospitalization. See Tr. of Record at 34, L. 1-3 ("I will grant you that [CMC] had a duty while they had the care, custody, and control of the child when [he] was there for evaluation and treatment.").

B. The Circuit Court's Order inaccurately stated the duty Appellant asserted in her negligence claim against CMC.

Judge Kimball's Order misstated the duty Appellant asserts CMC had and breached in its interactions with Owen C. in December 2009. The circuit court's ultimate conclusion is flawed because the Court considered the legal sufficiency of a duty Appellant did not assert and a duty that is not essential to Appellant's claim for relief. Throughout the Order, the circuit court focused on CMC's supposed duty to personally deny custody of Owen C. to his parents or a duty for CMC to personally and indefinitely refuse to discharge Owen C. from the hospital. See Order at 1 (discussing duty "to refuse to release the child back to his parents"). The Order indicated that Appellant sought to impose a duty on CMC to refuse a DSS instruction to release the child to his parents. Order at 5. Going one step further, the Order concludes Appellant's proposed duty would have required CMC to "withhold custody" or "remove a child from the custody of his parents." Id. at 5-6. The duty argument must fail, the circuit court concluded, because compliance with the duty Appellant sought to impose could subject CMC to a tort claim for false imprisonment or even criminal liability for kidnapping. Id. at 6.

However, Appellant's negligence claim against CMC did not rely on a duty to withhold custody or remove Owen C. from his parents' custody in contravention of a DSS directive. Instead, Appellant alleged CMC owed duties to (1) assess Owen C.'s injuries and home environment from a social work perspective; (2) communicate with DSS personnel regarding CMC's assessment; and (3) potentially intervene on Owen C.'s behalf. The Complaint plainly states that CMC's duty related specifically to the assessment CMC had a duty to perform on its patient and his home environment while the patient was in CMC's facility. Appellant alleged CMC had a duty to "adequately

consider or determine whether Owen C. could be safely discharged into the care of his parents," "adequately recognize or adequately consider" Owen C.'s earlier injuries, "implement...adequate additional assessment" of Owen C.'s home environment, and to "reasonably determine whether Owen C.'s parents were qualified to assume his care." (Compl. ¶ 35 (a)-(d)).

Since the circuit court analyzed the wrong alleged duty, it reached the wrong conclusion. Certainly, South Carolina common law would not impose a duty on CMC to perform illegal or criminal acts. CMC's compliance with the duty asserted in the Complaint could never result in falsely imprisoning or kidnapping an infant, as the Order suggests. See Order at 6. Appellant contends that CMC had a special relationship with its infant patient that served as the basis for the hospital's duty to conduct a reasonable psychosocial assessment of Owen C.'s injuries and his home environment while Owen was at CMC.[5] Appellant further contends that CMC breached this duty by attempting an assessment but falling far short of the standard for a competent assessment as indicated in CMC's own assessment standards and as discussed by expert witnesses. Finally, Appellant contends that CMC's assessment and communication breaches were a proximate cause of Owen C.'s damages. This assertion is also supported by testimony

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[5] During the hearing on Appellant's Motion to Reconsider, the circuit court acknowledged the actual duty argument Appellant asserted in her Complaint. (Tr. of Hearing at 48, L. 10-14) ("I suppose that your argument is that...if the hospital had done more investigation, the DSS would've said, 'Don't release the child'"). Judge Kimball rejected the claim as requiring the court to accept unreasonable inferences. Id. at 48, L. 14-17 ("But I think...there are inferences that you want me to draw that are not reasonable and issues of fact that are not genuine"). As discussed in more detail in Section II, Appellant believes the Court's holding is not compelled by the evidence presented and was improper at the summary judgment state of litigation.

from two expert witnesses. The circuit court misconstruction of the duty aspect argument is the source of its erroneous conclusion.

C. Alternatively, CMC voluntarily undertook a duty to perform a psychosocial assessment of Owen C.'s home environment.

Tort duty formation is generally limited to those sources stated in Jensen. However, a party can face liability even without reference to a duty created by these sources if the party voluntarily undertakes a service and fails to exercise reasonable care in performing the service. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 115, 512 S.E.2d 510, 520 (Ct. App. 1998) ("A person who voluntarily undertakes to perform an act must use due care in the performance of that act"). A party "assumes" a duty he otherwise would not have if he voluntarily engages in some service on behalf of another. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

A voluntarily assumed duty has long been recognized in South Carolina. Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504, 737 S.E.2d 512, 514 n. 3 (Ct. App. 2012)(collecting cases). The voluntarily assumed duty doctrine is rooted in and governed by a Restatement section that reads as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) His failure to exercise such care increases the risk of such harm; or
> (b) The harm is suffered because of the other's reliance on the undertaking.

Id. at 504, 737 S.E.2d at 514 (quoting Restatement (Second) of Torts § 323).

Even if the Court affirms the circuit court's ruling that Appellant has failed to establish CMC owed a duty based on South Carolina statutory or common law, CMC's

conduct toward Owen was sufficient to apply the voluntarily assumed duty doctrine. CMC personnel acknowledged the efforts they undertook to assess Owen C.'s condition and the potential danger posed by his surroundings. Ms. Newmark testified that she tried to determine the social conditions surrounding Owen C.'s subdural hematoma. (L. Newmark Dep. 36:5-9). Ms. Newmark later acknowledged that she and social worker Katie Harrison aided in CMC's psychosocial assessment for Owen C. (L. Newmark Dep. 99:5-11). CMC acknowledges undertaking a duty to assess Owen C.'s situation and communicate that assessment to DSS. CMC also voluntarily chose to create the Juvenile Abuse Policy in which CMC specifically outline the contours of the assessment/communication duty it chose or felt compelled to perform. CMC must be charged with a duty to perform its undertaking with reasonable care. With the support of CMC's policies and expert testimony discussed below, Appellant presented evidence to the circuit court indicating CMC failed to exercise reasonable care in performing this voluntarily assumed duty.

II. APPELLANT PRESENTED EVIDENCE ON ALL REMAINING ELEMENTS OF HER NEGLIGENCE CLAIM AGAINST CMC.

A. CMC breached its intra-admission assessment duty to Owen C.

i. The standard of care required CMC personnel to investigate specific issues and complete certain documents.

In a negligence claim, a party breaches its duty by deviating from the applicable standard of care. The content of a party's legal duty, i.e. the standard of care "may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." Madison v. Babcock Ctr., Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). This is not the legal question regarding a

duty's existence but a factual inquiry into the scope of duty. See Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987) ("Breach of duty is a fact question to be decided by the jury on the evidence presented in each case"). Also, unlike the legal question of duty, the factual standard of care issue may be addressed by expert testimony. See Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 189, 573 S.E.2d 789, 794 (2002) (noting "expert's opinion on what the applicable standard of care is"); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...").

Appellant submitted two expert affidavits and CMC's own policies as evidence on the standard of care for CMC in discharging its social work duty to patients like Owen C.[6] Dr. George Savarese, a licensed social worker and J. Kevin Moore, a former CMC administrator provided expert testimony on the standard of care for CMC's assessment and communication duties. See G. Savarese Aff.; K. Moore Aff. Neither CMC's motion nor the Circuit Court's order questioned the experts' qualifications or the reliability of their assertions.

CMC has internal policies specifically related to actions required by doctors, social workers, and other hospital staff in instances of suspected child abuse or neglect. These policies state the standard of care for the CMC personnel that treated and otherwise cared for Owen. CMC policy PR 110.03 sets the standard of care for CMC personnel for "Juveniles Suspected of Being Abused or Neglected." CMC Policy PR 110.03 ("Juvenile

[6] The expert affidavits were not offered, as Judge Kimball suggested, to create a duty not recognized by law. See Order at 7. As outlined in Section I above, Appellant's duty argument is based on CMC's relationship with the suspected child abuse victim in its care as well as CMC's voluntary assumption of a duty to perform a psychosocial assessment of Owen C.'s home environment.

Abuse Policy"). By its own terms, the Juvenile Abuse Policy is intended to set the required course of action "in cases of suspected abuse or neglect." The Juvenile Abuse Policy's procedures certainly applied to Owen C.'s December 2009 hospitalization. Three-month old Owen C. presented to CMC with two subdural hematomas, which the hospital deemed an "apparent life threatening event." CMC History & Physical, CMC 0059-0062. CMC policy requires its agents and employees to be suspicious of child abuse for any injury to a child under six months old. Juvenile Abuse Policy at 7 of 23. Thus, the standard of care required CMC to comply with the provisions of the Juvenile Abuse Policy in treating Owen in December 2009. Policies are not the only way to establish the standard of care owed by a provider.

Additionally, there are industry standards and accepted national standards in regard to the care to be rendered to a minor child in a situation like the one involving Owen C. Dr. Savarese cited several standards that govern all medical social workers in the performance of an assessment and communicating an assessment's results to others involved in the decision making process. G. Savarese Aff. at 2-6. These standards are formulated by the National Association of Social Workers ("NASW"). Specifically, the standards require social workers to "provide ongoing assessment" of the child's environment" which specifically includes the collection of "comprehensive information" to be used in the formation of treatment strategies. (G. Savarese Aff. at 3) (citing NASW Code of Ethics Section 2.03). Also, the standards indicate that a social worker is part of the "interdisciplinary team" caring for any vulnerable child and a social worker must "collaborate with other professionals...in and outside of their practice setting to enhance all aspects of the client and family system's care." Id. at 4.

CMC's Juvenile Abuse Policy imposes several obligations on CMC doctors, social workers, and other personnel in the treatment of suspected child abuse victims. First, the DSS office in the child's home county must receive notice of the hospitalization. Second, LCH staff must "Complete CHS Suspected Child Abuse and Neglect form (SCAN)" for the patient and document all positive exam findings on a SCAN form. Third, there must be a consult with a "CHS Clinical Care Management Social Worker" for the purpose of conducting an "assessment process." CMC's "Child Abuse and Neglect Algorithm," a flow chart of required activities in suspected child abuse cases, also notes the requirement of a medical social worker's involvement in the assessment and treatment process. See Child Abuse and Neglect Algorithm, Pla. Mem. in Opp. to Def's Mtn. for Summ. J., Exhibit 4. Regardless of any assessment or investigation required of DSS or law enforcement, CMC policy outlines the contours of CMC social workers' independent duty to assess patients in Owen C.'s position and communicate an assessment's results to social services. Ms. Newmark acknowledged her job entails certain assessment duties. L. Newmark Dep. 147:3-9.

The psychosocial assessment must explore certain specific issues to meet the standard of care imposed by the Juvenile Abuse Policy. A CMC social worker must determine whether (1) a child's parents have caused or allowed infliction of a serious physical injury—i.e. whether the suspected victim meets the Juvenile Abuse Policy's definition of an "abused juvenile"; (2) parents offer a "logical explanation...consistent with the age, pattern, and severity of the injury"; (3) parents are guilty of any "inappropriate parental behaviors" during the child's hospitalization; and (4) it is safe for the child to be discharged back to the parents' care. Plaintiff's expert Dr. George

Savarese, a licensed social worker, stated by affidavit that there are certain "basic elements" of a psychosocial assessment performed by any competent social worker. (G. Savarese Aff. at 8). These basic elements include a child's developmental history and temperament as well as characteristics of the parents including social/financial stressors, demographic risk factors (e.g. age/maturity level, educational history, and socioeconomic status), attitude toward parenting, and any relational issues between mother and father. These are standards that can be created by the policies at CMC but are also standards imposed on any social worker involved in Owen C.'s care.

The Juvenile Abuse Policy not only requires CMC social workers to include certain issues in psychosocial assessments for suspected child abuse cases, it also requires the social worker to take certain actions in response to an assessment's results. The Juvenile Abuse Policy is clear that a social worker must respond assertively before a child's discharge when an assessment indicates a high risk of abuse. This standard of care is distinct from the medical care provided by CMC doctors and nurses. Specifically, the Juvenile Abuse Policy states:

> **When medically cleared, do not discharge child until disposition has been determined by medical social worker and DSS and the safety plan has been placed on the chart in writing, if applicable.**

Juvenile Abuse Policy at 3 of 23 (emphasis in original); see also Algorithm (same).

Based on an assessment's results, a social worker must also take efforts to prevent a vulnerable child from being placed in a dangerous environment. If an assessment shows that it is potentially unsafe for a child to be returned to his parents, the social worker should first contact DSS to see whether the department, in concert with law enforcement, will use its authority to place the child in emergency protective custody. If

an assessment indicates a high risk for abuse and DSS chooses not to intervene, a CMC social worker has a duty to exercise the authority granted by North Carolina law to seek a court order to retain temporary custody of a suspected abuse victim. See N.C. Gen. Stat. § 7B-308 (2005). The use of this statute is part of the general duty to use reasonable care in rendering of services to a child. Though a North Carolina Statute, it is what a reasonable hospital and its employees and agents would use in discharging care to a child.

ii. Appellant produced evidence that CMC breached its assessment and communication duties in several ways.

A defendant breaches its legal duty by deviating from the established standard of care. Whether a defendant's conduct deviates from the standard of care is another question of fact for which a plaintiff may offer expert testimony. Elledge, 352 S.C. at 188, 573 S.E.2d at 794 (noting "experts were allowed to offer their opinions" that "relate to breach of a duty").

CMC's social workers breached the standard of care in their assessment, communication, and efforts to intervene on Owen C.'s behalf. G. Savarese Aff. at 7. Ms. Harrison and Ms. Newmark worked together to conduct a psychosocial assessment ignoring issues CMC policies required them to address and issues any competent assessment would include. Katie Harrison was the weekend social worker who initially worked on Owen C.'s case on December 5-6, 2009. Social work's duties were then handed over to Laura Newmark, LCH's weekday social worker. Between these two social workers, the psychosocial assessment of Owen's care was merely six quarter-page entries in Owen C.'s medical record. See CMC 0092-0097. The assessment's brief entries contain "minimal" information and "do[] not explore or probe any of the areas

that a competent psychosocial assignment should." G. Savarese Aff. at 9. Plaintiff's experts also note a deviation from the standard in the way in which Ms. Harrison and Ms. Newmark handled the transition from the weekend to the weekdays. Ms. Newmark's entries in the assessment make clear that she simply "rubberstamped" Ms. Harrison's bare-bones assessment while failing to ask the necessary questions to address the family's abuse risk profile. Id.

The social workers' assessment lacked the breadth and rigor the standard of care required. Ms. Newmark described her investigation of Owen C.'s subdural hematoma as limited to "tak[ing] a history from the parents on [whether] there [had] been any recent trauma." (L. Newmark Dep. 36:5-9). The tough yet vital questions were not asked of Owen C.'s parents. For those instances where questions were asked, the social workers were overly deferential to the parents' answers. Ms. Newmark viewed her assessment duty as nothing more than obtaining the parents' "story" regarding the source of the injury and the child's history. See (L. Newmark Dep. 162:16-163:2). According to Dr. Savarese, a competent social worker would interview parents and then investigate their claims rather than simply acquiring and accepting a parent's explanation. G. Savarese Aff. at 7.

Ms. Harrison and Ms. Newmark had at their disposal many different options to conduct a competent psychosocial assessment. The social workers should have interviewed extended family members including the paternal grandparents and father's step-brother who could have provided additional context to understand the home environment to which Owen C. was released. Id. at 19. There is no indication that the social workers requested police or prior treatment records for Owen C. or his parents. Id.

Social workers also typically use standardized child abuse screening tools and other "risk assessment instruments" to aid in the assessment process. CMC social workers should have employed these devices in Owen C.'s case to meet the standard of care. Id. at 20.

The assessment breaches contributed to the social workers' failure to comply with their communication duties. The other participants in Owen C.'s case (DSS and law enforcement) "depend upon the hospital's assessment of risk, which is based on a combination of both medical and psychosocial data." Id. at 29. DSS would have considered input from hospital sources in making DSS case decisions including "any concerns that they have." K. Hinnant Dep. 26:6-12. Ms. Newmark acknowledges CMC had a duty to "report to DSS" and "provid[e] them with up-to-date information." L. Newmark Dep. 35:20. However, by conducting an incomplete, surface level psychosocial assessment, CMC's social workers were not in a position to make the required communications. G. Savarese Aff. at 23. The psychosocial data CMC had a duty to obtain remained uncovered and was not reported to DSS as required by the standard of care including CMC's own Juvenile Abuse Policy. In sum, the social workers were required to "communicate accurately the potential risk of harm to the child" posed by the parents or parental home environment. Ms. Harrison and Ms. Newmark did not make the required communications on this "family risk profile." Id. at 23.

The Juvenile Abuse Policy and Plaintiff's experts establish that CMC's social workers had a clear responsibility related to a patient's discharge as part of their assessment and communication duties. Ms. Newmark refused to acknowledge these duties, claiming her responsibility was to be "a liaison between the medical team and

DSS." (L. Newmark Dep. 10:24-11:1). This claim is inconsistent with CMC's policy requiring social workers to be part of the process in determining Owen's disposition. Juvenile Abuse Policy, at 3 of 23. Ms. Newmark's efforts to disavow these responsibilities are concerning from a hospital policy and hospital administration perspective. The Juvenile Abuse Policy also included an admonition that a written plan be in the chart before discharge. A formal written plan was not placed in the chart as required by the policy and its absence is a violation of CMC's duty.

Plaintiff's hospital administration expert J. Kevin Moore notes deviations from the standard of care in the efforts of Ms. Newmark and other CMC agents to deem their actions as reasonable simply because non-accidental trauma was not conclusively established by medical tests. (K. Moore Aff. at 3-4) ("medical clearance is not synonymous with 'ready for discharge' and cannot be treated as such under CMC policy"). Dr. Cheryl Courtlandt, Owen's treating physician, made clear at her deposition that Owen C.'s medical tests did not eliminate the possibility that Owen C. was abused. Dr. Courtlandt testified that some elements presented concern for non-accidental trauma. From a medical perspective, "it could not be determined whether or whether not he had been the victim of child abuse." C. Courtlandt Dep. 45:13-21.

Additionally, the Juvenile Abuse Policy makes clear, medical substantiation is only one factor a hospital must consider when determining the conditions of a child's discharge. In circumstances like these, CMC agrees that it should err on the side of caution. (C. Courtlandt Dep. 41:1-13). By failing to assess Owen C.'s risk, communicate an adequate assessment to DSS, and by failing to intervene at Owen C.'s discharge when they knew or should have known the medical tests could not rule out non-accidental

trauma, CMC social workers failed to err on the side of caution. (K. Moore Aff. at 6) (hospital "failed to take actions which would or could have averted subject exposure to and possibilities for ongoing abuse").

B. CMC's breaches of duty were a proximate cause of Owen C.'s injuries.

Proximate causation is an essential element of any negligence cause of action. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010). This element requires proof of both "causation in fact and legal cause." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1987)(citing Hurd v. Williamsburg County, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). Causation in fact is established by proof that the injury "would not have occurred but for the defendant's negligence." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011)(citing Mellen v. Lane, 377 S.C. 267, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). Legal cause is established by determining foreseeability, a factor which focuses on "whether the injury is the natural and probable consequence of the alleged negligent act." Id. As the Cooke court noted, "[p]roximate cause is generally a question for the jury." 741 F. Supp. at 1214; see also Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986)("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law"). Summary judgment on proximate cause is inappropriate where the plaintiff has produced "some evidence." Cooke, 741 F. Supp. at 1214.

The circuit court's ruling is framed wholly in terms of CMC's alleged absence of duty. As discussed in Section I, Appellant believes the circuit court misunderstood the duty CMC owed, and Appellant raised this issue with the circuit court in her Motion for

Reconsideration. There are also indications, however, that the circuit court did not believe that an assessment and communication error by CMC during Owen's hospitalization could be a proximate cause of injuries Owen suffered weeks later at the hands of his father. See (Tr. of Record at 35-36; Tr. of Hearing at 48). Without further explanation, the circuit court's order on Appellant's Motion for Reconsideration noted but did not identify "inferences, suppositions, and conclusions that are not supported by the extensive discovery in this case." Form 4 Order, dated Aug, 14, 2013.

CMC's social workers breached the standard of care applicable to their assessment, communication, and intervention. As a direct and proximate result of those breaches, Owen C. has suffered severe brain injuries and impairments with which he must deal for the rest of his life. Owen C. can move only via a wheelchair and will forever have the mind of a one year old child. He cannot walk or talk. He will never walk or talk. This child was beaten savagely by his father. If CMC had done its job, it is reasonably foreseeable there would have been a different outcome in this case.

Plaintiff has submitted expert affidavits on the proximate cause issue. Expert testimony is an appropriate means of providing evidence on proximate cause. See e.g., Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326, 335 (Ct. App. 2003). The "causal chain" leading to Owen C.'s current condition started with the grossly insufficient psychosocial assessment performed by CMC's social workers. G. Savarese Aff. at 30. A competent assessment would have contained information CMC was under a duty to communicate to Owen C.'s medical team, DSS, and law enforcement.

Pertinent information was easily available to Ms. Harrison and Ms. Newmark had they properly performed their assessment responsibilities. Id. at 11. This is evident from

the information obtained when a fuller inquiry was undertaken after the January 2010 catastrophic injury Owen C. suffered. For example, (1) Michael acknowledged that his relationship with Kayla was strained since Owen C.'s birth; (2) Kayla acknowledged Michael's poor parenting skills and apathy toward Owen C.; and (3) the maternal grandmother reported stress between the grandparents and Kayla regarding Michael's conduct and disposition toward Owen C. Id. at ll-14.

A proper assessment in December 2009 would have revealed these pertinent facts and would have been included in the information communicated to other decision makers involved in the discharge of Owen C. to his parents. Instead, "dangerously inaccurate information was communicated, beginning with the hospital's social worker's deficient assessment of the psychosocial risk factors and her lack of comprehension of the resulting inherently high-risk of potential harm to the child." Id. at 30. CMC's social workers not only failed to acquire needed information during their assessment, they also failed to properly construe the evidence right before their eyes. Owen C. was admitted to CMC with a subdural hematoma for which his parents could not offer a satisfactory explanation. While medical tests for non-accidental trauma were inconclusive, construing these results as conclusive evidence of an accidental injury was not a reasonable response. The night before Owen C. was discharged, CMC neurosurgeon noted Owen C. was, from a medical perspective, ready for discharge but only "under supervision." (CMC 0039).

Had this information been collected, properly analyzed, communicated, and utilized in December 2009, Owen C. would not have been discharged to his parents without supervision. Instead, he would have been taken into emergency protective

custody by South Carolina authorities, remained at CMC, or discharged to some caregiver other than his parents. **More likely than not, Owen C. would not have been in Michael Carduff's custody in January 2010 when Michael inflicted the severe injuries from which Owen C. currently suffers.** This is not Appellant's supposition, it is the opinion of Appellant's expert witnesses. Dr. Savarese, a licensed social worker experienced in interactions between hospital social workers and state social services authorities, concluded that but for CMC's standard of care breaches "it is more likely than not this child would have been placed into custody with some other person than the custodial parents and the tragic situation in January 2010 would have been avoided." G. Savarese Aff. at 30. Kevin Moore, a former CMC hospital administrator concluded the "negligent actions or failure to act in contravention of clear suspicions of abuse and policy requirements caused and/or contributed to the injuries of Owen in January 2010." K. Moore Aff. at 6.

Judge Kimball disagreed with Dr. Savarese and Mr. Moore's conclusion that Owen C.'s injuries were caused by CMC's assessment/communication failings or their conclusion that permanent injuries stemming from abuse by the father was reasonably foreseeable to CMC. This holding is an error of law. Summary judgment may not be based on a court's disagreement with the evidence presented. Instead, the circuit court's order may stand only if there is no evidence from which a reasonable jury could conclude that Michael nearly fatal beating of his son was reasonably foreseeable to CMC and no evidence CMC's inadequate assessment and communication of the family's abuse risk profile was part of the chain of events leading to Owen C.'s injuries. Appellant's

uncontested expert testimony provides the requisite evidentiary showing to defeat summary judgment based on proximate cause.

Cases from other jurisdictions show that an assessment duty breach during a suspected child abuse victim's hospitalization can be a proximate cause of the victim's subsequent abuse injuries even if those injuries occur months after the child is discharged from the hospital. In Gaines v. Cumberland County Hospital System, Inc., 692 S.E.2d 119 (N.C. App. 2010), a young boy was taken to the emergency room with a broken wrist for which the boy offered inconsistent explanations.[7] Additional medical tests revealed other injuries in various stages of healing. None of the medical personnel notified the state department of social services regarding the injuries. Id. at 121. Three months later, the boy returned to the hospital with a traumatic brain injury. Ultimately the boy was rendered a quadriplegic with permanent brain damage. Id. at 122.

The Gaines court considered whether the plaintiff presented evidence that the hospital's breaches in the standard of care proximately caused the boy's permanent injuries. Id. The plaintiff offered expert testimony to prove the required causal connection. The hospital had child abuse policies requiring reports of suspected child abuse and completion of an "abuse/neglect screen" as part of its admission assessment process. Id. at 123. There was evidence in the record that the hospital staff did not complete the required assessment forms. Id.

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[7] Gaines has some factual distinctions from the present case (e.g. presence of earlier injuries evident on child's medical scans, abuser's outstanding warrants at time of inadequate hospital assessment) but none of them detract from the court's conclusion that a jury question on proximate cause can be created by an expert who testifies that an adequate assessment would have led DSS to intervene in a way that would have removed the child from the environment where the later permanent injuries were suffered.

The plaintiffs offered the expert testimony of a doctor with privileges at the hospital. She testified that the hospital breached the standard of care by, among other things, failing to properly screen the boy for child abuse. The expert also concluded that the boy's permanent injuries, suffered three months after the hospitalization where he was improperly screened, were proximately caused by the assessment failures. Id. at 124. The expert explained that had the hospital performed the proper assessment and properly communicated its results to North Carolina DSS, then the boy would not have been removed from the home in which he ultimately suffered permanent injury. Id. Even though the plaintiff's expert was opposed by a DSS witness, the court found sufficient evidence of proximate cause to submit the issue to a jury. Id. at 125.

In doing so, the court rejected the hospital's claim that the plaintiff's expert testimony was speculative in its conclusion as to how DSS would respond to the information the hospital would have gathered from a properly performed assessment. Since the plaintiff's expert had substantial experience with both DSS and the hospital, her testimony regarding DSS's likely response to a properly communicated assessment was non-speculative and sufficient to create a jury question even when opposed by a DSS witness. Id. at 124 (noting expert's "extensive experience").

As cited above, Appellant's two expert witnesses assert that Owen C. would not have been in Michael's care in January 2010 had CMC properly performed its assessment and communication duties in December 2009 because DSS would have contacted law enforcement and would have not permitted Owen C. to return or remain in his abuser's custody. The experts' conclusions were unopposed for purposes of CMC's summary judgment motion. Plus, Appellant's experts are intimately familiar with hospital social

work (Dr. Savarese is a licensed social worker) and the operations of CMC (Mr. Moore is a former CMC senior vice president and chief operating officer). In keeping with South Carolina proximate cause principles and supported by Gaines, Appellant presented proximate cause evidence sufficient to defeat CMC's summary judgment motion.

Similarly, Appellant's proximate cause showing is not undone by the intervening criminal act of Michael Carduff. the intervening criminal act of a third party does not automatically sever the causal chain between a defendant's negligent conduct and a plaintiff's injuries. In fact, "where the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act," then the defendant remains a proximate cause. Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 375 S.E.2d 37, 37 (Ct. App. 1989). Plaintiff need not prove the "particular chain of events" was foreseeable but only that the injury the criminal inflicted was "within the general range of consequences which any reasonable person might foresee." Cody P., 395 S.C. at 621, 720 S.E.2d at 478 (citing Shepard 299 S.C. at 375, 385 S.E.2d at 38). It was very foreseeable that allowing Owen C. to be returned to the care of the person(s) most likely responsible for causing the brain injury diagnosed on December 5, 2009, would lead to further injury or even death.

Several different types of evidence may be used to demonstrate that a defendant could reasonably foresee injuries ultimately perpetrated by the criminal act of an independent third party. Expert testimony may be used to establish foreseeability. An expert with knowledge of the defendant's business may testify regarding the types of harms the defendant anticipates in its business. See Cody P., 395 S.C. at 621-22, 720

S.E.2d at 478 (considering banking expert's testimony that banks anticipate theft). The defendant's policies and procedures may also demonstrate that it foresees certain types of harms may flow from its negligent conduct. In Cody P., the defendant's policies and procedures established rules to guard against certain harms. Id. at 622, 720 S.E.2d at 478. The policies themselves were some evidence that the defendant foresaw the types of harms it took the time and effort to guard against. Id.

Child abuse at the hand of a child's parent lies at the core of what the Juvenile Abuse Policy is designed to prevent. Before a child is discharged from the hospital, the Policy requires consideration of whether "it is unsafe for the juvenile to return to his or her parent." Juvenile Abuse Policy at 3 of 23. Competent social workers in the position of Ms. Harrison and Ms. Newmark recognize that their work is designed to prevent caretaker abuse of vulnerable children. They also recognize the risk of child abuse associated with "plac[ing] the child under the control of the two primary suspected potential perpetrators." G. Savarese Aff. at 29. Michael Carduff's conduct in 2010 was foreseeable to CMC and does not break the chain of causation between CMC's negligence and Owen's injuries.

In sum, Appellant produced evidence from which a jury could conclude that CMC breached its assessment and communication duties during Owen C.'s December 2009 hospitalization and that these breaches were a proximate cause of Owen's permanent injuries suffered in January 2010. However, proximate cause does not require that a negligent act precisely coincide with the damage it causes. In fact, a negligent act may "remain active" for liability purposes even if a third party's negligent act occurs in the interim. Mellen v. Lane, 377 S.C. at 282, 659 S.E.2d at 247 (citing State v. Burton, 302

S.C. 494, 498, 397 S.E.2d 90, 92 (1990)). The trier of fact must only determine whether the type of injury the plaintiff ultimately suffered was foreseeable to the defendant "at the time of the alleged breach." Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). Appellant's experts provided the requisite showing and the circuit order erred in granting CMC summary judgment.

CONCLUSION

CMC owed Owen C. a duty of care and Appellant presented evidence demonstrating CMC breached its duty resulting in catastrophic, permanent injuries. Appellant has met her obligation in this case to show duty, breach of duty, causation and damages. Based on the foregoing arguments, Appellant respectfully requests an order reversing the circuit court's summary judgment order.

Respectfully submitted,

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October 28, 2013