THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2014-002743

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER THE RESPONDENT WAS GROSSLY NEGLIGENT IN FAILING TO PROTECT, SUPERVISE, AND MONITOR THE PETITIONER?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PETITIONER FAILED TO PLEAD A PREMISES LIABILITY CAUSE OF ACTION, THAT THE PREMISES LIABILITY CAUSE OF ACTION WAS NOT RULED UPON BY THE CIRCUIT COURT, THAT THE PETITIONER'S PREMISES LIABILITY CAUSE OF ACTION WAS NOT PROPERLY PRESERVED FOR APPEAL, AND THAT SUMMARY JUDGMENT WAS PREMISES LIABILITY CAUSE OF ACTION?

STATEMENT OF THE CASE

This is a case alleging a lack of supervision under the South Carolina Tort Claims Act. It was commenced with the filing of a Complaint in the Sumter County Court of Common Pleas on April 24, 2008 alleging negligence/gross negligence. (ROA pp. 12-15). Defendants' Answer specifically pled the South Carolina Tort Claims Act and its limitations under S.C. Code Ann. §15-78-60. (ROA p. 18). A hearing on Defendants' Motion for Summary Judgment was held before the Honorable Clifton B. Newman on July 9, 2012. The Court granted the Petitioner additional time after the hearing to file any memorandum due to the fact that the Petitioner advised that they were unaware that the Tort Claims Act was being raised by the Respondent. (ROA pp. 1-2). Petitioner's final Memorandum was filed on July 19, 2012, Respondents replied and a Memorandum was filed on July 26, 2012. (ROA pp.188-209). By Order dated September 24, 2012 (hereinafter, Order), the Court granted Respondents' Motion for Summary Judgment. (ROA pp. 1-11).

South Carolina Court of Appeals affirmed the judgment of the Circuit Court on two (2) grounds. First, the Court determined that Summary Judgment was proper because the evidence

does not support the inference that the employees at the facility failed to exercise at least slight care in supervising Fatima Karriem. Furthermore, the Court ruled that the Petitioner's Premises Liability Claim was unreserved for their review because the Petitioner did not file a Rule 59(e) S.C.R.C.P., Motion Requesting a Ruling from the Circuit Court in regards to that issue.

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

As the circuit court properly found, the area where Fatima had been sitting was a leisure area. [R. 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 . . . . 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).

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. (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 patients are in that area is to get on and off a bus?

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. Plaintiff has provided no evidence – none – to the contrary.

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 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.").

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

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY HELD IN THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE RESPONDENT WAS GROSSLY NEGLIGENT IN FAILING TO PROTECT, SUPERVISE AND MONITOR THE PETITIONER

The Appellant has 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 governmental entity has the initial burden of establishing a limitation upon liability or an exception to the waiver of immunity, the Plaintiff must prove the government 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).

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)).

"'[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).

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. This, in and of itself, is "slight care." 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. This is far more than required, and thus doubly far from gross negligence.

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. The same applied here. There is a total absence of any evidence showing a lack of slight care. There is substantial and undisputed evidence that at least slight care was provided. These facts independently suffice to require summary judgment for the Defendant.

Finally, the Petitioner continuously argues throughout their brief that the water hose was "on a sidewalk". There is no evidence in the record that a water hose was in the sidewalk other than the leading questions posed to deponents by the Petitioner's attorney in where he assumes that the hose was on the sidewalk. Scotty Merritt testified in his deposition that the hose was "just sitting— you know, wrapped in a circle on the– the ground". (ROA p. 168). In fact, Scotty Merritt testified that the hose was "lying on the side of the building where the spigot was attached to the wall." (ROA p. 166).

Thus, the Petitioner's assertion throughout the brief that the hose was "sprawled out on the sidewalk" is incorrect. In fact, Scotty Merritt corrected the Petitioner's attorney in his deposition that the hose was not sprawled out, but rather wrapped. (ROA p. 167).

Lastly, the Petitioner also argues that Fatima Karriem was taken to a high traffic area for recreation. In fact, the group of consumers were taken to the loading area which was covered. This loading area was only busy during pick-up and drop-off times. The Petitioner's were advised in the deposition of Joyce M. Jackson that other than the pick-up and drop-off times, there was not a lot of activity other than the pick-up and drop-off times. (ROA p. 120).

The Petitioner has failed to demonstrate any evidence showing a lack of slight care. There

is substantial undisputed evidence that at least slight care was provided. Therefore, the Respondent's Motion for Summary Judgment was properly granted.

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE PETITIONER DID NOT PLEAD A PREMISES LIABILITY CAUSE OF ACTION, THAT THE PETITIONER'S PREMISES LIABILITY CAUSE OF ACTION WAS NOT RULED UPON BY THE CIRCUIT COURT, THAT THE PETITIONER'S PREMISES LIABILITY CAUSE OF ACTION WAS NOT PROPERLY PRESERVED FOR APPEAL AND THAT THE SUMMARY JUDGMENT GRANTED BY THE CIRCUIT COURT WAS UPHELD DUE TO THE PETITIONER'S FAILURE TO PRESERVE ADDITIONAL SUSTAINING GROUNDS

The Petitioner failed to plead in their Complaint a claim for premises liability. In paragraph 9 of the Petitioner's Complaint, the Petitioner listed nine (9) specific duties that were owed to the Petitioner by the Respondents. (ROA pp. 13-14). Paragraph 10 of Petitioner's Complaint further states that the Respondent and/or its employees and/or agents breeched their duty to Petitioner, in one or more of the particular set forth above, by negligent and grossly negligent conduct. (ROA p. 14).

Regardless, the Petitioner's argued at the Summary Judgment Hearing a premises liability claim. While the Respondents denied that they could raise this claim, it was nonetheless briefed and argued to the Court.

The Order of Judge Newman was premised on three (3) grounds. First, the Petitioner was precluded from prevailing in this action under the South Carolina Tort Claims Act. The Court found under that section that the Respondent was immune from liability pursuant to S.C. Code Ann. §15-78-60(25) and the Respondent was immune from liability pursuant to S.C. Code Ann. §15-78-60(4).

Next, the Court found the Petitioner's claim regarding negligent hiring and training fail as a matter of law. Lastly, the Court found that the Petitioner received adequate medical treatment.

There was not any direct ruling as to the Plaintiff's premises liablity claim that was first raised at the Summary Judgment Motion Hearing. Thus, it was incumbent upon the Petitioner to file a Rule 59(e) S.C.R.C.P. Motion to address the Court's lack of ruling in regards to that claim.

The Appellate Court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower Court it has ruled wrongly and then, if that effort fails, convince the Appellate Court that the lower Court erred. This principle underlines the long established preservation requirement that the losing party generally must both present his issues and arguments to the lower Court and obtain a ruling before an Appellate Court will review those issues and arguments. *E.g. Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (Appellate Court generally will not address an issue unless the issue was raised to and ruled upon by the Trial Court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (*Sumter Building and Loan SS'N v. Winn*, 45 S.C. 381, 23 S.E.29 (1895)).

The Court in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) stated, if the losing party has raised an issue in the lower Court, but the Court fails to rule upon it, the party must file a Motion to Alter or Amend the Judgment in order to preserve the issue for Appellate review. *E.g. Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *See also Rule 52(b) and 59(e) S.C.R.C.P.*

Imposing this preservation requirement on the appellant is meant to enable the lower Court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive

for a party to prepare a case throughly. It prevents a party from keeping an ace card up his sleeve- intentionally or by chance- in the hope that an appellate court will accept the ace card and, via a reversal, give him another opportunity to prove his case. *See Brown v. Singletary*, 226, S.C. 482, 85, S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial); *State v. Warren*, 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945). As mentioned previously, Judge Newman's Order does not address the Petitioner's premises liability claim. Therefore, it was incumbent for the Petitioner to raise that issue to the Court prior to filing this appeal. The Petitioner failed to raise the issue to the Court, and the Petitioner's premises liability claim is not properly preserved.

The Respondent also raised arguments before the Court of Appeals that the only issue appealed by the Petitioner was whether the trial court erred in finding that no genuine issue of material fact existed that demonstrated that the Respondent was grossly negligent in protecting, supervising and monitoring Fatima Karriem. Judge Newman's Order found that the Plaintiff was precluded from prevailing in this action under South Carolina Tort Claims Act on two (2) grounds. First, the Respondent was immune from liability pursuant to S.C. Code Ann. §15-78-60(25). Judge Newman also found an additional sustaining ground that the Respondent was immune from liability pursuant to S.C. Code Ann. §15-78-60(4). The Petitioner did not appeal this additional sustaining ground under §15-78-60(4). Thus, this matter should be affirmed under the two issue rule.

Issues and arguments are preserved for Appellate review only when they are raised to and ruled on by the lower Court. *Elam v. S.C. Dep't Transp.*, 361, S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court. Rule 208(b)(1)(B), S.C.A.C.R. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on

appeal." "Every ground of appeal ought to be so distinctly stated that the reviewing Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Forest Dunes Assocs. Club CARIB, Inc., 301 S.C. 87, 89, 390 S.E.2d. 368, 370 (Ct. App. 1990).

Under the two issue rule, where a decision is based on more than one ground, the Appellate Court will affirm unless the Appellant appeals all grounds because the unappealed ground will become the law of the case. *See Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); *See also First Union National Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511, S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance). This Court has explained that the two issue rule is applicable in situations not involving a jury:

> 'It should be noted that although cases generally have discussed the 'two issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.' *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417 n. 1, 472 S.E.2d 253, 255 n.1 (1996).

Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010) is analogous to this case. The Circuit Court granted a Motion for a directed verdict at the close of the Petitioner's case on four separate grounds. The Petitioner in Jones appealed three of the grounds but failed to appeal the Sheriff's Department was entitled to immunity under S.C. Code Ann. §15-78-60(6) for the method of providing police protection. The Supreme Court held that because the Petitioner failed to appeal the Circuit Court's holding that Respondent was entitled to immunity under §15-78-60(6) that finding became the law of the case under the two issue rule.

Similarly, your Respondent submits in this case that because the Petitioner failed to appeal the Court's determination that the Respondent's were immune from liability pursuant to

S.C. Code Ann. §15-78-60(4) that finding becomes the law of the case under the two issue rule. Hence, the Court should affirm the decision of the Circuit Court and the Court of Appeals.

CONCLUSION

For the reasons stated above, Respondents ask the Court to deny the Petition for Writ of Certiorari in this case.

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January 20, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No.: 2014-002743

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

v.

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

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Proof of Service

I certify that I have served upon Petitioner a copy of the Return to Petition for Writ of Certiorari by depositing the same today in the United States mail, postage prepaid, addressed to:

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Dated: January 20, 2015

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January 20, 2015

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ATTENTION: Brenda F. Shealy

IN RE: Fatima Karriem v. Sumter County Disabilities and Special Needs Board
Appellate Case No.: 2014-002743

Dear Mr. Shearhouse:

Enclosed herewith please find the original and six (6) copies of Respondent's Return to Petitioner's Petition for Writ of Certiorari along with Proof of Service in the above matter.

If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

G. MURRELL SMITH, JR.

GMSjr:bt
Enc.
cc: John R. Moorman, Esquire
Shanta Weston, IRF # 27505

Priority Mail
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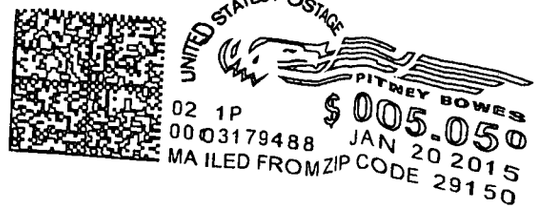

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