

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Clifton B. Newman, Circuit Court Judge

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Opinion No. 2014-UP-365 (S.C. Ct. App. filed October 22, 2014)

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

v.

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

APPENDIX

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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Case No. 2008-CP-43-1037

---

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

v.

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

---

APPENDIX TO RECORD ON APPEAL

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SC Court of Appeals

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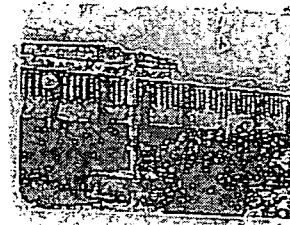
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Case Type:	Common Pleas	Case Sub Type:	Personal Injury 350	File Type:	Jury
Status:	Appeal	Assigned Judge:			
Disposition:	Other / Circuit Civil	Disposition Date:	10/01/2012	Disposition Judge:	Newman, Clifton
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

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	Order/Dismiss w/Prej and Summ Jud is granted	Order		10/01/2012-08:54	10/01/2012-08:54	
	Protective Order/Crt Terms- 9-10,10-22,11-5,12-10 2012	Order		09/06/2012-10:35	10/01/2012-10:35	
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Simmons, Philip	Summons & Complaint	Filing		04/24/2008-10:49	10/01/2012-10:49

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the video conference shall be responsible for the actual costs of the video conference, and the party proposing the expert shall be responsible for the costs of the expert, as set forth in paragraph # 4 above.

6. All counsel agree that if an out-of-state expert is named as a witness, the party naming the expert will accept a SCRCP 45(b) subpoena on the expert's behalf and agree that the expert is to comply with the subpoena, subject to the right of the party and/or expert to object to production of specific as required by the SCRCP.


7. Mediation shall be completed by September 15, 2010, should the parties agree to mediate.

8. All dispositive Motions would be filed at least ten (10) days prior to the trial.

9. The case shall be set for a day certain trial after October 1, 2010.

10. The parties may petition to amend this Scheduling Order upon good cause being shown with the consent of the attorney for the parties.

AND IT IS SO ORDERED.

  
CHIEF ADMINISTRATIVE JUDGE  
THIRD JUDICIAL CIRCUIT

Sumter, South Carolina  
Dec. 3, 2009

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER  
IN THE COURT OF COMMON PLEAS

RECORDED  
2011 NOV 21 AM 11:30  
JUDGMENT IN A CIVIL CASE  
CASE NO: 200SCP4301037  
JANE J. LAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Philip Simmons vs Sumter County Disabilities And Special Needs Board

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRCP.
  - Rule 41(e), SCRCP (Vol. Nonzuit).
  - Rule 43(k), SCRCP (Settled).
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRCP.
  - Bankruptcy.
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award.
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order,  Statement of Judgment by the Court

*This case is continued over the November 28 and December 5 terms. Discovery must be completed by March 9, 2012. All dispositive motions must be filed by March 16, 2012 and will be heard during the April 12 term. Case must be tried before 4/23/12.*

Court Reporter

*[Signature]*  
PRESIDING JUDGE

This judgment was entered on the . and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

J Thomas McElveen III Dahnmueller Goldman  
McElveen Ford Bulfinch P.O. Box 2038 Sumter, SC  
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G Murrell Smith Jr Lee Eric Wilson James Holler  
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CPFORM11M  
SCTA SCRCP Form 4 Revised 06/2010

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appendix to Record On Appeal contains all  
material proposed to be included by any of the parties and not any other material.

By: \_\_\_\_\_



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September 27, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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SEP 17 2013

SC Court of Appeals

Case No. 2008-CP-43-1037

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

v.

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

FINAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN FAILING TO APPLY A NEGLIGENCE STANDARD AS OPPOSED TO APPLYING A GROSS NEGLIGENCE STANDARD IN THE PRESENT CASE?**
  
- II. DID THE TRIAL COURT ERR IN FINDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED THAT DEMONSTRATED THAT THE RESPONDENT WAS GROSSLY NEGLIGENT IN PROTECTING, SUPERVISING, AND MONITORING FATIMA KARRIEM?**

## STATEMENT OF THE CASE

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

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

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

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

#### FACTS

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

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

---

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

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

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

## STANDARD OF REVIEW

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

The application of a negligence standard to the facts of this case is illustrated by several cases involving the State and/or State agencies and premises liability claims asserted by Plaintiffs injured on the State's premises. In South Carolina, the victim of sexual abuse on another's premises may bring suit under a premises liability theory.

Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589

(Ct.App.1994). In Burns, a resident at a rehabilitation center who was sexually assaulted by another resident brought a negligence suit against the Commission for the Blind. Id. at p.78. The jury returned a verdict in the victim's favor. On appeal, the Commission for the Blind argued the trial court erred in refusing to charge the jury on premises liability. Id. at p.80. This court agreed, stating that the relationship between the Commission and the victim was "analogous to that of a business invitee, [and] imposes liability on the Commission, if at all, similar to that of an owner of a business." Id. This court specifically held that "this is a premises liability case and, therefore, the judge should have charged the jury on premises liability, as limited by the South Carolina Tort Claims Act." Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

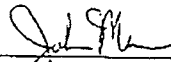
acknowledged that if the water hose was not being used, then it should have been put away. [R. at page 177-178]. Ms. Jackson also testified that she did not know how long the water hose had been on the sidewalk in the loading area. [R. at page 177-178]. When questioned, Ms. Jackson also agreed that leaving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

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

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

## CONCLUSION

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



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In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

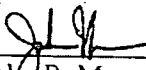
Fatima Karriem, through her court-appointed guardian, Phillip  
Simmons, .....Appellant,  
v.  
Sumter County Disabilities and Special Needs  
Board, .....Respondent.

PROOF OF SERVICE

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

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

This 17th day of September, 2013.

  
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Simmons.....Appellant,  
v.  
Sumter County Disabilities and Special Needs  
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APPEAL FROM SUMTER COUNTY

Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No.: 2012-213321

Fatima Karriem.....Appellant

v.

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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.<sup>1</sup>

### **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.

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<sup>1</sup> 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.<sup>2</sup> (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

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<sup>2</sup> 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).<sup>3</sup>

**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:

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<sup>3</sup> 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.)<sup>4</sup>

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.

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<sup>4</sup> *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.<sup>5</sup> 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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<sup>5</sup> 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.")<sup>6</sup>

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

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<sup>6</sup> 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<sup>7</sup>

### 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

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<sup>7</sup> 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.<sup>8</sup>

**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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<sup>8</sup> 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]he 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).<sup>9</sup>

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)).

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<sup>9</sup> 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.<sup>10</sup>**

**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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<sup>10</sup> 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).<sup>11</sup> If it was an independent contractor, as it appears to be, Appellant’s case must fail: 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).

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<sup>11</sup> 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.<sup>12</sup>

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<sup>12</sup> 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 here 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."<sup>13</sup> *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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<sup>13</sup> 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).<sup>14</sup> 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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<sup>14</sup> The Complaint reads almost as a list of items covered by Section 15-78-60 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).<sup>15</sup> 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.<sup>16</sup>

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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<sup>15</sup> 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).

<sup>16</sup> 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.<sup>17</sup> 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

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<sup>17</sup> Having additional staff would not have prevented her from being startled.

**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."<sup>20</sup> 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.

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<sup>20</sup> 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.

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

SC Court of Appeals

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

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

## FACTS

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

On or about April 25, 2006, Fatima was attending the day program at the Respondent's facility, and was under the care, supervision, custody, and control of the Respondent's employees when she was seated outside in the loading and unloading area of the Respondent's facility. [R. at page 153-155]. While she was seated outside in the loading and unloading area of the Respondent's facility, she was approached from behind by another consumer at the Respondent's facility, became startled, stood up from her seat and began to run away, and as she was running, she tripped and fell over a water hose that was lying on a sidewalk in the loading and unloading area of the Respondent's facility. [R. at page 175, lines 6-25]. As a result of her fall, Fatima suffered cuts to her face and a broken arm. At the time of her fall at the Respondent's facility, the Respondent's employee attempted to examine Fatima, but was unable to examine her. [R. at page 61]. Following Fatima's fall, the Respondent's employees provided no additional medical assistance and made no attempts to contact anyone about Fatima's fall or injuries.

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

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

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

It is important to consider Fatima Karriem's mental and physical limitations and propensities to be skittish and to become startled when approached from behind when deciding whether there exist genuine issues of material fact that would preclude the lower court's grant of summary judgment to the Respondent. The Respondent acknowledges that its employees had significant awareness of Fatima Karriem's overall condition in its brief, yet it attempts to ignore those facts in its analysis of whether any evidence existed to demonstrate that the Respondent was grossly negligent in protecting, supervising, and monitoring Fatima Karriem.

As stated in the Appellant's Initial Brief, the South Carolina Supreme Court stated that "[g]ross negligence is a relative term, and means the *absence of care that is necessary under the circumstances.*" Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629 (1952) (Emphasis supplied). This "absence of care that is necessary under the circumstances" language is completely ignored by the Respondent despite its relevance to the facts and circumstances involved in this case. Specifically, the "slight care" owed to one group of individuals is not the same as the "slight care" owed to another group of individuals. This distinction has been applied by South Carolina courts in determining whether or not evidence of gross negligence has been presented in cases involving the South Carolina Tort Claims Act.

In Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993), the South Carolina Supreme Court held that whether the School District exercised "slight care" in sending a note home from school with an eleven year old girl informing the girl's mother that her daughter's bus privileges had been suspended was a question for the jury.<sup>1</sup> Specifically, the South Carolina Supreme Court held that it was for the jury to determine whether the School District's failure to ensure that the girl's mother received actual notice of her daughter's bus suspension constituted gross negligence. In footnote two (2) of the Hollins opinion, the South Carolina Supreme Court distinguished the factual circumstances of Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) that were held to constitute "slight care." The basis for the Court's distinction in addressing whether a jury question existed in determining whether the School District exercised "slight care" dealt with the

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

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young age of the girl who was killed in Hollins, as opposed to high school ages of the Plaintiffs in Richardson.

As stated in the Hicks opinion, in determining whether or not an entity has exercised slight care, consideration must be given to the factual circumstances of a particular case. This reasoning and analysis was applied in the Hollins decision, which held that the age of an individual was to be considered in determining whether slight care was exercised under the circumstances. Like the South Carolina Supreme Court's consideration of the child's age in Hollins, the lower court must consider the particular circumstances involved, including Fatima Karriem's age, her mental capacity, and her overall limitations, in determining whether or not the Sumter County Disabilities and Special Needs Board exercised slight care in monitoring, protecting, and supervising Fatima Karriem.

The Court's holding in Hicks and the Court's application of that holding in Hollins is in line with the Court's analysis in Hughes v. Children's Clinic, P. A., 269 S.C. 389, 397-98, 237 S.E.2d 753, 756-57 (1977). While the Hughes' Court applied a "particular circumstances" analysis in the context of negligence, the Hollins' Court applied a similar analysis in the context of gross negligence.

As stated in the Respondent's Initial Brief, the Respondent acknowledged that Fatima has a number of physical and mental limitations as well as special supervision requirements. While the Respondent contests whether Fatima was approached from behind by another consumer, it clearly acknowledges that she was approached. Regardless of direction, the Respondent knew Fatima could be easily startled and was skittish, yet they allowed her to be approached by another consumer in an area that presented perils in her surroundings that she

could not appreciate. [R. at page 153-155]. Specifically, Fatima was in an area that was used for loading and unloading vehicles, was or had been undergoing some landscaping, and had an item, such as a water hose, that was not properly stored and was lying about. By the Respondent's own admission, this created a fall hazard not only for Fatima, but for others as well. [R. at page 159].

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

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

negligent in supervising, monitoring, and protecting Fatima Karriem given her mental and physical limitations and propensities.

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

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


As stated earlier, Scotty Merritt's testimony regarding the storage of the water hose and the hazards that leaving it on the sidewalk presented to consumers at the Defendant's facility was corroborated by Joyce Jackson. Ms. Jackson acknowledged that if the water hose was not being

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

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

### CONCLUSION

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



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

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

CERTIFICATE OF COUNSEL

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

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September 17, 2013

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

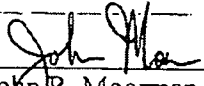
Sumter County Disabilities and Special Needs  
Board, ..... Respondent.

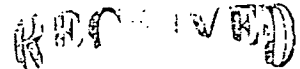
PROOF OF SERVICE

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

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

This 17th day of September, 2013.

  
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SC Court of Appeals

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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

v.

Sumter County Disabilities and Special Needs Board,  
Respondent.

Appellate Case No. 2012-213321

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Appeal From Sumter County  
Clifton Newman, Circuit Court Judge

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Unpublished Opinion No. 2014-UP-365  
Heard October 9, 2014 – Filed October 22, 2014

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**AFFIRMED**

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Appellant.

G. Murrell Smith, Jr., Lee, Erter, Wilson, Holler &  
Smith, LLC, of Sumter and Steven Barry Johnson, of  
Columbia, both for Respondent.

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**PER CURIAM:** Fatima Karriem, an adult diagnosed with autism and mental retardation, brought negligence claims against the Sumter County Disabilities and Special Needs Board after she fell and injured herself at a facility operated by the Board—the Disabilities and Special Needs facility in Sumter County. The trial court granted the Board's motion for summary judgment, finding Karriem presented no evidence of gross negligence as required by South Carolina Code subsection 15-78-60(25) (2005), an exception to the waiver of immunity under the Tort Claims Act.

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRPC." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted). Rule 56 provides the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

On appeal, Karriem asserts the trial court erred in granting summary judgment because issues of material fact exist as to whether the employees were grossly negligent in supervising, monitoring, and protecting Karriem. *See* § 15-78-60(25) (providing a governmental entity is not liable for a loss resulting from the "supervision, protection, control, confinement, or custody of any . . . patient . . . or client . . . , except when the responsibility or duty is exercised in a grossly negligent manner"). We find summary judgment was proper because the evidence does not support an inference that the employees at the facility failed to exercise at least slight care in supervising Karriem. *See Pack v. Associated Marine Inst., Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct. App. 2004) (defining gross negligence as "the failure to exercise slight care" (citation omitted)).

Karriem argues, however, she also brought a separate claim for premises liability that was not subject to any Tort Claims Act exception, and thus, the court erred in applying a gross negligence standard to grant summary judgment on this claim. Karriem's complaint does not expressly allege a premises liability cause of action. Instead, it alleges the failure of the employees to adequately "protect," "monitor," and otherwise supervise Fatima while at the facility, which mirrors the language of subsection 15-78-60(25). We acknowledge Karriem's arguments in response to the Board's motion for summary judgment effectively raised a separate claim for premises liability for the purposes of summary judgment. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412-13, 529 S.E.2d 543, 546 (2000) (finding party "effectively raised" a negligence claim at the summary judgment hearing although it was not pled in the complaint). Nonetheless, we find the trial court did not rule

on her premises liability claim in its order. Because Karriem filed no Rule 59(e), SCRCF, motion requesting a ruling, we find this issue unpreserved for our review. *See l'On. L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating when the trial court does not rule on an issue raised to it, a party must file a motion to alter or amend the judgment to preserve the issue for appellate review). Because we dispose of this issue on preservation grounds, we need not reach the Board's argument that the gross negligence standard provided in subsection 15-78-60(25) applies to Karriem's premises liability claim due to her status as a patient/client—to whom the facility owed a duty of supervision, protection, and control.

**AFFIRMED.**

**FEW, C.J., and SHORT and GEATHERS, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

---

Case No. 2008-CP-43-1037

---

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

v.

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

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PETITION FOR REHEARING

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NOV 05 2014

**SC Court of Appeals**

## INTRODUCTION

For reasons set forth below and for all reasons and grounds set forth in the Appellant's Final Appeal Brief and Final Reply Brief previously filed with the Court, the Appellant's Petition for Rehearing should be granted, the matter reheard, and judgment entered in favor of the Appellant. This case involves important questions regarding the preservation of issues before the trial court, the necessity of filing a motion to reconsider a trial court's order granting summary judgment, and the appropriateness of granting summary judgment on all of the Appellant's causes of action.

This is an appeal from an Order of the Court of Common Pleas for Sumter County, South Carolina granting summary judgment to the Respondent, Sumter County Disabilities and Special Needs Board. On April 24, 2008, the Appellant filed a Summons and Complaint against the Sumter County Disabilities and Special Needs Board. The Appellant's Complaint alleged both common law and statutory causes of actions involving negligence and gross negligence. On November 11, 2008, the Sumter County Disabilities and Special Needs Board filed its Answer. On March 16, 2012, the Sumter County Disabilities and Special Needs Board filed a generic motion for summary judgment that contained no basis for its motion other than stating that no genuine issues of material fact existed. At that time, no memoranda or affidavits accompanied the Sumter County Disabilities and Special Needs Board's motion for summary judgment. On July 9, 2012, a hearing on the Sumter County Disabilities and Special Needs Board's motion for summary judgment was held before the Honorable Clifton B. Newman. On the day of the hearing, the Respondent provided a Memorandum in Support of its Motion for Summary Judgment, which contained the basis of its Motion for Summary Judgment. In response to the Sumter County Disabilities and Special Needs Board's motion for summary judgment, but prior

to receiving Respondent's memorandum on the date of the hearing, the Appellant prepared a Memorandum in Opposition to the motion for summary judgment. Following oral arguments on July 9, 2012, the Appellant provided the Court with a Supplemental Brief in Response to the Sumter County Disabilities and Special Needs Board's Summary Judgment arguments, and the Sumter County Disabilities and Special Needs Board was permitted to file a Reply Brief to the Appellant's Supplemental Brief.

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

The appeal was timely filed, and the Court of Appeals affirmed the judgment of the trial court after oral argument. Fatima Karriem, through her court appointed guardian, Phillip Simmons v. Sumter County Disabilities and Special Needs Board, (S.C. Ct. App. October 22, 2012). Petitioner seeks a rehearing pursuant to Rule 221, SCACR, to review points overlooked and misapprehended by the Court.

#### ARGUMENTS AND AUTHORITY

Respectfully, the decision of this Court is in error. The Appellant respectfully submits that the Court overlooked and misapprehended several points in its opinion dated October 22, 2014.

**I. The Appellant Pled a Cause of Action for Premises Liability, the Premises Liability Cause of Action was Ruled Upon by the Circuit Court, the Issue was Properly Preserved for Appeal, and Summary Judgment was Improperly Granted by the Circuit Court on the Appellant's Premises Liability Claim.**

According to Rule 8 (a), South Carolina Rules of Civil Procedure, [a] pleading... shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends unless the court already has jurisdiction to support it. (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for relief to which he deems himself entitled... Additionally, Rule 8(f), South Carolina Rules of Civil Procedure states that "[a]ll pleadings shall be so construed as to do substantial justice to all parties."

In the present case, the Appellant clearly pled a cause of action for premises liability. Specifically, the Appellant pled in Paragraph 5 of her Complaint that "[o]n or about April 25, 2006, Fatima was at the Defendant Sumter County Disabilities and Special Needs Board's facility as a client/patient, and was under the care and supervision of the Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents when, due to the negligence of the Defendant and its employees and/or agents, she suffered a fall which resulted in serious injuries." In Paragraph 9 of the Appellant's Complaint, the Appellant stated [t]he Defendant Sumter County Disabilities and Special Needs Board and/or its agents and/or employees owed a duty to Fatima under the common law as well as by statute and regulation. This duty includes, but is not limited to, one or more of the following:..." Paragraph 10 of the Appellant's Complaint added "[t]he Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents breached their duty to Fatima, in one or more of the particulars set forth above, by negligent and grossly negligent conduct. Finally, the Appellant stated in Paragraphs 11 and 12 of the

Complaint that the negligent conduct of the Defendant was a proximate cause of the Appellant's injuries and damages.

In order to properly “[p]reserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity.” *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)). In the present case, the Appellant argued in her Memorandum in Opposition to Summary Judgment, at her oral argument, and in her Supplemental Memorandum in Opposition to Summary Judgment that this was a premises liability case. [R. at pp. 114-152, R. at pp.188-198, and R. at pp. 20-56].

The Appellant was not required to file a motion to reconsider because the cause of action for premises liability was properly raised before the Circuit Court and the Circuit Court judge ruled on the issue. In Judge Newman's Order dated September 24, 2012, he stated that he considered all oral arguments, briefs, and supplemental briefs in making his ruling. [R. at p. 1]. In the pleadings, at the oral argument, in the depositions taken by the Appellant, and in all of the Memorandum in Opposition to Defendant's Motion for Summary Judgment, the cause of action for premises liability was raised to the Circuit Court.

It is clear that Judge Newman ruled on all of the causes of action pled by the Appellant and that his ruling encompassed all causes of action, including premises liability. Specifically, Judge Newman's Order states “[t]here is no evidence to suggest the Defendant knew or could foresee that the Plaintiff would get startled, run from her chair to an area where yard work was being done and fall over a hose. There is no evidence Defendant or any staff member knew the hose was a trip hazard at the time the Plaintiff was injured...” [R. at p. 7]. Additionally, in his Order, Judge

Newman stated that “[t]he Court also notes that the Plaintiff has failed to produce any evidence, be it expert witness testimony or reports, that the water hose created a danger or unsafe environment at the time the Plaintiff ran to the area where the hose was located and fell. While not controlling this Court’s decision, the Court further notes our sister states have determined that a water hose lying in an open area, in plain sight was easily observable and did not create a foreseeable risk of unreasonable harm...” [R. at p. 7]. Finally, in his Order Judge Newman stated unequivocally that “[t]herefore, it is the ruling of this Court that all causes of action alleged as to the Sumter County Disabilities and Special Needs Board are hereby dismissed with prejudice, and the Defendant’s Motion for Summary Judgment is [granted].” [R. at p.11]. The Order sufficiently addresses the Appellant’s arguments to warrant the immediate filing of a notice of appeal. *See Smith v. Squires Timber Co.*, 311 S.C. 321, 324, 428 S.E.2d 878, 879-880 (S.C., 1993).

Furthermore, not considering the Appellant’s cause of action for premises liability against the Respondent violates Rule 1, South Carolina Rules of Civil Procedure. Rule 1, South Carolina Rule of Civil Procedure states: “[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure just, speedy, and inexpensive determination in every action.”

For instance, the decision rendered by the Court of Appeals in its October 22, 2014 opinion will result in unnecessary and expensive litigation. Based upon the reasoning in the present case, common form orders or one sentence denied orders will all be called into doubt and will require a motion to reconsider be filed. This would result in unnecessary motions for reconsideration and will eliminate the ability of judges to issue one sentence denied orders.

The decision of the Court of Appeals is also unjust. A portion of this appeal is that the Circuit Court was wrong in granting summary judgment on the Appellant's premises liability cause of action. It is clear that the premises liability issue was always before the Circuit Court. There were no deceptive tactics being employed by the Appellant to avoid a ruling on the issue. The Court of Appeals' decision is unreasonable and unjust to the Appellant because this is a case where an individual tripped and fell over a water hose and was injured. The Court of Appeals assumption that the Circuit Court overlooked and did not rule upon the premises liability claim asserted by the Appellant is unfair, unjust, and could not be further from the truth.

For instance, the Respondent never raised issue preservation as a grounds to defeat or end the Appellant's appeal. Had the Respondent believed that this was a grounds to end or defeat the Appellant's appeal, the Respondent would have certainly raised this issue in its brief to the Court of Appeals. Clearly, by its own actions, the Respondent knew that the premises liability cause of action had been sufficiently raised and ruled upon by the Circuit Court; therefore, asserting an issue preservation argument would be disingenuous and contrary to the South Carolina Rules of Civil Procedure.

In Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009), "[t]he Court of Appeals held that an issue was not preserved for review because petitioner failed to file a Rule 59(e), SCRPC, motion to alter or amend the judgment. Initially, the Court of Appeals held the issue was not preserved because the trial judge did not mention petitioner's alternative theory of liability that, as a former client of respondents, the petitioner had a continuing fiduciary relationship with the respondents.

However, in Spence v. Wingate the South Carolina Supreme Court held that the Court of Appeals erred in finding the issue was not preserved for appeal. The trial judge's order granted

the respondents' motion for summary judgment on *precisely* the grounds argued by the respondents at the summary judgment hearing. While that order did not restate the ground on which the petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling the respondents “owed no duty or obligation” to the petitioner. The South Carolina Supreme Court held that the trial court’s ruling was sufficient to preserve the petitioner’s argument that the respondents owed a duty to the petitioner, and the petitioner was not required to file a Rule 59(e) motion to alter or amend in order to preserve the issue for appeal.

Just like the petitioner in Spence, the Circuit Court’s ruling in the present case was sufficient to preserve the Appellant’s argument that the Respondent was negligent and breached its duty to maintain its premises, and this breach resulted in damages to the Appellant. As stated above, Judge Newman’s Order stated “[t]here is no evidence to suggest the Defendant knew or could foresee that the Plaintiff would get startled, run from her chair to an area where yard work was being done and fall over a hose. There is no evidence Defendant or any staff member knew the hose was a trip hazard at the time the Plaintiff was injured...” [R. at p. 7]. Additionally, in his Order, Judge Newman stated that “[t]he Court also notes that the Plaintiff has failed to produce any evidence, be it expert witness testimony or reports, that the water hose created a danger or unsafe environment at the time the Plaintiff ran to the area where the hose was located and fell. While not controlling this Court’s decision, the Court further notes our sister states have determined that a water hose lying in an open area, in plain sight was easily observable and did not create a foreseeable risk of unreasonable harm...” [R. at p. 7]. Finally, in his Order Judge Newman stated unequivocally that “[t]herefore, it is the ruling of this Court that all causes of action alleged as to the Sumter County Disabilities and Special Needs Board are hereby

dismissed with prejudice, and the Defendant's Motion for Summary Judgment is [granted]." [R. at p.11]. Just like the petitioner in Spence, the trial court's ruling in the present case was sufficient to preserve the Appellant's argument that the Respondent was negligent and breached its duty to maintain its premises.

**II. Genuine Issues of Material Fact Did Exist to Show that the Respondent was Grossly Negligent in Failing to Protect, Monitor, and Supervise the Appellant.**

Summary judgment was not appropriate on the Appellant's claims against the Respondent for failing to protect, monitor, and supervise Fatima Karriem. Clearly, more than one reasonable inference existed as to whether the Respondent was grossly negligent in protecting, monitoring, and supervising Fatima Karriem in light of her physical and mental limitations as well as her special supervision requirements.

The South Carolina Supreme Court has defined gross negligence in a number of ways. In Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932), the South Carolina Supreme Court held that it was "the failure to exercise slight care." In subsequent cases, it has been defined as "the intentional, conscious failure to do something which it is *incumbent* upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) (Emphasis supplied). The South Carolina Supreme Court has also stated that "[g]ross negligence is a relative term, and means the *absence of care that is necessary under the circumstances*." Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629 (1952) (Emphasis supplied).

"Gross negligence is ordinarily a mixed question of law and fact." Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (citing Clyburn v. Sumter

County School Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994)). "When the evidence supports but one reasonable inference, it is solely a question of law for court, otherwise it is an issue best resolved by the jury.... In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." *Id.* at 332, 566 S.E.2d at 545.

In Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993), the South Carolina Supreme Court held that whether the School District exercised "slight care" in sending a note home from school with an eleven year old girl informing the girl's mother that her daughter's bus privileges had been suspended was a question for the jury.<sup>1</sup> Specifically, the South Carolina Supreme Court held that it was for the jury to determine whether the School District's failure to ensure that the girl's mother received actual notice of her daughter's bus suspension constituted gross negligence. In footnote two (2) of the Hollins opinion, the South Carolina Supreme Court distinguished the factual circumstances of Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) that were held to constitute "slight care." The basis for the Court's distinction in addressing whether a jury question existed in determining whether the School District exercised "slight care" dealt with the young age of the girl who was killed in Hollins, as opposed to high school ages of the Plaintiffs in Richardson.

As stated in the Hicks opinion cited above, in determining whether or not an entity has exercised slight care, consideration must be given to the factual circumstances of a particular case. This reasoning and analysis was applied in the Hollins decision, which held that the age of

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

an individual was to be considered in determining whether slight care was exercised under the circumstances. Like the South Carolina Supreme Court's consideration of the child's age in Hollins, the lower court must consider the particular circumstances involved, including Fatima Karriem's age, her mental capacity, and her overall limitations, in determining whether or not the Sumter County Disabilities and Special Needs Board exercised slight care in monitoring, protecting, and supervising Fatima Karriem. As stated in the Respondent's Memorandum in Support of Summary Judgment, the Respondent acknowledged that Fatima has a number of physical and mental limitations as well as special supervision requirements. The Respondent knew Fatima could be easily startled and was skittish, yet they allowed her to be approached from behind by another consumer in an area that presented perils in her surroundings that she could not appreciate. [R. at page 153-155]. Specifically, Fatima was in an area that was used for loading and unloading vehicles, was or had been undergoing some landscaping, and had an item, such as a water hose, that was not properly stored and was lying about the area. By the Respondent's own admission, this created a fall hazard not only for Fatima, but for others as well. [R. at page 159].

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

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

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

In his deposition, Scotty Merritt testified that he completed an Incident Report. Mr. Merritt testified that all landscaping in the area where Fatima fell had been completed, that the

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

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

In addition to her testimony regarding the storage of the water hose that caused Fatima's fall, Ms. Jackson testified that the incident report documenting Fatima's fall was not properly completed, that Fatima's family should have been contacted, but were not, and that these steps

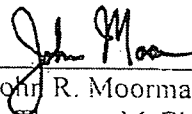
should both have been completed in accordance with the Defendant's policies and procedures. [R. at page 182-185].

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

#### CONCLUSION

Based on the foregoing, the Court erred with regard to holding that the Appellant did not properly preserve its argument that her premises liability claim was raised to the Circuit Court, was ruled upon by the Circuit Court in its Order, and erred with regard to holding that the no genuine issues of material fact were presented that the Respondent was grossly negligent in protecting, monitoring, and/or supervising Fatima Karriem in light of her physical and mental limitations as well as special supervision requirements.

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**SC Court of Appeals**

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

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v.

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

**PROOF OF SERVICE**

I certify that I have served the Appellant's Motion for Rehearing on the Respondent, by hand delivering a copy on November 5, 2014, addressed to their attorney of record, G. Murrell Smith, Jr., Esquire, at his office located at 126 North Main Street, Sumter, South Carolina 29150.

November 5, 2014  
Date

Gayle Tindal  
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# The South Carolina Court of Appeals

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

v.

Sumter County Disabilities and Special Needs Board,  
Respondent.

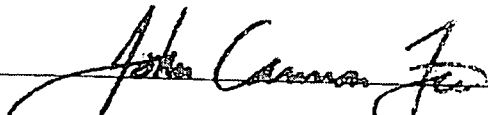
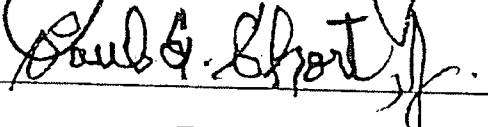

Appellate Case No. 2012-213321

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## ORDER

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After careful consideration of the Appellant's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_ C.J.  
  
\_\_\_\_\_ J.  
  
\_\_\_\_\_ J.

Columbia, South Carolina

cc:  
John Richard Moorman, Esquire  
Joseph Thomas McElveen, III, Esquire

**FILED**

November 21, 2014