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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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

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

Plaintiff,

Vs.

Sumter County Disabilities and Special
Needs Board,

Defendant.

RECORDED
2012 OCT - 1 PM 12:43
IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
DOCKET NUMBER: 2008-CP-43-1037

JAMES R. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. Hunt
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

ORDER

This matter is before the Court on Defendant's Motion for Summary Judgment. A hearing on the motion was held in the Sumter County Court of Common Pleas on July 9, 2012. J. Thomas McElveen, III, Esq., attended the hearing on behalf of the Plaintiff while G. Murrell Smith, Jr., Esq., and Steven B. Johnson, Esq., represented the Defendant. After hearing oral arguments and reviewing the briefs submitted by both parties, the Court allowed the parties to submit supplemental briefs. The Plaintiff submitted a timely supplemental brief in opposition on July 19, 2012 while Defendant submitted a timely response on July 30, 2012. After hearing oral arguments and reviewing the briefs submitted on behalf of both the Plaintiff and Defendant, for the reasons stated herein below, the Defendant's Motion for Summary Judgment is granted and this case is dismissed.

FINDINGS OF FACTS

Plaintiff alleges Defendant's conduct was negligent and grossly negligent in its dealings with Plaintiff. Defendant denies the Plaintiff's allegations. The facts as presented in the record are as follows. The Plaintiff is an autistic thirty nine year old female who cannot talk. See Defendants' Memorandum In Support of Motion for Summary Judgment Exhibit A, Deposition of Phillip Simmons p. 16. The Plaintiff has a limited understanding and inability to communicate wants/needs to unfamiliar

persons due to a lack of verbal abilities. See Id. Exhibit B, Report For Single Plan Development of Fatima Karriem. Moreover, Plaintiff has some compulsive autistic-like tendencies and history of aggressive behavior when upset. The Plaintiff lives with her uncle and court appointed guardian, Phillip Simmons. In April of 2006, she was enrolled at the Sumter County Disabilities and Special Needs facility located on Electric Drive. See Id. Exhibit A, Deposition of Phillip Simmons, p. 20. Plaintiff was enrolled as a day program participant which entailed her attendance at the Electric Drive facility Monday through Friday. Id. Plaintiff was picked up by a van operated by Defendant around 8:30 am and dropped off at her home around 3:30 pm. Id. As a consumer of the Facility Based Adult Day Services Program, Plaintiff was on an accountability level III which means she must be monitored by someone in the same room or nearby and may not be outside of visual supervision for longer than thirty minute periods. See Id. Exhibit B, Report For Single Plan Development of Fatima Karriem; Exhibit C, Deposition of Joyce M. Jackson, pp. 11-13; and Exhibit D, Accountability of Consumers Policy 1.3.8. Plaintiff was one of six consumers being monitored by two direct care staff.

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. The area is used for loading and unloading consumers from the facility and for providing an area where consumers can spend leisure time outside. See Id. Exhibit C, Deposition of Joyce M. Jackson, p. 19 and Exhibit E, Deposition of Scotty Merritt, p. 36-37. The records reflects that anytime before 2:30, which is loading time for consumers to go home, the consumers are allowed to sit in the covered area depending on the weather for leisure time. See Id. Exhibit C, Deposition of Joyce M. Jackson, pp. 19, 23-25. The Plaintiff was startled by another consumer, jumped from her chair and began to run. See Id. Exhibit F, Incident Report dated April 25, 2006. The Plaintiff ran from her chair and fell over a water hose in the grass which resulted in her falling to the ground. Id. The hose was in the grass because yard

maintenance was being done around the time of the fall. See Id. Exhibit E, Deposition of Scotty Merritt p. 40 & 53.

The Plaintiff was helped up and the nurse on duty was immediately summoned. See Id. Exhibit F, Incident Report dated April 25, 2006. The facility nurse responded to the scene and attempted to render first aid. The Plaintiff was found to have a small nick on her upper lip. See Id. Exhibit G, Deposition of Tina Lyes, p. 14 and Statement of Tina Lyes dated April 26, 2006. The Plaintiff was not bleeding and did not appear to be in any distress. Plaintiff would not allow the nurse to physically assess her or render first aid even after three attempts. See Id. Exhibit G, Deposition of Tina Lyes, p. 16. The Plaintiff was not guarding any particular body part, was not having any problems ambulating and did not appear injured. Id. The Plaintiff then walked away from the nurse and began scratching a staff member on the back which was an indication to staff that she was not injured.. See Id. Exhibit G, Statement of Tina Lyes dated April 26, 2006. There was no indication the Plaintiff was injured, had any swelling, bruising or that an emergency situation existed. See Id. Exhibit G, p. 30-34.

Shortly after her fall, Plaintiff left the facility on her normal bus route home. Two hours after being dropped off at home, Plaintiff's guardian discovered the Plaintiff acting differently. Plaintiff placed a towel over her arm and Plaintiff's guardian discovered her arm had some slight swelling. See Id. Exhibit A, Deposition of Phillip Simmons, p. 29-30. She was seen by a doctor about 5:00 p.m. that evening and it was discovered Plaintiff suffered a broken arm. Id. Exhibit A, Deposition of Phillip Simmons, p. 59.

CONCLUSIONS OF LAW

I. THE PLAINTIFF IS PRECLUDED FROM PREVAILING IN THIS ACTION UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

The Court finds as a matter of law that the Plaintiff is precluded from prevailing in this action pursuant to the South Carolina Tort Claims Act. The South Carolina Tort Claims Act "governs all tort

claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.” S.C. Code Ann. §15-78-10, et. seq. Pursuant to S.C. Code Ann. §15-78-20(b), the Tort Claims Act “constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.” Id. Governmental entities are defined by the act as “the State and its political subdivisions.” S.C. Code Ann. §15-78-30(d). 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”). A state employee is defined under the act as “any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty.” S.C. Code Ann. §15-78-30(c). The status of the Defendant 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. Thus, the Court finds Defendant in the present action is an agency of the state and any torts alleged to have been committed by any or all of its employees are governed by the provisions of the South Carolina Tort Claims.

A. Defendant is immune from liability pursuant to S.C. Code Ann. § 15-78-60(25).

This Court finds that Defendant is immune from liability for any alleged torts pursuant to Subsection 15-78-60(25). This provision provides that a governmental entity is not liable from “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.” S.C. Code Ann. § 15-78-60(25)(emphasis added). This Court finds the Plaintiff was a patient and client of a governmental entity and Plaintiff has failed to allege or produce evidence of any grossly negligent

conduct on the part of the Defendant.

Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Etheridge v. Richland School District 1, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (S.C. 2000). “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 (S.C. 2003). “Additionally, while 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.” Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245 (Ct. App. 2004)(citing Etheredge, 341 S.C. at 310)). The Plaintiff has the burden of proving gross negligence. See Stewart v. Richland Memorial Hospital, 450 S.C. 589 (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 still prove that the governmental entity has waived immunity)).

As in Pack, this Court finds there is absolutely no evidence in the record demonstrating that Defendant was grossly negligent. The Pack court determined that summary judgment was proper after finding that employees acted with at least slight care. Pack, 362 S.C. at 245. As in this case, the plaintiff in the Pack case 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)).

Plaintiff argues Hollins v. Richland County Sch. Dist. One, 310 S.C. 486 (1993) is applicable though this Court finds Hollins is distinguishable from the case at hand. The Court of Appeals found “the Supreme Court intended to limit the holding of Hollins to the facts of that particular case.” Clyburn v. Sumter County School District 17, 311 S.C. 521, 527 (Ct. App. 1993) *aff’d* 317 S.C. 50 (1994). The Clyburn court, which was affirmed by the Supreme Court, determined that the defendant was not grossly negligent as a matter of law and affirmed the trial court’s granting of summary judgment. Id. at 526. In Clyburn, it was alleged a school bus driver was grossly negligent when he failed to do more to prevent a second attack on a student rider. While the court determined the school bus driver *could* have taken other steps to ensure that a second attack would not occur, the court nevertheless found “at the very least they exercised ‘slight care’” and affirmed the trial court’s order granting summary judgment. Id.

There is no evidence that Defendant was grossly negligent or failed to exercise “slight care” in monitoring or providing Plaintiff with a safe environment. The record demonstrates that Plaintiff was being monitored in the area by staff when she was startled, ran from her seated position and fell over a hose in the grass. The hose was in a separate area from where Plaintiff was seated. The area where Plaintiff was seated was an area utilized by staff and consumers for leisure time. Plaintiff ran to a separate area where a hose was located due to yard maintenance. See Defendant’s Memo. In Support of Motion for Summary Judgment, Exhibit C and F, Depositions of Joyce Jackson and Scotty Brown, respectively. The hose was on the ground next to shrubbery because yard maintenance was being done around the time of the fall. See Id., Exhibit E, Deposition of Scotty Merritt p. 40, 45 & 53. Plaintiff attempts to support a gross negligence finding with the argument that Plaintiff fell and thus Defendant must have been grossly negligent in observing Plaintiff and the area because staff members did not prevent the fall. This is a circular argument akin to the doctrine of *res ipsa loquitur*. However, the law

requires some evidence of gross negligence, or in other words, some evidence that Defendant intentionally and consciously failed to do something or not do something.¹

There is no such evidence in this case and any such finding would be based on pure speculation. There is no evidence to suggest 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 or even in the area separate from Plaintiff's seated position.

The Court also notes that 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. See Zitron v. Sweep-A-Lot, 2010 WL 2395703, at *4 (Ohio App. 10 Dist. 2010); Smith v. Federal Cleaning Contractors, Inc., 126 Fed.Appx. 672, 674 (5th Cir. 2005)(finding a hose laying on the ground outside a shopping mall, clearly visible to anyone walking in the vicinity, does not pose an unreasonably dangerous condition)). There are no reports of other incidents with water hoses, no rules, standards or industry guidelines for the placement of water hoses that suggest Defendant created an unsafe or dangerous area.

There is no evidence that Defendant or any of its staff members were grossly negligent in their

¹ This Court finds Defendant is not liable for any cause of action alleging Defendant failed to inspect the area where Plaintiff ran to and fell to ensure it did not contain any hazard. Defendant can not be liable for such failures. See S.C. Code Ann. § 15-78-60(13) (Governmental entity is not liable for loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection of any property to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety.")).

monitoring of Plaintiff or providing Plaintiff with a safe environment. The only evidence in the record is that Plaintiff was being monitored and afforded a safe environment. For these reasons, Defendant is entitled to summary judgment.

B. Defendant is immune from liability pursuant to S.C. Code Ann. § 15-78-60(4).

Defendant is immune from liability for Plaintiff's allegations that Defendant failed to follow or comply with internal policies procedures and rules. Accordingly, Defendant is entitled to summary judgment. Subsection 15-78-60(4) provides that a governmental entity is not liable from "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." S.C. Code Ann. § 15-78-60(4). Subsection (4) of S.C. Code Ann. § 15-78-60 precludes a claim for the enforcement of or failure to enforce any written regulations, provisions, charters or policies.

The statute clearly exempts from liability any loss resulting from the failure to enforce a regulation, rule or policy; therefore, Defendant is immune from suit for any loss as a result of their non-enforcement of any written rule, regulation or policy.

II. PLAINTIFF'S CLAIMS REGARDING NEGLIGENT HIRING AND TRAINING FAIL AS A MATTER OF LAW.

Plaintiff's cause of action for negligent hiring, training and supervision of its employees fails as a matter of law. The Supreme Court of South Carolina has held in circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring the employee. James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008). Negligent hiring cases "generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties." Kase v. Ebert, 392 S.C. 57 (2011). Although foreseeability is usually an issue of fact, "the court should dispose

of the matter on a dispositive motion when no reasonable fact finder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard." Id. The standard in negligent hiring and retention cases is whether the employer knew the offending employee was in the habit of misconducting himself in a manner dangerous to others. Doe v. ATC, Inc., 367 S.C. 199 (Ct. App. 2005).

The record is void of any knowledge that any employee of Defendant created an undue risk of harm to the public. Any such claims are based on speculation and conclusory statements. Furthermore, the Plaintiff's claims that Defendant negligently trained its staff is unsupported by the record. There is no expert testimony regarding the training of Defendant's staff. The staff is regularly trained in a variety of issues including safety. See Defendant's Mem. In Support of Motion For Summary Judgment, Exhibit C, Deposition of Joyce Jackson p. 41. Accordingly, Defendant is entitled to summary judgment.

III. ADEQUATE MEDICAL TREATMENT

Plaintiff's assertion that Defendant did not receive adequate medical treatment after her fall fails as a matter of law and must be dismissed. In order to satisfy the burden of truth in a medical malpractice case, the South Carolina Supreme Court has previously held:

The plaintiff uses expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986); see also David v. McLeod Regional Medical Center, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

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

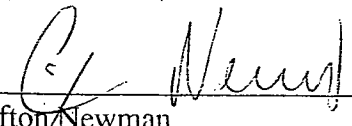
unless the plaintiff presents expert testimony on a standard of care and its breach by the defendant.” Jernigan v. King, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993). This is in accord with the Supreme Court’s view that in South Carolina, “medical malpractice actions require a greater showing than generic allegations and conjecture.” David, 367 S.C. at 249, 626 S.E.2d at 4. 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.

The Plaintiff has failed to provide the Court with expert testimony on the standard of care or its breach by the Defendant. The testimony of Tina Lyles reflects that she was immediately summoned to the scene and conducted an assessment. See Defendant’s Memo. In Support of Motion for Summary Judgment, Exhibit G, Deposition of Tina Lyles.

Plaintiff cannot simply allege in a conclusory fashion that she did not receive adequate medical care or attention, provide no supporting evidence, and expect to survive summary judgment. Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986) (courts need not assume the truth of legal conclusions couched as factual allegations)). Plaintiff’s personal opinion notwithstanding, nothing in the evidence and exhibits before the Court give rise to a genuine issue of fact as to whether anyone was deliberately indifferent to Plaintiff’s serious medical needs. See Scheckells v. Goord, 423 F. Supp.2d 342, 348 (S.D.N.Y. 2006)(citing O’Connor v. Pierson, 425 F.3d 187, 202 (2d Cir. 2005)(“Lay people are not qualified to determine...medical fitness, whether physical or mental; that is what...medical experts are for.”)). While Plaintiff may not agree with the extent and nature of the medical care she received, she cannot simply allege in a conclusory fashion that she did not receive adequate medical care or attention, otherwise provide no supporting evidence other than his own subjective opinion, and expect to survive summary judgment. See House v. New Castle County, 824 F.Supp. 477, 485 (D.Md. 1993).

THEREFORE, 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**.

AND IT IS SO ORDERED!



Clifton Newman
Circuit Court Judge

At Chambers,

Sept 24, 2012

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

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

PLAINTIFF,)

vs.)

Sumter County Disabilities and Special
Needs Board,)

DEFENDANT.)

RECORDED IN THE COURT OF COMMON PLEAS

2008 APR 24 CIVIL ACTION NO.: 2008-CP-43-1037
AM 10:42

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

COMPLAINT

**PLAINTIFF, THROUGH HER DULY APPOINTED AND ACTING GUARDIAN AD LITEM,
ALLEGES THE FOLLOWING:**

1. Plaintiff Fatima Karriem [**Fatima**] is a mentally, physically, and developmentally challenged woman with disabilities and special needs, and is a resident of the County of Sumter, State of South Carolina.
2. Upon information and belief, the Defendant, Sumter County Disabilities and Special Needs Board, is a private, non-profit corporation organized and existing under the laws of the State of South Carolina, and having its principal place of business in Sumter County, South Carolina.
3. The acts or omissions giving rise to this action were committed, either in whole or in part, in Sumter County, South Carolina and, therefore, venue is appropriate in this court, pursuant to Section 15-7-30 of the South Carolina Code of Laws.
4. For approximately a ten (10) year period prior to April 25, 2006, Fatima was a client/patient of the Defendant Sumter County Disabilities and Special Needs Board, and was under the care and supervision of the Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents.
5. On 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.

6. On or about the afternoon of April 25, 2006, Fatima was transported home, where she lives with her uncle, Phillip Simmons, from the Defendant Sumter County Disabilities and Special Needs Board's facility. After arriving home, Fatima began acting uncharacteristically, and appeared to be in distress. 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 ultimately required surgical intervention and further medical treatment.

7. On or about April 27, 2006, Phillip Simmons contacted the Defendant Sumter County Disabilities and Special Needs Board in an attempt to discover the cause of Fatima's serious injuries and to inquire about her daily activities; he was at that time notified by an employee and/or agent of the Defendant Sumter County Disabilities and Special Needs Board that Fatima had fallen on or about April 25, 2006 at the Defendant's facility.

8. Upon information and belief, the Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents failed to disclose Fatima's fall and/or her injuries to anyone who lived with or cared for Fatima, until Phillip Simmons inquired about these events approximately two days later. Furthermore, the Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents failed to have Fatima examined by a medical provider after her fall, and did nothing to facilitate medical treatment for Fatima's serious injuries.

9. The 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:

- 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.

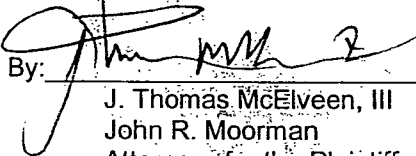
10. The Defendant Sumter County Disabilities and Special Needs Board and/or its employees and/or agents breached their duty to Fatima, in one or more of the particulars set forth above, by negligent and grossly negligent conduct.

11. The conduct of the Defendant set forth above was a proximate cause of Fatima's severe and permanent injuries, resulting in injuries and damages including past, present, and future pain, medical expenses, and suffering; mental and emotional anguish and illness; disfigurement, and disability; impairments which affect her enjoyment of life.

12. As a direct result of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness on the part of the Defendant, as aforesaid, the Plaintiff has been actually damaged and is entitled to punitive damages.

WHEREFORE, the Plaintiff requests appropriate judgment against the Defendant for actual damages together with punitive damages commensurate with the conduct of the Defendant, for the costs of this action, and for such other and further relief as the Court deems just and proper.

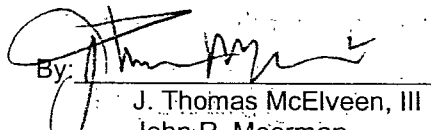
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Sumter, South Carolina
April 24, 2008

Jury Trial Requested.

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By: 
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John R. Moorman
Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER 2008 NOV 11 PM 4:13)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
DOCKET NUMBER: 2008-CP-43-1037

Fatima Karriem, through her court appointed guardian, Phillip Simmons,)
SUMTER COUNTY, S.C.)

Plaintiff,)

Vs.)

Sumter County Disabilities and Special)
Needs Board,)

Defendant.)

ANSWER
(JURY TRIAL DEMANDED)

The Defendant, by way of Answer to the Complaint of the Plaintiff, while reserving all right to the Motion to Strike pursuant to Rule 12(f), would respectfully show unto this Honorable Court the following:

1. Your Defendant denies each and every allegation not hereinafter admitted, denied or qualified and demands strict proof thereof.

AS A FIRST DEFENSE

2. Your Defendant admits the allegations of Paragraph 1 of the Plaintiff's Complaint.

3. Your Defendant would show that they are a governmental entity governed by the South Carolina Tort Claims Act as provided in S. C. Code Ann. §15-78-10 et seq.

4. Your Defendant admits so much of Paragraph 3 of the Plaintiff's Complaint as venue is proper in the County of Sumter, State of South Carolina but would show that venue is governed S.C. Code Ann. §9-15-100 (b).

5. Your Defendant admits the allegations of Paragraph 4 of the Plaintiff's Complaint.

6. Your Defendant admits so much of Paragraph 5 of the Plaintiff's Complaint in that April 25, 2006, Fatima Karriem was at the Sumter County Disabilities and Special Needs Board Facility as a client/patient. The remainder of said Paragraph is denied.

7. In regards to Paragraph 6 of the Plaintiff's Complaint, your Defendant is without sufficient information and belief to either admit or deny certain parts of said Paragraph and therefore denies the same and demands strict proof thereof.

8. In regards to Paragraph 7 of the Plaintiff's Complaint, your Defendant would admit so much of said Paragraph as Phillip Simmons contacted Sumter County Disabilities and Special Needs Board to inquire about her activities and he was notified that she had fallen.

9. In regards to Paragraph 8 of the Plaintiff's Complaint, your Defendant would deny the same and demand strict proof thereof. However, your Defendant does admit that they failed to notify Fatima Karriem's relatives of her fall until they inquired.

10. Your Defendant would deny Paragraph 9 of the Plaintiff's Complaint, including but not limited to, its sub-parts, as there is not a common law duty, statute or regulation that creates liability by these allegations on behalf of your Defendant.

11. Your Defendant denies the allegations of Paragraphs 10, 11 and 12 of the Plaintiff's Complaint.

12. Further answering Paragraph 12, your Defendant would show that the Plaintiff is not entitled to punitive damages pursuant to S. C. Code Ann. §15-78-120(b) and would move to strike the same pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure.

AS A SECOND DEFENSE

13. Your Defendant repleads all prior defenses as if set forth herein verbatim.
14. Your Defendant pleads sovereign immunity is an absolute bar to this action.

AS A THIRD DEFENSE

15. Your Defendant repleads all prior defenses as if set forth herein verbatim.
16. Your Defendant specifically pleads immunity and qualified immunity as a complete bar to the allegations of the Plaintiff.

AS A FOURTH DEFENSE

17. Your Defendant repleads all prior defenses as if set forth herein verbatim.
18. Your Defendant specifically pleads the applicable portions of the South Carolina Torts Claim Act, S. C. Code Ann. §15-78-10 et seq. as an absolute defense including, but not limited to, the following:

- a. The exercise of discretion or judgment by a governmental entity or employee or the performance or failure to perform any act of service which is in the discretion or judgment of the governmental entity or employee. (§15-78-60(5))
- b. Responsibility or duty including, but not limited to, the supervision, protection, control, confinement or custody of any student, patient, prisoner, inmate or client of any governmental entity, except when the responsibility of the duty is exercised in a grossly negligent manner (which is hereby denied by your Defendant). (§15-78-60(25))
- c. Acts or omissions of employees and volunteers of the South Carolina Protection and Advocacy System for the Handicapped acting within the scope of their official duties pursuant to Article 5, Chapter 33 of Title 43, when such acts or omissions are done are made in good faith and do not constitute gross negligence, recklessness, wilfulness, or wantonness (which is hereby expressly denied by your Defendant) (§15-78-60(31))
- d. Your Defendant specifically pleads a limitation on actual damages and a prohibition against punitive damages as are set forth in S. C. Code Ann. §15-78-120.

AS A FIFTH DEFENSE

19. Your Defendant repleads all prior defenses as if set forth herein verbatim.

20. Your Defendant would show that their acts were based upon due diligence and were in good faith. Therefore, they are not liable to the Plaintiff.

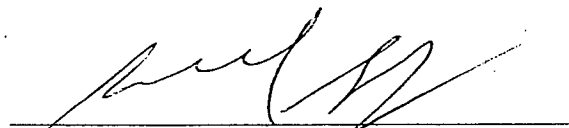
AS A SIXTH DEFENSE

21. Your Defendant repleads all prior defenses as if set forth herein verbatim.

22. The Plaintiff's claims for punitive damages under any cause of action directly violates the provisions of the United States and the South Carolina Constitutions, along with the provisions of the Code of Laws of South Carolina, specifically §15-78-10 et sq. and therefore any claim for punitive damages should be dismissed absolutely.

WHEREFORE, having fully answered the Complaint of the Plaintiff and Counterclaiming thereto, your Defendant would request that the Plaintiff's Complaint be dismissed, in its' entirety, and he be granted the relief sought in his Counterclaim and that they be granted costs for the defense of this case.

LEE, ERTER, WILSON, HOLLER,
SMITH & MCIVER, LLC



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November 10, 2008

State of South Carolina)
County of Sumter)

In The Court of Common Pleas
Third Judicial Circuit
2008-CP-43-1037

Fatima Karriem, through her)
court-appointed guardian,)
Phillip Simmons,)
Plaintiff,)

vs.)

Transcript of Record

Sumter County Department of)
Disabilities and Special)
Needs Board,)
Defendant.)

July 9, 2012
Sumter, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

A P P E A R A N C E S:

J. Thomas McElveen, Jr., Esquire
Attorney for the Plaintiff

G. Murrell Smith, Jr., Esquire
Steven B. Johnson, Esquire
Attorneys for the Defendant

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>
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No Exhibits Introduced.

1 THE COURT: The next one is Sumter Disabilities and
2 Special Needs Board, Simmons vs. Sumter Disability. All
3 right, defendant's memoranda in support of summary
4 judgement, memorandum in opposition to motion for summary
5 judgement. This is defendant's motion?

6 MR. SMITH: It is, Your Honor.

7 THE COURT: All right, Mr. Smith.

8 MR. SMITH: Thank you. May it please the court?
9 Sorry we didn't settle this one out, and it would have been
10 a shorter day for you, but nonetheless, we'll try to make
11 this quick.

12 Judge, I'm representing the Department of Disabilities
13 and Special Needs, and we will get into that, but let me
14 just give brief facts. I think Mr. McElveen and I can
15 agree as to the facts and in the light most favorable to
16 the plaintiff is Fatima Karriem is, I think she's
17 thirty-nine years old, but she's in her thirties and she's
18 disabled, Judge. And her disability -- and she's not
19 communicative, and so there's no communication with her.
20 She cannot, she cannot communicate at all hardly besides
21 just, you know, certain hand signals or things of that
22 effect.

23 She is a -- they call them consumers out at the
24 Department of Disabilities and Special Needs here in Sumter
25 on Electric Drive. She does the day, the day care provider

1 -- day care service which is, in essence, she comes in the
2 morning. A bus goes and picks her up from her home, and
3 then leaves about 3:00 or arrives home around 3, 3:30 by
4 the bus returning over there. And they, and they watch
5 these individuals. There's a number of them, and they have
6 providers.

7 Judge, she was a level 3. That came out through the
8 testimony, and a level 3, just to make sure I got this
9 right, must be monitored, and it's in the policy, by
10 someone in the same room or nearby and not outside, visual
11 supervision for longer than thirty minutes. That's her
12 level over there. So, that's by their own policy; that's
13 what they assessed her to be is at that level.

14 Judge, on April 25th of 2006, they were -- she was at
15 the Disabilities and Special Needs and she was watching --
16 it's some, there's some, I guess, confusion as to what, you
17 know, what happened all before but nonetheless, I think she
18 was at lunch from the testimony. Mr. McElveen -- well, let
19 me back up.

20 The testimony is also she is, she's had -- her
21 guardian I believe is her uncle, Judge, and so that's who
22 -- the guardian brought this, and so her guardian
23 testified. That's the only deposition we took. Basically,
24 she came home with a broken arm, and I'll tell the court
25 how she got there, but he didn't know how it occurred other

1 than, you know, what he found out through incident reports.
2 And then Mr. McElveen's office took depositions of three
3 individuals, Judge, and that's all the evidence we have in
4 this record, and they are referenced back and forth. There
5 are excerpts and depositions in both, both briefs.

6 But what happened is they took her outside, Judge,
7 under a porte cochere and let her sit there. And the
8 testimony of Scotty Merritt, who was a sort of supervisor
9 over this, says that was not unusual. If it was a nice
10 day, they went out there and sat, and sat around and
11 watched. Two people were out there at the time, Judge.
12 There were two workers -- that's the evidence that's in the
13 record -- who were supervising her, so to speak. And so,
14 you know, they complied with the policy with that.

15 She did not like people touching her, Judge, and so no
16 one was allowed to touch her, and this will be important
17 when we go through the facts. But someone walked outside,
18 another consumer, another patient of theirs walked outside,
19 and I think either touched her or did something that
20 startled her. And so when it startled her, Judge, she got
21 up and started running.

22 And you have to understand the dynamics of this. You
23 got a porte cochere and you got sidewalks, and the porte
24 cochere is where they're picked up. And I think through the
25 deposition testimony, it's, it's fairly clear. I think Mr.

1 Moorman took the depositions on behalf of Mr. McElveen, but
2 kind of some implications you shouldn't have had them out
3 there. It's pickup time. The testimony was clear that was
4 no pickup time. There weren't buses or cars coming and
5 doing any of that. They were just enjoying some relaxing
6 time around 1:25.

7 So, she took off running, Judge; she took off running
8 through the grass. There's a sidewalk that goes around the
9 building, and then there's grass in the middle, and when
10 she took off running, she tripped over a water hose and
11 fell.

12 And the water hose, Judge, the testimony, the only
13 testimony in the record is from Scotty Merritt, who's the
14 supervisor, who says that they doing maintenance, yard
15 maintenance around that time. Now, whether they were doing
16 it exactly then or not, they -- but, you know -- and she
17 just remembered -- couldn't say, but when she came out
18 there, they were doing yard maintenance. They were
19 watering bushes, et cetera, et cetera.

20 So, she tripped and fell over the water hose, Judge.
21 Eventually, the -- well, she -- eventually she had a broken
22 arm and just, they had to have a fracture repaired and
23 stabilized. But regardless, she tripped over.

24 The nurse came out. They called the supervisor. They
25 called the nurse. The nurse came out and tried to examine

1 her, tried on three different occasions. As I mentioned
2 earlier, she doesn't like to be touched, so she could not
3 -- you know, they couldn't really examine her. She had
4 long sleeves on. They didn't notice anything wrong with
5 her; she didn't seem to have any problems. She had a
6 little nick on her, on her lip. They said watch it, and
7 they sent her on home that evening.

8 So, she got home about 5:00. Her uncle or guardian
9 testified she came out of her room with a towel wrapped
10 around her arm, which to him was an indication that her arm
11 was hurting. He took her to the hospital, and that's when
12 they discovered the fracture. So, you know, some four
13 hours, four or five hours later, the fracture was
14 discovered.

15 They have filed suit, Judge, in this case and they
16 allege that there was -- you know, they allege negligence.
17 Reading through this and -- you know, they again, in his
18 brief he alleges negligence, and I'll talk about that.

19 But, Judge, as you know, we've governed by the Tort
20 Claims Act, and Tort Claims Act provides, you know, you
21 know, immunity or certain exceptions in that. And so, you
22 know, what we -- what he's done is allege negligence.
23 There's no other allegations in here besides negligence.
24 He's got a number of different, a number of different
25 allegations as to negligence. But regardless, Judge, we

1 need to deal with the Tort Claims Act, and that's where the
2 liability comes from.

3 First and foremost, I don't think there's any argument
4 from them that we're subject to the Tort Claims Act.
5 Although you got county boards, it's a governmental entity,
6 and cited in our brief is how the statutory scheme is that
7 would invoke the Tort Claims Act.

8 So, really, Judge, the allegation that this comes up
9 under, you know, in our opinion is we pled limitations of
10 liability immunities under 15-78-60. Specifically there's
11 two sections, but specifically it's 25, Judge. And under
12 25, it says:

13 A governmental entity is not liable for
14 responsibility or duty, including but not limited
15 to supervision, protection, control, confinement,
16 or custody of any student, patient, prisoner,
17 inmate, or client of any governmental entity
18 except when the responsibility or duty is
19 exercised in a grossly negligent manner.

20 So, Judge, what we've done is, is we pled that
21 section, and I don't think there's any question that this
22 section applies to the Department of Disability and Special
23 Needs. And so what it says is we're immune from liability
24 from any supervision or custody, control, confinement of
25 any patient, and that's the law in South Carolina unless it

1 is exercised in a grossly negligent manner.

2 Now, just skimming through Mr. McElveen's brief is
3 what he's arguing is we are negligent: negligent,
4 inherently dangerous, negligent. That's not the standard
5 that we're dealing with here today. The standard we're
6 dealing with is gross negligence. And, Judge, when you
7 read gross negligence, and obviously I know the court knows
8 the definition of gross negligence and deals with it often,
9 but it's:

10 The intentional, conscious failure to do
11 something which is incumbent upon one, or do
12 something intentionally ought not to be done.

13 And then, Judge, there's a number of cases in, in --
14 that the Supreme Court has ruled, and I think the sentinel
15 case, Judge, is dealing with *Jinks vs. Richland County*
16 which defines gross negligence in the context of a
17 liability by governmental entity. It's:

18 The intentional, conscious failure to do
19 something which is incumbent upon one to do, or
20 the doing of the thing intentionally that one
21 ought not to do.

22 It's the failure to exercise slight care. So, Judge,
23 what we're governing here is the slight care issue. That's
24 what the court needs to determine: whether there was slight
25 care provided to Fatima Karriem on April 25, 2006.

1 Now, Judge, most of times, and you go through and you
2 read these, these cases on gross negligence, and I will
3 certainly concede that gross negligence, and the court says
4 is a mix of law and fact. And so, you know, some of the
5 people say, well, you got to, you know -- what is an issue
6 of fact and let the jury determine.

7 Judge, as you may remember from over here in this
8 area, there was a case called *Pack vs. RMI*, and it was the
9 case, I don't, I don't know if you were involved in it, but
10 it was a case that was the Pack boys who run Pack's Landing
11 over here. They had, they had some juvenile defendants
12 from the Marine Institute that came and killed someone.
13 And the case, it is *Pack vs. RMI*, is a case that's almost
14 perfectly on point in my opinion, Judge, with what we have
15 here.

16 And in that case now, RMI was a, was a, was a
17 charitable entity, but as you know, the Charitable,
18 Solicitation of Charitable Funds Act incorporates the Tort
19 Claims Act. And in there, they talked about, they talked
20 about something very similar as this, and Judge Cooper,
21 Tommy Cooper -- or, as they call him, the Clarendon Tommy
22 Cooper -- is the one that heard that case and granted
23 summary judgment.

24 And what the Court of Appeals said is ordinarily it's
25 a mixed question of law and fact. When the evidence -- but

1 when the evidence supports one reasonable inference, then
2 the question becomes a matter of law for the court. And it
3 went on, Judge, as in that case just basically saying that
4 their, that their -- the evidence was overwhelming that
5 there was at least slight care. And so, Judge, that's the
6 same issue that we have here, in my opinion, with this case
7 is was there slight care.

8 And so what does the evidence show in this case? What
9 do they argue? And, Judge, a couple of things from what I
10 can glean from them is, one, they argue that a hose is an
11 inherently dangerous condition. You leave a hose unwound
12 in a setting of disabled people, then, you know, you can --
13 it should be foreseeable that someone's going to run and
14 trip and fall over the hose. So, following that logic,
15 Judge, you know, I guess that no one can ever perform any
16 maintenance with a hose during that time.

17 And, you know, and they cite this *Hughes* case, Judge,
18 which is out of Spartanburg and is cited in there. And
19 that's the case where the pediatrician's office had a
20 concave mirror that children came and played with, and a
21 child got a vaccination, fell over, the mirror shattered,
22 and they say that was an inherently dangerous condition.

23 Well, Judge, I guess that's what we're really going to
24 have to argue, and what the court's going to have to
25 determine, whether a hose unreeled while someone is working

1 or had just finished working. We don't know the answer,
2 but there is evidence, and the only evidence in the record,
3 that someone was doing yard work using that hose. It's not
4 like it was wound out and left for a long period of time.
5 It was just, it was there, and someone was using it.

6 And, Judge, you know, it, it -- just because they
7 argue that--it is an inherently dangerous condition doesn't
8 make it. I mean, I look around here and, say, walking up
9 to this witness stand right now is an inherently dangerous
10 condition because you got a step. That doesn't make it an
11 inherently dangerous condition. It's just, it's got to be
12 there.

13 So, Judge, I went and looked and tried to find --
14 certainly there should be cases in South Carolina with a
15 water hose, and there aren't any, Judge. I mean, there's
16 no, no water hose trips or all that. So, then we looked
17 around to, to other states. And, you know, Judge, just a
18 couple cases that, that we looked. There's one out of
19 Ohio, and certainly it's not binding, but obviously as the
20 court knows, you got to look to other areas to try to adopt
21 something.

22 And there's a federal court case out in the Fifth
23 Circuit -- where is that, Texas, Mississippi -- which
24 basically, you know, says if you got a hose that's clearly
25 visible then, you know, it's not, it's not an inherently

1 dangerous condition.

2 And when you go back to the *Hughes* case that they rely
3 upon, Judge, and you look at this, what *Hughes* has is
4 completely separate from this is. One, they're saying
5 it's, it's, you know, an attraction and to bring kids in.
6 It's made to provide enjoyment for kids, and they should
7 have known the mirror and the glass, and the way it was
8 made. But first and foremost, they had an expert, someone
9 that came and said that you had an inherently dangerous
10 condition.

11 And so when you extrapolate that back, what we have
12 here is they just -- is the plaintiffs have declared and
13 decreed that there's an unwound garden hose, and it's an
14 inherently dangerous condition, and you should foresee that
15 you're going to have someone that's sitting outside
16 enjoying an afternoon, and they're going to get startled,
17 and they're going to take off running, and they're going to
18 trip over the garden hose that's laying in the grass.

19 It's not like it was laying on the sidewalk, Judge.
20 It was laying in the grass, and that's the only evidence
21 that they have in this whole case. So, you know, you look
22 at that, and then you say does that constitute the failure
23 to exercise slight care. And, Judge, I think the record's
24 completely devoid of that.

25 They, they come and -- you know, you read their

1 depositions and you look through what they try to say is,
2 well, maybe you should have watched her more closely, but
3 you're complying with the policy. You have two people who
4 are out there. That's certainly slight care. And then you
5 shouldn't have taken them outside.

6 Well, Judge, the testimony of the supervisor is that's
7 what we do. And then he should have taken them when they
8 were contained within a fence or -- you know, it's, it's
9 just you should have done more.

10 Well, the question is not that you should have done
11 more. The question is did you exercise slight care. And,
12 Judge, I don't think there's any evidence whatsoever that
13 there was, that there was not at least the exercise of
14 slight care. You got somebody out there who's using the
15 hose. You got two people up there who are, who are
16 watching this consumer while she's out there.

17 Unfortunately, she got startled. I mean, it's not
18 something that they knew was going to happen or, you know,
19 they, did they know it could happen? Sure, but did that --
20 does that mean you've got to put her under some closer
21 supervision? No. That's -- they, they have assessed her
22 as at the level 3.

23 So, I think when you look at this case, it's just
24 right along the lines of *Pack vs. RMI* that there is at
25 least evidence of slight care in the record. There is no

1 evidence of -- that they -- that there was gross negligence
2 in this. It's a much higher standard, and it's a standard
3 that they're stuck with.

4 I mean, I don't think there's any question that they
5 can argue and get around the gross negligence. I think
6 absolutely DDSN is -- falls in within 25, under that
7 immunity, and that the only way they pierce that immunity
8 is through gross negligence. And Judge, the law is clear
9 that the burden of proof is on them.

10 The burden of proof is on us to prove there's
11 immunity, and I think that certainly the record's in -- the
12 evidence is in the record, and then the burden of proof is
13 upon them to show that there was gross negligence. And,
14 Judge, respectfully, I don't think that there is any
15 evidence in this record of gross negligence. And as a
16 matter of law, then we are entitled summary judgement.

17 Judge, they've gone through -- and briefly just saying
18 a couple other things. They're talking about, you know,
19 letting the court know that DDSN did not call the guardian
20 and tell them about this that afternoon. And so, and so
21 they're alleging the delay in care I guess, Judge, or
22 trying to make a medical malpractice argument or anything
23 like that.

24 Obviously, I don't think they can make a medical
25 malpractice argument. There is no evidence in the record

1 : whatsoever that the delay, four hours delay of treatment
2 : caused her any sustained injuries, but they do mention that
3 : as being negligence, Judge. You got to show some proximate
4 : cause to that, to that negligence or saying that's, you
5 : know, that's -- I guess you're still governed by the slight
6 : care standard, Judge, and I don't see any proximate cause
7 : or any relation to the failure to call.

8 : I mean, I think the policy, they should have called.
9 : You know, Judge, I don't know whether they were going to
10 : call the next day regardless. It happened, but fortunately
11 : she was able to get treatment that evening.

12 : Then they talk about negligent hiring, Judge,
13 : training. There is no evidence whatsoever in any of that.
14 : They, you know, they have no evidence that there was
15 : negligence in hiring any of these two people watching. The
16 : supervisor, there's no negligence in the type of training.
17 : They don't have any experts that say they should have done
18 : one, two, or three. So, you know, Judge, they just point
19 : to bland policies that say you're going to create a safe
20 : environment and you, you should have, you should have
21 : followed that.

22 : When you, when you look at that, Judge, you know, and
23 : I just remind the court under 15-78-64 is another immunity
24 : that provides:

25 : A governmental entity is not liable for adoption,

1 enforcement, compliance with any law or the
2 failure to adopt and enforce any law, whether
3 valid or invalid, including but not limited to
4 any charter, provision, ordinance, resolution,
5 rule, regulation, or written policy.

6 And there's no exception to that. So, if they come in
7 here, Judge, saying you've got policies and you didn't
8 follow your own written policy, there is complete immunity
9 under the Tort Claims Act for that, and there's no gross
10 negligence standard there. Just that, that is not an
11 issue, and that's something that the General Assembly has
12 said. You are immune from any liability for that. So, I
13 would respectfully say, Judge, that cannot be an issue here
14 in this case.

15 So, with all that being said, Judge, and the motion,
16 and the evidence most favorable to the plaintiff, I
17 respectfully believe that there is -- this record is
18 completely devoid of any evidence that the Department of
19 Disabilities didn't at least exercise slight care in this
20 case, and we're entitled to summary judgement as a matter
21 of law.

22 THE COURT: All right, Mr. McElveen.

23 MR. McELVEEN: Your Honor, with regard to the
24 negligence versus gross negligence standard, you know, we
25 did not argue that in our, in our memorandum in opposition

1 to the defendant's motion of summary judgement, and I did
2 not know what the defendant's motion was going to be based
3 on. We just received the brief, and I hadn't even finished
4 reading it yet.

5 But whether the standard is negligence or gross
6 negligence, I think that there certainly exists more than a
7 scintilla of evidence in the plaintiff's favor here to move
8 forward with.

9 And just to kind of give you some more background
10 information -- I don't want to, I don't want to rehash
11 everything Mr. Smith said in his facts because we do agree
12 with most of that. But Ms. Karriem, as he says,
13 thirty-nine years old. She is severely mentally
14 handicapped; she requires almost constant supervision and
15 monitoring.

16 And prior to this April 25, 2006, fall that she had at
17 the Disabilities Board campus, she had been under their
18 supervision for ten years prior to that, and they certainly
19 knew that she had this propensity for, I guess, being
20 startled or upset when people came in her personal space
21 and for running.

22 And basically there's a few things here. Number one,
23 when this, when this thing happened, she was, she was in,
24 like, an unloading area, what the testimony says. There's
25 some question as to whether or not she should have been

1 there at all.

2 Number two, of course there was a garden hose there
3 and that's what, and that's what she fell over. And Mr.
4 Smith says obviously that a, that a garden hose laying on
5 the ground is not an inherently dangerous condition, and I
6 agree that it wouldn't be for someone like me or Mr. Smith,
7 but for someone like Ms. Karriem who has a severe mental
8 handicap that the defendants were aware of, it can be a
9 dangerous condition.

10 And if you look at the case law, Your Honor, there's
11 several cases that kind of go to this where, where the
12 plaintiff was able to avoid summary judgement. One case is
13 this *Hancock vs. Midsouth Management case*, and that case
14 basically was a, it was a trip and fall case at a parking
15 lot. There was an open and notorious condition, but the
16 plaintiff was able to avoid summary judgement because the
17 question for the jury was would the defendant owe some sort
18 of duty to the invitee to eliminate this, this open and the
19 notorious, dangerous condition.

20 Another case Mr. Smith actually referenced is that
21 *Hughes case*. That's one where, you know, the actual mirror
22 wasn't in and of itself open and notorious. But when the
23 plaintiff child fell into it, you know, and got cut, then
24 the court found that, you know, there was enough there to
25 move forward past summary judgement. It was a question for

1 the jury.

2 Your Honor, in this case, I will point out to you that
3 Ms., Ms. Karriem fell on April 25, 2006, and she was sent
4 home. Her guardian, Mr. Phillip Simmons, was not notified
5 as to anything as far as her being injured that day on the
6 campus. When she got home, she began acting uncharacter --
7 uncharacteristically, and he took her for medical
8 attention.

9 When they went to the doctor, to the emergency room,
10 they found that she had suffered not only cuts to her face
11 and to her lip, but she also suffered a radial ulnar shift,
12 fractured her right arm. This did require surgical
13 intervention, and it also did require further medical
14 treatment. At no time was Mr. Simmons ever informed by the
15 defendant that she had, that she had fallen when she was in
16 their care on April 25, 2006.

17 On April 27, 2006, Mr. Simmons contacted the defendant
18 to ask them specifically about what had happened, and of
19 course they provided no reason or excuse for their failure
20 to contact him regarding her fall and her injuries.
21 They've still never given excuses to why they failed to
22 contact him and tell him what happened.

23 Your Honor, we got some, we got some testimony here
24 from two of the defendant's employees, and I believe the
25 first one -- Mr. Moorman took the depositions, but the

1 first individual that gave a deposition, you know, he, he
2 acknowledged that the hose was left out there in the area
3 where she was. He acknowledged that the work that would
4 entail using the hose was not going on while she was, while
5 she was right there. He also acknowledged, he also
6 acknowledged that if that hose had been in his own yard, he
7 might have fallen over.

8 Furthermore, there's another deposition that was
9 taken. That was a Joyce Jackson, I believe, who was an
10 employee of the Disabilities Board. She also said that if
11 the hose was not being used, it should have been put away.

12 In the defendant's own notes which is attached to my
13 brief is in incident report. It says on here, it says:

14 Preventative Measures. Make sure water hoses are
15 rolled up and/or put away in storage until
16 needed.

17 Our argument, argument, Your Honor, is simple. The
18 fact that the defense has acknowledged that hose was there
19 and that she tripped over it, and the fact that they've
20 acknowledged that it shouldn't have been there when she was
21 out there is enough to get us past summary judgment and to
22 a question for the jury. Whether the standard, whether the
23 standard is negligence or gross negligence, it's a jury
24 question.

25 THE COURT: All right, Mr. Smith.

1 MR. SMITH: Judge, just briefly, it's -- I certainly
2 understand his argument. Let me just clarify two areas.
3 One, the first one he's talking about where she said no one
4 was there or he said -- that was Scotty Merritt, Judge, and
5 the depositions have been attached. And Mr. Merritt did
6 not say nobody was there. He said someone was using it,
7 and he -- using it. Whether they were there or not at that
8 time, he did not know, but there was work being done to his
9 knowledge.

10 And, Judge, furthermore, really he is a supervisor
11 that -- and his deposition said he came out afterwards and
12 never even saw the hose. This is just what he knows. So,
13 you know, it's not, it's really not, it's not reliable
14 testimony in that regard.

15 And, Judge, you know, the things, you know, when he
16 talked to the other one is the safety director out there.
17 He said, you know, that Mr. Moorman kept asking, well, if
18 the hose should be wound up, shouldn't it, if it's not
19 being used. Well, she didn't know whether it was being
20 used or not being used at the time. Said sure. If the
21 hose is there, it should be wound up, which is common
22 sense, Judge.

23 I mean, you know, that's what should happen, but it's
24 not -- you know, you can't come in here and take the
25 evidence that no one -- that someone left the hose sitting

1 there and just forgot to roll it up when they went. And,
2 you know, regardless, Judge, you still go back to the point
3 that it is at -- you know, it's on the grass. It's not on
4 the sidewalk.

5 And, you know, there's no evidence in here. Mr.
6 McElveen said there's evidence that DDSN knew she had a
7 propensity to run. No, sir, Judge, there's no evidence in
8 this record about that. And I know it's difficult for the
9 court to determine when he says there is and I say there's
10 not, but there's not. I mean, that never got there, Judge.

11 So, you know, when you're, when you're dealing with
12 this, you're going back to the slight care issue, and
13 that's it, and it's is there slight care. And the question
14 really is, Judge, when you take someone else outside -- I,
15 I don't, I still don't quite understand the porte cochere
16 argument, that you shouldn't take them out there in the
17 loading and unloading zone when nobody -- the testimony is
18 in the record nobody is loading or unloading at, at 1:25 or
19 1:00 in the day. They're just out there enjoying. They
20 got seats for people to sit there.

21 THE COURT: Which -- what place is this again where
22 the injury occurred?

23 MR. SMITH: It occurred, it occurred ---

24 THE COURT: The location.

25 MR. SMITH: The best, best we can tell, Judge, from

1 the record is she fell outside the building. That she
2 stayed in the grass.

3 THE COURT: And this is located where? What kind of
4 place is this?

5 MR. SMITH: It's the Sumter County Disabilities and
6 Special Needs facility here in Sumter at, at Electric
7 Drive. So, it is -- Judge, as you know and I cite statutes
8 in there, you have to have a statewide DDSN. That's the
9 oversight, and then you have county DDSNs that run
10 everything. This is the county Disabilities and Special
11 Needs Board here.

12 THE COURT: All right, and she was where at the
13 facility?

14 MR. SMITH: She was in, in their adult -- I won't say
15 adult day care, but they were in their, you know, their
16 building having services.

17 THE COURT: I mean the place, the portico, whatever
18 you're saying.

19 MR. SMITH: The porte cochere is ---

20 THE COURT: What is that?

21 MR. SMITH: Is a little breezeway covered area where
22 -- and there were chairs for them to sit and just enjoy the
23 outside on a pretty day.

24 THE COURT: Mr. McElveen says there was an unloading
25 area. Was the unloading for, like, when you drive in a

1 breezeway of a building and people get out?

2 MR. SMITH: Yes, sir.

3 THE COURT: As opposed to loading and unloading at a
4 dock with supplies and shipping and receiving?

5 MR. SMITH: Yes, sir.

6 THE COURT: I'm trying to get a picture of it.

7 MR. SMITH: It's where the bus would come and drop
8 people off and pick them up at, at -- you know, at the drop
9 offs in the morning, the pickups in the afternoon.

10 THE COURT: It's just a shaded area?

11 MR. SMITH: Yes, sir.

12 THE COURT: As you drive into the place?

13 MR. SMITH: Yes, sir.

14 THE COURT: Okay.

15 MR. SMITH: And, Judge, that, that in essence is, is
16 our argument.

17 THE COURT: All right, Mr. McElveen.

18 MR. McELVEEN: Judge, just clarify a couple things.
19 Mr. Smith's right. You know, I don't think there's any
20 record that we, we have from the Disabilities Board that,
21 that Fatima ran, bolted. The records we do have that were
22 furnished by the defendant, they do say that:

23 Fatima does not talk but stand -- understands
24 what is said to her. She has a past history of
25 aggressive behavior. She has a very large

1 personal space zone and can be very shy and
2 skittish when others approach her closely.

3 Fatima can walk.

4 The point I was trying to make is they knew that she
5 had a propensity or that she was predisposed to being
6 startled very easily.

7 And the other thing is as far as, as far as where they
8 were at this time, I don't think this was a normal
9 recreational area or the area where they had the normal
10 activities. This was an area where patients were --
11 patients or clients were unloaded and loaded back up to go
12 home. But during the time when this happened, it wasn't,
13 it wasn't time to go home. It was around 1:30 in the
14 afternoon was my understanding.

15 THE COURT: And so had she taken off and, say, run
16 into a car or run into a wall, or run into a building, and
17 they would have been negligent for having her sitting out
18 there, or what were they supposed to do?

19 MR. McELVEEN: Well, I think, I think the number one
20 thing is, is the, is the garden hose which was there when
21 it should not have been posing, you know, an unreasonable
22 -- or condition that could have been foreseeable, could
23 have been prevented to stop this whole thing from
24 happening.

25 THE COURT: I notice in your brief you don't address

1 the Tort Claims Act in any way that I noticed scanning the
2 brief, and the cases seem to speak about general
3 negligence. Mr. Smith argues that we're dealing with a
4 different animal than we're dealing with the Tort Claims
5 Act. Unless you, unless you filed a case and demonstrated
6 some exception, some gross negligence, then as a matter of
7 law, summary judgement must be granted. What do you say
8 about all that?

9 MR. McELVEEN: Right, and I did not anticipate that
10 argument coming today. We had not briefed that side of it.
11 We just received this brief. We knew, we knew they'd made
12 the motion. We did not know what the grounds were going to
13 be, but I can tell you I, I still believe it's a question
14 for the jury, and it's certainly an argument that Mr. Smith
15 can make at trial. Again, again I ---

16 THE COURT: Well, you talked about the Marine
17 Institute case there where Judge Cooper threw out that case
18 where those boys got away and killed some people, and
19 summary judgement was granted and was affirmed because, as
20 a matter of law, there was no indication of gross
21 negligence.

22 MR. McELVEEN: Well, in this case also, I think you
23 have to, I think you have to look at the individual we're
24 talking about here.

25 You know, again, with leaving a garden hose laying

1 around in a place where an ordinary person goes, whether
2 it's a governmental entity or not, would that be a
3 dangerous condition for, for me or you or Mr. Smith?
4 Probably not, but again for Ms. Karriem, our argument is
5 that it is an inherently dangerous condition, and I think
6 the question of gross negligence does go to a jury in this
7 case.

8 I think there's -- that's something we have to prove,
9 but I also think that there is at least from the, from the
10 defendant's employee's testimony alone, there's enough of
11 it -- there's more than a scintilla of evidence to move us
12 forward.

13 THE COURT: Well, is it a scintilla standard when
14 you're dealing with the Tort Claims Act and the requirement
15 of gross negligence? So, you're saying a scintilla of
16 gross negligence, or just a scintilla of negligence?

17 MR. McELVEEN: Well, I think there's a scintilla. I
18 think there's a scintilla of both in this case.

19 THE COURT: Okay.

20 MR. McELVEEN: I mean, negligence -- gross negligence
21 is a form of negligence. It's just a heightened, just a
22 heightened standard.

23 THE COURT: I'm just asking questions. I'm going to
24 give Mr. Smith a chance to respond. I'm sure he's got a
25 response on this.

1 You know, there has to be a dividing line when you're
2 suing under the Tort Claims Act verses a regular negligence
3 action because negligence can be almost anything, the
4 absence of due care, even with regard to the hose. But the
5 question is whether we're talking about a different animal
6 when we're talking about suing the state.

7 What do you say about it, Mr. Smith?

8 MR. SMITH: Judge, I agree with the court obviously
9 when you say that, but let me tell you why I agree with the
10 court.

11 This is -- if this was a negligence action, I still
12 think that you're dealing with, you know, a hose is a hose,
13 an open and obvious condition. You know, courts in other
14 states have said no, it's not. I mean, you know, I, I --
15 we can argue that. But, you know, we're not dealing with a
16 negligence situation, and we're dealing ---

17 THE COURT: I mean, a water hose is almost part of the
18 common, everyday fabric of life around these parts.

19 MR. SMITH: Especially ---

20 THE COURT: I mean, everyone has a water hose
21 somewhere.

22 MR. SMITH: And especially in April 25th is when this
23 accident happened. I think that's right. You know,
24 you're, you're going to do lawn work and, and you can't,
25 Judge, you can't do lawn work at night, you know? I mean,

1 you know, you can't come in and have people do lawn work at
2 night. They got to do it, do it during the day. And, you
3 know, they're out there. You know, again we're dealing
4 with slight, you know, the slight care standard. And so if
5 they're out there and you got two people watching, you
6 know, you can't anticipate everything that's going to
7 happen, you know?

8 And as the court pointed out, I mean, you know,
9 instead of running, if she'd run and hit the brick wall and
10 fell over and broke her arm, is that, is that a issue? I,
11 I -- you know, there's a hundred different ways that we all
12 can come up with. But you come back to exactly what's your
13 point, and it's a governmental entity.

14 And you're dealing here -- what Mr. McElveen does is
15 he cites numerous, you know, trip and fall premises
16 liability cases and says that's the standard that we're
17 operating under. He says he didn't know that. Judge, it's
18 pled. I mean, I specifically pled 25, and then I plead
19 15-85-60, including but not limited to, but I pled 25. I
20 mean, that's been the whole point because there's no gross
21 negligence throughout this whole, whole area.

22 But, you know, even when you, when you go the
23 standard, and as they say in this *Jinks* case and as they
24 say in this *Jinks vs. Richland County*, which is
25 Palmetto-Richland Hospital but back then, and as they come

1 back to this, to this RMI, *Pack vs. RMI* case is you're, is
2 you're dealing -- it's a mixed question of law and fact.

3 And so, you know, but when there's only one -- when
4 the -- it -- your conclusion only supports, you know, when
5 the evidence only supports one conclusion, then, you know,
6 it becomes a matter of law and, you know, one reasonable
7 inference.

8 And, Judge, having two people out there watching her
9 at this time, and Mr. McElveen said that, you know, that
10 they shouldn't have taken her out there just -- in our
11 brief, there's deposition testimony that that's where they
12 take her, take them. It's not like this was an unusual day
13 and they decided to take them out here as opposed to
14 somewhere else. They'd taken them out there. They enjoyed
15 the day, and if somebody comes up and startles her, you
16 know, certainly you can't -- that's not something that's so
17 foreseeable.

18 So, I think you're dealing with, with this gross
19 negligence and, you know, it starts with immunity. There
20 is absolute immunity for them doing that, and rightfully
21 so, Judge. I mean, you know, as in if we started -- if we
22 didn't have this immunity and start allowing prisoners to
23 say I got beat up, you didn't supervise me, well, you know,
24 you open the floodgates.

25 If you have, if you have people who are consumers at

1 Disabilities and Special Needs who have a host of problems
2 and, you know, and they're difficult -- you know, they got
3 behavior problems, you know, handicap problems, you know,
4 and they're difficult to control -- and if you allow every
5 time that someone gets a nick, a cut, an injury to get sued
6 absent you having gross negligence, then, you know, the
7 floodgates open. That's why the legislature put that in
8 there and did that immunity. And the only exception to it
9 is gross negligence, the highest standard that we have for
10 our civil law in South Carolina, to say you just can't have
11 a deliberate indifference, and that's in essence what
12 they're saying.

13 And is there a deliberate indifference? Is there any
14 evidence in this record of a deliberate indifference? And,
15 Judge, there is none. And, you know, it's up to them to
16 show that evidence, and there is none. Saying a load -- a
17 hose is laid out, that in and of itself is gross
18 negligence, failure to exercise slight care, I respectfully
19 disagree.

20 And, Judge, you know, what -- the last thing I point
21 to, while she had a host of, you know, handicap problems,
22 mental issues, she could walk. She's ambulatory. I want
23 the record to make sure that it's not like she couldn't get
24 around. It was just that she, she was non-communicative
25 and was startled easily.

1 THE COURT: All right.

2 MR. McELVEEN: And, Judge, not, not to beat this in
3 the ground or belabor this point, but going back to the
4 gross negligence standard, you know, it, it is a, it is a
5 matter of fact and law. And in this case, you know,
6 landscaping was going on out there. We understand, we
7 understand that was going on. It was April 25th, but it
8 wasn't actively being done when they were out there. If it
9 wasn't actively being done, the hose should have been put
10 away. There wasn't someone there using that hose is my
11 point.

12 And, you know, it's kind of like if, if you have, if
13 you have recess and, and there's people doing yard work on
14 the playground, you don't send the kids out there. If, if
15 there's landscaping being done and, you know, you use
16 things like a, like a garden hose, then you can have the
17 clients or the patients somewhere else. There, there was
18 no need for her to be out there with that garden hose
19 sitting there. It could have been put away, and this whole
20 thing could have been avoided. And I think that's exactly
21 what gets us, you know, past summary judgement to a jury
22 and let them decide if the standard has been met.

23 THE COURT: All right, moving party gets the last
24 word.

25 MR. SMITH: Judge, and I'll try to limit it to his

1 remarkable because we could go on all day. But, Judge,
2 again I understand Mr. McElveen's perception is that they
3 left the hose, and there was no one out there, but we're
4 confined to what's in the record, and what's in the record
5 is from Scotty Merritt. They could have deposed whomever
6 they wanted to depose. They deposed the supervisor, and
7 the supervisor said they were working at -- when they did
8 it.

9 Now, were they standing there watering the hose when
10 it happened? She -- he said he didn't know because he
11 wasn't out there and seeing it. But his understanding is
12 that it was being used. It wasn't just left out and people
13 gone and, you know, and so it's a, it's a stretch. I know
14 that's what he wants to interpret out now, but we're bound
15 to what's in the record, and what's in the record is that
16 the hose was out there.

17 And, you know, and, you know, again, it's going back
18 to the slight care standard, and is leaving a hose in the
19 yard while you're working in the yard, whether you're
20 standing there holding it, is that failure to exercise
21 slight care? I just respectfully say it's not, Your Honor.

22 THE COURT: You mentioned the *Jinks* case, and I was at
23 a conference in Washington, George Mason University. A
24 presenter talked about the *Jinks* case as his, one of his
25 landmark Supreme Court argument cases, one of his victories

1 in the Supreme Court dealing with the issue of whether or
2 not the federal statute tolling the state's statute of
3 limitations violated the Tenth Amendment. And the *Jinks*
4 case started out in Richland County. The arrestee dies
5 withdrawing from alcohol, was locked up and there was
6 question whether he was monitored when he died, and sued
7 the state. I think Judge Manning threw it out. It went
8 back to the Supreme Court, reversed, and came back, and so
9 there was something of *Jinks* that reminds me of that in all
10 of this situation.

11 But in this issue, I mean, it presents a very
12 interesting issue on dealing with gross negligence and what
13 do you have to do to maintain a lawsuit against the state.
14 Of course, when I started practicing law, there was no Tort
15 Claims Act and you couldn't sue the state, state agency for
16 anything. The king can do no wrong. You can't sue the
17 state, and the law has evolved from there to starting the
18 Tort Claims Act, and you can sue them.

19 There are certain limitations, but it's not the same
20 as a regular negligence cause of action. There must be
21 some evidence of gross negligence. And the question is
22 whether or not, based on what's in this record, whether
23 there is or there isn't.

24 Mr. McElveen, you said you hadn't had an opportunity
25 -- that you didn't anticipate this issue. So, you didn't

1 brief it.. Certainly in your brief, your brief was as if it
2 was just a regular negligence case and not a case in a Tort
3 Claims Act. So, I'll be happy to -- since I need to read
4 everything that was given to me anyway, I'll be happy to
5 give you an opportunity to submit anything that you might
6 want to submit in response to the arguments made today and
7 in response to the brief. And then give the defense a
8 chance to respond to anything you submit, and then by that
9 time I will review it all and rule on the issue.

10 How much time would you need to submit something?

11 MR. McELVEEN: Could we get till Monday, Your Honor?

12 THE COURT: Sure, till Monday?

13 MR. McELVEEN: Yes, sir.

14 THE COURT: Longer than that if you wish.

15 MR. McELVEEN: All right. I think we'll be okay by
16 Monday, Judge.

17 THE COURT: Okay.

18 MR. SMITH: The only question, if I could have -- I'm
19 going out of town, and then I come back and I got a session
20 Tuesday and Wednesday, and hopefully that's going to be it.
21 I've spent my whole summer in it so far. But if I could
22 just have till the following Monday?

23 THE COURT: Okay.

24 MR. SMITH: That would give me time so I could at
25 least get back in the office and get it ready.

1 THE COURT: Okay. So, I'll just say you have ten days
2 to submit and ten days to respond.

3 MR. SMITH: Yes, sir.

4 MR. McELVEEN: Ten days to submit?

5 THE COURT: Yeah, ten days to submit and ten days to
6 respond. Whatever you submit, share. The best way is to
7 submit it by email and serve the defense with them, and
8 then the same thing with the defense's response.

9 MR. McELVEEN: We will do it.

10 THE COURT: All right.

11 MR. McELVEEN: Thank you.

12 THE COURT: Very good. Thank you all.

13 MR. SMITH: Thank you, Judge.

14 --- END OF TRANSCRIPT OF RECORD ---

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

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

Plaintiff,

Vs.

Sumter County Disabilities and Special
Needs Board,

Defendant.

RECORDED

2012 MAR 16

THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

PH 12: 2 CASE NO.: 2008-CP-43-1037

JAMES S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT

TO: J. THOMAS MCELVEEN, III, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service of this Motion, or as soon thereafter as the matter can be heard, counsel for the above captioned Defendant, Sumter County Disabilities and Special Needs Board, will move before the Presiding Judge of the Third Judicial Circuit, for an Order of Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The basis of this Motion being that there is no issue as to any material fact and that this Defendant is entitled to summary judgment in its favor as a matter of law; or in the alternative, for dismissal based on other grounds as set forth in any supporting documentation. This Motion will be supported by memoranda, depositions, affidavits, and other such documents as may be relevant to this matter.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER, SMITH, L.L.C.



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March 16, 2012

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

) IN THE COURT OF COMMON PLEAS
) IN THE THIRD JUDICIAL CIRCUIT
) C.A. NO. 2008-CP-43-1037

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

Plaintiff,

v.

Sumter County Disabilities and Special
Needs Board;

Defendant.

) DEFENDANT'S MEMORANDUM IN
) SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT

TO: J. THOMAS McELVEEN, III, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Sumter County Disabilities and Special Needs Board, (hereinafter "Defendants"), hereby submits its Memorandum in Support of Motion for Summary Judgment.

STATEMENT OF FACTS

Taking the facts in the light most favorable to the Plaintiff, the Plaintiff is an autistic thirty nine year old female who cannot talk. See Exhibit A, Deposition of Phillip Simmons p. 16. The Plaintiff has a limited understanding and inability to communicate wants/needs to unfamiliar persons due to a lack of verbal abilities. See Exhibit B, Report For Single Plan Development of Fatima Karriem. Moreover, Plaintiff has some compulsive autistic-like tendencies and history of aggressive behavior when upset. The Plaintiff lives with her uncle and court appointed guardian, Phillip Simmons. In April of 2006, she was enrolled at the Sumter County Disabilities and Special Needs facility located on Electric Drive. See Exhibit A, Deposition of Phillip Simmons, p. 20. Plaintiff

was enrolled as a day program participant which entailed her attendance at the Electric Drive facility Monday through Friday. Id. p. 21. Plaintiff was picked up by a van operated by Defendant around 8:30 am and dropped off at her home around 3:30 pm. Id. As a consumer of the Facility Based Adult Day Services Program, Plaintiff was on an accountability level III which means she must be monitored by someone in the same room or nearby and may not be outside of visual supervision for longer than thirty minute periods. See Exhibit B, Report For Single Plan Development of Fatima Karriem; Exhibit C, Deposition of Joyce M. Jackson, pp. 11-13; and Exhibit D, Accountability of Consumers Policy 1.3.8. Plaintiff was one of six being monitored by two direct care staff.

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. The area is used for loading and unloading consumers from the facility and for providing an area where consumers can spend leisure time outside. See Exhibit C, Deposition of Joyce M. Jackson, p. 19 and Exhibit E, Deposition of Scotty Merritt, p. 36-37. Anytime before 2:30, which is loading time for consumers to go home, the consumers are allowed to sit in the covered area depending on the weather for leisure time. See Exhibit C, Deposition of Joyce M. Jackson, pp. 19, 23-25. The Plaintiff was startled by another consumer, jumped from her chair and began to run. See Exhibit F, Incident Report dated April 25, 2006. The Plaintiff ran from her chair and fell over a water hose in the grass which resulted in her falling to the ground. Id. The hose was in the grass because yard maintenance was being done around the time of the fall. See Exhibit E, Deposition of Scotty Merritt p. 40 & 53.

The Plaintiff was helped up and the nurse on duty was immediately summoned. See Exhibit F, Incident Report dated April 25, 2006. The facility nurse responded to the scene and attempted to

render first aid. The Plaintiff was found to have a small nick on her upper lip. See Exhibit G, Deposition of Tina Lyes, p. 14 and Statement of Tina Lyes dated April 26, 2006. The Plaintiff was not bleeding and did not appear to be in any distress. Plaintiff would not allow the nurse to physically assess her or render first aid even after three attempts. See Id. p. 16. The Plaintiff was not guarding any particular body part, was not having any problems ambulating and did not appear injured. Id. The Plaintiff then walked away from the nurse and began scratching a staff member on the back indicating she was not injured. See Exhibit G, Statement of Tina Lyes dated April 26, 2006. There was no indication the Plaintiff was injured, had any swelling, bruising or that an emergency situation existed. See Exhibit G, p. 30-34.

Shortly after her fall, Plaintiff left the facility on her normal bus route home. Two hours after being dropped off at home, Plaintiff's guardian discovered the Plaintiff acting differently. Plaintiff placed a towel over her arm and Plaintiff's guardian discovered her arm had some slight swelling. See Exhibit A, Deposition of Phillip Simmons, p. 29-30. She was seen by a doctor about 5:00 p.m. that evening and it was discovered Plaintiff suffered a broken arm. Id. p. 59.

In Plaintiff's Complaint, Plaintiff alleges Defendant was negligent and grossly negligent in failing to protect Plaintiff's health and/or safety; protect Plaintiff from any unreasonable risk of harm; monitor Plaintiff to insure a safe environment is provided; provide timely medical treatment; properly notify Plaintiff's guardian about a fall; properly monitor Plaintiff; comply with Defendant's own policies and procedures and properly hire and supervise staff. Defendant has denied the Plaintiff's allegations, and the Defendant herein moves this Court for an Order dismissing the Plaintiff's claim as a matter of law. Viewing the evidence in the light most favorable to the Plaintiff, the record is devoid of any evidence of an intentional, conscious failure on the part of the Defendant.

The evidence presents only one reasonable inference: the Defendant was not grossly negligent.

LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted:

[i]f the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

S.C.R. Civ. P. 56(c).

In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. Bar. v. City of Rock Hill, 500 S.E.2d 157, 158 (S.C. Ct. App. 1998). Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Silvester v. Spring Valley Country Club, 543 S.E.2d 563, 566 (S.C. Ct. App. 2001).

Under Rule 56(c), *SCRCP*, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 410 S.E.2d 537 (S.C. 1991). With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. (citing Celotex Corp. v. Cartrett, 477 U.S. 317 (1986)). Once the moving party carries its initial burden, the "opposing party, under Rule 56(e), [must] '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.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). The party opposing summary judgment cannot simply rest on mere allegations or denials

contained in the pleadings. George v. Empire Fire & Marine Ins. Co., 545 S.E.2d 500 (S.C. 2001). More than a mere scintilla is required to overcome summary judgment. Bravis v. Dunbar, 449 S.E.2d 495 (S.C. Ct. App. 1994).

In the instant case, considering the evidence and all inferences which can reasonably be drawn from the evidence in the light most favorable to the Plaintiff, there are no triable issues of fact and no evidence to enable the Plaintiff to overcome this Motion for Summary Judgment. Therefore, Defendant respectfully requests that this Court grant its Motion for Summary Judgment.

ARGUMENT

I. THE PLAINTIFF IS PRECLUDED FROM PREVAILING IN THIS ACTION UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

The South Carolina Tort Claims Act “governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.” S.C. Code Ann. §15-78-10, et. seq. Pursuant to S.C. Code Ann. §15-78-20(b), the Tort Claims Act “constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.” Id. Governmental entities are defined by the act as “the State and its political subdivisions.” S.C. Code Ann. §15-78-30(d). 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”). A state employee is defined under the act as “any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty.” S.C. Code Ann. §15-78-30(c). The status of the Defendant 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. Thus, Defendant in the present action is an agency of the state and any torts alleged to have been committed by any or all of its employees are governed by the provisions of the South Carolina Tort Claims.

A. Defendant is immune from liability pursuant to S.C. Code Ann. § 15-78-60(25).

Subsection 15-78-60(25) provides that a governmental entity is not liable from “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.” S.C. Code Ann. § 15-78-60(25)(emphasis added).

Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Etheridge v. Richland School District 1, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (S.C. 2000). “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 (S.C. 2003). “Additionally, while 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.” Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245 (Ct. App. 2004)(citing Etheridge, 341 S.C. at 310)). The Plaintiff has the burden of proving gross negligence. See Stewart v. Richland Memorial Hospital, 450 S.C. 589 (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 still prove that the governmental entity has waived immunity)).

As in Pack, there is absolutely no evidence in the record demonstrating that Defendant was grossly negligent. The Pack court determined that summary judgment was proper after finding that employees acted with at least slight care. Pack, 362 S.C. at 245. As in this case, the plaintiff in the Pack case 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)).

Plaintiff was being monitored in the area by staff when she was startled, ran from her seated position and fell over a hose. The hose was in a separate area from where Plaintiff was seated. The area where Plaintiff was seated was an area utilized by staff and consumers for leisure time. Plaintiff ran to a separate area where a hose was located due to yard maintenance. See Exhibit C and F, Depositions of Joyce Jackson and Scotty Brown, respectively. Plaintiff attempts to support a gross negligence finding with the argument that Plaintiff fell and thus Defendant must have been grossly negligent in observing Plaintiff and the area because staff members did not prevent the fall. This is a circular argument akin to the doctrine of *res ipsa loquitur*. However, the law requires some evidence of gross negligence, or in other words, some evidence that Defendant intentionally and

consciously failed to do something or not do something.¹ There is no such evidence in this case and any such finding is based purely on speculation. There is no evidence to suggest 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 or even in the area separate from Plaintiff's seated position.

Plaintiff has failed to produce one shred of evidence, be it expert witness testimony or reports, that the water hose created a danger or unsafe environment. While there is no South Carolina case directly on point, courts of 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. See Zitron v. Sweep-A-Lot, 2010 WL 2395703, at *4 (Ohio App. 10 Dist. 2010); Smith v. Federal Cleaning Contractors, Inc., 126 Fed.Appx. 672, 674 (5th Cir. 2005)(finding a hose laying on the ground outside a shopping mall, clearly visible to anyone walking in the vicinity, does not pose an unreasonably dangerous condition)). There are no reports of other incidents with water hoses, no rules, standards or industry guidelines for the placement of water hoses that suggest Defendant created an unsafe or dangerous area.

There is no evidence that Defendant or any of its staff members were grossly negligent in their monitoring of Plaintiff or providing Plaintiff with a safe environment. The only evidence in the record is that Plaintiff was being monitored and afforded a safe environment. For these reasons,

¹ Should Plaintiff assert Defendant failed to inspect the area where Plaintiff ran to and fell to ensure it did not contain any hazard, Defendant can not be liable for such failures. See S.C. Code Ann. § 15-78-60(13) (Governmental entity is not liable for loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection of any property to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety.")).

Defendant is entitled to summary judgment.

B. Defendant is immune from liability pursuant to S.C. Code Ann. § 15-78-60(4).

Plaintiff asserts in her Complaint that Defendant is liable to Plaintiff for failing to follow or comply with Defendant's internal policies procedures and rules. Subsection 15-78-60(4) provides that a governmental entity is not liable from "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." S.C. Code Ann. § 15-78-60(4). Defendant submits that subsection (4) of S.C. Code Ann. § 15-78-60 precludes a claim for the enforcement of or failure to enforce any written regulations, provisions, charters or policies.

Specifically, Plaintiff claims Defendants failed to provide a safe environment and monitor the Plaintiff pursuant to Defendant's Mission Statement and Policy 1.6.1.7, Outdoor Area. The Mission Statement provides in part that Defendant will ensure the health, safety and welfare of the individuals it serves. Policy 1.6.1.7 provides in part that when there is an outdoor area to be used by consumers for leisure activities, a safe environment will be maintained. Notwithstanding the immunity provided in subsection (4), there is absolutely no evidence presented by Plaintiff that Defendant violated said policies. There is no expert that has testified the area was unsafe or that the hose even posed a hazard. Moreover, there is no evidence that Defendant had any actual or constructive knowledge, or "notice," of a dangerous condition. Plaintiff may not simply rely upon a presumption that if the hose was in the grass at the time of Plaintiff's fall, it was likely in the grass for some time beforehand and should have been observed by Defendant's employees.

The provisions of Section 15-78-60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation. The statute clearly exempts from liability any loss resulting from

the failure to enforce a regulation, rule or policy; therefore, Defendant is immune from suit for any loss as a result of their non-enforcement of any written rule, regulation or policy.

II. PLAINTIFF'S CLAIMS REGARDING NEGLIGENT HIRING AND TRAINING FAIL AS A MATTER OF LAW.

The Plaintiff alleges Defendant was negligent in the hiring, training and supervision of its employees. The Supreme Court of South Carolina has held in circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring the employee. James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008). Negligent hiring cases “generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.” Kase v. Ebert, 392 S.C. 57 (2011). Although foreseeability is usually an issue of fact, “the court should dispose of the matter on a dispositive motion when no reasonable fact finder could find the risk foreseeable or the employer’s conduct to have fallen below the acceptable standard.” Id. The standard in negligent hiring and retention cases is whether the employer knew the offending employee was in the habit of misconducting himself in a manner dangerous to others. Doe v. ATC, Inc., 367 S.C. 199 (Ct. App. 2005).

The record is void of any knowledge that any employee of Defendant created an undue risk of harm to the public. Any such claims are based on speculation and conclusory statements. Furthermore, the Plaintiff’s claims that Defendant negligently trained its staff is unsupported by the record. There is no expert testimony regarding the training of Defendant’s staff. The staff is regularly trained in a variety of issues including safety. See Exhibit C, Deposition of Joyce Jackson p. 41. Accordingly, Plaintiff’s claims regarding negligent hiring, retention and supervision must

be dismissed as Plaintiff has failed to present any evidence supporting such claims.

III. THE PLAINTIFF'S CAUSE OF ACTION REGARDING HIS ALLEGATIONS OF INADEQUATE MEDICAL TREATMENT OR MEDICAL MALPRACTICE BY AGENTS OF DEFENDANT MUST BE DISMISSED AS THE PLAINTIFF HAS FAILED TO IDENTIFY AN EXPERT ON THE STANDARD OF CARE OR ITS BREACH BY THE DEFENDANT

Plaintiff asserts Defendant did not receive adequate medical treatment after her fall. The evidence before the Court suggests otherwise. In order to satisfy the burden of truth in a medical malpractice case, the South Carolina Supreme Court has previously held:

The plaintiff uses expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986); see also David v. McLeod Regional Medical Center, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

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, 367 S.C. at 249, 626 S.E.2d at 4. 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.

In the present case, the Plaintiff has specifically alleged that Defendant SCDC, through its agents, breached the appropriate standard of medical care, yet has failed to provide the court with expert testimony on the standard of care or its breach by the Defendant. The testimony of Tina Lyles reflects that she was immediately summoned to the scene and conducted an assessment. See Exhibit G, Deposition of Tina Lyles. The Plaintiff was assessed and did not appear to be in any distress. Furthermore, she would not allow the nurse to perform a complete assessment. Her behavior did not exhibit any signs of injury or symptoms of being injured.

Plaintiff cannot simply allege in a conclusory fashion that she did not receive adequate medical care or attention, provide no supporting evidence, and expect to survive summary judgment. Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986) (courts need not assume the truth of legal conclusions couched as factual allegations)). Rather, Plaintiff's complaint is that medical personnel refused to provide him with the care and treatment he personally desired. Such allegations are not sufficient to allow this lawsuit to proceed. Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985)(Disagreements between an inmate and a physician over the inmate's proper medical care do not state a claim absent exceptional circumstances.)). Plaintiff's personal opinion notwithstanding, nothing in the evidence and exhibits before the Court give rise to a genuine issue of fact as to whether anyone was deliberately indifferent to Plaintiff's serious medical needs. See Scheckells v. Goord, 423 F. Supp.2d 342, 348 (S.D.N.Y. 2006)(citing O'Connor v. Pierson, 426 F.3d 187, 202 (2d Cir. 2005)("Lay people are not qualified to determine...medical fitness, whether physical or mental; that is what...medical experts are for.")). While Plaintiff may not agree with the extent and nature of the medical care he received, he cannot simply allege in a conclusory fashion that he did not receive adequate medical care or attention, otherwise provide no supporting evidence other than his

own subjective opinion, and expect to survive summary judgment. See House v. New Castle County, 824 F.Supp. 477, 485 (D.Md. 1993).

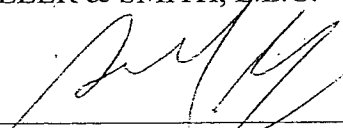
Given the Plaintiff's failure to identify an expert in support of her allegations in this case, as well as failing to provide an affidavit setting forth how the Defendant's standard of care was compromised, Defendants request that the Court dismiss any and all causes of action relating to inadequate medical care or medical malpractice.

CONCLUSION

The South Carolina Rules of Civil Procedure, Rule 56, specifically provide for relief for a party when there is no genuine issue as to any material fact, and if none, the movant is entitled to judgment as a matter of law. The Complaint in this case fails to raise any genuine issue that the Plaintiff is entitled to the relief sought. Therefore, judgment, as a matter of law should be ordered in favor of the Defendants, or the Complaint should be dismissed on other grounds set forth herein.

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, L.L.C.



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July 9, 2012
Sumter, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) FOR THE THIRD JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2008-CP-43-1037

Fatima Karriem, through her court appointed)
Guardian, Phillip Simmons,)

Plaintiff,)

vs.)

Sumter County Disabilities and Special)
Needs Board,)

Defendant..)

Deposition of PHILLIP SIMMONS, taken by Doris
Tompkins Brown, Certified Verbatim Reporter and
Notary Public in and for the State of South Carolina,
commencing at 2:27 P.M. on June 18, 2009, at the
offices of Bahnmuller, Goldman, McElveen, Ford and
Rodriguez, 17 East Calhoun Street, Sumter, South
Carolina.

APPEARANCES

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* * * * *

(No exhibits introduced into deposition)

(COURT REPORTER'S NOTE: --- INDICATES INTERRUPTION,
INCOMPLETE PHRASE, TRAILING OFF, INCOMPLETE SENTENCE)

1 that ---

2 A. Yeah. Willie Mae.

3 Q. Willie Mae, okay. And have you brought -- have you
4 gotten any Court Orders in South Carolina appointing
5 you as guardian over her?

6 A. When -- when I brought her down, I went to the Social
7 Security place, and they -- and they appointed me for
8 her legal guardian, and then the Department of Social
9 Services.

10 Q. Okay.

11 A. But I did got that.

12 Q. Okay. But they did that through the Department of
13 Social Services, and you got Power of Attorney or
14 something?

15 A. Yeah.

16 Q. Okay. What is -- tell me what your understanding of
17 Fatima's condition -- medical condition is. What's --
18 what's her problems?

19 A. Well, she's autistic, and she can't talk.

20 Q. How old is she now?

21 A. Thirty -- I think she's thirty-six.

22 Q. Okay. And when she came to live with you, where were
23 you living here in Sumter County?

24 A. I was living -- still at 1024 Huddersfield.

25 Q. Okay. So, you've lived there the whole -- Fatima's

1 A. Right -- right after she got here. Maybe about a
2 month or so.

3 Q. And has she been there ever since she moved here?

4 A. Yeah.

5 Q. Okay. And what would she do over there at the -- at
6 the Disabilities Board here in Sumter? Were they --
7 they provide -- I know in this case, they provide care
8 for her during the day time; is that right, when she
9 was injured here?

10 A. Yeah.

11 Q. Okay. Were they always doing that since she came to
12 live with you?

13 A. Yeah.

14 Q. Okay. And so, shortly after she came to live with
15 you, -- I'm not trying to put words in your mouth --
16 I just want to understand. But shortly after she came
17 to live with you, you enrolled her for the daycare
18 with disabilities?

19 A. Yeah.

20 Q. All right. Where -- when you first moved her here,
21 where were -- where did they provide her the care? It
22 wasn't in the same place on Electric Drive then, was
23 it?

24 A. No. It was downtown there on Main Street.

25 Q. Main and Hampton Street, when they had that building

1 over there?

2 A. Yeah.

3 Q. Okay. And how often would she go?

4 A. Every day.

5 Q. Even on weekends?

6 A. No. Just Friday -- Monday through Friday.

7 Q. Okay. What time would they take her?

8 A. They would pick her up at 8:00 -- sometimes, 8:00 or
9 8:30.

10 Q. And she -- when would they bring her back?

11 A. Around 3:30.

12 Q. Okay. And besides -- would they be the ones that came
13 and transported her?

14 A. Yeah.

15 Q. Okay. And they -- and they brought her back home,
16 too; right?

17 A. Yeah.

18 Q. Picked her up and brought her home?

19 A. Yeah.

20 Q. Was it a bus, or how would -- who would come get her?

21 A. It was a van.

22 Q. It was a van. Okay. Did they provide you any other
23 services besides daycare?

24 A. No.

25 Q. Okay. Did they ever have any camps or anything she

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1 Q. Okay. Who would -- who would take care of Fatima
2 while you were working second shift?

3 A. A family member. It would have to be a family member
4 to take care of them.

5 Q. Okay. Are you paying anybody now to take care of
6 Fatima?

7 A. No.

8 Q. So, Disabilities and Special Needs are providing you
9 your daycare now while you work; is that correct?

10 A. Right.

11 Q. Okay. All right. Tell me about -- tell me about this
12 incident here. What did -- when did you first find
13 out she fell and hurt her arm?

14 A. The day after she came home. And when she come home,
15 I be taking a nap. And then the provider, she be
16 there when she come. And then I first discovered it
17 when I was getting ready to go to work. And how I
18 discovered it, I noticed she had a towel throwed [sic]
19 over that -- that particular time, she had a towel
20 throwed over that arm. And that's when I realized
21 there was something was wrong.

22 Q. Have you ever seen her throw a towel on her arm
23 before?

24 A. Never.

25 Q. How did you -- is that what -- I mean, what made you

1 -- the arm, throwing a towel over -- what made that
2 unusual to you?

3 A. I mean, it was something that had never happened.

4 Q. So, what did you do when you saw the towel over her
5 arm?

6 A. I went to her and looked at the arm. I was, kind of,
7 swinging it a little bit. And then that's when I
8 discovered it was, like, swollen up here. (Witness
9 indicates). And that's when I discovered something
10 was wrong.

11 Q. Was it bruised or just swollen?

12 A. Well, it had a little bruise.

13 Q. Okay. Who was there providing her care when she came
14 home from DDSN that day?

15 A. Ms. Rhonda Pearce.

16 Q. Rhonda Pearce?

17 A. Yeah.

18 Q. And is she related to you?

19 A. That's the provider from the Disability Board.

20 Q. So, they would take her in the mornings and provide
21 her some care during the afternoons when she came home
22 by them when she was going over there?

23 A. Yeah. That was three hours.

24 Q. Okay. They were giving you three hours when she came
25 home?

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1 before?

2 A. No.

3 Q. Okay. All right. After this incident, when did you
4 first go to the Department of Disabilities and Special
5 Needs to talk to them about that?

6 A. Right after I see that -- when I got her -- she -- she
7 had got the medical attention. And then I called and
8 found out what happened, because nobody never called
9 and told me what happened.

10 Q. Okay. Who did you call?

11 A. I don't know who exactly that I spoke to up there.

12 Q. What did you tell them?

13 A. I asked them what -- did anything happen to Fatima at
14 the Day Program. And whoever was on the phone, they
15 said, "Oh," they said that she had a little fall. And
16 that's how I found out that she had fallen, because
17 they told me that she had tripped over a hose or
18 something.

19 Q. Okay. When was that that you called; was that the
20 same week?

21 A. That was the same week, yeah.

22 Q. And is that -- you don't know who you talked to that
23 time that you called?

24 A. No. I didn't know exactly who.

25 Q. You didn't get a name?

1 Q. Okay. Do you have anything that suggests that
2 something else happened besides she tripping over a
3 water hose?

4 A. I can't say, because I wasn't there.

5 Q. Okay. Has anyone told you anything different than
6 that?

7 A. No.

8 Q. Okay. So, they told you she tripped over the water
9 hose. Did they tell you what she was doing outside?

10 A. They said that's where -- that's where they take the
11 kids when they get ready to smoke. They take them out
12 there along with them while they're smoking.

13 Q. They take them out while they smoke. And so, who
14 smokes; are you talking about the workers?

15 A. I guess so.

16 Q. Okay. So, the kids go out on smoke break with the
17 adults?

18 A. Uh-huh.

19 Q. Who told you that?

20 A. I don't -- I don't know. They just told me at the day
21 program -- I mean, when I had a meeting with them,
22 they just told me that she slipped over a water hose.

23 Q. Where did you get this about the kids were outside
24 during a smoke break? Who told you that?

25 A. That way -- they told -- they say that's where the

1 kids be. In the meeting -- it was in the meeting,
2 that the kids -- that they take the kids out there
3 when they go out there and smoke. It's in that -- it's
4 in the area where the bus is coming to pick them up
5 and all, yeah.

6 Q. Yeah. That's the area where -- where they told you
7 this happened, is where the vans come and pick them up
8 and take them home; is that what they told you?

9 A. Yeah. They just said it happened in that area.

10 Q. What else did they tell you? Did they tell you
11 anything else?

12 A. No.

13 Q. What did they say about not calling you?

14 A. They didn't give me no -- no excuse why they didn't.

15 Q. Did they tell you how she fell other than falling over
16 the hose?

17 A. No.

18 Q. Did they tell you why the hose was out?

19 A. No.

20 Q. Did they tell you how she tripped over the hose?

21 A. No.

22 Q. Okay. Has anyone ever since -- ever since you went
23 and met with them, have you learned anything else
24 about how she fell?

25 A. No.

1 A. No.

2 Q. Okay. Did Dr. Drakeford -- how many times -- did he
3 take the cast off of her, I presume?

4 A. Yeah.

5 Q. Okay. How many more times did you have to go see him?

6 A. I didn't have to went to see him. You know, once they
7 took the cast off, I didn't have to go back to them at
8 all.

9 Q. Okay. Have you had any more medical treatment for her
10 since they took the cast off?

11 A. No.

12 Q. Okay. Does she have any problems with her arm now?

13 A. I don't know how to tell.

14 Q. You can't tell?

15 A. No. Because when she's in pain or something, she grab
16 that towel.

17 Q. Okay.

18 A. Yeah. The towel. And that's how I know it be
19 bothering her, you know.

20 Q. Okay.

21 A. Yeah.

22 Q. Does she do that from time to time?

23 A. Yeah.

24 Q. How often does she do that?

25 A. Pretty often.

1 Q. Okay. Is there anything that she could do -- that you
2 know she could do with her arm before this incident
3 that she can't do now?

4 A. No.

5 Q. Okay. Does she use her arms? I mean -- and I guess
6 you and I need to discuss her disability. I
7 understand autism. And she can't speak. But does she
8 pick things up? Does she ever grab things?

9 A. She can pick up some stuff.

10 Q. Okay.

11 A. You know.

12 Q. She still able to pick stuff up with that arm now?

13 A. Yeah.

14 Q. Okay. Does she -- I mean, is she able to bathe
15 herself, dress herself?

16 A. Yeah. Uh-huh.

17 Q. Okay. She does all that?

18 A. Yeah.

19 Q. Okay. What needs do you have to provide for her, like
20 daily needs? Do you have to fix her meals, I take it?

21 A. Yeah.

22 Q. Okay. Can she fix her own meals?

23 A. No.

24 Q. Okay. What can't she do for herself that most adults
25 do?

1 A. The most she can do is dress herself and bathe
2 herself.

3 Q. Okay.

4 A. Yeah.

5 Q. Beyond that, she can't -- she can't do anything else?

6 A. No.

7 Q. Okay. Do you have to provide for any other needs for
8 her besides cooking her meals and supervising her, so
9 to speak?

10 A. No.

11 Q. All right. Do you expect any more medical treatment
12 for her arm as a result of this?

13 A. No. I give her, when -- when she put that towel over
14 her arm, then I give her that -- give her aspirin or
15 Advil or something like that, because -- because
16 she'll have to give me a sign that that arm more or
17 less be bothering her at the time when she puts that
18 towel up.

19 Q. Uh-huh.

20 A. At the time, that's when -- that means that her arm is
21 bothering her.

22 Q. Okay. How about -- did Dr. Drakeford tell you that
23 she was going to have any more problems with that arm?

24 A. No.

25 Q. What did he do -- what type -- what did he do for the

1 autism, but besides her not being able to talk or
2 communicate, verbally communicate, how about that --
3 is there any other problem she has?

4 A. No.

5 Q. All right. After this incident, you took her out of
6 the Disabilities and Special Needs Daycare Program; is
7 that right?

8 A. Yes.

9 Q. And why did you do that?

10 A. Well, I was very worried about -- you know, since that
11 incident happened, I was very worried about her going
12 back there.

13 Q. Okay. And is there any other reason you took her out
14 besides that?

15 A. Well, she didn't -- she didn't want to go back either.

16 Q. Did you go talk to anybody about -- tell them you were
17 not going to return her to the program?

18 A. No. They -- they -- we were looking for her to go
19 back, but every time you go near the place, then she
20 did get enraged. She had known that you were taking
21 her back to that place she didn't want to go back
22 there.

23 Q. Okay. Who was living with you at that time in your
24 house besides you and Fatima?

25 A. Just me and Fatima.

1 estimate?

2 A. Ten.

3 Q. Okay. Did you ever find out what they did for her
4 when she was out there?

5 A. No.

6 Q. Do you know if they provided her any services or
7 autism treatment or anything like that?

8 A. No.

9 Q. Now, I think you and I are now on the same page, but
10 correct me. Was she on any medications?

11 A. No. She wasn't on any medication.

12 Q. She was on no medications at the time of this
13 incident?

14 A. No.

15 Q. Is she on any medications now?

16 A. No.

17 Q. Did anyone tell you that they did anything wrong at
18 the Disabilities and Special Needs as it relates
19 Fatima and this fall?

20 A. No.

21 Q. Okay. Did they apologize to you that it happened?
22 Did they say they were sorry?

23 A. I can't remember what they said now.

24 Q. Okay. You can't remember or you think they didn't say
25 anything?

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1 A. I think they didn't.

2 Q. Was there anything else -- I'm sure I've asked you
3 this -- besides her arm, was there anything else that
4 was -- that you know -- was hurt on Fatima?

5 A. No.

6 Q. As a result of this fall?

7 A. No.

8 Q. Did she complain of any neck pain, back pain, anything
9 like that that you know of?

10 A. Not that I know of. I have no way of knowing that.

11 Q. All right. Did you see any -- besides the little
12 bruise on her arm, was there any other scratches,
13 bruises anywhere else?

14 A. No.

15 Q. Okay. Cuts anywhere else that you noticed?

16 A. No.

17 Q. Was she cut on her arm at all, or just the little
18 bruise?

19 A. Just that bruise.

20 Q. Okay. You didn't see any bleeding or scabs or
21 anything like that?

22 A. No. No. The skin wasn't broken.

23 Q. The skin wasn't broken?

24 A. Uh-huh.

25 Q. All right. And you said there was a little swelling.

1 Where was the swelling on her?

2 A. In her hand and fingers.

3 Q. Okay.

4 A. Yeah.

5 Q. How bad was it swollen up?

6 A. Well, it was -- in the beginning, it was barely
7 swollen.

8 Q. Okay.

9 A. But by the time we got -- I got her to the Doctor's
10 Care, that whole hand had already swollen.

11 Q. Okay. So when you first noticed it, it was barely
12 swollen?

13 A. Yeah.

14 Q. Okay. And then by the time you got her to Doctor's
15 Care, it got bigger?

16 A. Yeah.

17 Q. So, did you notice anything unusual about her when you
18 first saw her before that towel was put on her?

19 A. Well, that's the -- that be the only thing. When she
20 came out of her room, she had the towel.

21 Q. Who is Ms. Pearson?

22 A. That's -- that's my daughter, Ms. Pearson.

23 Q. Yeah. Pearson, that's your daughter?

24 A. Yeah. Lawanda Pearson.

25 Q. Lawanda Pearson?

1 A. Right.

2 Q. Okay. No incidents, no complaints about what they've
3 done for her before this fall?

4 A. Right.

5 Q. All right. Any after this fall?

6 A. No.

7 Q. Okay. They're -- you know, they're sending people
8 out. Any problems with the care-givers they've sent
9 out to you?

10 A. Yes.

11 Q. What's the problems with them?

12 A. Oh, no. No. I didn't -- I'm sorry about that.

13 Q. That's all right.

14 A. No. I have -- I didn't have no problems with that;
15 good care-givers.

16 Q. Okay. And so, your concerns -- and I mean, I'm
17 reading through the suit, but I want you to tell me
18 what concerns and what problems you have with
19 Disabilities and Special Needs as a result of Fatima
20 falling.

21 A. Is that nobody contacted me to let me know that it
22 happened.

23 Q. Okay.

24 A. And I -- and it was so many -- so much time had passed
25 that I still got no contact from the Disabilities

1 office. I had to discover this myself. Even the
2 doctor asked me what happened; I couldn't even tell
3 the doctor what happened.

4 Q. Okay. And you took her for medical treatment later
5 that night after the fall; right?

6 A. As early as possible.

7 Q. Okay. But it was the same day; correct?

8 A. The same day.

9 Q. And do you -- did they tell you about what time that
10 she fell?

11 A. They say it was around about 2:30, between 2:00 and
12 2:30.

13 Q. Okay. And you got her to the doctor approximately
14 what time?

15 A. They dropped her off at 3:30, and I'd say it was
16 around about between four -- about five.

17 Q. You got her to the hospital about five?

18 A. Yeah. Uh-huh.

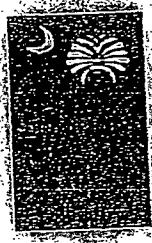
19 Q. Okay.

20 A. Not exactly.

21 Q. So, you got her to the doctor about three hours or so
22 after the fall?

23 A. Yeah.

24 Q. Okay. And the hospital didn't admit her that night,
25 did they?



FACILITY-BASED ADULT DAY SERVICES

Report for Single Plan Development ☒

5-31-05
(date developed)

Service & Treatment Plan ☐

(date developed)

SECTION 1: General Information

A. Day Service Type:

Day Habilitation ☒

Prevocational ☐

Individual Rehabilitation Supports ☐

B. Funding Source:

MR/RD Waiver ☒

Medicaid State Plan ☐

Other ☐

Specify: _____

SECTION 2: Identifying Information

A. Customer's Full Name: Fatima Karriem

B. Date of Birth: August 4, 2004

C. Home Telephone Number & Address: (803) 775-2793
1024 Huddersfield Dr.
Sumter, SC 29154

D. Primary Contact: Philip Simmons (uncle)
Address same as above

SECTION 3: Critical & Emergency Information

- A. Critical Information: Fatima is diagnosed with MR and positive PPD. She is on accountability level III within same room or nearby, outside of visual supervision for 30 minute periods. Fatima had a history of physical aggression but this is not a concern at the present time.
- B. Emergency Disaster Preparedness Plan Information: Mr. Simmon, uncle, reports that he will assume full responsibility for Fatima in the event of an emergency or disaster. Fatima's cousin, Juanita Oakes, cares for her when uncle is unavailable.

SECTION 4: Day Service Summary

- A. Assessment tool Information: SCDSNB Skills Assessment
- B. Assessment results summary: According to SCDSNB Skills Assessment Fatima has strength in the following areas: some personal care skills, some self-esteem skills, some 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.

Summary of progress and/or regression: Dining- Fatima will complete each step with 90% independence for three consecutive months. Fatima averaged 33%I, 7%G, 60%V in June '04, 33%I, 30%G, 37%V in July '04, 37%I, 40%G, 23%V in Aug. '04, 23%I, 77%G in Sept. '04, 50%I, 50%G in Oct. '04, 60%I, 40%G in Nov. '04, 67%I, 33%G in Dec. '04, 77%I, 23%G in Jan. '05, 83%I, 17%G in Feb. '05, 90%I, 10%G in March '05, 100%I in April '05, 100%I in May '05 Goal met for three consecutive months.

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.

SECTION 5: Health Information

- A. Primary Care Physician: Dr. Clay Lowder
325 Broad Street, Suite 100
Sumter, SC 29150
(803) 773-5227
- B. Hospital of choice: Tuomey Regional Medical Center
129 North Washington Street
Sumter, SC 29150

C. Medication administration:

- ☐ Customer
- ☐ Customer w/ assistance from Direct Support Staff
- ☐ Certified Medication Technician
- ☐ Licensed Nurse

Comments: At the present time Fatima don't take medication at the Adult Program.

D. Diet:

- Regular ☒ X
- Restricted Calories ☐ Explain: _____
- Restricted Foods ☐ Explain: _____
- Pureed ☐
- Chopped ☐

Comments: Fatima is on a regular diet; uncle chooses to provide her with low calorie alternatives at home to aid in maintenance of weight.

E. Adaptive Equipment:

Assistive Technology Device or Supplies	Schedule for Use
none	

SECTION 6: Provider Agency Information

A. Provider Agency: Sumter DSN Board 750 Electric Dr. 803-778-1669

B. Person Completing Report: Deloris McCaskey, Floor Supervisor, 803-778-1669 ext. 140

ADDENDUM

ANNUAL GOAL DETERMINATION

CONSUMER: Fatima Karim DATE: 4/1/05
HABILITATION AREA: Day Hab SUBJECT: First Aid Kit
TARGET DATE: 5/2006 TRAINER: A. Kelton / L. Jenkins

GOAL STATEMENT: I will learn to pick out the contents of a first aid kit that I use to treat a minor injury with 80% success

IMPLEMENTATION SCHEDULE: Daily

DATA COLLECTION: Daily

DOCUMENTATION:

Task letter

+ or -

ADDENDUM

ANNUAL GOAL DETERMINATION

CONSUMER: Fatima Karsum DATE: 6/1/05
HABILITATION AREA: Day Hab SUBJECT: Interact
TARGET DATE: 5/2006 TRAINER: A. Helton / L. Jenkins

GOAL STATEMENT: Fatima will interact with staff in a planned activity with 80% success for three consecutive months.

IMPLEMENTATION SCHEDULE: Daily

DATA COLLECTION: Daily

DOCUMENTATION:

Task letter

+ or -

SINGLE PLAN

COPY

I. BACKGROUND DOCUMENT

A. Identifying Information

Name: Fatima Kariem										
Address: 1024 Huddersfield Drive Sumter, SC 29154										
Phone No.: 803-775-2793		Social Security No.: 124-72-8947		Date of Birth: 8-5-72						
Medicaid No.: 5726056701			Medicare No.: 437209386c1							
Other Insurance: HMO Blue, policy number 4108421913										
Primary Contact and Relationship: Mr. Phillip Simmons, uncle										
Address: 1024 Huddersfield Drive Sumter, SC 29154										
Phone No.: 803-775-2793										
Emergency Contacts:										
Name: Mr. Phillip Simmons			Phone No.: 803-775-2793							
Name:			Phone No.:							
Critical Information: Accountability level III: visual supervision every 30 minutes. Fatima is non-verbal but understands what is said to her.										
Eligibility Category:	☐	Autism	DSN Waiver Information:	☒	MR/RD Waiver					
	☐	At Risk		☐	HASCI Waiver					
	☐	High Risk		☐	None					
	☒	MR/RD								
	☐	HASCI								
Which Agency is responsible for this consumer's primary case management? SCDSNB										
ICAP Level:	1 []	2 []	3 [x]	4 []	5 []	6 []	7 []	8 []	9 []	N/A []
Admission Date (for ICF/MR only):				x N/A						
Plan Implementation Date: 6-14-05										

B. Current Life Situation

General/Personal History/Family Information:

Fatima Karriem is a 33 year old female diagnosed with mental retardation according to her psychological evaluation dated 1/12/1996. Fatima is also diagnosed with Positive PPD, but is on no prescribed drugs, and is in good health. Fatima is non-verbal, but understands what is said to her. She is ambulatory. In the past, Fatima exhibited aggressive behaviors (physical aggression), but this is not a concern at the present time.

Fatima resides with her uncle/legal guardian, Mr. Philip Simmons. Mr. Simmons reports that Fatima possesses all self-care skills at home, but needs prompting to dress appropriately as she prefers old and familiar clothing, even though it may be in poor repair. Mr. Simmons will purchase new clothing and dispose of old clothing, but Fatima will retrieve and wear her old clothes when possible. Fatima prefers things to remain the same, including clothing and furniture placement. Mr. Simmons provides Fatima with a stable residence and has expressed no desire for the current living arrangement to change.

Fatima and Mr. Simmons continue to maintain an active schedule of social events. He takes her on all vacations and local outings. She especially likes grocery shopping and going to football games. Fatima enjoys listening to music. Mr. Simmons also noted that Fatima enjoys gatherings with friends and extended family for cook-outs and dinners, throughout the year. She also participates in some Special Olympic events.

Fatima chooses to attend Sumter Work Enterprises II 5 days per week where she is trained in skills to increase independence in areas of self-care. While at the workshop, Fatima is supervised by Day Habilitation trainer. She is on accountability level III—within same room or nearby, outside of visual supervision for 30 minute periods.

Fatima is supported in meeting her medical needs by her uncle/guardian via the scheduling of and transporting to and from appointments to her primary care physician of choice. Fatima does not utilize any prescribed drugs and has had no hospitalizations or surgeries in the previous year.

Fatima appears to be very cautious with people outside of her uncle/guardian and respite provider. She is shy and at the same time, very protective of her relationship with uncle, who has been a father to her.

Emergency/Disaster Plan and Back-Up Plan: Mr. Simmons, uncle, reports that he assumes full responsibility for Fatima in the event of an emergency or disaster. Cousin, Juanita Oakes, cares for Fatima when uncle is unavailable. Juanita Oakes is also to become Fatima's caregiver after uncle becomes unable to continue to do so.

Intervention/Services Summary and Assessment Results (informal and formal):

In the past year, Fatima has received service coordination from SCDSNB, funded via Medicaid, day habilitation via SCDSNB Sumter Work Enterprises funded by MR/RD waiver, and respite via chosen provider funded by MR/RD waiver. Mr. Simmons, uncle, expressed satisfaction with all services on behalf of Fatima.

Fatima received Service Coordination since her last plan (June 2004 to present), which afforded her services to include advocacy, needs assessment, linkage to services as necessary, monitorship of goals and services, and authorization of services obtained under the MR/RD waiver. Fatima received service coordination on a quarterly (or more frequently as needed) basis.

Fatima is afforded Respite provided by chosen trained caregiver and funded by MR/RD waiver. Mr.

Simmons works a full time job and does lawn care part time, to provide for himself and Fatima. In considering Mr. Simmons's work schedule and the stress of providing care to an adult female with Fatima's needs, Respite is provided to Fatima with funding under the MR/RD Waiver at the rate of 12 hours weekly (4 hours per day, 3 days per week). Mr. Simmons has expressed satisfaction with respite provider, and with respite care services. He used the following hours in (2004) June—58, July—48, August—56, September—52, October—48, November—56, December—52, (2005) January—52, February—48, March—56, April—48, May—56. Chosen provider is a trained respite caregiver is Lisa Brown.

Fatima chooses to attend SCDSNB Sumter Work Enterprises II for Day Habilitation, as funded under the MR/RD Waiver at the current rate of 5.5 hours per day, 5 days per week. Mr. Simmons has expressed satisfaction with Day Habilitation provided to Fatima and requests that services continue for the upcoming year with SCDSNB as the provider of choice.

Fatima worked on Dining goal: *Fatima will complete each step with independence (put food into mouth without spilling, clean up any spills, dispose of plate and leftovers): Criterion is 90% independence for 3 consecutive months.*

June:

July: 33%I

August: 37%I

September: 50%I

October: 50%I

November: 50%I

December: 67%I

January: 77%I

February: 83%I

March: 90%I

April: 100%I

May: 100%I

At SWE, Fatima works on Day Hab goals geared to develop skill and Fatima was assessed 5-31-05 using the SCDSNB assessment. Based on analysis of floor supervisor Deloris McCauley in 5-31-05 prestaffing, Fatima has strengths in the following areas: some personal care skills, some self-esteem skills, some cognitive independent living skills, some personal responsibility and self-direction skills, some social skills and positive interactions with others, 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 with others, most health and nutrition skills, most community living and peer relationships.

Fatima will work on a goal to improve social skills: *Fatima will interact with staff in a planned activity with success.* Fatima will also work on a personal care goal: *I will learn to pick out the contents of a first aid kit that I use to treat a minor injury with 80% success.* Fatima will also go on outings at least 1 x per week.

Fatima has a need to have bi annual dental exams. Fatima has not had a dental exam in a long time—since 12-02—thus a need was noted to have a dental exam at latest annual plan as a preventative health measure and to help maintain best oral hygiene. Uncle chose provider for Dr. G. Rabon but Dr. Rabon decided that he is not taking any new community patients at this time. New chosen provider is Dr. Allison Reeves of Liberty Street Dental. She has not yet had a dental exam this year. Fatima continues to need to maintain best oral health and hygiene, with bi-annual dental exams being a part of that maintenance.

Level of Care (for waiver participants and ICF/MR residents):

Type of Last Level of Care Evaluation: ☐ NF ☒ ICF/MR ☐ N/A

Effective Date of Last Level of Care Evaluation: 7-16-05

Expiration Date of Last Level of Care Evaluation: 7-15-04

Results of LOC Evaluation: ☒ Met ☐ Not Met

Explanation of Results: Fatima continues to meet ICF MR LOC due to the following reasons: she has MR, supervision is necessary due to impaired judgment and services are needed for acquisition of behaviors necessary to function with as much self determination and independence as possible and prevention or deceleration of regression or loss of current optimal functioning status

All needs included below should be supported by previous assessments or services information.

Needs and Recommendations for Actions:

Need: Fatima needs to receive supervision and skills training to function as independently as possible and maintain/improve self care skills in the areas of social skills and personal responsibility.	Recommendation to Address Need: Day Habilitation will be provided.
Need:	Recommendation to Address Need:
Need: Fatima needs supervision and care in the absence of her caregiver.	Recommendation to Address Need: Respite will be provided.
Need: Fatima needs advocacy, needs assessment, linkage to services, monitorship of goals/services, and authorization of services.	Recommendation to Address Need: Service Coordination will be provided.
Need:	Recommendation to Address Need:

C. Physical Health

Primary Physician of Choice: Dr. Clay Lowder	
Address: 325 Broad Street, Suite 100 Sumter, SC 29150	
Phone No.: 773-5227	Hospital of Choice: Tuomey Regional Medical Center
Date of Last Physical: 12-03	Date of Last PPD (if applicable): History of previous positive PPD. She was evaluated on for symptoms and none were found to be present. 8-31-05 <i>update 7-27-05</i>
Date of last OB/GYN (if female and at least 16 years of age): 8-29-03	
Date of Last Dental Exam: 12-02	Date of Last Vision Exam: 12-03
Other Medical Professionals Providing Care (to include address and phone numbers)	
Dr. Rabon, dentist, 2645-A Hardee Court, Sumter, SC 29150 905-3567	
DSM-IV/Mental Health Diagnosis:	☐ YES ☒ NO
If yes, explain:	
Behavioral/Emotional Health Issues:	☐ YES ☒ NO
If yes, explain:	

Describe any current medical and emotional/behavioral conditions, treatments, and medications.				
Condition	Medication/Intervention and Frequency	Prescriber/Provider/ Person Responsible	Service Name	Funding Source
MR	N/a	N/a	N/a	N/a
Positive PPD	N/a	N/a	N/a	N/a
Pain	hydrocodone 6 x day	Tuomey	Medicine	Medicaid
Cough/pain	hydrocodone syrup 6 x day	Tuomey	Medicine	Medicaid
What Health Insurance does this person have?		☒ Medicaid ☒ Medicare ☒ Other: HMO Blue		

Please indicate which of the following services will likely be needed during the next year and if needed, will be funded by one or all of the insurers noted above (this DOES NOT include Waiver Services):

☒	Hospital/Emergency Room	☒	Physician Visits
☒	Prescribed Drugs	☐	Home Health
☐	Durable Medical Equipment	☐	Dental (children or emergency)
☐	EPSDT	☐	Transportation
☒	Targeted Case Management	☐	Mental Health
☐	Family Planning	☐	Other:

Note: if services are needed and not covered by insurance, the need must be addressed.

List any therapies, equipment, assistive devices or supplies currently prescribed:				
Therapy, equipment, assistive devices, or supplies	Schedule for use/Frequency of Services	Provider/Person Responsible	Service Name	Funding Source
N/a				

Assistance with Medication: does not currently take any
 Needed? ☐ Yes ☒ No
 If yes, describe the level of assistance needed:
 Physical assistance only (open bottle, pour medication, etc.) ☐
 Verbal reminders/prompts to take ☐
 Both ☐
 Any special instructions for medication administration:

Other Physical/Functional Health
 Significant health issues since last review/to date?
 no
 Does the consumer have any allergies? ☐ Yes ☒ No
 If yes, explain:
 How does this person communicate? Fatima is non-verbal but comprehends what is said to her. She communicates mainly by action and context thereof. Fatima is most easily understood by those closest to her.
 Are Interpreter Services needed? ☐ Yes ☒ No
 If yes, explain:
 Diet: Fatima is on a regular diet; uncle chooses to provide her with low calorie alternatives at home to aid in maintenance of weight.
 Special Instructions:
 Has this person received genetics services/counseling: ☒ Yes ☐ No
 If no, does this person wish to receive genetics services/counseling: ☐ Yes ☐ No
 Additional Comments (if applicable):

All needs included below should be supported by previous assessments or services information.

Physical Health Needs and Recommendations for Actions:

Need: Fatima needs to maintain best oral hygiene.	Recommendation to Address Need: Bi-annual dental exams will be provided to Fatima.
Need: Fatima needs to maintain optimal health, to include a physical and ob/gyn exam.	Recommendation to Address Need: Uncle will schedule physical and ob/gyn exams, transport, and follow up as needed.
Need:	Recommendation to Address Need:

Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:

D: Rights Issues

Is this person a minor (under the age of eighteen)?	☐ Yes	☒ No
Has this person been adjudicated incompetent, been appointed a conservator, or relinquished power of attorney?	☐ Yes	☒ No
If yes, which one(s)?		
If this person has not been adjudicated incompetent, does he/she receive assistance with decision making/planning?	☒ Yes	☐ No
If yes, who provides the assistance? Phillip Simmons, uncle		
Does this person have a Living Will, Health Care Power of Attorney, Do not Resuscitate Order or EMS Do Not Resuscitate Order?	☐ Yes	☒ No
If yes, which one(s):		
If this person is enrolled in a DSN HCBS Waiver, has he/she been notified of his/her right to a choice of qualified providers and right to appeal waiver decisions?	☒ Yes	☐ No
Have any rights issues been reviewed by the Agency's Human Rights Committee on this person's behalf?	☐ Yes	☒ No
Any additional rights issues?		

This agency must comply with Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act of 1973, Americans with Disabilities Act of 1990 and Age Discrimination Act of 1975. This agency has designated the person noted below to coordinate the Agency's complaint process. If you feel you have been discriminated against, please contact this person at the number noted.

Anthony Mayfield
Compliance Coordinator's Name

778-1669 ext 120
Telephone Number

General Comments (if applicable):

All needs included below should be supported by previous assessments or services information.

Rights Needs and Recommendations for Actions:

Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:

Need:	Recommendation to Address Need:
-------	---------------------------------

E. Financial Resources

Indicate the financial resources currently being received:

Earned income from work	☐
Medicaid	☒
SSI	☒
SSDI	☐
Social Security Administration	☐
Food Stamps	☐
Housing Supplements	☐
DSN Family Supports	☐

Are resources adequate to meet current needs? ☒ Yes ☐ No

Is this person at risk for losing benefits due to resources or income in excess of program limits?
☐ Yes ☒ No

NOTE: If this person resides in a SCDDSN sponsored residential option, a Financial Plan must be completed as required by 200-12-DD.

Additional Comments: Uncle Phillip Simmons is Fatima's payee.

All needs included below should be supported by previous assessments or services information.

Financial Needs and Recommendations for Actions:

Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:

F. Personal Priorities and Preferences

Would you like a facilitator to assist with planning? ☐ Yes ☒ No ☐ N/A (SCDDSN Regional Centers only)	
If yes, who is your facilitator of choice?	
Who, if anyone, would you like to participate in your planning meeting (include addresses and phone numbers if available)? Uncle invited the following persons on Fatima's behalf: Deloris McCauley, floor supervisor, SWE II, 778-1669 ext 140 Arlene Helton, day hab. trainer, SWE II, 778-1669 ext 140	
Do you have a preference for where and when your planning meeting is held? (Uncle made the following decisions on Fatima's behalf) ☒ Yes ☐ No	
If yes, where and when: 6-14-05 SWE II 10:00 AM	
Are there specific topics/concerns you wish to discuss during the planning session (and included as a need/recommendation)? ☐ Yes ☒ No	
If yes, explain:	
Are there specific topics/concerns you do NOT want to discuss during the planning meeting? ☐ Yes ☒ No	
If yes, explain:	
Have you participated in a "Personal Outcomes Interview" or any other outcome interview? ☐ Yes ☒ No	
What areas of concern were noted:	
Have these areas been addressed/being addressed? ☐ Yes ☐ No	
If not, would you like to address them during your planning session? ☐ Yes ☐ No	
Are you a registered voter? ☐ Yes ☒ No ☐ N/A	
If no, would you like to be? ☐ Yes ☒ No	
Additional Comments (if applicable):	

All needs included below should be supported by previous assessments or services information.

Personal Preferences Needs and Recommendations for Actions:

Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:

G. Comments: Provide any additional information including needs not previously covered in this document.

All needs included below should be supported by previous assessments or services information.

Miscellaneous Needs and Recommendations for Actions:

Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:
Need:	Recommendation to Address Need:

H. Signature

Gayla Jackson SC
Signature of Person Completing
Gayla D. Jackson SC
Printed Name

6-3-05

Date Completed

A. Needs and Recommendations for Actions from the Background Document (must be exactly as written in the Background Document)

Need: Fatima needs to receive supervision and skills training to function as independently as possible and maintain/improve self care skills in the areas of social skills and personal responsibility.	
Recommendation: Day Habilitation will be provided.	
Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. Uncle said he was satisfied with day habilitation services via SCDSNB Sumter Work Enterprises and chooses to retain them as provider. Floor supervisor summarized Fatima's progress during the past year (met dining goal) and also reviewed latest assessment. She discussed Fatima's weaknesses medication management, most cognitive/independent living skills, most social skills and positive interactions with others, most health and nutrition skills, most community living and peer relationships. Fatima will work on a goal to improve social skills: <i>Fatima will interact with staff in a planned activity with success.</i> Fatima will also work on a personal care goal: <i>I will learn to pick out the contents of a first aid kit that I use to treat a minor injury with 80% success.</i> Fatima will also go on outings at least 1 x per week. Uncle said on behalf of Fatima that he agrees she can continue to train on personal responsibility and socialization goals with day habilitation trainers. When asked if she was happy at day program and would agreed to continue with training on personal responsibility and socialization skills, Fatima gave assent via a slight smile and very small nod. Floor supervisor will assess Fatima annually, develop appropriate goals, and monitor said goals once implemented. SC will monitor continued progress or lack thereof and make appropriate recommendations for revision, continuation, or D/C as needed.	
Will this be addressed in this year's Plan of Supports?	☒ Yes ☐ No
If no, explain:	

Need: Fatima needs supervision and care in the absence of her caregiver.	
Recommendation: Respite will be provided.	
Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. Fatima cannot be left alone for lengthy periods of time due to limited understanding and inability to communicate wants/needs to unfamiliar persons due to lack of verbal abilities. She has some compulsive autistic-like tendencies and history of aggressive behavior when upset. Uncle is Fatima's sole caregiver as well as having responsibilities such as working two jobs with long hours which often involve nights and some weekends. Due to the above reasons, uncle needs a relief from Fatima's care so he can continue to maintain her current living environment. Respite funded via MR/RD waiver is therefore much appreciated and continues to be a need. Uncle requests that current amount of 12 hours weekly (4 hours daily, 3 x weekly) continue. Uncle said he is satisfied with current provider Lisa Brown. Fatima will be provided with Respite via agency SCDSNB and provider Lisa Brown. SC will monitor quarterly via consult with uncle for usage and satisfaction with services, and make recommendations for increase/decrease in service and change of provider as necessary. Uncle agreed to this on Fatima's behalf. SC asked Fatima if she is happy with respite and current provider Lisa Brown, and if she agreed to continue, and she ducked head but smiled and nodded a very small nod.	
Will this be addressed in this year's Plan of Supports?	☒ Yes ☐ No
If no, explain:	

Need: Fatima needs advocacy, needs assessment, linkage to services, monitorship of goals/services, and authorization of services.

Recommendation: Service Coordination will be provided.

Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. SC explained what service coordination was and what in general SC has done over the past year. Uncle said he is satisfied with service coordination over the past year and chooses to retain SCDSNB as provider. Fatima assented via a slight smile which uncle interpreted as agreement. SC will continue to provide Fatima with Service Coordination. SC will contact Fatima or uncle 4x yearly to learn status of wants/needs and satisfaction with services. SC will monitor goals/services 4 x yearly and make recommendations for continuation, revision, or d/c of goals/services based on progress and satisfaction. SC will formulate a plan 1 x yearly, or more often as needed, that is reflective of Fatima's wants and needs.

Will this be addressed in this year's Plan of Supports? ☐ Yes ☒ No

If no, explain: Does not require monitoring.

Need: Fatima needs to maintain best oral hygiene.

Recommendation: Bi-annual dental exams will be provided to Fatima.

Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. Uncle has chosen Dr. Allison Reeves of Liberty Street Dental as provider and will schedule an appointment, transport, and follow up as needed. Uncle has already chosen to have dental exam funded via MR/RD waiver due to limited personal funds. He will have Dr. Reeves contact SC with services and cost so they can be added to MR/RD waiver budget. SC will add to budget per uncle's request and monitor for effectiveness and satisfaction. Uncle agreed to this on Fatima's behalf.

Will this be addressed in this year's Plan of Supports? ☒ Yes ☐ No

If no, explain:

Need: Fatima needs to maintain optimal health, to include a physical, ob/gyn exam, and eye exam.

Recommendation: Uncle will schedule physical, ob/gyn, and eye exams, transport, and follow up as needed.

Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. Uncle chooses to retain Dr. Clay Lowder as PCP, Sumter County Health Department as provider of ob/gyn exam. Uncle will need to choose an eye doctor. SC will send provider lists. Fatima has not had a physical, ob exam, or eye exam since 2003. Uncle will schedule an appointment, transport, and follow up as needed. Uncle agreed to this on Fatima's behalf.

Will this be addressed in this year's Plan of Supports? ☐ Yes ☒ No

If no, explain: Does not require monitoring.

Need:

Recommendation:

Discussion (to determine the action(s) needed):				
Will this be addressed in this year's Plan of Supports?	☐	Yes	☐	No
If no, explain:				

B. Needs and Recommendations for Actions that resulted from discussion at the Plan Meeting

Need: Fatima needs to maintain best personal hygiene during menstrual cycle.
Recommendation: Fatima will change pads regularly.
Discussion (to determine the action(s) needed): The team to include Fatima discussed above need. Uncle participated via phone and spoke on behalf of Fatima as she does not talk although she can understand what is said to her. Uncle stated that Fatima can change her pad by herself she just needs to be told to. Otherwise she will just keep on the same one and may develop an odor by the time she goes home. Fatima can independently toilet so trainers normally do not accompany her to bathroom. Vocational trainers will remind Fatima to change pad regularly at workshop when her cycle is on. Uncle agreed to this on behalf of Fatima.
Will this be addressed in this year's Plan of Supports? ☐ Yes ☒ No
If no, explain: does not require monitoring.

Need:
Recommendation:
Discussion (to determine the action(s) needed):
Will this be addressed in this year's Plan of Supports? ☐ Yes ☐ No
If no, explain:

Need:
Recommendation:
Discussion (to determine the action(s) needed):
Will this be addressed in this year's Plan of Supports? ☐ Yes ☐ No
If no, explain:

Need:
Recommendation:
Discussion (to determine the action(s) needed):
Will this be addressed in this year's Plan of Supports? ☐ Yes ☐ No
If no, explain:

Need:
Recommendation:

Discussion (to determine the action(s) needed):		
Will this be addressed in this year's Plan of Supports?	☐ Yes	☐ No
If no, explain:		

Need:		
Recommendation:		
Discussion (to determine the action(s) needed):		
Will this be addressed in this year's Plan of Supports?	☐ Yes	☐ No
If no, explain:		

Need:		
Recommendation:		
Discussion (to determine the action(s) needed):		
Will this be addressed in this year's Plan of Supports?	☐ Yes	☐ No
If no, explain:		

Need:		
Recommendation:		
Discussion (to determine the action(s) needed):		
Will this be addressed in this year's Plan of Supports?	☐ Yes	☐ No
If no, explain:		

III. PLAN OF SUPPORTS

Need: Fatima needs to receive supervision and skills training to function as independently as possible and maintain/improve self care skills in the areas of social skills and personal responsibility.
Action(s): Day habilitation will be provided.
Funding Source: MR/RD waiver
Provider: SCDSNB Sumter Work Enterprises
Timeframe/Projected Completion Date: 6-13-06
Person Responsible: floor supervisor, SC

Need: Fatima needs supervision and care in the absence of her caregiver.
Action(s): Respite will be provided.
Funding Source: MR/RD waiver
Provider: SCDSNB
Timeframe/Projected Completion Date: 6-13-06
Person Responsible: SC

Need: Fatima needs to maintain best oral hygiene.
Action(s): Bi-annual dental exams will be provided to Fatima.
Funding Source: MR/RD waiver
Provider: chosen dentist Dr. Reeves
Timeframe/Projected Completion Date: 6-13-06
Person Responsible: uncle, chosen dentist, SC

Need:
Action(s):
Funding Source:
Provider:
Timeframe/Projected Completion Date:
Person Responsible:

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

30(b)(6) Deposition of:
South Carolina Disability and
Special Needs Board
(Joyce M. Jackson)

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 12:33 P.M. - 1:31 P.M.

Court Reporter: Lisa Marie Weesner

The 30(b)(6) deposition is taken pursuant to notice
and/or agreement, in the above-entitled cause
pending in the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
Court Reporting Services
1525 Madison Avenue
Florence, SC 29501
843-229-4401 (Phone)
843-407-6108 (Fax)
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COPY

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By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/ln	Ex.	Description
12/23	P x 1	SCDSNB - Incident Report
16/11	P x 2	Hourly-Worker Accountability
27/17	P x 3	Incident Report
30/25	P x 4	Mission Statement
33/04	P x 5	Outdoor Area - Memo

** uh-huh = affirmative

huh-uh = negative

1 A Okay. And -- I hate to change this, I
2 don't want to change it. They may be able to
3 recognize some dangers, not all of them. I wouldn't
4 say the same as you and I, but they can recognize
5 some danger.

6 Q Right.

7 A Whereas somebody who requires constant
8 visual supervision, may not be able to recognize
9 any, or it may just be that that person needs total
10 care; and if they do, then somebody has to be there
11 to provide it.

12 Q Do they require different monitoring
13 needs?

14 A That's where the level of supervision and
15 accountability, that's -- all that ties into that.

16 Q Are there certain places that are better
17 for them to be than others?

18 A Do you mean, while they're at day program
19 or --

20 Q That's correct.

21 A -- throughout --

22 Q While they're at day -- the day program.

23 A And, do you mean, in conjunction with
24 their supervision level in terms of are there better
25 places for them --

1 Q Yes.

2 A -- to be?

3 Q Or the better places for them to be.

4 A Normally, if a perso--- let me think about
5 this. With the supervision level, at day program,
6 I'm trying to think of the best way to explain this.
7 If somebody is a level three, at 30 minutes, that's
8 regardless to where they are at the day program.
9 It's not just a -- you know, when they're on the
10 workshop floor. If that person is somebody --
11 because we might have somebody who goes from one
12 building to another, then staff has to be aware of
13 where they are in terms of, if that staff is not
14 walking with them, because they are allowed to walk
15 to the next building alone, staff has to know
16 they're in the next building, they went to the
17 canteen, and if they're not back, you know, they
18 have to see them before that 30 minutes is up.

19 Q Let me show you -- and this has been
20 marked as an exhibit previously.

21 MR. MOORMAN: So we'll mark this as
22 Plaintiff's Number 1.

23 (Plaintiff's Exhibit number 1
24 marked for identification.)

25

1 BY MR. MOORMAN:

2 Q And, Ms. Jackson, I'm going to show this.
3 This is Fatima Karriem's daily schedule. Do you
4 recognize -- do you recognize that or -- not that
5 particular one, but is that a common schedule that
6 you would see for somebody who's in the day program
7 at the Disabilities and Special Needs Board?

8 A It was then, yes.

9 Q Is that not the case now?

10 A It is not.

11 Q Okay.

12 A It's a little different than this because
13 of just the way the services are provided. It's
14 provided different than it was then.

15 Q Okay. What's -- what's different about it
16 now?

17 A During this time, our services were
18 provided as a day being a unit in terms of the way
19 we bill for them. Medicaid has changed that, so now
20 a unit is a half a day. And for Medicaid purposes,
21 the first unit is in the morning. It's a three-hour
22 unit and includes lunch. The second unit is in the
23 afternoon and it's only two hours. But -- so they
24 end up with like five hours --

25 Q Okay.

1 Q And what would -- would be -- the reason
2 consumers are in that area is to get on and off a
3 bus?

4 A If it's in the morning before 9:00, that's
5 why they're there. From 2:30 in the afternoon on,
6 you know, until they leave, would be why they're
7 there. Earlier than that, and depending upon the
8 weather, they could be there for leisure. That's a
9 -- because it's covered. Sometimes, depending on
10 the weather; spring, fall, when it's nice outside,
11 they may bring chairs out. Staff is with them and
12 they'll -- they may sit outside. But they would not
13 be sitting there at 2:30 because it's loading time,
14 nor would they be sitting there before nine o---
15 yeah, before nine in the morning.

16 Q And if they were out there for leisure
17 activities, would the hourly accountability sheet
18 show that?

19 A I'm going to look at what's on here and
20 see what the choices would have been. The staff
21 person would have either put work station or that
22 they were out for leisure -- leisure.

23 Q They would have put leisure if they --

24 A It's --

25 Q -- were outside?

1 required to be done is to ensure the safety of the
2 people at the Disabilities and Special Needs Board?

3 A Yes.

4 Q And to find out where individuals are at
5 all times?

6 A Yes.

7 Q The area where Fatima was, is -- is -- at
8 the time of her fall, is -- you said that that was a
9 loading area, are there people en--- entering the --
10 the -- entering and exiting the building there as
11 well?

12 A Not during the middle of the day. It
13 would only be in the mornings, when they are
14 arriving, and then in the afternoons, when they are
15 leaving is when you get the traffic. Otherwise that
16 door opens onto -- it takes you into the building
17 nears the seniors area.

18 Q Okay. Is that building near -- is that
19 area near a parking lot?

20 A It is. And I'm trying to think in my mind
21 now whether that -- the parking lot, if that fence
22 run down this way and shuts it off from it, but it
23 is near a parking lot.

24 Q Okay.

25 A Our parking lot.

1 Q Is that where staff parks their cars or?

2 A The staff.

3 Q Okay. And the area, is it concrete,
4 brick?

5 A Right in the loading area, there's
6 concrete, but then there's also some grassy areas.

7 Q Okay. And where would -- do you know
8 where Fatima would have been seated or where the
9 individuals are seated at that time? Is it in the
10 grass or is it in the -- on the sidewalk or where?

11 A Normally -- and this would be prior to
12 2:30 at the point that they would be going -- you
13 know, getting read to go home when they would have
14 them out just kind of for leisure activity. It's
15 pavement where they are, but there is -- there are
16 like -- I hate to call them islands, but like little
17 grassy areas where you can put flowers.

18 Q Okay.

19 A But it's -- the actual area is like a
20 driveway if that makes sense.

21 Q Does -- in your opinion, as a -- I guess,
22 being the person designated for safety at the
23 Disabilities and Special Needs Board, is having
24 clients in this area, or consumers in this area,
25 present any safety problems?

1 A It should not. If -- if the staff person
2 is there -- their -- their assigned staff, then it
3 should not. Because, normally, they're either in
4 rocking chairs or regular chairs that they'll take
5 out. And then when they get ready to go back in,
6 they take those chairs back inside.

7 Q I don't know -- are you aware that Fatima
8 Karriem has problems when people get into her
9 personal space; she can become startled.

10 A I have heard that.

11 Q Okay. Do you believe that this was a
12 appropriate place to have her being this close to a
13 parking lot?

14 MR. JOHNSON: Object to the form.

15 Q Go ahead.

16 A Okay. At that time of the day, there
17 would not have been anybody in the parking lot other
18 than who she's accustomed to. Because the -- where
19 they load at, you've got to walk across like a
20 median to get to where the cars are where the staff
21 would park, so where they're -- normally are, it
22 would have been just them.

23 Q Okay.

24 A Anybody invading her space would have come
25 from inside the building headed out the door, which

1 Q Okay. Do you have national standards that
2 you have to follow?

3 A For safety? No. Basically, it's our
4 state setting.

5 Q Okay. Where would all the safety
6 standards be found -- I mean, if you had a question
7 about a safety standard and/or safety question,
8 where would you go to look for the answer?

9 A For any of our policies and procedures,
10 the -- let me get her title right -- our executive
11 administrative assistant houses a huge manual near
12 her desk, but in each program area, they have a
13 smaller version of that.

14 Q Okay. Does the staff receive training in
15 regards to safety at the facility?

16 A They do. They --

17 Q How regularly do they do that?

18 A Staff are trained within 60 days of their
19 hire date. In fact, they do not go out on the floor
20 to work until they have completed the training. And
21 then the other training is completed annually as
22 required. Or if it's defensive driving, it's every
23 four year. But it depends on the training. But
24 like first aid, annually, I think for that.

25 Q Are safety audits done at the Disabilities

EFFECTIVE: September 2002

REFERENCE: Accountability of Consumers

PURPOSE: To establish procedures to ensure appropriate consumer accountability levels are identified and implemented for consumers entrusted into SCDSNB care

POLICY: 1.3.8

Inventory for Client and Agency Planning (ICAP):

The "service score" on the ICAP may be used to determine service intensity and staff ratio, coinciding with the consumer's current accountability level.

Consumer Rights and Residential Habilitation:

Consumers should reside/work in the most natural and normal environment that supports and respects their dignity and individual rights. When assigned, accountability levels should be least intrusive into and least disruptive of the consumer's life. Accountability levels should represent the least departure from normal patterns of living that can be effective in meeting consumer outcomes. Per South Carolina code of Laws 44-26-140, no consumer may remain at a level of care that is more restrictive than is warranted to meet their needs.

It is not acceptable to preclude a less restrictive/intrusive accountability level merely because of the possibility that a situation may occur. Instead, accountability levels must be based on each consumer's assessed strengths and needs. Providers must be able to objectively show how the accountability level relates to the assessed needs of the consumer. Consumers should receive skills training to eliminate the specific need for supervision.

Furthermore, it is appropriate for support teams to consider alternatives to direct staff supervision in situations where such supervision maybe overly intrusive or disruptive. For example, for some consumers the use of an intercom or a personal response system at night may be preferable to having staff enter the consumer's apartment to perform regular bed checks.

Residential and Day Staff Responsibility:

Residential and day staff are responsible for maintaining accountability for consumers assigned to them. If the party responsible for monitoring a consumer is not providing proper supervision, the incident must be reported immediately to the appropriate supervisory personnel.

Residential and day programs must have a system in place for assuring consumer accountability levels are maintained at all times. The system must allow for documentation of the consumer's whereabouts, and staff responsibility for each consumer.

Upon admission to the program area, an assessment must be completed which denotes the degree of

supervision required by the consumer. The "Balancing the Right of Consumers to Choose with the Responsibility of Agencies to Protect" guidelines is one of many tools which can assist staff in determining appropriate accountability levels. The assessment should be revised as needed, but at least annually to ensure accountability levels remain appropriate.

General Accountability Levels:

The consumer's circle of support shall designate at least one of the eight levels of accountability noted below both for when the consumer is awake, and for when the consumer is sleeping. Modification of an accountability level listed below can only be made when approved by SCDDSN.

In an actual, or potential, critical situation, 1:1 supervision can be ordered by the Administrator as required for consumer health and/or safety. The Executive Director must approve such orders in excess of 24 hours. Documentation of the order should be made in the consumer's plan.

Level I Requires pervasive, continuous, highly intense levels of support and supervision. For example, an individual may need special life support measures or personal care similar to that required by a newborn or, because of problem behavior which threatens self or others, and needs intense, vigilant supervision. This level of support requires highly intense personal supervision and support at all times.

Type of Supervision: Direct, continuous visual.

Level II Requires extensive, moderate intense levels of support and supervision. For example, a consumer may attain beginning self-care skills but may still require almost total personal care (i.e., for eating, dressing or bathing) or, because of serious problem behavior.

Type of Supervision: Within the same room or nearby, outside of visual supervision for 15 minute periods.

Level III Requires close support and supervision. For example, a consumer's personal care skills range from beginning to intermediate levels, but he/she still requires assistance with most daily activities and the supervision of at least one adult who is always present or within hearing distance for support of adaptive skills and/or management of problem behavior.

Type of Supervision: Within the same room or nearby, outside of visual supervision for 30 minute periods.

Level IV Requires limited support and supervision. For example, an individual may be independent in some personal care skills, but may require help, support, or supervision with many daily activities and direct and consistent supervision for much of each day in home, school, work, and community settings.

Type of Supervision: Within the same room or nearby, outside of visual supervision for one hour periods.

Level V Requires occasional support during the day. For example, an individual may be independent in most daily activities, but could use a staff person to “touch base with” a few times a day.

Type of Supervision: Every three hours.

Level VI Requires little support and supervision. For example, an individual may be able to manage most daily activities independently, but may sometimes need periodic advice, support, assistance, or supervision.

Type of Supervision: Daily.

Level VII Requires no support. For example, an individual possesses the ability to live and work independently without advice or assistance from others.

Type of Supervision: None.

Level VIII Because of special circumstances or needs, the individual does not fit into any of the accountability levels referred to above.

Type of Supervision: Supervision is specified in the Plan of Support with participation of the Circle of Support, as appropriate.

Bathing Accountability Levels:

In addition, the consumer’s circle of support shall designate one of the four levels of bathing accountability noted below for each consumer. Modification of a designated level of accountability can only be made if approved by SCDDSN.

In considering the level of supervision needed, the circle of support shall consider whether consumers are capable of discriminating water temperature; have the ability to regulate water temperature; are subject to seizures; have balance problems, and/or other factors that may lead to accidents/injuries.

Level A: Tubs/Showers/Adaptive Bathing Apparatus

Behavior: Consumers who are dependent on caregivers for bathing; are not capable of self preservation; who are medically fragile; subject to frequent falls; and/or do not understand potential dangers.

Type of Supervision: Constant visual surveillance 1:1 ratio (caregiver to consumer) is required.

Level B: Tubs/Showers/Adaptive Bathing Apparatus

Behavior: Consumers who require minimal assistance in bathing from staff, understand potential dangers; are able to alert caregivers if assistance is needed.

Type of Supervision: Caregivers present in same room but constant eye contact not necessary.

Level C: Showers Only

Behavior: Consumers who are self-bathers; risk of seizures, falls and accidents are minimal; are capable of regulating water temperatures; and are capable of self-preservation.

Type of Supervision: Caregiver required in immediate area of shower room.

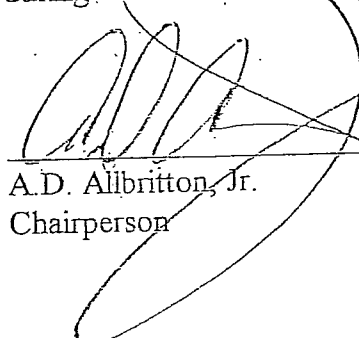
Level D: Tubs/Showers/Adaptive Bathing Apparatus

Behavior: Consumers who are independent bathers who require no assistance or supervision; capable of water temperature discrimination; and capable of self-preservation.

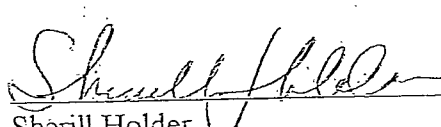
Type of Supervision: None required.

Eating Accountability Levels:

For some consumers, additional staff supervision is required around mealtimes and eating because of problems with chewing, swallowing, choking or aspiration. The consumer's circle of support should consider whether the accountability level assigned to a consumer during the rest of the day is sufficient for mealtimes and eating. If not, then specific, written guidance should be given to staff during mealtimes and eating in order to prevent consumer choking or aspiration.


A.D. Allbritton, Jr.
Chairperson

9-27-02
Date


Sherill Holder
Executive Director

9/27/02
Date

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

Deposition of: Scotty Fitzgerald Merritt

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 10:00 A.M. - 11:33 A.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
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I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/ln	Ex.	Description
12/11	P x 1	SCDSNB - Position Description
19/04	P x 2	Accountability of Consumers
22/19	P x 3	Ms. Karriem's Daily Schedule
27/19	P x 4	Hourly Worker Accountability
32/18	P x 5	SCDSNB - Incident Report
58/03	P x 6	SCDSNB - Outdoor Area
60/11	P x 7	SCDSNB - Mission Statement

** uh-huh = affirmative
huh-uh = negative

1 A -- adjacent to the parking lot, yes.

2 Q And you say -- is it a courtyard area?

3 A It has like a little patio area like
4 this -- about of the size of this room.

5 Q Okay. Are there chairs?

6 A Yes.

7 Q Are there --

8 A Uh-huh.

9 Q And is it fenced in?

10 A No.

11 Q Okay. Is it considered a leisure area?

12 A Yes. They can sit; there were chairs
13 placed out because, like I said, it's adjacent to
14 the senior area.

15 Q Okay. And it's a sidewalk?

16 A Yes.

17 Q Okay. Concrete ramps to get in and out
18 of?

19 A Yes.

20 Q Okay. And six or seven people were there?

21 A Yes.

22 Q And that's incl--- and how many staff were
23 there outside --

24 A The two --

25 Q -- at that point?

1 A -- staff.

2 Q And is -- why -- why were they in that
3 area?

4 A Little break time.

5 Q Okay.

6 A Just sitting where they can take them
7 outside for games to -- to break the monotony.

8 Q How -- how long were they -- how long were
9 -- had they been out there?

10 A I -- I -- I can't say. I don't know the
11 -- the longevity.

12 Q Is -- is that an area that they were
13 normally in?

14 A Yes.

15 Q How long had they been there before Fatima
16 fell; do you know?

17 A No. I do not.

18 Q Did -- did you ask them for that?

19 A No.

20 Q Okay. What did they -- were they out
21 there working on their goals and objectives?

22 A Yes, you can. They could take them out.
23 Depending on what type of goal they were running,
24 they could take them and work on their goals. Take
25 games -- they had games outside, table games --

1 Q Okay. And do -- now, as far as going
2 back, she was scheduled to leave at 2:30. Is --

3 A That's correct.

4 Q -- that correct? Were they going to a --
5 did they remain outside until 2:30?

6 A No.

7 Q No?

8 A No.

9 Q Where did they go next?

10 A They came back inside.

11 Q Okay. Going back, to talk a little bit
12 about the incident, I'm looking at your incident
13 report --

14 A Uh-huh.

15 Q -- that you filled out. There is some
16 discussion about a water hose. Why would -- where
17 was the water hose located?

18 A Lying on the side of the building where
19 the spigot was attached to the wall.

20 Q Okay. And why was the water hose out?

21 A They were doing some landscaping, you
22 know, maintenance landscaping.

23 Q When was that being done?

24 A It had already been done. They were
25 working throughout the day in the whole area.

1 A Uh-huh.

2 Q -- question is, certain areas or places
3 prevent -- present greater safety concerns for
4 Fatima than for you or I?

5 A Yes.

6 MR. JOHNSON: Object to the form.

7 A If there was a area where they're working
8 on construction or something like that and none --
9 none of that was going on.

10 Q Where they were doing landscaping?

11 A No. They weren't landscaping, they were
12 watering the shrubbery.

13 Q And so there were people out there
14 watering during the day?

15 A No. They -- not at that time, no. No.

16 Q Had they been earlier in the day?

17 A Yes.

18 Q Okay. When would they have been doing
19 that?

20 A Now, I can't say when, but I can only say
21 that they were out there working. And me passing
22 and leaving throughout the day program, I cannot say
23 that they were -- can pinpoint the maintenance
24 people's timing.

25 Q Now, did you get up and -- did you take

ER COUNTY DISABILITIES AND SPECIAL NEEDS BOARD, INC.
BEHAVIOR/INCIDENT/ACCIDENT/ILLNESS REPORT

STATUS:

CRITICAL

☒ NON-CRITICAL

PROGRAM: SWEET

Wk Adult

SLP/CTH

(Home)

Atk. East

Thomas Drive

Atk. West

INDIVIDUAL'S NAME: Fatima Karriem

DATE: 4/25/06 LOCATION: Outside near TIME: 1:25 am (pm)

Nature of incident, including what happened prior to incident, if known: (Attach additional sheet, if necessary):

Fatima was sitting down near the carport, and another customer came close to her, and she got up and started running, and tripped over the water hose, falling on her front face.

Describe action taken after incident: Staff assisted in Fatima getting up, and visually looked at her and due to the fact she would not let staff touch her, Nurse Tina Lyles was gotten immediately to check Fatima. Fatima would not let the nurse touch her.

Preventive measures: make sure water hoses are rolled up, and/or put away in storage until needed.

Medical treatment given (if necessary): See Attached Disht

Date, time and name of person notified as required by policy:

Day Service Administrator: _____

Service Coordinator: _____

Director of SLP/CTH Services: _____

QMRP/Community Residence: _____

Executive Director: _____

Parent/Guardian: _____

Law Enforcement/EMS: _____

Nurse/On-Call Nurse: _____

Other: _____

Supervisory Personnel Only

DDSN - if Critical: _____

DHEC (Only if Critical ICF/MR): _____

DSS/Ombudsman (Abuse, Neglect and Exploitation only): _____

Staff Submitting Report/Date
4/25/06

Adm. Program Floor Supervisor/Date
4/25/06

Day Service Administrator/Date
4/25/06

Director of Residential Services/Date

4/26/06

Director of Operations/Date

4/26/06

Executive Director/Date

Residential Administrator/Date

QMRP/SLP/CTH Program Coordinator/Date

Supervisor (Residential/Day)/Date

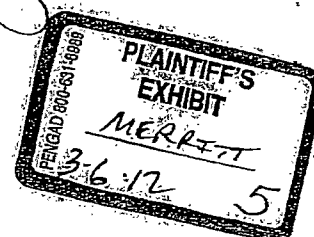
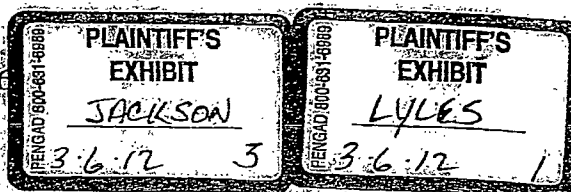
4-26-06

Service Coordinator/Date

4/26/06

Nurse/Date

Revised 4/3/06



132

1625

I went to the senior's area car port and found Fatima sitting in a chair on the other side of the brick wall in a chair. I attempted to check her for injuries but she would not let me touch her. I did observe a small nick on her upper lip to the right of midline of her upper lip. No bleeding noted at that time. She covered her face with her shirt when I tried to talk with her. I talked with her for a few minutes and again I tried to check her. At that time she got up from her chair and walked away. A short time later she returned to the chair and sat down. I tried the third time to check her. At that time she got up and walked toward a staff that had her back turned and scratched the staff on the back. She then went back to her chair, sat down and covered her face again. I advised the staff to watch her and notify Nursing of any changes.

[Signature] 4/26/06

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

Deposition of: Tina Lyles

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 11:40 A.M. - 12:25 P.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
Court Reporting Services
1525 Madison Avenue
Florence, SC 29501
843-229-4401 (Phone)
843-407-6108 (Fax)
weesner0901@gmail.com

A P P E A R A N C E S

For the Plaintiff:
The Bryan Law Firm
17 East Calhoun Street
Sumter, SC 29151
By: John R. Moorman, Esq.

For the Defendant:
Lee, Erter, Wilson, Holler & Smith, L.L.C.
126 North Main Street
Post Office Box 580
Sumter, SC 29150
By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman	3
Examination by: Mr. Johnson	30
Further Examination by: Mr. Moorman	33

E X H I B I T S

Pg/ln	Ex.	Description
11/10	P x 1	SCDSNB - Incident Report

** uh-huh = affirmative
huh-uh = negative

1. Q No?

2. A No. I do not.

3. Q Okay. And when you observed Fatima, what
4 did you -- what medical problems did she appear to
5 have?

6. A According to my report, she had a small
7 nick on her upper lip. It was not bleeding at that
8 time.

9. Q Do you know if anybody else was -- you --
10 how many times -- do you remember how many times you
11 checked on Fatima?

12. A According to my report, I believe it was
13 three.

14. Q Did you stay in the area while she was
15 there or did you --

16. A Yes. I stayed the whole --

17. Q Okay.

18. A -- the whole --

19. Q And did -- once she -- do you remember
20 what she was wearing that day?

21. A No. I'm sorry --

22. Q Okay.

23. A -- I do not.

24. Q Did -- what was the purpose of -- of
25 checking her -- or, I mean, if she can't -- you

I went to the senior's area car port and found Fatima sitting in a chair on the other side of the brick wall in a chair. I attempted to check her for injuries but she would not let me touch her. I did observe a small nick on her upper lip to the right of midline of her upper lip. No bleeding noted at that time. She covered her face with her shirt when I tried to talk with her. I talked with her for a few minutes and again I tried to check her. At that time she got up from her chair and walked away. A short time later she returned to the chair and sat down. I tried the third time to check her. At that time she got up and walked toward a staff that had her back turned and scratched the staff on the back. She then went back to her chair, sat down and covered her face again. I advised the staff to watch her and notify Nursing of any changes.

[Signature] 4/26/06

1 enough to touch them, what do you do then? What's

2 -- what's the procedure for dealing with --

3 A Well, I -- I made three attempts.

4 Q Right.

5 A And it was late in the afternoon, so it
6 was getting time -- close time for them to go home,
7 and the more I interacted with her, it seems the
8 more agitated or afraid she became. And so I -- I
9 just -- I watched her to see if she had any -- any
10 kind of movement issues or was guarding anything or
11 anything like that, and she did not appear to have
12 anything that would cause her to not be able to move
13 or anything like that.

14 Q Did -- did you give any instructions to
15 anyone about what to do about Fatima's condition and
16 about what to look for?

17 A It was almost time for them to get on
18 their van to go home, and I told -- I told the staff
19 to watch her and if she did anything different or
20 had any kind of change, to let me know.

21 Q Right.

22 A Because she was up moving, she was -- you
23 know, she was not having problems ambulating.
24 Nothing that would make me think that something was
25 emergent at -- at that moment.

1 E X A M I N A T I O N

2 BY MR. JOHNSON:

3 Q Ms. Lyles, I have just a few questions.

4 You're not a medical doctor, are you?

5 A No.

6 Q And you're not an orthopedist?

7 A No.

8 Q And you testified earlier that you were
9 not familiar with Fatima's conditions. What do you
10 mean by that?

11 A I don't have access to a medical record
12 for her, so I don't know what her diagnosis is or
13 anything like that.

14 Q But you knew Fatima was around the
15 facility?

16 A I just knew her in passing.

17 Q Did you know that she was skittish or
18 non-verbal?

19 A Yes.

20 Q Okay. Did you know that she was kind of
21 shy with -- around people and that she would tend to
22 not let people in her space?

23 A Yes.

24 Q Or often run from people?

25 A Yes.

1 Q Okay. Hold on a second. And when you --
2 you did your assessment, did you notice Fatima in
3 any kind of distress?

4 A She did not appear to be in any distress.
5 She was moving her arms and legs.

6 Q Okay. And I noticed that --

7 A And she was moving kind of quick.

8 Q She was moving kind of quick?

9 A Yeah. She was -- she was not guarding
10 arms or legs or anything.

11 Q So your visual-physical assessment did not
12 indicate any signs of distress?

13 A No.

14 Q Any signs of physical injury?

15 A Just the nick on her lip that I saw.

16 Q Okay. And I noticed in your report -- and
17 if you'll look at that for me, and I'm going to
18 quote you -- it says, I talked with her for a few
19 minutes.

20 A Uh-huh.

21 Q And again, I tried to check her.

22 A Uh-huh.

23 Q At that time she got up from her chair and
24 walked away.

25 A Uh-huh.

1 Q What does that tell you?

2 A She didn't want to interact with me.

3 Q Did it appear to you that she was injured
4 at that time?

5 A Only the nick on her lip.

6 Q Okay. A short time later, she returned to
7 the chair and sat down. I tried the third time to
8 check her. At that time, she got up and walked
9 toward a staff that had her back turned and
10 scratched the staff on the back. What does that
11 tell you if a -- if Fatima's is scratching a staff
12 member on the back?

13 A She must be agitated.

14 Q Okay.

15 A Or upset.

16 Q Okay. Would it show that she was injured
17 in anyway if she's able to scratch a staff member's
18 back? Is that an indicator to you that she's
19 injured?

20 A No.

21 Q She then went back to her chair, sat down
22 and covered her face. I advised the staff to watch
23 her and notify nursing of any changes.

24 A Yes.

25 Q So you advised the staff to continue to

1 watch her?

2 A Yes.

3 Q And to notify you of any change in her
4 condition?

5 A Yes.

6 Q Did any staff member come and notify you
7 at that point -- or after?

8 A Not after that, no.

9 Q Okay. So was there any sign of an acute
10 injury in those three times that you assessed
11 Fatima?

12 A Just the nick on her lip.

13 Q Okay. So was -- was there anything
14 indicative to you of an emergency situation or an
15 emergency scenario?

16 A Not at that time. That's why I asked the
17 staff to watch her because they're more familiar
18 with her; and if she's doing something that's not in
19 her normal -- her normal activity, then they needed
20 to notify me.

21 Q They never notified you?

22 A No. They did not.

23 MR. JOHNSON: That's all the questions I
24 have for you. Thank you.

25 FURTHER EXAMINATION

1 BY MR. MOORMAN:

2 Q A couple more. Ms. Lyles, if you couldn't
3 examine her, it's even more important that her
4 family be notified of the incident. Is that corr---
5 would you agree with that?

6 MR. JOHNSON: Object to the form.

7 THE DEPONENT: Does that mean do not
8 answer that?

9 MR. JOHNSON: You can answer.

10 A Ask it again.

11 Q If -- if -- if you couldn't physically
12 examine her --

13 A Uh-huh.

14 Q -- isn't that even more reason why her
15 family needed to be contacted to know about what
16 happened --

17 A Yes.

18 Q -- so they could look out after her?

19 MR. JOHNSON: Object to the form.

20 A Yes.

21 Q Now, you said that she appeared to
22 agitated.

23 A Uh-huh.

24 Q And isn't that something that could also
25 mean that she was hurt? I mean --

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION NO: 2008-CP-43-1037

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

PLAINTIFF,

vs.

Sumter County Disabilities and Special
Needs Board,

DEFENDANT.

**MEMORANDUM IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT**

TO: G. MURRELL SMITH, ESQUIRE, ATTORNEY FOR THE DEFENDANT:

FACTS

Fatima Karriem is a severely handicapped female, who has mental retardation functioning in the profound range intellectually and the severe range adaptively, is nonverbal and requires constant monitoring, assistance, and supervision. A copy of a form completed by the Defendant that documents Fatima's condition and requirements is attached as Exhibit 1. For approximately a ten (10) year period prior to April 25, 2006, Fatima Karriem had been a client/patient of the Defendant Sumter County Disabilities and Special Needs Board, and was always under the care and supervision of the Defendant Sumter County Disabilities and Special Needs Board's employees, while she was at their facility in Sumter County.

On or about April 25, 2006, Fatima Karriem was attending the day program at the Defendant Sumter County Disabilities and Special Needs Board's facility, and was under

the care and supervision of the Defendant Sumter County Disabilities and Special Needs Board's employees when she tripped and fell over a water hose that was lying on a sidewalk in the loading and unloading area of the Sumter County Disabilities and Special Needs Board facility. (Joyce Jackson deposition p. 18) As a result of her fall, Fatima suffered a cuts to her face and a broken arm.

After Fatima fell on April 25, 2006, she was transported home, where she lives with her uncle, Phillip Simmons, from the Defendant Sumter County Disabilities and Special Needs Board's facility. After arriving home, Fatima began acting uncharacteristically, and appeared to be in distress. 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. At no time was Phillip Simmons ever informed by the Sumter County Disabilities and Special Needs Board that Fatima had fallen and may have been injured.

On April 27, 2006, Phillip Simmons contacted the Defendant Sumter County Disabilities and Special Needs Board 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 Defendant Sumter County Disabilities and Special Needs Board that Fatima had fallen on or about April 25, 2006 at the Defendant's facility. The Defendant provided no reason or excuse to Mr. Simmons for their failure to contact him regarding Fatima's fall.

STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) and Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). In Hancock, the South Carolina Supreme Court held that in cases applying the preponderance of the evidence burden of proof, summary judgment should be denied where the non-moving party submits a mere scintilla of evidence.

ARGUMENT

The testimony of the Defendant's employees regarding the facts and circumstances surrounding Fatima's fall along with the mental capacity and overall limitations of Fatima Karriem precludes summary judgment in favor of the Defendant.

In Hancock, the South Carolina Supreme Court held that the Plaintiff had provided more than a mere scintilla of evidence and summary judgment was not appropriate. Id. at p. In Hancock, the Plaintiff tripped and fell in a parking lot of *The Newberry Observer*. The Plaintiff testified that she tripped on a "rock or something to that effect," "something raised up," and "broken asphalt." Id. The Plaintiff's daughter testified that the Plaintiff "tripped on that mess in front of the Observer." Id. Furthermore, the Plaintiff submitted an affidavit from a former employee, who stated that

the parking lot was in poor condition and management had been informed of the poor condition of the parking lot. Id.

The Hancock Court held that although the operator of a parking lot is not an insurer of the safety of those who use the lot, reasonable care must be used by the operator to keep the premises used by invitees in a reasonably safe condition. Id. citing Henderson v. St. Francis Community Hosp., 303 S.C. 177, 180, 399 S.E.2d 767, 768 (1990). However, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Id. citing, Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991), adopting Restatement (Second) of Torts 343A, Known or Obvious Dangers (1965).

The South Carolina Supreme Court in Hancock held that the court of appeals erred in affirming the trial court's grant of summary judgment. Id. Specifically, the trial court and the South Carolina Court of Appeals failed to properly consider the testimony of the Plaintiff, the Plaintiff's daughter, and the former employee's affidavit, which showed that the parking lot was in a state of disrepair. Id. Thus, taken in a light most favorable to the Plaintiff, evidence showed that the Defendant knew or should have known that a dangerous condition existed on its premises and that invitees would have to encounter this condition. See Henderson, 303 S.C. at 180, 399 S.E.2d at 769 (reversing the trial court's grant of a JNOV motion because the plaintiff presented evidence that a hospital failed to keep its parking lot reasonably safe).

Furthermore, the South Carolina Supreme Court held that the South Carolina Court of Appeals also erred in affirming the grant of summary judgment based on the finding that even if the parking lot contained a dangerous condition it was open and obvious. Id. While a parking lot's state of disrepair may be considered open and obvious, a jury could determine that the Defendant should have anticipated that such a condition may cause an invitee to fall and injure themselves. See Creech v. South Carolina Wildlife and Marine Resources Dept., 328 S.C. 24, 491 S.E.2d 571 (1997) (holding that a dock without a guard rail on one side was an open and obvious condition, but that the defendant should have anticipated the harm); Callander, 305 S.C. at 126, 406 S.E.2d at 363 (holding that although a missing seat on a stool was an open and obvious condition, the owner should have anticipated the harm).

In Hughes v. Children's Clinic, P. A., 269 S.C. 389, 397-98, 237 S.E.2d 753, 756-57 (1977), a child suffered serious injuries when he fainted in a doctor's office and fell into a mirror fastened to the wall behind him. In Hughes, the South Carolina Supreme Court determined that the child was clearly an invitee on the defendant's premises, and the defendant, therefore, owed the child the duty of exercising reasonable or ordinary care for his safety and was liable for any injury resulting from the breach of this duty. Id. This degree of care must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. Id. This duty is an active or affirmative duty. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him. 65 C.J.S. Negligence s 63(45). Moreover, it has been stated that . . . it is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable, or foreseen. It is

sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range. . . . **It was, therefore, a jury question whether the defendant had provided reasonably safe premises, and a reasonably safe installation upon the premises, for the use of the child invitee, . . .**

Orr v. First National Stores, Inc., 280 A.2d 785 (Me.1971), 50 A.L.R.3d 1202, 1213.

(emphasis supplied)

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

The reasoning espoused in Hughes and Hancock is applicable in the present case. Fatima Karriem was clearly an invitee; therefore, the Sumter County Disabilities and Special Needs Board owed Fatima a duty to keep the premises in a reasonably safe condition. Like the child in Hughes, the Sumter County Disabilities and Special Needs Board's degree of care owed to Fatima Karriem must be commensurate with the particular circumstances involved, including her age and capacity.

In his deposition, Scotty Merritt, who was employed as the floor supervisor at the time of Fatima 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. (Merritt deposition pp.15-17 and p. 21) 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. (Merritt deposition p.21 and p.52) Joyce Jackson, who was also employed at the Defendant's facility at the time of Fatima's fall and provided a 30(b)(6) deposition (A copy is attached as Exhibit 2), 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. (Jackson deposition p.25) Clearly, the Defendant's employees were aware of Fatima's limitations and her supervision requirements and that these were different from that of an average individual.

It is certainly foreseeable that if a water hose is left on a sidewalk, where people regularly travel and is not properly stored then someone could trip and fall and injure themselves. This is especially true for individuals with the limitations and mental capacity of Fatima Karriem. It is clear that the Defendant's employees knew or should have known that the water hose was on the sidewalk in a high traffic area, that leaving the water hose on the sidewalk created a dangerous condition, and that consumers and other individuals at the Defendant's facility would likely encounter this condition. In his deposition, Scotty Merritt testified that he completed the Incident Report, which is attached as Exhibit 3. 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. (Merritt deposition pp.40-43) **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.** (Merritt deposition p. 44) 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. (Merritt deposition p. 54)

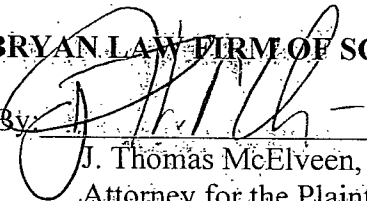
The testimony of Scotty Merritt regarding the storage of the water hose and the hazards that leaving it on the sidewalk presented to consumers at the Defendant's facility was corroborated by Joyce Jackson. In her deposition, Ms. Jackson acknowledged that if the water hose was not being used, then it should have been put away. (Jackson deposition p. 28-29) Ms. Jackson also testified that she did not know how long the water hose had been on the sidewalk in the loading area. (Jackson deposition p. 28-29) 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 Defendant's facility. (Jackson deposition p. 29-30) 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. (Jackson deposition p. 31-32) 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. (Jackson deposition p. 48-49)

In addition to her testimony regarding the storage of the water hose that caused Fatima's fall, Ms. Jackson testified that the incident report regarding Fatima's fall was not properly completed and that Fatima's family should have been contacted, but were not, and that these should both have been completed in accordance with the Defendant's policies and procedures. (Jackson deposition p. 36-39)

CONCLUSION

It is clear from the evidence and the testimony of the witnesses in the present case that leaving the water hose on the sidewalk was unsafe and created an unreasonable risk of harm to the Defendant's consumers, including Fatima Karriem. Based upon the facts and circumstances surrounding Fatima Karriem's fall and her injuries, there is clearly more than a mere scintilla of evidence to deny the Defendant's Motion for Summary Judgment.

BRYAN LAW FIRM OF SC, L.L.P.

By: 

J. Thomas McElveen, III
Attorney for the Plaintiff
17 East Calhoun Street
P. O. Box 2038
Sumter, SC 29151-2038
(803) 775-1263

Sumter, South Carolina
July 9, 2012

WVR010BDCOM

WAIVER SYSTEM
COMMENTS

HELP

ID: 124728947 NAME: MS FATIMA KARRIEM

COMMENT: PAGE 1

Fatima Karriem is a 33 year old lady who has MR functioning in the profound range intellectually and the severe range adaptively. Fatima does not talk but understands what is said to her. She has a past history of aggressive behavior. Fatima has a very large personal space zone and can be very shy and skittish when others approach her closely. Fatima can walk. Fatima is independent in most self care skills, but does need help to keep her hair neat and to dress neatly. Fatima did break and separate the radius and ulna bones in right forearm in late April requiring surgical correction. While in a cast and recovering from this surgery, Fatima requires more help with self care than usual. Fatima can cook simple foods, wash dishes and clothing, and pick up after herself. She does need help with >

CONTINUE SAME COMMENTS? Y (Y/N)

CANCEL

XMIT

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WVR010BDCOM

WAIVER SYSTEM
COMMENTS

HELP

ID: 124728947 NAME: MS FATIMA KARRIEM

COMMENT: PAGE 2

medication management, money management, more complex food preparation, social interaction, communication. Uncle Phillip Simmons makes decisions on Fatima's behalf due to limited understanding and communication ability. Fatima lives alone with her uncle and he is her primary caregiver; he also works two jobs. Fatima needs watching over and taking care of while her uncle works and she is not at day program. Respite can provide Fatima with care and supervision during her uncle's absence. For the period beginning 7-1-06 and ending 6-30-07, Uncle on behalf of Fatima is requesting Respite continue in the amount of 3 hours per day, 4 days per week (624 units annually) via chosen provider SCDSNB and funded under MR/RD waiver. For the period beginning 7-1-06 and >

CONTINUE SAME COMMENTS? Y (Y/N)

CANCEL

XMIT

WVR010BDCOM

WAIVER SYSTEM
COMMENTS

HELP _

_ ID: 124728947 _ NAME: MS FATIMA KARRIEM

COMMENT: PAGE 3

ending 6-30-07, Uncle on behalf of Fatima is requesting that day habilitation
will continue in the amount of 5.5 hours per day, 5 days per week (260 units
total) via chosen provider SCDSNB Sumter Work Enterprises and funded under
MR/RD waiver. This service will afford Fatima training in socialization
skills found to have deficits via assessment, such as ability to make and hold
eye contact for 15 seconds.

CONTINUE SAME COMMENTS? n (Y/N)

CANCEL _

XMIT _

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2008-CP-43-1037

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

PLAINTIFF,

vs.

Sumter County Disabilities and Special
Needs Board,

DEFENDANT.

**NOTICE OF TAKING
30(b)(6) DEPOSITION**

TO: STEVEN B. JOHNSON, ESQUIRE, ATTORNEY FOR THE DEFENDANT:

Pursuant to Rule 30(b)(6) of the *South Carolina Rules of Civil Procedure*, the Plaintiff will take the deposition of the individual(s) designated by you as the most knowledgeable to testify, on your behalf, about the storage of water hoses and other outdoor maintenance equipment at the Sumter County Disabilities and Special Needs Board facility in 2006 in Sumter, South Carolina, including:

1. The proper storage of water hoses and outdoor maintenance equipment following their use at the Sumter County Disabilities and Special Needs Board facility in 2006.
2. Maintaining, storing, and using outdoor maintenance equipment at the Sumter County Disabilities and Special Needs Board facility in a safe manner to protect the persons at the Sumter County Disabilities and Special Needs Board facility from injury, harm, and/or danger.

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3. Knowledge of the policies, procedures, regulations, and standards for maintaining the safety of the persons at the Sumter County Disabilities and Special Needs Board.
4. Policies, procedures, regulations, and standards for monitoring and/or supervising of persons in outdoor and common areas of the Sumter County Disabilities and Special Needs Board facility.
5. Inspecting the outdoor areas of the Sumter County Disabilities and Special Needs Board for hazardous, dangerous, and unsafe conditions.

This deposition will be taken on the 6th day of March, 2012, at 2:00 p.m. at the offices of the Bryan Law Firm, 17 East Calhoun Street, Sumter, South Carolina

The deposition will be taken before a Notary Public or some other official authorized by law to take depositions and to administer oaths. The testimony shall be used for the purpose permissible under the *South Carolina Rules of Civil Procedure*.

You are invited to attend and examine.

If the deponent is being separately subpoenaed to attend the said deposition for the purpose of the presentation of documents and/or things at the said deposition, a copy of the said subpoena, listing the documents or things, is attached hereto. (Exhibit A).

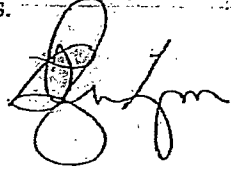
BRYAN LAW FIRM OF SC, L.L.P.

BY: _____

John R. Moorman
Attorney for Plaintiff
17 East Calhoun Street
P.O. Box 2038
Sumter, SC 29151
(803) 775-1263

Sumter, South Carolina
March 5, 2012

I went to the senior's area car port and found Fatima sitting in a chair on the other side of the brick wall in a chair. I attempted to check her for injuries but she would not let me touch her. I did observe a small nick on her upper lip to the right of midline of her upper lip. No bleeding noted at that time. She covered her face with her shirt when I tried to talk with her. I talked with her for a few minutes and again I tried to check her. At that time she got up from her chair and walked away. A short time later she returned to the chair and sat down. I tried the third time to check her. At that time she got up and walked toward a staff that had her back turned and scratched the staff on the back. She then went back to her chair, sat down and covered her face again. I advised the staff to watch her and notify Nursing of any changes.

 4/26/06

ER COUNTY DISABILITIES AND SPECIAL NEEDS BOARD, INC.
BEHAVIOR/INCIDENT/ACCIDENT/ILLNESS REPORT

TUS:

PROGRAM: SWEET

☐ CRITICAL

☒ Adult

SLP/CTH

(Home)

Atk. East

☒ NON-CRITICAL

SC/EI

Thomas Drive

Atk. West

INDIVIDUAL'S NAME: Fatima Karriem

DATE: 4/25/06 LOCATION: Outside near TIME: 1:25 am (pm)

Nature of incident, including what happened prior to incident, if known: (Attach additional sheet, if necessary):

Fatima was sitting down near the carport, and another customer came close to her, and she got up and started running and tripped over the water hose falling on her front face.

Describe action taken after incident: Staff assisted in Fatima getting up and visually checked her and due to the fact she would not let staff touch her, Nurse Jane Lyles was gotten immediately to check Fatima. Fatima would not let the nurse touch her.

Preventive measures: make sure water hoses are rolled up, and/or put away in storage until needed.

Medical treatment given (if necessary): See Attached Disht

Date, time and name of person notified as required by policy:

Day Service Administrator: _____

Service Coordinator: _____

Director of SLP/CTH Services: _____

QMRP/Community Residence: _____

Executive Director: _____

Parent/Guardian: _____

Law Enforcement/EMS: _____

Nurse/On-Call Nurse: _____

Other: _____

Supervisory Personnel Only

DDSN - if Critical: _____

DHEC (Only if Critical ICF/MR): _____

DSS/Ombudsman (Abuse, Neglect and Exploitation only): _____

Victory Marshall 4/25/06

Staff Submitting Report/Date

Victory Marshall 4/25/06

Adult Program Floor Supervisor/Date

Victory Marshall 4/25/06

Day Service Administrator/Date

Director of Residential Services/Date

Victory Marshall 5/3/06

Director of Operations/Date

Shirley Hule 4/26/06

Executive Director/Date

Residential Administrator/Date

QMRP/SLP/CTH Program Coordinator/Date

Supervisor (Residential/Day)/Date

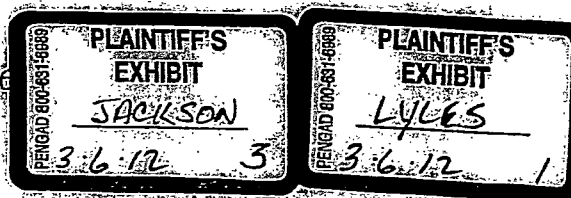
Gary Jackson 4-26-06

Service Coordinator/Date

Shirley Hule 4/26/06

Nurse/Date

Revised 4/3/06



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State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

Deposition of: Scotty Fitzgerald Merritt

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 10:00 A.M. - 11:33 A.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
Court Reporting Services
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Florence, SC 29501
843-229-4401 (Phone)
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weesner0901@gmail.com

COPY

A P P E A R A N C E S

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For the Defendant:
Lee, Erter, Wilson, Holler & Smith, L.L.C.
126 North Main Street
Post Office Box 580
Sumter, SC 29150
By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/l	Ex.	Description
12/11	P x 1	SCDSNB - Position Description
19/04	P x 2	Accountability of Consumers
22/19	P x 3	Ms. Karriem's Daily Schedule
27/19	P x 4	Hourly Worker Accountability
32/18	P x 5	SCDSNB - Incident Report
58/03	P x 6	SCDSNB - Outdoor Area
60/11	P x 7	SCDSNB - Mission Statement

** uh-huh = affirmative
huh-uh = negative

1 Q -- the consumer is?

2 A Uh-huh.

3 Q Okay. And I see you'd already told me
4 that you were going through, and you had had 13
5 years of experience working down in Florida. Is --

6 A Yes.

7 Q -- that correct? Okay. Did you have any
8 knowledge of Fatima's specific condi--- Fatima
9 Karriem's specific condition?

10 A Yes.

11 Q Okay. And what was your -- what was your
12 understanding of her condition?

13 A She was -- I knew she was non-verbal; and
14 in previous reports that I had read, that she could
15 be aggressive.

16 Q How long had you been working with her?

17 A Roughly about a month because I started
18 there on the 20th of March.

19 Q Who was in your position before?

20 A Delores McCulky -- McCully -- I'm sorry, I
21 can't pronounce her --

22 Q Okay.

23 A -- last name -- McCully, but I know it was
24 Delores.

25 Q And she left when you arrived. Is that

1 right? Or tell me how --

2 A She --

3 Q -- that worked.

4 A -- was still there.

5 Q Okay.

6 A And then she left probably a month after I
7 had arrived.

8 Q Did she do the initial training for you
9 when you arrived or did you have any training?

10 A Yes. She as well as Ms. Brown -- Daisy
11 Brown.

12 Q What training did they do for you?

13 A Going over the consumers' files, training
14 as far as staff development, me taking some things
15 that I needed by me just starting there.

16 Q Okay. What part of going over the
17 consumers' files -- what -- what did that entail?

18 A Their behaviors, what level of care --
19 just the full gamut of -- of that particular
20 individual.

21 Q Now, when you learned in dea--- in that
22 month prior to -- you said you were there about a
23 month prior to this incident that occurred on --

24 A Yes.

25 Q -- April 25th. In that month, or

1 reviewing her files, were you aware that Fatima
2 would become startled by other people?

3 A Yes.

4 Q And didn't like to have people in her
5 personal space?

6 A Yes.

7 Q And had fear of being approached from
8 behind?

9 A Yes.

10 Q And you were dealing with that on a reg---
11 dealing with her on a regular basis?

12 A Yes. As far as daily, yes.

13 Q So every day that she was there, you had
14 some interaction with her?

15 A Not every day, no.

16 Q Okay.

17 A No.

18 Q How often?

19 A I'd say roughly throughout the eight
20 hours, might have added up to probably over an hour
21 to an hour-and-a-half.

22 Q Where did that interaction primarily take
23 place?

24 A When I would go out throughout the day
25 program speaking with the staff.

1 A No,, because she was ambulatory. She had
2 no problems walking.

3 Q But as far as safe--- her own safety?

4 A No.

5 Q No.

6 A Not a maj--- no.

7 Q She was able to appreciate her
8 surroundings the same as you or I?

9 A No.

10 Q Okay.

11 A No, not in that capacity, no.

12 Q So, she would definitely have some safety
13 concerns?

14 A Yes.

15 Q She would not be someone that you could
16 leave alone by herself?

17 A And she wasn't.

18 Q That's right.

19 A No.

20 Q And she needed to be monitored?

21 A Yes.

22 Q And why are there -- why do y'all group
23 them in different levels of accountability?

24 A As far as their behaviors go and the --
25 well, as far as their behaviors. Now, at -- Fatima

1 Q Okay. And do -- now, as far as going
2 back, she was scheduled to leave at 2:30. Is --

3 A That's correct.

4 Q -- that correct? Were they going to a --
5 did they remain outside until 2:30?

6 A No.

7 Q No?

8 A No.

9 Q Where did they go next?

10 A They came back inside.

11 Q Okay. Going back, to talk a little bit
12 about the incident, I'm looking at your incident
13 report --

14 A Uh-huh.

15 Q -- that you filled out. There is some
16 discussion about a water hose. Why would -- where
17 was the water hose located?

18 A Lying on the side of the building where
19 the spigot was attached to the wall.

20 Q Okay. And why was the water hose out?

21 A They were doing some landscaping, you
22 know, maintenance landscaping.

23 Q When was that being done?

24 A It had already been done. They were
25 working throughout the day in the whole area.

1 Q Okay.

2 A And that's one particular staff. They had
3 more people in maintenance, but just throughout the
4 day.

5 Q Did they have --

6 A And --

7 Q Go ahead. I didn't mean to interrupt you.

8 A I'm sorry. They were watering because
9 they had just put plants out.

10 Q And had they finished using it?

11 A Not -- I cou--- I couldn't say. I don't
12 know.

13 Q Okay. Does that nor--- is that something
14 that would normally stay there?

15 A Yes -- not -- not normally. It wouldn't
16 be there all the time, no.

17 Q Right.

18 A Not throughout the day. But that
19 particular day, they were working throughout the
20 day, you know, working on the --

21 Q Where was the hose lying? Where was it?

22 A Lying on the side of the concrete attached
23 to the spigot.

24 Q Okay.

25 A It was not sprawled out. It was wrapped.

1 Q Okay.

2 A Just sitting -- you know, wrapped in a
3 circle on the -- on the ground.

4 Q Now, in your incident report you wrote
5 down preventive measures.

6 A Uh-huh.

7 Q What is that? What does that mean?

8 A Just some -- people can get into
9 accidents, but this is the preventative measure
10 is -- because she did get up and run and tripped
11 over the hose. She ran into -- ran off of the --
12 from the patio area to near where the hose was.

13 Q Okay. And you wrote that the -- the water
14 hose did not need to be left out. Was that correct?

15 A Exac--- exactly.

16 Q And you believe that it didn't need to be
17 left out. Is that correct?

18 A Not --

19 MR. JOHNSON: Object to the form.

20 A -- throughout the day, but in the event
21 that they were working, naturally they would have to
22 have it. And, as I said, I don't know what the
23 duration was of them working outside, but I knew
24 that they were working that day.

25 Q Were they working at the time that you got

1 out there?

2 A No.

3 Q Okay. And is there -- are there any
4 regulations or anything that will tell us about how
5 the hose needs to be stored?

6 A No.

7 Q Is there anything like, that would talk
8 about how a -- outdoor equipment would need to be
9 stored? Any regulations in regards to that that
10 you're --

11 A No. No --

12 Q -- familiar with?

13 A -- not that I'm familiar with.

14 Q Is -- is that something, as a floor
15 supervisor, those regulations are something you
16 would be familiar with?

17 A No.

18 Q No?

19 A No. Not as far as them working. Their
20 job description and what they're doing at the time.

21 Q Right. But as far as for, you know,
22 safety of the residents, you -- you'd want to know
23 if there was a --

24 A If there were large objects, something
25 that they -- and they wouldn't even be out there

1 then. But --

2 Q Right.

3 A -- it was a quiet day, nothing too much
4 was going on other than like I said, they were out
5 working, putting down pine straw and that type of
6 thing.

7 Q But you would agree with me that this,
8 leaving this hose on the sidewalk, would create a
9 trip hazard --

10 MR. JOHNSON: Object to the form.

11 Q -- wouldn't you?

12 A No. I wouldn't fully agree to that, no.

13 Q But it did create a trip hazard?

14 A Yes. At the time -- at that particular
15 time.

16 MR. JOHNSON: Object to the form.

17 Q And that particular time could be when
18 someone, like Fatima, with the condition that she
19 has --

20 A Not necessarily someone like Fatima. It
21 could have been me. I could -- I could trip over
22 it. I've tripped over mine --

23 Q Right.

24 A -- at home.

25 Q And that's all the more reason to put it

1 Q Is -- but you would agree with me that she
2 can't appreciate her surroundings like you and I
3 can?

4 MR. JOHNSON: Object to the form.

5 A No. Because she was not verbal. She's
6 non-verbal; so she -- it's not to say that she can't
7 appreciate it, but she's not verbal to be able to
8 tell you, oh, well, I like this area. And they are
9 accustomed to going outside, so that -- I don't see
10 where that posed a problem of them sitting out in
11 that area that they were accustomed to sitting in.

12 Q But, unlike you and I, Fatima requires
13 almost constant supervision.

14 A And she was being supervised.

15 Q Right. So you would agree with me,
16 though, that her -- she has different safety
17 concerns than you and I?

18 A Yeah. She does have different safety
19 concerns, but she was being supervised.

20 Q And certain places prevent greater safety
21 concerns for her than for others?

22 MR. JOHNSON: Object to the form.

23 A There -- at the time, like I said, it was
24 the patio area. That's where they normally sat.

25 Q Ri--- right. But my --

1 the water hose yourself off of the spigot afterwards
2 or did you --

3 A No. I --

4 Q -- leave it there? Did you leave it
5 there?

6 A Yes.

7 Q Okay. And why didn't you take it and
8 store it somewhere?

9 A I -- I just -- I didn't -- I didn't take
10 it and move it.

11 Q Okay. But you would agree that it needed
12 to be stored?

13 A No. I would agree that they were working.
14 Now, like I said, on here it says, make sure the
15 water hose is rolled up, not left out all night.
16 That's the preventative measure I wrote.

17 Q And -- and -- and you said --

18 A Because that was the -- she tripped over
19 that water hose.

20 Q And you would agree that if that water
21 hose wasn't there, she wouldn't have tripped and
22 fallen?

23 A No. I wouldn't --

24 MR. JOHNSON: Object to the form.

25 A -- agree to that because she could have

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

30(b)(6) Deposition of:
South Carolina Disability and
Special Needs Board
(Joyce M. Jackson)

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 12:33 P.M. - 1:31 P.M.

Court Reporter: Lisa Marie Weesner

The 30(b)(6) deposition is taken pursuant to notice
and/or agreement, in the above-entitled cause
pending in the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
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Florence, SC 29501
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weesner0901@gmail.com

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By: John R. Moorman, Esq.

For the Defendant:

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Sumter, SC 29150

By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/ln	Ex.	Description
12/23	P x 1	SCDSNB - Incident Report
16/11	P x 2	Hourly-Worker Accountability
27/17	P x 3	Incident Report
30/25	P x 4	Mission Statement
33/04	P x 5	Outdoor Area - Memo

** uh-huh = affirmative
huh-uh = negative

1 Q They were.

2 A Uh-huh. That's right.

3 Q Sorry. I didn't mean to complete your
4 sentence.

5 A Yes.

6 Q It -- it's important for that to be
7 completed --

8 A Yes.

9 Q -- accurately?

10 A Yes.

11 Q And is it done as the day goes by or at
12 the end of the day?

13 A It should be done in real time. If it's
14 for -- at 9:00 they would have been filling the 9:00
15 space for a particular day, for whatever day it is.
16 At 9:15, they would have been filling in where she
17 was at 9:15.

18 Q Okay. And are you familiar with the area
19 where Fatima Karriem fell on April the 25th of 2006?

20 A Yes.

21 Q Can you describe that area for me?

22 A It's actually the loading area where the
23 consumers board, get off the van or RTAS bus -- get
24 on and off is the easiest -- but it's the loading
25 area for the consumers.

1 A It should not. If -- if the staff person
2 is there -- their -- their assigned staff, then it
3 should not. Because, normally, they're either in
4 rocking chairs or regular chairs that they'll take
5 out. And then when they get ready to go back in,
6 they take those chairs back inside.

7 Q I don't know -- are you aware that Fatima
8 Karriem has problems when people get into her
9 personal space; she can become startled.

10 A I have heard that.

11 Q Okay. Do you believe that this was a
12 appropriate place to have her being this close to a
13 parking lot?

14 MR. JOHNSON: Object to the form.

15 Q Go ahead.

16 A Okay. At that time of the day, there
17 would not have been anybody in the parking lot other
18 than who she's accustomed to. Because the -- where
19 they load at, you've got to walk across like a
20 median to get to where the cars are where the staff
21 would park, so where they're -- normally are, it
22 would have been just them.

23 Q Okay.

24 A Anybody invading her space would have come
25 from inside the building headed out the door, which

1 -- head of safety, at the Disabilities and Special
2 Needs Board, that the -- the water hose that was out
3 and that Fatima Karriem fell over needed to be put
4 -- should have been put up?

5 MR. JOHNSON: Object to the form.

6 A If whoever -- if it -- whoever was using
7 the hose was finished with it, it should have been
8 put up, but at that time of the day, they may have
9 still been using the -- the hose. They may have
10 been out working. And if they were working, then,
11 you know, they would -- it wouldn't have been put up
12 until they finished.

13 Q Do you know how long it had been there;
14 the water hose?

15 A No.

16 Q Do you know if it was something that
17 stayed out overnight?

18 A No. It shouldn't have, but I don't know
19 that.

20 Q And are there any regulations or policies
21 within the Disabilities and Special Needs Board that
22 require that a water hose be stored after it's used
23 or how --

24 A Well --

25 Q -- it would be stored?

1 A -- that equipment should be stored after
2 it's -- it's used. Anything outside should be
3 secured. So that could very well be on the -- you
4 know, if it's plugged in, it actually is s---
5 secured to the facet, and if they were using it at
6 -- but this is conjecture, I don't know --

7 Q Right.

8 A -- what was going on at the time this took
9 place. But if it was in use -- and looking at the
10 time, it very well could have been, because it was
11 not the end of the day for them yet. That would
12 have been it.

13 Q But if it was not being used, then it
14 needed to be put up.

15 MR. JOHNSON: Object to the form.

16 Q And because leaving it out could --

17 MR. JOHNSON: Did --

18 MR. MOORMAN: -- could --

19 MR. JOHNSON: Did you answer that?

20 THE DEPONENT: I didn't -- yeah, well, I
21 did, but it was -- yes, it -- it could --

22 MR. MOORMAN: Okay.

23 THE DEPONENT: -- if they were completed.

24 BY MR. MOORMAN:

25 Q Leaving the water hose out on a sidewalk,

1 that could create a trip hazard. Would you agree
2 with that?

3 A I do.

4 Q And that could create a dangerous
5 condition for a consumer at the facility?

6 MR. JOHNSON: Object to the form.

7 A For anyone at the facility.

8 Q Okay. And -- because there's a lot of
9 foot traffic through that area?

10 A No. It -- with the exception of mornings,
11 when they get off, and afternoons, when they're
12 boarding.

13 Q Turning your attention to -- do you know
14 any reason why Fatima should have been in -- in this
15 area at 1:25 in the afternoon -- do you know -- do
16 you have any idea of why?

17 A Unless they were just out, I ca--- and
18 again, looking at the report and the date of the
19 report, it was April, might have been a nice day and
20 they were taking a -- a short break or something and
21 -- but otherwise, I don't know.

22 Q I'm going to show you -- I need you to
23 look at this, what's been marked -- or what would
24 this be, Plaintiff's Exhibit 4?

25 (Plaintiff's Exhibit number 4

1 marked for identification.)

2 MR. MOORMAN: Thank you.

3 BY MR. MOORMAN:

4 Q And do you recognize that, Ms. Jackson?

5 A I do.

6 Q And one of the primary parts of that
7 mission statement is, is to insure the health,
8 safety and welfare of individuals you serve -- or
9 Disabilities and Special Needs Board serve. Do you
10 believe that leaving that water hose there was
11 insuring her safety?

12 MR. JOHNSON: Object to the form.

13 A I don't know that the hose was left there.
14 I don't know that somebody wasn't still using it.
15 And if they were using it, they wouldn't go put it
16 up because she came out if they were out watering
17 flowers because there are flower beds in those
18 grassy areas.

19 Q Now, there's nothing in the report that
20 indicate -- the incident report that indicates that
21 the water hose was being used.

22 A In there -- there is not anything in the
23 report that indicates that.

24 Q And it actually says -- this was written
25 by Scotty Merritt, that make sure water hoses are

1 rolled up and/or put away in storage area until
2 needed. That indicates to me that the hose itself
3 was not rolled up.

4 MR. JOHNSON: Object to the form.

5 Q And getting back to my question. I'm
6 sorry if we're getting away. But the -- the main
7 reason for that is -- is that that hose didn't need
8 there is because somebody could trip and fall?

9 MR. JOHNSON: Object to the form.

10 Q You can answer it.

11 A If it was not being used --

12 Q Uh-huh.

13 A -- it would not have needed to be there.

14 Q And if it -- if it wasn't being used and
15 it was there and it created a trip-and-fall hazard,
16 somebody could get hurt if they fell.

17 MR. JOHNSON: Object to the form.

18 A True.

19 Q And one of the primary objectives is, is
20 to keep individuals safe at the Disabilities and
21 Special Needs Board.

22 A That's true.

23 Q Correct? And are you aware of what
24 Fatima's injuries were, Ms. Jackson?

25 MR. JOHNSON: Can we take a break?

1 witnessed it?

2 A Just based on timeframe. If it was him
3 trying to get it done so that it wasn't something --
4 because normally an incident report is completed by
5 the end of the work day that the incident occurred.

6 Q If he was do--- if he was doing that
7 portion of the incident report, would he also do the
8 portion, date, time and name of person notified as
9 required by policy? Would he be the one to complete
10 that as well?

11 A If he notified somebody or if he knew
12 someone else notified somebody, he could write it
13 in.

14 Q Okay. Does -- is that portion of the form
15 supposed to be filled out?

16 A Not -- well, it depends on the incident.

17 Q Okay. And a fall situation, like the one
18 Fatima experienced, is that something that should be
19 reported -- should that portion of the incident
20 report have been completed?

21 A It should have been, but not for all of
22 them. Just like, if you see law enforcement --

23 Q Right.

24 A -- he would not have called them, so it --
25 but --

1 Q What's the purpose of completing that
2 portion of the form?

3 A So that -- because this form is routed. A
4 person -- normally, the person who witnesses the
5 incident completes the form and then it's routed so
6 that all the appropriate people who need to see it
7 are aware that the incident took place.

8 Q Right.

9 A If the nurse was called, then the time he
10 informed the nurse would have been indicated on the
11 form.

12 Q Is that indicated on this form?

13 A It is not.

14 Q Should it have been?

15 A Yes.

16 Q And should there have been a section where
17 a parent or guardian was contacted on this form?

18 A There is a section.

19 Q And that was not done?

20 A If it wa---

21 Q That's not indicated on the form.

22 A It's not indicated on the form. If it was
23 done, he did not indicate it.

24 Q Okay.

25 A I don't know whether he contacted them or

1 not.

2 Q Okay. And how many people was this form
3 routed through?

4 A His supervisor, the -- what was her title
5 -- director of operations, the executive director,
6 the service coordinator and the nurse. And I
7 thought I read -- and I did, where the nurse did go
8 see her. So we know he did call the nurse, he just
9 didn't indicate the time. Somebody called, then the
10 nurse came over because it's documented, but he just
11 didn't write the time down on the form.

12 Q And is there a rea--- is -- is this
13 incident report supplied to anyone other than
14 internally; is it provided to the -- the consumer?

15 A It's not provided to the consumer. If the
16 family requests an incident report, they can just --
17 if they request any records, they can get them.

18 Q In an incident like Fatima's, where she
19 fell, should her family have been called --
20 contacted?

21 A It depends on the extent of the injury.

22 Q She had fallen --

23 A Somebody may --

24 Q -- and cut her face?

25 A If she -- yeah, if you -- if that person

1 saw her face was bleeding --

2 Q They should --

3 A -- that would warrant -- would more than
4 likely warrant a -- a call.

5 Q And would it be upsetting to you to find
6 out that that was not done in this case?

7 MR. JOHNSON: Object to the form.

8 Q Or upsetting -- would -- if -- yeah, would
9 that be upsetting to you if that was -- as a safety
10 director, if that was not done?

11 MR. JOHNSON: Object to the form.

12 A I don't know if I'd use the word
13 upsetting, but it should have been done.

14 Q Okay. And who should have made that call?

15 A Scotty could have made it. Daisy could
16 have made it. He was the supervisor and she was his
17 -- his supervisor; either one of them. The service
18 coordinator could have made the call.

19 Q So approximately three people could have
20 called?

21 A If the service coordinator -- this
22 incident occurred on the 25th, her signature is
23 dated the 26th. I don't know if that's when she
24 found out. I don't know when the service
25 coordinator found out --

1 authorized a safety audit or done one --

2 MR. JOHNSON: Object to the form.

3 Q -- at that point in time?

4 A Based on this incident -- well, I -- I --
5 need to know more.

6 Q Okay.

7 A Again --

8 Q What would you need to know?

9 A I'd need to know whether that hose was in
10 use. This report might lead you to think it wasn't
11 in use, but it may have. I would need to know for
12 sure was somebody using it. And if Scotty were to
13 say to me, I saw the hose and it was laying there
14 and nobody was using it --

15 Q Right.

16 A -- then -- but if somebody was using it,
17 see it --

18 Q Well --

19 A -- then it's not --

20 Q -- let -- let me ask you this; if he did
21 say that the hose was laying there and nobody was
22 using it, what would -- what would your opinion be?

23 MR. JOHNSON: Object to the form.

24 A That we need to find out who put that hose
25 there and then we'll, you know, address that with

1 would make a consumer's use of the premises more
2 dangerous?

3 MR. JOHNSON: Object to the form.

4 A Not necessarily.

5 Q It would make it more dangerous than
6 having it put up than when it -- if it were put up?

7 A Yes.

8 MR. JOHNSON: Object to the form.

9 MR. MOORMAN: That's all the questions
10 that I have.

11 MR. JOHNSON: No questions.

12 (Deponent excused.)

13 (Whereupon, at 1:31 P.M.,
14 the taking of the foregoing
15 deposition was concluded.)
16
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25

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER 2012 JUL 19 PM 4:27 CIVIL ACTION NO: 2008-CP-43-1037

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

PLAINTIFF,

vs.

Sumter County Disabilities and Special
Needs Board,

DEFENDANT.

**SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

TO: G. MURRELL SMITH, ESQUIRE, ATTORNEY FOR THE DEFENDANT:

The Plaintiff hereby incorporates herein any and all facts, arguments, exhibits, memoranda, and deposition testimony previously submitted to the Court on Monday, July 9, 2012. This is a premises liability case that also involves claims regarding the supervision, care, custody, and control of Fatima Karriem by the Sumter County Disabilities and Special Needs Board. As such, the premises liability portion of this claim is controlled by the common law of South Carolina and there is no requirement to prove gross negligence; the Plaintiff need only prove negligence with regard to the premise liability aspect of this case. With regard to the Plaintiff's claims relating to her supervision, protection, custody, and control by the Sumter County Disabilities and Special Needs Board, there is sufficient evidence for a jury to determine whether the Plaintiff has met her burden of proof regardless of whether the applicable burden is negligence or gross negligence on the part of the Defendant.

BRIEF SUMMARY OF FACTS

On or about April 25, 2006, Fatima Karriem was attending the day program at the Defendant Sumter County Disabilities and Special Needs Board's facility, and was under the care and supervision of the Defendant Sumter County Disabilities and Special Needs Board's employees when she tripped and fell over a water hose that was lying on a sidewalk in the loading and unloading area of the Sumter County Disabilities and Special Needs Board facility. (Joyce Jackson deposition p. 18) At the time of her fall, Fatima Karriem was sitting in the loading and unloading area for leisure. (See Joyce Jackson deposition p. 19 and Scotty Merritt deposition pp.36-37.) As a result of her fall, Fatima suffered cuts to her face and a broken arm. It is important to note that Fatima Karriem is unable to speak and has compulsive autistic-like tendencies.

STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) and Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). In Hancock, the South Carolina Supreme Court held that in cases applying the

preponderance of the evidence burden of proof, summary judgment should be denied where the non-moving party submits a mere scintilla of evidence.¹

APPLICATION OF NEGLIGENCE STANDARD

The Defendant 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.

According to South Carolina Code Ann. § 15-78-40, “[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” South Carolina Code § 15-78-60 provides exceptions to the State of South Carolina’s waiver of immunity. Nowhere in South Carolina Code § 15-78-60 is there an exception to the State’s waiver of immunity to properly maintain its premises in a safe condition.

In 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. (Merritt deposition pp.40-43) **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**

¹ In its Motion for Summary Judgment, the Defendant cites Bravis v. Dunbar, 449 S.E.2d 495 (Ct. App. 1994) for the proposition that the Plaintiff is required to submit more than a scintilla of evidence to overcome summary judgment. However, the Bravis decision was abrogated by Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009), which was cited in the Plaintiff’s initial Memorandum in Opposition to Defendant’s Motion for Summary Judgment.

as well. (Merritt deposition p. 44) 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. (Merritt deposition p. 54)

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 Defendant'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. (Jackson deposition p. 28-29) Ms. Jackson also testified that she did not know how long the water hose had been on the sidewalk in the loading area. (Jackson deposition p. 28-29) 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 Defendant's facility. (Jackson deposition p. 29-30) 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. (Jackson deposition p. 31-32) 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. (Jackson deposition p. 48-49)

This application of a negligence standard 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. 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. 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." 323 S.C. at 80, 448 S.E.2d at 591. This court specifically held that "this is a premises liability case and, therefore, the judge should have charged the jury on premises liability, as limited by the South Carolina Tort Claims Act." *Id.*

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

Based upon the reasoning set in the cases cited above, the facts of this case support a denial of the Defendant's Motion for Summary Judgment.

APPLICATION OF GROSS NEGLIGENCE STANDARD

In the event that a gross negligence standard is applied to some or all of the Plaintiff's claims, there are clearly genuine issues of material fact that the Defendant was grossly negligent in monitoring the Plaintiff and supervising the Plaintiff.

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 with eleven year old girl informing the girl’s mother that her daughter’s bus privileges had been suspended was a question for the jury.² 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

² 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.

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 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, this Court must consider the particular circumstances involved, including Fatima'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 maintaining its premises and supervising Fatima Karriem. As stated in the Defendant's Memorandum in Support of Motion for Summary Judgment, the Defendant acknowledged that Fatima has a number of physical and mental limitations as well as special supervision requirements.

In his deposition, Scotty Merritt, who was employed as the floor supervisor at the time of Fatima's fall and who 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. (Merritt deposition pp.15-17 and p.21) 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. (Merritt deposition p.21 and p.52) Joyce Jackson, who was also employed at

the Defendant's facility at the time of Fatima's fall, 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. (Jackson deposition p.25) Clearly, the Defendant's employees were aware of Fatima's limitations and her supervision requirements and that these were different from the limitations of an average individual. The Defendant's employees had Fatima Karriem and several other customers at the facility in the loading and unloading area of the Sumter County Disabilities and Special Needs Board facility for leisure activity. This clearly presents genuine issues of material fact regarding the supervision and protection of Fatima Karriem given her capacity and propensities.

As stated in the Plaintiff's previous Memorandum, it is certainly foreseeable that if a water hose is left on a sidewalk where people regularly travel and is not properly stored, then someone could trip and fall and injure themselves. This is especially true for individuals with the limitations, mental capacity, and the propensity to become startled like Fatima Karriem. It is clear that the Defendant's employees knew that the water hose was on the sidewalk in a high traffic area, 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 Defendant's facility would likely encounter this condition. There is clearly a genuine issue of material fact as to whether the Sumter County Disabilities and Special Needs Board employees exercised "slight care" regarding the facts and circumstances surrounding this case.

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. (Merritt deposition pp.40-43) **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.** (Merritt deposition p. 44) 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. (Merritt deposition p. 54)

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 Defendant'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. (Jackson deposition p. 28-29) Ms. Jackson also testified that she did not know how long the water hose had been on the sidewalk in the loading area. (Jackson deposition p. 28-29) 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 Defendant's facility. (Jackson deposition p. 29-30) 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. (Jackson deposition p. 31-32) 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. (Jackson deposition p. 48-49)

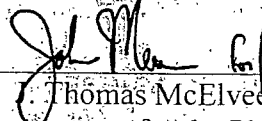
In addition to her testimony regarding the storage of the water hose that caused Fatima's fall, Ms. Jackson testified that the incident report regarding Fatima's fall was not properly completed and that Fatima's family should have been contacted, but were not, and that these

steps should both have been completed in accordance with the Defendant's policies and procedures. (Jackson deposition p. 36-39)

It is clear from the evidence and the testimony of the witnesses in the present case that leaving the water hose on the sidewalk was unsafe and created an unreasonable risk of harm to the Defendant's consumers, including Fatima Karriem. Based upon the facts and circumstances surrounding Fatima Karriem's fall and her injuries, there is clearly more than a mere scintilla of evidence to deny the Defendant's Motion for Summary Judgment.

BRYAN LAW FIRM OF SC, L.L.P.

By: _____


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(803) 775-1263

Sumter, South Carolina
July 18, 2012

RECORDED

2012 JUL 20 PM 4:03

2008-CP-43-1037

CERTIFICATE OF MAILING
CLERK OF COURT
SUMTER COUNTY, S.C.

Personally appears the undersigned, who first being duly sworn, deposes and says that in the matter entitled Fatima Karriem, through her court appointed guardian, Phillip Simmons vs. Sumter County Disabilities and Special Needs Board, she served a copy of Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment upon counsel for the Defendant by depositing the same on July 20, 2012, in the United States Mail, with sufficient postage affixed, and addressed as follows:

G. Murrell Smith, Esquire
Lee, Erter, Wilson, Holler & Smith, L.L.C.
Attorneys at Law
Post Office Box 580
Sumter, South Carolina 29151

Julie A. Long
Julie A. Long

SWORN TO BEFORE ME THIS
20th DAY OF JULY, 2012

Linda D. Price

Linda D. Price
Notary Public for South Carolina
My Commission Expires: 8/18/2014

RECORDED
2012 JUL 30 AM 9:30
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) IN THE THIRD JUDICIAL CIRCUIT
JAMES C. CAMPBELL) C.A. NO.: 2008-CP-43-1037
CLERK OF COURT
SUMTER COUNTY, S.C.)

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

Plaintiff,

v.

Sumter County Disabilities and Special
Needs Board;

Defendant.

**DEFENDANT'S REPLY TO
PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Defendant Sumter County Disabilities and Special Needs Board ("SCDSNB"), pursuant to the Court's Oral Order of July 9, 2012, hereby submits this Reply to Plaintiff's Supplemental Memorandum in Opposition to SCDSNB's Motion for Summary Judgment.¹ Plaintiff fails to address the clear application of the South Carolina Tort Claims Act, mis-characterizes the deposition testimony and relies on her own opinions and conclusions which are not supported by the record. Plaintiff's opposition largely fails to address the arguments set forth in SCDSNB's Motion. Instead, Plaintiff attempts to muddy the waters in the hopes of creating a genuine issue of fact that will survive summary judgment. These efforts fall short and SCDSNB's Motion for Summary Judgment should be granted.

¹ SCDSNB incorporates herein any and all arguments and memoranda previously filed with the Court.

A. PLAINTIFF'S RENDITION OF THE FACTS CONTAINS CONCLUSIONS WHICH ARE NOT IN THE RECORD AND NOT SUPPORTED BY THE RECORD.

In Plaintiff's supplemental brief, Plaintiff discusses a brief summary of the facts. However, the Plaintiff argues as facts conclusions that are not supported by the testimony or the record and must, therefore, be clarified for the Court. This clarification is respectfully presented to the Court because on a motion for summary judgment, the court may only review the facts contained in the record. Spencer v. Miller, 259 S.C. 453 (1972).

On more than one occasion throughout Plaintiff's supplemental brief, Plaintiff claims the water hose in question was left out on a sidewalk and references page 18 of Joyce Jackson's deposition supporting the assertion. However, a review of page 18 of Joyce Jackson's deposition does not state the water hose was left on a sidewalk. See Exhibit A, Deposition of Joyce Jackson, p. 18. Plaintiff also asserts Joyce Jackson testified on page 29 and 30 of her deposition that she did not know how long the water hose had been on the sidewalk in the loading area. However, Joyce Jackson never testified the hose was on a sidewalk on pages 29 and 30 of her deposition. In fact, Joyce Jackson's deposition is wholly void of her ever testifying the water hose was on a sidewalk.

Moreover, Plaintiff argues Scotty Merritt testified the water hose was left on a sidewalk and references pages 48 and 49 of his deposition testimony. See Supplemental Memorandum of Plaintiff, p. 4. However, a review of pages 48 and 49 of Scotty Merritt's deposition testimony does not mention the hose being left on a sidewalk. In fact, Scotty Merritt specifically states the hose was not on the sidewalk but laying beside the concrete on the ground near the shrubbery. See Exhibit B, Deposition of Scotty Merritt, p. 41, line 21-p. 42, line 3 and p. 45, lines 11,22-24.

Finally, Plaintiff claims as fact in her supplemental brief that "all landscaping in the area

where Fatima fell had been completed” and cites pages 40-43 of Scotty Merritt’s deposition to support her assertion. However, a review of pages 40-43 shows that Scotty Merritt did not testify the landscaping work was completed. In fact, Scotty Merritt testified he could not say whether the landscaping work was completed and whether the use of the hose had ended. See Id., p. 41, lines 10-11 and p. 45, lines 4-7.

The Court can only review the evidence presented in the record. Plaintiff’s version of the events differ from the testimony presented in the record. Plaintiff has failed to provide any evidence or testimony which supports her version of events as argued in the supplemental brief.

B. SCDSNB IS ENTITLED TO SUMMARY JUDGMENT ON THE PLAINTIFF’S NEGLIGENCE CLAIMS UNDER THE SOUTH CAROLINA TORT CLAIMS ACT.

Plaintiff asserts SCDSNB’s conduct was negligent and grossly negligent. Plaintiff asserts a cause of action based on tortious conduct of a governmental entity. Accordingly, the Tort Claims Act governs. Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E2d 557, 564 (Ct. App. 2004) (“The Tort Claims Act governs all tort claims against governmental entities.”) (citations omitted).

The Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity or its employees. S.C. Code Ann. § 15-78-70(b) (Supp.2008). “[The Tort Claims Act] constitutes the exclusive remedy *for any tort* committed by an employee of a governmental entity.” S.C. Code Ann. § 15-78-70(a) (Supp.2008) (emphasis added). Pursuant to the Act, the legislature granted governmental entities immunity from liability and suit for any tort except as waived by the Act.

The status of SCDSNB 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. Thus, Defendant in the present action is an agency of the state and any torts alleged to have been committed by any or all of its employees are governed by the provisions of the South Carolina Tort Claims.

Consistent with its intent to limit governmental liability, the General Assembly set forth thirty-two exceptions to the waiver of sovereign immunity which are contained in Section 15-78-60. S.C. Code Ann. § 15-78-60 (Supp. 2008). Subsection (25) of Section 15-78-60 unequivocally applies to the case at hand. Subsection 15-78-60(25) provides that a governmental entity is not liable from "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*." S.C. Code Ann. § 15-78-60(25)(emphasis added). Clearly, the gross negligence standard applies in this case.

"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 (S.C. 2003). "Additionally, while 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." Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245 (Ct. App. 2004)(citing Etheredge, 341 S.C. at 310)). The Plaintiff has the burden of proving gross negligence. See Stewart v. Richland Memorial Hospital, 450 S.C. 589 (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 still prove that the governmental entity has

waived immunity)).

Plaintiff has not addressed the implication and application of Pack in this case. As in Pack, there is absolutely no evidence in the record demonstrating that SCDSNB was grossly negligent. The Pack court determined that summary judgment was proper after finding that employees acted with at least slight care. Pack, 362 S.C. at 245. As in this case, the plaintiff in the Pack case 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)). The Plaintiff's arguments fail to address or distinguish the Pack decision from the case at hand.

Plaintiff attempts to support a gross negligence finding with the argument that Plaintiff fell and thus SCDSNB must have been grossly negligent in observing Plaintiff and the area because staff members did not prevent the fall. However, the law requires some evidence of gross negligence, or in other words, some evidence that SCDSNB intentionally and consciously failed to do something or not do something.² There is no such evidence in this case and any such finding is based purely

² SCDSNB would again point out that Should Plaintiff assert SCDSNB failed to inspect the area where Plaintiff ran to and fell to ensure it did not contain any hazard, SCDSNB can not be liable for such failures. See S.C. Code Ann. § 15-78-60(13) (Governmental entity is not liable for loss resulting from "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection of any property to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety.")).

on speculation. Again, Plaintiff has failed to provide any evidence whatsoever of gross negligence on the part of SCDSNB. Plaintiff has failed to provide any evidence or expert testimony that SCDSNB's failed to exercise slight care because of a failure to act with regard to Plaintiff. Plaintiff argues Hollins v. Richland County Sch. Dist. One, 310 S.C. 486 (1993), is applicable in this case. In Hollins, the Court found a jury question existed as to whether the defendants exercised "slight care" in failing to take a specific affirmative act. In the case at hand, there is no evidence SCDSNB failed to exercise "slight care" in failing to act in any particular manner. The record before the Court is void of any knowledge or notice SCDSNB had of the water hose on the ground prior to the Plaintiff's fall or that the hose was a hazard. Therefore it would have been impossible for SCDSNB to act regarding the same.

Moreover, Hollins is distinguishable from the case at hand as the Court of Appeals later narrowed Hollins, finding "[i]t is clear that the Supreme Court intended to limit the holding of Hollins to the facts of that particular case." Clyburn v. Sumter County School District 17, 311 S.C. 521, 527 (Ct. App. 1993) *aff'd* 317 S.C. 50 (1994). The Clyburn court, which was affirmed by the Supreme Court, determined that the defendant was not grossly negligent as a matter of law and affirmed the trial court's granting of summary judgment. *Id.* at 526. In Clyburn, it was alleged a school bus driver was grossly negligent when he failed to do more to prevent a second attack on a student rider. While the court determined the school bus driver *could* have taken other steps to ensure that a second attack would not occur, the court nevertheless found "at the very least they exercised 'slight care'" and affirmed the trial court's order granting summary judgment. *Id.*

There is no evidence that SCDSNB or any of its staff members were grossly negligent or failed to exercise "slight care" in their monitoring of Plaintiff or providing Plaintiff with a safe

environment. The record before the Court demonstrates that the Plaintiff was one of several consumers, under the *direct supervision of two direct care staff*, that were sitting in a covered area for leisure. The area is such that consumers can spend leisure time outside. See Defendant's Motion for Summary Judgment, Exhibit C, Deposition of Joyce M. Jackson, p. 19 and Exhibit E, Deposition of Scotty Merritt, p. 36-37. The Plaintiff ran from her chair and fell over a water hose which resulted in her falling to the ground. Id. The hose was *on the ground next to shrubbery* because yard maintenance *was being done* around the time of the fall. See Id., Exhibit E, Deposition of Scotty Merritt p. 40, 45 & 53. Plaintiff's supplemental memorandum mis-characterizes the record before the Court. At no time has Joyce Jackson or Scotty Merritt testified the water hose was on the *sidewalk* as argued by Plaintiff nor did Scotty Merritt testify the landscaping work was completed.

C. SCDSNB is immune from liability pursuant to S.C. Code Ann. § 15-78-60(4).

Plaintiff argues that pursuant to policy, the water hose should have been properly stored. Plaintiff also argues the incident report was not properly completed and Plaintiff's guardian was not immediately contacted. However, Plaintiff fails to account or address the immunity afforded under S.C. Code Ann. § 15-78-60(4). Subsection 15-78-60(4) provides that a governmental entity is not liable from "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." S.C. Code Ann. § 15-78-60(4). This provision precludes a claim for the noncompliance, enforcement of or failure to enforce any written regulations, provisions, charters or policies. The provisions of Section 15-78-60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation. Accordingly, any such claims must be dismissed as a matter of law.

D. PLAINTIFF'S APPLICATION OF NEGLIGENCE STANDARD IS FLAWED.

Plaintiff argues South Carolina law states that in premises liability cases involving the State or an agency of the State, a negligence standard is applied. However, Plaintiff's argument and the cases used to support the same are flawed. Premises liability is a *negligence action* in which the owner or occupier of land is held liable for violating a duty to protect the claimant from a defect in the premises. See King v. Daniel International Corp., 278 S.C. 350 (1982). As discussed above, the Tort Claims Act is applicable *for any tort* committed by a governmental entity. Furthermore, Subsection 15-78-60(25) provides that a governmental entity is not liable from "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*." S.C. Code Ann. § 15-78-60(25)(emphasis added). Clearly, a gross negligence standard applies in this case and the negligence standard of a premises liability claim does not.

Moreover, the cases cited to support Plaintiff's contention can be easily distinguished from the case at hand. The Burns decision dealt with the South Carolina Commission for the Blind's duty to a consumer to protect the consumer from the acts of third persons in a premises liability case. Burns v. S.C. Comm. for the Blind, 323 S.C. 77, 79 (Ct. Appl. 1994). A residence of a group home operated by the Commission for the Blind was sexually assaulted by another residence. The Commission argued the trial judge erred in refusing to charge the jury that the Commission is not an insurer of the safety of its clients. The Court of Appeals agreed and determined the duty owed to the Plaintiff to protect her from the acts of third parties may evolve from the special relationship that arose as a result of the plaintiff seeking the services of the Commission. The court reasoned the

relationship between the Commission and the Plaintiff was one analogous to that of a business invitee.

The Court of Appeals analyzed the case under the guise of a premises liability case and the duty of an owner to protect its invitees from third parties. Accordingly, the court found the trial judge erred in not charging the jury a premises liability charge. *Id.* at 80. Moreover, the Court of Appeals specifically stated the charge to the jury on premises liability should be “**limited by the South Carolina Torts Claims Act**” and remanded the case. *Id.* (emphasis added). The Court of Appeals did not address the application of the exception found under subsection (25). To analyze the case at hand by applying Burns without an application of subsection (25) would be flawed. The analysis must go one step further in this case with the application of subsection (25). Clearly, § 15-78-60(25) would limit the application of the premises liability charge to a standard of gross negligence. Moreover, the case at hand has nothing to do with SCDSNB’s duty to a consumer to protect the consumer from the acts of a third person. Accordingly, Burns is not controlling or helpful in this case.

The Creech case cited by the Plaintiff is also easily distinguished. Plaintiff cites Creech v. S.C. Wildlife & Marine Res. Dept., 328 S.C. 24 (1997), because the Court applied the negligence standard in determining premises liability against a governmental entity for a public dock where a girl fell due to a lack of safety rails. The Court determined the girl was a public invitee but did not apply a gross negligence standard because the exception of § 15-78-60(25) does not apply to the S.C. Wildlife & Marine Res. Dept. as it does in the case at bar.

Assuming, for the sake of argument, Plaintiff is correct in the application of the negligence standard under a premises liability claim, which is not conceded by SCDSNB, Plaintiff still fails to

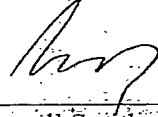
show there is any genuine issue of material fact. Breach of duty is an essential element of a cause of action for premises liability as in any negligence action. Kershaw Motor Co. V. Southern Ry. Co., 136 S.C. 377 (1926). Courts have refused to allow plaintiff's to dispense with a showing of actual or constructive notice of the hazard and consistently reject arguments that a defendant created a foreseeable risk of harm and should be held liable for failing to exercise due care in reducing or eliminating the risk of harm. See Wintersteen v. Food Lion, Inc., 336 S.C. 132 (Ct. App. 1999) *aff'd*, 344 S.C. 32 (2001)(rejecting argument that store created actionable hazard by installing self-service drink and ice machine)). The record is void of any evidence SCDSNB had actual or constructive knowledge that the water hose was a hazard or that the Plaintiff would run to the area where the hose was located and trip over the hose on the ground. Taking Plaintiff's argument that the hose was an inherent hazard to its logical conclusion, Plaintiff would make the Court believe even the simplest of objects could be an inherent trip hazard. There is simply no evidence in the record the water hose is a hazard as it was or that SCDSNB knew the water hose was a hazard in its condition in the ground. Accordingly, there is no genuine issue of material fact and SCDSNB's Motion for Summary Judgment must be granted.

CONCLUSION

For the foregoing reasons, Defendant requests that the Court enter summary judgment in its favor as to Plaintiff's causes of action as set forth in its Motion for Summary Judgment, and that the Court also award such other relief as it deems just and proper.

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, L.L.C.



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ATTORNEYS FOR THE DEFENDANTS

July 27, 2012

Sumter, South Carolina

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

30(b)(6) Deposition of:
South Carolina Disability and
Special Needs Board
(Joyce M. Jackson)

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 12:33 P.M. - 1:31 P.M.

Court Reporter: Lisa Marie Weesner

The 30(b)(6) deposition is taken pursuant to notice
and/or agreement, in the above-entitled cause
pending in the above-named court and pursuant to the
South Carolina rules of civil procedure.

Lisa Marie Weesner
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Lisa Marie Weesner - Court Reporter

COPY

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A P P E A R A N C E S

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By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/ln	Ex.	Description
12/23	P x 1	SCDSNB - Incident Report
16/11	P x 2	Hourly-Worker Accountability
27/17	P x 3	Incident Report
30/25	P x 4	Mission Statement
33/04	P x 5	Outdoor Area - Memo

** uh-huh = affirmative

huh-uh = negative

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1 Q They were.

2 A Uh-huh. That's right.

3 Q Sorry. I didn't mean to complete your
4 sentence.

5 A Yes.

6 Q It -- it's important for that to be
7 completed --

8 A Yes.

9 Q -- accurately?

10 A Yes.

11 Q And is it done as the day goes by or at
12 the end of the day?

13 A It should be done in real time. If it's
14 for -- at 9:00 they would have been filling the 9:00
15 space for a particular day, for whatever day it is.
16 At 9:15, they would have been filling in where she
17 was at 9:15.

18 Q Okay. And are you familiar with the area
19 where Fatima Karriem fell on April the 25th of 2006?

20 A Yes.

21 Q Can you describe that area for me?

22 A It's actually the loading area where the
23 consumers board, get off the van or RTAs bus -- get
24 on and off is the easiest -- but it's the loading
25 area for the consumers.

1 A -- that equipment should be stored after
2 it's -- it's used. Anything outside should be
3 secured. So that could very well be on the -- you
4 know, if it's plugged in, it actually is s---
5 secured to the facet, and if they were using it at
6 -- but this is conjecture, I don't know --

7 Q Right.

8 A -- what was going on at the time this took
9 place. But if it was in use -- and looking at the
10 time, it very well could have been, because it was
11 not the end of the day for them yet. That would
12 have been it.

13 Q But if it was not being used, then it
14 needed to be put up.

15 MR. JOHNSON: Object to the form.

16 Q And because leaving it out could --

17 MR. JOHNSON: Did --

18 MR. MOORMAN: -- could --

19 MR. JOHNSON: Did you answer that?

20 THE DEPONENT: I didn't -- yeah, well, I
21 did, but it was -- yes, it -- it could --

22 MR. MOORMAN: Okay.

23 THE DEPONENT: -- if they were completed.

24 BY MR. MOORMAN:

25 Q Leaving the water hose out on a sidewalk,

1 that could create a trip hazard. Would you agree
2 with that?

3 A I do.

4 Q And that could create a dangerous
5 condition for a consumer at the facility?

6 MR. JOHNSON: Object to the form.

7 A For anyone at the facility.

8 Q Okay. And -- because there's a lot of
9 foot traffic through that area?

10 A No. It -- with the exception of mornings,
11 when they get off, and afternoons, when they're
12 boarding.

13 Q Turning your attention to -- do you know
14 any reason why Fatima should have been in -- in this
15 area at 1:25 in the afternoon -- do you know -- do
16 you have any idea of why?

17 A Unless they were just out, I ca--- and
18 again, looking at the report and the date of the
19 report, it was April, might have been a nice day and
20 they were taking a -- a short break or something and
21 -- but otherwise, I don't know.

22 Q I'm going to show you -- I need you to
23 look at this, what's been marked -- or what would
24 this be, Plaintiff's Exhibit 4?

25 (Plaintiff's Exhibit number 4

Deposition of Scotty Fitzgerald Merritt

Page 1

State of South Carolina

in Common Pleas Court

County of Sumter

Phillip Simmons, as Guardian
for Fatima Karriem,
Plaintiff,

V.

2008-CP-43-1037

South Carolina Disability and
Special Needs Board,
Defendant.

Deposition of: Scotty Fitzgerald Merritt

Location: 17 East Calhoun Street
Sumter, South Carolina

Date: Tuesday, March 6, 2012

Time: 10:00 A.M. - 11:33 A.M.

Court Reporter: Lisa Marie Weesner

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina rules of civil procedure.

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Lisa Marie Weesner - Court Reporter

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For the Defendant:

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By: Steven B. Johnson, Esq.

I N D E X

Examination by: Mr. Moorman

3

E X H I B I T S

Pg/ln	Ex.	Description
12/11	P x 1	SCDSNB - Position Description
19/04	P x 2	Accountability of Consumers
22/19	P x 3	Ms. Karriem's Daily Schedule
27/19	P x 4	Hourly Worker Accountability
32/18	P x 5	SCDSNB - Incident Report
58/03	P x 6	SCDSNB - Outdoor Area
60/11	P x 7	SCDSNB - Mission Statement

** uh-huh = affirmative
huh-uh = negative

1 Q Okay. And do -- now, as far as going
2 back, she was scheduled to leave at 2:30. Is --

3 A That's correct.

4 Q -- that correct? Were they going to a --
5 did they remain outside until 2:30?

6 A No.

7 Q No?

8 A No.

9 Q Where did they go next?

10 A They came back inside.

11 Q Okay. Going back, to talk a little bit
12 about the incident, I'm looking at your incident
13 report --

14 A Uh-huh.

15 Q -- that you filled out. There is some
16 discussion about a water hose. Why would -- where
17 was the water hose located?

18 A Lying on the side of the building where
19 the spigot was attached to the wall.

20 Q Okay. And why was the water hose out?

21 A They were doing some landscaping, you
22 know, maintenance landscaping.

23 Q When was that being done?

24 A It had already been done. They were
25 working throughout the day in the whole area.

1 Q Okay.

2 A And that's one particular staff. They had
3 more people in maintenance, but just throughout the
4 day.

5 Q Did they have --

6 A And --

7 Q Go ahead. I didn't mean to interrupt you.

8 A I'm sorry. They were watering because
9 they had just put plants out.

10 Q And had they finished using it?

11 A Not -- I cou--- I couldn't say. I don't
12 know.

13 Q Okay. Does that nor--- is that something
14 that would normally stay there?

15 A Yes -- not -- not normally. It wouldn't
16 be there all the time, no.

17 Q Right.

18 A Not throughout the day. But that
19 particular day, they were working throughout the
20 day, you know, working on the --

21 Q Where was the hose lying? Where was it?

22 A Lying on the side of the concrete attached
23 to the spigot.

24 Q Okay.

25 A It was not sprawled out. It was wrapped.

1 Q Okay.

2 A Just sitting -- you know, wrapped in a
3 circle on the -- on the ground.

4 Q Now, in your incident report you wrote
5 down preventive measures.

6 A Uh-huh.

7 Q What is that? What does that mean?

8 A Just some -- people can get into
9 accidents, but this is the preventative measure
10 is -- because she did get up and run and tripped
11 over the hose. She ran into -- ran off of the --
12 from the patio area to near where the hose was.

13 Q Okay. And you wrote that the -- the water
14 hose did not need to be left out. Was that correct?

15 A Exac--- exactly.

16 Q And you believe that it didn't need to be
17 left out. Is that correct?

18 A Not --

19 MR. JOHNSON: Object to the form.

20 A -- throughout the day, but in the event
21 that they were working, naturally they would have to
22 have it. And, as I said, I don't know what the
23 duration was of them working outside, but I knew
24 that they were working that day.

25 Q Were they working at the time that you got

1 out there?

2 A No.

3 Q Okay. And is there -- are there any
4 regulations or anything that will tell us about how
5 the hose needs to be stored?

6 A No.

7 Q Is there anything like, that would talk
8 about how a -- outdoor equipment would need to be
9 stored? Any regulations in regards to that that
10 you're --

11 A No. No --

12 Q -- familiar with?

13 A -- not that I'm familiar with.

14 Q Is -- is that something, as a floor
15 supervisor, those regulations are something you
16 would be familiar with?

17 A No.

18 Q No?

19 A No. Not as far as them working. Their
20 job description and what they're doing at the time.

21 Q Right. But as far as for, you know,
22 safety of the residents, you -- you'd want to know
23 if there was a --

24 A If there were large objects, something
25 that they -- and they wouldn't even be out there

1 up and store it properly. Correct?

2 A No.

3 Q So you just --

4 A Because they couldn't -- they couldn't put
5 it up because I don't know whether they were still
6 working. They could have been at lunch at the time
7 that that happened.

8 Q They could have put it somewhere else
9 other than on the sidewalk.

10 MR. JOHNSON: Object to the form.

11 A They -- it was not on the sidewalk.

12 Q You said that, make sure the water hose
13 are rolled up and put away in storage until needed.
14 Is that correct?

15 A Yes.

16 Q And that's a statement that you stand by
17 today?

18 A Yes.

19 Q And that wasn't done in this case.
20 Correct?

21 MR. JOHNSON: Object to the form.

22 A They were working as I stated. And it was
23 the area that it was s--- the -- the hose was -- was
24 on the ground near the shrubbery.

25 Q Okay. And --

1 Q And getting back to this hose, you had
2 stated that it should have been put away. Am I
3 correct in that -- is that a correct assessment of
4 what you wrote?

5 A Yes. This says preventative measures.
6 Make sure water hose is roll -- are rolled up and/or
7 put away -- or rolled up. The hose was rolled up.
8 It was not put away. And as I said, I don't know
9 whether they were conti--- they were out -- still
10 out working.

11 Q Okay. But that's not in -- that's not in
12 your incident report?

13 A No.

14 Q Okay. And how long had -- and you don't
15 know how long Sharon or Arlene had been out there.

16 A Not the duration. It wasn't like hours.
17 It -- it -- no, not --

18 Q Well --

19 A -- in that time, no.

20 Q -- lunch would have been from 12:00 to
21 1:00. Is that correct?

22 A Yes.

23 Q And so they'd probably been out there for
24 30 minutes?

25 A More than likely, yes.

1 Q Okay. And so they would have seen this
2 hose for over 30 minutes and not done anything about
3 it?

4 MR. JOHNSON: Object to the form.

5 A No. I wouldn't say that. At that -- at
6 the time, I don't think the hose was a threat. And
7 as I stated before, she got up and ran towards that
8 area.

9 Q Do you know who startled her? Do you know
10 who the person was?

11 A I don't recall the individual that
12 startled here, but I know the individual that
13 startled her, she's not accustomed to -- to --
14 especially if there is another individual that she's
15 -- is aware that is aggressive.

16 Q Okay. And -- but you're not aware who
17 that person was?

18 A No. No.

19 Q That's not in--- indicated in your report?

20 A No.

21 Q Do you know if Sharon or Arlene did a
22 report and indicated who that was?

23 A No.

24 Q Do you know if they even gave a statement
25 about what happened?

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 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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August 28, 2013