

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 17 2013

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

SC Court of Appeals

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

John R. Moorman
J. Thomas McElveen, III
Bryan Law Firm of SC, L.L.P.
Post Office Box 2038
17 E. Calhoun Street
Sumter, South Carolina 29151
(803) 775-1263
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF ISSUES ON APPEAL.....1

FACTS.....2

ARGUMENT

 I. DID THE TRIAL COURT ERR IN FINDING THAT NO GENUINE
 ISSUES OF MATERIAL FACT EXISTED THAT DEMONSTRATED
 THAT THE RESPONDENT WAS GROSSLY NEGLIGENT IN
 PROTECTING, SUPERVISING, AND MONITORING FATIMA
 KARRIEM?.....3

CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952).....4, 5

Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654
(1993).....4, 5

Hughes v. Children's Clinic, P. A., 269 S.C. 389, 237 S.E.2d 753
(1977).....5

Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988).....4, 5

STATEMENT OF ISSUES ON APPEAL

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

FACTS

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

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

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

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

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

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

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

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

¹ 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.

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

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

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

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

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

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

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

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

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

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

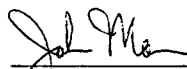
As stated earlier, Scotty Merritt's testimony regarding the storage of the water hose and the hazards that leaving it on the sidewalk presented to consumers at the Defendant's facility was corroborated by Joyce Jackson. Ms. Jackson acknowledged that if the water hose was not being

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

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

CONCLUSION

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



John R. Moorman
J. Thomas McElveen, III
Bryan Law Firm of SC, L.L.P.
Post Office Box 2038
17 E. Calhoun Street
Sumter, South Carolina 29151
(803) 775-1263
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

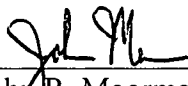
v.

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

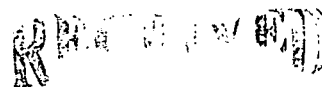
CERTIFICATE OF COUNSEL

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

By: _____


John R. Moorman
J. Thomas McElveen, III
Bryan Law Firm of SC, L.L.P.
Post Office Box 2038
Sumter, South Carolina 29151
(803) 775-1263
Attorney for Appellant

September 17, 2013



SEP 19 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2008-CP-43-1037

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

v.

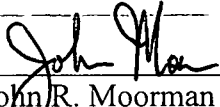
Sumter County Disabilities and Special Needs
Board,.....Respondent.

PROOF OF SERVICE

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

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

This 17th day of September, 2013.


John R. Moorman
Bryan Law Firm of SC, L.L.P.
Post Office Box 2038
17 E. Calhoun Street
Sumter, South Carolina 29151
(803) 775-1263
Attorney for Appellant

RECEIVED

SEP 19 2013

SC Court of Appeals