

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2011-CP-46-4508

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

Appellant

v.

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

Of whom

Charlotte-Mecklenburg Hospital
Authority d/b/a Carolinas Medical
Center is the

Respondent.

RECEIVED

JAN 24 2014

Defendants
SC Court of Appeals

FINAL REPLY BRIEF OF APPELLANT

Monteith P. Todd
Robert E. Horner
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400

S. Randall Hood
Deborah G. Casey
Lara Pettiss Harrill
Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

*Attorneys for Respondents, The Charlotte
Mecklenburg Hospital Authority d/b/a
Carolinas Medical Center*

Duane M. Shaw
Nathan J. Sheldon
Shaw Law Firm
1169 Ebenezer Road
Rock Hill, SC 29732
(803) 329-4200

*Attorneys for Appellant Elizabeth
Hope Rainey, as the Appointed
Guardian ad Litem to Owen C.*

TABLE OF CONTENTS

Table of Authorities	ii
Reply Argument	
I. APPELLANT DOES NOT CLAIM CMHA HAD A DUTY TO CONTRAVENE A DSS DIRECTIVE OR REFUSE TO RELEASE OWEN C. FROM ITS CUSTODY	1
A. CMHA’s brief opposes the imposition of a duty Appellant does not assert	1
B. CMHA’s duties to assess and communicate assessment results are recognized by South Carolina law	2
C. CMHA’s assessment and communication failures proximately caused Owen C.’s permanent injuries	5
II. CMHA’S SOCIAL WORKER TESTIFIED THAT SHE UNDERTOOK A PSYCHOSOCIAL ASSESSMENT DUTY FOR OWEN C.’S BENEFIT	7
III. THE CIRCUIT COURT CORRECTLY REFUSED TO APPLY SOUTH CAROLINA’S STATUTORY REPORTER IMMUNITY	9
Conclusion	12

TABLE OF AUTHORITIES

Case law

South Carolina

<u>In re Campbell</u> , 379 S.C. 593, 666 S.E.2d 908 (2008)	9
<u>Madison v. Babcock Center, Inc.</u> , 371 S.C. 123, 638 S.E.2d 650 (2006)	3
<u>Thompson v. Cisson Construction Co.</u> , 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008)	10
<u>Williams v. Watkins</u> , 379 S.C. 530, 665 S.E.2d 243 (Ct. App. 2008)	10-12

North Carolina

<u>Gaines v. Cumberland County Hospital System, Inc.</u> , 692 S.E.2d 119 (N.C. App. 2010)	6
---	---

Statutory Provisions

S.C. Code Ann. § 20-7-540	10
S.C. Code Ann. § 43-35-75	10
S.C. Code Ann. § 63-7-310	9, 10
S.C. Code Ann. § 63-7-390	9-12
S.C. Code Ann. § 63-7-410	9

Other Sources

Op. S.C. Att’y Gen. 06-22 (Jan. 26, 2006)	10
Op. S.C. Att’y Gen. 04-6 (Jan. 7, 2004)	10
Restatement (Second) of Torts § 323	7

REPLY ARGUMENT

I. APPELLANT DOES NOT CLAIM CMHA HAD A DUTY TO CONTRAVENE A DSS DIRECTIVE OR REFUSE TO RELEASE OWEN C. FROM ITS CUSTODY.

A. CMHA's brief opposes the imposition of a duty Appellant does not assert.

A majority of The Charlotte-Mecklenburg Hospital Authority's ("CMHA") brief is premised on the notion that Appellant's duty argument is limited to a claim that CMHA was required by law to disobey a South Carolina Department of Social Services ("DSS") directive to release Owen C. to his parents' custody. CMHA portrays Appellant's claim in this way throughout its brief. Initial Br. of Resp't at 5 ("CMHA did not owe a duty to Own to refuse to discharge him"); at 14 (Appellant "claims that CMHA breached a duty of care to Owen by discharging him into the custody of his parents"); at 15 (arguing Appellant contends "CMHA should not have returned the child to his parents"). CMHA claims Appellant made this argument "both at the hearing before the trial court and in her brief to this court." Id. at 5. This statement overlooks Appellant's duty assertion clearly expressed in her argument to the circuit court and its brief to this court. Appellant's oral argument before Judge Kimball and her brief make clear that she is not asserting a duty to retain custody or refuse a DSS directive. See Initial Br. of Appellant at 8 ("Appellant's negligence claim against CMC did not rely on a duty to withhold custody or remove Owen C. from his parent's custody"). (R. p. 131, line 24 – 132, line 1) ("my argument today does not go to the authority of DSS to discharge this child from the hospital").

CMHA inaccurately portrays Appellant's position as an effort to pit CMHA against DSS and require CMHA to perform an act grounded in social service decisions in

a way that directly contravenes a DSS social service directive. CMC's approach bears a certain surface level appeal in that, if Appellant's duty argument was truly contingent on a hospital supplanting DSS placement decisions, then Appellant would be advocating an overhaul of South Carolina's social service ecosystem. However, since Appellant's duty argument does not depend on CMHA holding Owen C. against DSS's will, CMHA's brief presents a false choice. Nothing in Appellant's claim asks the court to remove statutorily granted power from DSS, apply DSS statutory imposed duties to hospitals, or interpose hospitals in a role South Carolina law (supposedly) grants exclusively to DSS. CMHA's devotion to a "refusal to discharge" duty analysis renders much of its brief unresponsive to Appellant's claim.

B. CMHA's duties to assess and communicate assessment results are recognized by South Carolina law.

CMHA's duty and its breach occurred before Owen C.'s discharge with the effects of CMHA's breach reaching the date of discharge and beyond. CMHA's special relationship with its infant patient created a duty for CMHA to conduct a psychosocial assessment and communicate the assessment's results to DSS. CMHA recognizes this duty and maintains on-staff social workers and social work policies to govern its performance of this duty. In this case, CMHA social workers attempted an assessment but did not follow CMHA policy and did not adequately communicate important information from the assessment to DSS before Owen C. was discharged. If CMHA had properly performed its assessment and communication duties, then DSS would have made an alternative decision on placement and Owen C. would likely not have been exposed to the permanent injuries he suffered in January 2010. (R. p. 238) (but for

CMC's standard of care breaches "it is more likely than not this child would have been placed into custody with some other person than the custodial parents).

CMHA cites various South Carolina Children's Code provisions establishing child abuse investigative powers for DSS and other state entities. Initial Br. of Resp't at 7. CMHA then notes that the Code does not include similar provisions for hospitals beyond the statutory duty to report suspected abuse. CMHA ultimately concludes that there can be no hospital duty to assess because the Code does not specifically establish the duty. Initial Br. of Resp't at 10. CMHA's conclusion does not line up with the duty formation language in Madison v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006), which CMHA cites earlier in its brief. CMHA claims that since only the reporting duty is codified in a statute, "CMHA had no further duty to Owen" beyond the report. Initial Br. of Resp't at 10. However, legal duties are not limited to obligations imposed by statute. As CMHA acknowledged earlier in its brief, Madison identifies several sources of a legal duty including the parties' relationship and other special circumstances. Initial Br. of Resp't at 6 (citing Madison, 371 S.C. at 136, 638 S.E.2d 656-57). Appellant's duty assertion is based on the parties' hospital-patient relationship and, alternatively, CMHA's voluntarily assumed assessment duty.

CMHA also argues that assessments are exclusively a function of DSS in coordination with the family court system. Initial Br. of Resp't at 7. However, CMHA's policy clearly acknowledges the hospital's assessment duty. For example, in CMHA's "Child Abuse and Neglect Algorithm," if CMHA's medical team identifies a child for whom abuse is suspected, then the team must "[c]onsult CHS Clinical Care Management Social Worker to **assist with assessment process.**" (R. p. 363) ("Algorithm") (emphasis

added). CMHA social worker Laura Newmark testified that the hospital had a duty to “do a complete workup” of Owen C.’s situation. (R. p. 844 at P. 47, lines 6-12). CMHA social worker duties include working with CMHA doctors and nurses to determine whether it is safe for a juvenile to return to his parents. (R. p. 849, at P. 65, lines 17-21).

CMHA policy also states activities required as part of the assessment process. Policy PR 110.03 states “the procedure that should be followed in cases of suspected abuse or neglect.” (R. p. 341). Fundamentally, this policy requires CMHA to participate in the determination of whether a patient meets the definition of an “abused juvenile.” (R. p. 341). CMHA medical providers must “consult CHS clinical care management social worker to aid in the assessment process.” (R. p. 342). A child is an “abused juvenile” if his parent “inflicts or allows to be inflicted serious physical injury.” CMHA social workers were required to examine the evidence of parental injury to Owen C. to meet its core policy duty of determining whether Owen C. was an “abused juvenile.” Additionally, CMHA’s procedures for “Evaluation and Management of Suspect Child Abuse or Neglect” required several assessment related activities. CMHA was required to examine any explanation given by the child’s parents for injuries the child sustained. (R. p. 347). CMHA social workers were also responsible for determining whether Owen C.’s mother and father had engaged in “inappropriate paternal behaviors.” (R. p. 352).

The compartmentalization CMHA proposes, i.e. CMHA performs medical tests and DSS performs all social work activities, is also in conflict with the record. Both CMHA and DSS indicate greater CMHA responsibility in social service decisions than CMHA now claims. Ms. Newmark testified that CMHA social workers “work with” DSS in assessing a suspected child abuse victim’s safety. (R. p. 849 at P. 68, lines 17-20; R. p.

851 at P. 74, lines 17-19) (Ms. Newmark describes her role as personally “working with DSS” related to patient discharge); (R. p. 854 at P. 85, line 17) (“we work with DSS”). DSS witnesses testified that a hospital has a role in assessing a suspected child abuse victim. A typical DSS investigation would include interviewing hospital personnel and “tak[ing] to consideration any concerns that they have.” (R. p. 686 at P. 26, lines 6-9).

DSS supervisor Krista M. Hinnant also testified that DSS and the hospital can have overlapping social work responsibilities for a suspected child abuse case. DSS “[a]bsolutely” looked to the hospital for help in making DSS case decisions. K. Hinnant (R. p. 686 at P. 26, lines 10-12). DSS worker Dirvondra Hill also testified that a hospital, through its social workers, was responsible for providing DSS “information regarding the parents’ cooperation.” (R. p. 505 at P. 42, lines 14-18). DSS relies on information provided by hospital staff including hospital social workers. Clearly, CMHA’s role in Owen C.’s case went beyond the medicine. CMHA maintained on staff social workers and drafted CMHA social work policies specifically because CMHA recognized its role in suspected child abuse cases extends beyond the medicine.

C. CMHA’s assessment and communication failures proximately caused Owen C.’s permanent injuries.

CMHA also argues that any assessment and communication deficiencies could not have been a proximate cause of Owen C.’s injuries because of DSS’s important role in determining when and how a patient is discharged from the hospital. Initial Br. of Resp’t at 15. Initially, it is important to note that CMHA policy indicates that discharging a patient is a joint decision between DSS and CMHA social workers. (R. p. 363) (“When medically cleared, do not discharge child until disposition has been determined by medical social worker and DSS”). Additionally, Owen C.’s situation is similar to the one

described in Gaines v. Cumberland County Hospital System, Inc., 692 S.E.2d 119 (N.C. App. 2010), cited in Appellant's Initial Brief. Initial Br. of Appellant at 24-26. In Gaines, the hospital's breach included assessment failures and the court found competent evidence that these failures were a proximate cause of injuries suffered months later at the hand of a third party. Notably, CMHA makes no effort to distinguish Gaines or its duty and proximate cause principles that are directly on point to this case. Ultimately, Gaines is based on the effect a hospital's proper assessment would have had on DSS's placement decision and an innocent child's resulting exposure to an abuser. Proper hospital conduct would have affected North Carolina DSS's decision and eliminated the child's exposure to the abuser. The same principles apply here and show that CMHA errs in its assertion that Appellant contends CMHA "should not have returned the child to his parents." It is not that CMHA should not have returned Owen C. to his parents but that DSS **would not** have returned Owen C. to his parents had CMHA conducted a proper assessment and properly communicated its results to DSS.

CMHA argues Appellant has failed to show what additional information CMHA social workers would have uncovered had they performed the assessment required by law and outlined by hospital policy. Initial Br. of Resp't at 16. Extensive information about Owen C.'s family life and future abuse risk potential was available to CMHA social workers and would have been uncovered by a proper assessment. (R. pp. 219-224). Proper interviews of Owen C.'s parents would have revealed a troubling picture of family dysfunction and child abuse triggers. Based on information Owen C.'s parents later revealed, Appellant's expert and license social worker George Savarese concluded

CMHA social workers could have uncovered the same information in December 2009 had their assessment followed CMHA policy and general social work standards.

For example, a proper interview with Owen C.'s father Michael may have revealed that Michael had a criminal history and that the relationship between Owen C.'s parents was significantly "stressed" since Owen C. was born. (R. p. 219). Michael may have also acknowledged the past instances where he "would get frustrated with Owen's crying and pat him in the back hard." (R. p. 219). A proper interview with Owen C.'s mother Kayla would have revealed Michael's hesitation or apathy when caring for Owen C. Kayla was concerned that Michael "wasn't aware of how fragile a child could be." (R. p. 220) (quoting R. p. 788 at P. 44, lines 3-6). Interviews with Owen C.'s maternal grandparents would have also revealed prior bruising suffered by Owen C. while in Michael's care. (R. p. 223). This is just a small selection of the information a proper assessment would have revealed and forms part of the basis for Appellant's experts' opinions that DSS would not have placed Owen C. in his parents' custody if CMHA performed a proper assessment and communicated its results before Owen C.'s discharge.

II. CMHA'S SOCIAL WORKER TESTIFIED THAT SHE UNDERTOOK A PSYCHOSOCIAL ASSESSMENT DUTY FOR OWEN C.'S BENEFIT.

CMHA claims that it undertook no duty to perform a psychosocial assessment. However, CMHA conduct meets all required elements of Restatement (Second) of Torts § 323 and the voluntarily assumed duty doctrine applies in this case. CMHA contends that it did not actually undertake any social service duty while Owen C. was a patient at its hospital. Initial Br. of Resp't at 17. It is clear that CMHA social workers were actively involved in Owen C.'s hospitalization in their role as licensed social workers. (R. p. 834 at P. 8, lines 5-23). CMHA social workers Laura Newmark and Katie Harrison had

various interactions with Owen C.'s parents as part of their work as licensed social workers. (R. p. 841 at P. 36, lines 1-4).

CMHA appears to argue that Ms. Newmark and Ms. Harrison's interactions with the parents were limited to a medical inquiry as to the cause of Owen C.'s subdural hematoma. Initial Br. of Resp't at 17. In other words, CMHA argues that its social workers interviewed Owen C.'s parents only for the purpose of determining the cause of Owen C.'s injury and for no purpose related to the quality of the home to which Owen C. might be discharged. CMHA's argument is not supported by Laura Newmark's testimony. Ms. Newmark admitted that she participated in an "assessment" not a medical inquiry. (R. p. 857 at P. 99, lines 8-11). Ms. Newmark also acknowledged that the assessment CMHA social workers performed in Owen C.'s case was the assessment outlined in CMHA Policy 110.03 described above. (R. p. 857 at P. 99, lines 5-11). Policy 110.03 requires "Evaluation and Management" of suspected child abuse victims.

The procedures required for this assessment include evaluation of parents' explanations for a child's injuries and any evidence of inappropriate parental behavior. This is the social service assessment CMHA social workers acknowledge performing and this is the assessment Appellant alleged that CMHA social workers performed improperly by omitting actions required by policy. Appellant is not attempting to assign blanket social service responsibility to CMHA to the exclusion of DSS, as CMHA suggests in its brief. Initial Br. of Resp't at 18. Instead, Appellant asks the court to recognize the social service duty CMHA chose to undertake, endeavored to outline in its corporate policies, and failed to perform as required.

III. THE CIRCUIT COURT CORRECTLY REFUSED TO APPLY SOUTH CAROLINA'S STATUTORY REPORTER IMMUNITY.

The circuit court properly concluded South Carolina's statutory "[r]eporter immunity from liability" does not apply in this case. (R. pp. 13-14) (citing S.C. Code Ann. § 63-7-390). The South Carolina Children's Code requires certain classes of individuals to report instances of suspected child abuse or neglect to DSS or law enforcement. S.C. Code Ann. § 63-7-310(A), (D). The duty to report applies to any "physician," "nurse," "medical...professional," and "social or public assistance worker." Id. An individual subject to § 63-7-310's duty who fails to report suspected abuse or neglect may face criminal liability. S.C. Code Ann. § 63-7-410. The Children's Code also confers immunity on mandatory reporters for civil and criminal liability arising from the performance of their reporting duty. S.C. Code Ann. § 63-7-390. CMHA argued that the immunity provision entitled it to summary judgment on Plaintiff's negligence claim. However, the conduct underlying Plaintiff's claim does not fall within the immunity's scope and the circuit court correctly refused to apply the immunity.

To embolden various professionals interacting with children to meet their statutory obligation and help DSS/police address the public welfare problem of child abuse and neglect, immunity is provided for claims related to a report of suspected child abuse. The immunity provision's limited reach is clear from its language. Under § 63-7-390, a "person required or permitted to report...is immune from civil and criminal liability which might otherwise result by reason of these actions." The proper construction of this statute clearly indicates that immunity is limited. See In re Campbell, 379 S.C. 593, 599-600, 666 S.E.2d 908, 911 (2008) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature"). Legislative intent

“should be ascertained primarily from the plain language of the statute.” Thompson v. Cisson Constr. Co., 377 S.C. 137, 157, 659 S.E.2d 171, 181 (Ct. App. 2008). The statute’s plain language indicates the immunity is limited to “these actions,” i.e. actions described and mandated by § 63-7-310 and other provisions within the same article of the Children’s Code.

This immunity provision is not intended to provide reporters blanket immunity for post-report conduct. Recognizing the statute’s plain language, the South Carolina Attorney General’s office has concluded the immunity applies only “for reports made of abuse or neglect.” Op. S.C. Att’y Gen. 06-22 (Jan. 26, 2006); see also Op. S.C. Att’y Gen. 04-6 (Jan. 7, 2004) (statute provides immunity for reporter “by reason of his or her reporting in good faith” suspected abuse); Op. S.C. Att’y Gen. 95-224 (Nov. 27, 1995) (Children’s Code provides “standards set by law for reporting and immunity for doing so”).¹ Although there are no reported cases specifically interpreting § 63-7-390 or its predecessor, this Court’s handling of a similar statute is instructive. In Williams v. Watkins, 379 S.C. 530, 665 S.E.2d 243 (Ct. App. 2008), the Court addressed whether the Omnibus Adult Protection Act’s reporter immunity provision (S.C. Code Ann. § 43-35-75) immunized a psychologist from an alleged abuser’s claims for defamation and intentional infliction of emotional distress. The statute in question granted immunity to a reporter for potential liability that may arise “by reason of this action.” The Court held that immunity was limited to “potential liability flowing from the report.” Williams, 379 S.C. at 537, 665 S.E.2d at 247.

¹ These opinions commented on former S.C. Code Ann. § 20-7-540, the reporter’s immunity statute’s location before the Children’s Code was moved to Title 63 of the Code.

CMHA's allegedly negligent conduct does not flow from its report of suspected child abuse to DSS. CMHA policies required the hospital's agents to perform several acts in response to Owen C.'s presentation. At the very least, the hospital was required by its own policies to (1) report the case to DSS; (2) complete a SCAN form; and (3) conduct a competent and thorough psychosocial assessment before Owen's release. *K. Moore Aff.* at 2. CMHA's improper conduct is based on the assessment and communication obligations imposed by CMHA policy and not on the statutory obligation to report.

CMHA asks the court to construe § 63-7-390 to immunize non-reporting related conduct of an individual with a statutory duty to report child abuse. This interpretation goes beyond the plain meaning of the statute's language and must be rejected. Additionally, CMHA's proposed interpretation also fails to further the statute's legislative objective. This statutory framework is intended to "save abused and neglected children from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection." *See Op. S.C. Att'y Gen.* (June 22, 1990). Conferring immunity to CMHA for alleged violation of its common law and internal policy duties to conduct an assessment does nothing to protect children or encourage reports of suspected child abuse.

Reporter immunity is designed to prevent claims against a reporter based on the report's veracity or the reporter's motivation. The statutory language supports this view in that it includes a rebuttable presumption of good faith. To support the statutory goal of encouraging reports of even "suspected" child abuse, the legislature grants reporters immunity from defamation, emotional distress, and privacy tort claims for good faith reports *See Williams*, 379 S.C. at 532, 665 S.E.2d at 244 (applying reporter immunity to

defamation and intentional infliction of emotional distress claims). This strikes the proper balance between encouraging reports and preventing vindictive, bad faith reports.

Finally, CMHA argues that the conduct alleged in Appellant's negligence claim is covered by the immunity statute because it relates to "an investigation or judicial proceedings resulting from the report." Initial Br. of Resp't at 21-23. However, CMHA's negligent acts and omissions actually relate to CMHA's common law duties to assess and communicate as documented in its policies. Section 63-7-390 immunity applies only to reports and conduct comprising part of an investigation/judicial proceedings "resulting from the report." The social service work CMHA was required to perform and undertook to provide Owen C. arose from CMHA's duties to its patient and was not "resulting from" CMHA's suspected abuse report to DSS. In short, CMHA owed its assessment/communication duties regardless of the later arising DSS investigation, and CMHA's negligent conduct cannot be deemed to "result" from the report. In sum, Plaintiff's negligence claim against CMC does not allege conduct covered by the reporter's immunity and the immunity provision does not apply to this case.

CONCLUSION

Based on the arguments above and those in her Initial Brief, Appellant respectfully requests that the Court reverse the circuit court's order granting summary judgment to CMHA.



S. Randall Hood
Deborah G. Casey
Lara Pettiss Harrill
Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

(803) 327-7800

Duane M. Shaw
Nathan J. Sheldon
Shaw Law Firm
1169 Ebenezer Road
Rock Hill, SC 29732
(803) 329-4200

*Attorneys for Appellant Elizabeth
Hope Rainey, as the Appointed
Guardian ad Litem to Owen C.*

January 24, 2014
Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JAN 24 2014

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2011-CP-46-4508

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

Appellant

v.

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

Of whom

Charlotte-Mecklenburg Hospital
Authority d/b/a Carolinas Medical
Center is the

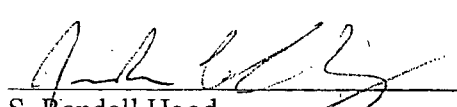
Respondent.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

(1) Final Brief of Appellant; and

(2) Final Reply Brief of Appellant.


S. Randall Hood
Deborah G. Casey

Lara Pettiss Harrill
Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellant

January 24, 2014
Rock Hill, SC