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SUMMARY OF ARGUMENT

The lower court misapplied the law when it found that Defendant was immune from tort liability pursuant to MISS. CODE ANN. § 11-46-9(1)(d) (2010), commonly known as the "discretionary exemption." Despite the undisputed material fact that Defendant put in place rules and regulations regarding fire safety and client supervision for the direct care workers to follow, the lower court failed to find that Beckwith – a direct care worker – had a ministerial duty to follow those rules and regulations. Instead, the lower court erroneously found that Beckwith "was exercising her discretion when the fire took place," and "[s]uch discretion involved the social policy alternatives" of Defendant. R:183, Order/Opinion. Simply put, the lower court misapplied the law; therefore, it should be reversed and the case remanded.

In its reply brief, Defendant asserts that it is immune to tort liability under the discretionary exemption. In the alternate, Defendant suggests that "if [the lower court] reached the right conclusion but for the wrong reason" that this appellate court find that Defendant owed no duty to Plaintiffs. Appellee's Brief, p. 11, FN 29. Both arguments fail as shown more fully below. Finally, Defendant argues that Plaintiffs cannot meet their burden of proof as to their claim of negligence. Defendant suggests that Plaintiffs are trying to hold Defendant liable under a strict liability theory – an argument soundly denied by Plaintiffs during oral argument when raised by Defendant. *See* T.33.

ARGUMENT

A. In its reply brief, Defendant – like the lower court – misapplies the law to the undisputed material facts of this case.

In its reply brief, Defendant – like the lower court – misapplies the law to the undisputed material facts of this case. Specifically, Defendant's continued reliance on *Dancy* is misplaced. As

already shown, unlike *Dancy* – where there were no formal policies or procedures regarding patient observation on field trips and the use of physical force by staff members was not a matter of formal policy – in the instant set of facts there were formal policies and procedures regarding fire safety and client supervision in group homes. *See* Appellant's Brief, p. 15-17; R:171. Defendant's statement that the formal policies and procedures found in the ALA Handbook were not "absolute duties" is disingenuous at best for the undisputed facts prove otherwise. See *Id.*, p. 10.

As already shown, fire safety and client supervision were issues of paramount concern to Defendant; therefore, Defendant charged its employees – like Beckwith – with a duty to follow certain and explicit guidelines while supervising the clients within the group home. Many of those guidelines focused on fire safety and charged Beckwith with specific duties not only to protect the clients, but also to provide a safe environment within the group home. Defendant drafted detailed guidelines for the prevention of a fire within the group home. Defendant memorialized those duties in the ALA Handbook, as evidenced by the excerpts from the ALA Handbook contained in the Record. *See* R:171. Section 4.1.1.7.1 of the ALA Handbook sets forth with specificity the ministerial duties of a direct care worker as pertaining to client supervision. *Id.* First and foremost, as stated below:

> **Appropriate client supervision is the primary duty of staff at all times.** In most cases, group home clients are directly supervised while on the premises of the facility (inside and outside), and if they leave the premises (outings, trips to the store, etc.). There may, however, be times when the program manager and staff have concluded that a client can be allowed more freedom, especially when that client is being prepared to move to a less restrictive environment. In those cases, the program supervisor should determine the degree of freedom or independent movement the client may be permitted. Under such circumstances, the whereabout of the client moving about in the community unsupervised should be known to staff. There should be an agreed upon destination, activity and time limit prior to the client leaving the premises. If a client violates any of those agreed upon issues, he/she will lose the freedom to move about unsupervised. **In all other situations, the following guidelines should be adhered to with regards to client supervision:**

- **food preparation/visible to staff**
- showering or bathing/within earshot
- **using appliances/visible to staff**
- using equipment or tools/visible to staff
- socializing with opposite sex/within earshot

No clients should be allowed to operate any appliance, piece of equipment or tool unless the program supervisor has determined that he/she can do so safely. **Under no circumstances should any group home client ever handle fuel or any type or any other flammable substance.**

Id. (emphasis added).

Although Defendant contends that Plaintiffs are trying to impose absolute ministerial duties on Beckwith as a direct care worker, a plain reading of Section 4.1.1.7.1 of the ALA Handbook proves otherwise. It was Defendant – not Plaintiffs – that imposed absolute ministerial duties on Beckwith when it came to client supervision. Section 4.1.1.7.1 provides that the program manager can allow the clients in the group home "more freedom, especially when that client is being prepared to move to a less restrictive environment," the section goes on to state categorically that "[i]n all ***other situations***, the following guidelines ***should*** be adhered to with regards to client supervision . . . ." *Id.* (emphasis added). Included in the mandatory guidelines are the following: ***"food preparation/visible to staff"*** and ***"using appliances/visible to staff."*** The section goes on to prohibit the operation of ***"any appliance,*** piece of equipment or tool unless the program supervisor has determined that he/she can do so safely. ***Under no circumstances should any group home client ever handle fuel of any type or any other flammable substance.***" *Id.* (emphasis added).

Although Section 4.1.1.7.1 is not a statute, the basic tenet of statutory construction still applies, which is that "shall" is mandatory and "may" is discretionary. *Franklin v. Franklin*, 858 So.2d 110, 115 (Miss. 2003). Therefore, it is disingenuous of Defendant to state in its reply brief that "[n]either the ALA Handbook nor Christy Beckwith's testimony support the imposition of these

absolute duties." Appellee's Brief, p. 10. The undisputed material facts speak to the contrary as shown by Defendant's memorialization of Beckwith's ministerial duties in the ALA Handbook. When it came to Beckwith's duties regarding food preparation and the use of appliances, it was mandatory that both activities were visible to Beckwith. Beckwith also had an absolute duty to prevent the residents of the group home from using flammable substances, like the grease that she left in the pan on top of the hot stove. As the facts prove, Beckwith failed in those absolute duties.

Defendant further misconstrues the facts when it states in its reply brief that unlike in *Mississippi Department of Mental Health v. Hall*, 936 So.2d 917 (Miss. 2006), in the instant set of facts there are no affirmative statutory duties imposed on Defendant. *Id.*, p. 11. As already shown, the legislature charged the State Board of Mental Health with safeguarding and protecting the well being and general welfare of persons under its control. MISS CODE ANN. § 41-4-1. In order to achieve this purpose, the legislature entrusted *inter alia* the following powers to Defendant:

* * * *

> (c) To supervise, coordinate and establish standards for all operations and activities of the state related to mental health and providing mental health services. . . .
>
> * * * *
>
> (g) To establish and promulgate reasonable minimum standards for the construction and operation of state and all Department of Mental Health certified facilities, including reasonable minimum standards for the admission, diagnosis, care, treatment, transfer of patients and their records, and also including reasonable minimum standards for providing day care, outpatient care, emergency care, inpatient care and follow-up care, when such care is provided by persons with mental or emotional illness, an intellectual disability, alcoholism, drug misuse and developmental disabilities;

MISS. CODE ANN. § 41-4-7.

Thus, as it was in *Hall*, the legislature imposed affirmative statutory duties on Defendant. First, to safeguard and protect the well being and general welfare of persons under its control.

Second, to supervise, coordinate and establish standards, and to establish and promulgate reasonable minimum standards for its health care facilities. Responding to those affirmative statutory duties, Defendant drafted the formal policies and procedures regarding client supervision in group homes as set forth in the ALA Handbook. By drafting those formal policies and procedures Defendant created absolute ministerial duties for its direct care workers, like Beckwith, to follow. Therefore, contrary to Defendant's assertions, Defendant had affirmative statutory duties imposed on it by the legislature; and (2) Defendant responded to those statutory duties by promulgating the absolute ministerial duties for its direct care workers as pertaining to client supervision.

Beckwith was negligent when she failed to follow the absolute ministerial duties pertaining to client supervision as set forth in the ALA Handbook. After creating a dangerous condition by placing a pan filled with grease – a flammable substance – on top of a hot stove, Beckwith allowed the residents of the group home – all with developmental disabilities – to move in and out of the kitchen unobserved and unsupervised, while she was outside on the deck. Beckwith's acts and omissions were akin to the acts and omissions of the nurses in *Hall*, who allowed the mental patients to move in and out of an unlocked conference room adjoining the nurses' station while collecting sheets from an unlocked linen closet. Like the situation in *Hall* where the mental patients tied the sheets together to create an escape rope, resulting in serious injury to one of the patients who fell from a third-story window, in the instant set of facts the pan filled with grease on the hot stove was another disaster just waiting to happen. However, unlike *Hall*, in the case *sub judice* Defendant did have formal policies and procedures in place regarding client supervision and fire safety. Beckwith just failed to follow them.

Therefore, Defendant did not, and can not, satisfy the first prong of discretionary analysis for the following reasons: First, the legislature imposed affirmative statutory duties on Defendant to

safeguard and protect the well being and general welfare of persons under its control; to supervise, coordinate and establish standards; and to establish and promulgate reasonable minimum standards for its health care facilities. In response to that mandate, NRMC promulgated and memorialized specific rules and regulations regarding client supervision and fire safety within the group home. These rules and regulations created certain ministerial duties for Beckwith as a direct care worker to follow; they were not discretionary. Based on the undisputed facts of this case, Beckwith breached her ministerial duties as contained in the ALA Handbook; therefore, the analysis ends here. As a matter of law, Defendant is not entitled to tort immunity pursuant to MISS. CODE ANN. § 11-46-9(1)(d) (2010).

Obviously troubled by the fact that NRMC memorialized specific rules and regulations in the ALA Handbook, which created ministerial duties for its direct care workers such as Beckwith, Defendant seems to ask this court – as it did the lower court – to obviate the threshold requirement of satisfying the first element of discretionary analysis. Unable to explain away the specific rules and regulations as memorialized in the ALA Handbook, Defendant simply chooses to ignore them in its reply brief. After making the conclusory statement that "there is no dispute that Beckwith's work activities necessarily involved elements of choice or judgment each day she supervised the clients assigned to the group home on Beanland Avenue,"[1] Defendant then leaps to the second prong of the analysis, the suggestion being that there is this over-arching social policy argument that trumps the need to satisfy the first element. In a nutshell, Defendant cannot satisfy the first element of discretionary analysis; therefore, as a matter of law, it is not relevant whether or not Beckwith's actions involved social policy.

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[1]Appellee's Brief, p. 7.

Accordingly, the lower court should be reversed and the case remanded because the discretionary exemption does not provide Defendant immunity from tort liability.

B. Defendant owed a duty to Plaintiffs because Defendant was operating a group home in the rental property owned and insured by Plaintiffs.

In an attempt to escape liability, Defendant tries to hide behind the fact that the five residents – all with developmental disabilities – not NMRC, signed the lease agreement with Moore and Lagrone. See Appellee's Brief, p. 11, FN 30. Defendant offers this alternate argument in case this court of appeal finds that the lower court "reached the right conclusion but for the wrong reason" as pertaining to the discretionary exemption. Appellee's Brief, p. 11, FN 29. This alternate argument, however, is incomplete and thus, misleading because NMRC – not the five clients – was operating a community group home for developmentally disabled clients in the property. Therefore, for Defendant to try and evade liability by hiding behind the lease agreement – its validity questionable – is nothing more than a sham.

Moreover, other than the signatures on the lease agreement, Defendant offers no evidence to support this alternate theory. Possibly that is why Defendant devoted no more than two (2) short paragraphs in its brief to this empty theory. Defendant has presented no proof that the five residents negotiated the terms of the lease, much less, possessed the capacity to execute the lease. According to the ALA Handbook:

> The Alternative Living Arrangements (ALA) Program is one of the major service delivery components of the Community Support Systems Department of the North Mississippi Regional Center. **The ALA Program offers community placement for individuals who are developmentally disabled, with their primary disability being mental retardation.** The individuals served by the ALA Program have their self-help skills and behavior that can be managed in the ALA setting, i.e., are able to successfully live in a group home with four other individuals managed by a team of Direct Care staff, with only one staff on duty at any given time.

R:148 (emphasis added).

It is clear from the above that NMRC developed and implemented the ALA Program in order to provide institutionalized living quarters within the subject rental property for developmentally disabled individuals, with their primary disability being mental retardation. NMRC referred to these individuals as "clients." R:145 - 149. NMRC established and implemented formal and detailed policies and procedures for the operation of this group home and its clients. NMRC ensured that there was a direct care worker within the group home twenty-four hours/seven days a week, whose primary duty was appropriate client supervision at all times.

Beckwith's first telephone call – after instructing one of the clients to phone 911 – was to NMRC and its director, Dr. Carole Haney. R:116. In response to Beckwith's call, Dr. Haney set in motion established procedures to respond to the fire, such as the Liability Claim Reporting Form and the Serious Incident Report filed with Defendant. R:115-116. Although NMRC was not a signatory to the lease, it was nonetheless responsible for the ALA Program within the subject property. *See* R:167. Therefore, equity demands that Defendant should be estopped from arguing that it had no duty to Defendants.

Accordingly, Defendant's argument that it had no duty to Plaintiffs is without merit and should be dismissed as merely a conclusory statement, lacking any supporting evidence.

C. Under the doctrine of *res ipsa loquitur* Plaintiffs proved proximate causation.

As already fully briefed, the lower court erred when it failed to find that Defendant met its burden of proof as to their claim that Beckwith – while acting within the scope of her employment with NMRC – was negligent. *See* Appellant's Brief, pp. 17-19. Although Plaintiffs presented compelling argument proving causation under the doctrine of *res ipsa loquitur* to the lower court, the lower court merely denied Plaintiffs' motion for summary judgment without providing a basis for its denial. *Compare* R:155-157 and T:20-23 with R:180-183. Like the lower court, Defendant

in its reply brief failed totally to respond to Plaintiffs' argument that causation is provable under the doctrine of *res ipsa loquitur*.

As set forth in Appellants' Brief, Plaintiffs have met the four elements of *res ipsa loquitur*. First, it is common sense that leaving a pan filled with a flammable substance on top of a hot stove creates a dangerous condition. Second, according to the ALA Handbook the clients could only use the stove while visible to Beckwith, and they could absolutely never use flammable substances, like grease. Third, the fire would not have occurred but for Beckwith leaving the pan with grease on top of the hot stove while the clients moved in and out of the kitchen unobserved and unsupervised. Fourth, there is no evidence that Plaintiffs caused the fire.

Instead of responding to Plaintiffs' argument, Defendant suggests that Plaintiffs are trying to hold Defendant liable under a claim of strict liability, a claim that Plaintiffs have already categorically denied. See Appellee's Brief, p. 13, T:33. Adopting Defendant's often used response, Defendant's strict liability argument is nothing more than "a red herring."

Plaintiffs met their burden of proof as to the four elements of negligence. As already shown, Beckwith had a ministerial duty to maintain a safe environment within the group home, which obviously included keeping the house safe. The two cannot be separated. To suggest otherwise, is absurd. Additionally, Beckwith had a duty not to come into the house and commit an act of negligence, which resulted in the destruction of the house. Second, Beckwith breached that duty when she allowed her clients to move in and out of the kitchen unobserved and unsupervised while the pan filled with grease on top of a hot stove was readily available to the residents who were out of Beckwith's control. As already shown, these acts and omissions were in direct violation of the rules and regulations in the ALA Handbook. Third, under the doctrine of *res ipsa loquitur*, Plaintiffs have proved causation. Finally, Defendants suffered damages when the house, owned by Lagrone

and Moore, and insured by Farm Bureau, burned to the ground.

Accordingly, the lower court erred when it denied Plaintiffs' motion for summary judgment by failing to find that Defendant was negligent.

CONCLUSION

The lower court should be reversed and the case remanded for the following reasons. First, the lower court, like Defendant, misapplied the law to the undisputed material facts of this case. *Dancy* does not apply because unlike *Dancy*, Defendant promulgated formal policies and procedures regarding client supervision and fire safety in response to its statutory mandate under Miss. Code Ann. § 41-4-7. As already shown, Defendant's use of the word "should" caused these ministerial duties to be absolute, not discretionary. Based on the foregoing, Beckwith's duties regarding client supervision and fire safety were ministerial duties; therefore, the threshold test of discretionary analysis is met, so it is unnecessary to proceed to the second prong of the analysis. Beckwith's acts and omissions were a breach of her ministerial duties; therefore, there is no tort immunity for Defendant.

Second, Defendant cannot avoid a duty to Plaintiffs by hiding behind a lease agreement that is probably invalid. Defendant's five clients that signed the lease agreement in all likelihood lacked capacity because they are developmentally disabled, with their primary disability being mental retardation. Moreover, the undisputed facts show that Defendant was operating a group home within the subject property and that the five clients were under its custody and control at all times.

Finally, Plaintiffs met their burden of proof as to their claim that Beckwith was negligent under the doctrine of *res ipsa loquitur*.

Accordingly, the lower court should be reversed in all aspects, and the case remanded for further consideration.

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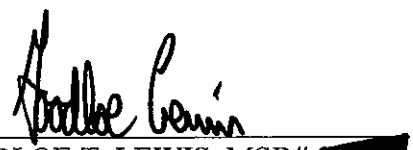

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CERTIFICATE OF SERVICE

I, Goodloe T. Lewis, do hereby certify that I have this date mailed, postage prepaid a true and correct copy of the above and foregoing document to:

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Honorable Robert W. Elliott
Circuit Court Judge of Lafayette County
102 N. Main Street
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Ripley, MS 38663

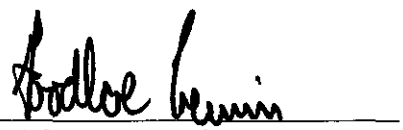
This the 6th day of June, 2011.

Goodloe Lewis

GOODLOE T. LEWIS

CERTIFICATE OF COMPLIANCE

Pursuant to M.R.A.P., I certify that this brief does not exceed twenty-five (25) pages.



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CERTIFICATE OF MAILING

I, GOODLOE T. LEWIS, of Hickman, Goza & Spragins, PLLC, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, the Brief of Appellants to be filed with the Clerk of the Court of Appeals of Mississippi.

THIS, the 6th day of June, 2011.

Goodloe T. Lewis
by Amanda Tindall Tailyour
GOODLOE T. LEWIS