2011-CA-00147 T

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1.	Mississippi Farm Bureau Insurance Company	Appellant
2.	Jimmy Moore	Appellant
3.	John Lagrone	Appellant
4.	Goodloe T. Lewis, Esq.	Counsel for Appellants
5.	Amanda Povall Tailyour, Esq.	Counsel for Appellants
4.	Mississippi Department of Mental Health	Appellee
5.	J. Cal Mayo, Esq.	Counsel for Appellee
6.	Christi Blount Beckwith	Employed by Defendant as a Direct Care Worker at North Mississippi Regional Center Group Home
7.	Patrick Chapman	Lessee and Resident of the North Mississippi Regional Center Group Home
8.	Brian Palmertree	Lessee and Resident of the North Mississippi Regional Center Group Home
9.	Eddie McNeal	Lessee and Resident of the North Mississippi Regional Center Group Home
10.	Ben Magnum	Lessee and Resident of the North Mississippi Regional Center Group Home
11.	Bobby Keen	Lessee and Resident of the North Mississippi Regional Center Group Home

Respectfully Submitted,

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY, JIMMY MOORE, AND JOHN LAGRONE

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2. Whether the Court erred in finding that the acts and omissions of Beckwith implicated social policy; thus, satisfying the second prong of the public policy function test in analyzing MISS. CODE ANN. § 11-46-9(1)(d)(2010) and as adopted by the Mississippi Supreme Court.

3. Whether the Court erred in failing to find that Beckwith failed to exercise ordinary care as set forth in the rules and regulations of North Mississippi Regional Center as mandated by the Mississippi Legislature; therefore, Defendant was negligent.

II. STATEMENT OF THE CASE

A. Course of Proceedings And Disposition In The Court Below.

Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau"), Jimmy Moore ("Moore"), and John Lagrone ("Lagrone") commenced this action in the Circuit Court of Lafayette County on January 30, 2008, seeking damages to a property destroyed by fire that was owned by Moore and Lagrone and insured by Farm Bureau. R:1-4. Defendant filed its *Answer and Affirmative Defenses* on March 12, 2008, and discovery followed. R:5-8. At the close of discovery, Defendant filed its *Motion for Summary Judgment* on January 3, 2010 and its brief in support on November 8, 2010. R:10-55, 58-68. On November 15, 2010, Plaintiffs replied to Defendant's motion. R:69-87. On November 22, 2010 Plaintiffs filed a cross-motion for summary judgment. R:88-125. On November 29, 2010 Defendant filed a supplement to its motion. R:126-150. On December 1, 2010 Plaintiffs filed its *Rebuttal in Further Support of Plaintiffs' Motion for Summary Judgment*. R:151-179.

On January 18, 2011 the lower court granted Defendant's motion for summary judgment and denied Plaintiffs' cross-motion. The lower court held that Beckwith – an employee of Defendant – was exercising her discretion while supervising the residents of the group home when the fire occurred; therefore, Defendant is immune from liability pursuant to MISS. CODE ANN. § 11-46-9(1)(d) (2010). R:180-183. On January 27, 2010 Appellants filed a *Notice of Appeal* to this court. R:184-185.

B. Statement of the Facts

The instant action rises out of the total loss of a rental house located at 1312 Beanland Drive in Oxford, Mississippi. R:2. John Lagrone ("Lagrone") and Jimmy Moore ("Moore") owned the house, and Farm Bureau provided fire and casualty insurance coverage for the property. *Id.* At the

time of the fire, five (5) adult individuals with developmental disabilities – Patrick Chapman, Brian Palmertree, Eddie McNeal, Ben Magnum and Bobby Keen – occupied the house. *Id.* All five tenants were clients of Defendant, North Mississippi Regional Center ("NMRC"). *Id.*

Defendant employed Christi Blount, nee Beckwith ("Beckwith"), as a Direct Care Worker. R:97-98. As a Direct Care Worker, Beckwith had a duty to assist the residents of the group home with their day-to-day living. R:99. Beckwith testified that it was also her duty to be present in the group home in order to prevent an accident or an emergency. R:10. According to Beckwith, the residents were under constant supervision. R:102. Beckwith further testified that the residents were not allowed to cook without supervision. R:114.

In order to work as a Direct Care Worker, Defendant required Beckwith to take a two-week training program that provided first aid training, CPR and fire safety. R:103. As a result of that training by Defendant, Beckwith had a duty to conduct monthly fire drills within the group home. R:104. Defendant also required Beckwith to watch a video entitled "Fire Prevention," which cautioned against leaving flammable objects on top of the stove. R:91, Exhibit B, Video "Fire Prevention". According to the video, fire safety was an issue and concern for Defendant; therefore, Defendant charged its employees – like Beckwith – with a duty to take specific precautions in order to prevent fires within the group home. *Id.* Moreover, Defendant provided Beckwith with a manual entitled "Alternative Living Arrangements" (ALA Handbook"), which explicitly set forth Beckwith's duties in order to prevent a fire in the group home. R:81-82,104, 152.

The purpose of the ALA Handbook was "to explain in everyday terms the laws, regulations, standards, policies and procedures which govern the operation of the ALA program." R:152; 167. As such, Defendant's group home – housed and maintained in the property owned by Plaintiffs Moore and Lagrone and insured by Farm Bureau – was under the supervision and control of

Defendant's ALA program. R:114 -115.

In order for Beckwith to become a Direct Care Worker, Defendant required Beckwith to successfully complete training and staff development. R:168. In addition to the training, Beckwith had to follow specific and explicit regulations to provide for a safe environment for the group home by following fire and health regulations. R:169. The manual included Beckwith's duties in case of a fire in the group home. R:81. As an example, Beckwith had a duty to conduct monthly fire drills in the group home. R:81, 169. As stated in the video "Fire Safety" and the ALA Handbook, Defendant strategically placed fire extinguishers, smoke detectors and carbon monoxide detectors throughout the group home. R:170.

Moreover, according to the ALA Handbook: "Appropriate client supervision is the primary duty of staff at all times." R:171. Specifically the ALA Handbook states **that food preparation should be visible to staff**. *Id.* (emphasis provided). Further, the ALA Handbook states the following:

> 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 of any type or any other flammable substance**.

Id. (emphasis provided).

On April 22, 2007 Beckwith was on duty as the Direct Care Worker for the five residents of Defendant's group home at 1312 Beanland Drive in Oxford, Mississippi. R:2, 69, 117. According to Beckwith, she and the residents began cooking supper at approximately 5:00 p.m. R:117. In describing the events leading up to the fire, Beckwith wrote – the day after the fire – in the *Serious Incident Report* the following:

> On 4/22/07 at approximately 5:00 p.m., staff Christie Blount [Beckwith], and clients, began cooking supper. We put baked beans in the oven and took hamburgers and hot

> dogs out to the grill on the deck. Pryor [sic] to that we had put french [sic] fries and oil out to cook after we had finished on the grill. Oil was in pan, on a burner, and fries were laying on the counter top. The burner was not turned on, as that would be the last thing to be cooked, when we finished on the grill.

R:117.

On the outside deck of the house, Beckwith heard a noise "that sounded like a loud bang." R:117-118. Reacting to the noise, Beckwith went inside the house and discovered a fire in the kitchen area. R:107; 118. "There was just fire all the way around the stove area. . . ." R:109. "I ran inside the house, and the whole stove, wall behind the stove, and cabinets above the stove was [sic] ablaze." R:118. The next day Beckwith admitted to her supervisor at NMRC that she believed that one of the residents had turned on the burner under the pan filled with grease and left it to ignite with flames. R:116.

The Mississippi 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 the State Board of Mental Health:

* * * *

> (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.

The North Mississippi Regional Center at Oxford is subject to the jurisdiction and control of Defendant. MISS. CODE ANN. § 41-4-11(2) (2010).

III. SUMMARY OF ARGUMENTS

The primary question before the lower court – whether Defendant was entitled to tort immunity pursuant to Miss. Code Ann. § 11-46-9(1)(d) – required a two-prong analysis. First, the lower court had to decide whether the acts and omissions of Beckwith – a direct care worker and employee of Defendant – were discretionary acts or ministerial duties. Second, if the court found that the acts and omissions were discretionary, then the acts must involve more than a mere hint of social policy.

Before the lower court were the following undisputed facts. First, the Mississippi Legislature statutorily mandated that Defendant promulgate rules and regulations regarding standards for the operations and activities of the group home and its direct care workers, such as Beckwith.[1] Second, Defendant memorialized those rules and regulations – specifically fire safety within the group home – in two publications: the ALA Handbook and the Policy and Procedure Manual from North Mississippi Regional Center. Third, the ALA Handbook specifically stated that (1) food preparation should be visible to staff; and (2) under no circumstances should any group home client ever handle fuel of any type or any other flammable substance. Fourth, Defendant required Beckwith to take a two-week training course, which focused on fire safety in the group home. Fifth, Defendant required Defendant to view a video entitled "Fire Safety," which further emphasized the importance of fire safety within the group home, and specifically cautioned against leaving flammable substances on top of the stove.

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[1] Miss. Code Ann. §§ 41-4-1; 41-4-7

As the undisputed facts showed, there was both a statutory mandate by the legislature and specific rules and regulations promulgated by Defendant, which established certain ministerial duties for Defendant's direct care workers, such as Beckwith. Therefore, the lower court erred when it failed to find that Beckwith's duties regarding fire safety within the group home were ministerial duties, not random discretionary acts.

Although Defendant was not, and is not, able to meet the first prong of discretionary analysis, assuming *arguendo* that the first prong is met, Defendant still cannot show that Beckwith's acts and omissions were anything more than a bad judgment call by Beckwith, which was in direct violation of Defendant's rules and regulations. Arguing before the lower court, Defendant relied on the *Dancy* case for the proposition that the "group home program sought to 'integrate [its clients] into society as a whole, requiring a multitude of discretionary decisions by staff members . . . .'" R:62-63. However, unlike the instant set of facts, there was no statutory mandate or specific rules and regulations in *Dancy*, so *Dancy* does not apply. Therefore, the lower court erred when it found that Defendant satisfied the second prong of discretionary analysis.

Finally, the lower court erred when it failed to find that Beckwith failed to exercise ordinary care as set forth in the rules and regulations of North Mississippi Regional Center as mandated by the Mississippi Legislature; therefore, Defendant was negligent.

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

IV. LAW AND ARGUMENT

A. Standard of Review

When the Court reviews a trial court's disposition of a motion for summary judgment, it must reach its own conclusions as to the applicable law and how it should be applied. *Miss. Dept. of Mental Health and Ellisville State School v. Shaw*, 45 So.3d 656, 658 (Miss. 2010). "The same

standard applies to 'proper application of the Mississippi Tort Claims Act.'" *Id.* A trial court should grant summary judgment only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fortenberry v. City of Jackson*, Nos. 2008-CT-00270-SCT, 2008-CT-00271-SCT, 2011 WL 448354, at *2 (Miss. 2011)(quoting MISS. R. CIV. P. 56 (c)). The moving party has the burden of proof and must demonstrate that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact. *Id.* "Review of a government entity's immunity under the Mississippi Tort Claims Act triggers *de novo* review, since immunity is a question of law." *Id.*

B. There is no tort immunity for Defendant pursuant to MISS. CODE ANN. § 11-46-9(1)(d), because Defendant cannot satisfy either prong of discretionary exemption analysis.

While the Mississippi Legislature has waived sovereign immunity in most contexts, § 11-46-9 sets forth a list of twenty -five (25) situations in which sovereign immunity still applies. MISS. CODE ANN. § 11-46-9(1). "Consistent with its long-standing disapproval of sovereign immunity as a defense, the Supreme Court has interpreted these statutory remnants of sovereign immunity strictly against the State, and in favor of recovery." Robert A. Weems & Robert M. Weems, MISSISSIPPI LAW OF TORTS § 16.22, (Dec. 2009).

At issue in this appeal is the so-called discretionary exemption or MISS. CODE ANN. § 11-46-9(1)(d). In order for there to be immunity for Defendant, the Court must conduct a two-pronged analysis. Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 Miss. L.J. 973, 987 (Spring, 2007). If the Court

finds that Beckwith's acts and omissions were legally mandated by law, ordinance or regulation, and thus, were ministerial duties, the analysis ends and there is no tort immunity for Defendant. *Id.* at 988. However, if the Court finds that Beckwith's actions were not legally mandated by law, ordinance or regulation, but instead were merely discretionary acts, then the Court must also find under the second prong of the analysis that Beckwith's acts involved potential considerations of social, economic or political policy alternatives. *Id.* at 988 - 989. Both prongs of the discretionary analysis must be satisfied in order for there to be tort immunity for Defendant. *Id.* Moreover, a mere hint of social policy is not sufficient to satisfy the second prong. *Pritchard v. Von Houten and The U. of S. Miss.*, 960 So.2d 568, 583 (Ct. App. 2007).

As set forth more fully below, the Mississippi Legislature mandated that Defendant promulgate rules and regulations regarding the group home and its direct care workers; thus, Beckwith had ministerial duties to safeguard the environment within the group home. These duties were not discretionary. Nonetheless, assuming *arguendo* that Beckwith's duties were not mandated by both state law and the rules and regulations as promulgated by Defendant, the lower court erroneously accepted Defendant's claim that Beckwith's acts and omissions implicated social policy. Simply put, Beckwith's acts and omissions were nothing more than a bad judgment decision.

Accordingly, there is no tort immunity for Defendant pursuant to MISS. CODE ANN. § 11-46-9(1)(d).

1. Beckwith failed to adhere to the statutory mandate of the rules and regulations as pertaining to fire safety within the group home as promulgated by Defendant; therefore, the lower court erred when it found that Defendant satisfied the first prong of discretionary analysis.

A duty is ministerial, not discretionary, if it is imposed by law and its performance is not dependent on the employee's judgment. *Miss. Dept. of Mental Health v. Hall*, 936 So.2d 917, 924

(Miss. 2006). Ministerial duties are defined as those duties that are positively designated, and are not dependant on the use of judgment or discretion. Jeffrey Jackson and Mary Miller, ENCYCLOPEDIA OF MISS. LAW, § 67:35 (Sept. 2010). In a nutshell, if there is a law, ordinance or regulation that requires an act to be performed in a certain way, it is a ministerial duty, not a discretionary act. Fraiser, 76 Miss. L.J. at 992. More importantly, if a statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no option but to adhere to the directive, then the duty is ministerial, not a discretionary act. *Fortenberry*, 2011 WL 448354, at *2 (citing *United States v. Gaubert*, 499 U. S. 315, 322 (1991)).

Moreover, a duty is ministerial, not discretionary, if it is imposed by law and its performance is not dependent on the employee's judgment. *Hall*, 936 So.2d at 924. In *Hall*, a mental patient in a hospital operated by Defendant, sustained serious injury when she tried to escape the hospital. See *Id.* at 921. Prior to her fall from a third-story window, Hall and two other patients – totally unobserved by the staff – moved in and out of an unlocked conference room adjoining the nurses' station while collecting sheets from an unlocked linen closet on the floor. *Id.* There was no security system in place to monitor the movements of the patients. *Id.* Nor was there a security screen on the third floor window that was accessible to the patients. *Id.* After tying the sheets together to create a "rope," Hall began climbing out of the third-floor window when she fell to the ground, seriously injuring herself. *Id.*

In *Hall* Defendant argued that it was immune from tort liability because "there was no written policy, rule or standard which required the conference room to be locked when not in use, required security screens to be placed on non-patient rooms, or required the staff to monitor continuously the patients." *Id.* at 925. This court held otherwise, finding that even though Defendant had not promulgated specific rules and regulations that required the conference room to be locked when not

in use, security screens on non-patient rooms, and patients to be monitored by staff, the hospital was required by statute to provide patients "with mental health care and treatment in accord with contemporary professional standards." *Id.* (quoting MISS. CODE ANN. § 41-21-102(6) (Rev. 2005)). Therefore, unlike the instant set of facts where Defendant did promulgate specific and explicit rules and regulations regarding fire safety within the group home, this court still found in *Hall* that Defendant was not immune from tort liability. *Id.*

Unlike *Hall*, Beckwith's duties regarding fire safety were specifically and explicitly stated by Defendant in both the "Policy and Procedure Manual from North Mississippi Regional Center," and the "ALA Handbook." In both of these substantial documents[2] Defendant set forth clearly and unambiguously the duties that Beckwith had as a direct care worker to take specific precautions in order to prevent fires within the group home. Defendant further reinforced and emphasized the importance of these duties by requiring Beckwith to undergo a two-week training course that included fire safety and prevention. Defendant also required Beckwith to view the video entitled, "Fire Prevention" to further demonstrate the importance of the rules and regulations that it promulgated in the two manuals. The video specifically warned against placing flammable substances on top of a stove.

First and foremost, Defendant was required by statute "[t]o supervise, coordinate and establish standards for all operations and activities of the state related to mental health and providing mental health services . . . ." MISS. CODE ANN. 41-4-7. Second, Defendant was required by statute "[t]o establish and promulgate reasonable minimum standards for the construction and operation of

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[2]The *Policy & Procedures Manual from North Miss. Regional Center and The ALA Handbook* contain the rules and regulations promulgated by Defendant that pertain to fire safety within the group home. Defendant produced both documents during discovery.

state and all Department of Mental Health certified facilities, ..." *Id.* This was not discretionary. Defendant's duty was statutorily mandated; therefore, it was ministerial. Further, it was a ministerial duty that Defendant acted upon when it promulgated the specific rules and regulations regarding fire safety in the two manuals, and conducted training for its staff to enforce these rules and regulations.

By her own testimony, Beckwith confirmed that she had a primary duty to maintain a safe environment in the group home. This was not an option, for the alternative – to maintain an unsafe environment – would create an absurd result. As an example, Beckwith had to conduct monthly fire drills. Defendant placed fire extinguishers, smoke detectors and carbon monoxide detectors strategically throughout the group home that had to be tested periodically for their reliability and maintenance. Beckwith had a ministerial duty to take certain precautions in order to protect the residents and the property by preventing a fire in the group home. This was not discretionary. Again, the alternative would create an absurd result.

Beckwith had a primary ministerial duty to supervise the clients at all times. The ALA Handbook specifically states: "Appropriate client supervision is the primary duty of staff at all times." Again, Beckwith testified that it was her duty to be in the group home in order to prevent an accident or an emergency. Again, this was not discretionary. This was a ministerial duty imposed on Beckwith by her employer, Defendant. In the ALA Handbook Defendant memorialized and prescribed a course of action for Beckwith to follow regarding safety in the group home. Therefore, Beckwith's duties were ministerial, not discretionary acts, because she had no option but to adhere to the directive.

In fact, Beckwith's ministerial duties were quite specific and detailed for two reasons. First, because the Legislature charged Defendant to implement safety standards; and second, because both the Legislature and Defendant recognized that when caring for patients with developmental

disabilities there was no room for discretion when it came to maintaining a safe environment. For example, the ALA Manual states "that food preparation ***should*** be visible to the staff at all times." (emphasis provided). Defendant's use of the word ***should*** is further evidence that this was not an option or discretionary, but was a ministerial duty. The ALA Handbook goes on to say "under no circumstances ***should*** any group home client ever handle fuel of any type or any other flammable substance." (emphasis added). Again, Defendant's own language confirms that it was not discretionary as to whether or not a group home client could handle a flammable substance such as cooking oil.

Despite these rules and regulations promulgated by Defendant, Beckwith failed in her ministerial duties. First, by leaving a pan filled with grease on the top of a hot stove, while baked beans cooked in an oven below. Second, by allowing the residents of the group home – like the patients in *Hall* – to move unsupervised and unobserved from the deck into the kitchen where there was a pan filled with grease on a hot stove – a disaster just waiting to happen. Both of these actions by Beckwith were in direct violation of the rules and regulations established and promulgated by Defendant

Unlike the court in *Hall*, which found a function ministerial merely because of some extrinsic statute[3] that provided a general directive to "act in accordance with the contemporary professional standards," in the present set of facts, there is not only statutory law, but also there are specific and explicit rules and regulations promulgated by Defendant that were mandated by that same statutory law. Beckwith's duties regarding fire safety in the group home and the supervision of the patients living within the group home not only rose out of a generalized statutory mandate, but also were set

[3]MISS. CODE ANN. § 41-21-102(6) (Rev. 2005).

forth by Defendant in rules and regulations as memorialized in the "Policy and Procedure Manual from North Mississippi Regional Center," and the "ALA Handbook." Beckwith, like the staff in *Hall*, failed to adhere to the mandate of her ministerial duties; therefore, the lower court erred in its decision because Defendant cannot satisfy the first prong of discretionary analysis.

Accordingly, the lower court's decision should be reversed, and the case remanded.

2. Assuming *arguendo* that Beckwith's duties regarding fire safety in the group home and the supervision of the patients living in the group home were discretionary, the court erred when it found that Defendant satisfied the second prong of discretionary analysis.

In order to satisfy the second prong of discretionary analysis, Defendant must show that Beckwith's decision to leave a pot filled with grease on a hot stove while allowing the patients of the group home to move in and out of the kitchen unsupervised and unobserved was more than a bad judgment call by Beckwith. *See* Fraiser, 76 Miss. L.J. at 987. Defendant must show that Beckwith's actions were more than merely exercising her judgment. *Id.* Defendant must show that Beckwith's actions implicated social, economic or political policy in order to satisfy the second prong of the analysis. *Id.*

Fraiser – whose law review article pertaining to Mississippi's Tort Claims Act provides a roadmap to discretionary exemption analysis – gives the following illustration that distinguishes between a mere judgment decision and a judgment decision implicating social, economic or political policy. *See* Fraiser, 76 Miss. L.J. at 988 - 993. Fraiser's hypothetical example involving a school bus driver is both helpful and illustrative.

> In other words, the decision by a bus driver to allow a claimant to exit a school bus at a particular intersection does not implicate policy, and is merely a judgment call, and thus not immunized by this exemption. However, a school board's decision to allow children to de-board buses during thunder-storms, at busy intersections, during nuclear attacks, etc., is a policy decision which may not be second guessed, even where ordinary care is not utilized by the board. Thus, if the board has decided that

> children may be let off at all intersections, then the drivers' decision to do so is immunized as discretionary – i.e., as involving judgment-plus-policy considerations.

Id. at 988.

Although Defendant designed the group home program to provide "a home like environment designed to foster independent living skills,"[4] Defendant clearly put in place rules and regulations to provide for the safety and supervision of the residents in the group home as shown above. There was no over-arching policy decision by Defendant to allow the residents of the group home total independence and autonomy while in the group home. That is why Defendant employed a direct care worker – like Beckwith – to be present in the group home at all times to observe and supervise the residents. That is why the Legislature mandated Defendant to establish and promulgate reasonable minimum standards for the construction and operation of state and all Department of Mental Health certified facilities. That is why Defendant put in place rules and regulations, which prevented the residents from engaging in certain dangerous activities such as cooking without supervision and handling flammable substances. Unlike the hypothetical school board's decision to allow the school children to de-board the buses in any and all eventualities, Defendant did not give the direct care workers or the residents *carte blanche* when it came to fire safety within the group home. For to do so – like Fraser's hypothetical school board, which voted to allow children to de-board the bus "during thunder-storms, at busy intersections, during nuclear attacks, etc." – would have been ludicrous.

In both its brief and at oral argument, Defendant relied on a Mississippi Supreme Court case decided in 2006. *Dancy v. East Miss. State Hospital*, 944 So.2d 10 (Miss. 2006). In *Dancy*, a patient in a state mental hospital brought a negligence action against the hospital and Defendant for

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[4]Order, January 18, 2011, R:180 -183.

injuries he sustained when he attempted to kill himself after escaping supervision on a field trip. *Id.* at 5. In *Dancy* the Court did not address the first prong of discretionary analysis. *See Id.* at 16 - 17. More importantly, the Court in *Dancy* found no extrinsic statute, as in *Hall*, that rendered the duties in question ministerial, rather than discretionary acts. *Id.* at 17; Robert A. Weems & Robert M. Weems, MISSISSIPPI LAW OF TORTS § 16.22, (Dec. 2009). Therefore, in *Dancy* the Court only addressed the second prong of discretionary analysis. *Id.*

Finding that the acts did not involve either economic or political policy, the *Dancy* court addressed the question as to whether the actions of the hospital and Defendant involved social policy alternatives. *Dancy*, 944 So.2d at 17. Dancy argued that the hospital and Defendant failed to adequately supervise and use physical restraint, preventing Dancy from injuring himself. *Id.* Although the lower court held that the second prong was satisfied, *Dancy* is easily distinguishable from the case *sub judice*.

Unlike *Dancy*, in the instant set of facts there were specific and explicit rules and regulations regarding fire safety. In the instant set of facts there were rules and regulations that required Beckwith, the Direct Care Worker, to observe and supervise the residents while they were cooking. In the instant set of facts there was a rule and regulation that prohibited the residents from using flammable substances in the group home. Whereas, in *Dancy* 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. *Id.* at 13. Therefore, *Dancy* does not apply to the case *sub judice*, because Defendant was statutorily mandated by the Legislature to put in place rules and regulations governing safety within the group home, which in fact, Defendant did.

Therefore, the lower court erroneously accepted Defendant's claim that the circumstances within the *Dancy* case presented an almost identical set of circumstances to this case. Accordingly,

the lower court should be reversed, and the case remanded because *Dancy* does not apply.

C. The lower court erred in failing to find that Beckwith failed to exercise ordinary care as set forth in the rules and regulations of North Mississippi Regional Center; therefore, Defendant was negligent.

The lower court erred when it failed to find that Beckwith failed to exercise ordinary care as set forth in the rules and regulations of North Mississippi Regional Center; therefore, Defendant was negligent. Beckwith, while acting within the scope of her employment as a Direct Care Worker for Defendant created a dangerous condition, which resulted in a fire that damaged Plaintiffs. Therefore, the lower court erred when it failed to find Defendant negligent.

In order to prevail on a negligence claim, Plaintiffs must establish by a preponderance of the evidence each of the elements of negligence: duty, breach, causation and damages. *Hall*, 936 So.2d at 922 (citing *Miss. Dep't of Transp. v. Cargile*, 847 So.2d 258, 262 (Miss. 2003)). As already shown, Defendant had a ministerial duty to safeguard the environment of the group home as mandated by the Legislature and as memorialized in rules and regulations that Defendant promulgated. Beckwith, while acting within the scope of her employment as a Direct Care Worker for Defendant breached that duty when she created a dangerous condition. First, Beckwith placed a pan filled with grease on top of a hot stove that had baked beans cooking in the oven. Second, Beckwith allowed the residents of the group to move in and out of the kitchen unobserved and unsupervised while the pan filled with grease on top of the hot stove was readily available to the residents and out of Beckwith's control. Both of these acts and omissions were in breach of the rules and regulations as promulgated by Defendant, which stated that (1) "food preparation should be visible to staff"; and (2) [u]nder no circumstances should any group home client ever handle fuel of

any type or any other flammable substance."[5] Thus, Plaintiffs met their burden of proof as to the first two elements of negligence.

Under the doctrine of *res ipsa loquitur* there is sufficient circumstantial evidence to prove causation. The doctrine of *res ipsa loquitur* requires four elements: (1) the matter must be within the common knowledge of laymen; (2) the instrumentality causing the damage must be under the exclusive control of the defendant; (3) the occurrence must be such as in the ordinary course of things would not happen if those in control of the instrumentality used proper care; and (4) the occurrence must not be due to any voluntary act on the part of the plaintiff. *Brown v. Baptist Memorial Hospital - DeSoto, Inc., et. al*, 806 So.2d 1131, 1135 (Miss. 2002).

It is common sense that leaving a pan filled with a flammable substance on top of a hot stove creates a dangerous condition. In addition, Beckwith allowed the residents – all with developmental disabilities – to move unobserved and unsupervised in and out of the kitchen. Common sense suggests that it was a disaster just waiting to happen.

Second, the instrumentality – the stove – was under the exclusive control of Beckwith. Beckwith testified that the residents were not allowed to use the stove. Also, the residents were not allowed – under any circumstances – to use flammable substances. Again, the grease that Beckwith put in the pan on top of the hot stove was in Beckwith's control.

Third, but for Beckwith leaving the pan filled with grease on top of the hot stove, the fire would not have occurred. If Beckwith, had followed the rules and regulations as contained the ALA Handbook – much less using common sense – the fire would not have occurred. Fourth, there is no evidence that Plaintiffs did anything to cause the fire. Therefore, by building the wall of

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[5]ALA Handbook, R:171.

circumstantial evidence "brick by brick" Plaintiffs can prove proximate causation under the doctrine of *res ipsa loquitur*.

Finally, Plaintiffs sustained damage when the house owned by Lagrone and Moore, and insured by Farm Bureau, burned to the ground. Therefore, Plaintiffs met their burden of proof as to their claim of negligence; thus, the lower court erred when it failed to grant their motion for summary judgment.

V. CONCLUSION

In summary, the lower court erred when it found tort immunity for Defendant pursuant to MISS. CODE ANN. § 11-46-9(1)(d) because Defendant did not, and cannot, satisfy both prongs of discretionary exemption analysis. First, Beckwith failed to adhere to the legislative mandate of the rules and regulations as pertaining to safety within the group home as promulgated by Defendant. Second, assuming *arguendo* that Beckwith's acts and omissions were discretionary, not ministerial duties, Beckwith's decision to leave a pot filled with grease on a hot stove – while allowing the patients of the group home to move in and out of the kitchen unsupervised and unobserved – was nothing more than a bad judgment call by Beckwith. Beckwith's bad judgment call did not implicate social policy – even a hint of social policy. Therefore, even if the court finds that Defendant satisfied the first prong of discretionary analysis, Defendant cannot show that Beckwith's actions – nothing more than a bad judgment call – implicated social, economic or political policy in order to satisfy the second prong of the analysis. Therefore, Defendant's motion for summary judgment fails as a matter of law.

Finally, the lower court erred when it failed to find that Plaintiffs had met their burden of proof as to their claim that Defendant was negligent. Accordingly, the lower court should be reversed and the case remanded in all respects.

Appellants so pray.

Respectfully submitted, this the 25th day of April, 2011.

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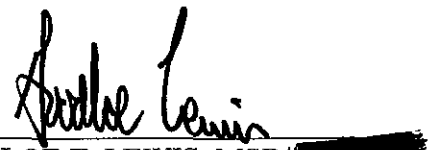

GOODLOE T. LEWIS, MSB#[redacted]
AMANDA POVALL TAILYOUR, MSB#[redacted]

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:

J. Cal Mayo, Jr., Esq.
MAYO MALETTE
Post Office Box 1456
Oxford, MS 38655

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

This the 25th day of April 2011.

GOODLOE T. LEWIS

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 25th day of April, 2011.

GOODLOE T. LEWIS