

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHESTERFIELD )  
 )  
 Jessica Condon, a biological parent and )  
 natural guardian of A.A., a minor child; )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 Ronnie Lee Sires, in his individual capacity )  
 as an agent/employee of Chesterfield County )  
 School District; Harrison Goodwin, in his )  
 individual capacity as Superintendent of )  
 Chesterfield County School District; )  
 Chesterfield County School District; and )  
 the South Carolina Department of )  
 Education, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOURTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO. 2019-CP-13-00193

**ORDER**

(as to Defendant Harrison Goodwin’s  
 Motion for Summary Judgment)

Judge:	Hon. Michael G. Nettles
Date of Hearing:	March 17, 2022
Court Reporter:	Krystal Smith
Plaintiff Jessica Condon:	Patrick J. McLaughlin
Defendants Sires, Goodwin and CCSD:	David N. Lyon and David T. Duff.
Defendant SC DOE:	Weldon L. Coates

THIS MATTER is before the Court on several pending motions filed by Defendants Sires (SIREs), Goodwin (GOODWIN) and Chesterfield County School District (CCSD). As to Defendant GOODWIN, Plaintiff’s pleads 42 U.S.C. §1983 claims against GOODWIN in his individual capacity.

SIREs and GOODWIN filed a *Motion Under Rule 12(c) for Judgment on the Pleadings* on October 30, 2019. A hearing was conducted on that motion on June 15, 2020. The court issued an order on June 26, 2020 holding the motion in abeyance pending further discovery. Subsequent to that order, the parties conducted further discovery. On November 9, 2020, SIREs, GOODWIN and CCSD filed a *School District Defendants’ Motion for Summary Judgment*.

A hearing was held on this matter on March 18, 2022. Prior the hearing, opposing parties submitted memorandums in support of their respective positions. It was conceded by the parties at that hearing that the proper procedural posture of all the pending motions at this stage was consolidation into summary judgment arguments by SIRES, GOODWIN and CCSD as to solely the pending 42 U.S.C. §1983 claims. Oral argument was heard by the Court, including viewing of some of the relevant portions of video from the morning and afternoon school bus rides giving rise to this matter and deposition testimony. At the conclusion of the hearing, the Court took the matter under advisement and asked the parties to submit proposed orders.

Having considered the arguments of counsel, the filings/submissions by the parties and the relevant case law, Defendant GOODWIN's motion is DENIED.

#### **BRIEF DESCRIPTION OF CASE**

On November 5, 2018, A.A., a 4-year-old, non-verbal autistic special needs student was transported to and from Ruby Elementary School by CCSD bus driver Ronnie SIRES. A.A. was one of three (3) non-verbal special needs students on the bus who were all physically restrained. One other special needs student, 9-year-old J.M., was not restrained. Over the course of the morning and afternoon bus rides, J.M. physically attacked A.A. ninety-six (96) times. Two months before those attacks, CCSD and GOODWIN had been warned via email by the South Carolina Department of Education that operating special needs buses, with children in restraints and not having adult attendants potentially endangered the students. CCSD policy dictates that as Superintendent, GOODWIN is responsible for the overall bus transportation in the school district.

#### **LEGAL STANDARDS**

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Conner v. City of Forest Acres, 348 S.C. 454,

462; 560 S.E.2d 606, 610 (2002), citing Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994) and Rule 56(c), SCRPC. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Conner at 462, 610, citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112; 410 S.E.2d 537, 543 (1991).

The government official bears the burden of proof and persuasion to establish the defense of Qualified Immunity. Wilson v. Kittoe, 337 F.3d 392, 397 (4th Cir. 2003); Elder v. Holloway, 510 U.S. 510 (1994).

## **ARGUMENTS OF THE PARTIES**

### **GOODWIN's Arguments**

GOODWIN argues that there is no constitutional violation under §1983 because the Plaintiff cannot meet either of the two narrow exceptions in which a state actor may be liable for a harm perpetuated by a private actor under DeShaney v. Winnebago County Department of Social Services, et al., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Those exceptions are the 1) “special relationship” exception; and 2) the “state-created/enhanced danger” exception.

GOODWIN also argues that if the Court were to find that there is a constitutional violation under §1983, he is entitled to qualified immunity because the right was not “clearly established” at the time.

### **Plaintiff's Arguments**

The Plaintiff argues that there are constitutional violations under §1983, as GOODWIN conduct meets both the “special relationship” and “state-created/enhanced danger” exceptions as

defined by *DeShaney*, via GOODWIN's authority over CCSD's official policies and customs. Plaintiff also argues the constitutional right was clearly established at the time and that GOODWIN is not entitled to qualified immunity due to his deliberate indifference and violation of S.C. law.

## DISCUSSION

### **I. GOODWIN's liability as the official with authority over CCSD policies and customs**

Under 42 U.S.C. §1983, a plaintiff may pursue a private right of action if a person, acting under color of state law, deprives the plaintiff of rights secured by the United States Constitution or conferred by a law of the United States. Wahi v. Charleston Area Medical Center, Inc., 562 F.3d 599, 615 (4<sup>th</sup> Cir. 2009). The law recognizes that a violation of a constitutional right is itself considered an injury. *See* Uzuegbunam v. Preczewski, 141 S.Ct. 792, 802 (2021) ("Because 'every violation [of a right] imports damage,' nominal damages can redress [the plaintiff's] injury even if he cannot or chooses not to quantify the harm in economic terms."). South Carolina recognizes that a violation of constitutional right is itself an injury, as evidenced through the charging of nominal damages to juries in §1983 cases. *See* Estate of Doe 202 v. City of N. Charleston, 433 S.C. 444, 450 (Ct. App. 2021) (Discussing trial court jury charge in §1983 case: "A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury...").

Plaintiff's claims against GOODWIN arise from GOODWIN's role as Superintendent of CCSD, in which he was the responsible official with authority over school bus policies and customs.

The law recognizes that if the conduct violating a constitutional right was done to effectuate an official policy or custom for which an official was responsible, the official could be liable. *See* Fisher v. Washington Metropolitan Area Transit Authority, 690 F.2d 1133, 1143 (4<sup>th</sup> Cir. 1982)

(citing to Hall v. Tawney, 621 F.2d 607 (4<sup>th</sup> Cir. 1980); Vinnedge v. Gibbs, 550 F.2d 926 (4<sup>th</sup> Cir. 1977)).

GOODWIN admits that CCSD policy establishes his authority over any policy or custom involving CCSD bus transportation:

Q: School District policy specifically states that you are responsible for the overall bus transportation in the School District?

A: Yes, by the policies that we noted earlier. Yes, sir.  
(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Harrison Goodwin*, p.58, l.24 – p.59, l.8).

Therefore, if there are material questions of fact that A.A.'s constitutional rights were violated, and those violations were the product of conduct that effectuated a policy or custom of CCSD bus transportation, then GOODWIN could be liable under §1983, even if he did not personally engage in the conduct.

GOODWIN admits that Fourth Circuit law provides that a plaintiff may demonstrate the existence of an official policy or custom through "certain omissions made by policymaking officials that 'manifest deliberate indifference to the rights of citizens.'" (11.09.2020 Memo, p.44, quoting Carter v. Morris, 164 F.3d 215, 218 (4<sup>th</sup> Cir. 1999)).

## **II. A.A.'s Constitutional Right**

GOODWIN concedes that A.A. has a constitutional right to bodily integrity that is a recognized liberty interest under the Fourteenth Amendment to the Constitution. (11.09.2020 Memo, p.23, citing to Meeker v. Edmundson, 415 F.3d 317, 323-24 (4<sup>th</sup> Cir. 2005). GOODWIN further concedes that despite the actual physical harm arising from the physical attacks by a third party (J.M.), if the Plaintiff meets either of the *DeShaney* exceptions, she has a viable §1983 claim.

In *DeShaney*, the United States Supreme Court laid out two types of situations wherein the government has a duty to provide protection: 1) if the government is responsible for creating the

danger (“State-created/enhanced danger” exception) and 2) if someone in government custody is unable to protect themselves (“Special Relationship” exception). *DeShaney* at 198-202. This Court has previously found in denying GOODWIN’s Rule 12(b)(6) motion, that the Plaintiff sufficiently pled factual allegations supporting liability under both exceptions. *Order*, July 30, 2019.

#### A. “Special Relationship”

As described in Sec. I above, if SIRES conduct that effectuated policy or custom of CCSD bus transportation violated A.A.’s constitutional right, GOODWIN could be liable as the official with responsible for CCSD bus transportation.

GOODWIN argues that the “threshold question” as to whether there was a “special relationship” to A.A. under *DeShaney* “is whether A.A. was in a custodial situation which is the equivalent to incarceration or institutionalization,” arguing that “as a matter of law, the answer is ‘No.’” (11.09.2020 Memo, p.27). GOODWIN argues the custody required for a special relationship “must be a situation where the state assumes responsibility for all of – not just some of, but all of – the individual’s ‘basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety.’” That, “in sum, a *DeShaney* ‘special relationship’ requires involuntary, more-or-less total custody by the state whereby the state is responsible for all the person’s basic needs. ‘Special relationship’ simply does not mean a temporary and partial restriction on a person’s movement.” (12.21.2020 Reply, p.4-5).

Federal case law from the South Carolina District Court holds that the custodial situation required to trigger an affirmative duty upon a state actor to protect against third party harm does **not** have to be “the equivalent to incarceration or institutionalization.” The South Carolina District Court, Hon. Henry M. Floyd, specifically addressed this argument:

Although tethered to the concept of custody, **the special relationship exception does not appear to require full custodial arrest or institutionalization before it**

**is triggered.** *DeShaney* itself recognized that the exception arises “not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, **but from the limitation which it has imposed on his freedom to act on his own behalf.**” 489 U.S. at 200. The Court of Appeals, in *Pinder*, likewise noted that the exception applies where there is “some sort of confinement of the injured party.” *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4<sup>th</sup> Cir. 1995); *see also id.* (finding the exception arises when individuals are “affirmatively restrained” or “otherwise restricted”). Based on this reasoning, once the state has restrained an individual and restricted his ability to act on his own behalf, an affirmative duty to protect him from violent acts of third parties arises.

*Polcyn v. Martin*, 2005 U.S. Dist. LEXIS 44416, 21-22 (D.S.C. Oct. 17, 2005), emphasis added.

The *DeShaney* language that Judge Floyd cited as his rationale for finding the special relationship exception does **not** require full custodial arrest or institutionalization, is the exact same rationale and language this Court previously cited in denying SIREs 12(b)(6) motion to dismiss the Plaintiff’s §1983 claim:

Some sort of custodial confinement of the injured party – incarceration, institutionalization, **or the like** – is needed to trigger the affirmative duty.” *Pinder* at 1175, emphasis added. “This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause.” *Id.* Or to put it more simply, “promises do not create a special relationship – custody does.” *Id.*

The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, **but from the limitation which it has imposed on his freedom to act on his own behalf.**” *DeShaney* at 200, quoting *Estelle* at 103, emphasis added.

*Order*, July 30, 2019, p.12, emphasis added.

GOODWIN argues he has “submitted a substantial body of case law establishing that no special relationships exists between a student and a school because school attendance is not the same as state custody” necessary for a *DeShaney* special relationship and that “Plaintiff has not provided a single case standing for the opposite proposition.” On the contrary, this Plaintiff has never argued A.A.’s school attendance or her riding the bus created the special relationship.

Plaintiff’s allegations of a special relationship arise from actual physical restraint. As this Court recognized when it denied GOODWIN’s Rule 12(b)(6) motion:

The “uniform rule” the *Stevenson* court was following was that “**when a student attends public school**, his liberty is not restrained to the extent contemplated in *DeShaney*. **Attending school is not the equivalent of incarceration or institutionalization.**” *Stevenson* at 31.<sup>1</sup>

In this case, the **Plaintiff does not allege any special relationship arises from the mere fact that the A.A. attended school or rode on the bus with the Defendants.** Instead, the complaint alleges a custodial context arises from other unique facts of this case...

...The well-pled factual allegations in Plaintiff’s complaint go well beyond asserting that a special relationship existed merely because A.A. attended school or rode on a bus with the Defendants. They allege that the Defendants affirmatively took custody and control over A.A., **restricting her freedom of movement and/or her ability to defend/protect herself.** This custody and control **manifested itself through the Defendants physically picking A.A. up, carrying her, placing her in a seat, strapping her in to that seat, where she was stuck until they came, unstrapped her from the seat and physically removed her from the seat...**

...There are numerous allegations throughout the complaint of that child **being attacked and having no recourse but to just sit there and suffer the attacks.** She was not able to care for own basic human needs, nor were her parents. This child literally cannot take or exit her seat on her own. She cannot voice her concerns or call for help. All she can do is sit there and cry. **She is completely reliant on the Defendants protecting her from exactly the type of harm she suffered at the hands of J.M. She is more defenseless than a prisoner in jail or a person involuntarily committed to a hospital. She had zero freedom of movement.**

*Order*, July 30, 2019, p.9 and 11, emphasis added.

This Court has previously explained why the “substantial body of case law” GOODWIN has submitted is not persuasive on this issue:

Had the Plaintiff’s pled facts only alleging a regular “student-school relationship,” the Defendants would be correct. However, this was not a regular “student-school relationship.” As the factual allegations referenced above show, it was something more. That “more” is exactly what makes it a “special relationship” pursuant to

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<sup>1</sup> The July 30, 2019 order was citing to *Stevenson v. Martin Co. Bd. Of Educ.*, 3 Fed. Appx. 25 at \*\*4 (4<sup>th</sup> Cir. 2001) (affirming dismissal of a student’s §1983 action against school board and school district employees). The school-student relationship does not constitute a special relationship “because the student **is not in physical custody** and, along with parental help, is able to care for his basic human needs.” *Id.* (noting this is the uniform rule among the circuit courts that have addressed the issue), emphasis added. This *Stevenson* language came directly from p.3, ¶6 of SIRES 12(b)(6) motion.



*DeShaney*'s custodial requirement. It may not be incarceration. It may not be institutionalization. But it is precisely the "or the like" situation *Pinder* explains triggers a "special relationship," because the Defendants rendered A.A. unable to care for herself and at the same time failed to provide for her basic human needs, while, as alleged, being deliberately indifferent to her safety. *Order*, July 30, 2019, p.13, emphasis added.

Plaintiff's legal argument for the special relationship has not changed since this Court's previous ruling denying GOODWIN's Rule 12(b)(6) motion, nor has GOODWIN's legal argument challenging the special relationship.

The law establishing what "custody" means under *DeShaney* and its progeny has not changed since this Court's previous ruling. Custody under *DeShaney* is **not** restricted to "more-or-less total custody by the state whereby the state is responsible for all the person's basic needs" as GOODWIN argues. *DeShaney* custody has always encompassed situations where the State so restrains a person's freedom that they cannot act on their own behalf.

There is no basis for this Court to change its rationale from its previous ruling on GOODWIN's Rule 12(b)(6) motion that SIREs taking physical custody of A.A. and strapping her into the seat, could constitute custody creating a special relationship under *DeShaney*.

What has changed is the record now contains additional factual support for the conclusion that A.A. was physically restrained to the point she lacked the freedom to act on her own:

First and foremost, SIREs admits that A.A. was in his custody:

Q: All right. Now A.A. was in your charge **and custody** when she was on your bus?

A: She was.  
(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Ronnie Lee Sires*, p.55, l.24 – p.56. l.1, emphasis added).

SIREs admits that his custody of A.A. included physical restraint that deprived A.A. of the freedom to act on her own behalf:

Q: **A.A. was physically restrained by you?**

A: **Yes.**

(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Ronnie Lee Sires*, p.78, 1.5 – 6, emphasis added).

Q: **A.A. would not have been capable of imposing those physical restraints on herself?**

A: **No she would not.**

Q: You had to physically pick A.A. up, put her in the seat and strap her in?

A: That is correct.

Q: She could not have done any of that on her own?

A: She could not.

Q: **If A.A. had to get out of those physical restraints, you had to do that?**

A: **I would have, yes.**

Q: **She could not have removed those physical restraints on her own?**

A: **No, she would not have been able to remove them on her own.** She was a small child, four year old. Three or four year old.

(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Ronnie Lee Sires*, , p.78, 1.11 – p.79, 1.2, emphasis added).

GOODWIN admits the restraint imposed on A.A. eliminated her freedom to act on her own behalf:

Q: When A.A. got on that bus Mr. Sires physically picks her up and straps her into that seat?

A: Yes, sir. That's correct.

Q: And so **once he takes control of her in picking her up and putting her in that seat and strapping her in, she doesn't have any freedom of movement, does she?**

A: **No, sir, she does not.**

Q: **She is reliant on Mr. Sires to free her if there is any danger?**

A: **Yes, sir.**  
 (12.03.2020 Memo, p.12, *Deposition of Harrison Goodwin*, p.156, l.12-22, emphasis added.)

GOODWIN argues there was no special relationship under *DeShaney*, because any “custody” of A.A. was voluntary; that it “is the involuntary nature of the placement into state custody which triggers substantive due process.” (12.21.2020 Reply, p.4). GOODWIN argues that Plaintiff “can hardly argue that AA was confined in the bus seat ‘involuntarily’ or against Plaintiff’s wishes.” (11.09.2020 Memo, p.30).

Setting aside that, as a minor, A.A. cannot as a matter of law consent to anything, the record before the Court shows that the Plaintiff will be able to present evidence from which a jury could reasonably infer that A.A.’s custody was involuntary. A.A.’s teacher, Mrs. Huggins, described waiting with A.A. for SIREs to arrive for the afternoon bus ride:

**When she saw the bus, she grabbed my hand and when she grabbed my hand I could feel her shaking**...and when I passed A.A. to Ms. McCormick I said, “**something is not right** because I can feel her shaking,” and **Linda agreed with me**...when Linda came back in the room Ms. McCormick said, “I asked him – **I asked Mr. Sires if anything unusual happened on the bus this morning**,” and her response to me in the classroom was **he said, “No.”**  
 (3.21.2022 Plaintiff’s Court’s Ex.1, *Deposition of Stephenie Huggins*, p.92, l.8-22, emphasis added).

Bus video shows A.A. board the bus for the afternoon ride, walking up the steps, turning to go down the aisle, encountering J.M. sitting in the first row and react. Mrs. Huggins, who interacts with A.A. closely on a regular basis, testified as to her impression of that encounter:

Q: ...did it appear to you that when A.A. got to the top of the steps and turned to go down the aisle that she reacted to something?

A: Yes, sir.

Q: Do you believe that video **represents her seeing J.M. and reacting to him**?

A: **I believe that she was afraid of something.**

Q: She acted like **she did not want to continue down that aisle**, didn't she?

A: **Yes, sir.**

Q: And, in fact, she started grabbing at Mr. Sires, the closest adult, didn't she?

A: Yes, sir.

Q: And **Mr. Sires reaction was to grab her and take her down the aisle and strap her into that seat?**

A: **Yes, sir.**

(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Stephenie Huggins*, p.91 1.1 – p.91, 1.17, emphasis added).

GOODWIN argues the “voluntary” nature of A.A.’s custody is evidenced by the fact that her parents chose to put her on the bus and would have “strongly objected” had SIREs not secured A.A. GOODWIN claims that the Plaintiff “agreed that AA ‘100 percent needed to be in a harness’ on the bus and that she would have been ‘pretty upset’ if the District had not secured AA in that manner.” (11.09.2020 Memo, p.30, citing to p.7, 1,11-17 of Plaintiff’s deposition)

The Plaintiff’s actual testimony was:

Q: And wouldn't it be true that if you learned that the school district was not securing her on the special needs bus, you'd be pretty upset with the district; would you not?

A: Yeah. I think she definitely, 100 percent needed to be in a harness, **but protected in that harness.**

(11.09.2020 Memo, Ex.2, *Deposition of Jessica Condon*, p.7, 1.11-17).

It is well established that the word “voluntary” in the law implies choice with knowledge of essential facts. *See Black’s Law Dictionary*, 6<sup>th</sup> Ed., p.1575 (defining “voluntary”). GOODWIN had notice at least two (2) months before the attacks, that CCSD’s common and customary practice of not having attendants on special needs buses potentially endangered restrained students:

Q: So the common practice at the time was to not have adult attendants on buses that had wheelchairs?

A: To my knowledge that would be correct.

Q: Okay. And the common practice at the time was to not have adult attendants on buses where harnesses were being used?

A: That's – that is correct.

Q: Okay. And the common practice at the time was to not have attendants on special needs buses in general?

A: If you say. Yes, I would have to say yes because as you noted it was for special situations.

(12.03.2020 Memo, p.16, *Deposition of Harrison Goodwin*, p.77, l.10 – p.77, l.5).

Q: **You knew by September 4<sup>th</sup>, 2018** that having attendants on the – **that not having attendants on the special needs buses potentially endangered students?**

A: We, we had received emails from earlier in September that did not the concerns of P.J. Krause. **Yes**.

Q: And those concerns were specifically **that not having attendants on the special needs buses potentially endangered students?**

A: **Yes...**

(12.03.2020 Memo, p.16-7, *Deposition of Harrison Goodwin*, p.16, l.8-18, emphasis added).

Despite having notice of the potential danger created by their operation District special needs buses, GOODWIN did **not** share that information with the Plaintiff:

Q: All right. So you knew that this potential dangerous operation of the special needs bus was out there and that y'all weren't going to address it immediately. Are the parents of the children on those buses not entitled to know of the potential danger to their children **so they can make a decision of whether or not they're going to leave the child on the bus** while y'all figure it out?

MR. DUFF: Object to the form.

A: If you, if you – you know, **if you put it in those terms, it would have been a good thing to have let them know**.

Q: **Can you think of an acceptable reason why you wouldn't let parents know in that type of situation?**

A: **No, sir.**  
(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Harrison Goodwin*, p.100, 1.2 – 1.19, emphasis added).

While A.A. is not capable of explaining her feelings, a jury watching the bus videos, and hearing Mrs. Huggins testimony set out above, could reasonably conclude that A.A. was afraid to continue down the aisle, she did not want to continue down that aisle, and that SIREs picking her up and strapping her in to leave her at J.M.'s mercy was "against her will" within the meaning of *DeShaney*. A jury could also reasonably conclude that by denying A.A.'s parents important information regarding the safety of A.A.'s transportation, GOODWIN deprived them of any meaningful choice; thus, making A.A.'s custody involuntary.

The record before the Court establishes that, at a minimum, there are material questions of fact concerning A.A.'s custody and the voluntary/involuntary nature of custody in this case sufficient to present to a jury. Further, there is a material question of fact concerning whether SIREs conduct effectuated policy or custom over which GOODWIN had authority.

#### **B. "State-Created/Enhanced Danger"**

In *DeShaney*, the Supreme Court observed that 'while the State may have been aware of the dangers that [the child] faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*' Doe at 438, quoting DeShaney at 201, emphasis added by Doe.

GOODWIN argues the Plaintiff has failed to meet the requirements of the state created/enhanced danger exception because he engaged in no "affirmative act" as required by *DeShaney*.

A plaintiff must show that the state actor created or increased the risk of private danger and did so directly through affirmative acts, "not merely through inaction or omission. Merely "allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger."

(11.09.2020 Memo, p.30, citing to Doe v. Rosa, 795 F.3d 429, 439-440 (4<sup>th</sup> Cir. 2015))

GOODWIN admits that SIRES strapping A.A. into her seat was “affirmative” act. (05.29.2020 Memo, p.7). GOODWIN attempts to mitigate this admission by arguing that affirmative act of strapping A.A. into her seat was “intended to safeguard” A.A. and “to argue that SIRES secured A.A. in her seat harness knowing that would make it easier for J.M to assault her is both cynical and **devoid of factual support.**” (05.29.2020 Memo, p.7, emphasis added).

There is factual support from which a reasonable jury could conclude that SIRES knew J.M. was physically attacking A.A. SIRES conduct was memorialized on video. With regard to that video, SIRES testified:

Q: In fact, **her cries were so alarming** to you that you actually stopped the bus and went back there to check on her?

A: That’s what I did according to the video.

Q: Okay. And that’s unusual, isn’t it?

A: **Completely unusual.**  
(3.21.2022 Plaintiff’s Court’s Ex.1, *Deposition of Ronnie Sires*, p.225, 1.19 – 1.24, emphasis added).

Having stopped the bus, the video shows SIRES walk back and calm A.A. sufficiently to get her to stop crying, only to resume driving the bus; whereupon J.M. resumes his attacks. After the attacks resume, the video records SIRES admonishing J.M. to “Leave her alone. Leave her alone.” A reasonable jury could conclude that the video of the morning bus ride was evidence of SIRES awareness of J.M.’s actions. Further, a jury could reasonably find or infer that when SIRES picked up and strapped A.A. in for the afternoon ride, he did so “knowing that would make it easier for J.M. to assault her.”

SIRES admits this presents a question of material fact for a jury to decide:

Q: So if a jury watches the video and believes that it does show you looking

right at J.M. as he attacks A.A., that jury would have to decide whether or not to believe what they saw on the video or whether or not to believe your testimony, is that fair?

A: They would have to.

MR. DUFF: Object to the form.

Q: Is that fair?

A: They would have, they would have to determine that...  
(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Ronnie Lee Sires*, p.249, l.18 – p.250, l.2).

GOODWIN's testimony supports the conclusion that the video presents a question of material fact as to SIREs knowledge of the attacks

Q: Is there any doubt in your mind having watched those clips that when J.M. goes across and attacks her on that second clip I just described and Mr. Sires told J.M. to leave her alone that he saw J.M. across the aisle messing with A.A.?

A: Mr. McLaughlin, all I can say is when I saw the video my question was like yours, **how did the driver not see that.**  
(12.03.2020 Memo, p.14, *Deposition of Harrison Goodwin*, p.158, l.2-9, emphasis added).

As GOODWIN argued in his Rule 12(b)(6) motion to dismiss the §1983 claims:

The key to the state created danger cases...lies in the state actors' **culpable knowledge** and conduct in **affirmatively placing** an individual *in a position of danger*, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid. Thus, *the environment* created by the state actors must be dangerous; they **must know** it is dangerous; and, to be liable, they must have used their authority to create *an opportunity* that would not otherwise have existed for the third party's [acts] to occur.  
(6.03.2019 Memo p.7, citing *Doe 246 v. Berkeley Cty. Sch. Dist.*, 189 F.Supp.3d 573, 578 (D.S.C.) (quoting *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5<sup>th</sup> Cir. 1994), (italicized emphasis from *Doe*, bolded emphasis by GOODWIN).

GOODWIN's own language emphasized above, creates a material question of fact regarding the state created/enhanced danger exception. A jury could reasonably conclude that SIREs had "culpable knowledge" when he strapped A.A. into her seat, placing her in a position of danger, denying her the ability to defend herself, and cutting off potential sources of aid. A



reasonable jury, presented with such evidence, could conclude that “the environment” SIRES created by doing his affirmative acts was dangerous and he “knew” it was dangerous; and that SIRES authority as the bus driver created “an opportunity” that would not otherwise have existed for J.M.’s attacks to occur.<sup>2</sup>

There is a material question of fact that GOODWIN knew SIRES affirmative act of strapping A.A. into her seat placed her in a position of danger, as GOODWIN admits to having been warned two months prior to such danger via the SCDOE emails.

A reasonable jury could conclude, applying South Carolina law, that SIRES placing restraints on A.A.’s freedom not only created a “special relationship,” but it also “created” the danger itself. Recently, affirming a directed verdict on a state-created danger claim, the South Carolina Court of Appeals relied on *DeShaney*, specifically highlighting the fact that “the police **did not take Jane Doe into custody, place any restraints on her freedom**, or assume the responsibility for caring for her.” Estate of Doe 202 v. City of N. Charleston, 433 S.C. 444, 452, 858 S.E.2d 814, 818 (Ct. App. 2021), emphasis added. Here, by contrast, a reasonable jury could find that SIRES did place restraints on A.A.’s freedom, creating the danger.

GOODWIN’s liability under the state-created danger exception is not solely dependent on SIRES conduct. GOODWIN could be liable if conduct by other CCSD agents was taken to effectuate policy and custom over which GOODWIN had authority.

In this case, GOODWIN admits that CCSD engaged in additional conduct to effectuate policy or custom that led to the state-created danger A.A. faced on November 5, 2018:

Q: The School District took the action of moving J.M. to the self-controlled classroom at Ruby Elementary School because J.M.’s behavior was physically aggressive?

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<sup>2</sup> GOODWIN admits SIRES leaving the bus to operate the wheelchair lift “**effectively created further opportunity for J.M. to attack**.” (11.09.2020 Memo, p.45, emphasis added).

A: That was the behavior issue that was being addressed, yes, sir.

Q: The School District **took the action of placing J.M. on the special needs bus to Ruby Elementary School?**

A: **Yes**. In order to get him there he had to ride the special needs bus.

Q: At the time the School District took those actions, J.M.'s permanent record had a documented history of physical aggression on school buses?

A: It had the referrals that you referred to earlier, yes.

Q: What precautions did the School District take to ensure that J.M. would not be physically aggressive on the special needs bus to Ruby Elementary School?

A: I don't know that I can know the answer to that question.  
(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Harrison Goodwin*, p.58, 1.3-23, emphasis added).

The referrals GOODWIN is referencing were 15 disciplinary referrals J.M. had, 11 of which involved physical aggression, with at least 3 of those occurring on school buses. Those referrals had resulted in evaluations of J.M. that documented J.M. "often" threatens to hurt others, loses temper too easily, hits other children and "sometimes" bullies and seeks revenge on others. CCSD records document that when J.M. was placed on the special needs bus, he was "determined to do harm" and "will hurt himself or another." (12.03.2020 Memo, p.41).

SIRES admits that having that knowledge and allowing his bus to operate without an attendant ignored a known danger:

Q: If the school district knew that J.M. had a history of physically attacking other students and they knew that he had a history of those attacks occurring on school buses and they were specifically warned via an email that it was dangerous to operate school buses with restrained children without having an additional attendant, do you think **that letting your bus operate that day without another adult attendant was ignoring a known danger?**

A: Because of this stuff, after what happened **I would say yes** because of what happened...

(3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Ronnie Lee Sires*, p.242, 1.14-25, emphasis added).

By his own admission, school district policy provides that GOODWIN is responsible for the overall bus transportation in the School District. There are material questions of fact as to whether the conduct of CCSD agents/employees, which violated A.A.'s constitutional right, was performed to effectuate an official policy or custom (pursuant to the above and *Carter*, see below) for which GOODWIN was responsible.

## **II. Qualified Immunity**

GOODWIN argues, that in conducting a qualified immunity (QI) analysis, a court must engage in a two-part inquiry to determine: 1) whether the government official's conduct as alleged violated the plaintiff's constitutional rights; and, if so, 2) whether the right allegedly violated by the government officials conduct was "clearly established" at the time of the alleged misconduct. (11.09.2020 Memo, p.39, citing to *Massey v. Ojaniit*, 759 F.3d 343, 353-54 (4<sup>th</sup> Cir. 2014)).

Not only does the discussion in Section I above support the conclusion that, at a minimum, the conduct discussed above creates material questions of fact as to whether SIRES and GOODWIN's actions violated A.A.'s constitutional right, but that discussion also supports the conclusion that "deliberate indifference" is the appropriate standard.

Citing to language from *Turner*, GOODWIN argues that the standard necessary to overcome qualified immunity is "intent to harm." GOODWIN argues "**apart from situations involving custody**, the Supreme Court has never applied a deliberate indifference standard merely because the State created a danger that resulted in harm." (11.09.2020 Memo, p.40, citing to *Turner v. Thomas*, 930 F.3d 640, 647 (4<sup>th</sup> Cir. 2019) (emphasis added).

This case, however, presents material questions of fact for a jury concerning custody and the voluntary/involuntary nature of the custody. As such, the deliberate indifference standard applies.

The Fourth Circuit has noted that officials are likely **not** entitled to qualified immunity when the official's conduct knowingly violated the law or constituted deliberate indifference. In *Thompson*, the Fourth Circuit suggested the court may skip the "clearly established" prong of the qualified immunity analysis in the event of an "officer's knowing violation of the law" because it is "per se unreasonable." *Thompson v. Virginia*, 878 F.3d 89, 97 n.3 (4<sup>th</sup> Cir. 2017).

The facts above present a genuine issue of material fact as to whether GOODWIN knowingly violated the law.

GOODWIN admits that the custom/policy of which he was in charge, violated S.C. Code §59-67-190, which prohibits drivers from leaving a bus while the engine is running:

Q: So, if the wheelchair lifts won't operate when the bus is off and the only adult on the bus is the driver, if that was the customary practice of the School District, **then the School District's customary practice violated South Carolina law?**

MR. DUFF: Object to the form.

A: **Yes, sir.** When you take it and connect the dots in that direction because, you know, it, it puts the – the fact that the lift will not operate does put the District driver in sort of a no win situation. (3.21.2022 Plaintiff's Court's Ex.1, *Deposition of Harrison Goodwin*, p.81, l.3-12, emphasis added).

The relevance of this evidence of violations of law is highlighted by GOODWIN's admission that SIREs leaving the bus to operate the wheelchair lift, "**effectively created further opportunity for J.M. to attack.**" (11.09.2020 Memo, p.45, emphasis added).

Although we need not reach the issue here, we note that some courts have concluded that it is not necessary to consider objective reasonableness prong of qualified immunity at all when summary judgment is denied on deliberate

indifference. See, e.g., Walker v. Benjamin, 293 F.3d 1030, 1037 (7<sup>th</sup> Cir. 2002); Beers-Capitol v Whetzel, 256, F.3d 120, 142 n.15 (3d Cir. 2001)...See Walker, F.3d at 1037 (holding that deliberate indifference and qualified immunity inquiries “effectively collapse into one” and that **“[i]f there are genuine issues of fact concerning a defendant’s deliberate indifference, the “defendant may not avoid trial on the grounds of qualified immunity”**”)....

Cox v. Quinn, 828 F.3d 227, 238 n.4 (4<sup>th</sup> Cir. 2016), emphasis added.

The Fourth Circuit’s dicta in *Cox* was in line with United States Supreme Court case law: “Officials can still be on notice that their conduct violates established law even in novel circumstances,” Hope v. Pelzer, 536 U.S. 730, 741 (2002), as “when extreme though unheard-of actions violated the Constitution.” Camreta v. Greene, 563 U.S. 692, 728 (2011).

This rationale is in line with South Carolina’s interpretations of *DeShaney*:

Pursuant to *DeShaney* and its progeny, there is no due process violation **unless** a plaintiff shows a state actor engaged in reckless behavior **or acted with deliberate indifference**.

Estate of Doe 202 at 452, emphasis added.

The Fourth Circuit has subsequently cemented the dicta from *Thompson* and *Cox*, through their decision in Felicia Harkness Dean v. Stephen B. McKinney, 947 F.3d 407 (4<sup>th</sup> Cir. 2020).

In *Harkness*, the Fourth Circuit noted that the district court which had denied summary judgment on qualified immunity found “there is relatively scant caselaw imposing liability under these specific circumstances. Neither the Supreme Court nor this Court has considered the exact conduct presented here...the parties concede that no other court decisions have addressed the factual circumstances upon which we must make a determination. But while there is no case on point factually to inform our analysis, core constitutional principles set forth in numerous cases lead us to the conclusion that Harkness’s substantive due process right was clearly established.”

Harkness at 418.

The *Harkness* court further explained that public officials “can still be on notice that their conduct violates established law even in novel factual circumstances, so long as the law provided ‘fair warning’ that their conduct was wrongful” and “we need not – and should not – assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense.” Harkness at 418.

The *Harkness* court explained the rationale for “deliberate indifference” overcoming the “clearly established” prong:

Certainly, time to “reflect on [ones] actions” is a factor in determining whether deliberate indifference is the appropriate standard. “**Liability for deliberate indifference...rests upon the luxury...of having time to make unharried judgments, upon the chance of repeated reflection, largely uncomplicated by the pulls of competing obligations.** When such extended **opportunities to do better** are teamed with protracted failure even to care, indifference is truly shocking.

Harkness at 415, internal citations omitted, emphasis added.

*DeShaney* and *Pinder* put GOODWIN on notice that restraining a child’s freedom to the point of depriving her of the ability to care for herself could violate her constitutional rights; thus giving him fair warning of the general applications of the core constitutional principles invoked under both *DeShaney* exceptions.

GOODWIN had the luxury of having time to make unharried decisions. He had over two months to consider that customary practice of his special needs buses was endangering children like A.A. GOODWIN had extended opportunities to do better. These facts present material questions of fact for the jury as to whether GOODWIN’s failure to do better was deliberately indifferent and/or knowingly violated the law.

## CONCLUSION & FINDINGS

While many of the evidentiary facts in this case are not disputed, there certainly is dispute as to the inferences and conclusions to be drawn from those facts. It is not this Court's role to make those inferences or draw those conclusions; rather they must be reached by a jury.

Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. Gilliland v. Elmwood Properties, 301 S.C. 295, 299; 391 S.E.2d 577, 579 (1990), citing Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196; 293 S.E.2d 706, 707 (1982). Summary judgment is inappropriate when more than one inference can be drawn from the evidence when it is viewed in the light most favorable to the non-moving party. Fickling v. City of Charleston, 372 S.C. 597; 643 S.E.2d 110 (2007). If any triable factual issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402 (1991).

Meeting *DeShaney's* narrow exceptions is a difficult proposition. While the Fourth Circuit may have "never issued a published opinion finding a successful 'state created danger' claim," *DeShaney* is the law. The Fourth Circuit has recognized these exceptions and the case law that does exist provides guidance on what is required to meet the exceptions, regardless of whether those cases usually find that the exceptions are not met.

The evidence on the record presents genuine issues of material fact as to the whether the Plaintiff can meet those exceptions.

Based on the above,

I FIND that GOODWIN's motion to dismiss the §1983 claim is DENIED.

AND IT IS SO ORDERED!

*(e-signature page to follow)*



Chesterfield Common Pleas

**Case Caption:** Jessica Condon VS Ronnie Lee Sires , defendant, et al

**Case Number:** 2019CP1300193

**Type:** Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140