STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD)	CIVIL ACTION NO. 2019-CP-13-00193
)	
Jessica Condon, a biological parent and)	
natural guardian of A.A., a minor child;)	
)	
Plaintiff,)	**ORDER**
vs.)	(as to Defendant Ronnie Lee Sires' Motion for Summary Judgment)
)	
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.)	
_____)	

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 SIRES, Plaintiff pleads 42 U.S.C. §1983 claims against SIRES 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 SIRES 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 (SCDOE) that operating special needs buses, with children in restraints and not having adult attendants potentially endangered the students. SIRES was criminally charged with a violation of S.C. Code §63-5-70, Unlawful Conduct Toward a Child. Those criminal charges are still pending.

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), SCRCP. 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

SIRES' Arguments

SIRES 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.

SIRES 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 is a genuine issue of material fact as to whether SIRES committed constitutional violations under §1983, as SIRES conduct meets both the "special

relationship" and "state-created/enhanced danger" exceptions as defined by *DeShaney*. Plaintiff also argues the constitutional right was clearly established at the time and that SIRES is not entitled to qualified immunity due to his deliberate indifference and violation of S.C. law.

DISCUSSION

I. A.A.'s Constitutional Right

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 (4th 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…").

SIRES concedes that A.A. has a constitutional right to bodily integrity that is a recognized liberty interest under the Fourteenth Amendment to the Constitution. (11.09.202 Memo, p.23, citing to Meeker v. Edmundson, 415 F.3d 317, 323-24 (4th Cir. 2005). SIRES 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" 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 ruling on SIRES Rule 12(b)(6) motion, that the Plaintiff sufficiently pled factual allegations supporting liability under both exceptions. *Order*, July 30, 2019.

A. "Special Relationship"

SIRES 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). SIRES 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 (4th 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 Rule 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.

SIRES argues he has "submitted a substantial body of case law establishing that no special relationship 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 that A.A.'s school attendance or her riding the bus created the special relationship.

Plaintiff's allegations of a special relationship between SIRES and A.A. arises from actual physical restraint. As this Court recognized when it denied SIRES 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.[1]
>
> 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" SIRES 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

[1] The July 30, 2019 order was citing to *Stevenson v. Martin Co. Bd. Of Educ.*, 3 Fed. Appx. 25 at **4 (4th 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 SIRES special relationship to A.A. has not changed since this Court's previous ruling denying SIRES Rule 12(b)(6) motion, nor has SIRES 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 SIRES 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 from the Rule 12(b)(6) motion that SIRES taking physical custody of A.A. and strapping her in to 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 in SIRES custody and 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, l.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, l.11 – p.79, l.2, emphasis added).

Superintendent 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.)

SIRES 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). SIRES 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 l.1 – p.91, l.17, emphasis added).

SIRES 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. SIRES 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, l,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, l.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, 6th Ed., p.1575 (defining "voluntary"). CCSD and GOODWIN had notice, at least two (2) months before the attacks, that having restrained children like A.A. on a special needs bus without adult attendants potentially endangered those students. Despite

having notice of the potential danger created by their operation of special needs buses, CCSD and GOODWIN did **not** share that information 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, l.2 – l.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, the Defendants 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 genuine issues of material fact concerning A.A.'s custody and the voluntary/involuntary nature of her custody in this case, sufficient to present to a jury.

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.

SIRES 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 (4th Cir. 2015)

SIRES admits strapping A.A. into her seat was "affirmative" act. (05.29.2020 Memo, p.7). SIRES attempts to mitigate this admission by arguing that the 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, l.19 – l.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 that 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 SIRES 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 (5th Cir. 1994), (italicized emphasis from Doe, bolded emphasis by SIRES).

SIRES' 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.[2]

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.

[2] SIRES admits 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).

II. Qualified Immunity

SIRES 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 (4th Cir. 2014).

Not only does the discussion in Section I above support the conclusion that SIRES conduct, at a minimum, creates material questions of fact as to whether his 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*, SIRES argues that the standard necessary to overcome qualified immunity is "intent to harm." SIRES 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 (4th 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 (4th Cir. 2017).

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

SIRES was charged with violation of S.C. Code §63-5-70, Unlawful Conduct Toward a Child. During his deposition, SIRES admitted that A.A. was in his charge and custody on the bus, that A.A. was bodily harmed while in his charge and custody, and that the bodily harm was unlawful. (12.03.2020 Supplemental Memo, p.32-34).

The District Superintendent admitted that SIRES leaving the bus to operate the lift violated S.C. Code §59-67-190, which prohibits driver from leaving a bus while 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 SIRES' admission that 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).

The *Thompson* rationale was in line with *Cox*:

> 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 (7th 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 (4th 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 (4th 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 SIRES 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.

SIRES had the luxury of having time to make unharried decisions. He stopped the bus, walked back and sat beside A.A. He stopped at A.A.'s school and dropped her off. He had the opportunity between the morning and afternoon rides to investigate the "completely unusual" events of the morning including the opportunity to view the video of the morning ride. SIRES had extended "opportunities to do better." These facts present material questions of fact for the jury as to whether SIRES 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.

Therefore, based on the above,

I FIND that SIRES' 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