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DIRECT DIAL NUMBER

May 24, 2012

George E. Schaefer, III, Clerk
Norfolk Circuit Court - Law Division
100 St. Paul's Boulevard
Norfolk, VA 23510

CL 12-3982

FILED
2012 MAY 24 PM 2:44
NONFOLK
CIRCUIT COURT OF EMERSON
RY: [Signature]

Re: *Betsy Cummings as Administrator of the Estate of Dylan Jayden Cummings, Deceased, et al. v. Little Eagles Daycare, et al.*

Dear Mr. Schaefer:

Enclosed for filing and preparation for service, please find an original and ten (10) copies of a Complaint, in the above referenced matter. Please prepare the Notice and Complaint for each defendant for service by a private process server.

Also, please "Filed" and date stamp the additional copy of the Complaint for our file.

Please contact my office at 757-671-7041 when they are ready and we will have someone come and pick them up.

I have enclosed our firm's check in the amount of \$349.00 for the applicable filing fee.

Thank you for your cooperation and assistance with this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours

[Signature of Joseph J. Perez]

Joseph J. Perez

JJP:rpb
Enclosures
cc: Betsy Cummings (w/enc.)
Kevin L. Locklin, Esq. (w/enc.)

OK
5/29

COVER SHEET FOR FILING CIVIL ACTIONS
COMMONWEALTH OF VIRGINIA

Case No. CL12-3988
(CLERK'S OFFICE USE ONLY)*

Norfolk

Circuit Court

Betsy Cummings as Administrator of the Estate of

v./In re:

Little Eagles Daycare, et al.

PLAINTIFF(S)

DEFENDANT(S)

Dylan Jayden Cummings, Deceased, et al.

I, the undersigned plaintiff defendant attorney for plaintiff defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

- | | | |
|--|--|--|
| <input type="checkbox"/> Accounting | <input type="checkbox"/> Confessed Judgment | <input type="checkbox"/> Judicial Review |
| <input type="checkbox"/> Administrative Appeal | <input type="checkbox"/> Conservator of Peace | <input type="checkbox"/> Landlord/Tenant |
| <input type="checkbox"/> Adoption | <input type="checkbox"/> Construe Will | <input type="checkbox"/> Law Enforcement Petition |
| <input type="checkbox"/> Adoption - Foreign | <input type="checkbox"/> Contract Action | <input type="checkbox"/> Mechanics Lien |
| <input type="checkbox"/> Adult Protection | <input type="checkbox"/> Contract Specific Performance | <input type="checkbox"/> Medical Malpractice |
| <input type="checkbox"/> Aid and Guidance | <input type="checkbox"/> Correct/Erroneous State/Local Taxes | <input type="checkbox"/> Motor Vehicle Tort |
| <input type="checkbox"/> Annexation | <input type="checkbox"/> Counterclaim - Monetary Damages | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Annulment | <input type="checkbox"/> Counterclaim - No Monetary Damages | <input type="checkbox"/> Order to Sever |
| <input type="checkbox"/> Annulment - Counterclaim/
Responsive Pleading | <input type="checkbox"/> Cross Claim | <input type="checkbox"/> Partition |
| <input type="checkbox"/> Appeal Decision of ABC Board | <input type="checkbox"/> Custody/Visitation/Support/
Equitable Distribution | <input type="checkbox"/> Petition |
| <input type="checkbox"/> Appeal Decision of Board of Zoning | <input type="checkbox"/> Declaratory Judgment | <input type="checkbox"/> Product Liability |
| <input type="checkbox"/> Appeal Decision of Comp Board | <input type="checkbox"/> Declare Death | <input type="checkbox"/> Quiet Title |
| <input type="checkbox"/> Appeal Decision of Employment
Commission | <input type="checkbox"/> Delinquent Taxes | <input type="checkbox"/> Referendum Elections |
| <input type="checkbox"/> Appeal Decision of Local
Government | <input type="checkbox"/> Detinue | <input type="checkbox"/> Reformation of Trust |
| <input type="checkbox"/> Appeal Decision of Marine Resources
Commission | <input type="checkbox"/> Divorce - Counterclaim/
Responsive Pleading | <input type="checkbox"/> Reinstatement of Driving
Privileges |
| <input type="checkbox"/> Appeal Decision of Voter
Registration | <input type="checkbox"/> Ejectment | <input type="checkbox"/> Reinstatement (General) |
| <input type="checkbox"/> Appointment of Church Trustee,
Substitute Fiduciaries | <input type="checkbox"/> Encumber/Sell Real Estate | <input type="checkbox"/> Removal |
| <input type="checkbox"/> Approval of Right to be Eligible to
Vote | <input type="checkbox"/> Enforce Vendor's Lien | <input type="checkbox"/> Separate Maintenance |
| <input type="checkbox"/> Asbestos Litigation | <input type="checkbox"/> Escheat | <input type="checkbox"/> Separate Maintenance -
Counterclaim/Responsive
Pleading |
| <input type="checkbox"/> Attachment | <input type="checkbox"/> Establish Boundaries | <input type="checkbox"/> Standby Guardian/
Conservator |
| <input type="checkbox"/> Bond Forfeiture Appeal | <input type="checkbox"/> Expunge | <input type="checkbox"/> Termination of Mineral
Rights |
| <input type="checkbox"/> Child Abuse and Neglect -
Unfounded Complaint | <input type="checkbox"/> Forfeiture of U.S. Currency | <input type="checkbox"/> Unlawful Detainer |
| <input type="checkbox"/> Civil Contempt | <input type="checkbox"/> Freedom of Information | <input type="checkbox"/> Vehicle Confiscation |
| <input type="checkbox"/> Claim Impleading Third Party
Defendant - Monetary Damages | <input type="checkbox"/> Garnishment | <input type="checkbox"/> Will Contested |
| <input type="checkbox"/> Claim Impleading Third Party
Defendant - No Monetary Damages | <input type="checkbox"/> General Tort Liability (other than
motor vehicle) | <input type="checkbox"/> Writ of Certiorari |
| <input type="checkbox"/> Complaint - (Miscellaneous) | <input type="checkbox"/> Grievance Procedures | <input type="checkbox"/> Writ of Habeas Corpus |
| <input type="checkbox"/> Compromise Settlement | <input type="checkbox"/> Guardian/Conservator Appointment | <input type="checkbox"/> Writ of Mandamus |
| <input type="checkbox"/> Condemnation | <input type="checkbox"/> Impress/Declare a Trust | <input type="checkbox"/> Writ of Prohibition |
| | <input type="checkbox"/> Injunction | <input type="checkbox"/> Writ of Quo Warranto |
| | <input type="checkbox"/> Interdiction | <input checked="" type="checkbox"/> Wrongful Death |
| | <input type="checkbox"/> Interrogatory | <input type="checkbox"/> Other |
| | <input type="checkbox"/> Intentional Tort | |
| | <input type="checkbox"/> Judgment Lien-Bill to Enforce | |

Damages in the amount of \$ 5,350,000.00 are claimed.

May 24, 2012

DATE

PLAINTIFF

DEFENDANT

ATTORNEY FOR

PLAINTIFF

DEFENDANT

Joseph J. Perez

PRINT NAME

4525 South Boulevard, Suite 300, Virginia Beach, VA 23452 (757) 671-6000

ADDRESS /TELEPHONE NUMBER OF SIGNATOR

VIRGINIA: IN THE CITY OF NORFOLK CIRCUIT COURT

BETSY CUMMINGS AS ADMINISTRATOR OF THE
ESTATE OF DYLAN JAYDEN CUMMINGS, DECEASED,

AND

CU 12-398D

BETSY CUMMINGS AND EDGAR TRUJILLO, JR., Individually,

Plaintiffs,

v.

At Law No. _____

LITTLE EAGLES DAYCARE,
SERVE: Tammy Futrell
3628 Garland Drive
Chesapeake, VA 23323

And

BETHEL TEMPLE CHURCH OF DELIVERANCE
d/b/a, t/a, LITTLE EAGLES DAYCARE, a/k/a BTCOD LITTLE EAGLES DAYCARE
SERVE: Melvin Futrell
3628 Garland Drive
Chesapeake, VA 23323

SERVE: Tammy Futrell
3628 Garland Drive
Chesapeake, VA 23323

And

BETHEL TEMPLE CHURCH OF DELIVERANCE
SERVE: Melvin Futrell, Officer of
3628 Garland Drive
Chesapeake, VA 23323

And

TAMMY FUTRELL
3628 Garland Drive
Chesapeake, VA 23323

And

DINNETTE FEENEY
a/k/a Dennetta B. Thomas a/k/a Donnetta B. Feeney,
a/k/a Dimnetta B. Feeney a/k/a Dinnetta B. Feeney,
317 Ferdinand Circle
Virginia Beach, VA 23462

And

JUANITA BELL
3953 Holly Cove Drive
Chesapeake, VA 23321

And

ANGEL HOSKIE,
2709 Azalea Garden Road, Apt. A1
Norfolk, VA 23513

And

MELVIN FUTRELL
3628 Garland Drive
Chesapeake, VA 23323

Defendants.

COMPLAINT

COMES NOW the plaintiffs, by counsel, and files this their complaint against the defendants jointly and severally and ask that judgment be rendered against the defendants for the reasons stated herein and in support thereof state as follows:

1. Dylan Jayden Cummings is the child of Betsy Cummings and Edgar Trujillo, Jr.
2. Dylan Jayden Cummings was born on April 1, 2010.
3. Until the time of his death, Dylan Jayden Cummings had been in good health.
4. This action is brought as a result of the death of Dylan Jayden Cummings by and through Betsy Cummings, as personal representative of his estate, pursuant to Section 8.01-50 of the Code of Virginia, and Section 8.01-52 of the Code of Virginia.

5. Betsy Cummings and Edgar Trujillo, Jr. are the statutory beneficiaries pursuant to Section 8.01-53 of the Code of Virginia.

6. Bethel Temple Church of Deliverance (hereinafter BTCOD) is a church with its corporation charter cancelled but which continues doing business within the Commonwealth of Virginia.

7. Little Eagles Daycare is a daycare center operated by BTCOD, Tammy Futrell and Melvin Futrell.

8. BTCOD Little Eagles Daycare a/k/a Little Eagles Daycare (hereinafter LED) was/is operated by Bethel Temple Church of Deliverance and was located at 1317 East Little Creek Road, Norfolk, Virginia 23518.

9. On information and belief, Bethel Temple Church of Deliverance and LED were/are operated and managed by Tammy Futrell and Melvin Futrell.

10. At all relevant times, Tammy Futrell and Melvin Futrell, as owners, employers, and/or operators of Little Eagles Daycare, were responsible for the oversight and actions of all employees, staffing, maintenance, and safety and care of all children at the daycare facility during the relevant time periods herein.

11. Juanita Bell was an employee, agent, or representative of Bethel Temple Church of Deliverance and/or BTCOD Little Eagles Daycare at all times relevant to this lawsuit and was responsible for the care, oversight, and safety of the children at the facility.

12. Dinnette Feeney a/k/a Dennetta B. Thomas a/k/a Donnetta B. Feeney, a/k/a Dimnetta B. Feeney a/k/a Dinnetta B. Feeney was an employee, agent, or representative of Bethel Temple Church of Deliverance and/or BTCOD Little Eagles Daycare at all times relevant

to this lawsuit and was responsible for the care, oversight, and safety of the children at the facility.

13. Angel Hoskie was an employee, agent, or representative, of Bethel Temple Church of Deliverance and/or BTCOD Little Eagles Daycare at all times relevant to this lawsuit and was responsible for the care, oversight, and safety of the children at the facility.

14. Betsy Cummings was appointed as Administrator of the Estate of Dylan Jayden Cummings by the City of Norfolk Circuit Court. See Exhibit 1.

15. On information and belief Tammy Futrell had in the past operated a day care center out of her home and had been subjected to a number of violations involving failure to provide for child safety on the premises, improper supervision of the children, and having staff with improper training.

16. All the defendants herein knew or should have known of all the standards which existed and which were in force and in effect for the conduct of the daycare center being operated by the defendants, and at all times pertinent hereto the defendants were acting within the scope of their employment and as agents and/or servants of the defendants' entities.

COUNT I - NEGLIGENCE

17. Paragraphs 1 through 16 are incorporated by reference as if stated herein.

18. The defendants had a duty to maintain a four (4) to one (1) ratio of caregivers to infants between the ages of zero (0) and twenty four (24) months at all times relevant to this action.

19. A staff member must be regularly present at each grouping of children during the relevant time periods herein.

20. The facility had a duty not to have more than nine (9) children between ages of zero (0) and two and half (2 ½) present in the facility at any one time at all times relevant herein. At the time of Dylan Jayden Cummings' death on May 25, 2010, there were 18 children in that age group.

21. The defendants failed to establish and implement procedures for purpose of supervision of all of the children in their care. The Defendants failed to have any written procedures regarding child supervision. At the time of Dylan's death, the facility was short-handed with only two staff members to care for all of the children.

22. At the time of Dylan Jayden Cummings' death on May 25, 2010, there were ten infants under the age of twelve months that were kept together in cribs in a separate room that was illuminated only by a small television on a shelf approximately five and a half feet off the floor with music from a DVR playing and a portable fan to provide air circulation.

23. This infant area where Dylan Jayden Cummings' crib was located at the time of his death was located over fifty feet away from the main child care room. The infant room was a warm, stuffy, dark converted electrical store room with no windows. The ten infant cribs were not visible by staff from the main child care room. The room did not have any baby monitors.

24. At the time of Dylan's death, there was only one staff member responsible for the care of all ten infants and she was eating lunch in the main child care room and talking with other staff and was thus unable to see or hear any of the infants in the infant room.

25. The individual defendants on behalf of BTCOD and LED had a duty to regularly check on each infant every 10 to 15 minutes on May 25, 2010, but failed to do so.

26. Instead, the individual defendants on behalf of BTCOD and LED failed to properly supervise Dylan Jayden Cummings and the other children and never personally checked on Dylan Jayden Cummings, but, at best, only scanned the room from the doorway.

27. At seven weeks old, Dylan Jayden Cummings was the youngest child in care of BTCOD and LED. His crib was the furthest back in a far corner of a room filled with cribs where he could not be readily seen by staff members at the door.

28. The defendants had a duty to place Dylan Jayden Cummings in a proper sleep position, which would have been on his back, and failed to do so by putting him on his stomach to sleep after feeding. On every prior occasion that Dylan was brought to the day care center, his parents had reminded the staff that Dylan was to sleep on his back and not facing down on his stomach.

29. BTCOD and LED by and through the defendants, their agents, representatives, and employees, had a duty to maintain a one to four (1:4) ratio of staff to infants but, instead, at the time of Dylan Jayden Cummings' death, had only a one to ten (1:10) ratio of staff to infants.

30. BTCOD and LED, its employees and the individual defendants had a duty to ensure that there was a person trained and certified in first aid and CPR present at the center whenever children were present. There existed no such person on the date of Dylan Jayden Cummings' death. In fact, the individuals that were on duty at the time of Dylan Jayden Cummings' death held no current certification in first aid and CPR. The sole staff member in charge of the infant room at the time of Dylan's death had no training in first aid or CPR whatsoever.

31. The facility had a duty to disclose in writing to Betsy Cummings and Edgar Trujillo, Jr., information about physical facilities, enrollment capacity, food services, health requirements for the staff and public, but failed to do so.

32. The center had a duty to establish and implement procedures ensuring that all children in the center are in compliance with the appropriate immunization requirements, but failed to do so.

33. At the time of Dylan Jayden Cummings' death, fewer than fifty percent (50%) of the children had immunization records on file.

34. The center, by and through its agents, representatives, and employees, had a duty to establish and implement procedures to ensure that all areas of premises accessible to children were free of open and obvious injury hazard.

35. Five of the ten infant cribs had loose, ill-fitting sheets on the cribs. Dylan Jayden Cummings' crib consisted of two foam pads and an ill-fitting sheet that was too large, and, because the sheet was loose, it posed a serious suffocation hazard.

36. On the date of Dylan Jayden Cummings' death, five (5) out of ten (10) cribs in the infant room had sheets that were too large to be tight fitting, posing a suffocation hazard. This was contrary to the applicable standard that required sheets to be tight fitting and on firm mattresses.

37. Within the infant room there was an unlocked closet that contained all electrical boxes for the facility. Its doors had no locking mechanism. Within the closet there were wires extending from the four (4) electrical circuit panels down to reachable height for ambulating or crawling infants. This condition posed a possible entanglement/strangulation hazard to said infants.

38. The facility had a duty to conduct background checks on its staff members. A review of the twelve (12) staff members' records after Dylan's death revealed that they were missing background checks on eight (8) of the twelve (12) staff members employed at the center.

39. On the day in question, May 25, 2010, there were only two (2) staff members on duty-- Juanita Bell and Dinnette Feeney a/k/a Dennetta B. Thomas a/k/a Donnetta B. Feeney, a/k/a Dimnetta B. Feeney a/k/a Dinnetta B. Feeney ("Feeney"), caring for the infant children between the ages of zero and twenty- four months.

40. On the morning of May 25, 2010, Defendant Bell noticed that Dylan was trying to catch his breath while lying on his stomach in his crib in the infant room. Bell did not inform anyone about this event. Defendant Bell left the facility sometime between 11:30 a.m., and noon for a doctor's appointment despite knowing this was in violation of the applicable guidelines and rules as to the appropriate staff to infant ratio and that it would be contrary to the safety and care of Dylan J. Cummings. After leaving the center, Defendant Bell did not return until after the death of Dylan Jayden Cummings.

41. Defendant Feeney stated that she fed Dylan Jayden Cummings a bottle at approximately 11:15 a.m. She then placed Dylan in the crib on his stomach, contrary to Dylan's parents' instructions and contrary to applicable child care standards.

42. After Dylan Jayden Cummings was placed in the crib on his stomach with his face down into the sheets/mattress, he began to cry and fuss.

43. Despite this warning and indication that this posed a problem to Dylan Jayden Cummings, Defendant Feeney picked Dylan Jayden Cummings up, patted him on the back, and again placed him in the crib on his stomach.

44. Defendant Feeney on behalf of Bethel Temple Church of Deliverance and BTCOD Little Eagles Daycare knew or should have known that this posed a danger to health and safety of Dylan Jayden Cummings due to his habit of placing his head face down. It was especially dangerous as she further knew that there were oversized sheets on this mattress and that this increased the chances of Dylan Jayden Cummings suffocating.

45. Despite being the only staff member present, Feeney then placed a blanket across Dylan Jayden Cummings' legs, turned on music, started a portable floor fan which prevented anyone from hearing any sounds that would be emitted by a struggling child, and left the room to go eat lunch in the main child care room.

46. Further, not only could the infants not be heard from the main child care room, the distance and location away from the room where Defendant Feeney was sitting made it impossible to observe any of the infants or provide any sound supervision.

47. After leaving the infant room, Defendant Feeney failed to properly check on the children to monitor their safety and welfare during the time period of 12:00 p.m. up until the death of Dylan Jayden Cummings in the early afternoon. No one else checked on the infants during that time either.

48. Defendant Feeney failed to properly check on how Dylan Jayden Cummings was doing during the relevant time period herein in that she did not physically walk up to his crib, did not physically touch him, but, at best, may have done a visual scan of the room from the doorway without the light on.

49. Further, Dylan Jayden Cummings' crib was located in the back left hand corner of the room, the furthest corner from the door. During this time, Defendant Feeney ate lunch and

chatted with staff in the large main childcare room and failed to do any inspection for the safety, health and welfare of Dylan Jayden Cummings for at least one (1) hour.

50. The only time Defendant Feeney actually went to check on Dylan Jayden Cummings personally was at around 2:00 p.m., a passage of time of over two (2) hours.

51. At the time Defendant Feeney went to pick up Dylan Jayden Cummings, he was not moving, was on his stomach, and was cold and clammy.

52. When Defendant Feeney picked up Dylan's body, she noted there was vomit and blood on his sheet, (see Exhibit 2 photograph of the crib), and that there was vomit or liquid coming out of Dylan's mouth. The church's janitor initiated CPR. Paramedics arrived at around 2:10 p.m., and took over performing CPR on Dylan. Dylan was eventually pronounced dead at the scene.

53. It was further noted that Defendant Feeney was employed to work at said facility as of March 5, 2010, less than three months prior to Dylan's death.

54. From the time of her employment Defendant Feeney received no training from BTCOD and LED nor did she have any CPR or First Aid certification.

55. At all times relevant hereto Defendants BTCOD and LED, by and through its employees and agents, failed to have appropriate staffing in place between the hours of 12:00 p.m., and 2:00 p.m., on a daily basis knowing that this was in violation of applicable standards.

56. At all relevant times herein, the facility had been instructed by Betsy Cummings to only place Dylan on his back when sleeping.

57. At all times relevant hereto there was no baby monitor in use to help monitor the welfare of the children through sound supervision.

58. On May 25, 2010 BTCOD Little Eagles Daycare had eighteen (18) children over the age of two and half (2 ½) years in care, in violation of the center's City of Norfolk exemption and certificate of use and occupancy, which allowed for only nine (9) children of two and one-half (2 ½) years and younger to be cared for at one time.

59. On May 25, 2010, none of the staff members had the criminal background checks required by the Virginia Code Section 63.2-1724. Five (5) of the staff members had not signed a sworn disclosure statement required by Virginia Code Section 63.2-1724.

60. BTCOD and LED had failed to obtain the clearance of the child protective service central registry for two (2) staff members.

61. On May 25, 2010, BTCOD and LED had failed to have written disclosure to the parents or guardians of the children in the center stating that the center is exempt from licensure as required by Virginia Code Section 63.2-1716(A).

62. On May 25, 2010, BTCOD and LED by and through its agents, representatives, and employees failed to provide Dylan Jayden Cummings' parents a written statement describing the physical facilities, enrollment capacity, food services, health requirements for the staff members and public liability insurance pursuant to Virginia Code Section 63.2-1716(A)(6).

63. On May 25, 2010, BTCOD and LED had failed to demonstrate compliance with First Aid Certification of staff members as required by Virginia Code Section 63.2-1716(B)(4).

64. On May 25, 2010, BTCOD and LED had failed to demonstrate compliance with ensuring immunization of children in daycare as required by Virginia Code Section 63.2-1716(B)(5).

65. Further, BTCOD and LED had inadequate staff supervision when it failed to demonstrate that the facility was free of open and obvious hazards as required by Virginia Code

Section 63.2-1716(B)(6) and that the infant room was poorly lit, that five (5) out of ten (10) cribs in use had loose fitting sheets including Dylan Jayden Cummings, which posed a suffocation hazard and would cause difficulty in trying to breathe to the infants in care and other hazard including but not limited to Dylan Jayden Cummings.

66. The aforesaid defendants, individually and collectively, acted negligently, carelessly, and recklessly when they failed to comply with the aforesaid statutes, failed to properly warn and advise the parents of Dylan Jayden Cummings, failed to properly check, had inadequate staffing, had improper fitting sheets on Dylan Jayden Cummings' crib, failed to properly monitor either visually or by sound supervision, negligently, improperly placed Dylan Jayden Cummings on his stomach, and for all the reasons referenced herein and as a direct result of this carelessness, recklessness and negligence of the defendants, this proximately resulted in the death of Dylan Jayden Cummings.

COUNT II – NEGLIGENT HIRING AND RETENTION

67. Paragraphs 1 through 66 are incorporated by reference as if stated herein.

68. BTCOD and LED by and through their employees, agents, and representatives were negligent in that they improperly hired, retained, and failed to properly train Juanita Bell, Dinnette Feeney a/k/a Dennetta B. Thomas a/k/a Donnetta B. Feeney, a/k/a Dimnetta B. Feeney a/k/a Dinnetta B. Feeney, and Angel Hoskie. Further, failed to do criminal background checks.

69. On information and belief, these individuals did not have proper training with regard to childcare, had not had sufficient information and knowledge when hired to properly care for a child or how to monitor a child at the age of Dylan Jayden Cummings, failed to offer CPR and other safety training necessary and a prerequisite for caring of children of a tender age.

70. The entities by and through their employees, agents, and representatives knew or should have known that the individuals so named, Juanita Bell, Dinnette Feeney a/k/a Denmetta B. Thomas a/k/a Donnetta B. Feeney a/k/a Dimnetta B. Feeney a/k/a Dinnetta B. Feeney, and Angel Hoskie, should not have been hired with the extent of training knowledge that they had, and they retained them notwithstanding this and further failed to do the necessary and proper training with regard to knowledge of how to care for a child of this age, and with regard to having the appropriate training with regard to First Aid and CPR.

71. As a direct and proximate result of the BTCOD and LED's improper hiring, retention of these individual defendants, this led to and was a proximate cause of the death of Dylan Jayden Cummings.

COUNT III VIOLATION – VIRGINIA CONSUMER PROTECTION ACT

72. Paragraphs 1 through 71 are incorporated by reference as if stated herein.

73. Defendant Hoskie at all times acting on behalf of BTCOD and LED as an authorized representative, agent, employee, provided child care services to Dylan Jayden Cummings for the relevant time period.

74. BTCOD and LED by and through Angel Hoskie, an authorized representative, agent, employee, advised both Betsy Cummings and Edgar Trujillo, Jr. acting on behalf of their son Dylan Jayden Cummings 1) that all workers at the facility were qualified in childcare, 2) that they had undergone background checks, and that that should not be a concern, 3) that with regard to the care of Dylan Jayden Cummings, that he would be watched at all times, that there would be a person observing/in the room at all times while Dylan Jayden Cummings was present, 4) that they had individuals that were First Aid qualified and one would always be on duty for that

age group of children, and 5) that there were ratios that were required by the state that they would be in full compliance with.

75. Betsy Cummings and Edgar Trujillo, Jr. acting on behalf of their son Dylan Jayden Cummings were advised of the aforesaid statements stated herein in mid February of 2010 and relied upon the aforesaid statements stated herein in making their determination to enroll and have Dylan Jayden Cummings cared for by and through BTCOD and LED.

76. At the time said statements were made to Betsy Cummings and Edgar Trujillo, Jr. by Angel Hoskie they believed them to be true and accurate and relied on these misrepresentations in placing Dylan Jayden Cummings in daycare with the defendants and leaving him there until his death.

77. At all times relevant herein to the decision for child care and actually child care of Dylan Jayden Cummings, Defendant Hoskie and BTCOD and LED through the defendants, their agents, employees, representatives, possessed express knowledge in the manner in which the child care would be provided including and not limited to complying with statutory ratios, conducting the appropriate background checks on all employees, observing Dylan Jayden Cummings at all times, and having individuals that were First Aid trained and people that were properly trained and qualified in watching a child of Dylan Jayden Cummings' age.

78. At all times relevant hereto Defendant Hoskie was acting as agent, representative, employee, and within the scope of her employment/agency, when she made the aforesaid statements which were false in nature and constituted misrepresentations.

79. Pursuant to Section 59.1-200 of the Code of Virginia, and related sections, defendants BTCOD and LED by and through Hoskie and its agents, representatives, or employees, used constructive fraud, false pretense, false promise, misrepresentation as noted

above in connection with this consumer transaction, which included the service of providing child care in a safe and adequate manner.

80. The providing and conduct of child care for children which are in question in this action constituted a consumer transaction and service as provided by Defendants BTCOD and LED which was the supplier as defined in Section 59.1-198 of the Code of Virginia.

81. The plaintiffs herein relied on the aforesaid statements which constituted fraud, made innocently and/or negligently, deception, false pretense, false promise, and misrepresentations.

82. The statements made by the aforesaid defendants caused these plaintiffs to accept and enroll their child in to the LED facility for child care service agreeing Dylan Jayden Cummings would be watched in a safe and adequate manner and in which caused them to use the facility in question on more than one occasion.

83. Pursuant to Section 59.1-200(A5) of the Code of Virginia, as amended, BTCOD and LED by and through its employees, agents, representatives, and specifically Angel Hoskie, misrepresented the character of the services that would be provided to Dylan Jayden Cummings as referenced in the statements noted herein.

84. BTCOD and LED by and through their agents, representatives, employees, specifically Angel Hoskie further breached 59.1-200 (A6) of the Code of Virginia, as amended, by the aforementioned statements as that the services provided and as to the quality of service provided to Dylan Jayden Cummings were not of a particular standard as misrepresented.

85. BTCOD and LED by and through its agents, representatives, employees, including but not limited to Angel Hoskie further breached Section 59.1-200(14) of the Code of

Virginia in connection with the quality of services provided, the quality of staffing that existed, and the overall care at the facility in question.

86. As a result of the aforesaid violations of Section 59.1-200 and the subsections hereby stated said statements were relied upon by the parents of Dylan Jayden Cummings which resulted in his placement in the facility until his death.

87. As a result of the improper quality of services and facility, Dylan Jayden Cummings died as a direct result thereof and as a result of this misrepresentation which resulted in his placement there.

COUNT IV – VIOLATION OF VIRGINIA CONSUMER ACT
ACTUAL FRAUD

88. Paragraphs 1 through 87 are incorporated by reference as if stated herein

89. Notwithstanding the above, in any alternative BTCOD and LED by and through its agents, representatives, employees, including but not limited to Angel Hoskie, made false misrepresentations on material facts on or about mid February of 2010. Said statements were made intentionally and/or knowingly with the intent to mislead and which the plaintiffs relied upon to their detriment.

90. The actual fraud occurred when the plaintiffs were specifically advised by Angel Hoskie as agent, representative, employee of BTCOD and LED that 1) all workers at the facility were qualified in child care, 2) that they had undergone background checks, and that that should not be a concern, 3) that with regard to the care of Dylan Jayden Cummings, that he would be watched at all times, that there would be a person observing/in the room at all times while Dylan Jayden Cummings was present, 4) that they had individuals that were first aid qualified and one would always be on duty for that age group of children, and 5) that there were ratios that were required by the state that they would be in full compliance with.

91. BTCOD and LED by and through its agents, representatives, employees, including but not limited to Angel Hoskie, had actual knowledge due to their expertise and knowledge with regard to the staff of the defendant entities as to the lack of training, violation of ratios, lack of having individuals present with proper CPR training, lack of training being provided by the defendant entities, the lack of proper observation both visually and by sound.

92. Pursuant to Section 59.1-200(A5) of the Code of Virginia, BTCOD and LED by and through Angel Hoskie and others, misrepresented that the services that were provided would have certain qualities and characteristics, benefits and uses.

93. Said defendants did make actual misrepresentations, false promises, made false pretenses and misrepresentations with regard to the character of the child services provided.

94. These statements were made on about mid February of 2010. See paragraph 86 and said statements which are incorporated by reference were willfully and made with reckless conscious disregard of the rights of Betsy Cummings, Edgar Trujillo, Jr. and Dylan Jayden Cummings.

95. The defendants entities BTCOD and LED by and through Angel Hoskie and its agents, representatives, employees, acting within the scope of their employment further breached Section 59.1-200(A6) of the Code of Virginia, as amended, by making the aforesaid statements as outlined herein, see paragraph 86, and these were misrepresentations of fact, false pretense, and false promise as to the standard and quality and/or mode of child care services that would be provided.

96. The defendants BTCOD and LED by and trough Angel Hoskie or any of its agents, representatives, employees, at said time further made false statements of facts, statements

of false pretenses, statements of false promise with regard to the fact as to the quality of services. They stated specifically as to the statements previously made herein.

97. At all times relevant hereto BTCOD and LED by and through Angel Hoskie, and its other agents, representatives, employees, failed to disclose the fact that there was no one qualified to provide CPR on the date and time of Dylan Jayden Cummings' death, failed to disclose that not all individuals were qualified in child care, failed to disclose and warn that not every individual had background checks.

98. The plaintiffs herein relied to their detriment on the aforesaid false representations of fact, fraud, false pretense, and false promises made by BTCOD and LED by and through Angel Hoskie and its agents, representatives, employees, while acting within the scope of their employment, which caused the plaintiffs herein to place Dylan Jayden Cummings in the child care services of the defendants entities. This substantial reliance on said misrepresentations caused the factors which substantially led to and were the proximate cause of the death of Dylan Jayden Cummings.

COUNT V – COMMON LAW FRAUD

99. The allegations contained in paragraphs 1 through 98 are incorporated by reference as if fully set forth herein.

100. Additionally, the defendants knew from their prior experience in providing daycare that, as a private daycare center, they would be subject to regular inspections by the Commonwealth of Virginia Department of Social Services, but, as a religious exempt daycare center, they would not be subject to inspections, unless and only if a complaint was made to Social Services.

101. The defendants failed to advise the plaintiffs of the fact that their daycare center was exempt from licensure and not subject to regular inspections by the Commonwealth of Virginia and suppressed that information from the plaintiffs. The defendants failed to disclose the qualifications of the personnel employed by them. The defendants likewise failed to disclose to the parent plaintiffs that no criminal background checks had been performed on any of the staff members who would be, and were, caring for their child. The defendants also failed to disclose that no staff members with First Aid or CPR training would be present at the daycare center at times when the parent plaintiffs' child was under the defendants' care. Defendant Tammy Futtrell failed to disclose that, previously, as an operator of a private child daycare center, she and her facility had been subject to Department of Social Services violations.

102. The foregoing information that was not disclosed to and was suppressed from the plaintiffs were material facts that the plaintiffs reasonably relied upon, which caused the plaintiffs to leave their child with the defendants instead of taking him to a daycare center subject to regular inspections by the Commonwealth of Virginia and which had done criminal background checks on its staff and had staff members with First Aid training.

103. As a direct result of the foregoing fraud and misrepresentations, the plaintiffs suffered damages, including, but not limited to, the death of their minor child and other damages.

COUNT VI - NEGLIGENCE *PER SE*

104. The allegations contained in paragraphs 1 through 103 are incorporated by reference as if fully set forth herein.

105. Defendants, jointly and severally, were *per se* negligent in failing to comply with federal, state, and local building codes, intended to protect the safety of persons, including Dylan Jayden Cummings, including, but not limited to, Va. Code §§ 63.2-1716(A); 63.2-1716(A)(3);

63.2-1716(A)(6); 63.2-1716(B)(2); 63.2-1716(B)(4); 63.2-1716(B)(6); 63.2-1724; City of Norfolk Certificate of Use & Occupancy, no. 07-5819; among others, as discovery in this case reveals.

106. The Defendants' joint and several *per se* negligence, was a direct and proximate cause of the death of Dylan Jayden Cummings.

COUNT VII – GROSS NEGLIGENCE

107. The allegations contained in paragraphs 1 through 106 are incorporated by reference as if fully set forth herein.

108. The aforementioned paragraphs which are incorporated herein establish that the defendants jointly and severally did with utter disregard of prudence amounting to complete neglect of the safety of Dylan Jayden Cummings and that it was the aforementioned conduct that was heedless and a violation of legal duties respecting the rights of others which amounts to the form of reckless and/or total disregard of the safety, welfare, and health of Dylan Jayden Cummings and to his parents.

109. That the accumulative affect of the aforementioned conduct referenced herein constituted such conduct so as to constitute gross negligence.

110. Wherefore, as a result of the foregoing actions of the named defendants herein, that their conduct constituted a willful and wanton conduct and/or gross negligence and/or negligence and/or violation of the Virginia Consumer Protection Act whereas to evince a consciences and willful disregard for the health and safety of Dylan Jayden Cummings who was in their charge.

111. That the defendants' conduct individually and collectively was so reckless and then different to the health and safety of the deceased infant that it constitutes, at a minimum, gross negligence.

112. Wherefore, as a result of the aforementioned conduct, the decedent Dylan Jayden Cummings is survived by his statutory beneficiaries Betsy Cummings (mother) and Edgar Trujillo, Jr., (father). These beneficiaries have sustained financial and pecuniary loss as a result of the death of plaintiff's decedent and have suffered severe mental anguish at the loss of Dylan Jayden Cummings' company and counsel.

COUNT VIII -PUNITIVE DAMAGES

113. The allegations contained in paragraphs 1 through 112 are incorporated by reference as if fully set forth herein.

114. The Defendants' foregoing described acts and inaction constituted willful and wanton conduct and/or conduct in conscious disregard for the rights and safety of Dylan Jayden Cummings. The foregoing described acts and inaction, combined with some or all of the aforesaid acts of simple negligence and gross negligence, in combination, constitute a conscious disregard for the rights and safety of others, including Dylan Jayden Cummings

PRAYER FOR RELIEF

115. Wherefore, as to all counts herein the plaintiffs claim damages against the defendants jointly and severally in the amount of FIVE MILLION DOLLARS (\$5,000,000.00) pursuant to Section 8.01-52 of the Code of Virginia (1950), as amended, on behalf of the decedent's beneficiaries as follows:

- a) for funeral expenses of the decedent,
- b) for sorrow mental anguish and loss of decedent's company,

c) for decedent's loss by statutory beneficiaries.

116. Wherefore, pursuant to the Virginia Consumer Protection Act for actual fraud the plaintiffs seek treble damages and reasonable attorneys fees and costs as permitted by the Virginia Consumer Protection Act.

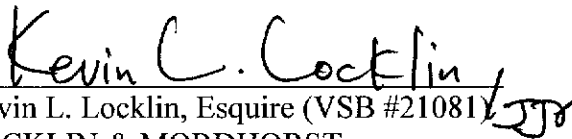
117. The plaintiffs seek punitive damages against each defendant in the amount of THREE HUNDRED AND FIFTY THOUSAND DOLLARS (\$350,000.00).

118. The plaintiffs further seek the prejudgment and post judgment interest at the legal rate, and for costs, as allowed by law.

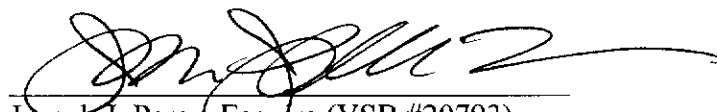
Jury Demand

The Plaintiff demands a jury on all issues herein including trial.

BETSY CUMMINGS AS ADMINISTRATOR OF THE
ESTATE OF DYLAN JAYDEN CUMMINGS, DECEASED,
AND BETSY CUMMINGS AND EDGAR TRUJILLO, JR.,
Individually
By Counsel



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Co-Counsel for Plaintiffs

CERTIFICATE/LETTER OF QUALIFICATION
COMMONWEALTH OF VIRGINIA
VA. CODE §§ 6.2-893, 6.2-1171, 6.2-1365, 6.2-1367, 37.2-1011, 64.1-122, 64.1-128

Court File No. 120001373

Norfolk Circuit Court

I, the duly qualified clerk/deputy clerk of this Court, **CERTIFY** that on May 22, 2012
DATE

Betsy K. Cummings
NAME(S) OF PERSON(S) QUALIFYING

duly qualified in this court, under applicable provisions of law, as **Administrator** under Va. Code § 8.01-50
of the estate of

Dylan Jayden Cummings
 DECEASED MINOR INCAPACITATED

The powers of the fiduciary(ies) named above continue in full force and effect.

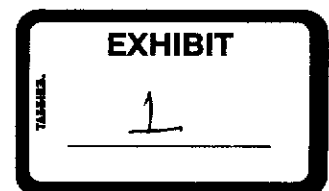
\$5,000.00 bond has been posted.

Given under my hand and the seal of this Court on

May 22, 2012
DATE

George E. Schaefer, Clerk

by *[Signature]*, Deputy Clerk





A WARNING: Infants can suffocate. Do not use this sheet on a cot, crib, or playpen. Use ONLY on a bed. Do not use on a sofa or chair. NEVER add a mattress, pillow, or blanket to a cot, crib, or playpen. Use ONLY as directed by manufacturer.

EXHIBIT

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