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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-001218
Case No. 2018-CP-40-4835

Joseph P. Sellaro, ... Respondent,

v.

The South Carolina Department of Social Services
and the Richland County Sheriff's Department, ... Defendants,

Of which, The South Carolina Department of
Social Services is the..... Appellant.

INITIAL BRIEF OF APPELLANT

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

LAKE E. SUMMERS
MALONE THOMPSON
SUMMERS & OTT, LLC
339 Heyward Street, Suite 100
Columbia, South Carolina 29201
(803) 254-3300

Counsel for Appellant

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in denying the Appellant's directed verdict and JNOV motions on the false imprisonment and negligence causes of action where the Seventy-Two Hour Hearing Order issued by the Family Court on March 1, 2016, conclusively establishes that probable cause existed for the Emergency Protective Custody from February 27, 2016 through March 7, 2016, and that order is not subject to collateral attack?

II. Did the trial court err in denying the Appellant's directed verdict and JNOV motions on the false imprisonment and negligence causes of action where the Appellant was entitled to absolute sovereign immunity pursuant to S.C. Code Ann. §§ 15-78-60(1)-(4) of the Tort Claims Act?

III. Did the trial court err in denying the Appellant's directed verdict and JNOV motions on the negligence cause of action where the Respondent failed to present expert testimony to establish the standard of care owed by the SCDSS employees and a breach of that standard of care?

IV. Did the trial court err in denying the motion for new trial absolute because the Tort Claims Act immunity defenses were submitted to the jury rather than being adjudicated as an issue of law?

V. Did the trial court err in denying the motion for new trial absolute where the verdict of $300,000 is unsupported by the damages evidence in the record?

VI. Did the trial court err in denying the motion for new trial absolute or alternatively motion for new trial nisi remittitur where the verdict of $300,000 is grossly excessive or, at the very least, unduly liberal?

STATEMENT OF THE CASE

This is an action for false imprisonment and negligence brought by the Respondent Joseph P. Sellaro against the Appellant South Carolina Department of Social Services ("SCDSS"). The action was also brought against the Defendant Richland County Sheriff's Department ("RCSD").

After the completion of discovery, the case proceeded to trial on May 16, 2022, before Circuit Court Judge Robert E. Hood and a Richland County jury. SCDSS moved for a directed verdict at the close of Sellaro's case-in-chief, again at the close of the Defendant RCSD's case-in-chief, and at the close of the evidence. The trial court denied those motions.

On May 19, 2022, the jury returned a verdict in favor of Sellaro on both the false imprisonment and negligence claims against SCDSS only. The jury found that the Defendant RCSD was not negligent and did not falsely imprison Sellaro. (Verdict Form). The jury awarded actual damages of $300,000 against SCDSS.

SCDSS thereafter filed post trial motions including for judgment notwithstanding the verdict (JNOV), or alternatively, a new trial absolute or a new trial nisi remittitur. A hearing was held on the post-trial motions on July 28, 2022. Thereafter, on August 3, 2022, the trial court issued a Form Order denying all of the post-trial motions.

SCDSS thereafter filed a timely appeal to this Court.

STATEMENT OF FACTS

On the evening of Saturday, February 27, 2016, Joseph Sellaro's wife, Eileen, died after a motor vehicle accident in Columbia, South Carolina. Richland County Deputy Coroner Zemulus Dozier, along with Carol Ann Outlaw, a close friend of the late Mrs. Sellaro, traveled to Sellaro's home to notify him of his wife's death. Investigator Reggie Gaymon, who serves in the Victim Advocacy Division of Richland County Sheriff's Department, Deputy Karen Wolf, and Master Deputy Edward Guyon also responded to Sellaro's home.

Deputy Coroner Dozier and Investigator Gaymon eventually requested assistance from Richland County's Emergency Services Department, and both a paramedic and emergency medical technician responded to their request.

Carol Ann Outlaw provided the sheriff's deputies with specific information regarding Joseph Sellaro's medical conditions which included dementia, a heart condition with a pacemaker, asthma, and diabetes. Outlaw also advised that Sellaro did not drive and could not take care of himself alone.

As neither Deputy Coroner Dozier, Investigator Gaymon, nor Deputy Wolf could locate anyone to care for or otherwise assist Sellaro in the immediate aftermath of his wife's death, Investigator Gaymon placed Sellaro into Emergency Protective Custody ("EPC") under S.C. Code Ann. § 43-35-55 in the late evening hours of Saturday, February 27, 2016.

The EMS personnel then transported Sellaro to Palmetto Health Richland Hospital in Columbia, and, upon his admission between midnight and 1:00 a.m. on Sunday, February 28, 2016, Sellaro was transferred into SCDSS' care in accordance with S.C. Code Ann. §§ 43-35-45 and 43-35-55. Valorie Lawton-McDaniel, an SCDSS Adult Protective Services case manager, assumed Sellaro's case upon his admission to the hospital and after being placed in EPC. SCDSS personnel played no role in the placement of Sellaro in EPC.

SCDSS timely complied with S.C. Code Ann. §§ 43-35-55(E), (F), and (G). S.C. Code Ann. § 43-35-55(F) requires the Family Court to "hold a hearing to determine whether there is probable cause for the protective custody within seventy-two hours of the Department of Social Services filing the petition [for protective custody required by S.C. Code Ann. § 43-35-55(E)], excluding Saturdays, Sundays, and legal holidays." In compliance with the applicable statutes, Family Court Judge James G. McGee, III conducted a 72-hour Probable Cause Hearing on Tuesday, March 1, 2016, and afterwards, he issued what he styled the Seventy-Two Hour Hearing Order. (RCSD Ex. 1). In paragraph 4 of that order, Judge McGee issued the following ruling:

> The above facts clearly establish that there was ample probable cause for taking [Mr. Sellaro] into [EPC], and probable cause remains for [SCDSS] being ordered to have custody of [Mr. Sellaro] pending Merits Hearing. Based on the above information, [Mr. Sellaro], is a vulnerable adult, as defined by S.C. Code Ann. § 43-35-10(11) (Supp. 2012), as he is a person

> eighteen (18) years of age or older who is impaired in his ability to adequately provide for his own care and protection, and [Mr. Sellaro] is not being adequately cared for by others.

(RCSD Ex. 1). By his Seventy-Two Hour Hearing Order, Judge McGee granted SCDSS temporary legal custody of Joseph Sellaro, along with "the right to provide for and to authorize such routine and/or emergency medical case as may be required." (RCSD Ex. 1).

On Thursday, March 3, 2016, the Family Court appointed a Guardian ad Litem for Sellaro named Victoria Deas-Johnson. After communicating with the guardian ad litem on March 4, 2016, J. Tyler Burns, who then served as a staff counsel for SCDSS, agreed to schedule a hearing before the Family Court on the next business day, Monday, March 7, 2016, regarding Sellaro's EPC status.

At the hearing conducted on March 7, 2016, which served as the "merits hearing" required under S.C. Code Ann. § 43-35-45(C), SCDSS consented to end Mr. Sellaro's EPC, and Sellaro returned home the same day. A Bench Order was issued on that date by Family Court Judge John M. Rucker dismissing the EPC case. (Pl. Ex. 3).

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

"In an action at law, on appeal of a case tried by a jury, [appellate courts] may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 142 (2010).

"Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." *Austin*, 691 S.E.2d at 149.

ARGUMENTS

I. The trial court erred in denying the Appellant's directed verdict and JNOV motions on both the negligence and the false imprisonment claims.

The trial court erred in denying SCDSS's directed verdict and JNOV motions on both the negligence and the false imprisonment causes of action. The trial court erred in concluding that the existence of probable cause for the EPC was a question for the jury when, in actuality, a conclusive finding of probable cause had already made by the Family Court in a valid and lawful order issued pursuant to S.C. Code Ann. § 43-35-55(F). The trial court also erred in denying a directed verdict and JNOV on immunity defenses asserted pursuant to the South Carolina Tort Claims Act and given Sellaro's failure to establish a standard of care by expert testimony.

A. Existence of Probable Cause

The Appellant SCDSS is entitled to a directed verdict and JNOV as to all claims because there was probable cause as a matter of law supporting the RCSD taking Sellaro into EPC on February 27, 2016, and for the Family Court to order the continuation of custody until the merits hearing was held on March 7, 2016.

Under South Carolina law, causes of action for false arrest and false imprisonment are the same. *See, Carter v. Bryant*, 429 S.C. 298, 838 S.E.2d 523, 527 (Ct. App. 2020) ("[f]alse arrest in South Carolina is also known as false imprisonment"). "The elements of the tort are intentional restraint of another without lawful justification." *Id*. "In order to establish a cause of action, the evidence must prove: (1) that the defendant restrained the plaintiff; (2) that the restraint was intentional; and (3) that the restraint was unlawful." *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 377 S.E.2d 127, 130 (Ct. App. 1989).

SCDSS is entitled to a directed verdict and JNOV on all claims because there was probable cause for the EPC and the continuation of custody through March 7, 2016. In effect, the existence of probable cause makes the restraint lawful, and hence, Sellaro's claims fail for that reason. South Carolina courts have consistently ruled that the absence of probable cause is an essential element for the state law causes of action for false imprisonment. *See, Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 665, n. 4 (Ct. App. 2005). Thus, a finding of probable cause is fatal to that claim.

In addition, as a technical matter, a cause of action for "negligent imprisonment" or "negligent investigation" is not actually recognized under South Carolina law. In *Gist v. Berkeley County Sheriff's Department*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), the South Carolina Court of Appeals held that "[f]alse

imprisonment is an intentional tort; negligence is not an element." 521 S.E.2d at 167. Accordingly, the Court of Appeals concluded that "the gross negligence standard is not applicable" to claims for intentional torts. *Id*. Consequently, as the *Gist* decision demonstrates, there is really no separate cause of action for negligent imprisonment or negligence resulting in a false imprisonment or custodial situation. Sellaro's negligence claim is, therefore, really a reiteration or duplication of his false imprisonment claim. Therefore, the existence of probable cause is also a bar to a cause of action for negligent imprisonment, assuming such a cause of action exists under South Carolina law. In other words, SCDSS cannot be found negligent where there was probable cause to support its actions with respect to the EPC and continuation of custody of Sellaro until March 7, 2016.

The evidence in the record that probable cause existed is undisputed but more importantly unassailable. The Family Court held a Seventy-Two Hour Probable Cause Hearing on March 1, 2016, in accordance with S.C. Code Ann. §§ 43-35-45(B) and 43-35-55(F). The record includes both the transcript of the Seventy-Two Hour Probable Cause Hearing and the Seventy-Two Hour Hearing Order that Judge McGee issued afterwards. In paragraph 4 of that order, Judge McGee ruled as follows:

> The above facts clearly establish that there was ample probable cause for taking the [Plaintiff] into [EPC], and *probable cause remains for [SCDSS] being ordered to have custody of [the Plaintiff] pending Merits Hearing*. Based on the above

> information, [the Plaintiff], is a vulnerable adult, as defined by S.C. Code Ann. § 43-35-10(11) (Supp. 2012), as he is a person eighteen (18) years of age or older who is impaired in his ability to adequately provide for his own care and protection, and [the Plaintiff] is not being adequately cared for by others.

(RCSD Exhibit 1). (Emphasis added).

Sellaro, however, is prohibited from collaterally attacking that order by the Family Court and its findings of fact and conclusions of law. Our Supreme Court's decision in *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 710 S.E.2d 67 (2011), is controlling. *Argoe* was a civil action for false imprisonment, defamation, and intentional infliction of emotional distress arising from an involuntary commitment of the plaintiff to an inpatient psychiatric facility. The plaintiff's tort claims were premised on the allegation that the commitment orders of the Probate Court were not "lawful" and were not factually supported. Based on that premise, the plaintiff argued that the inpatient psychiatric facility was not justified in detaining her. As addressed in detail in its opinion, the Supreme Court concluded that the plaintiff "is procedurally barred from challenging the validity of the underlying orders" and "[b]ased on the valid orders, we conclude that the circuit court judge correctly granted summary judgment in favor of Respondent." 710 S.E.2d at 71.

As the facts in *Argoe* demonstrate, the plaintiff failed to timely appeal the commitment orders issued by the Probate Court. The Supreme Court found the

commitment orders to be valid and "lawful." Moreover, the Supreme Court ruled that "[plaintiff] was precluded from collaterally attacking the underlying commitment orders" where the commitment orders had not been timely appealed. 710 S.E.2d at 72. In adjudicating the plaintiff's false imprisonment claim, the Supreme Court held that the plaintiff "was lawfully taken into custody and detained pursuant to valid probate court orders." 710 S.E.2d at 73. Citing an article from *American Jurisprudence*, the Supreme Court explained:

> A person confined pursuant to an authorized mental health commitment proceeding or process may not recover damages in a false imprisonment action. In accordance with the general rule dealing with confinement under process, even where the order of commitment is erroneously made, but is valid on its face and issued by a court of competent jurisdiction, the detention is not false imprisonment.

Id., *citing* 32 Am.Jur.2d *False Imprisonment* § 33 (2007). The Supreme Court also cited favorably to the case of *Manley v. Manley*, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987), in which this Court concluded that "[the] involuntary commitment of [a] mother, who claimed she was not mentally ill, was pursuant to a lawful order of the probate judge and, thus, was not a basis for recovery on a claim of false imprisonment against former husband, two adult children, and psychiatrist." *Id*., *citing Manley, supra*.

In effect, the issue of probable cause is conclusively established by the Family Court's Seventy-Two Hour Hearing Order, and that order is not subject to

collateral attack in this litigation, just as was the case with the Probate Court commitment orders in *Argoe*. The Family Court order, whether correct or not, was valid on its face and was issued by a court of competent jurisdiction in accordance with S.C. Code Ann. §§ 43-35-45(B) and 43-35-55(F). There is no evidence that Sellaro timely appealed that Family Court order or that an appellate court reversed or vacated that order.[1] However, by allowing Sellaro to contest the issue of probable cause, despite the findings made by Judge McGee in an order that was never appealed or challenged, the trial court improperly allowed Sellaro to collaterally attack a valid and lawful Family Court order, which is akin to the commitment orders addressed in *Argoe*.

The Family Court order bars not only the false imprisonment claim, but Sellaro's negligence claim as well. According to the allegations of his Complaint, Sellaro's negligence claim is duplicative of the false arrest claim in that Sellaro alleges that SCDSS was negligent in "apprehending Plaintiff," "taking custody of Plaintiff," "retaining custody over the Plaintiff," and "refusing to relinquish custody and allow Plaintiff to leave hospital for ten days." *See*, Complaint, ¶ 30. (R. ___). In *Argoe*, the Supreme Court found that the other tort claims, not just the false imprisonment claim, were barred by the valid and lawful commitment orders.

[1] Likewise, there is no evidence that Sellaro sought a writ of habeas corpus to challenge and invalidate that Family Court order. *See*, *Muhammad v. Geo Care*, 2011 WL 5827612, *1 (D.S.C. 2011) ("[c]laims challenging involuntary commitments to mental institutions are cognizable under 28 U.S.C. § 2254").

The Supreme Court, in fact, held that plaintiff "could not, as a matter of law, maintain a claim for intentional infliction of emotional dismiss against Respondent as Respondent's conduct towards [plaintiff] was reasonable and in accordance with the valid probate court orders." *Argoe*, 710 S.E.2d at 74. The same is true in this case. The valid and lawful Family Court order precludes Sellaro's recovery on all tort claims, including his negligence claim.

In sum, based on the conclusive showing that probable cause existed for the EPC and the continued custody of Sellaro following the March 1, 2016 hearing, SCDSS is entitled to a directed verdict and JNOV on both the false imprisonment claim and the negligence claim.

B. Tort Claim Act Immunities

Even if the trial court was correct in finding that the issue of probable cause was for the jury, despite the finding of probable cause in the valid and lawful Family Court order, the Appellant SCDSS was nonetheless entitled to absolute immunity under the Tort Claims Act.[2] S.C. Code Ann. § 15-78-60(3) precludes liability for a governmental agency for the "execution, enforcement, or

[2] In *Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), the Court of Appeals explained that "[o]ne who pleads immunity, conditionally admits the plaintiff's case, but asserts his immunity as a bar to liability." 374 S.E.2d at 916. Therefore, the assertion of any immunity defense assumes some finding of fault but nonetheless serves as a bar to liability.

implementation of the orders of any court or execution, enforcement, or lawful implementation of any process." S.C. Code Ann. § 15-78-60(3). Similarly, S.C. Code Ann. § 15-78-60(4) precludes liability for a governmental agency for the "[a]doption, enforcement, or compliance with any law." S.C. Code Ann. § 15-78-60(4). These provisions tend to work in tandem.

As the undisputed facts demonstrate, SCDSS assumed jurisdiction of Sellaro at Palmetto Health Richland Hospital in the early morning hours of Sunday, February 28, 2016, from the RCSD after the RCSD placed him into EPC in compliance with S.C. Code Ann. §§ 43-35-55(A), (B), (C), and (D). Thereafter, the record is conclusive that SCDSS enforced and complied with the procedures established by statute, namely S.C. Code Ann. §§ 43-35-45(B) and 43-35-55(D), (E), (F), and (G). The standard applicable to the RCSD's decision to take the Plaintiff into EPC was whether "there [was] probable cause to believe that by reason of abuse, neglect, or exploitation there exists an imminent danger to the vulnerable adult's life or physical safety." *See*, S.C. Code Ann. § 43-35-55(A)(1). SCDSS did not make the decision to place Sellaro in EPC. Instead, SCDSS complied with S.C. Code Ann. §43-35-55(E), and the Family Court timely conducted its March 1, 2016 Probable Cause Hearing pursuant to S.C. Code Ann. § 43-35-55(F), and thereafter issued its Seventy-Two Hour Hearing Order. (RCSD Exhibit 1).

Sellaro and the trial court were critical that SCDSS personnel did not provide a copy of medical records or a psychological report to Family Court Judge James McGee at the March 1, 2016 hearing; however, that was not required by the statutory scheme. In fact, there is no evaluation of the vulnerable adult that is required prior to the Probable Cause Hearing. Instead, S.C. Code Ann. § 43-35-45(D) states: "*Before the hearing on the merits* the Adult Protective Services Program must conduct a comprehensive evaluation of the vulnerable adult." S.C. Code Ann. § 43-35-45(D). (Emphasis added). That comprehensive evaluation, by statute, must include "if needed, a medical psychological, social, vocational, or educational evaluation." S.C. Code Ann. § 43-35-45(D)(4). Moreover, the statute defines when that evaluation must be provided to the Family Court: "A copy of the evaluation must be provided to the court, the guardian ad litem, and the attorney at least five working days before the hearing on the merits." S.C. Code Ann. § 43-35-45(D). There is no statutory requirement for any psychological evaluation to be provided to the Family Court prior to or at the Probable Cause Hearing.

In sum, SCDSS complied with the procedures established by S.C. Code Ann. § 43-35-55(D), (E), (F), and (G), upon assuming jurisdiction of Sellaro from the RCSD at Palmetto Health Richland Hospital in the early morning hours of Sunday, February 28, 2016 until Monday, March 7, 2016, the date upon which the

Family Court conducted a hearing at which it ended the EPC and Sellaro was discharged. Accordingly, SCDSS is entitled to absolute sovereign immunity pursuant to S.C. Code Ann. § 15-78-60(4).

Additionally, between March 1, 2016 and March 7, 2016, SCDSS complied with the provisions of the Seventy-Two Hour Hearing Order. Accordingly, because it complied with a valid and lawful court order, SCDSS is entitled to absolute sovereign immunity pursuant to S.C. Code Ann. § 15-78-60(3). That is true regardless of whether that order was correctly decided or entered, although as explained above based on the Supreme Court's decision in *Argoe*, *supra*, Sellaro is nonetheless precluded from collaterally attacking the Family Court's Seventy-Two Hour Hearing Order, just as the commitment orders in *Argoe* could not be collaterally attacked as a matter of law.

Furthermore, in its jury instructions, the trial court correctly found that S.C. Code Ann. §§ 15-78-60(1) and (2) are relevant to this litigation. (Tr. 854-855). Those immunity provisions apply to "legislative, judicial, or quasi-judicial action or inaction" and "administrative action or inaction of a legislative, judicial, or quasi-judicial nature." S.C. Code Ann. §§ 15-78-60(1) and (2). They were also asserted in the directed verdict arguments. (Tr. 607-608). In essence, those immunity statutes embody the concepts of witness immunity and prosecutorial immunity. In *Faile v. South Carolina Department of Juvenile Justice,* 350 S.C.

315, 566 S.E.2d 536, 540 (2002), our Supreme Court recognized that "[t]he United States Supreme Court extends absolute immunity to protect some quasi-judicial actors, such as prosecutors and witnesses, who perform judicial functions." 566 S.E.2d at 541, n.2. Our Supreme Court in *Faile* cited favorably to *Briscoe v. LaHue*, 460 U.S. 325 (1983), in which the United States Supreme Court recognized that witnesses enjoy absolute immunity from civil liability for damages for their testimony, and that is true even where the witness provides false, perjured, or incomplete testimony. Similarly, in *Vaughn v. McLeod Regional Medical Center*, 372 S.C. 505, 642 S.E.2d 744 (2007), our Supreme Court also recognized the witnesses in commitment hearings, including court-appointed guardians and court-appointed examiners, are entitled to absolute quasi-judicial immunity for their testimony during court proceedings. That same quasi-judicial witness immunity would also apply to SCDSS witnesses (and any other witnesses) who testify during court proceedings. That, in fact, is the essence of quasi-judicial witness immunity – to protect witnesses from civil liability for their testimony, and that quasi-judicial immunity is embodied in S.C. Code Ann. § 15-78-60(1) and (2) of the Tort Claims Act. Contrary to the trial court's ruling, however, the application of quasi-judicial immunity under S.C. Code Ann. § 15-78-60(1) and (2) presents an issue of law for the court to decide and not one of fact to submit to the jury.

In sum, to the extent that Sellaro was suing SCDSS for the conduct of the witnesses in the March 1, 2016 Family Court hearing, that testimony is an immune function under the common law and as codified in S.C. Code Ann. §§ 15-78-60(1) and (2). The SCDSS witnesses, like the attorney representing SCDSS, are not subject to civil liability, and as a result, SCDSS was entitled to immunity on Sellaro's negligence claim on this additional basis.[3]

C. Absence of Expert Testimony

The Appellant SCDSS is also entitled to a directed verdict and JNOV because there was no expert testimony introduced by Sellaro to support a finding that SCDSS, by the acts or omissions of its employees, acted negligently towards him from February 28, 2016, the date upon which the agency assumed jurisdiction of him after the RCSD placed him into EPC, until March 7, 2016, the date upon he was discharged from Palmetto Health Richland Hospital. Likewise, there was no expert testimony introduced by Sellaro to support a finding that SCDSS, by the

[3] SCDSS also notes that S.C. Code Ann. § 43-35-75(A) provides an additional layer of immunity for actions taken under the Omnibus Adult Protection Act. That specific immunity provision was not litigated as part of this case, in part because the Tort Claims Act immunities govern. However, reference is made to S.C. Code Ann. § 43-35-75(A) to further illustrate and emphasize the very point that the General Assembly has recognized that all persons involved in the processes under the Omnibus Adult Protection Act to protect vulnerable adults -- governmental and non-governmental alike -- are entitled to immunity from civil liability. In fact, S.C. Code Ann. § 43-35-75(A) provides for immunity not just for reporting activities but also for any person "who participates in an investigation or judicial proceeding resulting from a report." S.C. Code Ann. § 43-35-75(A).

omissions and/or acts of any of its employees, falsely imprisoned Sellaro from February 28, 2016 until March 7, 2016. More precisely, Sellaro failed to produce (1) any expert opinion testimony concerning any applicable standard of care governing SCDSS's management of the Plaintiff's EPC case from February 28, 2016 through March 7, 2016, nor (2) any expert opinion testimony as to how SCDSS deviated from any such applicable standard.

Under South Carolina law, "[i]n a professional negligence cause of action, the plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession. If the plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law." *City of York v. Turner-Murphy, Inc.*, 317 S.C. 194, 452 S.E.2d 615, 616-617 (Ct. App. 1994). This Court further explained that "[w]here professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct." 452 S.E.2d at 617.

The requirement for expert testimony is particularly critical in this case given the absence of any competent evidence to establish a standard of care nor even an appropriate jury instruction to guide the jury in its assessment of the standard of care and potential breach by SCDSS employees. In its jury

instructions, the trial court correctly charged the jury as to the four elements required to prove a negligence claim. As to the first prong -- the duty of law owed -- the trial court correctly explained that "[t]his is a question of law which I will decide. So, if I find there was a duty, you must then decide the remaining questions." (Tr. 845). However, the trial court erred because it *never* found a duty of care owed by SCDSS, and the court certainly *never* articulated any duty of care to the jury. Thus, the jury had no basis -- *in fact or in law* -- to find a breach of a duty of care, but the jury nonetheless found SCDSS to have been negligent, which is clearly erroneous and warrants a new trial absolute at a minimum.

At the close of Sellaro's case-in-chief, SCDSS moved for a directed verdict on the basis that "there's been no expert testimony establishing a standard by which DSS either failed to meet or did not meet." (Tr. 460). In denying that motion, the trial court stated: "I don't know that you have to have an expert to establish the standard of care when we have a statute that defines the duties." (Tr. 461). However, Sellaro never requested that the trial court charge the statutes applicable to SCDSS, and the record clearly reflects that the trial court never charged the jury with the sections of S.C. Code Ann. §§ 43-35-45 and 43-35-55 that pertain to SCDSS's conduct (as opposed to the conduct of law enforcement). (Tr. 849-851).

Moreover, it is undisputed that Sellaro did not establish the standard of care

by expert testimony. At best, Sellaro produced expert testimony in the form of excerpts from the deposition transcript of Dr. Jeffery Brandenburg, a resident psychiatrist at Palmetto Health Richland Hospital who examined Sellaro on February 29, 2016, after his admission on EPC status. Dr. Brandenburg was not presented as a standard of care expert but rather was qualified only as an "expert in the area of general psychiatry." (Tr. 345-346). Accordingly, none of the deposition testimony by Dr. Brandenburg consisted of expert opinions concerning any applicable standard of care governing SCDSS's management of the Sellaro's EPC case from February 28, 2016 through March 7, 2016 and/or how SCDSS deviated from any such applicable standard.

In sum, given the absence of the requisite expert testimony establishing both the standard of care and a breach of that standard, Sellaro did not prove his negligence claim against SCDSS. Accordingly, SCDSS is entitled to judgment as a matter of law.

II. The trial court erred in denying the Appellant's motions for a new trial absolute or alternatively a new trial nisi remittitur.

A. Submission of Tort Claims Act Immunity Defenses to Jury

The trial court correctly determined that there were several immunity provisions under S.C. Code Ann. § 15-78-60 that were applicable to the proper

adjudication of this case, and in fact, the trial court charged the jury on S.C. Code Ann. §§ 15-78-60(1)-(4), among other. (Tr. 854-855). The trial court, however, erroneously delegated to the jury to decide the merits of the immunity defenses under S.C. Code Ann. §§ 15-78-60(1)-(4) rather than recognizing that those issues present an issue of law for the Court to decide and apply. SCDSS moved for a new trial absolute on that basis, which the trial court erred in denying.

B. Damages Award is Unsupported by the Evidence

The Appellant SCDSS is also entitled to a new trial absolute because the trial record is devoid of evidence supporting the jury's $300,000 verdict against SCDSS. Joseph Sellaro presented evidence of the RCSD placing him into EPC on February 27, 2016, SCDSS assuming jurisdiction over his EPC case on February 28, 2016 after his admission into Palmetto Health Richland Hospital, the Seventy-Two Hour Probable Cause hearing conducted by the Family Court on March 1, 2016, and the Bench Order entered March 7, 2016 by the Family Court. The damages evidence, however, was minimal. The only specials admitted into evidence was an "Itemized Statement of Charges" issued on or after March 7, 2016 by Palmetto Health Richland Hospital to the Plaintiff reflecting "total charges" of $9,291.00.

Thus, the only economic damages submitted as evidence was the medical bill. While Sellaro could claim emotional harm, under South Carolina law "damages for emotional or mental suffering are typically not recoverable, unless there is some physical manifestation of the emotional distress." *Babb v. Lee County Landfill*, 405 S.C. 129, 747 S.E.2d 468, 481 (2013), *citing Dooley v. Richland Memorial Hospital*, 283 S.C. 372, 322 S.E.2d 669 (1984). Sellaro offered no evidence to establish any physical manifestation of the emotional distress nor any needed medical care as a result. Moreover, Sellaro had just experienced the death of his wife, which precipitated the EPC, and hence, there would be no logical means for the jury to distinguish emotional harm from collateral circumstances vis-a-vis what was causally related to the alleged acts or omissions of SCDSS. (Tr. 409-410).[4]

In sum, given the nature of evidence, or the lack thereof, the jury's $300,000 verdict against SCDSS was not supported by the evidence and was clearly excessive. The trial court abused its discretion in refusing to set aside the verdict and granting a new trial absolute.

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[4] Sellaro also offered testimony that Carol Ann Outlaw, who was a friend of his deceased wife and took custody of his four dogs, had one dog euthanized and another was given to Pets, Inc. Sellaro cannot use the loss of the two dogs to support the verdict because (1) SCDSS did not remove him from his home per the EPC and certainly had nothing to do with what happened to the two dogs, and (2) a pet owner is precluded under South Carolina law from claiming emotional harm for the loss of an animal or pet. *See, Fowler v. FedEx Ground Package System, Inc.*, 2023 WL 234557 (S.C. Ct. App. 2023) ("damages for the loss of a pet are limited to compensatory damages representing the market value of the property"). At any rate, Sellaro presented no evidence as the market value of the two dogs he lost.

C. Verdict is Grossly Excessive or at least Unduly Liberal

For the same reasons as discussed above, the Appellant SCDSS requested that the trial court grant a new trial absolute because the verdict of $300,000, in addition to be unsupported by the evidence, is shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence.

As the Supreme Court has explained, "[w]hen a party moved for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557, 558 (1993). "[W]hen the verdict is so grossly excessive … that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge … to set aside the verdict absolutely." *Id*., *citing Easler v. Hejaz Temple,* 285 S.C. 348, 329 S.E.2d 753, 758 (1985).

As discussed above, the verdict of $300,000 was not supported by the evidence presented. That alone demonstrates that the verdict is grossly excessive. However, other factors also demonstrate that the jury's verdict against SCDSS

must have been the result of bias, prejudice, or improper considerations. Sellaro sued RCSD and SCDSS for essentially the same conduct. *See*, Complaint, ¶¶ 27, 30. (R. ___). The jury heard the same evidence as to both Defendants. The decision by RCSD to place Sellaro in EPC and the subsequent acts by SCDSS upon assuming custody from RCSD were all governed by the same standard -- probable cause. Sellaro was also critical of witnesses, both RCSD and SCDSS, during the Probable Cause Hearing held on March 1, 2016.

With its verdict, however, the jury found that RCSD did not falsely imprison Sellaro nor act in a negligent manner. *See*, Verdict Form, ¶¶ 1-3. (R. ___). SCDSS agrees with that decision. However, the jury's decision to find no fault on the part of RCSD does not comport with the jury's decision to hold SCDSS liable. This inconsistency in the adjudication of the identical claims against RCSD and SCDSS demonstrates quite convincingly that the jury treated SCDSS differently than the evidence and law mandates. That substantial difference in treatment by the jury demonstrates that the jury was most probably motivated by passion, caprice, bias, or some other inappropriate motive in returning a verdict against SCDSS and particularly a verdict that exceeds the realms of reasonableness in light of the damages evidence presented. On this additional basis, the trial court abused its discretion in refusing to set aside the verdict and granting a new trial absolute.

In the alternative, even if this Court were to conclude that the verdict is not grossly excessive as to warrant a new trial absolute, the Appellant SCDSS submits that the verdict is certainly unduly liberal such that the Court should, in the proper exercise of fundamental fairness and justice, grant a remittitur to a more appropriate amount given the evidence. Subject to the other motions, SCDSS offered the concession in the trial court that a more appropriate damages award based on the record presented would be $50,000. Therefore, in the alternative of the Appellant SCDSS's other arguments for a JNOV and new trial absolute, it submits that a remittitur to $50,000 would be warranted. The trial court abused its discretion in rejecting the request for a remittitur.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully requests that the Court reverse the orders issued by Circuit Court Judge Robert E. Hood denying SCDSS's motions for directed verdict, JNOV, new trial absolute, and new trial nisi remittitur and remand for entry of judgment as a matter of law in favor of SCDSS, or alternatively, a new trial absolute or a new trial nisi remittitur.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

LAKE E. SUMMERS #64146
MALONE THOMPSON SUMMERS & OTT, LLC
339 Heyward Street, Suite 100
Columbia, South Carolina 29201
(803) 254-3300
Email: summers@mtsolawfirm.com

Counsel for Appellant South Carolina Department of Social Services

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