

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5093 (S.C. Ct. App. filed February 27, 2013)

Diane Bass and Otis Bass, Individually and as Parents and
Guardians of Alex B., a minor under the age of ten (10) years,
and Hanna B., a minor under the age of ten (10) years,

Petitioners,

v.

South Carolina Department of Social Services,

Appellant.

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing and Rehearing *En Banc* was made and finally ruled on by the Court of Appeals on May 21, 2013.

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE JURY'S VERDICT BASED ON A WRONG INTERPRETATION OF THE STANDARD AND SCOPE OF REVIEW AN APPELLATE COURT MUST APPLY TO A JURY VERDICT AND IN DIRECT CONTRADICTION TO WELL ESTABLISHED CASE LAW OF THIS COURT?
2. WHETHER THE COURT OF APPEALS ERRED IN REVERSING A JURY VERDICT BY IMPROPERLY WEIGHING THE EVIDENCE AND REPLACING THE JURYS VIEW OF THE EVIDENCE WITH THAT OF ITS OWN?
3. WHETHER THE COURT OF APPEALS MISAPPREHENDED OR MISAPPLIED THE RECORD ON APPEAL IN REACHING ITS DECISION TO OVERTURN THE JURY VERDICT AND REVERSE THE PROPER RULING OF THE TRIAL COURT?

STATEMENT OF THE CASE

Petitioners, Diane Bass and Otis Bass, individually and as parents and guardians of Alex Bass and Hanna Bass, both minors under the age of ten years, instituted a lawsuit in the Fairfield County Court of Common Pleas on November 4, 2009 against Long's Drugstores of South Carolina, Inc., James D. McNinch, and South Carolina Department of Social Services (hereinafter referred to as "SCDSS" or "Appellant"). In their Complaint, Respondents allege that in April of 2008, Mrs. Bass filled the minor children's Clonidine prescription at Long's Drugstore in Columbia, South Carolina. (R. p. 10). Unknown to the Respondents, the prescription was 1,000 times more potent than that for which it was prescribed. The misfilled prescription was then administered to the minor children by Mrs. Bass and, as a result of taking said medication, the minor children were hospitalized. (Id). When the minor children were discharged from the hospital on May 19, 2008, SCDSS removed the children from their home and they were not returned until June 25, 2008. (R. p. 11).

Petitioners alleged negligence and gross negligence on the part of Long's Drugstore, McNinch and SCDSS, and prayed for actual and punitive damages. (R. pp. 11-12). SCDSS answered the Complaint on or about January 5, 2010, with a qualified general denial and additional affirmative defenses. (R. pp. 13-19). Long's Drugstores and McNinch answered the Complaint on or about December 16, 2009 and settled with the Respondents after a mediation held on April 14, 2011.

To conform to evidence discovered during depositions in the case, Petitioners moved to amend their Complaint on or about May 10, 2011. (R. pp. 835-838). Appellant consented to the amendment and was served with the Amended Complaint on or about May 23, 2011. Petitioners alleged causes of action for gross negligence, defamation and outrage, and prayed for actual damages. (R. pp. 20-23). In its Answer to the Amended Complaint, which was served on or about May 24, 2011, Appellant asserted a qualified general denial, in addition to affirmative

defenses of Comparative Negligence, Negligence of a Third Party, Legal Privilege and Justification, South Carolina Tort Claims Act Defenses under S.C. Code Ann. § 15-78-60(3), (4), (5), (20), and (25), Qualified Privilege, S.C. Code Ann. § 15-78-30(f) as not including "Outrage" as a loss recoverable under the South Carolina Tort Claims Act, and that the defamation and outrage causes of action failed to state facts sufficient to constitute a cause of action upon which relief could be granted. (R. pp. 24-30).

The case was tried before a jury from May 23 to May 27, 2011 before The Honorable Ralph Ferrell Cothran, Jr. SCDSS moved for directed verdict at the conclusion of the Plaintiffs' case (R. p. 409, line 22-p. 451, line 3) and at the conclusion of all of the evidence. (R. p. 532, line 19-p. 534, line 5). Judge Cothran denied both motions. (R. p. 451, line 4-p. 452 line 4, p. 452 lines 14-21, p. 534, lines 7-14). Plaintiffs withdrew their defamation cause of action (R. p. 534, lines 18-20), and moved for directed verdict as to the SCDSS defenses of discretionary immunity and negligence of a third party. Judge Cothran granted Plaintiffs' motions which struck those defenses. (R. p. 534, line 23-p. 536, line 12).

After being instructed on the law, the jury returned a verdict for the Plaintiffs in the amount of Four Million (\$4,000,000.00) Dollars. (R. p. 567, line 22-p. 568, line 11, p. 8).

SCDSS filed and served Motions for JNOV, or in the Alternative, for New Trial Absolute, and a Motion to Reduce Verdict, or in the alternative, for a New Trial. (R. pp. 839-844). The Court issued an Order Denying the Defendant's Post Trial Motions on June 22, 2011. (R. pp. 1-6). However, the Court granted the Motion to Reduce the Verdict, reducing the verdict to Six Hundred Thousand (\$600,000.00) Dollars. (Id). SCDSS subsequently filed and served its Notice of Appeal on July 21, 2011.

The Court of Appeals heard oral arguments on January 9, 2013. On February 27, 2013, the Court of Appeals issued their Opinion Number 5093, which reversed the jury verdict and the trial court's rulings on numerous issues. On March 13, 2013, Petitioners filed their Petition for Rehearing, which was denied by the Court of Appeals on May 21, 2013.

STATEMENT OF THE FACTS

On Mother's Day 2008, a chain of events began in the lives of the Bass family that changed their world.

Dianne and Otis Bass are married and have three children, Brittany, Hanna and Alex. The family has always resided in Fairfield County, South Carolina. (R. p. 250, lines 20-22; p. 336, lines 7-8; p. 257, line 23-p. 258, line 3). During trial, Brittany was 10, Hanna was 8 and Alex was 5 years old. (R. p. 361, lines 4-17). Each of the children had educational delays and required special assistance. (R. p. 251, lines 12-16; p. 263, lines 13-17; p. 340, lines 1-4; p. 350, lines 17-21). At the time of the incident giving rise to this lawsuit, Mr. Bass worked at FN Manufacturing. (R. p. 253, lines 22-25). Mrs. Bass worked at home where she cared for Alex, Hanna, and Brittany. (R. p. 254, line 25-p. 255, line 7; p. 352, line 12-p. 353, line 13; p. 354, lines 1-9). The family did everything together and both parents were active in their children's lives. (R. p. 203, line 5-p. 205, line 13).

Alex and Hanna have various forms of autism and other cognitive issues. (R. p. 223, lines 6-19). Both were prescribed Clonidine to help them rest at night. (R. p. 268, lines 16-19; p. 343, lines 9-16; p. 363, lines 14-19). Mrs. Bass had Hanna and Alex's prescriptions filled at Long's Drugstore in Columbia, South Carolina, as that was the closest location that could perform the compounding process. (R. p. 362, lines 23-25; p. 86, lines 14-18; p. 610).

On Mother's Day evening, May 11, 2008, Mrs. Bass gave Hanna her dose of Clonidine. (R. p. 255, lines 11-16; p. 269, line 22-p. 270, line 5). After taking her medicine, Hanna fell ill while her father was giving her a bath. (R. p. 270, lines 6-12). Hanna was taken to the Fairfield Memorial Hospital where she was treated and released. (R. p. 271, line 14-p. 272, line 22). Two days later, she exhibited continuing problems and was taken to her family doctor at Fairfield Medical Associates. (R. p. 273, lines 1-9). From there, Hanna was taken to Palmetto Richland Memorial Hospital where she was admitted. (R. p. 273, lines 17-20).

Alex was not given his medicine on May 11, 2008. When he received it on May 15, 2008, he also became sick. (R. p. 277, line 5-p. 278, line 5). Mrs. Bass took him to Fairfield Medical Associates. After seeing Nurse Practitioner Evelyn May, Alex was transported via EMS to Fairfield Memorial Hospital. He was then transported via helicopter from Fairfield Memorial Hospital to Palmetto Health Richland and placed on life support. (R. p. 832).

On May 15, 2008, the Fairfield County office of SCDSS received a call from Palmetto Health Richland explaining that two special needs children had recently been hospitalized for unexplained illnesses. (R. pp. 570-571). SCDSS indicated in its records that the caller suggested that it was a "possible parental poisoning." (R. p. 156, line 25-p. 157, line 4). The call was received around 2:15 p.m. on May 15, 2008. (R. p. 155, lines 11-22; p. 570). The case worker assigned to the report was Monique Parrish. (R. p. 160, lines 6-8). Ms. Parrish arrived at Palmetto Health Richland at approximately 3:00 p.m. (R. p. 163, lines 9-25; p. 575). She spoke with Mr. and Mrs. Bass and observed the children. (R. p. 165, lines 5-15; p. 167, lines 5-15). She did not speak with any medical providers. (R. p. 141, lines 12-13). Before leaving, she asked Mr. and Mrs. Bass to come to the SCDSS office the next morning. When they explained that someone needed to stay with their hospitalized children, Ms. Parrish agreed to meet Mrs. Bass at the SCDSS office in Winnsboro the next morning. (R. p. 379, lines 2-16).

SCDSS records indicate that the next action that took place was a meeting with Ms. Bass and others at 1:30 p.m. on May 16, 2008. (R. p. 479, lines 1-15; R. p. 577). The entry indicates that the first action taken was to inform the Bass family that the children could not return home with their parents after discharge from the hospital. (R. p. 577). SCDSS made no entry or record of attempting to talk, or talking with, any medical provider or any member of the Bass family between meeting the Bass family and making the decision that the children and parents would be separated upon discharge. (R. p. 60, lines 14-16; p. 60, line 25-p. 61, line 7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-577). The toxicology lab results were never obtained by the SCDSS. (R. p. 141; 143; 150-151). In fact, the record and

testimony of the witnesses make it crystal clear that nothing was done between the time Monique Parrish met with the Bass family on May 15 and when the decision was made to remove the children from the parents' custody. (R. p. 479, lines 1-15; p. 58, line 10-p. 59, line 2; pp. 575-577).

Mr. and Mrs. Bass were given a "choice." At the meeting in the SCDSS office on May 16, 2008, Mrs. Bass was told that if there was no relative with whom to place the children, they would be placed in foster care. (R. p. 152, line 25-p. 153, line 8; p. 380, lines 21-24). Later that day, Monique Parrish returned to Palmetto Health Richland and informed Mr. Bass of the decision to remove the children from their parents. (R. p. 279, line 9-p. 280, line 4; pp. 575-577). He too was given the "choice" of relative placement or foster care. Mr. and Ms. Bass agreed to have their children stay with their maternal aunt, Linda Sims, rather than be split up in foster care. (R. p. 642).

SCDSS employees agreed that it was inappropriate to remove the children unless an imminent safety threat existed. (R. p. 127, lines 18-21; p. 318, lines 16-22). There was no testimony that the children were at imminent risk for harm when SCDSS removed them. The children were in the hospital under the care of the hospital staff when the decision was made. (R. p. 144, lines 7-24). When the decision to remove the children was made, SCDSS had not spoken with any of the primary care medical providers for the Basses. (R. p. 60, lines 14-16; p. 61, lines 1-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22). Further, SCDSS had not investigated the home prior to the decision to remove the children from their parents. (R. p. 149, lines 1-5; pp. 575-577). Simply put, there was no evidence that the children were at risk for injury by remaining with their parents. Upon Alex and Hanna's discharge on May 19, 2008, they were not allowed to return home with their parents but were instead sent to Ms. Sims' home. Brittany, who had not been hospitalized, had already been placed with Ms. Sims. (R. pp. 575-577).

As previously mentioned, the condition of the Bass home was not a basis for removing the children. It was not until after the children were removed from their parents' custody that SCDSS investigated the Bass home. (R. pp. 577-581). Monique Parrish and Jane Arnold documented that they visited the home on May 20, 2008, the Monday after the children were removed from their parents and the date that they were discharged from the hospital. (R. p. 581). There was conflicting testimony about which SCDSS employee actually inspected the home. Monique Parrish stated that she was in too much pain to inspect the home although she admitted to travelling with Jane Arnold to the home. (R. p. 151, lines 12-25). Jane Arnold, on the other hand, testified that her role in the Bass case was as the treatment worker and not the investigator. (R. p. 494, lines 1-9). Ms. Arnold also admitted that she was present for the home inspection. (R. p. 495, lines 18-24). Thus, it is unclear if anyone actually conducted an inspection for the purposes of determining whether a "threat" existed. SCDSS' expert, Jocelyn Goodwin, admitted that the condition of the home did not present an immediate threat of harm to the children. (R. p. 480, lines 15-22). Accordingly, the condition of the home was not a basis for removing the children.

Additionally, the children's medical conditions were not bases for their removal. SCDSS did not present evidence that any investigation was conducted into the children's health, despite SCDSS removing the children from the Bass home. (R. p. 58, line 10-p. 59, line 2; p. 61, lines 1-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-641). Monique Parrish admitted that cases of alleged medical neglect require consideration of medical evidence and discussions with medical providers. (R. p. 129, line 22-p. 130, line 3). Ms. Parrish testified that she only looked at the children when she arrived at the hospital on May 15, 2008. (R. p. 126, lines 17-19). Additionally, there is no evidence that Ms. Parrish spoke with any of the Bass family's primary care medical providers before the decision was made to remove the children. (R. pp. 575-577). More telling on this point, however, is Ms. Parrish's admission that the decision to remove the children was not the children's health, but rather the condition of the

home. (R. p. 147, line 23-p. 148, line 5). As noted above, however, this is impossible as the home "inspection" was not conducted until four days after the decision was made to remove the children. (R. pp. 575-577). Thus, the children's health was not a factor in the decision to remove the children from the parents' custody.

Ms. Bass' health condition was not a factor in the decision to remove the children from the home. SCDSS alleged during trial and in its initial brief to the Court of Appeals that Mrs. Bass' health condition was a basis for removal of the children. (Initial Brief of Appellant, p. 12). However, prior to removal, there is no evidence that Monique Parrish or anyone else at SCDSS had knowledge of any health problem by either parent that would constitute a risk of imminent harm to the children. (R. p. 58, line 10-p. 59, line 2; p. 61, lines 2-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-577). Mr. Bass' health was not a factor in the decision to remove the children on May 16, 2008. There was no evidence that Mr. Bass' health was ever a factor. (R. p. 82, line 7-p. 83, line 9). Regardless, the parents' health condition was insufficient to form the basis for removing the children from the home.

After the decision was made by the SCDSS to remove the children from the home, SCDSS was active in the life of the Bass family. Despite the lack of any connection to the children's unexplained illness, SCDSS took certain actions and/or required the following:

1. Refused to let Mr. and Mrs. Bass see their daughter Hanna on her birthday on May 25, 2008 (R. p. 259, line 10-p. 260, line 13);
2. For the first week, would not let Mr. and Mrs. Bass see their children except at the SCDSS office (R. p. 260, lines 14-25);
3. Portions of the home had to be painted (R. p. 266, lines 20-23; p. 267, lines 7-12);
4. The carpet had to be removed (R. p. 267, lines 13-20);
5. Black plastic over a window to help Mr. Bass sleep during the day since he worked at night had to be removed (R. p. 261, line 17-p. 262, line 3); and

6. Aluminum cans and other pieces of aluminum collected throughout the year by Mr. Bass so that he could sell them and use the money to purchase Christmas presents for the children had to be removed from the property (R. p. 262, line 4-p. 263, line 2; p. 264, line 15-p. 265, line 2).

SCDSS documented other observations as well:

1. The Bass parents actually harmed their children (R. p. 644);
2. The Bass parents were not fit to be primary caregivers (R. p. 582);
3. The Bass parents were limited in knowledge of their children at this time (R. pp. 583, 590);
4. The Bass parents needed parenting classes (R. p. 599); and
5. The Bass parents needed psychological counseling (R. p. 599).¹

So, it is clear that SCDSS became quite intrusive in the life of the Bass family. (See, generally, e.g., R. p. 642; p. 644; p. 569; pp. 787-806). None of that activity, however, could possibly be grounds for the decision to remove the children from the home. Regardless of the accuracy of such opinions or justifications for the actions required, none of the items listed above represented an imminent threat of harm to the children. (R. p. 64, lines 3-5; p. 65, lines 2-18; p. 480, lines 15-22; p. 531, lines 9-15; pp. 575-641).

On June 17, 2008, SCDSS learned that the children's medication was the reason they were hospitalized in May. (R. pp. 610-611; p. 513, line 17-p. 514, line 22). Linda Sims informed Monique Parrish that she received a call from Pharmacist Mutual concerning the misfilled Clonidine. (R. p. 610). This revelation led to the eventual return of the children to their parents. (R. p. 617). Importantly, SCDSS did nothing to learn what harmed the children. (R. p. 57, lines 9-12; pp. 575-641).

¹ The "observations" identified by SCDSS regarding Mr. and Mrs. Bass' ability to parent were not supported by facts. The baselessness of such "observations" is evidenced by the fact the parents were not required to go through parenting classes and psychological counseling. (R. p. 342, lines 3-24; p. 443, lines 1-8).

SCDSS remained a constant presence in the life of the Bass family after it was determined the medicine caused the problems. (R. pp. 575-641). SCDSS continued to make announced and unannounced visits through the end of 2008. (R. p. 386, line 17-25; p. 388, line 1-p. 391, line 7; p. 522, line 24-p. 525, line 14; pp. 575-641; pp. 787-805). Not even clear and convincing evidence of the real source of harm was enough to prevent SCDSS from staying the course in disrupting the Bass family life.

The family suffered as a result of being ripped apart by SCDSS. Mr. and Mrs. Bass had never spent a night away from Hanna and only one with Alex. (R. p. 346, line 23-p. 347, line 16). Every part of their lives was directed at caring for and loving their children. (R. p. 341, lines 8-10; p. 44, lines 5-8; p. 203, line 5-p. 205, line 6). Despite the difficulties, Mr. and Mrs. Bass were regarded as excellent parents. (R. p. 99, line 22-p. 100, line 14; p. 108, line 17-p. 110, line 21). The evidence showed that Mr. and Mrs. Bass were destroyed by the allegations that they somehow injured their children. (R. p. 34, lines 17-22; p. 209, lines 12-17; p. 212, lines 1-25; p. 283, lines 13-p. 284, line 11; p. 286, lines 4-8; p. 345, lines 3-5). Moreover, they suffered like never before at the forced separation from their children. (R. p. 44, lines 5-8; p. 207, lines 12-24; p. 211, lines 11-25).

The children suffered as well. Testimony established that while removed from their home, both Alex and Hanna cried because they missed their parents. (R. p. 209, lines 24-p. 211, line 4; p. 213, line 1-p. 215, line 8). Prior to the forced removal, Hannah was very close to her Aunt Linda. (Id). After returning to her parents, however, she avoids her. (R. p. 209, lines 24-p. 211, line 4; p. 213, line 1-p. 215, line 8). The Bass' expert, child psychologist Dr. Greer-Simmons, testified that her examination and testing of Hannah revealed that she was still suffering from the forced separation and would require therapy to overcome the problems from being removed from her parents. (R. p. 228, line 19-p. 229, line 18; p. 231, line 2-p. 232, line 15; p. 233, line 1-p. 239, line 17; p. 240, line 20-p. 242, line 24). The trial established that the entire ordeal was excruciatingly difficult for all of the family.

ARGUMENTS

Pursuant to Rule 242, SCACR, the Petitioners respectfully move for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals' Opinion No. 5093, which reversed the jury verdict and the trial court's rulings on numerous issues. Review should be granted because of the special and important issues raised by the Opinion's rulings below. The Opinion below should be reviewed because the ruling is in direct contradiction with existing case law concerning the scope and standard of appellate review. Furthermore, the Opinion directly conflicts with decisions of this Court. Lastly, the Opinion misapplies or misapprehends the record on appeal.

This Petition should be granted because the Opinion overlooks or misapprehends the standard of review in this case. It is well settled that in review of this case, the "any evidence" standard applies. When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. The Court of Appeals is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. An appellate court will only reverse the trial court's ruling when *no evidence* supports the ruling or when the ruling is controlled by an error of law. A factual finding by the jury will not be overturned unless there is no evidence that reasonably supports the jury's findings. The role of an appellate court in reviewing an action tried by a jury is to correct errors of law. The "any evidence" standard is the equivalent of a "scintilla of evidence." Despite these well-defined standards of review, the Court of Appeals instead weighed the evidence and decided which evidence was more important to the fact finders, the jury. In so doing, the

Court of Appeal's Opinion conflicts with the relevant case law and deviates from the correct standard of review.

Certiorari should be granted because the Opinion also overlooks or misapprehends evidence in the record that supported the jury's verdict. In so doing, the Court of Appeals ignores well established case law and takes over the jury's role to weigh and consider evidence. Throughout this appeal, from the filing of JNOV motions through all briefings, Appellant SCDSS' only basis for appeal was the lack of "any evidence" to support the jury's verdict. Rather than reviewing the record on appeal to determine whether this low bar of "any evidence" to support the ruling is found, the Court of Appeal's opinion only considers the testimony of the Respondent's expert, Mike Corey, on the issue of gross negligence. The Court of Appeals has overlooked substantial evidence that was a part of the record on appeal that supports the jury verdict. Unfortunately, this Opinion now stands for the proposition that it can substitute the jury's decision on credibility and weight of evidence with its own.

The relief sought should be granted because the Opinion overlooks or misapprehends the evidence as it relates to the outrage claim brought by Petitioners.² The Court of Appeals overlooked Appellant SCDSS' argument concerning the applicability of an outrage claim in a S.C. Tort Claims Act. Instead, the Court of Appeals determined that "no evidence" existed of gross negligence at the time the children were removed from their parents, and, therefore, there was no outrage claim. However, the

² The opinion contains an error with regard to who moved for directed verdict on the outrage claim: "The Basses further asserted they were entitled to a directed verdict on the intentional infliction of emotional distress claim because the South Carolina Tort Claims Act (the Act) excludes 'intentional infliction of emotional harm' from the definition of a recoverable loss." At no time did the Plaintiff move for directed verdict for outrage. Petitioner pointed this out to the Court of Appeals in the Petition for Rehearing but the Court failed to correct the error. The Court should grant this Petition to correct the decision to properly state who moved for a directed verdict.

outrage claim was not limited to the period of time from notification of a potential problem to Appellant and the time of removal. Petitioners claimed outrage damages for the entire period of time that the children were removed from their parents. The Opinion fails to take into account substantial evidence that supports the jury's verdict as to the outrage cause of action the entire time Appellant kept Petitioners' children from the home.

For the reasons that follow, Petitioners/Respondents therefore respectfully request that this Court grant their Petition for Writ of Certiorari.

I. By Concluding that Petitioner's Expert's Testimony was Without Sufficient Factual Support, the Court of Appeals Misapplies South Carolina Case Law Addressing the Standard of Review for an Appellate Court.

In its Opinion, the Court of Appeal's ignored the well-settled standard of review to reverse the trial court's ruling on the JNOV motion.

The Court of Appeals held that the evidence in the record was insufficient to support a determination of gross negligence by the jury. In other words, there was no evidence from which the jury could conclude that SCDSS was grossly negligent. To arrive at this conclusion, the Court of Appeals held that evidence in the record failed to show that Petitioner's liability expert, Mike Corey, took into account the expediency with which Appellant must investigate claims of abuse and neglect. This is error for two reasons.

First, whether Mr. Corey's opinion was based on a sufficient evidentiary basis was never raised during his testimony, at the directed verdict stage, in any JNOV motion, in any appellate brief, nor argued before the Court of Appeals at oral argument. *This*

issue has never been raised by Appellant at any point. The Court of Appeals went beyond what the Appellant asked to be reviewed. It is a bedrock concept of appellate review and issue preservation that “where the trial court has never been given an opportunity to rule upon” an argument or an issue, that issue is not preserved for appeal.³ Armstrong v. Collins, 366 S.C. 204, 224–25, 621 S.E.2d 368, 378 (Ct. App. 2005); see also, Stephens ex rel. Lillian C. v. CSX Transp., Inc., 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012).

Moreover, on this issue which was *never* raised, inexplicably the Court of Appeals reached its erroneous decision based on its perception of a lack of evidence in the record on appeal. This is incorrect and fundamentally unfair to the Respondents. With absolutely no notice that the issue of the sufficiency of the Petitioners’ expert’s opinions would be an issue on appeal, how would Petitioner know to include something in the record on appeal for the Court’s consideration? This approach not only flies in the face of established case law and the Rules of Appellate Practice, but is also fundamentally unfair.

Second, even if the Court of Appeals were allowed to consider the unappealed, never before raised issues, it overlooked direct evidence in the Record on Appeal on this very issue. The Opinion states that “[t]he record, however, is devoid of any indication that Corey in any way took into account the expedience with which DSS must investigate claims of abuse and neglect.” On this point, the opinion is simply wrong as the Court of Appeals clearly ignored or misapprehended the record as it relates to this issue. At page 71 of the Record on Appeal the following testimony is presented:

³ While this Court may *affirm* for any ground appearing in the record, it may not reverse. Rule 220 (c), SCACR.

Q: Now, in this case, you'll agree with me that Ms. Parrish made a timely initial response to a serious intake, correct?

A: Yes.

(R. p. 71, ll. 15-18).

Again at page 76 of the Record on Appeal the following testimony by Corey is present:

Q: As of that point, up to that point, what DSS did was appropriate?

A: Responded to there, told Ms. Bass who she -- the worker told Ms. Bass who she was and the reason she was there, I assume told some similar thing to Mr. Bass and spoke for a few moments with Ms. Bass and gathered a little bit of information.

Q: Okay.

A: So up to that point, at 3:00 or whatever time it was, no, I don't have any problem.

Q: Okay. They exercised due care as of that point, didn't they?

A: They exercised care in responding to the report and at the beginning of the initial contact.

(R. p. 76, ll. 4-17). The record is not devoid of evidence that Corey took into account the expediency of the initial investigation.⁴ To the contrary, there is direct evidence on the very issue that the Court of Appeals held was dispositive on the issue of gross negligence. Certiorari is necessary to correct this grievous error.

⁴ The factual summary provided in the Opinion incorrectly states the following: "Parish further testified she retrieved the children's lab results when she arrived at the hospital, but they were inconclusive as to poisoning." There is no evidence that this took place upon arrival at the hospital or at any other time during the SCDSS involvement in the life of the Bass family. In fact, the record is very clear that lab results were never obtained by the SCDSS. (R. p. 141; 143; 150-151). Thus, a purported fact that the Court of Appeals appears to rely upon to show slight care was not only absent from the record, but was the exact opposite. Additionally, during the trial there was additional evidence that the SCDSS never received the lab results but since this issue was never raised on appeal that evidence was not made a part of the record.

This Court has ruled on a similar issue in the past. In Curcio v. Caterpillar, Inc., 355 S.C. 316585 S.E.2d 272 (2003), a unanimous Court held that “the trial judge is concerned with the existence of the evidence, not the weight of the evidence or the credibility of the witnesses.” The Court of Appeals has now held that the trial judge in this case should have weighed the evidence and judged the credibility of the witnesses and granted the JNOV motion. This is reversible error.

The Opinion makes a substantive change in the law. As written, the Court of Appeals’ Opinion contains language that creates a new gross negligence standard for *all* torts for all governmental entities when it states: “The governmental entity is not liable for a loss resulting from . . . responsibility or duty . . . except when the responsibility or duty is exercised in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25) (2005).” The section actually provides, “The governmental entity is not liable for a loss resulting from . . . responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner.” The language of the Court’s opinion leaves out crucial limiting language in the S.C. Tort Claims Act. For example, an ordinary car wreck would be embraced by the Court’s statement that gross negligence must be proved. Petitioner raised this point in the Petition for Rehearing but the Court of Appeals failed to correct this error. At a minimum, the Court should grant this Petition to correct this error.

II. The Court of Appeal's Opinion Disregards Evidence in the Record that Supports the Jury's Verdict and Disregards the "Any Evidence" Standard.

The Court of Appeal's Opinion overlooks evidence in the record that would support the jury's verdict, regardless of the testimony of Petitioner's expert. In so doing, the Opinion ignores this Court's prior case law regarding the applicable standard of review. An appellate court can only reverse the trial court's ruling on denial of a directed verdict and JNOV when *no evidence* supports the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). A factual finding by the jury will not be overturned unless there is no evidence that reasonably supports the jury's findings. Rogers v. Norfolk S. Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). Furthermore, the court is required to view the evidence and any inferences reasonably drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The "any evidence" standard is the equivalent of a "scintilla of evidence." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2008).

This Opinion places a burden on the Petitioners that is not supported by the case law. In the Opinion, the Court of Appeals states: "While far from perfect, there is no evidence in the record indicating DSS failed to exercise slight care." This is an inaccurate reflection of the evidence and the record on appeal, as there is voluminous testimony and evidence of the same.

More important, though, is the standard the Court of Appeals has created for cases where the burden of proof is gross negligence. Under the precedent created by the

Opinion, so long as a party puts forth evidence that it did *something* – *anything* – there will be no civil liability as a matter of law. This new position takes away the jury’s sole province to weigh the evidence and decide whether or not the evidence, as a whole, reflects slight care. It deprives the trial courts of the gatekeeping function of considering evidence, observing witnesses, taking testimony, and deciding whether a plaintiff has presented evidence to survive a directed verdict. Now, a trial court need only look for an affirmation of action, of any act by the Defendant, to grant summary judgment. This is a dangerous new approach to the long standing gross negligence analysis.

The Opinion will be far reaching. Henceforth, SCDSS need only “respond in a timely fashion” and there will be no civil liability for any action or inaction that follows a timely response. Injured parties and families like the Bass family will have no recourse for an overreaching or inactive SCDSS. The practical conclusion of this Opinion is that a jury’s role has been substantially diminished, if not been banished, for future cases challenging the acts and omissions of the agency.

If this new standard were not applied, the jury verdict must be upheld. The only issue on appeal as to the gross negligence cause of action is whether or not there was any evidence to support the jury verdict. A factual finding by the jury will not be overturned unless there is no evidence that reasonably supports the jury’s findings. Rogers v. Norfolk S. Corp., 356 S.C. 85, 91, 588 S.E.2d 87, 90 (2003). “The trial court can only be reversed by this [c]ourt when there is no evidence to support the ruling below.” Jinks v. Richland Cnty., 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). The record before the Court of Appeals was replete with evidence from which the jury could and did find that

the SCDSS failed to exercise slight care. A review of some of the evidence in the record on appeal is warranted:

- No one from DSS ever contacted the Bass children's doctors (R. p. 96; pp. 110-111; p. 141; p. 150; p. 180);
- DSS made the decision that the Bass children could not return to their home after the hospitalization with no basis for removal. (R. p. 479);
- The only options given to Respondents were to have their kids go to foster care or relative placement. (R. p. 153);
- DSS removed special needs children from the home and placed them in another home without knowing what type of special care was needed for their well-being. (R. p. 149; p. 153; p. 323);
- DSS sent the case worker assigned to investigate the issue concerning the Bass family into the field when the case worker was suffering from such disabilities that she was shaking, sweating and unable to write or type and not ready to be at work. When she was supposed to be conducting an investigation, she was primarily trying to keep her job, even though her DSS supervisor testified that case workers that are unable to do their work should not be doing investigations. (R. pp. 138-140; p. 147; p. 322);
- A suspicion of poisoning case should require that the case worker contact the pharmacy and that did not happen. (R. pp. 324-325);
- *SCDSS's own liability expert testified that after the initial response, an investigation would have to be done before the decision to remove children was made and there is no evidence that anything was done.* (R. p. 479, ll. 13-22).
- SCDSS' own liability expert admitted that in her opinion, there was no showing of any imminent risk of harm to the children that warranted taking the Respondent's children. (R. p. 481, ll. 12-19).

Undoubtedly, the Court of Appeals failed to take into account the evidence above in deciding that there was no evidence that the SCDSS failed to exercise slight care. According to Jinks, supra, gross negligence has been defined as "the absence of care that is necessary under the circumstances." Id. There was no dispute between the parties that an appropriate investigation must be done before the children could be removed from

their parents. The jury heard evidence from witnesses from both parties that an appropriate investigation was not performed *before the decision to remove the children was made*. (R. p. 96; R. pp. 110-111; R. p. 141; R. pp. 150-151; R. p. 162, l. 10 - 163, l.16; p. 180; R. p. 479, ll. 13-22; R. p. 481, ll. 12-19;)

The SCDSS has a duty to respond to a call concerning a potential parental poisoning. S.C. Code Ann. §63-7-920. The SCDSS has a separate duty to conduct an investigation before removing children from their parents. Id. The duty to conduct a thorough investigation before a decision is made is a ministerial duty. The manner in which the investigation is conducted is one of discretion, unless the investigation is so incomplete that it could not be found to be thorough. If an action is taken because the investigation was incomplete and there were not enough facts upon which to make an informed decision, the Defendants are not entitled to official immunity. Jensen v. Anderson County Dep't of Social Services, 403 S.E.2d 615 (1991).

This Opinion makes the illogical and erroneous leap that performing the *first duty of response* in an appropriate manner somehow relieves the SCDSS of any and all responsibility and liability in the *second duty of thoroughly investigating* before removing children from their parents. This should not be the analysis, as it is not an accurate reflection of the law.

III. The Opinion Below Fails to Consider the Appropriate Time Period for the Damages Allocated to the Outrage Claim.

The Court of Appeal's Opinion misapprehends the scope of Petitioners' claim of outrage. The Opinion holds that because the Court of Appeals found no evidence of gross negligence in the decision to remove the children from their parents (based erroneously on the expert's lack of foundation, See I, above), there can be no outrage

claim. Petitioner's outrage claim was not limited to the initial improper removal of the children. There was substantial testimony and evidence that the entire time the children were removed from their parents that the conduct of SCDSS was reckless. Again applying the low bar of the "any evidence" standard, some of the evidence to support the jury's verdict from the record follows:

- SCDSS's expert, the former state director of Child Protective Services, opined there was no showing of any imminent risk of harm to the children that warranted taking the Respondent's children. (R. p. 481, ll. 12-19);
- With no basis for removing the children, SCDSS decided after the hospitalization that the children could not return to their home. (R. p. 479);
- Despite no basis for the initial removal, SCDSS only gave Respondents the option of having their kids go to foster care or to relative placement. (R. p. 153);
- No one from SCDSS, during the entire time the children were taken from their parents, ever contacted the Respondent's children's doctors. (R. p. 96; pp. 110-111; p. 141; p. 150; p. 180);
- Having removed special needs children from their home and parents and placing the children in another home, SCDSS did not determine or know what type of special care was needed for the children's well-being. (R. p. 149; p. 153; p. 323);
- During the period of removal, the case worker SCDSS assigned to investigate the Bass family was suffering from such physical disabilities that she was shaking, sweating and unable to write or type. She was not ready to be at work. When she was supposed to be conducting an investigation, she was primarily trying to keep her job, even though her DSS supervisor testified that case workers that are unable to do their work should not be doing investigations. (R. pp. 138-140; p. 147; p. 322);
- Despite the suspicion of poisoning, DSS did not contact the pharmacy, as it should. (R. pp. 324-325);
- According to SCDSS's expert, *NOTHING* was done by SCDSS, after the initial response, to investigate whether and determine whether the children should be removed. (R. p. 479, ll. 13-22).

The Opinion must be reversed with regard to the outrage claim. In reaching its decision to reverse the jury's verdict, the Court of Appeals considered a time period of less than 24 hours. Petitioners and their children, however, were subject to reckless, cruel, inhumane and unwarranted family disruption for over eight (8) months. The jury was asked to consider the entire time that SCDSS monitored and directed the life of the Bass family. The Court of Appeals should not diminish the hard work of the jury that heard and considered relevant evidence on this cause of action.

CONCLUSION

The Court of Appeals failed to address the very record before it, ignored the applicable standard of review, and published an opinion that is based on issues and arguments that are not preserved and were never raised in the entire life of this case. As an unfortunate result, if the Opinion stands families across this state will lose their legal ability to challenge the government in a civil court for damages that agency caused where gross negligence is the standard. The Court of Appeals has gone beyond the well-established standards of review. In doing so, it has ignored the issues on appeal and the overwhelming evidence in the record. Certiorari is necessary to correct these errors.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5093 (S.C. Ct. App. filed February 27, 2013)

Diane Bass and Otis Bass, Individually and as Parents and
Guardians of Alex B., a minor under the age of ten (10) years,
and Hanna B., a minor under the age of ten (10) years, Petitioners,

v.

South Carolina Department of Social Services, Appellant.

PROOF OF SERVICE

I hereby certify that I have served the **PETITION FOR WRIT OF CERTIORARI** on the Appellant, by depositing a copy in the United States Mail, postage prepaid, on the 19th day of June, 2013, addressed to the attorney of record, Patrick J. Frawley, Esquire, at Post Office Box 489, Lexington, South Carolina 29071.

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SC Court of Appeals

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