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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF UNION)

H.A., by and through her guardians, Jane and John Smith, and Jane Smith and John Smith, individually,
Plaintiffs

v.

South Carolina Department of Social Services, South Carolina Department of Children's Advocacy, Tammy Gaye Causey Dalsing, and Edward Anthony Dalsing,
Defendants.

Case No. 2020-CP-44-00104

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES AND SOUTH CAROLINA DEPARTMENT OF CHILDREN'S ADVOCACY

This matter came before the Court on motions for summary judgment of Defendants South Carolina Department of Social Services (SCDSS) and South Carolina Department of Children's Advocacy (SCDCA). On May 25, 2023, the Court conducted an in-person hearing at the request of all parties. Melinda I. Butler and Laura M. Saunders appeared for Plaintiffs. L. Dale Dove and P. Christopher Smith appeared for Defendants Tammy Dalsing and Edward Dalsing. Stephanie H. Burton appeared for Defendants SCDSS and SCDCA. For the reasons set forth below, this Court grants the motions for summary judgment of SCDSS and SCDCA.

FINDINGS OF FACT

Family Court Proceedings

Emergency Protective Custody of H.A.

This South Carolina Tort Claims Act negligence action arises from a nearly six-year family court dispute relating to custody of a child, H.A. On August 27, 2013, H.A., who was then eight months old, was taken into emergency protective custody by law enforcement because her

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biological parents were operating a methamphetamine lab and she was being physically neglected.[1] (Aug. 28, 2013, Order, pp. 1-2.) At that time, SCDSS Caseworker Robin Miller asked H.A.'s biological mother if there was a family member with whom H.A. could be placed, but she did not identify any viable relative placement option. (Kaylor Aff. Ex. A, pp. 2-3.) Given this, H.A. was placed by SCDSS with Edward and Tammy Dalsing that day. (July 16, 2014, Order, p. 2, ¶ 3; J. Cooper Dep. Ex. 10; T. Dalsing Dep. 54:16-23; Tisdale Aff. Ex. A, p. 464.) At the time, the Dalsings were duly licensed by SCDSS as foster parents. (Am. Compl., p. 3, ¶ 10; J. Cooper Dep. Ex. 10; T. Dalsing Dep. 23:15-17.) Although they had provided foster care for a number of children, there is no evidence of any complaint to SCDSS about the care rendered by the Dalsings prior to H.A.'s placement with them. (E. Dalsing Dep. 40:15-17; T. Dalsing Dep. 53:2-5.) On August 28, 2013, Family Court Judge Tony Jones found that there was probable cause for law enforcement to take H.A. into emergency protective custody and for SCDSS to assume legal custody of H.A. (Aug. 28, 2013, Order, pp. 1-2.)

After H.A.'s placement with the Dalsings, SCDSS caseworkers searched for family members with whom she could be placed. (Kaylor Aff. ¶¶ 6-8, Exs. B-D.) In August 2013, her father, John Stafford, identified two relatives. (Dec. 1, 2021, D. Armstrong Dep. 10:8-18; Kaylor Aff. ¶ 7, Ex. B, pp. 8-12.) Upon investigation, SCDSS concluded that neither relative was a suitable placement option for H.A. (Dec. 1, 2021, D. Armstrong Dep. 10:19-11:1; Kaylor Aff. ¶

[1] This Court may take judicial notice of the records in the underlying family court proceedings. Rule 201(b), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); Rule 201(c), SCRE ("A court may take judicial notice, whether requested or not."); Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (1984) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records."); Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (Explaining that courts "may properly take judicial notice of matters of public record"); Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that the most frequent use of judicial notice is in noticing the content of court records.").

9, Ex. D.) Thereafter, SCDSS paid for a Seneca Search to identify relatives of H.A. who might be an appropriate placement option. (Kaylor Aff. ¶ 8, Ex. C.)

In the fall of 2013, the Family Court conducted several hearings. (Oct. 9, 2013, Order; Nov. 6, 2013, Order.) The court ordered that temporary legal and physical custody remain with SCDSS. (Oct. 9, 2013, Order, p. 7, ¶ 2; Nov. 6, 2013, Order, p. 4, ¶ 3.) The court also ordered that a permanent plan of reunification with her biological parents was in the best interest of H.A. (Oct. 9, 2013, Order, p. 7, ¶ 3.)

On February 19, 2014, the Family Court conducted a permanency planning hearing. (Feb. 19, 2014, Order.) The court reviewed H.A.'s placement and found that H.A.'s placement with the Dalsings was "safe, appropriate, and in the best interests of [H.A.]." (Id. at p. 4, ¶ 7.) The Family Court ordered legal and physical custody of H.A. to remain with SCDSS. (Id. at p. 4, ¶ 1.) The court also ordered that a permanent plan of termination of parental rights and adoption with a concurrent plan of reunification with H.A.'s biological parents was in the best interest of H.A. (Id. at p. 4, ¶ 2.)

Identification of the Armstrongs as a Placement for H.A.

On April 29, 2014, John Stafford identified his uncle, Daryl Armstrong, as a potential placement option for the first time. (Kaylor Aff. ¶ 9; Dec. 1, 2021, D. Armstrong Dep. 9:21-23.) That same day, SCDSS Caseworker Stacie Eison met with Daryl Armstrong and his wife, Ruth Ann Armstrong, at which time they agreed that they were willing to have H.A. placed with them. (Kaylor Aff. ¶ 10, Ex. E; Dec. 1, 2021, D. Armstrong Dep. 11:12-16; Apr. 12, 2021, R. Armstrong, Dep. 33:8-20.) As a result, SCDSS completed an investigation and determined that the Armstrongs were a suitable placement for H.A. (Kaylor Aff. ¶ 11, Ex. F; Dec. 1, 2021, D. Armstrong Dep. 11:17-19.) H.A.'s Guardian ad Litem Jennifer Cooper concurred with this placement. (June 4,

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2014, Order, p. 2, ¶ 1; J. Cooper Dep. Ex. 7, p. 3.) Accordingly, on May 30, 2014, GAL Jennifer Cooper submitted a Report and Recommendation to the Family Court recommending that H.A. be placed with the Armstrongs. (J. Cooper Dep. 57:4-18, Ex. 7, p. 3.)

The June 4, 2014 Hearing

The Dalsings were informed that SCDSS had identified suitable relatives of H.A. and planned to request that the Family Court order that H.A. be placed with the Armstrongs. (June 4, 2014, Order, p. 2, ¶ 2; T. Dalsing Dep. 57:6-21.) Prior to the June 4, 2014 hearing, the Dalsings filed an action seeking termination of the parental rights of H.A.'s biological parents, to adopt H.A., and a motion to intervene. (June 4, 2014, Order, p. 2, ¶ 3; Compl., C.A. No. 2014-DR-44-155.) The Dalsings also filed an administrative appeal of SCDSS's decision to remove H.A. from their home and an application to adopt H.A. with the SCDSS Adoption unit. (June 4, 2014, Order, p. 2, ¶ 3.)

On June 4, 2014, the Family Court conducted a permanency planning hearing. (June 4, 2014, Order.) At the hearing, SCDSS notified the Family Court that it had reached an agreement with H.A.'s biological parents, with the concurrence of the Guardian ad Litem, to place H.A. with Plaintiffs while H.A.'s biological parents tried to complete their treatment plan. (Id. at p. 2, ¶ 1.) The Dalsings objected because they had not been given a ten-day prior notice of the child's removal. (Id. at p. 2, ¶ 2.) The Family Court agreed that proper notification had not been given to the Dalsings and rescheduled the hearing for July 16, 2014. (Id. at p. 2, ¶ 3.) The Family Court found that H.A.'s current placement with the Dalsings was safe, appropriate, and in the best interests of H.A. (Id. at p. 3, ¶ 2.) Importantly, the Family Court ordered that the Armstrongs "are not required but shall be permitted unsupervised weekend visitation with [H.A.], to be arranged and coordinated by SCDSS." (Id. at p. 3, ¶ 3.) The Parties thereafter agreed that H.A. would

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spend Monday afternoon through Friday morning with the Dalsings and Friday afternoon through Monday morning with the Armstrongs. (Dec. 4, 2017, Order, p. 2, ¶ 1; April 12, 2021, R. Armstrong Dep. 101:16-18; T. Dalsing Dep. 66:20-22; South Carolina Dep't of Soc. Servs. V. Boulware, 422 S.C. 1, 5, 809 S.E.2d 223, 225, n.3 (2018).) Throughout the course of the lengthy Family Court proceedings involving Plaintiffs and the Dalsings and consistent with the continuing orders of the Family Court, H.A. was shuttled between them pursuant to this schedule. (Dec. 1, 2021, D. Armstrong Dep. 129:16-23; Tisdale Aff. Ex. A.)

Subsequent Family Court Proceedings

On July 15, 2014, Guardians ad Litem Stephanie Kitchens and Jennifer Cooper submitted a Report and Recommendation to the Family Court. (J. Cooper Dep. Ex. 11.) The GALs found that "[H.A.] is very much at home in the Armstrong home and has taken over the hearts of [the] Armstrong[s]." (Id. at p. 4.) They noted that "[t]he foster parents have provided excellent care to [H.A.], but the time has come that [H.A.] is removed from foster care and be place[d] with [the Armstrongs] who want to adopt her." (Id. at p. 5.) The Report also recommended that if H.A. was not placed with the Armstrongs, that she be removed from her current placement at the Dalsings' home. (Id.)

On July 16, 2014, the Family Court conducted a hearing concerning the Dalsings' motion to intervene and SCDSS's motion to change the permanent plan for H.A. (July 16, 2014, Order.) Plaintiffs appeared at the hearing. (Id. at p. 2.) The Family Court granted the Dalsings' motion to intervene and added the Dalsings as parties in the family court proceeding. (Id. at ¶ 12.) The Family Court ordered that the February 2014 permanent plan would remain the permanent plan for H.A., and the living arrangements of H.A. would continue as previously ordered. (Id. at ¶ 13.b.)

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Importantly, during a permanency planning hearing on August 27, 2014, the Armstrongs were added as parties in the family court proceedings. (Aug. 27, 2014, Order, ¶ 2.) The Family Court continued the permanency plan and ordered that all provisions of prior Family Court orders remain in full force and effect. (Id. at ¶ 4.)

On January 13, 2015, the Family Court conducted a permanency planning hearing, at which hearing the Armstrongs and their counsel and the Dalsings and their counsel appeared. (Jan. 13, 2015, Order.) The Family Court again found that H.A.'s current placement was safe, appropriate and in the best interests of H.A. (Id. at p. 4, ¶ 7.) The Family Court ordered that legal and physical custody of H.A. would remain with SCDSS. (Id. at p. 5, ¶ 1.) The Family Court ordered that a permanent plan of termination of parental rights and adoption was in the best interest of H.A. (Id. at p. 5, ¶ 2.) The Family Court also ordered that SCDSS had made reasonable efforts to make and finalize in a timely manner a permanent plan for H.A. (Id. at p. 5, ¶ 3.)

On March 11 and 12, 2015, the Family Court conducted a termination of parental rights hearing. (Mar. 12, 2015, Order.) During the hearing, H.A.'s Guardian ad Litem Stephanie Kitchens recommended that H.A. be removed from the Dalsings' home and placed with the Armstrongs. (Id. at p. 6, ¶ 19.) The Family Court found that SCDSS had made reasonable efforts to make and finalize a permanent plan for H.A. (Id. at p. 7, ¶ 23.) Importantly, the Family Court found that the Dalsings did not have standing to file or maintain an action to adopt H.A. and dismissed the Dalsings' adoption action. (Id. at pp. 8-9, ¶ 30; p. 11, ¶ 3.) The Family Court terminated the parental rights of H.A.'s biological parents, ruled that custody of H.A. would remain with SCDSS, and that all provisions of previous orders not in conflict with this ruling would remain in full force and effect. (Id. at pp. 10-11, ¶¶ 1, 3, & 7.)

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The Dalsings Appeal the Finding that They did not Have Standing

On July 15, 2015, the Dalsings appealed the March 12, 2015 order of the Family Court to the South Carolina Court of Appeals. (Dec. 16, 2015, Order, p. 2, ¶ 5.) During pendency of the appeal, the Family Court conducted multiple permanency planning hearings. (Dec. 16, 2015, Order; Sept. 21, 2016, Order; Dec. 7, 2016, Order; Dec. 4, 2017, Order.) During such hearings, the Family Court repeatedly: (1) found that H.A.'s placement with the Dalsings was safe, appropriate, and in the best interest of H.A.; (2) found that SCDSS had made reasonable efforts to finalize the permanent plan for H.A.; (3) ordered that custody of H.A. remain with SCDSS; and (4) ordered that the *status quo* be maintained during the appeal. (Dec. 16, 2015, Order, pp. 2-3, ¶¶ 5 & 7; Dec. 7, 2016, Order, p. 2, ¶¶ 2 & 4, p. 3, ¶¶ 1 & 4; 3; Dec. 4, 2017, Order, p. 3, ¶¶ 1-3; R. Armstrong Dep. 143:4-6, Apr. 12, 2021.)

The Decision of the Court of Appeals

On May 19, 2016, the South Carolina Court of Appeals affirmed the Family Court's order ruling that the Dalsings did not have standing to file an adoption action. South Carolina Dep't of Soc. Servs. v. Boulware, Op. No. 2016-UP-220 (Ct. App., May 19, 2016.) On October 20, 2016, the South Carolina Supreme Court granted the Dalsings' petition for a writ of certiorari. South Carolina Dep't of Soc. Servs. v. Boulware, 2016 S.C. LEXIS 318 (Oct. 20, 2016).

Although the March 2015 Family Court order remained on appeal, on February 10, 2017, the Armstrongs filed a motion for emergency temporary relief in Family Court requesting a permanency plan hearing and an order changing H.A.'s permanent plan to "custody/guardianship with a fit and willing relative." (Feb. 10, 2017, Mot., pp. 1-2.) In their supporting affidavit, the Armstrongs stated that the Family Court needed "to grant emergency physical custody [of H.A.] to [them]" to "stop the back and forth that happens each week between her temporary foster home

and her permanent guardianship placement." (Id. at pp. 3-4, ¶¶ 10-11.) During the subsequent emergency hearing, the Family Court ordered that H.A.'s custody "shall remain status quo." (Feb. 22, 2017, Order, p. 2, ¶ 4.)

On December 4, 2017, the Family Court conducted a permanency planning hearing at which the Armstrongs and counsel and the Dalsings and counsel appeared. (Dec. 4, 2017, Order.) Notably, in its order, the Family Court noted that "**the parties agree for the matter to remain status quo**." (Id. at p. 2, ¶ 1.) (emphasis added).

January 3, 2018 Decision by the South Carolina Supreme Court

Thereafter, on January 3, 2018, the Supreme Court of South Carolina reversed the decision of the Family Court and the Court of Appeals regarding standing. South Carolina Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 14, 809 S.E.2d 223, 229-30 (2018). The Supreme Court held that the Dalsings had standing to pursue a private adoption action of H.A. Id.

Events Following the Decision of the South Carolina Supreme Court

Thereafter, on January 5, 2018, the Armstrongs filed an action to adopt H.A. (Compl., 2018-DR-44-0007.) The Armstrongs contemporaneously filed a motion to intervene and consolidate their recently filed adoption action with the adoption action previously filed by the Dalsings. (May 25, 2018, Order, p. 1.) By order dated May 25, 2018, the Family Court consolidated the adoption actions of the Dalsings and the Armstrongs. (Id. at p. 2, ¶ 1.)

On October 9, 2018, the Dalsings filed a motion to withdraw their adoption action, which was granted on October 16, 2018. (Oct. 16, 2018, Mot.) In their Return, the Armstrongs admitted that within days of their agreement to serve as a placement for H.A. in 2014, SCDSS asked the Family Court to place H.A. with them. (Oct. 17, 2018, Return, pp. 1-2.) The Armstrongs admitted that "[t]hrough it all, each Guardian ad Litem advocated for [H.A.] to be placed with [them]." (Id.

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at p. 2) The Armstrongs also lamented the long joint visitation relationship arguing that "The [Dalsings] have caused much delay in allowing [H.A.] to have the permanency she should have had in 2014[,]" and "have caused [H.A.] unrelenting pain and suffering." (Id. at p. 3.) On January 23, 2019, the Family Court approved the Armstrong's adoption of H.A. (Jan. 23, 2019, Order.)

OHAN Investigations

During the lengthy Family Court proceedings, numerous reports were made to the Out of Home Abuse and Neglect unit (OHAN)[2] of SCDSS against both the Armstrongs and the Dalsings concerning allegations of abuse or neglect of H.A. SCDSS repeatedly investigated such reports. (L. Cooper Aff. Ex. A.) Until April 2018, all reports made to OHAN were either not accepted for investigation or upon investigation were determined to be unfounded[3]. (Id.)

An April 2018 OHAN investigation of the Dalsings for reported physical abuse of H.A. was indicated[4] against Tammy Dalsing. (L. Cooper Dep. Ex. 2; T. Dalsing Dep. 107:9-18.) Accordingly, on June 11, 2018, SCDSS removed H.A. from the Dalsings' home, and placed her in another foster home. (Mot., Oct. 9, 2018, p. 5.) Tammy Dalsing appealed the OHAN finding against her. (T. Dalsing Dep. 107:20-23.)

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[2] SCDSS "is authorized to receive and investigate reports of abuse and neglect of children who reside in or receive care or supervision in residential institutions, foster homes, qualified residential treatment programs, and childcare facilities." S.C. Code Ann. § 63-7-1210 (A) (2008 & Supp. 2021). These investigations are conducted by a unit that is not responsible for selecting or licensing these homes. S.C. Code Ann. § 63-7-1210 (A) (2008). The Out of Home Abuse and Neglect (OHAN) unit fulfills this obligation by investigating allegations of abuse or neglect relating to children in foster care.

[3] An unfounded report "means a report made pursuant to this chapter for which there is not a preponderance of evidence to believe that the child is abused or neglected. For the purposes of this chapter, it is presumed that all reports are unfounded unless the department determines otherwise." SC Code Ann. § 63-7-20(30) (2008).

[4] An indicated report "means a report of child abuse or neglect supported by facts which warrant a finding by a preponderance of evidence that abuse or neglect is more likely than not to have occurred." SC Code 63-7-20(14) (2008).

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In November 2019, the OHAN Administrative Tribunal conducted an administrative hearing concerning the allegations against Tammy Dalsing. (Order, Sept. 21, 2020, Tammy Dalsing v. South Carolina Dep't of Soc. Servs., S.C Admin. Ct. Case No. 47-OHAN.) During the trial, SCDSS determined that there was insufficient evidence to prove that Tammy Dalsing had physically abused H.A. and it agreed to dismiss its finding against her. (Order, Sept. 21, 2020, Tammy Dalsing v. South Carolina Dep't of Soc. Servs., S.C Admin. Ct. Case No. 47-OHAN; T. Dalsing Dep. 107:21-108:1, 108:14-17.)

Conclusions of Law

In this Action, Plaintiffs assert gross negligence claims against SCDSS and SCDCA pursuant to the South Carolina Tort Claims Act. As an initial matter, this Court notes that gross negligence connotes the failure to exercise a slight degree of care. Hollins v. Richland Cnty. Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1992). Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544-45 (2002). To prove gross negligence, Plaintiffs must prove that Defendants were so indifferent to the consequences of their conduct that they did not give even the slightest care to what they were doing. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999).

This Court Cannot Second Guess the Family Court

All of Plaintiffs' claims in this case emanate from the proceedings in the Family Court and were or could have been addressed by that court. At the hearing, Plaintiffs' counsel primarily contended that SCDSS and SCDCA should not have permitted the visitation arrangement ordered by the Family Court pursuant to which H.A. spent part of each week with each family. Plaintiffs

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contend that physical custody of H.A. should have been transferred by SCDSS to them because Daryl Armstrong is a biological relative. Plaintiffs contend that the split arrangement ordered by the Family Court that was in place during the pendency of the appeals was not in the best interest of H.A. Plaintiffs presented this Court with the deposition transcript of their expert, Dr. Monique Mitchell, during which she testified that split custody arrangements can be emotionally damaging to children. Plaintiffs also contend that H.A. was physically abused in the home of the Dalsings and that SCDSS and SCDCA should have removed her from their home even though OHAN did not find that such abuse occurred and the single charge which was indicated against Tammy Dalsing was subsequently reversed during a contested administrative hearing.

As discussed at length by the parties at the hearing, it is uncontested that there were extended Family Court proceedings relating to the placement and custody of H.A. The Armstrongs were parties in the Family Court action and they actively participated in those proceedings. The Family Court has exclusive jurisdiction to hear and determine actions for adoption of children, hear and determine actions for termination of parental rights, to award custody of a child, to modify or vacate any order issued by the Family Court, to make any order necessary to enforce the provisions of the South Carolina Children's Code, and to issue orders compelling public officials to perform official acts. S.C. Code Ann. §§ 63-3-530(A) (3), (4), (20), (25), (30), and (36) (2010).

The uncontroverted evidence shows that SCDSS, the Foster Care Review Board, and the Guardians ad Litem consistently appeared before the Family Court or made recommendations to the Family Court regarding the best interests of H.A. As the Armstrongs admit, SCDSS, the Foster Care Review Board, and the Guardians ad Litem consistently recommended that H.A. be placed with the Armstrongs, but the Family Court ordered otherwise. (Am. Compl., ¶ 12; Dec. 1, 2021,

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D. Armstrong Dep. 11:20-12:6; Apr. 12, 2021, R. Armstrong Dep. 39:10-11, 111:8-15.) The Family Court had discretion to accept or reject their recommendations. The Family Court repeatedly: (1) found that H.A.'s placement with the Dalsings was safe, appropriate, and in the best interest of H.A; (2) found that SCDSS had "made reasonable efforts to finalize the permanent plan for [H.A.];" and (3) ordered that the status quo (including the visitation arrangement) be maintained during the pendency of the appeal. (Dec. 16, 2015, Order, pp. 2-3, ¶¶ 5 & 7; Dec. 7, 2016, Order, p. 2, ¶¶ 2 & 4, p. 3, ¶¶ 1 & 4; 3; Dec. 4, 2017, Order, p. 3, ¶¶ 1-3.) Plaintiffs agreed "for the matter to remain status quo." (Dec. 4, 2014, Order, p. 2, ¶ 1.) Plaintiffs did not appeal any Family Court order, they are binding in this case, and this Court will not second guess those decisions.[5]

The Armstrongs assert gross negligence claims against SCDSS and SCDCA individually and in their representative capacity for H.A. The South Carolina Tort Claims Act mandates that this Court construe the Act in favor of limiting the liability of these state agencies. To that end, the Act states: "The provisions of this chapter establishing limitations on and exemptions to the liability of the States, its political subdivisions, and employees, while acting within the scope of official duty must be liberally constructed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (2005).

Both SCDSS and SCDCA were obligated to comply with the orders of the Family Court. Both SCDSS and SCDCA have immunity for any claim relating to their adherence to the orders of the Family Court. Under the Tort Claims Act, these state agencies are not liable for a loss resulting from:

[5] "[A]ny order issued as a result of a merit hearing, as well as any later order issued with regard to a treatment, placement, or permanent plan, is a final order that a party must timely appeal." Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 363 (1999).

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> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement or lawful implementation of any process.

S.C. Code Ann. § 15-78-60(3) (2005). While SCDSS and SCDCA made recommendations to the Family Court, they were legally obligated to comply with that Court's orders and are immune from suit in so doing.

Plaintiffs had the opportunity to ask the Family Court to remove H.A. from her placement with the Dalsings on the grounds that she was being physically abused at their home, yet they did not do so. This Court does not have jurisdiction to and cannot substitute its judgment for that of the Family Court which repeatedly found her placement safe. The decisions of the Family Court on these issues are final and binding upon the parties in this Action, all of whom were parties in the Family Court proceedings and had a full and fair opportunity to litigate those issues in Family Court. Accordingly, Plaintiffs are estopped from relitigating the issues in this action that were or could have been addressed by the Family Court proceedings. Doe v. State, 294 S.C. 125, 127-28, 363 S.E.2d 106, 108 (1987). Therefore, this Court finds that both SCDSS and SCDCA are entitled to summary judgment in their favor as a matter of law.

Both SCDSS and SCDCA Are Entitled to Summary Judgment Concerning the Claims Asserted by the Armstrongs Individually

Both SCDSS and SCDCA are entitled to summary judgment for the claims asserted by the Armstrongs individually for several reasons. First, any claims that the Armstrongs assert against either SCDSS or SCDCA are barred by the applicable statute of limitations. The Tort Claims Act includes the following statute of limitations:

> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever **barred unless an action is commenced within two years after the date the loss was or should have been discovered**; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

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S.C. Code Ann. § 15-78-110 (2005) (emphasis added). There is no evidence that Plaintiffs filed a claim, nor did they contend that they did so at the hearing. Thus, the two-year statute of limitations applies. Plaintiffs filed this Action against SCDSS and SCDCA on **March 11, 2020**. Thus, if their claims accrued before **March 11, 2018**, they are time-barred.

In South Carolina, the discovery rule applies to determine when the Armstrongs' claims accrued. Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 190, 534 S.E.2d 1, 8-9 (Ct. App. 2000) ("Under the [SCTCA]…the statute of limitations begins to run when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery."); Young v. South Carolina Dep't of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) ("[C]ourts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist."); Gillman v. City of Beaufort, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006) ("Under the discovery rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence."); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 99, 90 (1995) ("The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question.")

This Court finds that the individual claims of the Armstrongs accrued prior to March 11, 2018. On April 29, 2014, the Armstrongs admittedly learned that H.A. was in the custody of SCDSS, and that they had been identified as a potential placement option for H.A. (Dec. 1, 2021, D. Armstrong Dep. 9:21-23; Kaylor Aff. ¶¶ 10-11, Exs. E-F.) On June 4, 2014, the Armstrongs learned about the Court's decision to grant them unsupervised visitation. (Dec. 20, 2021, D. Armstrong Dep. 44:5-9.) The Armstrongs allege that H.A. was being physically abused and

neglected at the Dalsing home yet contend that they complained about her mistreatment as early June 6, 2014, and constantly took photographs of her and took her to the Union County SCDSS office. (Apr. 12, 2021, R. Armstrong Dep. 57:18-58:8.) Plaintiffs participated in the Family Court proceedings, were represented by counsel in such proceedings, and were aware of the Court's rulings regarding custody and placement of H.A. Accordingly, this Court finds that the statute of limitations bars all of their individual claims in this case.

Second, this Court finds that neither SCDSS nor SCDCA owe any legal duty to the Armstrongs as a matter of law The question of the existence of a legal duty is a question for this Court. Hendricks v. Clemson Univ., 353 S.C. 449, 454, 578 S.E.2d 711, 713 (2003).

"Without a duty, there is no actionable negligence." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). This Court is not aware of any South Carolina case that establishes that either SCDSS or SCDCA owes any legal duty to a relative of a child who has been taken into emergency protective custody. Plaintiffs have not identified such a case to this Court. To the contrary, South Carolina courts have held that an affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003). Furthermore, South Carolina courts "will not extend the concept of a legal duty of care in tort liability beyond reasonable limits." McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 48, 644 S.E.2d 43, 46 (2007). This Court finds that there is no statute, contract, relationship, status, property interest, or some other special circumstance which created an affirmative legal duty owed by either SCDSS or SCDCA to the Armstrongs.

Third, the damages that Plaintiffs seek in this case are not recoverable. In the first place, the damages that *a parent* can recover for an injury to a child do "not include the intangible losses

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of aid, companionship, and society." Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 69-70, 651 S.E.2d 305, 308 (2007). The Armstrongs were not parents of H.A. during the time period relevant to their complaint. (Jan. 23, 2019, Order.) Accordingly, the Armstrongs cannot recover damages for the alleged loss of H.A.'s companionship. In the second place, while a parent may maintain an action for the loss of a child's services and earning capacity, H.A. was not adopted by the Armstrongs until 2019, after all of the events about which they complain. Third and finally, Plaintiffs presented no evidence of any loss of services or earnings, not surprising in light of H.A.'s tender age. Accordingly, this Court finds that both SCDSS and SCDCA are entitled to summary judgment as to all claims asserted by the Armstrongs individually.

SCDSS has Discretionary Immunity Relating to the Placement of H.A. in the Dalsing Home and for its Investigations of Abuse and Neglect

The South Carolina Tort Claims Act provides immunity to state agencies like SCDSS and SCDCA for discretionary decisions. To that end, the Act provides that such entities are not liable for a loss resulting from:

> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.

S.C. Code Ann. 15-78-60(5) (2005).

To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. Clark v. South Carolina Dep't of Pub. Safety, 362 S.C. 377, 386, 608 S.E.2d 573, 578 (2005). Furthermore, the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id. The South Carolina Supreme Court has held that the decision whether an allegation of abuse or neglect is founded or unfounded is a discretionary decision or

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an agency. Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 204, 403 S.E.2d 615, 620 (1991).

In this case, Plaintiffs appear to allege that OHAN, which conducted numerous investigations, should have concluded that H.A. was being abused at the home of the Dalsings. Notably, Plaintiff's expert did not offer any opinion to support this allegation. To the contrary, she testified that:

> Q. Okay. Tell me what opinions you have about the South Carolina Department of Social Services.
>
> A. In regard to this case; correct?
>
> Q. Yes, of course.
>
> A. At this point in time, looking at what my observations and opinions are on this case, I don't think that I have something specific to the Department of Social Services.

(Mitchell Dep. 126:8-11.) In addition, Defendants submitted the affidavit of an expert Nicol Stolar-Peterson, in support of their motion. Ms. Stolar-Peterson opined that SCDSS considered appropriate factors:

(1) In deciding to place H.A. with the Dalsings when she was taken into emergency protective custody by law enforcement;

(2) In determining whether H.A. should remain in the Dalsing home following allegations of abuse against both the Dalsings and the Armstrongs; and

(3) In attempting to identify a relative placement for H.A.

(Stolar-Peterson Aff. ¶¶ 5, 7, & 10.) Plaintiff did not offer any opposing evidence that DSS did not utilize accepted professional standards, nor did Plaintiff's expert offer any opinion that either SCDSS or SCDCA deviated from any applicable standard of care. Accordingly, this Court finds

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that SCDSS is entitled to discretionary immunity because there is no evidence that these Defendants failed to utilize accepted professional standards, or deviated from any applicable standard of care.

SCDSS is Entitled to Summary Judgment as to Any Claim Concerning the Licensing of the Dalsings as Foster Parents

To the extent that Plaintiffs attempt to assert a gross negligence claim against SCDSS based upon an alleged breach of duty by SCDSS in licensing of the Dalsings as foster parents or renewing their license, this Court finds that such claim is barred by the provisions of the Tort Claims Act. First, the decision to license the Dalsings is within the discretion of SCDSS. Simmons v. Robinson, 305 S.C. 428, 431, 409 S.E.2d 381, 382-83 (1991). As discussed above, SCDSS is immune from suit for the exercise of discretion.

In addition, SCDSS is not liable for a loss resulting from:

> (12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.

S.C. Code Ann. 16-78-60(12) (2005).

The uncontroverted evidence establishes that prior to the placement of H.A., the Dalsings had fostered a number of children. (T. Dalsing Dep. 43:5-49:15.) The evidence also establishes that SCDSS had not received any complaints about abuse or neglect of any child placed into their care and Plaintiffs did not identify any such complaints. (E. Dalsing Dep. 40:11-17; T. Dalsing Dep. 53:2-5.) Therefore, this Court finds that SCDSS is entitled to summary judgment as to any claims concerning the licensing or relicensing of the Dalsings as foster parents.

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SCDSS is Entitled to Summary Judgment as to Any Claims Concerning the Identification of the Armstrongs as a Placement Option for H.A.

This Court finds that SCDSS did not owe Plaintiffs a duty to identify the Armstrongs as a relative placement option for H.A. Even if such a duty was owed, Plaintiffs failed to produce any evidence from a qualified expert witness establishing that SCDSS breached any applicable standard of care searching for relative placement options for H.A. Furthermore, the evidence shows that SCDSS exercised at least slight care in its efforts to identify placement options for H.A. SCDSS requested relative information from H.A.'s biological mother when H.A. was taken into emergency protective custody by law enforcement. Subsequently, SCDSS repeatedly requested such information from H.A.'s parents. SCDSS conducted investigations into the suitability of the relatives identified by H.A.'s father, John Stafford. SCDSS also paid for a Seneca Search to identify relatives of H.A. who might be an appropriate placement option.

In addition, the Affidavit of Nicol Stolar-Peterson establishes that the efforts utilized by SCDSS to locate relative placement options are the same as was employed by other similar state agencies. (Stolar-Peterson Aff. ¶ 8.) Therefore, this Court finds that SCDSS is entitled to summary judgment as to any claims concerning the efforts of SCDSS to identify relative placement option for H.A.

SCDCA is Entitled to Summary Judgment as a Matter of Law

On July 1, 2019, approximately six months after the Armstrongs adopted H.A., SCDCA was established as an independent state agency by the South Carolina General Assembly. S.C. Code Ann. § 63-11-2210 (2018). SCDCA receives, refers, monitors, and/or investigates complaints regarding services provided to children by other identified state agencies. S.C. Code Ann. §§ 63-11-2270(4) & (5) (2018). The statutes establishing SCDCA do not provide for any private right of action against SCDCA. In addition, SCDCA was created to examine the care and

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services provided by other state agencies on a system-wide basis, but they do not create an independent duty by SCDCA to Plaintiffs. Arthurs ex rel Munn v. Aiken Cnty., 346 S.C. 97, 551 S.E.2d 579 (2001); Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 200, 403 S.E.2d 615, 617 (1991).

SCDCA is Not Liable for the Acts of the Foster Care Review Boards

In their Amended Complaint, Plaintiffs incorrectly allege that SCDCA is formerly the Foster Care Review Board. Plaintiffs appear to assert claims against SCDCA relating to the reports of the local Foster Care Review Board to the Family Court relating to H.A. (Am. Compl. ¶ 7.) Plaintiff's claims against SCDCA are legally deficient.

First, all of the reviews and reports of the Foster Care Review Board occurred prior to the formation of SCDCA on July 1, 2019, because the Armstrong's adoption of H.A. was finalized on January 23, 2019. There is nothing in the statutes providing that SCDCA is retroactively responsible for the actions of the Foster Care Review Boards that occurred before it even came into existence.

Second, SCDCA is not liable for the actions of the Foster Care Review Boards. The South Carolina General Assembly created Foster Care Review Boards (FCRBs) in each of South Carolina's sixteen judicial circuits to aid the family courts regarding children in foster care. S.C. Code Ann. § 63-11-710(A) (2008). FCRBs conduct biannual reviews of children in public foster care for more than four consecutive months to determine what efforts have been made by the supervising agency or facility to acquire a permanent home for the child. S.C. Code Ann. § 63-11-720(A)(1) (2008 & Supp. 2016). To that end, FCRBs submit written reports and recommendations to the Family Court. S.C. Code Ann. § 63-11-720(A)(2). Members of those

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FCRBs are appointed by the South Carolina Governor and can only be removed by the Governor. S.C. Code Ann. § 63-11-710(A) (2008).

At the hearing, Plaintiffs argued that SCDCA has a foster care review program and that somehow this means that SCDCA is responsible for the acts of the independently appointed Foster Care Review Boards. To the contrary, SCDCA provides only administrative support to the FCRBs. The State Child Advocate cannot appoint or remove any member of a Foster Care Review Board. S.C. Code Ann. § 63-11-2240 (2018). Accordingly, this Court finds that as a matter of law, the SCDCA is not liable for the acts of the Foster Care Review Boards.

Even if SCDCA was liable for the acts of the FCRBs, it has immunity under the Tort Claims Act. The Act specifically provides that a governmental entity is not liable for a loss resulting from:

> (30) acts or omissions of members of local foster care review boards acting within the scope of their official duties pursuant to Subarticle 4, Article 14, Chapter 7 of title 20. However, the member shall act in good faith, his conduct may not constitute gross negligence, recklessness, willfulness, or wantonness, and he must have participated in a training program established by the state foster care review board system.
>
> S.C. Code Ann. §15-78-60(30) (2005).

Plaintiff did not argue nor present any evidence to this Court that any member of any FRCB that considered H.A.'s foster placement did not act in good faith and did not have appropriate training. Moreover, there is no evidence that the Foster Care Review Boards did not properly consider whether SCDSS was working to acquire a permanent home for H.A. nor did not properly report its findings to the Family Court. Therefore, this Court finds that SCDCA is entitled to summary judgment as a matter of law for any claims relating in any way to the actions of the Foster Care Review Boards.

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Any Claim Relating to the Guardian ad Litem Program is Deficient

Plaintiffs do not assert any allegations in their Amended Complaint directed specifically to the actions of the Guardians ad Litem, but instead generally allege that SCDCA "had dealings" with the Dalsings and that SCDCA's "county agents, volunteers and employees" should have known of the Dalsings' abuse of H.A. (Am. Compl. ¶ 16.) To the extent that Plaintiffs' claims against SCDCA relate to the alleged gross negligence of any of H.A.'s Guardians ad Litem, this Court finds such claims to be legally deficient.

The General Assembly created the Cass Elias McCarter Guardian ad Litem Program, which has been administered by SCDCA since July 1, 2019. S.C. Code Ann. § 63-11-500(A) (2008 & Supp. 2018); § 63-11-2270 (2018). Guardians ad Litem do not have authority to place children, to remove a child from a placement, or take a child into emergency protective custody. Instead, Guardians ad Litem represent the interests of the children to whom they are assigned and provide reports and recommendations to the Family Court, which may adopt or reject the recommendations. S.C. Code Ann. § 63-11-510 (2008). As Plaintiffs admit, once the Armstrongs were identified as a suitable relative placement for H.A., the Guardians ad Litem consistently recommended to the Family Court that she be placed with them, which recommendation was not adopted by the Family Court in its sole discretion. This Court will not substitute its judgment for that of the Family Court which considered such recommendations, among other things, when it decided that H.A.'s placement with the Dalsings was appropriate and that the status quo should be maintained.

South Carolina's Court have held that a Guardian ad Litem, acting in the scope of his duties, performs quasi-judicial acts and is entitled to "absolute quasi-judicial immunity." Fleming v. Asbill, 326 S.C. 49, 57, 483 S.E.2d 751, 755-56 (1997) ("Because one of the guardian's roles is to

act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a constant threat of lawsuits from disgruntled parties, a finding of quasi-judicial immunity is necessary...The immunity to which guardians ad litem are entitled is an absolute quasi-judicial immunity."); Falk v. Sadler, 341 S.C. 281, 287-88, 533 S.E.2d 350, 353-54 (Ct. App. 2000) ("It is the nature of the acts, not simply the status of the defendant as a guardian ad litem, that determines the availability of immunity for the challenged acts and the extent of protection afforded by that immunity."); Dingle v. Armstrong, C.A. No. 9:22-cv-2746-BHH-MHC, at *10 (D.S.C. Dec. 12, 2022), *Report and Recommendation adopted by* C.A. No. 9:22-2746-BHH (D.S.C. Jan. 10, 2023) (Finding that "a GAL is entitled to quasi-judicial immunity for duties performed in that role."); Holtzclaw v. Epps, C.A. No. 6:12-cv-0100-HMH-JDA, at *8-9 (D.S.C. Jan. 13, 2012) *Report and Recommendation adopted by* C.A. No. 6:12cv-0100-HMH (D.S.C. Feb. 23, 2012) (Holding that "[a] guardian ad litem must . . . be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. Consequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in judicial proceedings.") Plaintiffs have not identified any evidence that any Guardian ad Litem appointed for H.A. acted outside of her duties. As such, common law absolute quasi-judicial immunity bars Plaintiffs' claims against SCDCA that relate to the actions of the Guardians.

In addition to common law immunity, SCDCA is immune from liability under the Tort Claims Act. The Act provides that SCDCA is not liable for a loss resulting from:

(1) Legislative, judicial, or quasi-judicial action or inaction;

(2) Administrative action or inaction of a legislative, judicial, or quasi-judicial nature.

S.C. Code Ann. §§ 16-78-60(1) & (2) (2005).

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As the cases cited above plainly hold, the actions of a Guardian ad Litem, acting within the scope of her duties, are quasi-judicial acts. There is no evidence that any Guardian acted outside of her duties. Thus, the Tort Claims Act bars Plaintiffs' claims against SCDCA for any alleged loss resulting from those acts.

Finally, all of the volunteer Guardians ad Litem for H.A. are protected by additional statutory immunity. To encourage individuals to serve as volunteer Guardians for children, the Legislature provided them with immunity. To that end, Section 63-11-560 provides:

> After participating in the training program of the South Carolina Guardian ad Litem Program, or a county guardian ad litem program operating pursuant to Section 63-11-500(B), a person who is appointed to serve as guardian ad litem and serves without compensation is not liable for any civil damages for any personal injury as a result of any act or omission by the person in the discharge of the responsibilities of a guardian ad litem if the person acts in good faith and is not guilty of gross negligence.

S.C. Code Ann § 63-11-560 (2008).

As the December 2, 2022 Affidavit of Amanda Whittle, the State Child Advocate, makes clear, Jennifer Cooper, Amy Gibson, and Wayne Cooke, each of whom were appointed by the Family Court to serve as volunteer Guardians ad Litem for H.A., completed the training provided by the South Carolina Guardian ad litem program. (Whittle Aff. ¶¶ 3-5.) As such, they are immune from suit which immunity applies to any vicarious liability claim against SCDCA for their actions.

Finally, Plaintiffs have presented no evidence from any qualified expert witness regarding the applicable standard of care of a Guardian ad Litem nor evidence that any Guardian ad Litem deviated from any applicable standard of care. Therefore, for all of these reasons, this Court finds that SCDCA is entitled to summary judgment as a matter of law.

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Plaintiffs' Claim for Punitive Damages Is Barred by the South Carolina Tort Claims Act

Plaintiffs improperly seek punitive damages from SCDSS and SCDCA. Pursuant to Section 15-78-120(b) of the South Carolina Tort Claims Act, "[n]o award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment." S.C. Code Ann. § 15-78-120(b) (2005). As such, Plaintiffs' claim for punitive damages against SCDSS and SCDCA is barred by the Act. Charleston Cnty. Sch. Dist. v. State Budget and Control Board, 313 S.C. 1, 7, 437 S.E.2d 6, 8-9 (1993).

CONCLUSION

Based upon the foregoing reasons, the motions for summary judgment of Defendants South Carolina Department of Social Services and South Carolina Department of Children's Advocacy are **GRANTED.**

AND IT IS SO ORDERED.

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Daniel D. Hall, Judge
Court of Common Pleas

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Union Common Pleas

Case Caption: H. A. , plaintiff, et al VS South Carolina Department Of Social Services , defendant, et al

Case Number: 2020CP4400104

Type: Order/Summary Judgment

So Ordered

s/Daniel D. Hall 2753

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