THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-001218

Joseph P. Sellaro,……..……..……Respondent,

v.

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

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

FINAL BRIEF OF RESPONDENT

BARNES LAW FIRM, LLC
Kathleen C. Barnes, SC Bar No. 78854
Post Office Box 897
Hampton, SC 29924
803-943-4529
kbarnes@barneslawfirmsc.com

BARRY B. GEORGE, P.A.
Paige B. George, SC Bar No. 75124
1419 Bull Street
Columbia, SC 29201
803-254-7222
lawyer@paigebgeorge.com

BROWN & BREHMER
Karl S. Brehmer, SC Bar No. 12849
Post Office Box 7966
Columbia, SC 29202
803-771-6600
ksb@brownandbrehmer.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the lower court correctly denied DSS's motions for a directed verdict and JNOV on the negligence and false imprisonment claims where the seventy-two-hour hearing order was issued without Joseph's presence or representation and no case law supports DSS's argument?

II. Whether the lower court correctly denied DSS's motions for a directed verdict and JNOV on the negligence and false imprisonment claims where DSS did not preserve arguments as to S.C. Code Ann. §§ 15-78-60(1)-(2) and §§ 15-78-60(3)-(4) do not apply to the facts of this case?

III. Whether the lower court correctly denied DSS's directed verdict and JNOV motions on the negligence cause of action because there is evidence of the standard of care and DSS's breach of it, DSS failed to preserve an argument that this case involves professional negligence, and, regardless, no expert testimony is required in this case?

IV. Whether the lower court correctly denied DSS's motion for a new trial absolute because DSS actually agreed to the lower court charging the jury on the immunity defenses and, regardless, DSS abandons the argument by failing to cite any law to support it?

V. Whether the lower court correctly denied DSS's motion for a new trial absolute because the evidence amply supports the jury's $300,000 damages award?

VI. Whether the lower court correctly denied DSS's motion for a new trial absolute or, alternatively, for a new trial *nisi remittitur* because the $300,000 verdict bears a reasonable relationship to the character and extent of Joseph's injuries?

STATEMENT OF THE CASE

Appellant South Carolina Department of Social Services (DSS) held Respondent Joseph Sellaro in involuntary custody at a hospital for over a week as an alleged vulnerable adult after the sudden, tragic death of his wife. A unanimous jury found DSS's conduct negligent and that it falsely imprisoned Joseph, and awarded him $300,000 in damages.

On August 31, 2016, Joseph filed a complaint against DSS and the Richland County Sheriff's Department (RSCD). He stated causes of action for, *inter alia*, negligence and false imprisonment. (R. pp. 12-19). DSS and RCSD filed answers generally denying the allegations. (R. pp. 20-40).

On May 16-19, 2022, Joseph's case was tried before the Honorable Robert E. Hood, and a jury returned a verdict for Joseph against DSS on the negligence and false imprisonment claims. The jury awarded Joseph $300,000 in damages against DSS. The jury returned a verdict for RSCD on the claims against it.

On May 31, 2022, DSS filed motions for JNOV or, alternatively, a new trial absolute or new trial *nisi remittitur*. (R. pp. 41-52). On July 8, 2022, Joseph filed a reply in opposition to the motions. (R. pp. 54-62). On July 28, 2022, the lower court held a hearing on the motions. (R. p. 709). On August 3, 2022, the lower court denied DSS's motions. (R. p. 7). DSS filed this appeal. (R. p. 736).

FACTS

Joseph and Eileen Sellaro were married for over forty years. (R. p. 231). Joseph worked at Baptist Hospital buffing the floors but got into a work accident, broke his leg, and retired as a result. (R. p. 232). Eileen still worked, and Joseph took care of the house, yard, dogs, and himself while she was gone. (R. pp. 232-33). Joseph is a diabetic who administered his insulin shots and checked his blood sugar. (R. pp. 233-34).

On Saturday, February 27, 2016, Eileen left for work and Joseph expected her home around 5:00 p.m. (R. p. 237). By late into the evening, she still had not returned. She died tragically in a car accident. The emergency room at Palmetto-Health Richland Hospital called Carol Outlaw, Eileen's friend, in an effort to reach a next of kin. (R. p. 174). Outlaw went to the ER and learned that Eileen passed. At the request of the deputy coroner, Outlaw then went with law enforcement and the coroner to the Sellaros' house to notify Joseph of Eileen's death. (R. pp. 176, 324-26). Outlaw told the deputy coroner and sheriff's deputies that went with them to the Sellaros' house

that Joseph had diabetes and depression, Eileen took care of him, he could not care for himself, and he could not drive. (R. pp. 182, 329-30).

At 10:00 p.m., RSCD officers, highway patrol, the deputy coroner, and Outlaw knocked on the Sellaros' door and, when Joseph answered, told him that Eileen died in a car accident. (R. pp. 237, 334-37). The deputy coroner testified that Joseph was asleep when they arrived and seemed disoriented after being woken up from sleep by a mass of law enforcement and told that his wife of over forty years was dead. (R. pp. 338, 351-53).

EMS arrived at the Sellaros' house at 11:26 pm on February 27. (R. p. 113). EMS noted that Joseph walked by himself; check his blood sugar and administer his own insulin medication; provide personal information including his date of birth, social security number, medical history, and medications; and "answer all questions appropriately." (R. pp. 114-19, 355-56).

RCSD decided to place Joseph in emergency protective custody under S.C. Code Ann. § 43-35-55 and, as a result, EMS transferred him to the hospital just before midnight on Saturday, February 27. (R. pp. 119, 121). The deputy coroner agreed that Joseph was "hit with a ton of bricks" when they told him that Eileen died and then, after only an hour-and-twenty minutes in his house, they "took the man off from his house that – his safe haven" against his will. (R. pp. 354, 357, 361, 363).

Joseph was "bewildered" and "lost it after [they told him Eileen died] cause they were asking me silly questions about who's my doctor and what's his address." (R. p. 238). Joseph asked "where's my wife and they said she's in the morgue . . . at Palmetto Health." (R. p. 238). He tried to leave the house to go to her but they would not let him go, and then an ambulance arrived and they told him "You got to get on the gurney." (R. pp. 238-39).

EMS transported Joseph to the hospital, where he was met by Valorie McDaniel, a DSS representative. (R. pp. 413-15, 387, 429). At that point, Joseph was in DSS custody. (R. pp. 413-15, 387). McDaniel met Joseph at the hospital because she was the on-call DSS worker that night, but Joseph was actually assigned to DSS case worker Naqua Edgerton. (R. pp. 502, 514-15). McDaniel's "time with [Joseph] was limited" and she testified at trial only that he was confused and frail (after finding out his wife was dead and being taken into custody against his will around midnight). (R. pp. 515-16, 524). Before leaving the hospital at around 1:00 a.m. on February 28, McDaniel requested the hospital evaluate Joseph. (R. pp. 525-26).

Hospital records from Sunday, February 28 state that Joseph was "alert, oriented, and conversationally appropriate", "oriented to self", "denies that he has dementia", and "wants to go home." (R. p. 204). Safiya Tate worked for the Palmetto-Health Richland hospital as a licensed master social worker and was assigned to Joseph. (R. pp. 131-32). Joseph told her that RCSD brought him to the hospital against his will. (R. p. 134). Joseph denied having dementia, and Tate noted that the "psych team" found Joseph "to have capacity." (R. p. 135). Joseph said he could care for himself. (R. p. 136).

On Monday, February 29, 2016, Dr. Jeffrey Brandenburg examined Joseph. (R. pp. 199, 217-18). The lower court qualified Dr. Brandenburg as an expert in general psychiatry. (R. p. 199). Dr. Brandenburg found "no evidence of dementia." (R. p. 218). He felt Joseph "ha[d] capacity to make his own healthcare decisions" and found Joseph "pleasant and cooperative [with] no short term memory deficits." (R. p. 218). In Dr. Brandenburg's opinion, Joseph "was not suffering from any dementia" and he did not see any reason for Joseph to be held in adult protective custody. (R. pp. 219-20). No other medical expert testified to the contrary.

DSS is responsible for filing a petition for protective custody within one business day of receiving notification from law enforcement that it took someone into protective custody. S.C. Code Ann. § 43-35-55(E). "Within seventy-two hours of [DSS] filing the petition, excluding Saturdays, Sundays, and legal holidays," the family court must hold a hearing "to determine whether there is probable cause for the protective custody." S.C. Code Ann. § 43-35-55(F).

DSS caseworker Edgerton visited Joseph on February 29 and knew that he already had evaluations by a psychologist and an internal medicine doctor. (R. p. 557). At 11:11 a.m. on March 1, 2016, Tate sent a fax to Edgerton that included Joseph's medical records, health and physical notes, and psychiatric capacity consult note showing no dementia or cognitive problems and no reason for him to be in protective custody. (R. pp. 137-38). Tate faxed the documents for "inclusion in the Court [72-hour] hearing so that they could make a good determination of whether or not he needed to remain in care or whether he was safe enough to discharge home alone." (R. p. 139). Edgerton should have received the documents over two hours before the hearing. (R. p. 140, 681). However, because Valorie McDaniel met Joseph when he arrived at the hospital, she attended the hearing rather than Edgerton—his actual case worker. (R. pp. 514-17). Even though McDaniel asked for a medical evaluation three days earlier, she did not check on the results before she attended the hearing. (R. pp. 526-27). McDaniel did not bring any medical records to Court. (R. p. 523).

On March 1, 2016, at 1:30 p.m., the family court held a hearing in DSS's case against Joseph. (R. p. 685, 158-61). The only people at the hearing were the DSS attorney, an RCSD officer representative who was not at the Sellaros' home and never met Joseph, and Valorie McDaniel. (R. pp. 158-61, 396, 399, 685-90). The only evidence taken was testimony from the RSCD officer representative who said that **RCSD** determined on the night of **February 27** that

Joseph "was unable to take care of himself" and "the wife who was deceased was the actual caregiver." (R. pp. 685-90, 142-43, 145). DSS is the plaintiff in the action but it provided no information on Joseph's medical condition during the three days he was in DSS's custody at the hospital. McDaniel did not give a word of testimony at the hearing; she merely attended. (R. p. 523).

Based on the only evidence before it from RCSD about the night Joseph was taken into custody, the family court found Joseph "is a vulnerable adult" and probable cause for DSS "being ordered to have custody of a pending Merits Hearing" in 40 days. (R. pp. 689, 672, 692-94). DSS did not provide the court with any of Joseph's medical records even though it had them at the time of the hearing and even though he had been in DSS's custody at the hospital for three days. (R. pp. 671-73).

While in DSS's custody, Joseph could not call his children to tell them about their mother's death. (R. p. 135). Joseph was not allowed to see Eileen's body. (R. p. 244). Her sister came and cremated her before Joseph was released from custody. (R. p. 244). Joseph could not make arrangements for his wife's funeral. (R. pp. 389-90, 390). He worried about making his house payments. (R. pp. 136, 143-44).

When police took Sellaro into custody, he left a house key with Carol Outlaw and asked her to take care of his dogs. (R. p. 147). On March 3, 2016, Joseph learned that Outlaw euthanized one dog, took one to the pound, and kept the other two. (R. pp. 147, 252). Joseph was "very upset" and called the police out of concern for his home. (R. p. 147).

Joseph's March 2, 2016 medical records state it is "unclear why" he is in adult protective services case. (R. p. 214). The hospital found Joseph "alert with **absolutely no medical or psych**

needs." (R. p. 214) (emphasis added). "It is **unclear why patient was placed under custody**. He is not demented." (R. p. 214) (emphasis added).

On March 3, 2016, the family court appointed Victoria Johnson as a guardian ad litem for Joseph. (R. p. 97). She spoke with the DSS caseworker, reviewed Joseph's emergency room and hospital records, and met with Joseph. (R. pp. 99-101). Joseph's March 3, 2016 medical records state "[h]e is not demented," he has "[n]o cognitive impairment **or** physical needs," and "[n]o medical reason to be here." (R. pp. 208-09) (emphasis added). The March 4, 2016 records say the same thing. (R. p. 208).

On Friday, March 4, after seeing the medical records showing that Joseph's psychological evaluation found no dementia, Johnson asked her GAL attorney to file a motion to dismiss Joseph's case. (R. pp. 101-02, 667-69). She did not uncover new evidence but merely acted on the existing medical records available to DSS at the March 1, 2016 hearing. (R. pp. 103, 106-07). She filed an affidavit stating that Joseph's February 28 and 29 medical records showed no physical or mental impairments, yet "DSS went to Court the following day, March 1st, for the Probable Cause hearing. **Despite knowledge of the Doctors' reports**, DSS represented to the court that Mr. Sellaro had dementia and was unable to care for himself and asked t[he] court that he remain in care." (R. pp. 671-73) (emphasis added).

Joseph's Saturday, March 5 medical records state he has "absolutely no inpatient medical or psychiatric needs" and has "[n]o medical reason to be here." (R. pp. 207-08). The Sunday, March 6 records state the same thing. (R. pp. 215-16).

On Monday, March 7, 2016, the family court issued a bench order dismissing the case **with consent of DSS**. (R. pp. 103, 150-51). The order states that the GAL attorney moved to dismiss

the case and, "[a]ll parties agreed that the case should be dismissed as all physicians report that he is not suffering from dementia and is quite capable of managing his affairs." (R. p. 670).

On August 31, 2016, Joseph filed a complaint against DSS and RCSD. (R. p. 12). From May 16-19, 2022, the case was tried before a jury. At the close of Joseph's case, DSS moved for a directed verdict arguing that Joseph did not introduce expert testimony on the standard of care or that DSS failed to meet a standard. (R. p. 313). The trial court denied the motion, finding "a question of fact for the jury" and stating "I don't know that you have to have an expert establish the standard of care when we have a statute that defines the duties." (R. p. 314).

At the close of RCSD's case, DSS made a motion for a directed verdict based on the 72-hour hearing order. (R. p. 489). It argued that DSS is immune from liability under S.C. Code Ann. § 15-78-60(3) because it acted under the 72-hour order and, therefore, Joseph's loss resulted from "execution, enforcement, or implementation" of a court order. (R. p. 489). Joseph argued that he was not allowed to participate in the hearing. (R. p. 490). The lower court denied the motion. (R. p. 493).

The jury deliberated for about three-and-a-half hours. (R. pp. 654, 656-57). The jury unanimously found that DSS was negligent in its care of Joseph and falsely imprisoned him. (R. pp. 658, 10). It awarded Joseph $300,000 in damages. (R. pp. 659, 10). The jury also found that RCSD was not negligent and did not falsely imprison Joseph. (R. p. 658).

DSS filed a motion for JNOV or, alternatively, a new trial absolute or new trial *nisi remittitur*. (R. p. 41). Joseph filed a reply in opposition to the motions. (R. p. 54). The lower court held a hearing and denied the motions in a Form 4 Order. (R. pp. 709, 7). This Court should affirm.

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (internal quotation and alteration marks omitted). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. " *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 (internal quotation marks and citation omitted).

"An appellate court will not reverse a circuit court's decision regarding a jury instruction unless there is an abuse of discretion. An abuse of discretion occurs when the circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. McGowan*, 430 S.C. 373, 379, 845 S.E.2d 503, 505-06 (Ct. App. 2020) (internal citation and quotation and alteration marks omitted).

"The jury's determination of damages is entitled to substantial deference. The denial of a new trial motion is within the discretion of the trial court and, absent an abuse of discretion, it will not be reversed on appeal." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 309-10, 578 S.E.2d 16, 25 (Ct. App. 2002). "Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the

conclusions reached are controlled by error of law. When considering the trial court's ruling on motions for a new trial or new trial nisi remittitur, this court employs a highly deferential standard of review." *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 226-27, 865 S.E.2d 910, 917 (Ct. App. 2021) (internal citations and quotation and alteration marks omitted).

ARGUMENT

The undisputed evidence shows that there was not a medical reason for Joseph to remain in DSS's custody. DSS asked for Joseph's medical evaluations, knew they occurred, and received medical records showing no need for his custody—all before the 72-hour hearing. Yet, DSS failed to present the records to the court and, instead, kept Joseph in unnecessary custody. Many of DSS's appellate arguments are unpreserved. The remainder are either legally incorrect or factually inapplicable. For the reasons explained below, the Court should affirm on all issues and remand to the circuit court to enforce the judgment against DSS.

I. THE LOWER COURT CORRECTLY DENIED DSS'S MOTIONS FOR A DIRECTED VERDICT AND JNOV ON THE NEGLIGENCE AND FALSE IMPRISONMENT CLAIMS.

A. The lower court correctly found probable cause was an issue for the jury.

DSS does not argue that probable cause existed on the merits. Instead, it makes a procedural argument that the family court's March 1, 2016 order on the 72-hour hearing is dispositive of probable cause and establishes as a matter of law that DSS is not liable. The lower court correctly rejected this argument and submitted the issue to the jury. *See Jones v. Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990) ("South Carolina follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury.").

DSS relies heavily on *Argoe v. Three Rivers Behavioral Health, LLC*, 392 SC. 462, 710 S.E.2d 67 (2011). *Argoe* does not support its position in this case because it is based on a different statutory scheme and is not factually applicable.

Argoe involved an involuntary commitment for psychiatric, inpatient treatment under the procedures in Title 44, Chapter 17 for commitment of mentally ill persons ("commitment statute"). *Id.* at 466, 710 S.E.2d at 69. The commitment statute contains strict requirements for health evaluations and a specific appellate procedure. S.C. Code Ann. §§ 44-17-410 to -630.

Argoe's husband filed an application for an involuntary emergency hospitalization under the commitment statute. 392 S.C. at 466, 710 S.E.2d at 69. Pursuant to the statute, a probate judge granted the application, a physician gave Argoe a mental health evaluation and diagnosis within 24 hours, and she was sent home with orders to return the following day. *Id.* at 466, 710 S.E.2d at 69-70. On that following day, a second physician evaluated Argoe and ordered inpatient psychiatric hospitalization, and she was involuntarily admitted to a facility for treatment. *Id.* at 466-67, 710 S.E.2d at 70. About six weeks later, Argoe was discharged. *Id.* at 468, 710 S.E.2d at 70. Two years later, she filed suit against the hospitals, among others, for intentional infliction of emotional distress, false imprisonment, defamation, and invasion of privacy. *Id.*

The commitment statute states a specific procedure and 15-day time period for appealing from a probate court order finding someone mentally ill and ordering treatment. S.C. Code Ann. § 44-17-620. Because Argoe's "challenge to the commitment proceedings was clearly beyond the statutorily-mandated fifteen-day time period", the Supreme Court ruled that Argoe "was precluded from collaterally attacking the underlying commitment orders." 392 S.C. at 471, 710 S.E.2d at 72.

While Argoe's action against the hospitals was pending, she filed an action to vacate the commitment proceedings, got an adverse ruling from the circuit court, and did not appeal that order. *Id.* at 470-71, 710 S.E.2d at 71-72. The Supreme Court held that separate, unappealed order of the circuit court "constitutes a final adjudication regarding the validity of the commitment

proceedings" and "*res judicata* precludes [Argoe] from asserting any challenge to the commitment orders." *Id.* at 471, 710 S.E.2d at 72.

The Supreme Court then found that, because the commitment orders were already finally adjudicated as valid, Argoe could not maintain a false imprisonment action because her detention was lawful. *Id.* at 473, 710 S.E.2d at 73.

This case is vastly different from *Argoe*. The Omnibus Adult Protective Act does not contain an appellate procedure. S.C. Code Ann. §§ 43-35-5 to -90. Therefore, there is no "final adjudication" to preclude Joseph from challenging DSS's conduct. Further, in *Argoe*, the plaintiff had previously attempted to vacate the order and then failed to appeal an adverse ruling. Nothing of the sort occurred in this case. Joseph asked to, but was prohibited by DSS, from attending the 72-hour hearing. Then, six days later, DSS agreed to dismiss the case. There was no final adjudication of anything that precludes Joseph from bringing this action as a matter of law.

Perhaps more importantly, Joseph **was not represented** at the 72-hour hearing. No one attended the hearing on his behalf. He cannot be precluded from challenging DSS's conduct based on an order issued after a hearing where he was unrepresented. Once the family court dismissed DSS's case, there was nothing for Joseph to appeal because he would not have been an aggrieved party.[1] Rule 201(b), SCACR.

Argoe is not "controlling", as DSS argues, because it is neither legally nor factually applicable to this case. The lower court correctly denied DSS's motion on this issue, and this

[1] For example, in *S.C. Dep't of Soc. Servs. v. Patten*, 412 S.C. 93, 770 S.E.2d 192 (Ct. App. 2015), Mr. Patten appealed from the final merits hearing that found him a vulnerable adult. In this case, Joseph never even reached a final merits hearing because the attorney for his guardian ad litem moved to dismiss the case and DSS consented to dismissal. Therefore, there was nothing for Joseph to appeal.

Court should affirm. Even if the Court considers DSS's remaining arguments on this issue, it should still affirm.

DSS argues that Joseph's negligence claim is a "duplication of his false imprisonment claim" and, therefore, the alleged existence of probable cause bars the negligence claim as well. (Br. of App. pp. 8-9). The Court should reject this argument for three independent reasons.

First, it is unpreserved because DSS raised it for the first time in a post-trial motion. DSS moved for a directed verdict twice at trial but did not ever argue that the negligence claim is a duplication of the false imprisonment claim. (R. pp. 313-14, 489-93). "[A]n issue may not be raised for the first time in a post-trial motion." *Dawkins v. Mozie*, 399 S.C. 290, 295, 731 S.E.2d 342, 345 (Ct. App. 2012) (finding unpreserved an issue first raised "in a post-trial brief"). The Court should not consider this argument because DSS failed to preserve it.

Second, DSS mischaracterizes the negligence claim as one for "negligent imprisonment." (Br. of App. pp. 8-9). The negligence claim is for DSS's failure to exercise due care in fulfilling its statutory responsibilities to Joseph under the Omnibus Adult Protection Act. There is no law to prevent a plaintiff from asserting negligence and false imprisonment claims in that context.

Third, DSS argues that, because the *Argoe* Court affirmed the dismissal of all claims based on the orders in that case, this Court should grant a JNOV as to the negligence claim if it finds that the false imprisonment claim is precluded by the March 1, 2016 order. (Br. of App. pp. 12-13). *Argoe* is not controlling on this issue. *Argoe* affirmed summary judgment on a claim for intentional infliction of emotional distress because the Court found the defendant's conduct "reasonable and in accordance with the valid probate court orders." 392 S.C. at 475-76, 710 S.E.2d at 74. The defendant was a facility that provided court-ordered treatment. It was not a party to the action against *Argoe*. Here, DSS was the plaintiff in the family court action against Joseph. The *Argoe*

holding was based on the particular facts of that case and is not a blanket rule that, if a false imprisonment claim fails as a matter of law, all other additional causes of action fail as well. *Argoe* is simply not the "smoking gun" that DSS wants it to be in this case.

The lower court correctly found the issue of probable cause was for the jury, and this Court should affirm its denial of DSS's motions for a directed verdict and JNOV.

B. The lower court correctly held DSS is not entitled to immunity under the South Carolina Tort Claims Act as a matter of law.

The lower court correctly denied DSS's motions for directed verdict and JNOV as to immunities under the SCTCA. DSS claims immunity under two provisions of the SCTCA—S.C. Code Ann. §§ 15-78-60(3) and -60(4). These SCTCA exceptions provide immunity for an alleged loss arising out of the lawful implementation of process and the enforcement of state law. Neither is applicable as a matter of law.

Section 15-78-60(4) of the South Carolina Code provides the government immunity for "adoption enforcement, or compliance with any law . . . whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." DSS argues it is entitled to immunity under § 15-78-60(4) because it "complied with" § 43-35-55 when it assumed custody of Joseph. (Br. of App. pp. 14-16). DSS argues that the Adult Protection Act did not require it to provide a copy of Joseph's medical records to the judge because the statute discusses medical evaluations that must occur before the final merits hearing. (Br. of App. pp. 14-15). DSS misses the point—the statute does not prevent DSS from obtaining and providing the medical records at the 72-hour hearing. DSS could have, but did not, seek Joseph's release at the 72-hour hearing. (R. pp. 685-90). Indeed, as our Supreme Court held, a person should "not spend any more time in [DSS] custody than ***absolutely*** necessary." *S.C. Dep't of Soc. Servs. v. Patten*, 412 S.C. 93, 100, 770 S.E.2d 192, 196 (Ct. App. 2015) (emphasis added). Regardless of a statutory

requirement for the timing of an evaluation, DSS ordered them, knew they occurred, and received the results before the March 1 hearing. (R. p. 557). With that knowledge, it cannot sit by idly and keep Joseph in unnecessary custody until a final merits hearing. Edgerton, Joseph's DSS case manager, testified that she put Joseph's "medical records in his case file" and did not testify to even reading them. (R. p. 548).

The final merits hearing is to be held "***[w]ithin*** forty days of the filing of a petition." S.C. Code Ann. § 43-35-45(C) (emphasis added). That is not a required time period. Under DSS's argument, it would maintain custody of every adult for forty days regardless of its knowledge of the person's condition.[2] This is plainly not intended by the Act. *Patten*, 412 S.C. at 100, 770 S.E.2d at 196. Once DSS had Joseph's medical records, his custody was no longer necessary and DSS should have released him.

Section 15-78-60(3) of the South Carolina Code provides the government immunity for a loss resulting from "execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process." DSS argues this provision entitles it to immunity for Joseph's custody from March 1 until March 7. (Br. of App. p. 16). Joseph argued, and the jury found, that DSS never should have gotten the order on March 1. If, as Joseph argues, DSS provided the medical records to the family court on March 1, it would not have obtained the order. DSS cannot rely on the fruits of its own negligence to seek immunity. DSS acted negligently in obtaining that order such that § 15-78-60(3) provides no immunity.

Finally, DSS argues for the first time on appeal that it is also immune under S.C. Code Ann. §§ 15-78-60(1) and -60(2) "to the extent that [Joseph] was suing SCDSS for the conduct of

[2] When asked what has to be done to release someone from custody, Edgerton testified DSS gathers information and just waits for the merits hearing. (R. p. 549).

the witnesses in the March 1, 2016" hearing. (Br. of App. pp. 16-18). This is unpreserved and factually inapplicable. DSS states that these immunity provisions were "asserted in the directed verdict arguments" and cites to pages 607-608 of the trial transcript. (Br. of App. p. 16). Those pages contain argument by the lawyer for RCSD. (R. pp. 457-58). DSS never argued it was entitled to immunity under § 15-78-60(1) and -60(2).[3] An "appellant cannot bootstrap an issue for appeal by way of a codefendant's objection." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 324 n.3, 487 S.E.2d 187, 190 n.3 (1997). DSS cannot cite these sections for the first time on appeal and cannot rely on another party's argument for issue preservation. The Court should find the argument unpreserved.

Regardless, the sections are not factually applicable because no one from DSS testified at the March 1 hearing. (R. pp. 685-90). The only witness at the hearing was an RCSD officer representative. (R. pp. 685-90). Therefore, DSS is not entitled to immunity.

Finally, DSS refers to S.C. Code Ann. § 43-35-75(A) as "an additional layer of immunity" but states that provision "was not litigated." (Br. of App. p. 18 n.3). If it was not litigated, then it is not preserved. Regardless, DSS misreads the statute as in any way applicable to it. The statute applies to "a ***person*** who, acting in good faith, reports pursuant to this chapter or who participates in an investigation or judicial proceeding resulting from a report." § 43-35-75(A) (emphasis added). DSS is a government entity that is not the intended subject of this immunity provision.

C. <u>The lower court correctly denied DSS's motions on the basis of expert testimony.</u>

The lower court correctly denied DSS's directed verdict and JNOV motions on the basis of an absence of expert testimony. (R. p. 314, 7).

---

[3] Its post-trial motion mentions the code sections in a footnote only to state that the lower court found them "relevant to this litigation" in "its jury instructions." (R. p. 46 n.2). They were relevant as to RCSD—the only party that argued them.

There is evidence of DSS's duty, standard of care, and deviation from the standard. The 72-hour hearing order states that DSS "is the agency charged with the duty of providing for the protection of vulnerable adults." (R. p. 692). It states that, according to S.C. Code Ann. § 43-35-10(11), a vulnerable adult "is a person eighteen (18) years of age or older who is impaired in his ability to adequately provide for his own care and protection, and [] is not being adequately cared for by others." (R. p. 693).

Safiya Tate, Joseph's hospital case manager, testified that law enforcement decides to take a person into emergency protective custody and then, once at the hospital, DSS assumes a person's care. (R. pp. 152-54). Tate worked closely and frequently with DSS on protective custody cases. (R. p. 545). Tate's job is to be the point of contact and communicate with DSS about someone in protective custody. She testified that, in protective custody cases, DSS generally "would consult the psychiatric team . . . and do an assessment to determine whether or not that patient has capacity to make decisions and is safe to live alone." (R. p. 139). In this case, Tate faxed those records to DSS for the purpose of DSS including them "in the Court hearing so that they could make a good determination of whether or not [Joseph] needed to remain in care." (R. p. 139).

Dr. Jeffrey Brandenburg testified as an expert in general psychiatry. (R. p. 199). He evaluated Joseph and found "absolutely no patient medical or psychiatric needs." (R. p. 205). He found it "unclear why" Joseph was in protective custody. (R. p. 214). In his medical opinion, he did not see any reason for protective custody. (R. p. 220).

DSS case manager Valorie McDaniel testified that it is DSS's "responsibility" to "go out and assess if those allegations [of a vulnerable adult] are true or not true." (R. p. 501). She testified that "at the 72 hour court hearing, that is when it is to be determined whether or not the person is in imminent danger" and whether DSS "should retain care, custody, and control of" Joseph. (R.

pp. 512, 522). She testified that DSS is supposed to give the family court "relevant information" that it has "at the current time." (R. p. 522). McDaniel denied having Joseph's medical records at the time of the hearing but admitted that, if DSS had them, she had a "responsibility to put them in the Court's hands." (R. p. 523). McDaniel admitted that the evaluations DSS requested should have been done before the March 1 hearing but she did not even check on them. (R. pp. 526-27). Naqua Edgerton, Joseph's DSS case manager, testified that she ordered his medical evaluations, knew they were completed, but did nothing to look for them before the 72-hour hearing. (R. pp. 557-59).

Viewing this evidence in a light most favorable to Joseph, there is evidence of DSS's standard of care and that it breached that standard. DSS had knowledge and actual receipt of medical records showing no need for protective custody, and two DSS employees knew about the medical records but did not seek them out before the hearing. (R. pp. 139, 512, 522-23, 557-59).

For the first time on appeal, DSS cites to a case involving expert testimony in professional negligence cases. (Br. of App. p. 19). DSS never made that argument below in either a directed verdict or post-trial motion. (R. pp. 313, 489-92, 48-49, 718-19). Therefore, it is not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (internal quotation marks omitted)).

Regardless, the argument is legally meritless because this is not a professional negligence case. The only law that DSS cites to in its argument on this issue is a case that involved an engineer. *City of York v. Turner-Murphy Co.*, 317 S.C. 194, 195, 452 S.E.2d 615, 616 (Ct. App. 1994). This case involves DSS case managers and their alleged negligence in not presenting the family court with existing medical records that unequivocally show Joseph did not need to be in

protective custody. "In a professional negligence cause of action, the plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession." *Id.* at 196, 452 S.E.2d at 616-17. This is not a professional negligence case. *See, e.g.*, S.C. Code Ann. § 15-36-100 (stating requirement for expert affidavit in "professional negligence" cases and list of applicable professions that does not include DSS). Joseph does not allege that DSS failed to conform to accepted practices in any alleged case manager profession. Rather, Joseph alleged and the jury found that DSS failed to reasonably fulfill its statutory duties.

Alternatively, even if DSS case managers are considered "professionals", the facts of this case would fall within the "common knowledge exception" under which "expert testimony is not required where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence on the part of the professional and to determine the presence of the required causal link between the professional's performance and the alleged malpractice." *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 637 n.13, 760 S.E.2d 399, 408 n.13 (2014). A layman can understand that a reasonable case manager holding an unwilling adult in protective custody would look for and present a court (deciding the adult's future for the next forty days) with medical evaluation records that she requested and knows are completed.

Finally, DSS argues it is entitled to a JNOV because the lower court allegedly "never found a duty of care owed" and did not charge the jury on the Adult Protection Act. (Br. p. 20). This is incorrect. The judge denied DSS's directed verdict motion on the standard of care and expert testimony—plainly showing that the lower court found evidence of a duty. It ruled that the statute "defines the duties." (R. p. 314). As to the jury charge, DSS does not cite law that requires a judge to charge a statute to the jury. In this case, the evidence already included testimony about the Adult Protection Act (including its purpose and procedure) and the 72-hour hearing. (R. pp. 152-

54, 139, 501, 512, 522-23, 692-94). As argued above, viewing this evidence in a light most favorable to Joseph, there was evidence of the standard of care.

Viewing the evidence in a light most favorable to Joseph, he presented evidence of DSS's standard of care and breach of that standard.

II. THE LOWER COURT CORRECTLY DENIED DSS'S MOTIONS FOR A NEW TRIAL ABSOLUTE OR NEW TRIAL *NISI REMITTITUR*.

A. The lower court correctly submitted the SCTCA immunity defenses to the jury at DSS's request.

DSS argues that the lower court erred in charging the jury on the SCTCA immunity defenses and that this entitles it to a new trial absolute. (Br. of App. pp. 21-22). This argument fails for at least two independent reasons.

First, DSS does not cite to any legal authority that says the issue of immunity defenses is solely a matter of law for the court. (Br. of App. pp. 21-22). "When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue." *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018). DSS abandoned the argument, and the Court should not address the merits of it.

Second, DSS took an entirely different position on this issue in the lower court—it asked and consented to the court charging the jury on immunity defenses. During the charge conferences, the lower court asked if the parties are "gonna request that I charge on the immunities." (R. p. 582). DSS did not state a position. RCSD stated it would like to consider the issue overnight but its "tendency would be . . . to not charge them." (R. pp. 739-40). Overnight, RCSD "switch[ed] positions" and submitted a proposed charge on the immunities. (R. pp. 741-42). DSS "**agree[d]** . . . with the proposed inclusion of the language." (R. p. 742) (emphasis added). Joseph then stated his belief "that those were legal issues for the court as opposed to issues for the jury." (R. p. 742). After reviewing the charges again, the lower court asked one more time about the parties' positions

on the issue. (R. p. 743). RCSD stated it found a case indicating "it's in the discretion of the court." (R. pp. 743-44). DSS's only comment was "that is my understanding as well." (R. p. 744). DSS agreed with and never opposed the lower court charging the jury on the immunity defenses. "Appellant may not argue a different position on appeal." *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013). DSS cannot seek one thing below and then argue the opposite on appeal as an alleged basis for a new trial absolute. The Court should reject this argument outright.

B. The lower court correctly found the damages award is supported by the evidence.

The lower court correctly ruled that the evidence supports the jury's $300,000 damages award for Joseph.[4] (R. p. 7). "The trial court and this court must give substantial deference to the jury's determination of damages." *Kelley v. Wren*, 415 S.C. 379, 393, 782 S.E.2d 406, 413 (Ct. App. 2016) (internal quotation marks omitted).

DSS's entire argument on this issue is that Joseph presented evidence of $9,291.00 in actual, economic damages and that he cannot recover for his emotional and mental suffering because he allegedly did not have a physical manifestation of emotional distress. (Br. of App. pp. 22-23). The Court should reject this argument and affirm the lower court's decision.

First, the issue is not preserved because DSS never argued at trial that Joseph could not recover non-economic damages because he allegedly did not have a physical manifestation of emotional distress. DSS never argued below that there was no evidence of non-economic damages. DSS never objected to the court's charges on damages, including non-economic damages for "psychological trauma, mental anguish, mental distress, apprehension, anxiety,

[4] In its post-trial motion, DSS also moved for a new trial under the thirteenth juror doctrine. (R. p. 52). However, it abandons that argument by not raising it on appeal.

emotional injury, psychological injury." (R. p. 645). Instead, it allowed those damages to be submitted to the jury without objection and made this argument for the first time in a post-trial motion. "[A]n issue may not be raised for the first time in a post-trial motion." *Dawkins v. Mozie*, 399 S.C. 290, 295, 731 S.E.2d 342, 345 (Ct. App. 2012) (finding unpreserved an issue first raised "in a post-trial brief").

Second, DSS's position is incorrect. The medical records and bills show that, while in DSS custody, Joseph was forced to undergo physical and mental health evaluations by multiple doctors, and had to go through blood and other lab work. (R. p. 691, 696-708). Being touch, poked, and prodded by medical personnel for multiple days is certainly physical injury. The medical records state Joseph was "upset" and being held against his will. (R. p. 682). Joseph testified he "cried for a long time" in the hospital and was determined "to get out of this place." (R. p. 263). There was ample evidence, viewed in a light most favorable to Joseph, for him to recover for emotional and mental damages.

Finally, DSS argues that the jury could not distinguish between Joseph's suffering from the loss of his wife versus his suffering from DSS's conduct. (Br. of App. p. 23). DSS underestimates juror's abilities. Jurors are routinely asked to distinguish between damages awards and parse out which defendant caused which damages. In this case, for example, the judge charged the jury on damages including emotional, economic, physical, non-economic, pain and suffering, and loss of enjoyment of life. (R. pp. 645-47).

Given the evidence that Joseph did not want to go into custody, remained in custody with no medical necessity for eight days, endured medical exams and lab tests while in custody, received a medical bill for $9,291 while in involuntary custody, could not see his wife's body for

the last time to say goodbye to her, could not properly or privately mourn the loss of his wife, and feared the loss of his home, the jury's $300,000 award is supported by the evidence.

C. The lower court correctly found the jury's verdict is not grossly excessive or unduly liberal.

The lower court correctly denied DSS's motions for a new trial absolute and new trial *nisi remittitur* because the verdict is neither grossly excessive nor unduly liberal. "A verdict which may be supported by ***any*** rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained is not excessive." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982) (emphasis added). "Compelling reasons [] must be given to justify invading the jury's province in this manner." *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). The lower court correctly denied the motions, and this Court should affirm under the "highly deferential standard of review." *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 226-27, 865 S.E.2d 910, 917 (Ct. App. 2021).

As to excessiveness of the verdict amount, DSS merely repeats its argument addressed above in section II.B. (Br. of App. p. 24). The only additional argument it makes for a new trial absolute is that, because the jury found RCSD not liable, it is allegedly inconsistent to find DSS liable. (Br. of App. p. 25). It cites to no law that says it is inconsistent or a basis for a new trial absolute for a jury to absolve one defendant while finding another defendant liable. DSS's argument is not a basis for a new trial absolute based on the **amount** of damages but, rather, more of an argument that it should not be liable at all. For that reason, it is an inappropriate argument in a new trial absolute motion based on the alleged excessiveness of the verdict.

However, even if the Court considers this argument on the merits, the jury's decision is fully supported by the law and evidence. RCSD and DSS had different responsibilities and duties to Joseph at different times. Under S.C. Code Ann. § 43-35-55, "a law enforcement officer takes

protective custody of a vulnerable adult" and then, once the adult is transferred to "a place of safety," "Adult Protective Services [DSS] has custody of the vulnerable adult" and is responsible for his care and prosecution of the protective services case. §§ 43-35-55(B), -55(E). Law enforcement decided to take Joseph into custody but, once he arrived at the hospital, DSS assumed custody and the statutory duties to decide whether to keep him in custody. (R. pp. 413-15, 387, 429). Therefore, the law and evidence support the jury's decision to absolve RCSD from liability for its decision to take Joseph into custody but to hold DSS liable for its failures in keeping him in custody for much longer than was absolutely necessary.

The jury's liability decisions in no way affected its decision on how much to award in damages. *See* Br. of App. p. 25. A grossly excessive verdict is one "deemed to be the result of a disregard of the facts and of the instructions of the Court, and to be due to passion and prejudice rather than reason." *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). "[T]o warrant a new trial absolute, the verdict reached must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury." *Holroyd v. Requa*, 361 S.C. 43, 66, 603 S.E.2d 417, 429 (Ct. App. 2004).

In determining whether a verdict amount is excessive, "the facts must be viewed in the light most favorable to the plaintiff and, where the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). DSS presents no compelling reason for the Court to invade the jury's province. Viewing the evidence in a light most favorable to Joseph, it bears a reasonable relationship to the character and extent of the injuries sustained and supports the lower court's finding that the verdict was not excessive.

Joseph was in involuntary, hospitalized custody for eight nights. It is undisputed expert testimony from Dr. Brandenburg that there was no medical reason for Joseph to be in the hospital. Joseph was forced to undergo unnecessary medical evaluations and lab and blood tests. He received a bill for $9,291.00 for care that he did not seek or need.

Perhaps more importantly, DSS knew there was nothing ordinary about these eight days in custody—they were the eight days following the tragic and unexpected death of his wife. While in DSS's involuntary custody, Joseph could not see his wife's body for the last time to say goodbye to her. (R. p. 244). Eileen was cremated before Joseph was released from custody. (R. p. 244). Joseph could not make arrangements for his wife's funeral. (R. pp. 143-44, 390). Joseph told doctors that he wanted to go home "to mourn the death of his wife with family." (R. p. 208). He worried about making his house payments. (R. pp. 136, 143-44).

Time cannot be bought, and Joseph lost time to say goodbye to his wife and to properly, respectfully, and humanely mourn her in privacy during the first eight days after her death. Instead of grieving in the comfort of his home, he was forced to sleep in an unfamiliar hospital surrounded by strangers. The jury's award of $300,000.00 in damages for his losses and mental and physical sufferings is not only not grossly excessive but, actually, is "extraordinarily low." (R. p. 729).

For these same reasons, the award is also not unduly liberal and there is no basis to remit the award to $50,000.00. Because DSS does not cite to any law for its argument that the award is unduly liberal (Br. of App. p. 26), the Court should deem it abandoned. *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018). Regardless, the lower court correctly denied the motion. There is no yardstick or measure for determining non-economic damages. *See Knoke v. S.C. Dep't of Parks, Rec. & Tourism*, 324 S.C. 136, 142, 478 S.E.2d 256, 258-59 (1996) (stating "intangible damages" "cannot be determined by any fixed measure"); *Lucht*

v. Youngblood, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976) (stating non-economic damages "are intangibles, the value of which cannot be determined by any fixed yardstick"). In this case, the evidence provided ample basis for the jury to award economic damages and non-economic damages for Joseph's physical and mental sufferings while in DSS's custody. DSS fails to show that the lower court's decision to deny the *remittitur* motion is "wholly unsupported by the evidence or [that its] conclusions reached are controlled by error of law." *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 226-27, 865 S.E.2d 910, 917 (Ct. App. 2021) (internal quotation marks omitted). This Court should affirm.

CONCLUSION

For these reasons, the Court should affirm and remand to the circuit court for enforcement of the judgment against DSS.

Respectfully submitted,

s/Kathleen C. Barnes
BARNES LAW FIRM, LLC
Kathleen C. Barnes, SC Bar No. 78854
P.O. Box 897
Hampton, SC 29924
803-943-4529
kbarnes@barneslawfirmsc.com

Paige B. George
BARRY B. GEORGE, P.A.
1419 Bull Street
Columbia, South Carolina 29201
(803) 400-1219

Karl S. Brehmer
BROWN & BREHMER
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600

Attorneys for Respondent
August 14, 2023