THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
Court of Common Pleas

Honorable Daniel D. Hall

Appellate Case No. 2023-001049

Jane and John Smith, individually and as
Guardians of H.A., and H.A. Individually,

Appellants,

v.

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

Respondents.

RESPONDENTS TAMMY GAYE CAUSEY DALSING AND EDWARD ANTHONY DALSING'S RESPONSE TO THE APPELLANTS' MOTION FOR LEAVE TO MOVE FOR NEW TRIAL AND ALERNATIVE RELIEF

Respondents Tammy Gaye Causey Dalsing and Edward Anthony Dalsing (Dalsings) hereby submit this response to the Appellants' Motion for Leave to Move for New Trial and Alternative Relief (Motion). The undersigned counsel consents to Appellants' request to have the

time for Appellants' initial brief to be stayed until a ruling on the Motion and consents to an extension to file the Initial Brief. However, we oppose the Motion for Leave to Move for a New Trial. There is no basis for a new trial in this matter and the relief being sought is not appropriate.

In their Motion, the Appellants argue that they are entitled to a new trial because the record cannot be accurately reconstructed. See Motion at p. 1. The Appellants cite Clements v. Young in support of their Motion. The Clements case is distinguishable from the above-captioned case.

In the Clements case:

> At trial, the referee's recording equipment did not work properly and **no record of the testimony was recorded**. Clements moved to **reconstruct the record**. The Supreme Court remanded to the special referee for an order reconstructing as much of the record as necessary for appeal. No appeal was taken from the referee's reconstruction of the case.

Clements v. Young, 310 S.C. 73, 74, 425 S.E.2d 63, 64 (Ct. App. 1992). (Emphasis added).

The above-captioned case does not involve a full trial and does not involve the absence of the entire recording of the trial like what occurred in Clements. Id. In our case, we simply have a revised transcript containing some "indiscernible" notations and a few incorrect words. The revised transcript is virtually complete with only minor omissions. Arguably, there is nothing left to be reconstructed. Further, Appellants have not argued that they took any actions to attempt to have the "indiscernible" notations reconstructed. In their Motion, the Appellants are not seeking to have the record reconstructed, as was done in the Clements case when there was no transcript whatsoever. Rather, in our case where we have a complete record that includes a revised transcript that contains some "indiscernible" notations, the Appellants are impermissibly seeking a second bite at the apple by asking for a new trial when we have a complete record and when the Clements case they rely upon did not award such a remedy when no transcript existed.

According to the revised transcript, the motion hearing began at 10:21 AM and ended at 1:17 PM, lasting almost three (3) hours. Detailed Motions and Memoranda were filed with the Court, accompanied by voluminous exhibits. We are providing the Court with the revised transcript, as well as the Memoranda filed in support of the Motions for Summary Judgment, but omitting the voluminous exhibits attached to the Memoranda for this Motion. See Exhibit A (revised transcript), Exhibit B (Dalsing Memorandum) and Exhibit C (SCDSS Memorandum). The voluminous exhibits presented by the collective Respondents can be provided to the Court if necessary and will be included in the record on appeal. At the hearing, the Appellants also presented eleven (11) exhibits as reflected in the revised transcript. See Exhibit A at pp. 3, 38-54. Unlike the Clements case, our case involves a very voluminous record including a complete transcript that simply contains a few notations of "indiscernible" and a few incorrect words. See Exhibits A, B and C.

In the Appellants' Motion, they correctly summarize that a revised version of the transcript was provided after we raised concerns to the court reporting company that significant portions of the transcript were indiscernible and contained what appeared to be misheard words. That revised version was provided to Appellants' counsel. The Appellants are correct in that the revised transcript resulted in a significant increase in the number of pages. We contend the revised transcript is now a complete transcript of the hearing, although containing some "indiscernible" notations. Copies of the revised transcript provided to the undersigned counsel is attached as an Exhibit since the Appellants failed to attach the transcript to their Motion and they are asserting that the record cannot be accurately reconstructed without demonstrating what record actually exists. See Exhibit A. In addition, as mentioned above, the Motions and Memoranda which are part of the record are also being included as exhibits to demonstrate to the Court the voluminous

and complete record available in this case. See Exhibits B and C. The revised transcript demonstrates that what appears to be almost all of the arguments made by the attorneys has now been captured and transcribed, with only some "indiscernible" notations remaining in the revised transcript. These notations are made throughout the transcript and are included in each attorney's arguments.

The indiscernible portions remaining in the revised transcript do not amount to a record that cannot be accurately reconstructed and do not rise to the level of granting the Appellants' Motion, allowing them an impermissible second bite at the apple to make new arguments that are not preserved for appellate review when the entire hearing has been transcribed and simply contains some indiscernible statements by all parties. There are a few noticeable errors with legal terms such as "res judicata" in the revised transcript appearing as other words, but nothing which warrants remanding the case back to the trial court on this issue. See generally Hughey v. State, No. 2010-170387, 2015 WL 2231252, at *3, footnote 2 (S.C. May 13, 2015) ("Although we commonly find typographical errors in transcripts, an appellate court must accept the transcript as presented. I observe that the Hughey transcript contains far more errors than the Binney transcript. It would be regrettable, indeed, if an otherwise error-free death penalty verdict is set aside due to sloppy transcription.")

The substance of all arguments made by all parties is captured in the revised transcript, which contains the issues raised at the hearing which are preserved for appellate review. Further, the Judge's Orders granting summary judgment to the Respondents are consistent with the contents of the revised transcript and the Memoranda filed in support of the Motions for Summary Judgment.

The word "indiscernible" appears forty-one (41) times in the revised transcript. See Exhibit A. Only eleven (11) of those 41 are during the Appellants' arguments in opposition to the Respondents' Motions. Id. at pp. 32-34, 37, 44, 52, 83, and 88.

The first "indiscernible" occurs on Page. 32, which states, in part, "… in medical records Harmony has bruise noted on her (indiscernible) upper arm, bruises to her back, and buttocks." Id. at lines 1-3. There appears to be one word missing there, either "left" or "right", which are not material to the arguments for summary judgment.

The second "indiscernible" during Appellants' arguments is between two questions asked by the Judge. Id. at p. 32, line 11. It is not material to the Appellants' arguments in opposition to summary judgment.

The third "indiscernible" during Appellants' arguments occurs on page 33, line 7. That sentence pertains only to where the child was taken after removal and has nothing to do with Appellants' arguments in opposition to summary judgment.

The fourth "indiscernible" during Appellants' arguments occurs on page 34, line 2. It pertains to the location of a bruise on the left thigh. Id. No critical language pertaining to Appellants' arguments in opposition to summary judgment appears to have been omitted. Id.

The fifth "indiscernible" during Appellants' arguments occurs on Page 37, line 3. The sentence pertains to the handing up of an exhibit, which was accepted by the Judge. Id. No critical argument is omitted.

The sixth "indiscernible" during Appellants' arguments pertaining to the Appellants occurs on Page 37, line 25. Based on the discussions surrounding the "indiscernible" comment, this dialogue clearly involves only the marking of an exhibit which was accepted by the Court. Id. at pp. 37-38.

The seventh "indiscernible" during Appellants' arguments occurs on page 44, line 13. It pertains to the marking of exhibits and identification of the exhibits which were accepted by the Judge. Id.

The eighth "indiscernible" during Appellants' arguments pertaining to the Appellants occurs on Page 52, line 9. A Bates label page number is simply not heard. Appellants' counsel repeats the page number 2 lines later at the request of the Judge. Id. at p. 52, line 11.

The ninth "indiscernible" during Appellants' arguments occurs on Page 83, line 8. We made an argument pertaining to res judicata. The "indiscernible" at issue reads, …"I'll get to the collateral estoppel and rescue (indiscernible) that Mr. Smith has argued…." Rescue should be "res" and the (indiscernible) is judicata. Again, no critical argument made by the Appellants has been omitted.

The tenth "indiscernible" during Appellants' arguments occurs on Page 83, line 14. The relevant surrounding text reads, "We were not parties to the OHAN trial. (Indiscernible) -- That's the case that Mr. Smith is telling you ---" Id. at lines 12-15. Again, no critical argument is missing from the transcript.

The eleventh "indiscernible" during Appellants' arguments occurs on Page 88, line 3. It is simply a reference to the Appellants' next exhibit regarding forensic reports. Id.

Appellants cannot demonstrate any prejudice that would result from proceeding on appeal with the revised transcript being included in the Record on Appeal. No critical statements whatsoever made by Appellants' counsel during the hearing are missing. The citations above demonstrate that. However, the Respondents would suffer significant prejudice if the Appellants were permitted to have this matter remanded to the trial court for a second hearing on the Motions

for Summary Judgment when the revised transcript substantially reflects and documents the arguments that were made at the hearing.

Based on the foregoing, the Dalsings respectfully request that the Appellants' Motion for Leave to Move for a New Trial be denied. The undersigned counsel consents to Appellants' request to have the time for Appellants' initial brief to be stayed until a ruling on the Motion and consents to an extension to file the Initial Brief.

Respectively Submitted,

CLARKSON, WALSH, & COULTER, P.A.

s/James P. Walsh
James P. Walsh, Esquire (15180)
P. Christopher Smith, Jr. (74086)
P.O. Box 6728
Greenville, South Carolina 29606
(864) (864) 232-4400
jwalsh@clarksonwalsh.com
csmith@clarksonwalsh.com
Attorneys for Respondents Tammy Gaye Causey Dalsing and Edward Anthony Dalsing

And

THOMPSON DOVE LAW GROUP
L. Dale Dove, Esquire (1735)
P.O. Box 907
Rock Hill, SC 29731
(803) 327-1910
dale@tdlawgroup.com
Attorneys for Respondents Tammy Gaye Causey Dalsing and Edward Anthony Dalsing

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