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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Common Pleas
Union County

Honorable Daniel D. Hall

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 Gay Causey Dalsing, Edward Anthony Dalsing, Respondents

Appellate Case No. 2023-001049

Initial brief of Appellants

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STATEMENT OF ISSUES ON APPEAL

VI. The trial court erred in granting DSS[2] and the Foster Parents' motions for summary judgment because sufficient evidence existed to warrant submission to the jury the question of whether or not DSS owed a duty to Appellants, for the child abuse that occurred in the foster home.

VII. The trial court erred in making a finding that the statute of limitations was exceeded as that was not argued by Respondents as part of the summary judgment motion and the Appellants were within time frames for filing their action.

VIII. The trial court erred in finding that the cause of action is barred by the South Carolina Tort Claims Act.

IX. The trial court erred in granting summary judgment on collateral estoppel, judicial estoppel, res judicate, bankruptcy, statute of limitations, duty/negligence and/or the Children's Code, when it found these issues were not argued by Appellant.

X. The trial court erred in finding that the SCTCA does not allow recovery for punitive damages.

[2] Appellants do not appeal the grant of summary judgment to South Carolina Department of Children's Advocacy (DCA).

STATEMENT OF THE CASE

Appellants filed and served a Complaint/Amended Complaint for damages demanding a jury trial. They allege several causes of action. SCDSS and the Foster Parents (Dalsings) filed motions to dismiss in this Court and they were denied.

The trial court, however, granted summary judgment in full.

Appellants presented the deposition testimony/report of Dr. Monique Mitchell.[3] Dr. Mitchell opined that multiple red flags existed over the four plus years the child was left in the foster home. The child was originally placed with the foster parents when she was less than a year-old. DSS and the child's Guardian *ad litem* found relatives (Appellants) for her after a few months of being in foster care. The Foster Parents hired a lawyer (Dale Dove) to come to the family court and contest the child being placed with the relatives.[4] After hearing arguments, the family court began visitation with the relatives every single weekend from Friday until Monday.[5]

The Case was heavily litigated and ended up at the South Carolina Supreme Court in a *landmark* opinion: the now infamous[6] *Boulware* case, where it was determined that foster parents across this State have standing to pursue private adoptions of children in DSS custody even when they have not been legally freed for adoption.[7]

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[3] Dr. Mitchell has been employed with South Carolina Children's Law Center and written books/articles relating to foster care. Dr. Mitchell submitted a written report in this matter and also underwent deposition(s).

[4] June 4, 2014.

[5] See these facts as recounted by the South Carolina Supreme Court at *S.C. Dept of Soc. Serv's v Boulware*, 422 S.C. 1, 809 S.E.2d 223, (2018).

[6] Family Court Judge Coreen B. Khoury got it right to start with when she ruled that foster parents have no standing to pursue private adoption of children in DSS custody. This Court affirmed Judge Khoury's ruling. *S.C. Dep't of Soc. Servs. v Boulware*, Op. No. 2016-UP-220 (Ct. App., May 19, 2016).

[7] Nonetheless, the Appellants/Relatives went on to prevail when the case went back to the family court from the Supreme Court, and on January 25, 2019, the Honorable Thomas H. White, IV, signed a Decree of Adoption allowing the Appellant/Relatives to adopt their niece. See also the filed Order of Judge Daniel D. Hall which is the order on Appeal in this instant action at page. 8: "By order dated May 25, 2018, the [f]amily [c]ourt consolidated the

STANDARD OF REVIEW

"The character of an action as legal or equitable depends on the relief sought." *First Union Nat'l Bank of S.C. v Soden*, 333 S.C. 554, 574, 511 S.E.2d 372, 382 (Ct. App. 1998); *see also Longshore v Saber Sec. Servs. Inc.,* 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005) ("An action in tort for damages is an action at law.") Questions of law are decided *de novo*, and the appellate court "is free to decide [them] with no particular deference to the trial court." *Osmundson v School District 5 of Lexington and Richland Counties*, Opinion No. 6066 (Ct. App. June 26, 2024) citing *Proctor v Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012).

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). When reviewing the grant of a summary judgment motion, the court applies the same standard that governs the trial court under SCRCP, Rule 56; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002). Rule 56 provides that summary judgment is proper *only* when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), SCRCP, (quoting *Springbob v Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (2014)). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161 (2003). It is not sufficient for

adoption actions of the Dalsings and the Armstrongs…. On January 23 (*sic*), 2019, the [f]amily [c]ourt approved the Armstrong's adoption of H.A."

a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Kitchen Planners, LLC v Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023).[8]

ARGUMENT

I. The trial court erred in granting DSS and the Foster Parents' motions for summary judgment because sufficient evidence existed to warrant submission to the jury the question of whether or not DSS owed a duty to Appellants, for the child abuse that occurred in the foster home.

In order to recover in a negligence action[9] the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *Crolley v Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). Reasonable inferences exist to support a finding by the jury that DSS owed Appellants a duty, and breached that duty.

[8] The instant summary judgment motion was argued May 25, 2023 prior to the *Kitchen Planners* clarifying opinion issued August 23, 2023: "[w]e now clarify that the 'mere scintilla' standard does not apply under Rule 56 (c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule."

[9] Appellant's acknowledge their burden is gross negligence at trial, but for summary judgment purposes, they seek only to establish the existence of a *genuine issue of material fact*.

In *Giannini v S.C. Dept. of Transp*.378 S.C. 573, 664 S.E.2d 450 (S.C. 2008), the Court held that submission of the issues of whether SCDOT owed a duty to install a median barrier where the accident occurred; and whether or not the agency was entitled to immunity; and whether the absence of the median barrier proximately caused the accident, were issues properly submitted to the jury. Similarly, in the case at hand, there is enough evidence on the issues of duty, breach and causation to overcome summary judgment and submit it to the jury.

Likewise in the *Bass* case, (*Bass v S.C. Dep't of Soc. Servs.,* 414 S.C. 558, 780 S.E.2d 252 (S.C. 2015)), the Court held that even though DSS put forth some evidence that it acted with the requisite standard of care, there was also ample evidence that the agency did not. Please remember the standard of care provided or not provided is not the issue for this summary judgment motion, it is whether the agency has a duty or does not have a duty. Nonetheless, there is ample evidence in the Record on Appeal to create a genuine issue of material fact that DSS was grossly negligent in carrying out their duties.

For the Respondent to argue that the Court of Common Pleas will be second guessing the family court if it rules on torts claims, is preposterous. The family court's jurisdiction in domestic matters is laid out at S.C. Code Ann. § 63-3-530. Nowhere in the forty-six (46) delineations, will one find the ability to determine if DSS is liable for damages to a party. The causes of action and legal remedies alleged by the Appellants in this lawsuit they filed with the Court of Common Pleas in March of 2020, the family court has zero jurisdiction to hear. Appellants contend that the child was physically abused in the foster home. Appellants submitted evidence that OHAN brought a four-day trial against the foster parents where DSS presented evidence of the abuse that was happening in the foster home. Dr. Susan Lamb testified in that OHAN trial for DSS. After Dr. Lamb's testimony, the foster parents withdrew their fight to appeal the indicated finding of abuse

and agreed to permanently surrender their foster care license. Judge Hall's order at p. 11, would have this Court believe that the indicated case against Tammy Dalsing was reversed, but there is no proof of that, and that is a disputed fact. Tammy Dalsing testified in her deposition that she was indicated for child abuse and surrendered her license to foster children.[10]

Judge Hall's order at p. 11 additionally finds that "SCDSS, the Foster Care Review Board, and the Guardians ad Litem consistently recommended that H.A. be placed with the Armstrongs, but the [f]amily [c]ourt ordered otherwise." Appellants submit that the trial court should have concerned itself more with the standard in this instant case, i.e., whether DSS circumvented its duty to tell the family court of the abuse that was taking place in the foster home, specifically whether DSS ever in all the years of appearing before the family court, showed the family court the dozens of pictures in its' file of the abuse on this child. A child who was under the age of five years old, whom had three broke arms, dog bites, scratch marks in her private areas, bruises on her face and about her body, marks around her wrists, and the list goes on and on[11]. As Judge Hall's order succinctly states, Appellants claim they "constantly took photographs of [child] and took [child] to the Union County SCDSS office."[12] There was a genuine issue of material fact as to whether the Appellants did take these pictures to the DSS office. [13]

The Appellants argued at the summary judgment motion that DSS was the agency in charge when they took this child into care and placed her where they did. They had a duty to make sure that the child's placement was safe and protected." Tr. p. 32, ll. 18-25. "All ambiguities,

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[10] Tragically, this was only after she had been allowed to adopt four other children from DSS—at least two of whom had relatives, grandparents, fathers and others who were fighting for them. See *Dalsing v. Hudson*, 2016-UP-405 (S.C. App. Aug. 17, 2016) and *SCDSS v Smith*, 423 S.C. 60, 814 S.E.2d 148 (S.C. 2018).
[11] Judge Hall's order conveniently excludes a listing of these injuries which are readily identifiable in the file and are a part of this Record at p. ___.
[12] Order granting summary judgment to DSS at p. 15.
[13] A substantial amount of the photographs Appellants claim to have taken to DSS were in fact disclosed to Appellants from DSS' file in discovery!

conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Young v South Carolina Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id*. Summary judgment dispositions cause litigants to not have their day in court. In this case, there are real disputable issues at play. This child had real bruises. Real broke arms. Real dog bites. Real scratches in her private area. Real slap to the face. Real trauma of being forced to go back into the abuse. Every. Single. Week. It is understandable why DSS and the Dalsings would not want these facts to come in front of a jury. However, improper deprivation of trial by a grant of summary judgment is not the way to avoid that—settlement is.

II. The trial court erred in making a finding that the statute of limitations was exceeded as that was not argued by Respondents as part of the summary judgment motion and the Appellants were within time frames for filing their action.

The trial court's order regarding the foster home reads as follows on page 1 "[t]he Dalsings' Motion for Summary Judgment is granted based upon the following grounds: (1) Plaintiffs' claims are barred by the legal doctrines of judicial estoppel, res judicata, collateral estoppel and the applicable statute of limitations."

The trial court's order regarding DSS reads as follows at p. 13: "Any claims that the Armstrongs assert against either SCDSS or SCDCA are barred by the applicable statute of limitations." The case was ruled on by the Supreme Court January 2018. The child was removed from the foster home for abuse in June 2018. The foster parents were then put on trial by the OHAN department of DSS. The Appellants adopted the child January 2019. The Appellants then had the legal ability to pursue a cause of action. The Appellants filed their action March 2020. "Courts 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." *Young v S.C. Dep't of Corr.,* 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

III. The trial court erred in finding that the cause of action is barred by the South Carolina Tort Claims Act.

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Appellant's complaint alleges the causes of action by the State of South Carolina. DSS claims the Appellants cannot prevail on their claims due to immunity.

The SCTCA is the exclusive civil remedy available for any tort committed by a governmental entity, its employers, or its agents, as long as they are acting within the scope of their official duties and have not engaged in intentional conduct. When the General Assembly created the SCTCA, it did so with two balancing principles in mind: the government is not absolutely immune from liability for its actions, but it cannot be subjected to unlimited liability. S.C. Code Ann. § 15-78-20 (a). The SCTCA is not an absolute bar to governmental liability. It is prescribed to create a fair and equitable forum through which grievances such as Appellant's may be redressed. As the *Bass* court found, allowing for the recovery of damages under the SCTCA maintains this balance.

Whether the government's actions is intentional or reckless is the key distinction. Intentional acts are excluded under the SCTCA. Reckless acts are not.

Therefore, under the SCTCA and current case law the causes of action against DSS and the foster parents were properly plead and the judge erred in dismissing it as a matter of law.

Intentional infliction of emotional distress also known as outrage, is not excluded under the SCTCA. At trial, Appellant, will establish the requisite elements to prove the cause of action. In a claim for the tort of outrage, a plaintiff must show: (1) that a defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) that the conduct was so outrageous that it exceeded all possible bounds of decency and so atrocious as to be utterly intolerable in a civilized community; (3) that such actions actually caused plaintiff's emotional distress; and (4) that the emotional distress was so severe that no reasonable man could be expected to endure it. *Hanson v Scalise Builders of S.C.* 374 S.C. 352 650 S.E.2d 68 (2007); *Upchurch v New York Times Co*., 314 S.C. 531, 431 S.E.2d 558 (1993); *Wright v Sparrow*, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989). The SCTCA only excludes intentional conduct, not reckless conduct. Because outrage can be based on reckless conduct, it is a viable cause of action against a governmental entity.

S.C. Code Ann. § 15-78-30 (f) of the SCTCA provides:

> "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the *intentional* infliction of emotional harm. (Emphasis added).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). (citing *Charleston County Sch. Dist. v. State Budget and Control Bd*., 313 S.C. 1, 437 S.E.2d 6 (1993)). If a statute's language is plain and unambiguous, and expresses clear and definite meaning, courts must not look for or impose alternate meaning. *Paschal v State Election Comm'n*., 317 S.C. 434, 454 S.E.2d 890 (1995)). The language of S.C. Code Ann. § 15-78-30 (f) enunciates that the intentional infliction

of emotional harm is not a recoverable loss under the SCTCA. The statute says nothing about the *reckless* infliction of emotional harm.

S.C. Code Ann. § 15-78-60, entitled "Exceptions to waiver of immunity," sets forth an exhaustive list of waiver of immunity exceptions under the SCTCA. Neither outrage nor the reckless infliction of emotional distress are included in this list. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers. *City of Camden v Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997)). Any ambiguity in the statute should be resolved in favor of a just, equitable and beneficial operation of the law. *Id*. at 367. Each word must be given its plain and common meaning without resorting to a forced construction that stretches the statute's function. *Id.* at 366. S.C. Code Ann. § 15-78-60 clearly explains and defines forty exceptions to the immunity waiver. The statute does not reference outrage, or the reckless infliction of emotional harm. See generally *Bass v S.C. Dep't of Soc. Servs* , 414 S.C. 558, 574-578, 780 S.E.2d 252 (2015). Asserting that the tort of outrage is specifically excluded as a loss under the SCTCA and *must be dismissed as a matter of law* grossly misinterprets legislative intent and case law.

Furthermore, DSS bears the burden of proving a claim of governmental immunity. The entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issues before them. This is a question of fact for the jury and the trial court erred to the extent it granted summary judgment as a matter of law, simply because the agency being sued is the government. *Clark v South Carolina Dep't of Pub. Safety*, 362 S.C. 377, 608 S.E.2d 573 (2005).

IV. The trial court erred in granting summary judgment on collateral estoppel, judicial estoppel, res judicata, bankruptcy, statute of limitations, duty/negligence and/or the Children's Code, when it found these issues were not argued by Appellant.

At p. 33 of the Summary Judgment Order regarding the foster parents, the order states: "[t]he [Appellants] did not present any legal arguments or case law to contradict the Dalsings' arguments pertaining to collateral estoppel, res judicata, judicial estoppel, bankruptcy, the statute of limitations, duty/negligence, and/or the Children's Code."

But see the colloquy in the transcript beginning at p. 74:

Butler: So this is first opportunity that they're able to argue that issue, the bankruptcy statute--- (Tr. p. 74, ll. 9-10).

> Court: Help me to understand that. See, I'm not trying—not trying to pick on you. I'm just, I'm a circuit court judge. In a family court—clearly, these are family court issues. A party in a family court case, involving adoption or termination of parental rights or reunification, never has the basis by which to raise—they may not be (sic) in a legal sense file an action for negligence per se, in family court, but isn't that the standard this is basically applied in every – in every case that a Supreme Court judge has to decide?
> …
>
> Butler: I think what you're saying is because the family court has decided that (sic) the best interest, the jury shouldn't be able to determine if DSS was grossly negligent or the Dalsings were grossly negligent in their dealings with the family.

Clearly, this discussion is about all of these issues which the court says there was no argument presented on. Nonetheless, the colloquy continues between the trial court and the Attorney for the Appellants:

> Court: It seems to me like – and again, I'm not trying to pick on you, I'm just trying to absorb all of this. that if that's the case, then that would (sic) not your argument almost would be that every adoption could be subject to a civil action for

> negligence, negligent per se, or --- because you could argue that well the [indiscernable] or with – that somebody has a right as a cause of action against DSS and other foster parents. Seems like it opens the door to (sic) just as wide open to sue after the adoption if things didn't go right. In medical ---
>
> Butler: And I think that's certainly the same question, Your Honor, that I've had. And the response reminds us there is the family court case where [Child] was abused and neglected. That is a whole different case from what you're dealing with –with gross negligence. [14]

At the end, at p. 82, the trial court expresses its' gratitude for the "way all you lawyers have conducted yourself today and certainly historically charged atmosphere, I appreciate you and the way you have professionally made your arguments and answered questions today. Thank you all for that."[15] Tr. p. 82, ll.15-20.

V. The trial court erred in finding that the SCTCA does not allow recovery for punitive damages.

The *Bass* jury returned a verdict of four-million dollars ($4,000,000.00) in damages. See the Jury Verdict form: *Bass v SCDSS*, Case No. 2009-CP-20-0395 at ROA ___. "The trial court granted DSS's motion to reduce the verdict to $600,000.00." *Bass v S.C. Dep't of Soc. Servs.,* 403 S.C. 184, 742 S.E.2d 667 (Ct. App. 2013). On appeal to our Supreme Court, it "reinstate[d] the verdict subject to the trial court's reduction of the award in accordance with the TCA's limitations on damages." *Bass v S.C. Dep't of Soc. Servs* , 414 S.C. 558, 576, 780 S.E.2d 252 (2015) (fn.11). Therefore, the trial court erred in finding that punitive damages are excluded by the SCTCA. The trial court failed to consider the *Bass* case in its' determination even though that

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[14] Tr. p. 75, ll. 14-20.

[15] It was not lost upon the trial court that the lawyer for Appellants had been sued personally –within this very case-- by the lawyer for the foster parents.

case was discussed nostalgia at the hearing. The *Bass* case came subsequent to the case relied upon by the trial court in its' order regarding punitive damages—a 1993 case.

CONCLUSION

SCDSS recklessly and negligently allowed the child to remain in the foster home when it knew, or should have known, the child was being abused. The trial court erred in granting summary judgment as to the foster parents and SCDSS. Accordingly, Appellant respectfully requests the trial court's ruling be reversed.

Respectfully submitted,

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This 1st day of November, 2024.