THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2023-001049

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

v.

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

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES

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STATEMENT OF THE ISSUES ON APPEAL

I. SCDSS DOES NOT OWE ANY LEGAL DUTY TO THE ARMSTRONGS.

II. COLLATERAL ESTOPPEL BARS ALL OF APPELLANTS' CLAIMS.

III. SCDSS IS ENTITLED TO IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FOR ALL OF APPELLANTS' CLAIMS.

IV. APPELLANTS CANNOT RECOVER PUNITIVE DAMAGES FROM SCDSS.

V. APPELLANTS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT.

STATEMENT OF THE CASE

On March 11, 2020, Appellants initiated this Action asserting claims against South Carolina Department of Social Services (SCDSS), South Carolina Department of Children's Advocacy (SCDCA), and Tammy Gaye Causey Dalsing and Edward Anthony Dalsing (the Dalsings). (Compl., R. pp. 349-358.) On March 25, 2020, Appellants filed an Amended Complaint asserting three causes of action: (1) simple negligence; (2) gross negligence; and (3) negligence per se. (Am. Compl., R. pp. 359-368.) The crux of Appellants' claims against SCDSS relates to unsubstantiated allegations that the Dalsings physically abused H.A. and that SCDSS did not take appropriate action to investigate the claims and remove H.A. from the Dalsings' home and place her with them. (Id. at p. 7, ¶ 25, R. p. 365.)

On December 2, 2022, SCDSS filed a motion for summary judgment. (Dec. 2, 2022, Mot. of SCDSS, R. pp. 273-287.) Also on December 2, 2022, the Dalsings filed a motion for summary judgment. (Dec. 2, 2022, Mot. of the Dalsings, R. pp. 288-290.) On May 25, 2023, the Trial Court heard Respondents' motions. (May 25, 2023, Tr., R. pp. 419-522.) On June 30, 2023, the Trial Court issued an order granting the motion for summary judgment of SCDSS and SCDCA. (June 30, 2023, Order, R. pp. 122-173.) On July 3, 2023, the Trial Court issued an order granting the motion for summary judgment of the Dalsings. (July 3, 2023, Order, R. pp. 174-208.) On July 3, 2023, Appellants served Notice of Appeal. (July 3, 2023, Notice of Appeal, R. pp. 331-332.) On July 10, 2023, Appellants served an Amended Notice of Appeal. (July 10, 2023, Am. Notice of Appeal, R. pp. 333-334.)

STANDARD OF REVIEW

This Court must review the Trial Court's grant of summary judgment under the same standard to be applied by the trial court. Wells v. City of Lynchburg, 331 S.C. 296, 301, 501

S.E.2d 746, 749 (Ct.App. 1998). Rule 56(c) of the South Carolina Rules of Civil Procedure requires that the moving party is entitled to summary judgment if the evidence shows 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. SCRCP 56(c); Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023). Once the moving party meets the initial burden by showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Instead, the non-moving party must present specific facts showing that there is a genuine issue for trial. Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003). It "is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Kitchen Planners at 463, 892 S.E.2d at 301. (citing Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party bears the burden of proof. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007).

FACTS

Emergency Protective Custody of 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 biological parents were operating a methamphetamine lab, and she was being physically neglected. (Aug. 28, 2013, Order, pp. 1-2, R. 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, Supp. R. pp. 8-9.) Given this,

H.A. was placed by SCDSS with the Dalsings that day. (July 16, 2014, Order, p. 2, ¶ 3, R. p. 32; J. Cooper Dep. Ex. 10, Supp. R. p. 1079; T. Dalsing Dep. 54:16-23, Second Supp. R. p. 16, lines 16-23; Tisdale Aff. Ex. A, p. 464, Supp. R. p. 434.) At the time, the Dalsings were duly licensed by SCDSS as foster parents. (Am. Compl., p. 3, ¶ 10, R. p. 361; J. Cooper Dep. Ex. 10, Supp. R. p. 1079; T. Dalsing Dep. 23:15-17, Supp. R. p. 847, lines 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, Supp. R. p. 906, lines 15-17; T. Dalsing Dep. 53:2-5, Supp. R. p. 857, lines 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, p. 1-2, R. 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, Supp. R. p. 4; Kaylor Aff. Exs. B-D, Supp. R. pp. 11-68.) In August 2013, her father, John Stafford, identified two relatives. (Dec. 1, 2021, D. Armstrong Dep. 10:8-18, Supp. R. p. 564, lines 8-18; Kaylor Aff. ¶ 7, Supp. R. p. 4; Kaylor Aff. Ex. B, p. 8-12, Supp. R. pp. 12-16.) However, 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, Supp. R. p. 564, lines 8-18; Kaylor Aff. ¶ 9 Supp. R. p. 4; Kaylor Aff. Ex. D, Supp. R. pp. 45-68.) Thereafter, SCDSS paid for a Seneca Search to identify relatives of H.A. who might be an appropriate placement option. (Kaylor Aff. ¶ 8, Supp. R. p. 4; Kaylor Aff. Ex. C, Supp. R. pp. 33-44.)

In the fall of 2013, the Family Court conducted several hearings. (Oct. 9, 2013, Order; Nov. 6, 2013, Order, R. pp. 14-19.) The court ordered that temporary legal and physical

custody remain with SCDSS. (Oct. 9, 2013, Order, p. 7, ¶ 2, R. p. 11; Nov. 6, 2013, Order, p. 4, ¶ 3, R. p. 18.) 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, R. p. 11.)

On February 19, 2014, the Family Court conducted a permanency planning hearing. (Feb. 19, 2014, Order, R. pp. 20-25.) 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, R. p. 24.) The Family Court ordered legal and physical custody of H.A. to remain with SCDSS. (Id. at p. 4, ¶ 1, R. p. 24.) 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, R. p. 24.)

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, Supp. R. pp. 4-5; Dec. 1, 2021, D. Armstrong Dep. 9:21-23, Supp. R. p. 563, lines 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, Supp. R. p. 5; Kaylor Aff. Ex. E, Supp. R. pp. 96-70; Dec. 1, 2021, D. Armstrong Dep. 11:12-16, Supp. R. p. 565, lines 12-16; Apr. 12, 2021, R. Armstrong, Dep. 33:8-20, Supp. R. p. 656, lines 8-20.) As a result, SCDSS completed an investigation and determined that the Armstrongs were a suitable placement for H.A. (Kaylor Aff. ¶ 11, Supp. R. p. 5; Kaylor Aff. Ex. F, Supp. R. p. 71-75; Dec. 1, 2021, D. Armstrong Dep. 11:17-19, Supp. R. p. 565, lines 17-19.) H.A.'s Guardian ad Litem Jennifer Cooper concurred with this placement. (June 4, 2014, Order, p. 2, ¶ 1, R. p. 28; J. Cooper Dep. Ex. 7, p. 3, Supp. R. p. 1077.) 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, Second Supp. R. p. 14, lines 4-18; J. Cooper Dep. Ex. 7, p. 3, Supp. R. p. 1077.)

The June 4, 2014 Hearing

SCDSS informed the Dalsings that it 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, R. p. 28; T. Dalsing Dep. 57:6-21, Supp. R. p. 858, lines 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, R. p. 28; June 4, 2014, Complaint of the Dalsings, R. pp. 335-340.) 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, R. p. 28.)

On June 4, 2014, the Family Court conducted a permanency planning hearing. (June 4, 2014, Order, R. pp. 26-29.) 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 the Armstrongs while H.A.'s biological parents tried to complete their treatment plan. (Id. at p. 2, ¶ 1, R. p. 28.) The Dalsings objected because they had not been given a ten-day prior notice of the child's removal. (Id. at p. 2, ¶ 2, R. p. 28.) 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, R. p. 28.) 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, R. p. 29.) 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, R. p. 29.) The Parties thereafter agreed that H.A. would 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, R. p. 92; April 12, 2021, R. Armstrong Dep. 101:16-18, Supp. R. p. 708, lines 16-18; T. Dalsing Dep. 66:20-22, Supp. R. p. 867, lines 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 Appellants 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, Second Supp. R. p. 7, lines 16-23; Tisdale Aff. Ex. A, Supp. R. pp. 91-558.)

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, Supp. R. pp. 1081-1085.) 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, Supp. R. p. 1084.) 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, Supp. R. p. 1085.) The GALs also recommended that if H.A. was not placed with the Armstrongs, 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, R. pp. 30-36.) Appellants appeared at the hearing. (Id. at p. 2, R. p. 32.) The Family Court granted the Dalsings' motion to intervene and added the Dalsings as parties in the family court proceeding. (Id. at ¶ 12, R. p. 35.) 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, R. p. 35.)

Importantly, during a subsequent permanency planning hearing on August 27, 2014, the Armstrongs were added as parties. (Aug. 27, 2014, Order, ¶ 2, R. p. 40.) The Family Court continued the permanency plan and ordered that all provisions of prior Family Court orders remain in effect. (Id. at ¶ 4, R. p. 41.)

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, R. pp. 46-52.) 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, R. p. 50.) The Family Court ordered that legal and physical custody of H.A. would remain with SCDSS. (Id. at p. 5, ¶ 1, R. p. 51.) 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, R. p. 51.) The Family Court also ordered that SCDSS had made reasonable efforts to make and finalize a permanent plan for H.A. (Id. at p. 5, ¶ 3, R. p. 51.)

On March 11 and 12, 2015, the Family Court conducted a termination of parental rights hearing. (Mar. 12, 2015, Order, R. pp. 54-65.) 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, R. p. 59.) 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, R.

p. 60.) 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 p. 8-9, ¶ 30, R. pp. 61-62; p. 11, ¶ 3, R. p. 64.) 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 effect. (Id. at p. 10-11, ¶¶ 1, 3, & 7, R. p. 63-64.)

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. (Dec. 16, 2015, Order, p. 2, ¶ 5, R. p. 72.) During pendency of the appeal, the Family Court conducted multiple permanency planning hearings. (Dec. 16, 2015, Order, R. pp. 70-73; Sept. 21, 2016, Order, R. pp. 74-77; Dec. 7, 2016, Order, R. pp. 78-81; Dec. 4, 2017, Order, R. pp. 90-93.) 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, p. 2-3, ¶¶ 5 & 7, R. pp. 72-73; Dec. 7, 2016, Order, p. 2, ¶¶ 2 & 4, p. 3, ¶¶ 1 & 4, R. pp. 80-81; Dec. 4, 2017, Order, p. 3, ¶¶ 1-3, R. p. 93; Apr. 12, 2021, R. Armstrong Dep. 143:4-6, Supp. R. p. 736, lines 4-6.)

The Decision on Appeal

On May 19, 2016, this Court issued an unpublished opinion affirming 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, 2016 WL 2944266 (Ct. App., May 19, 2016, R. pp. 211-219.) The South Carolina Supreme Court granted the

Dalsings' petition for a writ of certiorari. South Carolina Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 6, 809 S.E.2d 223, 225 (2018).

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., p. 1-2, R. pp. 239-240.) 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 p. 3-4, ¶¶ 10-11, R. pp. 241-242.) 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, R. p. 86.)

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, R. pp. 90-93.) Notably, in its order, the Family Court noted that "**the parties agree for the matter to remain status quo**." (Id. at p. 2, ¶ 1, R. p. 92.) (emphasis added).

January 3, 2018 Decision by the South Carolina Supreme Court

Thereafter, on January 3, 2018, the Supreme Court of South Carolina reversed. 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. (Jan. 5, 2018, Complaint of Appellants, R. pp. 345-348.) 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, R. p. 96.) By order dated May 25, 2018, the Family Court consolidated the adoption actions. (Id. at p. 2, ¶ 1, R. p. 99.)

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., R. pp. 257-266) 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, p. 1-2, R. pp. 267-269.) The Armstrongs admitted that "[t]hrough it all, each Guardian ad Litem advocated for [H.A.] to be placed with [them]." (Id. at p. 2, R. p. 269.) 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, R. p. 270.) On January 23, 2019, the Family Court approved the Armstrong's adoption of H.A. (Jan. 23, 2019, Order, R. pp. 116-121.)

OHAN Investigations

During the lengthy Family Court proceedings, numerous reports were made to the Out of Home Abuse and Neglect unit (OHAN)[1] of SCDSS against both the Armstrongs and the

[1] 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) (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) (2021). The Out of Home Abuse and Neglect (OHAN) unit

Dalsings concerning allegations of abuse or neglect of H.A. SCDSS repeatedly investigated such reports. (L. Cooper Aff. Ex. A, Second Supp. R. pp. 21-168.) Until April 2018, all reports made to OHAN were either not accepted for investigation or upon investigation were determined to be unfounded[2]. (Id.)

An April 2018 OHAN investigation of the Dalsings for reported physical abuse of H.A. was indicated[3] against Tammy Dalsing. (L. Cooper Dep. Ex. 2, R. p. 835; T. Dalsing Dep. 107:9-18, Supp. R. p. 896, lines 9-18.) Accordingly, on June 11, 2018, SCDSS removed H.A. from the Dalsings' home, and placed her in another foster home. (Oct. 16, 2018, Mot. p. 5, R. p. 262.) Tammy Dalsing appealed the OHAN finding against her. (T. Dalsing Dep. 107:20-23, Supp. R. p. 896, lines 20-23.)

In November 2019, the OHAN Administrative Tribunal conducted an administrative hearing concerning the allegations against Tammy Dalsing. (Sept. 21, 2020, Order, Tammy Dalsing v. South Carolina Dep't of Soc. Servs., S.C Admin. Ct. Case No. 47-OHAN, Second Supp. R. pp. 1-2.) 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. (Sept. 21, 2020, Order, Tammy Dalsing v. South Carolina Dep't of Soc. Servs., S.C Admin. Ct. Case No. 47-OHAN, Second Supp. R. pp. 1-2; T. Dalsing Dep. 107:21-108:1, 108:14-17, Supp. R. p. 896, lines 21-25, Second Supp. R. p. 17, lines 1, 14-17.)

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fulfills this obligation by investigating allegations of abuse or neglect relating to children in foster care.

[2] 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." S.C. Code Ann. § 63-7-20(30) (2023).

[3] 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." S.C. Code Ann. § 63-7-20(14) (2023).

ARGUMENT

I. SCDSS DOES NOT OWE ANY LEGAL DUTY TO THE ARMSTRONGS.

Whether a Duty is Owed is a Question for the Court.

While Appellants incorrectly argue otherwise, the question of whether SCDSS owes a legal duty to the Armstrongs, relatives of the child, is a question for the Court, and is not a question of fact to be considered by a jury. See Wright v. South Carolina Dep't of Transp., 437 S.C. 184, 191, 877 S.E.2d 788, 791 (Ct. App. 2022) ("Whether a duty exists is a question of law for the Court."); McCord v. Laurens Cnty. Health Care Sys., 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020) ("In tort law, the existence of a duty is a question of law."); Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136–37 (2014) (Stating that "whether a duty exists in regard to an alleged wrong is a question of law for the court."); Roe v. Bibby, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014) ("The existence of a duty owed is a question of law for the courts.").

SCDSS Did Not Owe Any Duty to the Armstrongs.

Although their theory of liability is not addressed in Appellants' brief, they have posited various theories regarding existence of a duty owed by SCDSS to the Armstrongs in this case. Their theories include:

1. That H.A. should not have been placed by SCDSS with the Dalsings on August 27, 2013, when she was taken into emergency protective custody.

2. That Plaintiffs should have been identified by SCDSS as a placement option for H.A. before April 29, 2014, when her father finally told SCDSS about their existence.

3. That H.A. should have been permanently placed with Plaintiffs after they were identified by H.A.'s biological father on April 29, 2014, despite the many orders to the contrary issued by the Family Court.

4. That H.A. should not have been allowed visitation with Plaintiffs while she was in the care of the Dalsings.

5. That SCDSS and/or SCDCA should have made the judicial system operate more

efficiently so that permanent custody could have been established.

There is no law in South Carolina to support any of these theories. The Trial Court properly concluded that SCDSS did not owe any legal duty to the Armstrongs because "[w]ithout 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). As the Trial Court aptly noted, there is no South Carolina case that establishes that SCDSS owes any legal duty to a relative of a child who has been taken into emergency protective custody nor have Appellants identified one to date. 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). There is no statute, contract, relationship, status, property interest, or some other special circumstance which created an affirmative legal duty owed by SCDSS to the Armstrongs.

Appellants cite Giannini v. South Carolina Dep't of Transp., 378 S.C. 573, 664 S.E.2d 450 (2008). (Brief of Appellants, p. 8.) Problematically, Giannini does not support Appellants' position. Giannini addressed only the duties of the South Carolina Department of Transportation to install median barriers and whether SCDOT was entitled to design immunity under Section 15-78-60(15) of the Tort Claims Act. The Supreme Court held that design immunity did not apply because SCDOT was on notice of a hazard on its roadway and failed to take corrective action.

As Justice Costa M. Pleicones noted in his dissent in Giannini, the majority did not address SCDOT's claim that it did not owe the plaintiffs a duty to install median barriers. Id. at 589, 664 S.E.2d at 458. However, the following year, Justice Pleicones authored the opinion in Skinner v.

South Carolina Dep't of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009), which contradicts Appellants' position in this case. In Skinner, the Court held that "[w]hether a duty exists is a question of law for the Court." Id. at 523, 681 S.E.2d at 873. Ultimately, the Court affirmed the circuit court's ruling that neither the regulations nor the statutes cited by the plaintiffs created a duty owed by the defendants to travelers to warn of or to protect them from shoulder ruts. Id. at 524, 681 S.E.2d at 873.

Appellants also cite Bass v. South Carolina Dep't of Soc. Servs., 414 S.C. 558, 780 S.E.2d 252 (2015). Bass provides no support for Appellants' position in this case. Bass addressed whether SCDSS owed a duty to children that SCDSS had removed from their home, not whether SCDSS owed a legal duty to their relatives.

The Armstrongs have not identified any case law or statute supporting their position that SCDSS owed a duty of care to them in their individual capacities. Instead, the Armstrongs blithely contend that they will "trust the jury to be [their] expert over duty..." (Tr. 99:25-100:2, R. p. 517, line 25 – p. 518, line 2.) SCDSS did not owe any legal duty to the Armstrongs as members of H.A.'s extended family. Accordingly, this Court should affirm the order of the Trial Court.

The Claims of the Armstrongs Are Barred by the Statute of Limitations.

The Trial Court properly concluded that the Armstrongs' claims against SCDSS are barred by the statute of limitations set forth in Section 15-78-110 of the Tort Claims Act. The Act provides: "any action brought pursuant to [the SCTCA] is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered..." S.C. Code Ann. § 15-78-110 (2005). South Carolina's courts routinely apply the discovery rule to determine when a claim accrues under the Act. See Hackworth v. Greenville Cnty., 371 S.C. 99, 103, 637 S.E.2d 320, 322 (Ct. App. 2006) ("The date on which discovery of the cause of action

should have been made is an objective, rather than subjective, question."); 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."); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (rejecting the appellant's argument that the discovery rule tolled the statute of limitations until he knew a cause of action existed against DOT for his wife's death, and holding that "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered.") Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 190, 534 S.E.2d 1, 8 (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.").

Appellants filed their Complaint on **March 11, 2020**. Thus, if their claims accrued prior to **March 11, 2018**, they are time-barred. Any claim by the Armstrongs concerning the placement of H.A. with the Dalsings on August 27, 2013, accrued long ago. Appellants have known about her placement since the Spring of 2014. They have employed legal counsel for years.

The claim that Appellants should have been identified as a placement option for H.A. prior to April 29, 2014 is likewise time-barred. Appellants were aware that H.A. had been taken into emergency protective custody and that Mr. Armstrong had been identified as a relative by her

father in April 2014. Any claims that SCDSS should have identified them as a placement option accrued in 2014.

To the extent that the Armstrongs assert a legal claim against SCDSS for the continued placement of the child with the Dalsings, that claim also accrued long ago. To that end, they testified,

> Q. "I'm asking all the way back in 2015, do you recall objections being made on your behalf over the Family Court making a determination on the placement of Harmony?
>
> A. Of course, I guess we objected because we were there to take her as family reunification; is that what you're talking about?"

(July 29, 2021, R. Armstrong Dep. 216:15-18, Second Supp. R. p. 12, lines 15-18.)

> Q. And you understand that as of June the 4th of 2014, it was certainly DSS's recommendation and perhaps the recommendation of the Guardian ad Litem that Harmony be placed in your custody?
>
> A. Yes, I do believe that's correct.
>
> Q And throughout, and I know it was a long and laborious litigation process right, going up to Appellate Courts and stuff, but throughout that process, is it your understanding that DSS and the Guardian ad Litem Program continued to seek placement with you and your wife but were unable to do so because the Court didn't order it?
>
> A. Yes, I believe that's correct also.

(Dec. 1, 2021, D. Armstrong Dep. 11:20-12:6, Supp. R. p. 565, line 20 – p. 566, line 6.)

> Q. Okay. All right, so, when you went to Court the first time on June the 4th of 2014, was the plan not to place the child, well, excuse me, was - - did DSS not represent to the Court that the child was gonna be placed with you and your wife, a relative custody, that's what they were seeking, so that giving the birth parents more time to work on their treatment plan?

A. I believe that would've been correct, relative placement at the time.

(Dec. 1, 2021, D. Armstrong Dep. 86:17-25, Second Supp. R. p. 4, lines 17-25.)

With respect to Plaintiffs' claims that H.A. should not have been spending weekends with them and weekdays with the Dalsings, that arrangement first occurred in June 2014, when the Family Court ordered that Plaintiffs have visitation. They knew about that arrangement for nearly six years prior to filing suit.

Q. Okay. Okay, and I gather that you, after this June 2014 hearing, started having Harmony come to your house on the weekends?

A. Yes, ma'am.

(Apr. 12, 2021, R. Armstrong Dep. 41:8-11, Second Supp. R. p. 9, lines 8-11.)

Q. Okay, was there any formal court order that required that you have weekend visitation?

A. Yes, there was in the beginning.

(July 29, 2021, R. Armstrong Dep. 212:11-13, Supp. R. p. 762, lines 11-13.)

Q. So, Harmony then came to your house for, after that hearing, that hearing would've been on Wednesday, June the 4th, 2014, she came to your house for a weekend visit two days later starting on June the 6th of 2014; is that correct?

A. I believe that would be correct.

Q. And she stayed with you then from Friday, that Friday evening or late afternoon until Monday morning; is that right?

A. I believe that would be correct.

Q. And she continued that same process for virtually every single weekend over the next four years; is that correct?

A. Minus a couple of weekend visitations here or there, yes.

(Dec. 1, 2021, D. Armstrong Dep. 90:21-91:8, Second Supp. R. p. 5, line 21 – p. 6, line 8.)

Finally, with respect to the Armstrongs' claims that H.A. was being abused and neglected by the Dalsings, the Armstrongs have made this contention virtually since their first visit with her. "I'm saying that it started the first weekend about her being neglected." (July 29, 2021, R. Armstrong Dep. 91:2-3, Second Supp. R. p. 11, lines 2-3.)

> Q. So, can you give me an idea, if you started having Harmony on the weekends after the June 4, 2014 hearing, when did you have concerns about bruises on Harmony?
>
> A. Well, the very first weekend she had a severe ear infection and they refused to give her medication and, um, I started documenting everything after that. It took to July the 3rd to get her ears cleared up.
>
> Q. Okay, but I was asking you about bruises not ear infections.
>
> A. That's, that's what I'm saying, that it started that weekend with the severe ear infection, I took her to the ER, they did not give her her medication, I had to take her back several times to get her ears cleared up and I started documenting things after that.
>
> Q. So, right off the bat?
>
> A. Yes, ma'am.

(Apr. 12, 2021, R. Armstrong Dep. 57:18-58:8, Supp. R. p. 669, line 18 – p. 670, line 8.)

To the extent that they even have any legal basis to assert a claims against SCDSS, it is clear that all claims which the Armstrongs assert against SCDSS are time barred. Therefore, the Trial Court's order should be affirmed.

The Armstrongs do not argue that they did not know of their purported injuries before March 11, 2018. Instead, Appellants inexplicably contend that they believe that they were not able "to pursue a cause of action" until after they adopted H.A. in January 2019. It appears that the Armstrongs conflate their own claims with that of the child. To the extent that they can assert any

legal claim against SCDSS in their individual capacities, the undisputed evidence demonstrates that those claims accrued long ago and are barred by the statute of limitations. Therefore, this Court should affirm the Trial Court's ruling that the Armstrongs' claims against SCDSS are barred by the statute of limitations.

The Damages the Armstrongs Seek Are Not Recoverable.

The Armstrongs did not appeal the Trial Court's determination that the damages the Armstrongs seek in their individual capacities for emotional damages and the loss of H.A.'s companionship are not recoverable. As such, this Court should affirm this ruling under the two-issue rule. See Walbeck v. I'ON Company, LLC, 439 S.C. 568, 594 n.14, 889 SE 2d 537, 550 n.14 (2023) ("Under the two-issue rule, when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); Dreher v. South Carolina Dep't of Health & Envtl. Control, 412 S.C. 244, 249-50, 772 S.E.2d 505, 508 (2015) ("An unappealed ruling is the law of the case and requires affirmance. Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case."); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

Nonetheless, the Trial Court's decision should be affirmed. South Carolina "common law only allow[s] a parent to maintain an action for the loss of a child's services and earning capacity." Doe v. Greenville County Sch. Dist., 375 S.C. 63, 69, 651 S.E.2d 305, 308 (2007) (ruling that South Carolina courts do not recognize a claim for filial consortium). "This right was based upon the concept that a father was entitled to compensation for the loss of services and earning capacity

of his minor child." Id. at 68, 651 S.E.2d at 307-08. (citing Hughey v. Auborn, 249 S.C. 470, 476, 154 S.E.2d 839, 841-42 (1967).) The damages that a parent can recover for an injury to this child do "not include the intangible losses of aid, companionship, and society." Id. at 69-70, 651 S.E.2d at 308.

Here, the Armstrongs seek damages for the loss of H.A.'s companionship, which are not recoverable. The Armstrongs do not seek damages for the loss of H.A.'s services or earning capacity, nor could they since were not the parents of H.A. until 2019, long after all of the events about which they complain and she was a very young child. Moreover, the Armstrongs did not present any evidence of any loss of services or earnings. Thus, the Trial Court's decision that the Armstrongs are not entitled to an award of damages against SCDSS is supported by precedent and the record. This Court should affirm the Trial Court's ruling accordingly.

II. COLLATERAL ESTOPPEL BARS ALL APPELLANTS' CLAIMS.

Appellants amalgamate seven independent grounds in Section IV of their Brief: "[t]he 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." (Brief of Appellants, p. 4.) In their argument, Appellants reference only the Trial Court's July 3, 2023 Order granting summary judgment in favor of the Dalsings. (Brief of Appellants, p. 14.) Thus, Appellants did not appeal the Trial Court's order regarding collateral estoppel with respect to SCDSS.[4]

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[4] Rules 208(b)(1)(B), 208(b)(1)(E), SCACR. Greenville Bistro v. Greenville, 435 S.C. 146, 170-71, 866 S.E.2d 562, 575 (2021) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."); State v. Ortho-McNeil-Janssen Pharm., Inc., 414 S.C. 33, 72-73, 777 S.E.2d 176, 197 (2015) (holding that an appellant had abandoned an issue on appeal because the appellant had failed to sufficiently identify with particularity the alleged error in the trial court's ruling); Wayne's Automotive Center, Inc. v. South

Even if Appellants appealed the issue relating to collateral estoppel with respect to SCDSS, the Trial Court correctly determined that all of Appellants' claims "emanate from the proceedings in the Family Court and were or could have been addressed by that court." (Order, p. 10, R. p. 140.) Accordingly, the Trial Court properly ruled that all Appellants "are estopped from relitigating the issues in this action that were or could have been addressed by the Family Court proceedings." (Id., p. 13, R. p. 146.)

Collateral estoppel applies when an issue has been actually litigated and determined by a valid and final judgment. The determination is conclusive in a subsequent action whether on the same or a different claim. Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. Jinks v. Richland Cnty., 355 S.C. 341, 349, 585 S.E.2d 281, 285 (2003). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

The South Carolina Supreme Court's decision in Doe v. State, 294 S.C. 125, 363 S.E.2d 106 (1987) is directly on point. In Doe, a child was taken into emergency protective custody. Id. at 127, 363 S.E.2d at 107. Subsequently, SCDSS filed a removal petition, and the family court determined that there was probable cause to do so. Id. No party appealed the order. Id.

Carolina Dep't of Pub. Safety, 431 S.C. 465, 481 n.6, 848 S.E.2d 56, 65 n.6 (Ct. App. 2020) (concluding that the appellant had abandoned certain arguments "because they are either conclusory, not supported by cited authority, or otherwise vague."); Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."). Harris v. Campbell, 293 S.C. 85, 87, 358 S.E.2d 719, 720 (Ct. App. 1987) (concluding that this Court is "not in the business of figuring out on [its] own whether error exists.").

Approximately forty days after the removal, a merits hearing was conducted. Id. The parties had reached a compromise agreement, and the order of the family court held that the discipline that the mother administered was excessive. Id. The family court ordered custody of the child to be returned to the mother subject to counseling and supervision. Id. That order was not appealed. Id. Nearly two years later, the mother sued SCDSS alleging that SCDSS had improperly removed her son from her custody. Id. at 127, 363 S.E.2d at 107-08.

The South Carolina Supreme Court held that the claims were barred by collateral estoppel; "[u]nder the doctrine of collateral estoppel parties are prevented from relitigating specific issues in a second suit, based on a separate claim, where the issues were previously decided in litigation." Id. at 127, 363 S.E.2d at 108 (citing Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986)). The South Carolina Supreme Court found that the issue of whether the child was wrongfully removed had already been decided by the family court. Id. at 128, 363 S.E.2d at 108. Accordingly, the Court found that SCDSS was entitled to summary judgment. Id.

In a different section of their Brief, Appellants contend that it is preposterous "[f]or the Respondent to argue that the Court of Common Pleas will be second guessing the family court if it rules on tort claims." (Brief of Appellants, p. 8.) Appellants reference Section 63-3-530 of the Children's Code in support of their position that the Family Court lacked the ability to determine if SCDSS was liable for damages. The issue is not whether the Family Court could award damages, but instead whether the issues that Appellants now want to relitigate were litigated in Family Court.

Appellants' claims against SCDSS are based upon allegations that: (1) SCDSS 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; (2) 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.; (3) SCDSS

should have transferred physical custody of H.A. to them sooner because Daryl Armstrong is a biological relative; and (4) SCDSS should have removed H.A. from the Dalsings' home based upon their belief that H.A. was being abused in the home. (Am. Compl., R. pp. 359-368.) All of these issues were actually litigated and directly determined during the family court action.

It is uncontested that SCDSS consistently recommended that H.A. be placed with the Armstrongs. (Am. Compl., ¶ 12, R. pp. 361-362; June 4, 2014, Order. p. 2, ¶ 1, R. p. 28; Dec. 1, 2021, D. Armstrong Dep. 11:20-12:6, Supp. R. p. 565, line 20 – p. 566, line 6; Apr. 12, 2021, R. Armstrong Dep. 39:10-11, 111:8-15, Supp. R. p. 662, lines 0-11; Supp. R. p. 716, lines 8-15.) During the permanency planning hearing conducted on June 4, 2014, SCDSS notified the Family Court that it had reached an agreement with H.A.'s biological parents to place H.A. with Appellants while H.A.'s biological parents tried to complete their treatment plan. (June 4, 2014, Order, p. 2, ¶ 1, R. p. 28.) However, the Family Court ordered otherwise, finding 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, R. p. 29.)

During the family court proceedings, the family court repeatedly found that: (1) H.A.'s placement with the Dalsings was safe, appropriate, and in the best interest of H.A; (2) SCDSS had "made reasonable efforts to finalize the permanent plan for [H.A.]"; and ordered that the status quo (including the visitation arrangement) be maintained during the pendency of the appeal. (Dec. 16, 2015, Order, p. 2-3, ¶¶ 5 & 7, R. pp. 72-73; Dec. 7, 2016, Order, p. 2, ¶¶ 2 & 4, p. 3, ¶¶ 1 & 4, R. pp. 80-81; Dec. 4, 2017, Order, p. 3, ¶¶ 1-3, R. p. 93.) Appellants did not appeal any family court order despite being represented by counsel and actively participating in the extended Family Court proceedings. The family court orders are valid and final judgments. Therefore, this

Court should affirm the Trial Court's ruling that SCDSS is entitled to summary judgment based upon collateral estoppel.

III. SCDSS IS ENTITLED TO IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FOR ALL OF APPELLANTS' CLAIMS.

Appellants do not address with any specificity the exceptions to the waiver of sovereign immunity that the Trial Court concluded apply in this case. Instead, they merely recite the purposes of the Tort Claims Act. Thus, they have abandoned any appeal of those findings. To the extent that their vague brief addresses those issues, the order of the Trial Court should be affirmed.

SCDSS Is Entitled to Immunity For its Compliance with the Order of the Family Court Under Section 15-78-60(3) of the Tort Claims Act

The Trial Court correctly found SCDSS was immune from liability under Section 15-78-60(3) of the Tort Claims Act. (Order, p. 12-13., R. pp. 144-146) Section 15-78-60(3) of the Tort Claims Act provides that a governmental entity is not liable for a loss resulting from the "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). The record in this case demonstrates that the Family Court issued numerous orders with which SCDSS was obligated to comply.

Specifically, even though SCDSS asked to place H.A. with the Armstrongs on June 4, 2014, the Family Court denied that request and continue her placement with the Dalsings. (June 4, 2014, Order, R. pp. 26-29.) Thereafter, the Family Court repeatedly ordered that the visitation arrangement remain in place. On July 16, 2014, the Family Court ordered that "the living arrangements of H.A. would continue as previously ordered." (July 16, 2014, Order, ¶ 13.b., R. p. 35) On August 27, 2014, the Family Court "ordered that all provisions of prior Family Court

orders remain in full force and effect." (Aug. 27, 2014, Order ¶ 4, R. p. 41.) SCDSS complied with the Family Court's orders throughout the course of the lengthy family court proceedings by consistently shuttling H.A. between the families pursuant to the visitation arrangement and the continuing orders of the Family Court. (Dec. 1, 2021, D. Armstrong Dep. 129:16-23, Second Supp. R. p. 7, lines 16-23; Tisdale Aff. Ex. A, Supp. R. pp. 91-558.)

The Armstrongs admit that beginning in June 2014, SCDSS consistently recommended that H.A. be placed with the Armstrongs. (Am. Compl., ¶ 12, R. pp. 361-362; Dec. 1, 2021, D. Armstrong Dep. 11:20-12:6, Supp. R. p. 566, line 20 – p. 567, line 6; Apr. 12, 2021, R. Armstrong Dep. 39:10-11, 111:8-15, Supp. R. p. 662, lines 10-11; Supp. R. p. 716, lines 8-15.) It is irrefutable that the Family Court repeatedly found that H.A.'s placement, which was not in the home of the Armstrongs, was in her best interest and that she was safe. (Feb. 19, 2014, Order, p. 4, ¶ 7, R. p. 24; June 4, 2014, Order, p. 3, ¶ 2, R. p. 29; Jan. 13, 2015, Order, p. 4, ¶ 7, R. p. 50; Dec. 16, 2015, Order, p. 2-3, ¶¶ 5 & 7, R. pp. 72-73; Dec. 7, 2016, Order, p. 2, ¶¶ 2 & 4, p. 3, ¶¶ 1 & 4, R. pp. 80-81; Feb. 22, 2017, Order, p. 2, ¶ 4, R. p. 86; Dec. 4, 2017, Order, p. 3, ¶¶ 1-3. R. p. 93; Nov. 14, 2018, Order, p. 3, ¶ 7, R. p. 113.) The Family Court also repeatedly ordered that the placement of H.A. and the visitation arrangement remain status quo. (Dec. 16, 2015, Order, p 3, ¶ 7, R. p. 73; Dec. 7, 2016, Order, p. 3, ¶ 4, R. p. 81; Feb. 22, 2017, Order, p. 2, ¶ 4, R. p. 86; Dec. 4, 2017, Order, p. 3, ¶ 1, R. p. 93; Apr. 12, 2021, R. Armstrong Dep. 143:4-6, Supp. R. p. 736, lines 4-6.)

The continued placement with the Dalsings arose from the execution, enforcement, or implementation of the continuing orders of the Family Court. Furthermore, the actions or inactions of SCDSS concerning H.A.'s split visitation arrangement with the Armstrongs and the Dalsings occurred pursuant to Family Court's orders. Thus, the Trial Court properly concluded that SCDSS was immune from suit for its compliance with the orders of the Family Court.

SCDSS is Entitled to Discretionary Immunity

The Trial Court properly concluded that SCDSS is protected by discretionary immunity. (Order, p. 16-18, R. pp. 152-155.) The South Carolina Tort Claims Act provides immunity to SCDSS for its discretionary decisions, stating that SCDSS is 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 faced with alternatives, it 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). The governmental entity must show that in weighing the competing considerations, it utilized accepted professional standards appropriate to resolve the issue before it. 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. Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 204, 403 S.E.2d 615, 620 (1991).

To the extent that Appellants allege that OHAN, which conducted numerous investigations instigated by complaints made by both the Armstrongs and Dalsings, should have concluded that H.A. was being abused at the home of the Dalsings, the Trial Court properly determined that the decision to whether to indicate or unfound a report of abuse or negligent necessarily requires consideration of alternatives. In addition, the Trial Court properly noted that the uncontested evidence in this case established that SCDSS utilized professional standards in making such decisions.

SCDSS filed the affidavit of expert Nicol Stolar-Peterson. 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, Supp. R. pp. 84-86.) Appellants did not offer any opposing evidence that SCDSS did not utilize accepted professional standards, nor did Appellants' expert offer any opinion that SCDSS deviated from any applicable standard of care. Appellants' expert testified:

> 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, Second Supp. R. p. 19, lines 8-11.)

While Appellants cite Clark v South Carolina Dep't of Pub. Safety, 362 S.C. 377, 608 S.E.2d 573 (2005), that case does not support Appellants' argument. The Supreme Court acknowledged that the Tort Claims Act includes immunity for discretionary decisions, but decided that a law enforcement officer is not immune for the decision whether to engage in a high speed chase of a suspect. Id. at 387, 608 S.E.2d at 579.

Jensen v. Anderson Cnty. Dept. of Soc. Servs., 304 S.C. 195, 403 S.E.2d 615 (1991), is instructive. In Jensen, a social worker interviewed a child after SCDSS received a report of

potential child abuse from the child's teacher. The social worker saw bruises and observed that the child feared the mother's boyfriend. However, the social worker failed to follow up, did not gather other information, locate the family, and eventually closed the file as "unfounded." One month later, the child's brother was beaten to death in the home and a lawsuit ensued.

This Court noted that the manner in which an investigation is conducted is discretionary unless the investigation is substantially incomplete. This Court held that the classification of a report of abuse as "unfounded" is a discretionary act because it involves the application of judgment to the particular facts. Thus, the issue in the case was whether professional standards were utilized. Accordingly, in considering the grant of a motion to dismiss, this Court remanded the case for discovery so that the facts could be developed.

The South Carolina Supreme Court agreed. Therefore, the Supreme Court held that on remand whether a "thorough" investigation was performed had to be developed. Accordingly, the Court ruled that SCDSS was required to present evidence that competing choices were considered and that they made a conscious decision based upon the facts to close the file. See also Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 330, 566 S.E.2d 536, 544 (2002) (For a governmental entity to be entitled to discretionary immunity it must prove that it "evaluated competing alternatives and made a judgment call based on applicable professional standards.")

Unlike Clark, there is no genuine dispute whether SCDSS is entitled to discretionary immunity in this case. Here, the record clearly demonstrates that SCDSS weighed competing choices and utilized accepted professional standards in: (1) deciding to place H.A. with the Dalsings when she was removed from her meth-cooking parents and taken into emergency protective custody; (2) searching for relative placement options for H.A.; and (3) investigating all allegations of abuse and neglect of H.A.

The record shows that prior to H.A.'s placement with the Dalsings, they were licensed as foster parents and had never been accused of abusing or neglecting any of the children who had been placed with the Dalsings through the foster care system. (E. Dalsing Dep. 40:15-17, Supp. R. p. 906, lines 15-17; T. Dalsing Dep. 37:13-15; 53:2-5, Supp. R. p. 850, lines 13-15; Supp. R. p. 857, lines 2-5.) The uncontroverted expert testimony of Nicole Stolar-Peterson establishes that SCDSS "considered the provided and available options and utilized accepted professional standards when it made the discretionary decision to place H.A. with the licensed foster care providers, Edward and Tammy Dalsing on August 27, 2013." (Stolar Aff. ¶ 5, Supp. R. p. 84.) Moreover, SCDSS "demonstrated accepted professional standards when it made the initial placement [of H.A.] into the Dalsing Home." (Id. at ¶ 7, Supp. R. p. 85.)

The record proves that SCDSS requested relative information from H.A.'s biological mother when H.A. was taken into emergency protective custody. (Kaylor Aff. Ex. A, Supp. R. pp. 7-10.) The evidence proves that SCDSS continued to request such information from H.A.'s parents. (Id. at ¶¶ 5-6; Ex. B, Supp. R. p. 4; Supp R. pp. 11-32.) SCDSS conducted investigations into the suitability of the two relatives identified by H.A.'s father. (Id. at ¶ 7, Supp. R. p. 4.) SCDSS also paid for a Seneca Search for possible family of H.A. who might serve as a placement option for H.A. (Id. at ¶ 8; Ex. C, Supp. R. p. 4; Supp. R. pp. 33-44.) The expert witness of SCDSS testified that the techniques utilized by SCDSS to locate relative placement options of children in its care and custody are the same types of techniques employed by other state departments of social services and comply with 42 U.S.C. § 671(a)(29). (Stolar Aff. ¶ 8-9, Supp. R. pp. 85-86.) Moreover, the uncontested testimony of SCDSS's expert witness establishes that SCDSS utilized accepted professional standards and acted in accordance with its policies in searching for relative placement options for H.A. (Id. at ¶ 10, Supp. R. p. 86.)

There is no evidence that SCDSS breached any duty to investigate allegations of abuse or neglect of H.A. Instead, the record establishes that SCDSS investigated a plethora of claims, anonymous and otherwise, lodged against both the Dalsings and the Armstrongs. The uncontroverted expert witness testimony of Nicole Stolar-Peterson establishes that SCDSS "conducted investigations of abuse and neglect asserted against [the Dalsings] and also against [the Armstrongs] in accordance with the standard of care utilized by other similar state agencies." (Id. at ¶ 6, Supp. R. pp. 84-85.) SCDSS utilized accepted professional standards when determining whether H.A. should remain in the Dalsing home following allegations of abuse against both the Dalsings and the Armstrongs. (Id. at ¶ 7, Supp. R. p. 85.) Moreover, the discretionary decisions made by SCDSS concerning whether allegations of abuse or neglect of H.A. warranted the removal of H.A. were made after weighing and considering the same types of information that other state departments of social services consider for those situations. (Id.) Appellants failed to present any evidence from any qualified expert witness establishing that SCDSS deviated from any applicable standard of care in conducting any investigation of alleged abuse or neglect of H.A.

The Trial Court's decision that SCDSS is entitled to discretionary immunity is supported by the record and Appellants produced no opposing evidence nor do they point to any in their Brief. Therefore, this Court should affirm the Trial Court's finding that SCDSS is entitled to discretionary immunity as provided by Section 15-78-60(5) of the Tort Claims Act.

SCDSS Is Entitled to Immunity Under Section 15-78-60(12) as to Any Claims Relating to the Licensing of the Dalsings as Foster Parents.

The Trial Court correctly found that to the extent that Appellants attempt to assert a claim against SCDSS based upon an alleged breach of duty by SCDSS in licensing the Dalsings as foster parents or renewing their license, such claim is barred by Section 15-78-60(12) of the Tort Claims

Act. (Order, p. 18, R. p. 155.) Appellants do not address this issue in their Brief. (Brief of Appellants.) Therefore, this Court may affirm the Trial Court under the two-issue rule.

Even if Appellants preserved this issue for review, the Trial Court's ruling should be affirmed. 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. 15-78-60(12) (2005).

The record before the Trial Court established that the Dalsings attended training prior to being licensed as foster parents, and that prior to H.A.'s placement they had never been accused of abusing or neglecting any child placed with the Dalsings through the foster care system. (E. Dalsing Dep. 40:15-17, Supp. R. p. 906, lines 15-17; T. Dalsing Dep. 37:13-15; 53:2-5; Supp. R. p. 850, lines 13-15; Supp. R. p. 857, lines 2-5.) The record shows that SCDSS had not received any complaints about abuse or neglect of any child placed into their care and Appellants have never identified any such complaints. There is no evidence that SCDSS breached any applicable standard of care or was grossly negligent in the licensing of the Dalsings as foster parents. This Court should affirm the Trial Court's order accordingly.

IV. APPELLANTS CANNOT RECOVER PUNITIVE DAMAGES FROM SCDSS.

Despite the South Carolina Tort Claims Act's express bar otherwise, Appellants inexplicably argue that they can recover punitive damages against SCDSS. (Brief of Appellants, p. 15-16.) Section 15-78-120(b) of the South Carolina Tort Claims Act provides that "[n]o award of damages under this chapter shall include punitive or exemplary damages or interest prior to the judgment." S.C. Code Ann. § 15-78-120(b) (1997). The South Carolina Supreme Court has held

that the South Carolina Tort Claims Act does not permit recovery of punitive damages. See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993) (ruling that no punitive damages are recoverable under Section 15-78-120(b) of the State Tort Claims Act.); MacMurphy v. South Carolina Dep't of Highways & Pub. Transp., 295 S.C. 49, 51, 367 S.E.2d 150, 151 (1988) (holding that there was "no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies.")

Appellants cite one irrelevant case, Bass v. South Carolina Dep't of Soc. Servs., 414 S.C. 558, 780 S.E.2d 252 (2015). The plaintiffs in Bass initially filed suit against SCDSS and the compounding pharmacy and its pharmacist seeking actual and punitive damages. However, after settling with the pharmacy and the pharmacist, the plaintiffs filed an amended complaint against SCDSS **seeking only actual damages**. The Bass jury did not award punitive damages. See Bass v. South Carolina Dep't of Soc. Servs., C.A. No. 2009-CP-20-0395, 2011 WL 12565683, (Fairfield Cnty, S.C. Ct. Com. Pls., May 27, 2011). Instead, the verdict stated: "We, the Jury, find for the [p]laintiffs against the [d]efendant in the amount of $4,000,000.00 damages." Id. at *2.

Appellants cannot recover punitive damages from SCDSS. Therefore, this Court should affirm the order of the Trial Court.

V. APPELLANTS' CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT.

Contrary to a recent decision by the South Carolina Supreme Court, Appellants argue that the Trial Court erred in granting summary judgment with respect to their claims for intentional infliction of emotional distress.[5] Their argument is contrary to both the express language of the

[5] It does not appear that Appellants appeal the Trial Court's order granting summary judgment with respect to their claim for negligent infliction of emotional distress and have abandoned that claim. The Trial Court properly found that this case did not involve bystander liability. Kinard v. Augusta, 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985).

Tort Claims Act and significant case law. Such a claim is not actionable against a governmental entity in South Carolina.[6]

The South Carolina Tort Claims Act governs all tort claims against governmental entities and provides the exclusive civil remedy. S.C. Code Ann. § 15-78-200 (1997). The Act grants a right of recovery only to "any person who suffers a **loss** proximately caused by a tort" of a governmental entity. S.C. Code Ann. § 15-78-50(a) (1986). The South Carolina Legislature defined "loss" under the Act, and expressly excluded a claim for intentional infliction of emotional distress or outrage against a governmental entity. To that end, the Act defines "loss" as:

> 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.**
>
> S.C. Code Ann. § 15-78-30(f) (2008).

In its recent March 27, 2024 opinion, the South Carolina Supreme Court specifically held that a claim for intentional infliction of emotional distress is barred by the South Carolina Tort Claims Act. In Gore v. Dorchester Co. Sheriff's Off., 442 S.C. 438, n.3 900 S.E.2d 423 (2024), the South Carolina Supreme Court addressed a certified question from the United States District Court for the District of South Carolina: "Does the bar under the South Carolina Tort Claims Act of claims of intentional infliction of emotional distress, S.C. Code Ann. § 15-78-30(f), apply to claims of reckless infliction of emotional distress?" Id. at 439, 900 S.E.2d at 424. In its

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[6] The tort of outrage includes both the reckless and intentional infliction of emotional distress. Gore v. Dorchester Co. Sheriff's Off., 442 S.C. 438, 443, n.3, 900 S.E.2d 423, 426, n.3 (2024)("When we adopted the tort of outrage in Ford in 1981, we clearly stated the tort encompassed both the reckless and intentional infliction of emotions distress."); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

consideration, the Court noted that reckless infliction of emotional distress is merely a subset of intentional infliction of emotional distress and "there is no separate cause of action in South Carolina for the reckless infliction of emotional distress." Id. at 440, 900 S.E.2d at 424. The Court construed the definition of "loss" in Section 15-78-30(f), specifically stating that a claim of intentional infliction of emotional distress is barred by the Act. The Cout noted that "the definition of 'loss' ends with an exclusion prohibiting recovery not for a specific element of actual damages, **but rather for an entire cause of action—the intentional infliction of emotional distress**." Id. at 442, 900 S.E.2d at 425 (emphasis added). The Court reasoned that because the reckless infliction of emotional distress is part of intentional infliction of emotional distress, the express statutory bar to recovery in section 15-78-30(f) necessarily applies. Id. at 442-43, 900 S.E.2d at 425-26. Therefore, the Court ruled that "[t]he bar to recovery for the intentional infliction of emotional distress in section 15-78-30(f) applies to the subset of claims for the reckless infliction of emotional distress." Id. at 443, 900 S.E.2d at 426.

This Court has also ruled that a cause of action for intentional infliction of emotional distress is barred by the Tort Claims Act, S.C. Code Ann. § 15-78-30(f). See Trask v. Beaufort Cnty., 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm."). Accordingly, the Trial Court properly determined that Appellants cannot assert a claim for intentional infliction of emotional distress and its decision should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the order granting summary judgment in favor of the South Carolina Department of Social Services.

Respectfully submitted,

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