THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case Tracking No. 2011195866
Case No. 2009-CP-20-0395

Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Respondents,

v.

South Carolina Department of Social Services, Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On or about November 4, 2009, Diane Bass and Otis Bass, individually and as parents and guardians of Alex Bass and Hanna Bass, both minors under the age of ten years, filed a lawsuit in the Fairfield County Court of Common Pleas, naming as Defendants Long's Drugstores of South Carolina, Inc., James D. McNinch, and Fairfield County Department of Social Services. Complaint, at R. pp. 9-12. In their Complaint, Mrs. and Mr. Bass alleged that they were the parents of Alex and Hanna Bass, that they had obtained prescription medication for the minor children from Long's Drugstore, and that, unknown to them, the medication from Long's Drugstores was far more potent than it should have been. *Id.* The Complaint further alleged that Mrs. Bass administered the medication to the minor children, and that both children were subsequently hospitalized as a result of taking the medication. *Id.* The Complaint further alleged that, when the children were discharged from the hospital on May 19, 2008, the Fairfield Department of Social Services removed the children from the Bass home, and did not return the children until June 25, 2008. *Id.* The Complaint alleged negligence and gross negligence on the part of Long's Drugstores, McNinch, who was a pharmacist with Long's, and Fairfield County Department of Social Services, and prayed for actual and punitive damages. *Id.*

The South Carolina Department of Social Services (hereinafter referred to as "SCDSS") answered on or about January 5, 2010, interposing a qualified general denial, and additional affirmative defenses. *See* Answer, at R. pp. 13-19. Long's Drugstores and

McNinch also answered, and ultimately settled with the Basses following an April, 2011 mediation.

On or about May 10, 2011, Diane and Otis Bass moved to amend their Complaint to conform to evidence discovered through depositions, and SCDSS consented to the amendment. *See, e.g.*, Motion to Amend, at R. pp. 835-838. Immediately prior to the start of trial, Mr. and Mrs. Bass served their Amended Complaint on or about May 23, 2011, naming only SCDSS as Defendant, and alleging causes of action sounding in gross negligence, defamation, and outrage, praying for judgment in an unspecified amount of actual damages. *See*, Amended Complaint, at R. pp. 20-23. SCDSS served its Answer to Amended Complaint on or about May 24, 2011, again interposing a qualified general denial, and asserting affirmative defenses of Comparative Negligence, Negligence of a Third Party—Long's Drugstores, Legal Privilege and Justification, South Carolina Tort Claims Act Defenses under *S.C. Code Ann.* § 15-78-60(3), (4), (5), (20), and (25), Qualified Privilege, *S.C. Code Ann.* § 15-78-30(f) as not including "Outrage" as a loss recoverable under the South Carolina Tort Claims Act, and that the defamation and outrage causes of action failed to state facts sufficient to constitute a cause of action upon which relief could be granted. *See,* Answer to Amended Complaint, at R. pp. 24-30.

The case was called and a jury was drawn for trial May 23, 2011. The jury trial was conducted by The Honorable Ralph Ferrell Cothran, Jr., May 23-27, 2011. At the conclusion of the Plaintiffs' case, SCDSS moved for directed verdict, R p. 409, line 22 to p. 451, line 3, which motions were denied. *Id.*, p. 451, line 4 to p. 452, line 4, p. 452 lines 14-21. SCDSS also moved for directed verdict at the conclusion of all of the evidence, *id.*, p. 532, line 19 to p. 534, line 5, which motions were denied. *Id.* p. 534, lines 7-14. The

Plaintiffs withdrew their defamation cause of action, *id.*, p. 534, lines 18-20, and moved for directed verdict as to the SCDSS defenses of discretionary immunity and negligence of a third party, which motions were granted, striking those defenses. *Id.*, p. 534, line 23 to p. 536, line 12.

The Court charged the jury on the law, *id.*, p. 544, line 21 to p. 563, line 17, but did not charge an SCDSS Request to Charge from *Etheredge v. Richland School District One*, 341 S.C. 307, 534 S.E. 2d 275 (2000), and SCDSS took exception to that omission, which the Court noted for the record. R. p. 564, line 1 to p. 565, line 3.

The Jury deliberated from 11:10 a.m. until 11:58 a.m., *compare*, *id.*, p. 563, lines 18-20 *with id.* p. 567, lines 10-11, and returned a verdict for the Plaintiffs in the amount of Four Million ($4,000,000.00) Dollars. *Id.*, p. 567, line 22 to p. 568, line 11; Verdict Form, at R. p. 7.

The Court afforded SCDSS time to make post trial motions, and SCDSS filed and served a Motions for JNOV, or in the alternative, for New Trial Absolute, and a Motion to Reduce Verdict, or in the alternative, for a New Trial. Post Trial Motions, at R. pp. 839-844. The Court issued its Order Denying the Defendant's Post-Trial Motions June 22, 2011, filing the Order June 24, 2011. *See*, Order, at R. pp. 1-6. Although the Court denied the motion for JNOV or, in the alternative for New Trial, the Court granted the motion to Reduce the Verdict, reducing the verdict to Six Hundred Thousand ($600,000.00) Dollars. *Id.*

SCDSS received written notice of Entry of Judgment on June 28, 2011, and filed and served its Notice of Appeal July 21, 2011.

STATEMENT OF FACTS

In May, 2008, Diane and Otis Bass had been married to each other 14 years, resided in Winnsboro, South Carolina, and had three young children, Brittany, 10 years old, Hanna, 8 years old, and Alex, 5 years old, all of whom had health problems and were developmentally disabled. *E.g.*, R. p. 250, line 20 to p. 252, line 6, p. 263, lines 13-21, p. 336, lines 2-18, p. 350, lines 17-24. *See, generally, id.*, p. 224, line 25 to p. 225, line 5, p. 227, line 19 to p. 231, line 14 (regarding Hanna's autism and Alex's PDD). Mr. Bass was the family provider, and worked ten hours a day at $14.75 per hour, four days a week, Monday through Thursday, leaving home at 1:45 p.m. *See, e.g., id.*, p. 254, line 11 to p. 255, line 4, p. 291, line 16 to p. 292, line 18, p. 293, lines 4-16.

Mrs. Bass cared for the children while Mr. Bass was at work, including picking them up from school, feeding them their evening meal, preparing them for bed, and administering their medication. *Id.*, p. 352, line 12 to p. 353, line 13, p. 354, lines 1-9. Among the medications Mrs. Bass administered to her three children was clonodine, the purpose for which was to help them sleep. *Id.* p. 353, lines 14-25, p. 363, lines 14-19. Mrs. Bass had her own set of health problems in May, 2008, which included a recent knee surgery and a recent diagnosis of diabetes, for which she gave herself insulin injections twice a day. *Id.*, p. 290, lines 6-19, p. 355, line 2 to p. 358, line 8; Plaintiff's Exhibit #13, at

R. pp. 669-694. Occasionally, if she was preoccupied in getting her children ready for bed, Mrs. Bass would miss giving herself the insulin injections, and if she missed an injection, it would sometimes make her shaky and nervous, resulting in her diabetes not being under control. *Cf.*, R. p. 359, line 6 to p. 360, line 19 (testified on cross-examination that she sometimes missed injections, "may have" told SCDSS caseworker that her diabetes was not under control, and sometimes felt shaky and nervous when she missed an injection); *but see, id.*, p. 337, lines 16-18, p. 338, lines 22-24 (testified on direct examination that she had not had problem with her diabetes).

On the evening of Sunday, May 11, 2008, Mrs. Bass gave Hanna her medication, including clonidine that was actually prescribed for Alex, not Hanna. *Id.*, p. 363, lines 20-23, p. 364, lines 15-18. *See also, id.*, p. 364, lines 10-14 (the clonidine dosage for Hanna was different than the dosage for Alex). Shortly there after, as Otis Bass was bathing Hanna, she suddenly "went blank," with her "eyes turned around in the back of her head, and her skin turned cold." *Id.*, p. 269, line 22 to p. 270, line 11. Mrs. Bass and her sister, Linda Sims, took Hanna to the hospital, where she was treated and released, *id.*, p. 272, lines 1-22; but two days later, on May 13, 2008, she had more problems, and was taken to Fairfield Medical Associates, where she was seen by Dr. Gaddy. *Id.*, p. 272, line 23 to p. 273, line 4; Defendant's Exhibit #30, at R. p. 833. After taking a history from Mrs. Bass and examining Hanna, Dr. Gaddy had no assessment of the problem, but indicated on Hanna's medical chart that she should continue taking her then-current medications of Benadryl and clonidine. Defendant's Exhibit #30, at R. p. 833; R. p. 105, line 4 to p. 106, line 15, p. 114, lines 20-25, p. 115, lines 6-9. From Fairfield Medical Associates, Mrs.

Bass took Hanna to Palmetto Richland Memorial Hospital, where she was admitted the same day. *Id.* p. 273, lines 17-20.

On May 15, 2008, while Hanna was still in the hospital, Mrs. Bass took Alex, who was breathing shallowly and with difficulty, to Fairfield Medical Associates, where he was seen by Nurse Practitioner Evelyn May. *E.g., id.*, p. 109, lines 10-19, p. 116, lines 9-24, p. 364, line 19 to p. 365, line 21; Defendant's Exhibit #29, at R. p. 832. Ms. May took the history of the present illness from Mrs. Bass, and took the boy's vital signs for purposes of assessing and treating Alex, and Mrs. Bass, who was admittedly upset, told Ms. May that Alex had not taken meds for ADHD and clonidine in about three weeks, and took no meds the previous day "because refused." R. p. 117, line 3 to p. 118, line 5; p. 119, lines 15-17; p. 365, line 22 to p. 368, line 5; Defendant's Exhibit #29, at R. p. 832. Alex was taken by EMS to Fairfield Memorial Hospital, and from there he was transported by helicopter to Palmetto Richland Memorial Hospital. R. p. 121, line 24 to p. 122, line 1; Defendant's Exhibit #29, at R. p. 832.

Given the history she had received from Mrs. Bass and her own examination of Alex, Ms. May was not sure what the boy's problem was, and broadened her scope of inquiry to include the Bass home, suspecting carbon monoxide poisoning or other causes, sending firefighters to the home to check for possible causes. R. p. 119, line 1 to p. 120, line 3. *But see, id.*, p. 120, lines 4-20 (Ms. May did not document in the progress notes her sending the firefighters to the Bass home, something she typically would have done).

On Thursday, May 15, 2008, at approximately 2:15 p.m., the Fairfield County office of the South Carolina Department of Social Services (SCDSS) received an intake report that three children from the same family had been sent to Palmetto Richland Memorial

Hospital on life support, possible poisoning by parents. Plaintiffs' Exhibit #2, at R. pp. 570-574; R. p. 154, lines 12-23; p. 155, line 11 to p. 159, line 15. SCDSS Assessment Caseworker Monique Parrish responded to the hospital by 3:00 that same afternoon, met with Mr. and Mrs. Bass and their eldest daughter, Brittany, and began her investigation into the report. Plaintiffs' Exhibit #3, at R. p 575; R. p. 160, line 9 to p. 167, line 11; p. 294, line 23 to p. 295, line 19; p. 369, line 15 to p. 370, line 4. Ms. Parrish introduced herself to Mr. and Mrs. Bass, told them that she was from SCDSS, that SCDSS had received a report about the Bass children, and that SCDSS would be conducting an investigation. *Id.*, p. 374, lines 4 -16; p. 378, lines 10-23. Ms. Parrish also provided an informational brochure and a multi-page "Child Abuse, Child Neglect" pamphlet in that first meeting, outlining the procedure for SCDSS investigations, and explaining the Bass's rights, which included the right to an attorney and the right to contest or appeal SCDSS findings. Plaintiffs' Exhibit #3, at R. p. 576; Defendant's Exhibits ##2, 3, and 4, at R. pp. 807, 808, 810; R. p. 167, line 12 to p. 168, line 8; p. 370, line 5 to p. 371, line 14; p. 371, line 20 to p. 372, line 12; p. 373, lines 10-19.

Mrs. Bass read the brochure and handbook. *Id.*, p. 373, lines 20-22; p. 375, line 24 to p. 377, line 4. After reading the brochure and handbook, Mrs. Bass understood that, if she and Mr. Bass disagreed with what DSS was proposing, they could go to Family Court to contest it. *Id.*, p. 375, lines 12-19. *But see, id.*, p. 296, line 24 to p. 297, line 14 (Otis Bass could not remember if Diane Bass had shown him the brochure and handbook).

The following day, Friday, May 16, 2008, Ms. Parrish held a "family meeting" with Diane Bass and other members of Mrs. Bass's family, including her sisters, Linda Sims and Mary Cathey, and her niece, LaShonda Sims. *Id.*, p. 169, lines 15-20; p. 379, line 9 to

p. 380, line 3; Plaintiffs' Exhibit #3, at R. p. 578. After advising Mrs. Bass that SCDSS needed to ensure the safety of the children during the SCDSS investigation, and after discussing with Mr. and Mrs. Bass possible relatives with whom the children could be placed, Ms. Parrish sought "relative placement" of the children with Linda Sims and LaShonda Sims, the aunt and the then-20-year-old cousin and frequent baby-sitter of the Bass children, who lived nearby, and with whom the children were familiar and affectionate. Plaintiffs' Exhibit #3, at R. p. 577; R. p. 45, lines 4-7; p. 45, line 13 to p. 47, line 22; p. 48, lines 3-9; p. 169, line 21 to p. 170, line 17; p. 216, lines 12-20; p. 217, lines 21-23; p. 218, lines 8-10, 15-18; p. 219, lines 4-19; p. 381, line 19 to p. 382, line 6. Also on May 16, Ms. Parrish began the background check and home visit necessary for the relative placement of the children with Ms. Sims. Plaintiffs' Exhibit #3, at R. pp. 579-580; R. p. 51, lines 8-14; p. 171, line 25 to p. 173, line 22. Although Ms. Parrish's SCDSS dictation does not document when she made the request, she also requested, received, and reviewed medical records for Mrs. Bass. *Id.*, p. 186, line 24 to p. 187, line 10. *See also*, Plaintiffs' Exhibit #13, at R. pp. 669-786 (Fairfield Medical Associates records for Diane Bass received by SCDSS).

After participating in the Family Meeting and providing input and recommendations to Monique Parrish with regard to the temporary relative placement of their children during the DSS investigation, on May 16 Diane and Otis Bass each voluntarily signed a "Safety Plan" that SCDSS prepared, thereby agreeing to the temporary placement of their children with Ms. Sims. Plaintiffs' Exhibit #4, at R. p. 642; R. p. 52, line 8 to p. 54, line 4; p. 54, line 20 to p. 55, line 21; p. 169, lines 8-14; p. 194, line 1 to p. 197, line 5; p. 287, line 25 to p. 288, line 12; p. 382, line 7 to p. 384, line 17. *See also*, *id.*, p. 55, lines 17-21 (Linda

Sims understood, when she signed the Safety Plan, that DSS was trying to keep the Bass children with relatives and family with whom they were familiar); *id.* p. 288, line 15 to p. 289, line 17 (Otis Bass understood when he signed the Safety Plan that, had he disagreed with what DSS was proposing, he could have refused to sign the plan, could have contested what DSS was proposing, and could have required DSS to go to Family Court). Diane Bass also told Monique Parrish who the doctors were for Hanna and Alex. *Id.* p. 383, line 23 to p. 384, line 17.

A friend of the Bass family, Mrs. Shirley Pullen, testified at trial that she had suggested to Monique Parrish at the hospital that they check the children's medication, but admitted that she did not mention checking the medication to any of the medical professionals at the hospital; *e.g., id.*, p. 35, line 4 to p. 36, line 22; nor did Mrs. Bass suggest to any doctors or nurses that they check the medication she had given her children. *Id.* p. 386, lines 8-11. SCDSS took possession of the children's medication at some point, but SCDSS did not test the medicine.

Brittany, who was not hospitalized, was the first of the Bass children to be placed with Ms. Sims. Hannah and Alex began their placement with Linda Sims upon their release from the hospital on Monday, May 19, 2008.

On Tuesday, May 20, once the children were out of the hospital and placed with Linda Sims, Ms. Parrish and Jane Arnold, another caseworker for SCDSS, performed a home visit to the Bass home to survey the home and conditions insofar as they pertained to the safety of the environment in which the children lived and their well being. *See*, Plaintiffs' Exhibit #3, at R. p. 581; R. p. 173, line 23 to p. 175, line 10; p. 297, line 15 to p. 299, line 10; p. 495, lines 18-24; p. 496, lines 14-25. Ms. Parrish and Ms. Arnold took

photographs and found the home to be in disarray, with mold on some walls, a shattered pane of glass in the yard, and a foul, urine-like odor in the children's bedroom. *See, e.g.*, Plaintiffs' Exhibit #3, at R. p. 581; Plaintiffs' Exhibit #9, at R. pp. 647-665; R. p. 299, line 11 to p. 301, line 12; p. 303, line 2 to p. 304, line 22; p. 495, lines 18-24; p. 496, lines 14-25; p. 497, line 22 to p. 503, line 17. They advised Mr. and Mrs. Bass what needed to be done with the home, and Mr. and Mrs. Bass immediately began fixing the home. *E.g.*, R. p. 301, line 15 to p. 302, line 24. During this period of time Ms. Bass had also told the caseworkers of her diabetes, that she was missing shots, and that her diabetes was not under control. *Id.*, p. 359, line 6 to p. 360, line 4; p. 397, lines 15-22.

SCDSS also had its required 5-day staffing of the case on May 20, in which Monique Parrish shared the information she had gathered up to that point with her supervisor and other caseworkers. *See*, Plaintiffs' Exhibit #16, at R. p. 806; R. p. 176, line 10 to p. 185, line 7; p. 328, line 24 to p. 330, line 10.

SCDSS Caseworker Jane Arnold received a call from Mr. and Mrs. Bass about arranging a visitation with their children, which Ms. Arnold did on May 23, 2008, setting up a supervised visitation and observing Mr. and Mrs. Bass interact with their children. Plaintiff's Exhibit #3, at R. p. 583; R. p. 504, line 21 to p. 506, line 10.

Linda Sims indicated to Ms. Arnold on May 27, 2008 that she was having second thoughts about being able to continue to care for the three Bass children pending the investigation, and SCDSS held a second family meeting, seeking a second relative placement, rather than foster-care, which entailed further background checks and home visits with other relatives. *See, e.g.*, Plaintiffs' Exhibit #3, at R. pp. 588-601; R. p. 48, line 25 to p. 51, line 1; p. 520, line 16 to p. 521, line 2. Alex and Brittany were moved to the

home of Christy Yoder, a married niece of Mr. and Mrs. Bass, while Hanna remained with Linda Sims. R. p. 51, lines 2-7; p. 311, line 9 to p. 312, line 2; Plaintiffs' Exhibit #3, at R. p. 606.

SCDSS again staffed the case on May 27, 2008. Plaintiffs' Exhibit #5, at R. p. 643; R. p. 188, line 4 to p. 193, line 2; p. 331, line 6 to p. 332, line 4. *See also*, Plaintiffs' Exhibit #3, at R. p. 588 (SCDSS caseworkers called Palmetto Richland Memorial Hospital to inquire into toxicology results for "further guidance" on the case).

On June 2, 2008, SCDSS indicated the case for physical neglect, and sent written Notice of the Indicated Case, along with a Determination Fact Sheet, to Mr. and Mrs. Bass at their home mailing address. Plaintiffs' Exhibit #6, at R. p. 644; Defendant's Exhibit #28, at R. p. 830; R. p. 197, line 6 to p. 200, line 9. The determination fact sheet accompanying the Notice to Mr. and Mrs. Bass that the case was indicated, listed four factors: Diane's medical condition is uncontrolled, passive parenting practices, inadequate home environment, and lack of structure in the home. *Id.* No mention was made in the determination fact sheet about the over-medication that had put the two children in the hospital, because results from the blood analysis done on the children during their hospitalization had not yet come back from the hospital. R. p. 200, line 15 to p. 201, line 17. *See also, id.*, p. 313, line 5 to p. 314, line 6 (Otis Bass had read the notice that the case was indicated, had read the language in the notice setting forth his and Mrs. Bass's rights to appeal within 30 days of their receipt of the June 2, 2008 notice if they did not agree with the SCDSS finding, and Mr. and Mrs. Bass had an attorney as of June 24, 2008); *id.* p. 525, lines 15-24; Defendant's Exhibit #32, at R. p. 834 (SCDSS treatment caseworker

Jane Arnold received June 24, 2008 letter from attorney giving written notice of representation of Mr. and Mrs. Bass).

Once the case was indicated, Jane Arnold took over as the SCDSS treatment caseworker, and maintained contact with the Bass family. R. p. 201, lines 18 to 22. Otis Bass lost his job of ten years in late May for having failed to call in on one of the days that he was with his children in the hospital. *E.g., id.*, p. 306, lines 3-15, p. 506, lines 11-25. When Ms. Arnold learned of that, she called Mr. Bass's supervisor, and facilitated Mr. Bass getting his job back in early June—working 12-hour daytime shifts Friday, Saturday, and Sunday, so he could assist Mrs. Bass with the children when they returned home, making more money per hour than he had been making before he was fired, and most importantly, reinstating his health insurance benefits. *Id.* p. 306, line 16 to p. 310, line 14; p. 311, lines 1-8; p. 394, line 17 to p. 397, line 14; p. 507, line 1 to p. 510, line 9; Plaintiffs' Exhibit #3, at R. pp. 601, 603, 607.

Mr. and Mrs. Bass painted and refurbished their home while the children were with Linda Sims, calling Ms. Arnold by late May to ask her to come by and inspect. Plaintiffs' Exhibit #3, at R. pp. 583, 603 ; R. p. 301, line 15 to p. 302, line 24; p. 304, line 11 to p. 305, line 5. Ms. Arnold viewed the work done on the home when she visited June 5 to assist Mr. Bass in getting his job back, and noted that the condition of the home was vastly improved. Plaintiffs' Exhibit #3, at R. p. 603; R. p. 510, line 10 to p. 513, line 3. Also during that visit, Mrs. Bass reported to Ms. Arnold that she was taking her diabetes medication regularly, and her diabetes was under control. *E.g.*, Plaintiffs' Exhibit #3, at R. p. 603; R. p. 513, lines 4-16.

On June 17, 2008, Ms. Arnold received a telephone call from a representative from Pharmacist Mutual Companies, an insurer of Long's Drugstores, the pharmacy that had filled Alex Bass's prescription for clonidine in early May. Plaintiffs' Exhibit #3, at R. p. 610; R. p. 513, line 17 to p. 514, line 22. The representative told Ms. Arnold that they had discovered that the clonidine had been improperly compounded by Long's, was far more potent than it should have been, and that the enhanced potency had probably been the cause for the hospitalization of Hanna and Alex. Plaintiffs' Exhibit #3, at R. p. 610; R. p. 515, lines 3-13. Ms. Arnold requested that the representative send her something in writing, and a letter confirming the conversation was received June 23. R. p. 515, line 20 to p. 518, line 13; Plaintiffs' Exhibit #3, at R. p. 612; Plaintiffs' Exhibit #8, at R. p. 645. Ms. Arnold met with Mrs. Bass and explained the letter to her on June 24, 2008, and advised Mrs. Bass to get an attorney; Mrs. Bass replied that they already had an attorney. Plaintiffs' Exhibit #3, at R. pp. 613-614. The Bass children were returned to the Bass home on June 25, 2008. *Id.*, at R. p. 617; R. p. 519, lines 16-22.

Ms. Arnold continued to make face to face home visits to the Bass home each month through the end of 2008 pursuant to a treatment plan signed by Mr. and Mrs. Bass on July 23, 2008. R. p. 386, lines 17-25; p. 388, line 1 to p. 391, line 7; p. 522, line 24 to p. 525, line 14; Plaintiffs' Exhibit #3, at R. pp. 618-641; Plaintiffs' Exhibit #14, at R. p. 787. Without exception, when Ms. Arnold made her visits and inquired into how the Basses and their children were doing, Mrs. Bass always told Ms. Arnold they were doing fine, and never indicated that Hanna was withdrawing or experiencing any residual problems from her hospitalization or 41-day placement with her Aunt Linda Sims. R. p. 387, lines 1-25; p. 526, line 25 to p. 530, line 11; Plaintiffs' Exhibit #3, at R. pp. 627-629. *Cf.*, R. p. 387,

lines 20-25 (Mrs. Bass testified that, if her children had been sick or had a problem, she would have told DSS).

The case was closed in January, 2009. *E.g.*, Plaintiffs' Exhibit #3, at R. pp. 639-641.

Neither Otis Bass nor Diane Bass had any mental or emotional health counseling following the hospitalization of their children due to the Long's Drugstores mis-compounding of the clonidine and the 41-day placement of the children with relatives. R. p. 391, lines 8-17.

Despite testimony of relatives at trial that Hanna was afraid to visit Linda Sims' home since the placement, refused to leave her own home, and was suffering from separation anxiety with regard to her parents, the Basses offered no testimony from health care professionals who had treated Hanna before and since the 41-day placement, and who would have had perspective as to her autism, that she was adversely affected by the separation, even though they had two health care professionals from Fairfield Medical Associates present at trial, who testified to other matters. *See, generally,* R. p. 90, line 18 to p. 106, line 25 (Dr. Stephen Barnett); p. 107, line 18 to p. 122, line 7 (Nurse Practitioner Evelyn May). *See also, id.* p. 312, lines 17-21 (Otis Bass testifying that, when he was deposed in Spring, 2010, he had testified that "the kids are going well"); p. 391, line 18 to p. 393, line 22 (Diane Bass testifying that Hanna has been seen by someone for her autism throughout most of her life, but has not been counseled by anyone for a psychological problem resulting from living with Linda Sims, and the only psychologist she had seen with regard to this case was Dr. Grier-Simmons, who evaluated Hanna for purposes of the lawsuit March 10-11, 2011, but had not seen Hanna before nor since).

The only mental or emotional health expert testimony with regard to an adverse psychological or emotional impact on the Bass children came from Dr. Margaret Grier-Simmons, a child psychologist who evaluates but does not treat children, who testified that she had tested and evaluated Hanna and Alex Bass over a two-day period March 10-11, 2011, after never having seen them before the assessment. *Id.* p. 243, line 1 to p. 244, line 14. Dr. Grier-Simmons found that Alex had suffered no emotional, physical, or mental injury that she could detect as a result of the May-June hospitalization and separation from his parents, *id.* p. 228, line 19 to p. 229, line 7, p. 245, lines 2-21, but found that Hanna's level of agitation and social withdrawal was significantly increased. *E.g., id.* p. 229, lines 8-12. Dr. Grier-Simmons opined that Hanna would require five to six years of intensive therapy at a cost of $35,000 to $45,000 per year, followed by a two-year phase-out program at roughly half that cost. *E.g., id.* p. 237, line 14 to p. 239, line 8. Dr. Grier-Simmons testified that the behavioral therapy program she was recommending for Hanna was a program that Hanna, as an autistic child, would have benefitted from regardless of the May, 2008 placement, *id.*, p. 246, lines 7-18, but could not testify with any certainty as to how much of the need for the therapy was attributable to her autism, and how much was attributable to the hospitalization and placement with Linda Sims, testifying that she could not do it precisely as a percentage, and referred to her attempt to do so as "an overall guesstimate." *Id.* p. 246, line 19 to p. 248, line 4. *See also, id.* p. 248, line 6 to p. 249, line 9 (Dr. Grier-Simmons "definitely" thought that Hanna "would have needed ABA therapy anyway," could give no formulaic assistance to the jury to determine how much of the cost of the therapy was attributable to the removal, and could not be more specific than a speculation that the distribution of causation and cost was half and half).

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the appellate court's jurisdiction extends merely to the corrections of errors of law. *Graham v. Whitaker*, 282 S.C. 393, 396, 321 S.E.2d 40, 42 (1984), citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). A factual finding of the jury will not be disturbed unless a review of the record discloses no evidence which reasonably supports the jury's findings. *Id.*

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct. Ap. 2010). The court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party; and the motions should be denied when the evidence yields more than one inference or its inference is in doubt. *Id.* An appellate court will only reverse the trial court's ruling when there is no evidence to support the ruling, or when the ruling is controlled by an error of law. *Id. Accord, Smalls v. South Carolina Department of Education*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. Ap. 2000). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Id. But see, Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct. Ap. 1993) citing *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975)(In a law case, a jury's verdict may be reversed on appeal when the only reasonable inference to be

drawn from the evidence is contrary to the factual findings implicit in the jury's verdict.). When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *Dreher v. Dreher*, 370 S.C. 75, 78, 634 S.E.2d 646, 648 (2006). An appellate court may decide questions of law with no particular deference to the trial court's legal conclusions. *Id.*; *Wachovia Bank v. Blackburn*, 394 S.C. 579, 584, 716 S.E.2d 454, 457 (Ct. Ap. 2011).

ARGUMENT I

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT SCDSS'S MOTION FOR JNOV BECAUSE THE UNDISPUTED EVIDENCE AT TRIAL WAS THAT MR. AND MRS. BASS VOLUNTARILY PARTICIPATED IN THE RELATIVE PLACEMENT OF THEIR CHILDREN WITH AN AUNT WHO LIVED NEAR THEM, WITH WHOM THE CHILDREN WERE FAMILIAR, AFTER HAVING BEEN PROVIDED WITH DOCUMENTATION BY SCDSS THAT FULLY INFORMED THEM OF THEIR RIGHTS—INCLUDING THE RIGHT TO AN ATTORNEY—IF THEY DISPUTED THE ACTIONS OF SCDSS.

In denying the Appellant SCDSS's Motion for JNOV, the Trial Judge found that, in viewing the evidence in a light most favorable to the Plaintiffs, there was sufficient evidence from which the jury could decide that SCDSS did not exercise slight care before removing the Bass children. Order Denying Post-Trial Motions, at R. p. 1. The Trial Judge erred in denying the motion for JNOV because SCDSS did not "remove" the Bass children from their home; rather, the Basses were fully informed—and understood—their legal rights from their first contact with SCDSS, having been provided with a brochure and a handbook setting forth and explaining their rights, and voluntarily participated in the relative placement of their children with Mrs. Bass's sister—an aunt to the children—whom the Basses recommended, who lived within five minutes of the Bass home, and with whom the children were familiar.

A person who signs a contract or written document cannot avoid the effect of the document by claiming he did not read it. *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. Ap. 2011). A person signing a document is responsible for

reading the document and making sure of its contents. *Id.* One who signs a written instrument has the duty to exercise reasonable care to protect himself. *Id.*

To their credit, Otis and Diane Bass did not attempt, at trial, to claim that they did not read the SCDSS Safety Plan prior to signing it, or that they did not understand its contents. *See, e.g.*, Plaintiffs' Exhibit #4, at R. p. 642; R. p. 287, line 25 to 289, line 20; p. 382, line 7 to p. 384, line 17. Otis Bass even testified that he understood that, if he disagreed with what SCDSS was proposing in the Safety Plan, he could have not signed the document. *Id.* p. 288, line 15 to p, 289, line 4, p. 289, lines 8-17. Diane Bass also testified that, after reading the Brochure and "Child Abuse, Child Neglect" pamphlet that SCDSS caseworker Monique Parrish had given her in the first contact on May 15, 2008—the day before she signed the Safety Plan—she understood that if she did not agree with what DSS was proposing, she could take the matter to Family Court, and had the right to be represented by an attorney. *Id.* p. 375, line 5 to p. 378, line 2. *See also, id.* p. 167, line 12 to p. 168, line 8; p. 370, line 5 to p. 371, line 14; p. 371, line 20 to p. 372, line 12; p. 373, lines 10-19; Plaintiffs' Exhibit #3, at R. p. 576; Defendant's Exhibits ## 2, 3, and 4, at R. pp. 807, 808, 810 (Ms. Parrish provided, and Mrs. Bass signed for, the informational brochure and a multi-page "Child Abuse, Child Neglect" pamphlet in the first contact between the two at the hospital on May 15, 2008).

Mr. and Mrs. Bass do not even contend that Linda Sims, Mrs. Bass's sister and the children's aunt, who lived within a five-minute ride from the Bass home, in a home the Bass children had visited frequently, and with whom the children were close, R. p. 216, lines 12-20, p. 220, lines 9-22, p. 352, lines 9-11, was not a good placement for the children pending the investigation of the then-unknown affliction that had put Hanna and

Alex Bass in the hospital, with Alex on life support. *Cf.*, *id.* p. 382, lines 2-5 (Diane conceding that, if the children were to be placed with relatives, Linda Sims and her daughter, LaShonda, were the best choice at that point). *See also*, *id.*, p. 170, lines 5-17 (Monique Parrish received indications from Mr. and Mrs. Bass that Linda Sims would be the appropriate relative placement); *id.*, p. 311, lines 9-13; p. 311, line 20 to p. 312, line 2 (Otis Bass admitted his children well cared for by Linda Sims and Christy Yoder, the relatives with whom they were placed).

Otis and Diane Bass did not seek an attorney, nor dispute what SCDSS proposed in its Safety Plan tendered to them on May 16, 2008. They recommended which relative the children should be placed with, they participated in the formulation of the Safety Plan, and they voluntarily signed the Safety Plan. But well after the fact, they claimed that they were coerced into signing because of the fear that SCDSS might bring an action and take their children, based upon Mr. Bass's experience with a DSS case as a child in 1977, when he was apparently removed from his father because his father was an alcoholic. *Id.*, p. 274, line 21 to p. 280, line 6.

The threat of a legal process or court action does not constitute coercion or oppression. *Shockley v. Wycliffe*, 150 S.C. 476, 477, 148 S.E. 476, 477 (1929). *See also*, *Shuck v. Interstate Building & Loan Ass'n*, 63 S.C. 134, ___, 41 S.E. 28, 32 (1902)(Courts are the places where people settle their disputes, and to threaten a lawsuit for the assertion of one's rights cannot fall under the ban of oppression). Similarly, SCDSS telling the Basses that, in the event it felt the Bass children were in jeopardy, given their life-support status and the tenor of the "possible parental poisoning" intake report that beckoned SCDSS involvement in the first place, was neither coercive nor oppressive. The Basses

had rights—Monique Parrish gave them literature fully informing them of their rights, including the right to an attorney. Had they disputed the actions of SCDSS, they could have contested those actions; but they chose not to. Instead, they voluntarily participated in the relative placement of their children, and voluntarily signed the Safety Plan. Then they brought suit against SCDSS two years later.

The only reasonable inference from the evidence at trial was that the Basses had voluntarily participated in and agreed to the SCDSS Safety Plan and relative placement of their children without coercion or over-reaching by SCDSS, and the Trial Judge erred in failing to grant SCDSS's Motion for JNOV.

ARGUMENT II

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT SCDSS'S MOTION FOR JNOV BECAUSE THE ONLY REASONABLE INFERENCE FROM THE EVIDENCE AT TRIAL WAS THAT SCDSS HAD EXERCISED AT LEAST SLIGHT CARE IN ITS INVOLVEMENT WITH THE BASS FAMILY; AND THE FACT THAT IT DID NOT DO EVERYTHING THAT THE BASSES ARGUE SHOULD HAVE BEEN DONE DOES NOT NEGATE THE FACT THAT SCDSS DID EXERCISE AT LEAST SLIGHT CARE, AND WAS NOT GROSSLY NEGLIGENT AS A MATTER OF LAW.

The Trial Judge erred in denying Appellant SCDSS's Motion for JNOV because the trial record was replete with evidence of SCDSS exercising slight care and beyond from the inception of its involvement with the Bass family, the fact that SCDSS did not do everything it possibly could have done did not negate the fact that it had exercised at least slight care, and the only reasonable inference to be drawn from that evidence of at least slight care was contrary to the factual findings implicit in the jury's verdict.

The South Carolina Tort Claims Act, codified at *S.C. Code Ann.* §§15-78-10 through -220 (1986 as amended), is a limited waiver of governmental immunity. *See, e.g., Staubes v. City of Folly Beach*, 331 S.C. 192, 204, 500 S.E.2d 160, 167 (Ct. Ap. 1999). The remedy provided by the South Carolina Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity such as SCDSS, its agents or employees, so long as they act within the scope of their official duties, and did not commit actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. *See, e.g., S.C. Code Ann.* §§15-78-20(b), 15-78-70(b) (1986 as amended), 15-78-200 (1997 as

amended); *Huggins v. Metts*, 371 S.C. 621, 624, 640 S.E.2d 465, 466 (Ct. Ap. 2007). Provisions of the South Carolina Tort Claims Act establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability. *Id.* §§15-78-20(f), 15-78-200; *Staubes,* cited *supra,* 331 S.C. at 205, 500 S.E.2d at 167. A governmental entity such as SCDSS is not liable for a loss resulting from responsibility or duty, including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or *client* of the governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner. *Id.* §15-78-60(25) (1986 as amended) (emphasis added). *Cf.*, R. p. 70, lines 20-24 (Plaintiffs' expert witness Michael Corey agreed that, once SCDSS becomes involved in a Child Protective Services case, the parents and children become clients of SCDSS).

South Carolina Courts have defined gross negligence in a number of ways: as the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do, as the failure to exercise slight care, *e.g.*, *Etheredge v. Richland School District One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); *Clyburn v. Sumter County District Seventeen*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); *Staubes*, cited *supra*, 331 S.C. at 204, 500 S.E.2d at 167, and as a conscious failure to exercise due care. *Staubes*, 331 S.C. at 204, 500 S.E.2d at 167. While gross negligence is ordinarily a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the Court. *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277 (2000); *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887.

If a Defendant has exercised at least slight care, the fact that it might have done more does not negate the fact that it did exercise slight care and was not grossly negligent. *Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278. *See also*, *Clyburn*, 317 S.C. at 53-54, 451 S.E.2d at 888 (in affirming Court of Appeals affirmation of lower Court grant of summary judgment in suit brought by high school student for injuries sustained in knife attack by a non-student assailant on a school bus, South Carolina Supreme Court, while acknowledging the student's argument that the School District had not brought a criminal action against the assailant after an earlier incident, enumerated those steps that the School District had taken to avert a further attack, and concluded that the only reasonable inference to be drawn from those facts was that the School District, at the very least, had exercised slight care, and was not grossly negligent as a matter of law).

Evidence at trial indicated that the Fairfield County office of SCDSS received an intake report at 2:15 on Thursday, May 15, 2008, that the three Bass children had been sent to Palmetto Richland Memorial Hospital on life support, with parental poisoning suspected. Plaintiffs' Exhibit #2, at R. p. 570; R. p. 154, lines 12-23; p. 155, line 11 to p. 159, line 15. Within forty-five minutes, SCDSS Assessment Caseworker Monique Parrish responded to the hospital, met with Mr. and Mrs. Bass and their eldest daughter, Brittany, and began her investigation into the report. Plaintiffs' Exhibit #3, at R. p. 575; R. p. 160, line 9 to p. 167, line 11; p. 294, line 23 to p. 295, line 19; p. 369, line 15 to p. 370, line 4. Evidence at trial established that, from that point onward SCDSS, through its caseworkers and supervisors exercised slight care and beyond in dealing with the Bass family, both before the relative placement of the Bass children up through the June 2, 2008 indication of the case, and thereafter through the June 25, 2008 return of the children following the

Long's Drugstore revelation that it had mis-compounded the clonidine, and through the January, 2009 closing of the case. *Cf.*, Brief of Appellant, Statement of Facts, *supra*, pp. 7-12, and Record citations therein (actions from intake through June 2, 2008 Notice of Indicated Case); *id.*, pp. 12-14, and Record citations therein (from June 2, 2008 through closing of case January, 2009).

Among the actions SCDSS took that amounted to slight care and beyond, were the following:

The intake and response, May 15, 2008, *e.g.*, R. p. 326, lines 4-15; p. 461, lines 14-18;

The initial face-to-face contact with the Basses, Brittany, and other family collaterals, *id.*, p. 461, lines 19-21; p. 476, line 20 to p. 477, line 16;

Providing the brochure and handbook to the Basses at the initial contact, from which literature the Basses could learn of the SCDSS process and their rights, *id.* p. 167, line 12 to p. 168, line 8; p. 326, lines 16-18; p. 370, line 5 to p. 371, line 14; p. 371, line 20 to p. 372, line 12; p. 463, lines 2-25;

Requesting and reviewing medical records for Mrs. Bass, *id.*, p. 186, line 24 to p. 187, line 10; p. 476, lines 13-19; Plaintiffs' Exhibit #13, at R. pp. 669-786; and from Palmetto Richland, R. p. 328, lines 21-23;

Face-to-face meeting with other family members and holding Family Meeting to explore Relative Placement, *id.*, p. 169, lines 15-20; p. 326, lines 19-21; p. 327, lines 7-13; p. 379, line 9 to p. 380, line 3; p. 464, lines 1-18;

Alternative caregiver site visit to Linda Sims' home and conducting background checks for alternative caregivers, *id.*, p. 51, lines 8-14; p. 171, line 25 to p. 173, line 22; p. 328, lines 5-17; p. 465, line 21 to p. 466, line 22;

Preparing Safety Plan, presenting it to the Basses, Linda Sims, and Mary Cathey for their review and signatures, Plaintiffs' Exhibit #4, at R. p. 642; R. p. 52, line 8 to p. 54, line 4; p. 54, line 20 to p. 55, line 21; p. 169, lines 8-14; p. 194, line 1 to p. 197, line 5; p. 287, line 25 to p. 288, line 12; p. 382, line 7 to p. 384, line 17; p. 466, line 23 to p. 467, line 25;

Holding the 5-day staffing May 20, 2008, at which Ms. Parrish shared information she had gathered up to that point with her supervisor and other caseworkers, Plaintiffs' Exhibit #16, at R. p. 806; R. p. 176, line 10 to p. 185, line 7; p. 328, line 24 to p. 330, line 10; p. 470, line 17 to p. 471, line 24;

Conducting a home visit to the Bass home on May 20, 2008, Plaintiffs' Exhibit #3, at R. p. 581; R. p. 173, line 23 to p. 175, line 10; p. 297, line 15 to p. 299, line 10; p. 328, lines 18-20; p. 471, line 25 to p. 473, line 3; p. 495, lines 18-24; p. 496, lines 14-25;

Arranged for visitation with the children May 23, 2008, Plaintiff's Exhibit #3, at R. p. 583; R. p. 504, line 21 to p. 506, line 10;

Holding a second Family Meeting to explore alternative Relative Placement when Linda Simms indicated she would not be able to care for all three children long term, entailing further background checks and home visits with other relatives, *e.g.*, Plaintiffs' Exhibit #3, at R. pp. 588-601; R. p. 48, line 25 to p. 51, line 1; p. 327, line 20 to p. 328, line 4; p. 473, line 22 to p. 475, line 3; p. 520, line 16 to p. 521, line 2;

Holding a follow-up staffing May 27, 2008, Plaintiffs' Exhibit #5, at R. p. 643; R. p. 188, line 4 to p. 193, line 2; p. 331, line 6 to p. 332, line 4;

Following up on Mrs. Bass taking her medication, *e.g.*, Plaintiffs' Exhibit #3, at R. p. 603; R. p. 475, lines 4-10; p. 513, lines 4-16;

Assisting Mr. Bass in getting his job back after he had been fired, R. p. 306, line 16 to p. 310, line 14, p. 311, lines 1-8; p. 394, line 17 to p. 397, line 14; p. 507, line 1 to p. 510, line 9; Plaintiffs' Exhibit #3, at R. pp. 601, 603, 607.

Even the Bass's standard of care expert witness, Michael Corey, while he was clearly critical of SCDSS's performance in his opinions, grudgingly conceded that SCDSS was very good in its response to the intake, R. p. 68, lines 4-25, p. 71, lines 15-24, gave the Basses the brochure and handbook at the first meeting, which should have been done, *id.*, p. 71, line 25 to p. 72, line 2, held the Family Meeting to seek relative placement, as they should have—although he second-guessed DSS that the children should have been placed with relatives as opposed to being placed back at home, *id.*, p. 72, lines 3-9, p. 73, line 20 to p. 74, line 3, conducted the home studies of the relative placements, *id.*, p. 75, lines 2-10, and held a second Family Meeting and explored a second relative placement after Linda Sims indicated she could no longer care for the children, *id.*, p. 74, line 17 to p. 75, line 1. *See also*, *id.*, p. 77, lines 1-9, p. 78, lines 14-17 (After opining that DSS did not speak with "collaterals" in its investigation, Corey admitted that the people at the hospital and family members with whom Ms. Parrish spoke were "collaterals"); *id.*, p. 77, lines 10-16 (Corey conceded that requesting Mrs. Bass's medical records was proper); *id.*, p. 77, line 17 to p. 81, line 3 (Corey conceding what SCDSS did right).

Although the Basses argued at trial that SCDSS did not test the clonidine, and had they done so, perhaps the Bass children would not have been separated from their parents, even the Long's Drugstore representative admitted that mis-mixing of clonidine was "really a rare occasion" in her experience with Long's. *Id.*, p. 87, lines 3-9, p. 88, line 24 to p. 89, line 2. *See also, id.*, p. 104, line 21 to p. 105, line 3 (The Bass's primary health care physician, Dr. Barnett, testified that in his 17 years of practice it was a rare occasion for medication to be mis-mixed or compounded to 1000 times its potency); *id.*, p. 105, line 4 to p. 106, line 15, p. 115, lines 6-9; Defendant's Exhibit #30, at R. p. 833 (Dr. Gaddy, a partner of Dr. Barnett, after examining Hanna for her overdose, did not suspect the clonidine as the cause for Hanna's illness, and directed that she continue taking it); R. p. 116, line 25 to p. 118, line 5, p. 119, lines 1-8, p. 119, line 12 to p. 120, line 3 (Evelyn May, a Nurse Practitioner who treated the Bass family and saw Alex when he became ill on May 15, 2008, was unsure what the cause of Alex's illness was, particularly after being provided an inaccurate—and absolutely false—history by Mrs. Bass that Alex had not taken clonidine in three weeks, and broadened her view of the potential cause to consider the Bass home—which is what SCDSS did following the May 20, 2008 visit of the Bass home); *id.*, p. 69, lines 4-22 (Michael Corey, the Bass's expert standard of care witness, conceded that none of the medical providers suggested that the medication should be examined for its potency, and that, in his experience, Departments of Social Services typically do not have pharmacists on staff). Given the rarity of medication mis-mixing, and the fact that even the health care providers familiar with the Bass family did not suspect the clonidine, expecting SCDSS to immediately suspect the potency of the medication was a stretch and was unreasonable.

Yet even if that expectation was reasonable, the fact that SCDSS did not test the clonidine, or figure some labyrinthine arrangement pursuant to which the Bass children could have remained in the Bass home during the investigation, with Mr. Bass as the protector parent—notwithstanding the fact that he knew nothing about what medication had been administered to the children, R. p. 181, line 19 to p. 183, line 8, and until he was fired from his job and Jane Arnold, of DSS, helped him get his job back, working weekend hours, he would not have been at the house to assist, anyway—that alleged DSS shortcoming did not negate the evidence at trial that SCDSS had clearly exercised slight care and beyond; and with DSS having thus exercised slight care and beyond, the only *reasonable* inference was that SCDSS had not been not grossly negligent. While gross negligence is ordinarily a mixed question of law and fact, at that point, with the evidence of what SCDSS *did* do in its involvement with the Bass family before the Trial Judge, the question should have become a matter of law for the Court. *Etheredge*, cited *supra*, 341 S.C. at 310, 534 S.E.2d at 277; *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. The Trial Judge erred in denying SCDSS's Motions for Directed Verdict and in allowing the case to go to the jury; and he erred in denying SCDSS's Motion for JNOV.

On appeal, the only reasonable inference to be drawn from the evidence—that SCDSS had clearly exercised at least slight care and was not grossly negligent as a matter of law—is contrary to the factual findings implicit in the jury's verdict. The jury's verdict should be reversed. *Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct. Ap. 1993).

ARGUMENT III

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT SCDSS'S MOTION FOR JNOV TO STRIKE THE PLAINTIFFS' "OUTRAGE" CAUSE OF ACTION—ALSO KNOWN AS "INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS"—BECAUSE INTENTIONAL INFLICTION OF EMOTIONAL HARM IS SPECIFICALLY EXCLUDED AS A LOSS RECOVERABLE UNDER THE SOUTH CAROLINA TORT CLAIMS ACT; AND EVEN IF THE LOSS WAS RECOVERABLE, THE PLAINTIFFS FAILED TO PROVE THE REQUISITE ELEMENTS.

The Basses amended their Complaint on the threshold of trial, adding a cause of action sounding in "Outrage." Amended Complaint, at R. pp. 20-23, para. 19-23. In its Answer to Amended Complaint, SCDSS asserted, as an affirmative defense, that the "Outrage" cause of action, also known as "intentional infliction of emotional harm," should be dismissed, as not being a loss recoverable under the South Carolina Tort Claims Act, as "loss" is defined by *S.C Code Ann.* §15-78-30(f). Answer to Amended Complaint, at R. pp. 24-30, para. 19. SCDSS moved at the directed verdict stages at trial and for JNOV to strike the "Outrage" cause of action, R. p. 409, line 25 to p. 423, line 16, p. 532, line 19 to p. 533, line 1; Motion for JNOV, at R. pp. 839-842, para. 4; which motions the Trial Judge denied. R. p. 533, lines 2-9; Order Denying Post-Trial Motions, at R. pp. 1-6. Denial of the motion for JNOV to strike the cause of action was error, because the cause of action is specifically excluded as a loss under the Tort Claims Act; and even if the cause of action was deemed a loss recoverable under the Tort Claims Act, the Basses failed to establish the requisite elements to prove their case, and outrage should never have gone to the jury as a cause of action for the jury to consider.

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Beaufort County v. South Carolina State Election Commission*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). In cases involving statutory construction, the South Carolina Supreme Court has repeatedly held that a statute shall not be construed by concentrating on an isolated phrase; and the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. *Beaufort County*, cited *supra*, 395 S.C. at 371, 718 S.E.2d at 435; *Laurens County School Districts 55 and 56 v. Cox*, 308 S.C. 171, 172, 417 S.E.2d 560, 561 (1992). In applying the rule of strict construction the courts may not give to particular words significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent. *Beaufort County*, cited *supra*, 395 S.C. at 371, 718 S.E.2d at 435; *Laurens County School Districts*, cited *supra*, 308 S.C. at 172, 417 S.E.2d at 561. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Beaufort County*, cited *supra*, 395 S.C. at 371, 718 S.E.2d at 435; *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *Beaufort County*, cited *supra*, 395 S.C. at 371, 718 S.E.2d at 435; *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

The remedy provided by the South Carolina Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents, so long as they are acting within the scope of their official duties, and have not engaged in conduct constituting actual fraud, actual malice, intent to harm, or a crime of moral turpitude. *See, e.g., S.C Code Ann.* §§15-78-20(b), 15-78-70(b) (1986 as amended). The General Assembly sets forth its intended purpose in enacting the South Carolina Tort Claims Act with its recitation of legislative findings and public policy early in the Act, stating that, while total immunity from liability on the part of the government is not desirable, neither should the government be subject to unlimited nor unqualified liability for its actions. *Id.*, §15-78-20(a). The General Assembly further declares that it is the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established in the Tort Claims Act. *Id.*

At the forefront of such principles established in the Tort Claims Act is the mandate, set forth in two separate places in the Act, that the provisions of the Tort Claims Act establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability. *Id.* §§15-78-20(f), 15-78-200. Also on the forefront of such principles is the definitions section of the Act, defining the terms, conditions, and provisions that must be liberally construed in favor of limiting liability. *See, generally, id.*, §15-78-30. In the definitions section, "Loss," for purposes of the Act, specifically excludes the *intentional infliction of emotional harm. Id.* §15-78-30(f) (emphasis added).

South Carolina Courts have recognized that one's willful, malicious conduct proximately causing another's emotional distress may be actionable as intentional infliction of emotional distress or the tort of outrage since 1981. *See, e.g., Ford v. Hutson*, 276 S.C. 157, 161, 276 S.E.2d 776, 778 (1981); *Williams v. Lancaster County School District*, 369 S.C. 293, 305, 631 S.E.2d 286, 293 (Ct. Ap. 2006). That was four years before the South Carolina Supreme Court abolished the doctrine of sovereign immunity, *see, generally, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), and five years before the General Assembly enacted the South Carolina Tort Claims Act. *See, e.g.*, 1986 S.C. Acts No. 463, §1. It can be no accident that the South Carolina General Assembly, in the wake of the creation of a new cause of action in South Carolina called the "Intentional Infliction of Emotional Distress," and in light of its stated manifest purpose of limiting the liability of the State and its political subdivisions to those torts within the limitations of the legislation it was enacting, drafted and enacted the Tort Claims Act while specifically excluding as a loss recoverable under the Act the "intentional infliction of emotional harm." Construing that the cause of action of Intentional Infliction of Emotional Distress is not a loss recoverable under the Tort Claims Act, given the plain language of §15-78-30(f), is not repugnant to the meaning of the Act as a whole, nor is it destructive of the Act's obvious and stated intent. Rather, such an interpretation is practical, reasonable, and fair, and is consonant with the purpose, design, and public policy as stated by the General Assembly elsewhere in the provisions of the Act. *See also, McCall v. Batson,* cited *supra,* 285 S.C. at 244, 329 S.E.2d at 741 (interestingly, the very case which resulted in the abolishment of sovereign immunity and the eventual enactment of the South Carolina Tort Claims Act included a cause of action for intentional infliction of emotional distress,

further supporting the argument that the General Assembly's use of the verbiage of the exclusion in §15-78-30(f) was intended, and was not simply coincidental).

At trial, Counsel for the Basses argued that §15-78-30(f) excludes only *intentional* acts inflicting emotional harm, and the elements of the cause of action for Intentional Infliction of Emotional Distress or Outrage allow for a Defendant to intentionally *or recklessly* inflict severe emotional distress. *Compare* §15-78-30(f) *with Ford v. Hutson*, cited *supra*, 276 S.C. at 162, 276 S.E.2d at 778 *and Williams v. Lancaster County School District*, cited *supra*, 369 S.C. at 305, 631 S.E.2d at 293. This argument ignores the fact that the cause of action is named the *Intentional* Infliction of Emotional Distress, even though case law creating the cause of action in 1981 and sustaining it since then includes recklessness as an element. *See, e.g., Ford* and *Williams*, cited *supra*. If §15-78-30(f) excludes the cause of action of Intentional Infliction of Emotional Distress as a loss recoverable under the Tort Claims Act, whether an element of that cause of action is recklessness rather than an intentional act makes no difference, because the cause of action itself, including all of the elements of which it is comprised, is excluded as a loss.

However, even if the Trial Judge properly denied SCDSS's motions for directed verdict and JNOV to strike the Outrage/ Intentional Infliction of Emotional Distress cause of action as being excluded under §15-78-30(f), the Trial Judge, as the "gatekeeper" upon whom is conferred the duty of determining whether a defendant's conduct may be considered so extreme and outrageous so as to even allow the cause of action to go to the jury, erred in refusing to direct a verdict before sending the matter to the jury, and in denying the JNOV.

In order to state a claim for intentional infliction of emotional distress, a party must establish 1) the Defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; 2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; 3) the actions of the Defendant caused the Plaintiff's emotional distress; and 4) the emotional distress suffered by the Plaintiff was so severe that no reasonable person could be expected to endure it. *E.g.*, *Williams v. Lancaster County School District*, cited *supra*, 369 S.C. at 305, 631 S.E.2d at 293. Initially, it is for the trial court to determine whether the Defendant's conduct may be considered so extreme and outrageous as to permit recovery, and only where reasonable minds might differ should the issue even be submitted to the jury. *Id.*

Even assuming, for argument's sake, that the acts or omissions of SCDSS were intentional, grossly negligent, and reckless, and that the Basses suffered the requisite level of extreme emotional distress as a result, exactly what conduct did SCDSS engage in that was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community? SCDSS responded within forty-five minutes of receiving an intake that the Bass children were in the hospital on life support, and that parental poisoning was suspected. *See*, *e.g.*, Plaintiffs' Exhibit #2, at R. p. 570; R. p. 154, lines 12-23; p. 155, line 11 to p. 159, line 15. Once there, the caseworker made contact with the parents, inquired into what they knew, provided them with literature setting forth their rights, spoke with collaterals such as the eldest daughter, Brittany, who was not being hospitalized, Linda Sims, LaShonda Sims, Mary Cathey, and

Shirley Pullem, requested medical records, conducted a family meeting, took the Basses recommendation that Linda Sims be considered as relative placement, presented the Basses with a safety plan, which they signed, conducted the requisite home visits and background checks to implement the relative placement, and performed a home visit at the Bass home. All between May 15 at 2:15 p.m. and May 20. *See, generally, e.g.*, Plaintiffs' Exhibit #3, at R. pp. 575-581; Plaintiffs' Exhibit #4, at R. p. 642; Plaintiffs' Exhibit #13, at R. pp. 669-786; R. p. 35, line 4 to p. 36, line 22; p. 45, lines 4-7; p. 45, line 13 to p. 47, line 22; p. 48, lines 3-9; p. 51, lines 8-14; p.52, line 8 to p. 54, line 4; p. 54, line 20 to p. 55, line 21; p. 160, line 9 to p. 168, line 8; p. 169, line 15 to p. 170, line 17; p. 171, line 25 to p. 173, line 22; p. 186, line 24 to p. 187, line 10; p. 216, lines 12-20; p. 217, lines 21-23; p. 218, lines 8-10, 15-18; p. 219, lines 4-19; p. 294, line 23 to p. 295, line 19; p. 369, line 15 to p. 371, line 14; p. 371, line 20 to p. 372, line 12; p. 373, lines 10-19; p. 374, lines 4 -16; p. 378, lines 10-23; p. 379, line 9 to p. 380, line 3; p. 381, line 19 to p. 382, line 6.

The sole agenda of SCDSS's caseworkers from the inception of their contact with the Bass family was to stabilize an unknown situation with the children, make certain the children were out of jeopardy, and attempt to place the children with relatives with whom they were familiar pending their investigation. *Cf.* R. p. 47, line 23 to p. 48, line 2, p. 55, lines 17-21 (Linda Sims agreed that it appeared that DSS was trying to keep the Bass children with relatives with whom they were familiar). If an after-the-fact, forensic review of those efforts subjects DSS to second-guessing and finger pointing, even by its own supervisors, after discovery that the "suspected parental poisoning" was really the mis-compounding of the clonidine by the pharmacy—which had conveniently settled out with the Basses prior to trial—the fact remains that, whatever the SCDSS caseworkers did or

did not do, their actions came nowhere near amounting to willful, malicious conduct, nor conduct so extreme and outrageous as to permit recovery for intentional infliction of emotional distress.

The Trial Judge, as gatekeeper, should have recognized that and kept the cause of action from going to the jury. It was error for him to deny the Motions for Directed Verdict and JNOV as to the Outrage cause of action.

CONCLUSION

The Trial Judge erred in denying SCDSS's Motion for JNOV because the only reasonable inference from the evidence at trial was that the Basses had voluntarily participated in and agreed to the relative placement of their children after having been fully informed of their rights, and there was no evidence of coercion or over-reaching on the part of SCDSS. Furthermore, the trial record is replete with evidence establishing that SCDSS acted with at least slight care and beyond, from which the only reasonable inference was that SCDSS was not grossly negligent as a matter of law. Finally, the Outrage/ Intentional Infliction of Emotional Distress cause of action was not a loss recoverable under the South Carolina Tort Claims Act, and even had the cause of action been valid, evidence of SCDSS's conduct did not rise to the level of outrageousness that should have gone to the jury.

The denial of the JNOV motions was error, and should be reversed, with the jury verdict vacated.

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July 4, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2009-CP-20-0395

Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Respondents,

v.

South Carolina Department of Social Services, Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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