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.

BRIEF OF RESPONDENTS

Lee D. Cope (S.C. Bar # 14361)
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P. A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
lcope@pmped.com

- and-

John K. Koon (S.C. Bar # 3600)
Jamie L. Walters (S.C. Bar # 76956)
KOON & COOK, P.A.
2016 Gadsden Street
Columbia, SC 29201
(803) 256-4082
jkoon@koonandcook.com
jwalters@koonandcook.com
ATTORNEYS FOR RESPONDENTS

RECEIVED
JUL 09 2012
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES .... iii-vi

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 13

ARGUMENTS

I. The Trial Court Correctly Ruled that Sufficient Evidence Existed to Warrant Submission to the Jury the Question of Whether or not the Bass Parents Voluntarily Placed their Children with Linda Sims **13**

II. The Trial Court Correctly Submitted to the Jury the Issue of Whether or Not SCDSS Exercised Slight Care in its Decision to Remove the Children From Their Parents' Custody and Home **16**

III. The Trial Court Correctly Submitted to the Jury the Respondents' Cause of Action for Outrage Because Outrage is Not Barred by the South Carolina Tort Claims Act; Respondents Proved the Requisite Elements of Outrage; and Given the General Verdict Returned by the Jury, the Verdict Should Not be Disturbed if Either of Respondents' Causes of Action were Properly Submitted to the Jury **23**

CERTIFICATE OF RULE 211(b) COMPLIANCE 34

PROOF OF SERVICE 35

TABLE OF AUTHORITIES

Cases

Anderson v. West,
241 S.E.2d 551 (S.C. 1978), 270 S.C. 184 30

AJG Holdings, LLC v. Dunn,
2011 WL 794855, 5 (Ct. App. 2011) 24

Bethea v. Western Union Telegraph Co.,
116 S.C. 319, 108 S.E. 95 31

Burns v. Universal Health Services, Inc.,
361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004) 15

Charleston County Sch. Dist. v. State Budget and Control Bd.,
313 S.C. 1, 437 S.E.2d 6 (1993) 25

City of Camden v. Brassell,
326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997) 26

City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck,
330 S.C. 371, 498 S.E.2d 894, 896 (Ct. App. 1998) 26

Clyburn v. Sumter County District Seventeen,
317 S.C. 50, 451 S.E.2d 885 (1994) 16

Duncan v. Hampton County School Dist. No. 2,
335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) 16

Felder v. K-Mart Corp,
297 S.C. 446, 337 S.E. 2d 332 (1989) 13

Ford v. Hutson,
S.C. 157, 276 S.E.2d 776 (1981) 24

Gibson v. Bank of America, N.A.,
383 S.C. 399, 405, 680 S.E. 2d 778, 781 (Ct.App.2009) 13

Graham v. Whitaker,
282 S.C. 393, 396, 321 S.E.2d 40, 42 (1984) 14, 16

Gold Kist, Inc. v. Citizens and Southern National Bank of South Carolina,
333 S.E.2d 67 (.S.C. App. 1985), 286 S.C. 272 30

TABLE OF AUTHORITIES (Cont'd)

Hanson v. Scalise Builders of S.C.,
374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) 24

Hilton Head Realty, Inc. v. Skull Creek Club,
287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986) 13, 14, 16

Hodges v. Rainey,
341 S.C. 79, 533 S.E.2d 578 (2000) 25

Hollins v. Richland County School Dist. 1,
310 S.C. 486, 427 S.E.2d 654 (1993) 16, 22

Hussman Refrigerator & Supply Co. v. Cash & Carry Grocer, Inc.,
134 S.C. 191, 132 S.E. 173 (1926) 30

Jensen v. Anderson County Dep't of Social Services,
403 S.E.2d 615 (S.C. 1991) 18

Jinks v. Richland County,
355 S.C. 341, 585 S.E.2d 281 (2003) 16

Law v. S.C. Dep't of Corr.,
368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006) 13

McAlister v. Thomas & Howard Co.,
116 S.C. 319, 108 S.E. 94 (1921) 30, 31

McMillan v. Oconee Mem'l Hosp. Inc.,
367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) 13

Paschal v. State Election Comm'n,
317 S.C. 434, 454 S.E.2d 890 (1995) 25

Pope v. Heritage Communities, Inc.,
395 S.C. 404, 717 S.E. 2d 765 (Ct. App. 2011) 13

Rhame v. City of Sumter,
113 S.C. 151, 101 S.E. 832 (1920) 30

TABLE OF AUTHORITIES (Cont'd)

S.C. Dep't of Social Services v. Scott K.,
668 S.E.2d 425 (S.C. Ct. App. 2008) 20

State v. Morgan,
352 S.C. 359, 574 S.E.2d 203, 205, 207 (2002) 25, 26

Steinke v. S.C. Dept. of Labor, Licensing and Regulation,
336 S.C. 373, 520 S.E.2d 142 (1999) 22, 23

Todd v. South Carolina Farm Bureau,
283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984, rev'd on other ground,
287 S.C. 190, 336 S.E.2d 472 (1985) 25

Townes Associates, Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 14

Upchurch v. New York Times Co.,
314 S.C. 531, 431 S.E.2d 558 (1993) 24

Wright v. Sparrow,
298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989) 24

Statutes

S.C. Code Ann. § 15-78-60(3), (4), (5), (20) and (25) 2, 25, 26

S.C. Code Ann. § 15-78-30(f) 2, 25, 26, 27

S.C. Code Ann. § 63-7-900, § 63-7-920 18

S.C. Code Ann. § 63-7-10 18

S.C. Code Ann. § 15-78-10 .... 25, 27

S.C. Code Ann. § 15-78-20(a) 27

Other Authorities

South Carolina Tort Claims Act 23, 24, 25, 26, 27

STATEMENT OF THE CASE

Respondents, 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, instituted a lawsuit in the Fairfield County Court of Common Pleas on November 4, 2009 against Long's Drugstores of South Carolina, Inc., James D. McNinch, and South Carolina Department of Social Services (hereinafter referred to as "SCDSS" or "Appellant"). In their Complaint, Respondents allege that in April of 2008, Mrs. Bass filled the minor children's Clonidine prescription at Long's Drugstore in Columbia, South Carolina. (R. p. 10). Unknown to the Respondents, the prescription was 1,000 times more potent than that for which it was prescribed. The misfilled prescription was then administered to the minor children by Mrs. Bass and, as a result of taking said medication, the minor children were hospitalized. (Id). When the minor children were discharged from the hospital on May 19, 2008, SCDSS removed the children from their home and they were not returned until June 25, 2008. (R. p. 11).

Respondents alleged negligence and gross negligence on the part of Long's Drugstore, McNinch and SCDSS, and prayed for actual and punitive damages. (R. pp. 11-12). SCDSS answered the Complaint on or about January 5, 2010, with a qualified general denial and additional affirmative defenses. (R. pp. 13-19). Long's Drugstores and McNinch answered the Complaint on or about December 16, 2009 and settled with the Respondents after a mediation held on April 14, 2011.

To conform to evidence discovered during depositions in the case, Respondents moved to amend their Complaint on or about May 10, 2011. (R. pp. 835-838). Appellant consented to the amendment and was served with the Amended Complaint on or about

May 23, 2011. Respondents alleged causes of action for gross negligence, defamation and outrage, and prayed for actual damages. (R. pp. 20-23). In its Answer to the Amended Complaint, which was served on or about May 24, 2011, Appellant asserted a qualified general denial, in addition to affirmative defenses of Comparative Negligence, Negligence of a Third Party, 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. (R. pp. 24-30).

The case was tried before a jury from May 23 to May 27, 2011 before The Honorable Ralph Ferrell Cothran, Jr. SCDSS moved for directed verdict at the conclusion of the Plaintiffs' case (R. p. 409, line 22-p. 451, line 3) and at the conclusion of all of the evidence. (R. p. 532, line 19-p. 534, line 5). Judge Cothran denied both motions. (R. p. 451, line 4-p. 452 line 4, p. 452 lines 14-21, p. 534, lines 7-14). Plaintiffs withdrew their defamation cause of action (R. p. 534, lines 18-20), and moved for directed verdict as to the SCDSS defenses of discretionary immunity and negligence of a third party. Judge Cothran granted Plaintiffs motions which struck those defenses. (R. p. 534, line 23-p. 536, line 12).

After being instructed on the law, the jury returned a verdict for the Plaintiffs in the amount of Four Million ($4,000,000.00) Dollars. (R. p. 567, line 22-p. 568, line 11, p. 8).

SCDSS filed and served 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. (R. pp. 839-844). The Court issued an Order Denying the Defendant's Post Trial Motions on June 22, 2011. (R. pp. 1-6). However, the Court granted the Motion to Reduce the Verdict, reducing the verdict to Six Hundred Thousand ($600,000.00) Dollars. (Id). SCDSS subsequently filed and served its Notice of Appeal on July 21, 2011.

STATEMENT OF THE FACTS

On Mother's Day 2008, a chain of events began in the lives of the Bass family that changed their world.

Dianne and Otis Bass are married and have three children, Brittany, Hanna and Alex. The family has always resided in Fairfield County, South Carolina. (R. p. 250, lines 20-22; p. 336, lines 7-8; p. 257, line 23-p. 258, line 3). During trial, Brittany was 10, Hanna was 8 and Alex was 5 years old. (R. p. 361, lines 4-17). Each of the children had educational delays and required special assistance. (R. p. 251, lines 12-16; p. 263, lines 13-17; p. 340, lines 1-4; p. 350, lines 17-21). At the time of the incident giving rise to this lawsuit, Mr. Bass worked at FN Manufacturing. (R. p. 253, lines 22-25). Mrs. Bass worked at home where she cared for Alex, Hanna, and Brittany. (R. p. 254, line 25-p. 255, line 7; p. 352, line 12-p. 353, line 13; p. 354, lines 1-9). The family did everything together and both parents were active in their children's lives. (R. p. 203, line 5-p. 205, line 13).

Alex and Hanna have various forms of autism and other cognitive issues. (R. p. 223, lines 6-19). Both were prescribed Clonodine to help them rest at night. (R. p. 268, lines 16-19; p. 343, lines 9-16; p. 363, lines 14-19). Mrs. Bass had Hanna and Alex's prescriptions filled at Long's Drugstore in Columbia, South Carolina, as that was the closest location that could perform the compounding process. (R. p. 362, lines 23-25; p. 86, lines 14-18; p. 610).

On Mother's Day evening, May 11, 2008, Mrs. Bass gave Hanna her dose of Clonodine. (R. p. 255, lines 11-16; p. 269, line 22-p. 270, line 5). After taking her medicine, Hanna fell ill while her father was giving her a bath. (R. p. 270, lines 6-12). Hanna was taken to the Fairfield Memorial hospital where she was treated and released.

(R. p. 271, line 14-p. 272, line 22). Two days later, she exhibited continuing problems and was taken to her family doctor at Fairfield Medical Associates. (R. p. 273, lines 1-9). From there, Hanna was taken to Palmetto Richland Memorial Hospital where she was admitted. (R. p. 273, lines 17-20).

Alex was not given his medicine on May 11, 2008. When he received it on May 15, 2008, he also became sick. (R. p. 277, line 5-p. 278, line 5). Mrs. Bass took him to Fairfield Medical Associates. After seeing Nurse Practitioner Evelyn May, Alex was transported via EMS to Fairfield Memorial Hospital. He was then transported via helicopter from Fairfield Memorial Hospital to Palmetto Health Richland and placed on life support. (R. p. 832).

On May 15, 2008, the Fairfield County office of SCDSS received a call from Palmetto Health Richland explaining that two special needs children had recently been hospitalized for unexplained illnesses. (R. pp. 570-571). SCDSS indicated in its records that the caller suggested that it was a "possible parental poisoning." (R. p. 156, line 25-p. 157, line 4). The call was received around 2:15 p.m. on May 15, 2008. (R. p. 155, lines 11-22; p. 570). The case worker assigned to the report was Monique Parrish. (R. p. 160, lines 6-8). Ms. Parrish arrived at Palmetto Health Richland at approximately 3:00 p.m. (R. p. 163, lines 9-25; p. 575). She spoke with Mr. and Mrs. Bass and observed the children. (R. p. 165, lines 5-15; p. 167, lines 5-15). She did not speak with any medical providers. (R. p. 141, lines 12-13). Before leaving, she asked Mr. and Mrs. Bass to come to the SCDSS office the next morning. When they explained that someone needed to stay with their hospitalized children, Ms. Parrish agreed to meet Mrs. Bass at the SCDSS office in Winnsboro the next morning. (R. p. 379, lines 2-16).

SCDSS records indicate that the next action that took place was a meeting with Ms. Bass and others at 1:30 p.m. on May 16, 2008. (R. p. 479, lines 1-15; R. p. 577). The entry indicates that the first action taken was to inform the Bass family that the children could not return home with their parents after discharge from the hospital. (R. p. 577). SCDSS made no entry or record of attempting to talk, or talking with, any medical provider or any member of the Bass family between meeting the Bass family and making the decision that the children and parents would be separated upon discharge. (R. p. 60, lines 14-16; p. 60, line 25-p. 61, line 7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-577). In fact, the record and testimony of the witnesses make it crystal clear that nothing was done between the time Monique Parrish met with the Bass family on May 15 and when the decision was made to remove the children from the parents' custody. (R. p. 479, lines 1-15; p. 58, line 10-p. 59, line 2; pp. 575-577).

Mr. and Mrs. Bass were given a "choice." At the meeting in the SCDSS office on May 16, 2008, Mrs. Bass was told that if there was no relative with whom to place the children, they would be placed in foster care. (R. p. 152, line 25-p. 153, line 8; p. 380, lines 21-24). Later that day, Monique Parrish returned to Palmetto Health Richland and informed Mr. Bass of the decision to remove the children from their parents. (R. p. 279, line 9-p. 280, line 4; pp. 575-577). He too was given the "choice" of relative placement or foster care. Mr. and Ms. Bass agreed to have their children stay with their maternal aunt, Linda Sims, rather than be split up in foster care. (R. p. 642).

SCDSS employees agreed that it was inappropriate to remove the children unless an imminent safety threat existed. (R. p. 127, lines 18-21; p. 318, lines 16-22). There

was no testimony that the children were at imminent risk for harm when SCDSS removed them. The children were in the hospital under the care of the hospital staff when the decision was made. (R. p. 144, lines 7-24). When the decision to remove the children was made, SCDSS had not spoken with any of the primary care medical providers for the Basses. (R. p. 60, lines 14-16; p. 61, lines 1-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22). Further, SCDSS had not investigated the home prior to the decision to remove the children from their parents. (R. p. 149, lines 1-5; pp. 575-577). Simply put, there was no evidence that the children were at risk for injury by remaining with their parents. Upon Alex and Hanna's discharge on May 19, 2008, they were not allowed to return home with their parents but were instead sent to Ms. Sims' home. Brittany, who had not been hospitalized, had already been placed with Ms. Sims. (R. pp. 575-577).

As previously mentioned, the condition of the Bass home was not a basis for removing the children. It was not until after the children were removed from their parents' custody that SCDSS investigated the Bass home. (R. pp. 577-581). Monique Parrish and Jane Arnold documented that they visited the home on May 20, 2008, Monday after the children were removed from their parents and the date that they were discharged from the hospital. (R. p. 581). There was conflicting testimony about which SCDSS employee actually inspected the home. Monique Parrish stated that she was in too much pain to inspect the home although she admitted to travelling with Jane Arnold to the home. (R. p. 151, lines 12-25). Jane Arnold, on the other hand, testified that her role in the Bass case was as the treatment worker and not the investigator. (R. p. 494, lines 1-9). Ms. Arnold also admitted that she was present for the home inspection.

(R. p. 495, lines 18-24). Thus, it is unclear if anyone actually conducted an inspection for the purposes of determining whether a "threat" existed. SCDSS' expert, Jocelyn Goodwin, admitted that the condition of the home did not present an immediate threat of harm to the children. (R. p. 480, lines 15-22). Accordingly, the condition of the home was not a basis for removing the children.

Additionally, the children's medical conditions were not bases for their removal. SCDSS did not present evidence that any investigation was conducted into the children's health, despite SCDSS removing the children from the Bass home. (R. p. 58, line 10-p. 59, line 2; p. 61, lines 1-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-641). Monique Parrish admitted that cases of alleged medical neglect require consideration of medical evidence and discussions with medical providers. (R. p. 129, line 22-p. 130, line 3). Ms. Parrish testified that she only looked at the children when she arrived at the hospital on May 15, 2008. (R. p. 126, lines 17-19). Additionally, there is no evidence that Ms. Parrish spoke with any of the Bass family's primary care medical providers before the decision was made to remove the children. (R. pp. 575-577). More telling on this point, however, is Ms. Parrish's admission that the decision to remove the children was not the children's health, but rather the condition of the home. (R. p. 147, line 23-p. 148, line 5). As noted above, however, this is impossible as the home "inspection" was not conducted until four days after the decision was made to remove the children. (R. pp. 575-577). Thus, the children's health was not a factor in the decision to remove the children from the parents' custody.

Ms. Bass' health condition was not a factor in the decision to remove the children from the home. SCDSS alleged during trial and in its brief that Mrs. Bass' health

condition was a basis for removal of the children. (Initial Brief of Appellant, p. 12). However, prior to removal, there is no evidence that Monique Parrish or anyone else at SCDSS had knowledge of any health problem by either parent that would constitute a risk of imminent harm to the children. (R. p. 58, line 10-p. 59, line 2; p. 61, lines 2-7; p. 66, lines 10-24; p. 67, lines 21-24; p. 348, line 21-p. 349, line 3; p. 479, lines 1-22; pp. 575-577). Mr. Bass' health was not a factor in the decision to remove the children on May 16, 2008. There was no evidence that Mr. Bass' health was ever a factor. (R. p. 82, line 7-p. 83, line 9). Regardless, the parents' health condition was insufficient to form the basis for removing the children from the home.

After the decision was made by the SCDSS to remove the children from the home, SCDSS was active in the life of the Bass family. Despite the lack of any connection to the children's unexplained illness, SCDSS took certain actions and/or required the following:

1. Refused to let Mr. and Mrs. Bass see their daughter Hanna on her birthday on May 25, 2008 (R. p. 259, line 10-p. 260, line 13);
2. For the first week, would not let Mr. and Mrs. Bass see their children except at the SCDSS office (R. p. 260, lines 14-25);
3. Portions of the home had to be painted (R. p. 266, lines 20-23; p. 267, lines 7-12);
4. The carpet had to be removed (R. p. 267, lines 13-20);
5. Black plastic over a window to help Mr. Bass sleep during the day since he worked at night had to be removed (R. p. 261, line 17-p. 262, line 3); and

6. Aluminum cans and other pieces of aluminum collected throughout the year by Mr. Bass so that he could sell them and use the money to purchase Christmas presents for the children had to be removed from the property (R. p. 262, line 4-p. 263, line 2; p. 264, line 15-p. 265, line 2).

SCDSS documented other observations as well:

1. The Bass parents actually harmed their children (R. p. 644);
2. The Bass parents were not fit to be primary caregivers (R. p. 582);
3. The Bass parents were limited in knowledge of their children at this time (R. pp. 583, 590);
4. The Bass parents needed parenting classes (R. p. 599); and
5. The Bass parents needed psychological counseling (R. p. 599).[1]

So it is clear that SCDSS became quite active in the life of the Bass family. (See, generally, e.g., R. p. 642; p. 644; p. 569; pp. 787-806). None of that activity, however, could possibly be grounds for the decision to remove the children from the home. Regardless of the accuracy of such opinions or justifications for the actions required, none of the items listed above represented an imminent threat of harm to the children. (R. p. 64, lines 3-5; p. 65, lines 2-18; p. 480, lines 15-22; p. 531, lines 9-15; pp. 575-641).

On June 17, 2008, SCDSS learned that the children's medication was the reason they were hospitalized in May. (R. pp. 610-611; p. 513, line 17-p. 514, line 22). Linda Sims informed Monique Parrish that she received a call from Pharmacist Mutual concerning the misfilled Clonidine. (R. p. 610). This revelation led to the eventual return

[1] The "observations" identified by SCDSS regarding Mr. and Mrs. Bass' ability to parent were not supported by facts. The baselessness of such "observations" is evidenced by the fact the parents were not required to go through parenting classes and psychological counseling. (R. p. 342, lines 3-24; p. 443, lines 1-8).

of the children to their parents. (R. p. 617). Importantly, SCDSS did nothing to learn what harmed the children. (R. p. 57, lines 9-12; pp. 575-641).

SCDSS remained a constant presence in the life of the Bass family after it was determined the medicine caused the problems. (R. pp. 575-641). SCDSS continued to make announced and unannounced visits through the end of 2008. (R. p. 386, line 17-25; p. 388, line 1-p. 391, line 7; p. 522, line 24-p. 525, line 14; pp. 575-641; pp. 787-805). Not even clear and convincing evidence of the real source of harm was enough to prevent SCDSS from staying the course in disrupting the Bass family life.

The family suffered as a result of being ripped apart by SCDSS. Mr. and Mr. Bass had never spent a night away from Hanna and only one with Alex. (R. p. 346, line 23-p. 347, line 16). Every part of their lives was directed at caring for and loving their children. (R. p. 341, lines 8-10; p. 44, lines 5-8; p. 203, line 5-p. 205, line 6). Despite the difficulties, Mr. and Mrs. Bass were regarded as excellent parents. (R. p. 99, line 22-p. 100, line 14; p. 108, line 17-p. 110, line 21). The evidence showed that Mr. and Mrs. Bass were destroyed by the allegations that they somehow injured their children. (R. p. 34, lines 17-22; p. 209, lines 12-17; p. 212, lines 1-25; p. 283, lines 13-p. 284, line 11; p. 286, lines 4-8; p. 345, lines 3-5). Moreover, they suffered like never before at the forced separation from their children. (R. p. 44, lines 5-8; p. 207, lines 12-24; p. 211, lines 11-25).

The children suffered as well. Testimony established that while removed from their home, both Alex and Hanna cried because they missed their parents. (R. p. 209, lines 24-p. 211, line 4; p. 213, line 1-p. 215, line 8). Prior to the forced removal, Hannah was very close to her aunt Linda. (Id). After returning to her parents, however, she

avoids her. (R. p. 209, lines 24-p. 211, line 4; p. 213, line 1-p. 215, line 8). The Bass' expert, Dr. Greer-Simmons, a child psychologist, testified that her examination and testing of Hannah revealed that she was still suffering from the forced separation and would require therapy to overcome the problems from being removed from her parents. (R. p. 228, line 19-p. 229, line 18; p. 231, line 2-p. 232, line 15; p. 233, line 1-p. 239, line 17; p. 240, line 20-p. 242, line 24). The trial established that the entire ordeal was excruciatingly difficult for all of the family.

STANDARD OF REVIEW

A factual finding by the jury will not be overturned unless there is no evidence that reasonably supports the jury's findings. Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). The role of an appellate court in reviewing an action tried by a jury is to correct errors of law. Felder v. K-Mart Corp., 297 S.C. 446, 337 S.E.2d 332 (1989).

"In ruling on motions for directed verdict or judgment notwithstanding the verdict ("JNOV"), the trial court must view the evidence and the inferences reasonably drawn "therefrom in the light most favorable to the party opposing the motions and deny the motions if the evidence yields more than one inference or its inference is in doubt." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "The trial court should deny the motions when either the evidence yields more than one inference or its inference is in doubt." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Motions for JNOV should be denied where "the evidence yields more than one inference." Gibson vs. Bank of America, N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009).

If there is **any** evidence to sustain the factual findings implicit in the jury's verdict, the appellate court will affirm. Hilton Head Realty, Inc. v. Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)(emphasis added).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT SUFFICIENT EVIDENCE EXISTED TO WARRANT SUBMISSION TO THE JURY

THE QUESTION OF WHETHER OR NOT THE BASS PARENTS VOLUNTARILY PLACED THEIR CHILDREN WITH LINDA SIMS

It is important to note that both parties agree on one thing: if evidence exists that reasonably supports the jury's findings, the verdict must be sustained and the appeal dismissed. 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); see also, Appellants Brief, p 17. Therefore, this argument is limited to a review of the record to see if there is **any** evidence that reasonably supports the jury's findings. Id; Hilton Head Realty, Inc., supra.

The trial court did not err in submitting this issue to the jury. The voluntariness of the placement of the children with relatives was contested. (R. p. 348, lines 8-16; p. 279, line 9-p. 280, line 6; p. 281, line 17-p. 282, line 7; p. 285, lines 16-23; p. 206, lines 8-24; p. 62, line 8-p. 63, line 2; p. 152, line 19-p. 153, line 8; p. 483, line 10-p. 484, line 5). The Bass parents testified that they were told that the children could reside with a relative or go to foster care. (R. p. 279, line 9-p. 280, line 6; p. 380, line 21-p. 381, line 3). Mr. Corey testified that such choice could not possibly be viewed as "voluntary" as it was no choice at all. (R. p. 62, line 8-p. 63, line 2). In essence, without conducting an investigation or any evidence of actual harm caused by the parents or an imminent risk of harm to the children, SCDSS decided that the children could not return with their parents. After SCDSS unilaterally made that decision, the parents were then given the "choice" of foster care or relative placement. This lawsuit was over the removal of the children; not where they went. There was no evidence that the parents wanted their children to be removed from their care and home. The issue was properly submitted to the jury.

The signing of a safety plan does not equate with a voluntary decision to have the children removed. Mr. and Mrs. Bass did what they thought they had to do to have their children returned home the quickest. (R. p. 285, lines 16-25). Mr. Bass testified that due to his past experience of having been placed in foster care for several years as a child, he did whatever he had to to make sure his children did not end up in foster care. (R. p. 274, line 21-p. 277, line 4; p. 285, lines 16-25). Choosing the lesser of two evils is not the same as a voluntary choice to have your children reside somewhere other than their home.

SCDSS' own expert agreed that the decision was not voluntary. Ms. Goodwin admitted that the only choice for the Bass family was to allow family placement or have their kids placed in foster care. (R. p. 483, line 20-p. 484, line 5). Moreover, she agreed that such choice was not voluntary. (R. p. 483, line 20-p. 484, line 5). Given this "choice" it is clear the decision was not voluntary. SCDSS should be bound by the testimony of its paid expert. It is disingenuous to argue to this Court that the only inference that can reasonably be drawn from the testimony is a voluntary act when SCDSS' own expert agrees that the choice was not voluntary. Moreover, a dispute as to whether the "choice" was voluntary was best left to the fact finder, the jury.

The jury had to decide if the Bass parents voluntarily allowed their children to be removed from the home. This was the very issue argued by both parties. (R. p. 537, line 21-p. 538, line 11; p. 539, lines 11-16; p. 540, line 23-p. 541, line 4; p. 542, lines 15-23; p. 543, lines 5-10). As noted above, both parties presented testimony that it was not voluntary. Factual disputes such as this are best resolved by juries. Burns v. Universal Health Services, Inc., 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004). In response to

SCDSS' assertion that the decision was voluntary, Mr. and Mrs. Bass have presented evidence that either directly or through reasonable inferences contradicts that assertion. Charged with the law and considering the facts, the jury determined that the actions were not voluntary. Accordingly, the jury's finding should not be disturbed.

II. THE TRIAL COURT CORRECTLY SUBMITTED TO THE JURY THE ISSUE OF WHETHER OR NOT SCDSS EXERCISED SLIGHT CARE IN ITS DECISION TO REMOVE THE CHILDREN FROM THEIR PARENTS' CUSTODY AND HOME

Again, both parties agree on one thing: if there is ***any*** evidence to support the jury's findings, the verdict should be sustained and the appeal dismissed. Graham, supra; Hilton Head Realty, Inc., supra. Therefore, this argument as well is limited to a review of the record to see if there is ***any*** evidence to support the jury's findings. Id.

Whether the SCDSS' actions and/or inaction constituted gross negligence is best determined by the jury. Duncan v. Hampton County School Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Gross negligence has been called the "absence of care that is necessary under the circumstances." Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281, (2003) citing Hollins v. Richland County School Dist. 1, 310 S.C. 486, 427 S.E.2d 654 (1993). The failure to exercise slight care is gross negligence. Clyburn v. Sumter County District Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994). In viewing the light most favorable to the Respondents, there was sufficient evidence from which the jury could decide that the SCDSS did not exercise slight care before removing the children.

The Appellant, SCDSS, has cited evidence that it did *things* that constitute slight care warranting reversal. (Appellant's Initial Brief, pp. 26-28 and references therein). A close examination, however, has to be performed to determine *when* those things were done. Obviously, things done after the children were removed from their parents could

not possibly be used to justify the decision to remove the children. Therefore, the inquiry for the jury, and for this Court, into whether or not SCDSS exercised slight care in conducting an investigation must be between 3:00 p.m. on May 15, 2008 and 1:30 p.m. on May 16, 2008, when the records indicate Ms. Bass was told the children could not return home when released from the hospital. (R. pp. 570-578).

Simply put, there is no evidence that the SCDSS performed any investigation into what caused the children's illness between May 15 and May 16. (R. p. 126, lines 17-19; p. 135, lines 1-23; p. 131, line 3-p. 132, line 8; p. 133, line 6-p. 134, line 24; p. 148, line 9-p. 149, line 5; p. 156, line 25-p. 157, line 4; p. 160, lines 6-8; p. 163, lines 9-25; p. 165, lines 5-15; p. 167, lines 5-17; p. 141, lines 12-13; p. 150, line 21-p. 151, line 11; p. 319, lines 3-10; p. 323, lines 13-21; p. 324, lines 7-17; p. 379, lines 2-16; p. 479, lines 1-15). The evidence showed that the only action taken during this time period by SCDSS was Monique Parrish receiving a call, driving to the hospital, looking at the children, introducing herself to Ms. Bass, scheduling a meeting with Ms. Bass for the next morning and then informing her that the children could not return home when released from the hospital. (R. p. 126, lines 17-19; p. 135, lines 1-23; p. 131, line 3-p. 132, line 8; p. 133, line 6-p. 134, line 24; p. 148, line 9-p. 149, line 5; p. 156, line 25-p. 157, line 4; p. 160, lines 6-8; p. 163, lines 9-25; p. 165, lines 5-15; p. 167, lines 5-17; p. 141, lines 12-13; p. 150, line 21-p. 151, line 11; p. 319, lines 3-10; p. 323, lines 13-21; p. 324, lines 7-17; p. 379, lines 2-16; p. 479, lines 1-15). Ms. Goodwin admits this is the only known activity. (R. p. 478, line 15-p. 479, line 22). Mr. Corey recognizes this and opines, without objection, that he does not believe that these actions constitute an investigation. Moreover, he testified that there was an absolute lack of slight care by the SCDSS. (R. p.

56, line 25-p. 57, line 15; p. 59, lines 3-16). Accordingly, there was ample evidence that the jury could rely upon in determining that the SCDSS failed to exercise slight care.

Appellant SCDSS had a duty to conduct an investigation before removing the children from their parents. The Child Protection Act requires social workers to conduct "an appropriate and thorough" investigation. S.C. Code Ann. § 63-7-900, § 63-7-920. The manner in which the investigation is conducted is one of discretion, unless the investigation is so incomplete that it could not be found to be thorough. If an action is taken because the investigation was incomplete and there were not enough facts upon which to make an informed decision, the Defendants are not entitled to official immunity. Jensen v. Anderson County Dep't of Social Services, 403 S.E.2d 615 (S.C. 1991).

The reason for a stringent investigation is codified as well. Any intervention by the State into family life on behalf of children must be guided by law, by strong philosophical underpinnings, and by sound professional standards for practice. S.C. Code Ann. § 63-7-10. A guiding principle for this position is the recognition that parents have the primary responsibility for and are the primary resource for their children. (Id). In addition, our laws recognize that children should have the opportunity to grow up in a family unit if at all possible. S.C. Code Ann. § 63-7-10. It is within this legal framework and philosophical background that this issue must be viewed.

Understanding the law and SCDSS' duty in this matter, the only logical conclusion is the one made by the jury: SCDSS' inaction constitutes gross negligence. There are only two approaches to SCDSS' argument here: (1) if we do anything we have exercised slight care, or (2) actions taken after the offending act (removal from the parents) can be retroactively applied to justify that act.

The law does not stand for the proposition that if the SCDSS does *anything* it cannot be held liable. Let's consider a hypothetical: A police officer is transporting a prisoner to jail in his cruiser when he runs a red light and causes a wreck that injures his passenger, the prisoner.[2] Is he exempt from liability simply because the wreck occurred in his lane of travel or that he was travelling the speed limit or he made sure the seatbelt was fastened? In other words, has he exercised slight care because he did *something* right? Or, should the jury be able to consider whether or not his actions constitute gross negligence because he failed to obey a traffic signal? It is illogical to conclude that doing *something* constitutes slight care. The acts and omissions have to be compared in light of the situation as a whole.

Comparing the duty imposed on the SCDSS and its actions in this case makes clear that the SCDSS' actions do not amount to slight care. Prior to removal, there is no evidence that the SCDSS did anything to determine if the children were at risk by returning home with their parents. (R. pp. 570-578; pp. 642-644; p. 56, line 25-p. 57, line 15; p. 59, lines 3-16; p. 478, line 15-p. 479, line 22). Accordingly, SCDSS did not exercise slight care. The jury's verdict should not be overturned.

Appellant SCDSS' second attempt at establishing slight care also has no merit. The testimony offered at trial and reiterated in its brief to this Court concerns actions taken after May 16th. SCDSS references actions to clean the home, helping with Mr. Bass' employment, assisting with legal matters regarding the prescription misfill, etc. All of these purported good deeds do not justify or explain why the children were removed from their parents. If we refer back to the hypothetical above, would the police officer's

[2] S.C. Code Ann. § 15-78-60(25) requires a showing of gross negligence when a governmental entity has responsibility for a prisoner; the same standard applied to the SCDSS in this action.

gross negligence be abolished if, after the wreck, he called EMS and had the prisoner taken to the hospital for medical care? Of course not. Absent proof of action taken to investigate the children's safety threat ***before*** removal, there is no proof of slight care. Due to the overwhelming proof of gross negligence, the appeal should be denied.

As testified to by SCDSS in trial, children cannot be removed from their parents based solely on suspicion. (R. p. 128, lines 14-18; p. 320, lines 19-21). And yet, that is exactly what SCDSS did. According to Ms. Parrish, she had no evidence to explain what caused the children's illness. (R. p. 150, line 21-p. 151, line 11). The record is absent of any evidence of discussions with any medical providers. (R. p. 60, line 14-p. 61, line 7; pp. 570-642; pp. 645-646; pp. 666-668; R. p. 33, line 6-p. 34, line 22; p. 41, line 6-p. 44, line 10; p. 336, lines 15-18; p. 339, line 23-p. 340, line 4; p. 343, lines 12-18; p. 350, line 17-p. 351, line 10; p. 223, line 6-p. 224, line 14; p. 224, line 22-p. 242, line 24; p. 126, lines 17-19; p. 135, line 1-p. 146, line 1; p. 146, line 9-p. 147, line 22; p. 148, line 9-p. 149, line 5; p. 150, line 21-p. 151, line 11; p. 156, line 25-p. 157, line 4; p. 160, lines 6-8; p. 163, lines 9-25; p. 165, lines 5-15; p. 167, lines 5-17; p. 319, lines 3-10; p. 323, lines 13-21; p. 324, line 7-p. 325, line 8; p. 379, lines 2-16; p. 479, lines 1-15; p. 131, line 3-p. 132, line 8; p. 133, line 6-p. 134, line 24). Ms. Parrish testified that the condition of the home was the main reason the kids were removed. (R. p. 147, line 23-p. 148, line 5). The home inspection did not occur until four days after the decision to remove the children was already made. (R. pp. 578-581). Furthermore, the condition of the home, by itself is not a sufficient basis for the SCDSS action. SCDSS cannot classify the condition of a home as indicated for abuse and neglect unless they can prove that the condition of the home caused the children harm or put them in imminent risk of harm.

S.C. Dep't of Social Services v. Scott K., 668 S.E.2d 425 (S.C. Ct. App. 2008). SCDSS' expert, Ms. Goodwin, admitted that there was no evidence that the condition of the home or any other purported family problems caused the children harm or put them in imminent risk of harm. (R. p. 480, line 15-p. 481, line 13).

There is direct evidence that the SCDSS' actions constitute gross negligence. Respondent's expert, Mike Corey, testified, without objection, that the SCDSS did not exercise slight care. (R. p. 39, lines 7-16). In addition, the jury heard evidence that Monique Parrish was tasked with conducting an investigation when she was not competent to do so. (R. p. 57, lines 16-21; p. 138, line 6-p. 140, line 8; p. 149, lines 6-24). A reasonable inference from this alone supports a jury's finding that the SCDSS failed to exercise slight care.

Monique Parrish's physical and mental well-being in May 2008 is additional evidence of gross negligence. According to Monique Parrish, during the time the SCDSS was required to investigate the allegation of possible poisoning, she was suffering from pain and limitations due to a neck injury. (R. p. 138, line 11-p. 147, line 22). She said the pain and discomfort prevented her from performing her job. She could not walk. (R. p. 138, line 11-p. 147, line 22). She was sweating and shaking while attempting to do her job. (R. p. 147, lines 5-22). When she brought this up to her supervisor, she was told she had to go into the field or she would lose her job. (Id). Ms. Parrish's supervisor admitted that if a case manager is unable to do the things Ms. Parrish said she couldn't do, that she would not be competent to do her job. (R. p. 321, line 13-p. 322, line 23). Mr. Corey agreed. (R. p. 57, lines 16-21). This testimony alone is sufficient to show that the SCDSS failed to exercise slight care and was grossly negligent.

Lastly, removal and placement of autistic children without knowledge of their special needs is gross negligence. Monique Parrish removed these children knowing that they had special needs. She admitted that she was unaware of the special needs of autistic children. (R. p. 149, line 6-p. 150, line 13). She assumed she was doing her job correctly because her supervisor was overseeing her decisions. (R. p. 146, line 9-p. 147, line 4). Ms. Price, however, also admitted to not knowing what autistic children need. (R. p. 323, lines 6-21). Moreover, she admitted that it would be improper to remove autistic children without first addressing what their needs are. (Id). This is additional evidence that the jury could rely upon in its finding that the SCDSS was grossly negligent. Accordingly, the jury's verdict should not be overturned.

SCDSS' actions constitute gross negligence. In Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999), the Supreme Court reiterated the definition of gross negligence to include the failure to exercise slight care. It also noted that it has also been defined to mean the intentional, conscious failure to do something that is required or doing something not allowed. It also acknowledged that it has been held to be a "relative term, and means the absence of care that is necessary under the circumstances." Hollins v. Richland County School Distr. One, 310 S.C. 486, 490, 427 E. 2d 654, 656 (1993). In Steinke, there were reports of problems to the S.C. Department of Labor, Licensing and Regulation regarding a bungee jump amusement ride in Myrtle Beach. Based on some of these reports, an inspector went near the site but never fully investigated the problems. Bases on his observations of the ride from across the road, the inspector assumed the ride was not operated but never crossed the road or spoke with the owners. Thereafter, the ride malfunctioned and injured Steinke.

The Steinke Court upheld a jury determination of gross negligence. The Defendant argued that it exercised slight care. The Supreme Court, however, disagreed noting that the Defendant did nothing more than "cast a glance" at the dangerous operation of the bungee ride. Id. Simply doing "something" is not exercising slight care.

There is absolutely no evidence that could possibly be viewed as an investigation that took place before the removal. At best, SCDSS merely "glanced" at the parents and children without any investigation. The absence of an investigation before removal is the absence of slight care. Accordingly, there is ample evidence to support the jury's determination that the actions and/or inactions of the SCDSS constitute gross negligence. Thus, the appeal should be dismissed.

III. THE TRIAL COURT CORRECTLY SUBMITTED TO THE JURY THE RESPONDENTS' CAUSE OF ACTION FOR OUTRAGE BECAUSE OUTRAGE IS NOT BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT; RESPONDENTS PROVED THE REQUISITE ELEMENTS OF OUTRAGE; AND GIVEN THE GENERAL VERDICT RETURNED BY THE JURY, THE VERDICT SHOULD NOT BE DISTURBED IF EITHER OF RESPONDENTS' CAUSES OF ACTION WERE PROPERLY SUBMITTED TO THE JURY.

Prior to trial, Respondents amended their Complaint to add "Outrage" as a cause of action. (R. p. 22, ¶¶19-23). Respondents contended that the removal of the Bass's children without a proper investigation recklessly inflicted emotional distress onto the Basses and their children by removing them from their parents' care and custody from May 16, 2008 to June 25, 2008. (Id). In its Answer to the Amended Complaint, Appellant asserted that outrage is also known as the "intentional infliction of emotional distress" and therefore, the cause of action should be dismissed because it is not a loss recoverable under the South Carolina Tort Claim Act (SCTCA). (R. p. 29, ¶19). The Trial Judge was correct in denying Appellant's motion for JNOV to strike the cause of action because the

cause of action is not excluded under the SCTCA and Respondents established the requisite elements to prove the cause of action. Given the general verdict form, review of the record can not reveal whether the jury found for the Respondents on both causes of action or one or the other.

In denying Appellant's Motion for JNOV, the Trial Judge found sufficient evidence to conclude that SCDSS recklessly inflicted emotional distress on the Basses. (R. p. 3). In a claim for the tort of outrage, a plaintiff must show: (1) that a defendant "*intentionally or recklessly* inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous that it exceeded "all possible bounds of decency" and so "atrocious" as to be utterly intolerable in a civilized community"; (3) that such actions actually caused plaintiff's emotional distress; and (4) that the emotional distress was so severe that "no reasonable man could be expected to endure it." AJG Holdings LLC v. Dunn, 2011 WL 794855, 5 (Ct. App. 2011); citing Hanson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007); Ford v. Hutson, S.C. 157, 276 S.E.2d 776 (1981)(emphasis added). Appellants argue that the SCTCA expressly forbids claims of intentional infliction of emotional distress and, therefore, Respondents' cause of action for outrage should be dismissed, because outrage is commonly called the "intentional infliction of emotional distress." (R. p. 29, ¶19).

Appellant's argument is not persuasive. Although outrage is commonly called the "intentional infliction of emotional distress", it is also frequently referred to as the "*reckless* infliction of emotional distress." See, generally, Ford v. Hutson, S.C. 157, 276 S.E.2d, 776 (1981); Upchurch v. New York Times Co., 314 S.C. 531, 431 S.E.2d 558

(1993); Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989). The Trial Judge was correct in denying the motion for JNOV because case law is clear that a plaintiff can prove outrage by either the *intentional* or *reckless* infliction of emotional distress. Todd v. South Carolina Farm Bureau, 283 S.C. 155, 321 S.E.2d 602 (Ct.App. 1984, rev'd on other ground, 287 S.C. 190, 336 S.E.2d 472(1985)(emphasis added). The SCTCA only excludes intentional conduct, not reckless conduct; a fact conceded by the Appellant during the directed verdict argument at the end of the Respondents' case. (See, generally, S.C. Code Ann. § 15-78-10 et. seq.; R. p. 409, line 22-p. 423, line 16). Because outrage can be based on reckless conduct, it is a viable cause of action against a governmental entity.

Section 15-78-30(f) of the SCTCA provides:

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

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). If a statute's language is plain and unambiguous, and expresses clear and definite meaning, courts must not look for or impose alternate meaning. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (2002) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). The language of S.C. Code Ann. § 15-78-30(f) enunciates that the intentional infliction of emotional harm is not a recoverable loss under the SCTCA. The statute says nothing about the reckless infliction of emotional harm.

Section 15-78-60, entitled "Exceptions to waiver of immunity", sets forth an exhaustive list of waiver of immunity exceptions under the SCTCA. Neither outrage nor the reckless infliction of emotional distress are included in this list. A statute as a whole must "receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers." State, 352 S.C. at 367, 574 S.E.2d at 207 (citing City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997)). Any ambiguity in the statute should be resolved in favor of a just, equitable, and beneficial operation of the law. State, 352 S.C. at 367, 574 S.E.2d at 207 (citing City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct.App.1998)). Each word must be given its plain and common meaning without resorting to a forced construction that stretches the statute's function. State, 352 S.C. at 366, 574 S.E.2d at 205 (citing City of Sumter Police Dep't, 330 at 375, 498 S.E.2d at 896). Section 15-78-60 clearly explains and defines forty exceptions to the immunity waiver. The statute does not reference outrage, or, the reckless infliction of emotional harm. The Trial Judge charged the jury on the cause of action, in part, as follows:

> In order to recover for the *reckless infliction of emotional distress*, the plaintiff must prove by a preponderance or greater weight of the evidence the following. One, the defendant's *reckless infliction of severe emotional distress* was sure and substantially sure that the severe emotional stress would have resulted from his conduct. This may be proven by evidence that the defendant knew or was substantially certain that the stress would result from his conduct. Finally, this evidence must be shown by the evidence that the defendant's conduct was a result of a conscious *indifference or reckless disregard for the plaintiff's rights*. R. p. 557, lines 5 to 19. (emphasis added).

Asserting that the tort of outrage is specifically excluded as a loss under the SCTCA grossly misinterprets legislative intent and undermines the purpose of the

legislation itself. Appellant improperly applies section 15-78-30(f) to exclude the tort of intentional infliction of emotional distress. This is misplaced. A 15-78-30(f) "loss" is a damage; it is not an act and it is not a tort. The section refers to emotional harm intentionally inflicted. It does not refer to the tort of intentional infliction of emotional distress.

The SCTCA is the exclusive civil remedy available for any tort committed by a governmental entity, its employers, or its agents, as long as they are acting within the scope of their official duties and have not engaged in intentional conduct. (See, e.g., S.C. Code Ann. § 15-78-10 et. seq). When the General Assembly created the SCTCA, it did so with two balancing principles in mind: the government is not absolutely immune from liability for its actions, but it cannot be subjected to unlimited liability. (Id., §15-78-20(a)). The SCTCA is not an absolute bar to governmental liability. It is prescribed to create a fair and equitable forum through which grievances such as Respondents' may be redressed. Allowing for the recovery of the reckless infliction of emotional harm under the SCTCA maintains this balance.

Appellant contends that Respondent's outrage claim cannot be maintained, because, "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 compromised, is excluded as a loss", is clearly repugnant to the meaning and purpose of the statute as a whole. (Initial Brief of Appellant, p. 35). The SCTCA specifically lists mental anguish as a recoverable loss, except when it results from the intentional infliction of emotional harm. (S.C. Code Ann §15-78-30(f)). Whether the government's action is intentional or reckless makes all the difference in the

world. Intentional acts are excluded under the SCTCA. Reckless acts are not. It was proper for the Trial Judge to deny Appellant's Motion for JNOV.

Furthermore, Respondents established the requisite elements of outrage and it was therefore proper for the cause of action to go to the jury for consideration. In denying the Appellant's Motion for JNOV, the trial judge found that the evidence admitted during the course of the trial was susceptible of an inference that SCDSS recklessly caused the Bass family severe emotional distress. (R. pp. 3-4). The trial judge was correct in finding that the "lack of any investigation before removal, coupled with the unique circumstances of the family and the hospitalization of the children provide a sufficient evidentiary basis from which a jury could find for the Plaintiffs on their outrage claim." (Id).

Alex and Hannah Bass have varying degrees of autism and other cognitive issues. When Palmetto Richland Memorial notified SCDSS on May 15, 2008 that there was a possible parental poisoning, SCDSS went to the hospital and met with the parents. SCDSS did no further investigation or research. They did not interview any medical staff, thoroughly inquire into the children's medical history, or investigate the medications that the children were exposed to and taking. Instead, the next day, SCDSS notified the Bass family that the children could either be placed with relatives or enter foster care, but that they could not return home upon discharge. The Bass family and friends notified SCDSS of their suspicions that the Clonidine might be the source of the illness. On May 19, 2008, SCDSS took possession of the Clonidine but never attempted to contact the pharmacy or have the children's medication tested. (See, generally, e.g., R. pp. 570-642; pp. 645-646; pp. 666-668; p. 33, line 6-p. 34, line 22; p. 41, line 6-p. 44, line 10; p. 336, lines 15-18; p. 339, line 23-p. 340, line 4; p. 343, lines 12-18; p. 350, line 17-p. 351, line

10; p. 42, lines 7-10; p. 223, line 6-p. 224, line 14; p. 224, line 22 to p. 242, line 24; p. 126, lines 17-19; p. 135, line 20-p. 146, line 1; p. 146, line 9-p. 147, line 22; p. 148, line 9-p. 149, line 5; p. 150, line 21-p. 151, line 11; p. 156, line 25-p. 157, line 4; p. 160, lines 6-8; p. 163, lines 9-25; p. 165, lines 5-15; p. 167, lines 5-17; p. 319, lines 3-10; p. 323, lines 13-21; p. 324, line 7-p. 325, line 8; p. 379, lines 2-16; p. 479, lines 1-15).

The Defendant's conduct is clearly susceptible to a reasonable inference by the jury that the conduct was reckless. SCDSS failed to conduct any investigation prior to the removal of the children. (R. p. 126, lines 17-19; p. 135, lines 1-23; p. 131, line 3-p. 132, line 8; p. 133, line 6-p. 134, line 24; p. 148, line 9-p. 149, line 5; p. 156, line 25-p. 157, line 4; p. 160, lines 6-8; p. 163, lines 9-25; p. 165, lines 5-15; p. 167, lines 5-17; p. 141, lines 12-13; p. 150, line 21-p. 151, line 11; p. 319, lines 3-10; p. 323, lines 13-21; p. 324, line 18-p. 325, line 3; p. 379, lines 2-16; p. 479, lines 1-15). The SCDSS caseworker admitted that she had no idea what kinds of needs children with autism have. (R. p. 149, lines 6-13; p. 150, lines 9-13). Her supervisor was also unaware of autistic children's needs. (R. p. 323, lines 10-21). It is outrageous to contend that a person's parenting skills are so inept that you will remove the children from the home without ensuring the children's needs can be met elsewhere. This is especially true when the allegations that brought SCDSS into the Bass family's life were medical in nature and yet there was never any contact with medical personnel. This reckless conduct is sufficient to establish a reasonable inference from which a jury could find outrage. Thus, it was proper for the trial judge to deny Appellant's Motion for JNOV.

Even if this Court should find that outrage was improperly presented to the jury, the appeal should be denied. The verdict rendered in this case was a general verdict and

did not distinguish between gross negligence and the reckless infliction of emotional distress. (R. pp. 7-8). The Court cannot determine whether the jury found for the Respondents on both causes of action or one or the other. The Court has previously addressed the two issue scenario finding that "when there are several issues in the case submitted to a jury under full instructions, a general verdict in favor of one or the other of the parties, in the absence of objection to the verdict not having passed upon the several issues separately, will be held to have concluded all the issues." Hussman Refrigerator & Supply Company v. Cash & Carry Grocer, Inc, et al., 132 S.E. 173 (S.C. 1926), 134 S.C. 191. "Where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." Anderson v. West, 241 S.E.2d 551 (S.C. 1978), 270 S.C. 184. This application remains true even when causes of action are submitted in error. Gold Kist, Inc. v. Citizens and Southern National Bank of South Carolina, 333 S.E.2d 67 (S.C. App. 1985), 286 S.C. 272. "Despite the trial court's erroneous submission of the fraud action to the jury, we nevertheless affirm the judgment entered on the verdict. The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict. Specifically, where a jury returns a general verdict in a case involving two or more issues or defenses and its verdict is supported as to at least one issue or defense, the verdict will not be reversed." Id. If this Court finds that either cause of action was properly presented to the jury, then the verdict must not be disturbed.

South Carolina law is clear that where a verdict is objectionable as to form, the complaining party should call that fact to the Court's attention when the verdict is published. Failing to do so waives the right. Rhame v. City of Sumter, 113 S.C. 151, 101

S.E. 832 (1920); McAlister v. Thomas & Howard Co., 116 S.C. 319, 108 S.E. 94 (1921); Hussman, 134 S.C. 191, 132 S.E. 173 (1926).

In McAlister, supra, the jury awarded a general verdict without specifying whether the amount represented actual or punitive damages, or if both, the amount found for each. Defendant moved for a new trial. The Court refused, stating: "It was the duty of the defendant's attorney to call attention to the form of the verdict, when it was published. By failing to do so, he waived the right to raise the question presented by this exception." 116 S.C. 319, 108 S.E. 95. In Bethea v. Western Union Telegraph Co., Defendant's motion for new trial was denied because the matter the Defendant complained of, an issue with the verdict form, was a mere irregularity which should have been called to the attention of the trial judge. 97 S.C. 385, 81 S.E. 675 (1914).

In the case at hand, Appellant failed to object to the form of the verdict. On the last day of trial, two causes of action were charged to the jury: gross negligence and the reckless infliction of emotional distress. (R. p. 544, line 22-p. 561, line 11). The jury was then presented with a "possible verdict form." (R. p. 561, lines 12-13). The trial judge explained to the jury the nature of the form:

> And it's simply the caption of this case, the parties involved, the case number. And then it says "jury verdict." And there are two possible verdicts in this case. One, "We, the jury, find for the plaintiff against the defendant in the amount of blank damages." Two, "We, the jury, find for the defendant." Your verdict must be a unanimous verdict, which simply means all twelve of you must agree on this verdict. And when you have agreed on this verdict, you are to write in whichever verdict you all have decided. You will fill that verdict out, sign your name, and date it, and then knock on the door and let us know that you have reached a verdict in this case. R. p. 561, line 13-p. 562, line 3.

At no point did Appellant except or object to the general verdict form provided to the

jury. Consequently, the jury awarded a general verdict for the Respondents in the amount of $4,000,000. There is no way of knowing whether the verdict represented a finding of gross negligence, the reckless infliction of emotional distress, or both. Thus, even if this Court should find that outrage was improperly submitted to the jury, because the Appellant did not seek a verdict form that distinguished the two causes of action, the verdict cannot be disturbed if gross negligence was properly submitted to the jury.

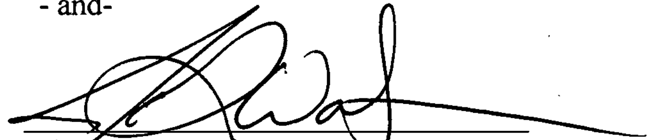
CONCLUSION

The Bass family has suffered greatly at the grossly negligent intrusion that the Appellant made into its life in 2008. The jury presided over a factual dispute that required it to decide whether the Bass parents voluntarily sought the placement of their children outside of their home, whether the SCDSS conducted an investigation before the children were removed and whether SCDSS recklessly inflicted emotional distress onto the Bass family. The five day trial saw the introduction of written evidence and testimony that supported the Respondent's allegations against SCDSS. The Respondent has cited to overwhelming evidence that supports the jury's findings as to gross negligence which, if it exists, the appellant agrees should not be reversed. Because the Respondent has clearly shown a legislative intent to only exclude intentional conduct, the jury's findings as to outrage should be left to stand. If either cause of action was properly submitted to the jury then the verdict cannot be disturbed. Accordingly, Respondent respectfully requests that this appeal be denied.

(Signature Page Follows)

Lee D. Cope (S.C. Bar # 14361)
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P. A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
lcope@pmped.com

- and-



John K. Koon (S.C. Bar # 3600)
Jamie L. Walters (S.C. Bar # 76956)
KOON & COOK, P.A.
2016 Gadsden Street
Columbia, SC 29201
(803) 256-4082
jkoon@koonandcook.com
jwalters@koonandcook.com
ATTORNEYS FOR RESPONDENTS

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

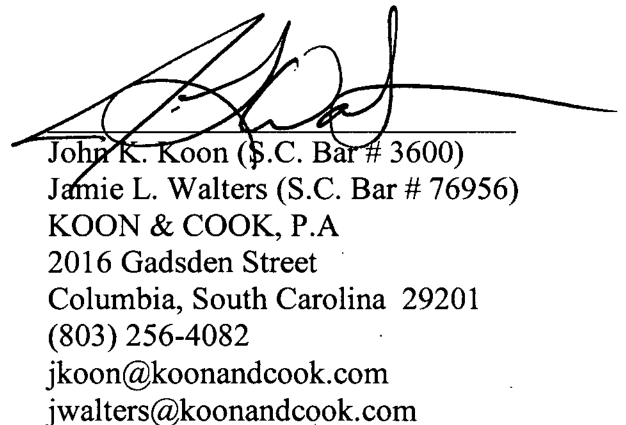
Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Respondents,

v.

South Carolina Department of Social Services, Appellant.

CERTIFICATE OF RULE 211(b) COMPLIANCE

The undersigned hereby certifies that this Brief of Repondents complies with Rule 211(b), SCACR.



Lee D. Cope (S.C. Bar # 14361)
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P. A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
lcope@pmped.com

John K. Koon (S.C. Bar # 3600)
Jamie L. Walters (S.C. Bar # 76956)
KOON & COOK, P.A
2016 Gadsden Street
Columbia, South Carolina 29201
(803) 256-4082
jkoon@koonandcook.com
jwalters@koonandcook.com

ATTORNEYS FOR RESPONDENTS

July 9, 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

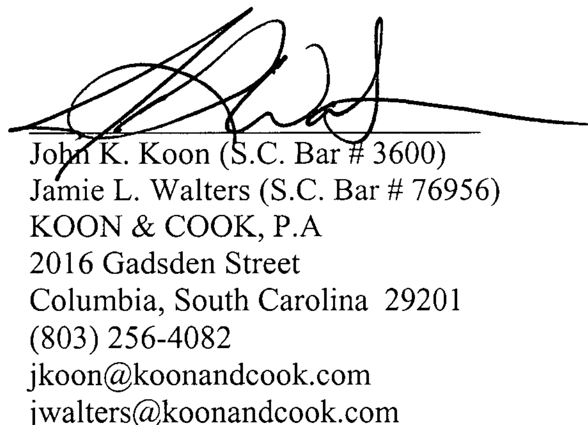
Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Respondents,

v.

South Carolina Department of Social Services, Appellant.

PROOF OF SERVICE

I hereby certify that I have served the Brief of Respondents on the Appellant, by depositing a copy in the United States Mail, postage prepaid, on the 9th day of July, 2012, addressed to their attorney of record, Patrick J. Frawley, Esquire, at Post Office Box 489, Lexington, South Carolina, 29071



Lee D. Cope (S.C. Bar # 14361)
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P. A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
lcope@pmped.com

John K. Koon (S.C. Bar # 3600)
Jamie L. Walters (S.C. Bar # 76956)
KOON & COOK, P.A
2016 Gadsden Street
Columbia, South Carolina 29201
(803) 256-4082
jkoon@koonandcook.com
jwalters@koonandcook.com

ATTORNEYS FOR RESPONDENTS

July 9, 2012