THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

RECEIVED
NOV 30 2017
SC Court of Appeals

Appellate Case No. 2017-001367

Elizabeth Hope Rainey, as the
Guardian *ad Litem* to Owen C.,
A minor ..... Appellant,

v.

South Carolina Department of
Social Services ..... Respondent.

Initial Brief of Respondent

Patrick J. Frawley
DAVIS FRAWLEY, LLC
140 East Main Street (29072)
PO Box 489
Lexington, South Carolina 29071-0489

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES Page

STATUTES

RULES OF COURT

STATEMENT OF ISSUES ON APPEAL

WHETHER THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT, FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BUT THAT SCDSS HAD EXERCISED AT LEAST SLIGHT CARE IN ITS HANDLING OF THE OWEN C. CASE FROM THE SEPTEMBER 6, 2009 INTAKE REPORT TO THE JANUARY 11, 2010 INJURY TO THE CHILD, AND WAS NOT GROSSLY NEGLIGENT AS A MATTER OF LAW?

STATEMENT OF THE CASE

This matter was started with the filing of a Summons and Complaint in York County on December 1, 2011, naming the South Carolina Department of Social Services (hereinafter "SCDSS") as a Defendant, along with Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center, Bruce Bryant, as the Sheriff of York County, the York County Sheriff's Department, and York County, and alleging that the Plaintiff Elizabeth Hope Rainey (hereinafter "Appellant") was the duly appointed Guardian *ad Litem* for Owen C., a minor, born September 9, 2009 to Kayla Lythgoe and Michael C.[1], of York County, and that Owen C. had been hospitalized at Levine Children's Hospital, in Charlotte, North Carolina on December 4, 2009 for injuries that were suspected to be non-accidental trauma, that the York County office of SCDSS was alerted by medical social workers from the hospital that the injuries may have been non-accidental, but the hospital released the child to its parents on December 8, 2009, and that the child was again admitted to the hospital January 11, 2010 for more serious injuries that resulted from physical abuse by the father, which injuries have left the child permanently injured. *See, generally*, Complaint, pp. 1, 3-6, ¶¶ 9-31. The Complaint further alleged that the various Defendants failed to fulfill their respective duties owed the child, with SCDSS being accused of,

[1] Because the minor child's surname is the same as his father's and could be readily identified by fully naming the father, SCDSS will refer to the father in its Brief by only the first initial of his last name. The mother's last name is different, and SCDSS will fully name her.

essentially, failing to adequately investigate the intake report and failing to protect the child from further injury at the hands of his father after having received the intake report. *Id.*, pp. 8-11, ¶¶ 37-47. The claims against all of the Defendants were couched as negligence causes of action, with an additional cause of action against all Defendants being called a "Necessaries Claim," being brought on behalf of the maternal grandparents, who now have custody of the child, for medical and life care expenses for the child's life. *Id.*, pp. 13-14, ¶¶ 58-67. The Summons and Complaint were served upon SCDSS December 8, 2011.

SCDSS answered January 9, 2012, interposing a qualified general denial, asserting, in part, that SCDSS received an intake report at 5:01 p.m. on December 6, 2009, responded to the Charlotte hospital by 7:45 p.m. the same day, and conducted an appropriately thorough and timely investigation, and took appropriate steps to protect the child, given the information that was available at the time. SCDSS also alleged affirmative defenses sounding in intervening negligence of third parties, South Carolina Tort Claims Act defenses under *S.C. Code Ann.* §15-78-60(1), (2), (3), (4), (5), (12), (20), (23), and (25), and §15-78-120(b) as a bar to punitive damages. *See, generally*, Answer of the Defendant South Carolina Department of Social Services.

The remaining Defendants all answered, denying liability, and the parties engaged in discovery. The Defendant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center (hereinafter "the Hospital") filed and served a Motion for Summary Judgment on or about February 26, 2013, which motion was heard April 18, 2013 and granted by Order dated May 13, 2013. Following the August 14, 2013 denial of the

Appellant's Motion to Reconsider, the Appellant dismissed the Defendant Bruce Bryant, as the Sheriff of York County, the York County Sheriff's Department, and York County, leaving SCDSS as the sole remaining Defendant in the case pending the outcome of the appeal.

On September 5, 2013, SCDSS served its own Motion for Summary Judgment by U.S. Mail, filing the Motion September 9, 2013, stating as its grounds there was no genuine issue of material fact but that SCDSS, through its agents and employees, exercised at least slight care and beyond in its investigative efforts and handling of the matter subject of the action between the December 6, 2009 intake report received by SCDSS and the January 11, 2010 injury sustained by the minor child, and was not grossly negligent as a matter of law. The motion was made on the further grounds that there was no evidence that the injury to the child that triggered the December 6, 2009 intake report was the result of any act or omission of the father of the child, such that SCDSS should have had cause to suspect that the father, Michael C., would willfully and criminally injure the child on January 11, 2010. *See*, SCDSS Motion for Summary Judgment (filed September 9, 2013).

The Appellant appealed the granting of the Hospital's Motion for Summary Judgment and denial of the Plaintiff's Motion to Reconsider on September 10, 2013, with the appeal designated Appellate Case No. 2013-002058. The circuit court case with SCDSS as the sole remaining Defendant was stayed pending the appeal. The South Carolina Court of Appeals affirmed the lower Court in Unpublished Opinion No. 2015-UP-209 dated April 22, 2015. The Appellant Petitioned for Rehearing, which was denied,

then Petitioned for Certiorari to the South Carolina Supreme Court, which was denied on or about May 6, 2016.

SCDSS re-filed its Motion for Summary Judgment January 4, 2017, asserting the same grounds as its September 9, 2013 filing, and attaching the September 2013 Motion. *See,* SCDSS Motion for Summary Judgment (filed January 4, 2017). The motion was heard March 13, 2017 by the Honorable S. Jackson Kimball, Special Circuit Court Judge, and was granted by Judge Kimball. *See*, Order for Summary Judgment (March 31, 2017). The Appellant filed a Motion to Alter or Amend and for Reconsideration April 4, 2017, which motion was heard by Judge Kimball May 18, 2017, and denied. *Cf.*, Order (Rule 59(e) Motion)(May 24, 2017)(Judge Kimball issued a two-page, written Order, not a Form 4 Order, as Appellant has maintained in her Brief, p. 11).

The Appellant served and filed a timely Notice of Appeal on or about June 19, 2017.

STATEMENT OF FACTS

Owen C. was born to Kayla Lythgoe, then 19 years old, and Michael C., then 18 years old. On December 4, 2009, when Owen was twelve weeks old, his parents took him to Piedmont Medical Center (hereinafter "PMC") in Rock Hill for medical attention. On December 5, 2009 PMC physicians transferred Owen to Levine Children's Hospital (hereinafter "Levine") at Charlotte-Mecklenburg Hospital Authority ("CMHA") in Charlotte for further care. The following day, December 6, a CT scan by CMHA staff revealed a subdural hematoma, which raised suspicions of a non-accidental injury to Owen. Levine then notified the York County office of SCDSS that the child may have been the victim of non-accidental trauma.

SCDSS received an intake December 6, 2009, at 5:01 p.m., reporting that a 2-month old baby with two subdural hematomas had been admitted to the hospital, raising the possibility of non-accidental trauma, although the report went on to indicate that the parents' behavior with the child had been "appropriate." *See*, SCDSS Intake Summary, bates numbered SCDSS 0466 to -0470.

On-call case worker Chandra Tyler responded to the hospital by 7:45 p.m., having face-to-face meetings with the parents of the child and collaterals—the paternal grandparents, a paternal uncle, and an unnamed nurse. *See*, SCDSS Case Dictation,

(hereinafter "Dictation"), pp. 309-311.[2] *See also*, Deposition of Charlotte Williams (July 20, 2012)(hereinafter "Williams Deposition"), p. 108, line 14 to p. 110, line 16 (Charlotte Williams, the maternal grandmother, testifying that Ms. Tyler spoke with her, the parents, and several other people in the room, and discussed relative placement of the child with her in the event of removal of the child). Ms. Tyler provided the parents with the DSS Brochure 3034 and the handbook entitled *Child Protective Services: A Guide For Parents*, advising them of the SCDSS procedure in Child Protective Services (CPS) cases and their right to representation by counsel, which both parents signed for, acknowledging receipt. Dictation, p. 311; *see also*, DSS Brochure 3034 (Feb. 03) and signed Acknowledgement. Ms. Tyler also had the parents sign a Safety Plan, pursuant to which the parents agreed to follow medical advice of the hospital, and not to remove the child from the hospital until the child was medically discharged. Dictation, p. 309; SCDSS Safety Plan (12/6/09). *See also*, Deposition of Kayla Lythgoe (July 20, 2012)(hereinafter "Lythgoe Deposition"), p. 73, line 23 to p. 79, line 8)(the mother, Kayla Lythgoe, testifying to what Ms. Tyler did with Lythgoe and the father, Michael Carduff, after meeting them at the hospital December 6, including identifying herself as a DSS caseworker, providing the couple with the DSS Brochure setting out their rights, questioning them, and having them sign a Safety Plan).

Oddly, the nurse Ms. Tyler spoke with seemed unaware of a CPS call, and thought that Ms. Tyler was at the hospital to relieve the sitter who was present in the room with the child. *Cf.*, Dictation, p. 310, bottom paragraph ("The nurse seemed confused and said that

[2] Case Dictation is read from back to front, with the first entry with Action Date 12/6/09 appearing on SCDSS-311, at the back, and the most recent entry with Action Date 1/11/10—the day after the child's second injury—appearing on SCDSS-288.

they had no known concerns of non accidental trauma and that the social worker was not supposed to be calling for those reason [sic], but was to call to get DSS approval to remove the sitter for Owen's room."). *See also*, Exhibit 12 to Plaintiff's Memorandum in Opposition to SCDSS Motion for Summary Judgment, p. 17 of second Affidavit (Appellant's Expert, George W. Savarese notes the incident, that the hospital staff had no apparent concerns for the child and that the December 6 injury was accidental, and communicated that lack of concern and "the notion that the child's injuries were likely accidental" to SCDSS).

The morning of December 7, 2009 Ms. Tyler and her supervisor, Lola Sutherland, had a staffing with the assessment case worker to whom the case was being assigned, Dirvondra Hill, and her supervisor Krista Hinnant. *See, e.g.*, Dictation, pp. 305-307; Deposition of Lola Sutherland (January 10, 2013)(hereinafter "Sutherland Deposition"), p. 27, line 19 to p. 28, line 20; Deposition of Krista M. Hinnant (January 10, 2013)(hereinafter "Hinnant Deposition"), p. 39, line 20 to p. 40, line 11; Deposition of Dirvondra Hill (January 14, 2013)(hereinafter "Hill Deposition"), p. 12, lines 9-17; SCDSS Case Transfer and/or Case Staffing form 3062 (December 7, 2009). At the initial staffing, it was discussed that Owen had two subdural hematomas, that the hospital social worker and a nurse had concerns that the injuries were the result of non-accidental trauma, but no doctor was saying that injuries were non-accidental, and that the child was ready for discharge from the hospital. Dictation, p. 307.

After the initial staffing and accepting the transfer of the case from the on-call caseworker Tyler, SCDSS Assessment Supervisor Hinnant and Assessment Caseworker

Dirvondra Hill had a second staffing that same morning with SCDSS Legal. *See,* Dictation, pp. 307-308; Hinnant Deposition, p. 39, line 20 to p. 40, line 6; p. 41, lines 6-11; SCDSS Case Transfer and/or Case Staffing Form 3062, Legal Staffing (December 7, 2009). Later that morning, DSS supervisor Krista Hinnant contacted Levine Children's Hospital social worker Laura McDowell, inquiring into whether doctors thought the trauma was non-accidental. Dictation, p. 305. McDowell told Hinnant that she would speak with the doctors and report back to her. *Id.* Hinnant spoke with a second social worker, Laura Newmark, at approximately 11:50 a.m., who told Hinnant that she was the social worker who had been working with the family, that she had spoken with the pediatric staff, and that they could not determine whether the child's injuries were accidental or not. *Id.*, p. 304. She told Hinnant that, although the family had no clear history of trauma, the hospital could not rule out trauma, but that there were no obvious findings of abuse or neglect, and that the hospital mostly had concerns about lack of supervision. *Id.* Newmark further stated that Dr. Cheryl Courtland was working with the child, and that Dr. Courtland could not determine if the injuries were accidental or not at that point in time. *Id.*

Hinnant staffed the matter with the DSS legal department, and authorized the discharge of the child to the care of his parents. Dictation, pp. 303-304; Hinnant Deposition p. 31, line 18 to p. 32, line 19, p. 33, lines 3-17. Dirvondra Hill attempted a home assessment with the child later December 7, but found no one at home. Dictation, p. 308; Hill Deposition, p. 10, line 16 to p. 12, line 6. Ms. Hill followed up with attempted home visits December 8 and 10, but found no one at home. Dictation, pp. 301-302. Ms.

Hill sent a "home attempt" letter to Michael Carduff and Kayla Lythgoe, indicating her unsuccessful attempts to visit the home, and scheduled a home visit for December 21 at 9:00 a.m. *See*, Hill Deposition, p. 35, line 6 to p. 36, line 6; Hill letter to Michael C./Kayla Lythgoe (undated).

Ms. Hill sent criminal records check inquiries to the York County Sheriff's Department December 16, 2009 for Michael Carduff, Kayla Lythgoe, and Charlotte Williams, the maternal grandmother. Dictation, p. 300; SCDSS Fax Sheets and Criminal History Requests, Bates Numbered SCDSS-0457 through -0461.

Ms. Hill finally caught someone at home for a home visit and face-to-face interview with the mother, Lythgoe, on December 17. Dictation, pp. 299-300. Lythgoe was about to leave for work, so the visit was short; but she told Ms. Hill that the child was out with the grandmother while Lythgoe worked, and could not give a phone number at which she could be reached. *Id.*, p. 299. Lythgoe Deposition, p. 80, line 16 to p. 81, line 10, p. 84, line 25 to p. 85, line 23. Ms. Hill presented Lythgoe with a Safety Plan, which Lythgoe signed, and, after Lythgoe acknowledged having received the "home attempt" letter from DSS, she and Ms. Hill agreed to a meeting December 21 at 9:00 a.m., for Ms. Hill to inspect the home and meet all members of the household. Dictation, pp. 299-300; Lythgoe Deposition, p. 81, lines 11-18.

Also on December 17, Ms. Hinnant spoke with a Lt. Miller of the York County Sheriff's Department, who told Hinnant the Department had received the law enforcement inquiry, but needed additional information. Hinnant provided the additional information to Lt. Miller. Dictation, p. 298. The criminal records check came back negative for the

young parents, Kayla Lythgoe and Michael C., but indicated that the maternal grandmother, Charlotte Williams, had a criminal domestic violence conviction in her history. Hinnant Deposition, p. 92, line 14 to p. 94, line 16. *See also*, Williams Deposition, p. 7, line 11 to p. 8, line 3 (Williams testified to convictions for the CDV in 2008 and a DUI).

Ms. Hill met with Michael C., Kayla Lythgoe, and the child at their home on December 21, 2009. Dictation, pp. 297-298. Ms. Hill read the allegations of the report and received a history from the mother and father of what had happened leading up to the child's hospitalization. *Id.* Ms. Hill noted that the home was "warm and organized in the living room," and observed that the child was on the floor with the father, describing the child as "vibrant lying on his back on a blanket kicking his feet and arms laughing and smiling as his father interacted with him." *Id.*, p. 298; Lythgoe Deposition, p. 81, line 19 to p. 83, line 18.

On January 4, 2010, Krista Hinnant and Ms. Hill staffed the case, resolving to get all medical records, follow up with the December 16 law enforcement inquiry, and assess the grandmother Charlotte Williams' home. Dictation, pp. 296-297; SCDSS Case Transfer and/or Case Staffing form 3062 (January 4, 2010).

On January 11, 2010, Michael C. and Kayla Lythgoe took their son to Piedmont Medical Center, and the nurse they spoke with—Elizabeth Super—later told Ms. Hill that she observed multiple bruises to the body, left leg, left hand, chest, and face of the child. Dictation, p. 290. The mother explained that the child had been "normal" on the previous day, but the next morning was having seizures, and the parents apparently attempted to

attribute the bruises to the child scratching himself. *Id.* The child was transferred, actively seizing, to Levine Children's Hospital ICU, in critical condition, on a ventilator. *Id.*, pp. 289-291. CT scans were performed at PMC and Levine, which revealed up to five new areas of brain bleeds for the child different from the two he had in December. Skeletal CT scans were negative for fractures. *Id.* At one point the child was taken off of life support, with doctors opining that he was terminal, and he was moved to a Rock Hill hospice; but the child did recover, but he has permanent brain damage and vision problems. He has been in the custody of the maternal grandparents.

Law enforcement got involved, administered a polygraph test to the father, Michael Carduff, who eventually confessed to having inflicted the recent injuries to the child. Voluntary Statements of Michael C. (January 11, 2010, 9:52 p.m.), bates numbered SCDSS-0420 through -0422. He did not admit to inflicting the injuries leading to the December 6, 2009 intake report to SCDSS. *Id.*

Michael C. pled guilty to criminal charges and was incarcerated. The mother, Kayla Lythgoe, passed her polygraph, indicating, apparently, that she neither abused the child nor was aware that the father had abused him. There is no evidence that the father injured the child resulting in the first hospitalization, which is the incident the Appellant argues should have alerted SCDSS that the father was a potential safety threat to the child.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. *Companion Property and Casualty Ins. Co. v. Airborne Express, Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006), citing *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary Judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* *See also*, *Strother v. Lexington County Recreation Comm'n,* 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998)(In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party); *Companion Property*, 369 S.C. at 390-391, 631 S.E.2d at 916 ([appellate court's] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom).

Summary Judgment is appropriate and should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Hancock v. Mid-South Management*

Co., Inc., 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009); *Lanier Construction Company, Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). Summary Judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Lanier*, 384 S.C. at 278, 681 S.E.2d at 911. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hancock*, 381 S.C. at 329-330, 673 S.E.2d at 802.

The moving party in a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the non-movant can prove her case. *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393 (4th Cir. 1994). *See also, Celotex Corporation v. Catrett,* 477 U.S. 317, 325 (1986) (The burden on the non-moving party may be discharged by "showing"—that is, by pointing out to the court—that there is an absence of evidence to support the non-moving party's case).

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. However, under South Carolina case law, the meaning of the "scintilla of evidence rule" is not that, if there is any relevant testimony, amounting to a scintilla, it must be left to the jury to determine its force and effect; rather, "[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of

speculative, theoretical, and hypothetical views." *Crawford v. Town of Winnsboro*, 205 S.C. 72, __, 30 S.E.2d 841, 849 (1944) (emphasis in original). *Cited with approval* in *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946). *See also, Radcliffe*, 209 S.C. at 421, 40 S.E.2d at 630 ("[if] it be conceded that there may be deduced by a process of unusual *finesse* of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury." (emphasis in original)).

ARGUMENT

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT, FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BUT THAT SCDSS HAD EXERCIZED AT LEAST SLIGHT CARE IN ITS HANDLING OF THE OWEN C. CASE FROM THE SEPTEMBER 6, 2009 INTAKE REPORT TO THE JANUARY 11, 2010 INJURY TO THE CHILD, AND WAS NOT GROSSLY NEGLIGENT AS A MATTER OF LAW.

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).

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).

SCDSS Exercised at Least Slight Care and Was Not Grossly Negligent.

The Lower Court properly found that there was no genuine issue of material fact but that SCDSS had exercised at least slight care and beyond in its investigative efforts and handling of this matter from the time it received the intake report on December 6, 2009 through the January 11, 2010 injury sustained by Owen C. at the hands of his father, and was not grossly negligent as a matter of law.

As set forth in the Statement of Facts, above, the SCDSS on-call caseworker, Ms. Tyler, responded quickly after receiving the intake report December 6, 2009, spoke with the parents and paternal extended family at the hospital, as well as hospital personnel. Dictation, pp. 309-311. *See also*, Williams Deposition, p. 108, line 14 to p. 110, line 16 (Charlotte Williams, the maternal grandmother, testifying that Ms. Tyler spoke with her, the parents, and several other people in the room, and discussed relative placement of the child with her in the event of removal of the child). Ms. Tyler also had the parents enter into a Safety Plan after providing them with the SCDSS Brochure, advising them of their rights. Dictation, p. 311; DSS Brochure 3034 (Feb. 03) and signed Acknowledgment. The following morning Ms. Tyler and her supervisor, Lola Sutherland, staffed the case with the Assessment Supervisor Krista Hinnant and the Assessment Caseworker who was to take over the case, Dirvondra Hill; and Hinnant and Hill later that same morning staffed the case again with SCDSS Legal. Dictation, pp. 305-308; Sutherland Deposition, p. 27, line 19 to p. 28, line 20; Hinnant Deposition, p. 39, line 20 to p. 40, line 11, p. 41, lines 6-11;

Hill Deposition, p. 12, lines 9-17; SCDSS Case Transfer and/or Case Staffing form 3062 (December 7, 2009). At the initial staffing, it was discussed that Owen had two subdural hematomas, that the hospital social worker and a nurse had concerns that the injuries were the result of non-accidental trauma, but no doctor was saying that injuries were non-accidental, and that the child was ready for discharge from the hospital. Dictation, p. 307.

After the initial staffing and accepting the transfer of the case from the on-call caseworker Ms. Hinnant had several conversations with Hospital Social Workers to determine if the child's injuries indicated non-accidental trauma, and was able to get no doctor to opine that the child's injuries were the result of anything other than an accidental occurrence. *See*, Statement of Facts, p. 9, supra, and evidentiary citations therein. With the hospital indicating that the child was medically ready for discharge and no indication from the health care professionals that the injuries were the result of non-accidental trauma, Ms. Hinnant consulted again with DSS legal, and told the hospital to release the child to his parents. Even the Appellant's expert, George Savarese, commented that the hospital social worker had conveyed the notion that the child's injuries were likely accidental in communications with DSS. Savarese Affidavit (April 6, 2013), p. 17, fourth bullet point.

Hill attempted a home visit unsuccessfully on December 7, 8, and 10, then sent a letter to the parents scheduling a home visit for December 21 at 9:00 a.m.; despite that scheduling, Hill made another attempt at a home visit December 17, and was able to find the child's mother at home, and confirmed the December 21 meeting. At the December 21 home visit—Ms. Hill's *fifth* attempt at the home visit—the child and father interacted well

and the home appeared to not be a threat to the child. Dictation, pp. 297-298. *See also*, Lythgoe Deposition, p. 81, line 19 to p. 83, line 18.

The foregoing actions of SCDSS amounted to at least slight care and beyond, given the short timeframe afforded SCDSS between receiving the intake report and the hospital's release of the child, and the Appellant's argument that SCDSS never-the-less should have removed Owen C. from his parents without a definitive non-accidental trauma finding from the Hospital, or that DSS had not sent the criminal history inquiry out within the first 24 hours rings hollow, and was accounted for by Judge Kimball in his Order.

With regard to the failure to remove, Judge Kimball properly noted that SCDSS staff must consider numerous policy and procedure dictates in making judgments pertaining to action plans in individual cases. Order for Summary Judgment, p. 6. He further noted that the SCDSS Human Services Policy and Procedure Manual provided that interventions should be in the least intrusive manner possible, and that referral to court and removal of children should only be done when it is determined that children cannot be kept safely in their own home. *Id.*, pp. 6-7, and footnote 1.

The Appellant has argued that SCDSS failed to timely request a criminal history from Law Enforcement within 24 hours of receiving the intake report, not making the request until ten days after the December 6, 2009 intake. *See*, Brief of Appellant, pp. 19-20; SCDSS Fax Sheets and Criminal History Requests (December 16, 2009). Yet the Appellant proffers no evidence that makes that delay a contributing factor to Owen's injury, instead making a proximate cause argument while conveniently ignoring the absence of criminal history for the parents, with only the maternal grandmother—who has

custody of Owen—having a criminal history for CDV. Hinnant Deposition, p. 92, line 14 to p. 94, line 16. *See also*, Williams Deposition, p. 7, line 11 to p. 8, line 3 (Williams testified to convictions for the CDV in 2008 and a DUI). Even had the request for a criminal history for Michael C. been timely sent, it would have yielded no history.

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. SCDSS exercised at least slight care and beyond in its actions in responding to the December 6, 2009 intake report and its actions thereafter, and was not grossly negligent as a matter of law. Judge Kimball properly found that, and his Orders granting SCDSS summary judgment and denying the Appellant's SCRCP Rule 59(e) motion should be affirmed.

Appellant's Reliance on *Bass v. SCDSS* is Misplaced.

In support of her argument that SCDSS should have removed the child, the Appellant cites *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 780 S.E.2d 252 (2015). *See*, Brief of Appellant, pp. 13-15. That reliance is misplaced.

In *Bass*, SCDSS received a report on May 15, 2008 that two special needs children were in the hospital due to suspected parental poisoning, with hospital staff speculating that the children had been overly medicated. *Id.* at 563-564, 780 S.E.2d at 254. The SCDSS case worker responded timely to the hospital within forty-five minutes of receiving the report, spoke with the parents and collaterals at the hospital, and took the bottle of medicine; and the following day conducted a family meeting. Following the family meeting, the case worker determined that the children should be removed when released

from the hospital and placed with an aunt, who lived nearby. *Id.* at 564, 780 S.E.2d at 254-255. The case worker did not arrange to have the medicine tested, nor otherwise investigate its contents. *Id.* at 564, 780 S.E.2d at 254. On June 17, 2008 a telephone call from the compounding pharmacy's insurer revealed that the Clonidine given the children had been improperly filled by the pharmacy, and the medication had been the cause of the children's hospitalization. *Id.* at 564, 780 S.E.2d at 255. The children were returned to the parents, and the parents filed a lawsuit against SCDSS, the compounding pharmacy, and the pharmacist, alleging gross negligence. SCDSS was the lone remaining Defendant at trial, a jury returned a verdict for the Plaintiffs, SCDSS appealed, and the South Carolina Court of Appeals reversed the jury verdict. *Id.* at 568-569, 780 S.E.2d at 257

In reviewing the Court of Appeals decision, the Supreme Court found as a matter of law that DSS had not acted in a grossly negligent manner in the Emergency Protective Custody (EPC) removal of the children, holding that EPC removal is typically associated with exigent circumstances and time constraints, and that the Court was not imposing upon DSS "a duty to conduct the post-EPC investigation in a pre-EPC setting." *Id.* at 571, 780 S.E.2d at 258. The Supreme Court then reversed the Court of Appeals decision and reinstated the jury verdict, concluding that DSS's post-EPC investigation presented a jury question on the issue of gross negligence. *Id.*

The essential basis for the Court determining that there was a jury issue was the testimony of the *Bass* expert, Michael Corey, who testified to the proper standard of care, opining that SCDSS *did not exercise slight care*, and was therefore *grossly negligent* in removing the Bass children from the home. *Id.* at 566-567, 780 S.E.2d at 256 (italics

added). *See also, id.* at 572, 780 S.E.2d at 259 (The expert stated the *proper standard of care* and provided examples to support his opinion)(italics added). Corey testified that DSS should only have sought placement in a relative's home after determining that the children were not safe in their own home, and that DSS was grossly negligent in removing the children. *Id.* at 567, 780 S.E.2d at 256. Even the DSS expert witness, Jocelyn Goodwyn testified that there was no evidence that Diane and Otis Bass had harmed their children, or that the children were in imminent risk of harm. *Id.* at 568, 780 S.E.2d at 257

The Appellant's reliance on *Bass* is misplaced because, as in *Bass*, there was no evidence that Owen's parents had injured him in early December, when SCDSS received the report and began its investigation, given the Hospital's inability to find non-accidental trauma. The *Bass* decision further undercuts the Appellant's argument given the Supreme Court's focus on the expert witness Corey's stating the proper standard of care—gross negligence—as its cornerstone for reversing the Court of Appeals, when the Appellant's expert Savarese was clearly not aware of the proper standard of care in offering his opinion—not once, but two times over a 20-month period—misstating the appropriate standard of care, never mentioning failure to exercise slight care, and opining that DSS was merely negligent. *See, e.g.*, Savarese Affidavits of August 4, 2011 and April 6, 2013. *See also*, *Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010)(Court found summary judgment appropriate because Plaintiff's experts failed to define the correct legal standard of care or opine how the Defendants breached the standard of care). Savarese's conclusory statements and inaccurate stating of the standard

of care, as was the case with the expert in *Harris Teeter*, do not create a genuine issue of material fact. *Id.*

The Appellant's claim against SCDSS is made with total 20-20 hindsight, asserting that the caseworker, Ms. Hill could have done more, or done it more quickly, or reached different conclusions from what she saw. The Appellant argues that Krista Hinnant should have spoken to one more hospital social worker, or another doctor or nurse before concluding that, with no medical opinion that the injury was the result of non-accidental trauma, she should never-the-less have had DSS take custody of the child and remove him from the parents. *S.C. Code Ann.* §15-78-60(25) imposes a gross negligence standard on the Appellant's claim; and in order to have survived Summary Judgment below, the Appellant must have proffered at least a scintilla of evidence, creating a genuine issue of material fact that SCDSS failed to exercise even slight care. She failed to do that.

While in retrospect, SCDSS perhaps could have done more, or done things more quickly, or done them better in the thirty-five days it had between the December 6, 2009 intake report and when Owen's father injured him January 10, 2011. Yet the fact that SCDSS did not do all things the way the Appellant and her hired expert would assert does not detract from the fact that SCDSS did, through its caseworkers and supervisors, exercise beyond slight care. The SCDSS Case Dictation alone catalogs the level of care that SCDSS went to, and it exceeds slight care. The fact that SCDSS did not do everything the Appellant argues it should have done, after-the-fact, does not detract from that..SCDSS is not grossly negligent as a matter of law. *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.

Judge Kimball properly found that SCDSS was not grossly negligent, and properly granted summary judgment. His Orders below should be affirmed.

CONCLUSION.

Owen C.'s injuries are tragic, but SCDSS did not strike the blows that injured the child, and there was nothing that SCDSS did or failed to do that could have prevented the injuries. There is no genuine issue of material fact but that SCDSS did exercise at least slight care and beyond in its efforts to respond to the December 6 intake report and investigation. As a matter of law SCDSS is not grossly negligent, and is entitled to Summary Judgment and dismissal of the Plaintiff's action. For the foregoing reasons argued in this Brief, and to be argued at oral argument, if afforded, that grant of summary judgment should be affirmed.

DAVIS FRAWLEY, LLC

By: _____

Patrick J. Frawley
Post Office Box 489
Lexington, South Carolina 29071
PHONE: (803) 359-2512
pat@oldcourthouse.com
ATTORNEYS FOR RESPONDENT

Lexington, South Carolina
November 28, 2017.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

RECEIVED
NOV 30 2017
SC Court of Appeals

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2017-001367

Elizabeth Hope Rainey, as the
Guardian *ad Litem* to Owen C.,
A minor ..... Appellant,

v.

South Carolina Department of
Social Services ..... Respondent.

CERTIFICATE OF COUNSEL

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

DAVIS FRAWLEY, LLC

By: _____

Patrick J. Frawley
Post Office Box 489
Lexington, South Carolina 29071
Telephone: (803) 359-2512
pat@oldcourthouse.com
ATTORNEYS FOR RESPONDENT SCDSS

Lexington, South Carolina
November 28, 2017.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2017-001367

RECEIVED
NOV 30 2017
SC Court of Appeals

Elizabeth Hope Rainey, as the
Guardian *ad Litem* to Owen C.,
A minor ..... Appellant,

v.

South Carolina Department of
Social Services ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent South Carolina Department of Social Services' Initial Brief and Designation of Matter for the Record on Appeal in this matter by depositing a copy of it in the United States Mail, postage prepaid on November 28, 2017, addressed to their attorney of record, Whitney B. Harrison of McGowan, Hood & Felder, LLC, 1517 Hampton Street, Columbia SC 29201.

DAVIS FRAWLEY, LLC

BY: _____

Patrick J. Frawley
140 East Main Street (29072)
Post Office Box 489
Lexington, South Carolina 29071-0489
Telephone: 803-359-2512
pat@oldcourthouse.com
ATTORNEYS FOR RESPONDENT

Lexington, South Carolina
November 28, 2017

James Randall Davis
Patrick J. Frawley
Jeff M. Anderson
John J. McCauley ◊
Carey M. Ayer Δ
Ryan M. Wingard
Evan M. Gessner

Of Counsel
Robert K. Bouknight
George S. Nicholson, Jr.

Francis C. Jones
(1919 – 1968)
Hubert E. Long
(1921 – 2000)

Davis | Frawley LLC
Attorneys at Law

Direct Dial: (803) 951-7419
pat@oldcourthouse.com

Since 1961

◊ American Board of Trial Advocates
Δ Certified Circuit Court Mediator

RECEIVED
NOV 30 2017
SC Court of Appeals

November 28, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia SC 29201

RE: *Elizabeth Hope Rainey, as the appointed Guardian ad Litem to Owen Carduff, a minor, v. South Carolina Department of Social Services.*
Appellate Case No. 2017-001367

Dear Ms. Kitchings:

Enclosed, please find the original and one copy each of the Initial Brief of Respondent South Carolina Department of Social Services, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service for the referenced appeal. Please file the originals, and return the copies to me, clocked in, in the enclosed self-addressed, stamped envelope.

By copy of this letter to the attorney for the Appellant, I am serving her with copies of the enclosed documents as well.

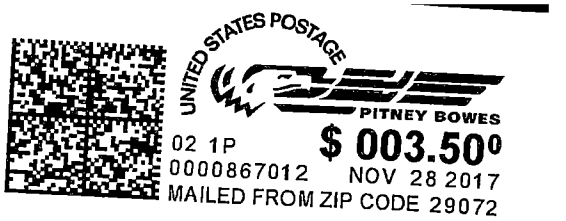
Thank you in advance for your help.

Yours very truly,

Patrick J. Frawley

Enclosures

cc: Whitney B. Harrison
McGowen, Hood & Felder, LLC
1517 Hampton Street
Columbia SC 29201



Davis | Frawley LLC
Attorneys at Law

140 East Main Street
Old Courthouse Place
P.O. Box 489, Lexington, SC 29071

RECEIVED
NOV 30 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia SC 29201