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

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SC Court of Appeals

Appellate Case No. 2017-001367

Elizabeth Hope Rainey, as the
Appointed Guardian ad Litem to
Owen C., a minor .....Appellant,

v.

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

Initial Reply Brief

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This appeal concerns the simple application of tort law. The inquiry is whether the trial court applied an incorrect standard for determining gross negligence and as a result failed to recognize genuine issues of material fact. The answer rests in the fact that summary judgment is only appropriate when there is no genuine issue of material fact and the undisputed fact results in only one legal outcome. By embracing an improper standard for gross negligence, the trial court could neither evaluate the context of slight care nor give credence to genuine issues of material fact when applying the rubric for slight care. Specifically, the trial court erred in finding the summary judgment standard requires "DSS demonstrate the absence of a factual issue concerning the exercise of 'slight care.' . . . DSS need only show from the entire record that it met the standard of slight care in this case." (Order at 7). That cannot be the gross negligence standard at summary judgment.

When taken to its logical conclusion, the trial court's interpretation ensures one outcome: DSS can never be grossly negligent. If the exercise of slight care in one instance absolves DSS from liability for other actions or inactions—there can never be liability. This is nonsensical. DSS attempts to disregard the trial court's errors by inviting a sweeping review of the underlying facts to create justification of slight care. This attempt, however, cannot reconcile the errors. This Court should reverse.

A. Gross Negligence Standard

The trial court's fundamental mistake was its failure to appreciate that the inquiry into gross negligence is two-fold. Part requires a determination as to whether DSS acted with necessary care based on whether the agency tailored its actions to the situation given the child's age and the circumstances presented. *See, Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 534 S.E.2d 275 (2000); *Clyburn v. Sumter Cty. Sch. Dist. No. 17*, 317 S.C. 50, 451 S.E.2d 885 (1994); *Hollins*

v. Richland Cnty. School District, 310 S.C. 486, 427 S.E.2d 654 (1993). South Carolina jurisprudence clarifies this inquiry is best left for the jury for younger children. *Id.* Practically, this is not surprising given the variance in the requisite level of care when a child is younger. Thereby, inviting more than one inference on the meaning of slight care based on vulnerability of both age and circumstance. The other part requires a determination as to whether DSS exercised slight care as to each undertaking. Thus, a determination as to slight care cannot be limited to a broad overview of the record as a whole. *See Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 571, 780 S.E.2d 252, 258-59 (2015). Allowing such an interpretation removes the general purpose of the statutory charges to the agency and conflicts with the plain language of the Tort Claims Act.

B. The Import of *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 780 S.E.2d 252 (2015) and the Role of Causation.

DSS attempts to support the trial court's error through a myopic discussion of *Bass*. Specifically, DSS frames *Bass* as a case about expert testimony and gives no consideration to other portions of the opinion. *See* Brief of Respondent, pp. 21-23. This interpretation blurs the import of *Bass* and confuses the issue with causation as it relates to genuine issues of material fact.

Prior to addressing expert testimony in *Bass*, the Supreme Court distinctly recognized that the exercise of slight care in one instance did not insulate DSS indefinitely for other action or inaction. Thus, the inquiry turned on whether there was evidence of slight care within each undertaking.

While DSS suggests *Bass* is inapplicable because it involved expert testimony and undercuts Appellant's expert, the reality is the discussion of expert testimony has no bearing on this appeal. In *Bass*, the Court was reviewing the expert testimony provided at trial under an any

evidence standard to determine if a jury verdict could be upheld. Here, Appellant's expert offered separate opinions on the standard of care and causation.[1]

DSS would have this Court disregard these opinions because of the standard of care referenced in the affidavit. This contention is unsupported by law. First, this is not a case in which an expert opinion is statutorily required. *See Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, 390 S.C. 275, 289 701 S.E.2d 742, 749 (2010) (addressing an expert affidavit within the context of legal malpractice); *see also Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014) ("[T]he plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge."); *Bramlette v. Charter–Med.–Columbia,* 302 S.C. 68, 72–73, 393 S.E.2d 914, 916 (1990) (holding expert testimony is not required to prove proximate cause). Thus, any argument that summary judgment is proper because of a deficiency in an affidavit is unfounded. Second, the Appellant's expert's opinions are distinct. Put simply, the causation opinion creates a genuine issue of material fact. Moreover, it discharges any issue of proximate cause raised by DSS or the trial court. For these reasons, DSS's interpretation of *Bass* is inapplicable.

C. Genuine Issues of Material Fact were Ignored.

Although the parties disagree on the interpretation of *Bass,* what is undisputed is the opinion did not alter the summary judgment standard. The trial court erroneously dismissed genuine issues of material fact by weighing the evidence presented under its interpretation of slight

[1] As to the standard of care, Appellant's expert addressed three breaches: failing to conduct an appropriate assessment of the risks factors for child abuse, initiating and facilitating an appropriate discharge plan, and protecting a vulnerable child from abuse. (Affidavit at 2). As to the causation, Appellant's expert states that the "actions or inactions of DSS "contributed to the injuries and damages of Owen C." *Id.*

care. The evidence offered provides more than one reasonable inference and the trial court erred in evading the province of the jury.

At summary judgment, the trial court's duty is to determine whether there is a genuine issue of fact to be tried. *See Spencer v. Miller,* 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972). Even if there is no dispute as to the evidence, summary judgment is not appropriate where there is a dispute as to the conclusion or inference to be "drawn from those facts and to clarify the application of the law." *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002).

DSS defends the trial court's error by contending because it took some action over the course of the investigation that its obligation of slight care was satisfied. Specifically, DSS suggests the following evidence sufficiently satisfied slight care: DSS's involvement during the initial twenty-four hours following Owen C.'s arrival to Levine, the staffing of his case the next morning, and unsuccessful attempts at a home visit.

In response, Appellant set forth evidence establishing DSS's statutory duty to act within each undertaking and evidence raising genuine issues of whether each duty was breached. *See* S.C. Code Ann. § 63-7-310, S.C. Code Ann. § 63-7-920; S.C. Code Ann. § 63-7-980. (CPS manual 0013; 0052-53; 0057; Hinnant Deposition at 87; Sutherland Deposition at 32–35; Hill Deposition at 27–28). As to the duty and standard of care, Appellant put forth the applicable statutory duties, DSS's handbook, and internal policies and procedures to establish each undertaking. As to breach, Appellant submitted deposition testimony: that at the time of Owen C.'s discharge non-accidental trauma could not be ruled out, DSS had no contact with any family member for ten days and no contact with Owen C. for fourteen days, and DSS workers acknowledged it was their responsibility to follow up with the family pursuant to DSS's policies and that had not been accomplished.

Perhaps the most blatant genuine issue ignored by the trial court is DSS's failure to exercise slight care in reporting suspected child abuse to law enforcement pursuant to the statutory mandate and its own policies and procedures. S.C. Code Ann. § 63-7-980; (Exhibit 9, DSS Policy and Procedure at 17). Appellant provided deposition testimony of two DSS workers stating it was DSS's responsibility to contact law enforcement within twenty-four hours given Owen C.'s injuries. (Hill Deposition, at 27-28; Hinnant Deposition at 24; Sutherland Deposition at 33). This breach is further supported by Lieutenant Miller's call with DSS, in which he repeatedly expressed his frustration arising from DSS's failure to contact law enforcement. (Transcript of Call at 7-10, 14).

In addition to ignoring or weighing this evidence, the trial court erroneously determined the issue of proximate cause. *See* Order at 7, fn.2 (stating "while DSS did not act within the prescribed time to notify law enforcement, that failure was not the proximate cause of the tragic injury to Owen [C.]"); *see also S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001); *Anderson*, 477 U.S. 242, 249 (1986) (explaining the trial court is not to weigh the evidence but rather to determine if there is a genuine issue for trial). The question of proximate cause is one that should be left to the jury, especially given Owen C.'s age as discussed *supra*. *See McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (recognizing that ordinarily, proximate cause is a question for the jury).

The trial court's causation holding ignores evidence and the genuine issues raised by Appellant that set forth the multiple ways in which the failure to contact law enforcement connect to DSS's investigation. Further, Appellant's expert affidavit as to causation offered more than a scintilla of evidence to create a genuine issue of material fact. (Affidavit at 2).

In sum, the trial court's disregard of controlling case law blurred the requisite standard and appreciation of the evidence presented.

D. The Trial Court's Order Insulates DSS from All Liability Arising from Gross Negligence

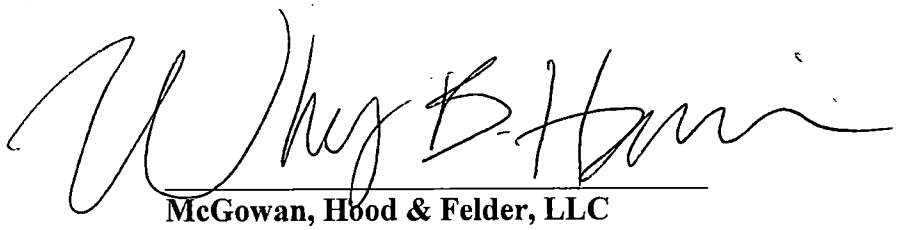
If this order is upheld, DSS can never be held liable. Under a plain reading of the order, if DSS offers any evidence that it acted with slight care in one instance then summary judgment must always be granted. No case could ever proceed to trial. DSS will always be able to assert an action qualifies as slight care. When taken to fruition, no evidence suggesting the absence of care is relevant if DSS only needs to show slight care in one instance. Such a proposition is preposterous.

The things we know for sure: the Generally Assembly enacted the Tort Claims Act to limit liability for gross negligence, not absolve all liability. S.C. Code Ann. § 15-78-60; *Giannini v. S.C. Dep't of Transp.*, 378 S.C. 573, 583–84, 664 S.E.2d 450, 455–56 (2008). We know at summary judgment the trial court serves as a gatekeeper to determine the existence of evidence not to weigh the evidence. We also know summary judgment is a drastic remedy that is used cautiously. *Doe ex rel. Doe v. Batson,* 345 S.C. 316, 322, 548 S.E.2d 854, 857 (1999). Further, we know that a determination of slight care is a question for the jury, especially with a young child. *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277 ("We took notice of the age difference between the parties and distinguished the steps taken by the administrators in *Clyburn* to control the situation.").

These well recognized principles, however, cannot be harmonized with the trial court's order. If one instance of slight care truly absolves DSS from liability for other actions or inactions, opposing summary judgment is futile and these principles are obsolete. Respectfully, if this case does not survive summary judgment then no case will.

CONCLUSION

Based on the forgoing reasons, the trial court's grant of summary judgment should be reversed and this matter should proceed to trial.



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PROOF OF SERVICE

The undersigned hereby certifies that on January 2, 2018 she served counsel for Respondent with the *Initial Reply Brief of Appellant* in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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January 2, 2018

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RE: *Elizabeth Hope Rainey, v. South Carolina Department of Social Services*
Appellate Case No. 2017-001367

Dear Ms. Kitchings,

Enclosed please find the original and one copy of the Appellant's Initial Reply Brief. Please return a clocked copy. If you have any questions or concerns, please do not hesitate to contact me.

With kind regards,

Sincerely,

Whitney B. Harrison

cc:

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Enclosures