

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

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

v.

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

RECEIVED
FEB 12 2018
SC Court of Appeals

RECORD ON APPEAL

Volume II of II

Davis Frawley Law Firm

Patrick J. Frawley
Post Office Box 489
Lexington, SC 29071
Phone: (803) 359-2512

ATTORNEY FOR RESPONDENT

McGowan, Hood & Felder, LLC

Whitney B. Harrison
1517 Hampton Street
Columbia, SC 29201
Phone: (803)-779-0100

S. Randal Hood
Lara P. Harrill
Jordan C. Calloway
1539 Health Care Drive
Rock Hill, SC 29732
Phone: (803) 327-3800

ATTORNEYS FOR APPELLANT

Shaw Law Firm

Duane Shaw
Nathan J. Sheldon
1169 Ebenezer Road
Rock Hill, SC 29732
Phone: (803) 329-4200

INDEX

Volume I

ORDERS

Order for Summary Judgment, filed March 31, 2017.....	1
Order Denying Motion to Reconsider, filed May 24, 2017.....	10

PLEADINGS

Complaint.....	14
Answer of South Carolina Department of Social Services	44

MOTIONS, SUPPORTING MEMORANDA AND OTHER FILINGS

Defendant's Motion & Memorandum of Law in Support of Motion for Summary Judgment....	53
Motion.....	53
Memorandum of Law in Support of Motion for Summary Judgment.....	63
Exhibit A— Intake.....	77
Exhibit B—Case Dictation.....	82
Exhibit C—DSS Brochure.....	106
Exhibit D—Safety Plan.....	109
Exhibit E—Excerpts of Lola Sutherland Deposition	110
Exhibit F— Excerpts of Krista Hinnant Deposition.....	112
Exhibit G—Excerpts of Dirvondra Hill Deposition.....	119
Exhibit H—Case Transfer/Case Staffing Form.....	122
Exhibit I—Legal Staffing Form.....	124
Exhibit J—Letter from Dirvondra Hill.....	126
Exhibit K—York County Sheriff Department.....	127
Exhibit L—Case Transfer/Case Staffing Form.....	132

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.....	134
Exhibit 1—Piedmont Medical Records.....	156
Exhibit 2—Carolina Health Care System Records.....	158
Exhibit 3—Excerpts of Deposition of Krista Hinnant.....	167
Exhibit 4—Case Dictation.....	176
Exhibit 5—Excerpts of Deposition of Dirvondra Hill.....	205
Exhibit 6—DSS's Referral to Law Enforcement Letter.....	212
Exhibit 7—Transcript of Call between DSS and Law Enforcement.....	214
Exhibit 8—News Articles.....	226
Exhibit 9—Excerpts of DSS Policy and Procedure Manual.....	238
Exhibit 10—National Association of Social Workers Code of Ethics.....	274
Exhibit 11—Rap Sheet for Charlotte Lythoge Jaegee (Williams) & Excerpt of Deposition of Charlotte Williams.....	316
Exhibit 12—Affidavit of George W. Savarese.....	320
Exhibit 13—Excerpts of Deposition of Cheryl Courtlandt.....	362
Exhibit 14—Excerpts of Deposition of Lola Sutherland.....	364
Exhibit 15—Excerpts of Transcript of Call between DSS and Law Enforcement.....	368
Plaintiff's Motion to Alter or Amend and For Reconsideration.....	395

VOLUME II

TRANSCRIPTS

Transcript of Motion Hearing, March 13, 2017.....	412
Transcript of 59(e) Hearing, May 18, 2017.....	482

State of South Carolina	)	
	)	
County of York	)	
	)	
Elizabeth Hope Rainey,	)	11-CP-46-04508
as the appointed	)	
Guardian ad Litem to	)	
Owen [REDACTED] a minor,	)	
	)	
Plaintiff,	)	Transcript
	)	
v.	)	of
	)	
South Carolina Department	)	Hearing
of Social Services,	)	
	)	
Defendant.	)	

Date: March 13, 2017

Time: 2:31 p.m.

Location: Historical York Courthouse, 2 South Congress
Street, York, South Carolina

Reported by
Kathleen R. Tackett, CVR-M

APPEARANCES

Presiding: The Honorable S. Jackson Kimball
York County Government
York, South Carolina

For the Plaintiff: Whitney B. Harrison, Esq.
McGowan Hood & Felder, LLC
Columbia, South Carolina

Eve S. Goodstein, Esq.
McGowan Hood & Felder, LLC
Rock Hill, South Carolina

For the Defendant: Patrick J. Frawley, Esq.
Davis Frawley, LLC
Lexington, South Carolina

Also present: Duane Shaw, Esq.

INDEX

Proceeding: 3

EXHIBITS

No exhibits were marked during the course of this
hearing.

1 PROCEEDINGS

2 THE COURT: This is Case Number 2011-CP-46-04508,
3 "Elizabeth Hope Rainey and others against the --
4 now only the Department of Social Services." This
5 is the defendant's motion for summary judgment.

6 Mr. Frawley, if you're ready.

7 MR. FRAWLEY: I'm ready, Your Honor. May it please the
8 Court?

9 THE COURT: Yes, sir.

10 MR. FRAWLEY: Your Honor, this is our motion for summary
11 judgment. I -- I represent the sole remaining
12 defendant in this case, the South Carolina
13 Department of Social Services. I'm Pat Frawley with
14 the Davis Law Firm in Lexington. Your Honor's had
15 some involvement in this case, earlier, with the
16 hospital.

17 THE COURT: More than some.

18 MR. FRAWLEY: Yes, sir. A good -- a good bit, actually.
19 This -- the issue here, I think, is probably a
20 little more cleanly defined than that earlier one
21 was, at least with regard to what Your Honor will
22 have to -- to determine. We filed our motion for
23 summary judgment, originally, September 9th of
24 2013. The matter was then stayed while it was on
25 appeal, and, then, once the appeal was concluded,

1 we had a -- a status conference with the Court.
2 And then we refiled our motion for summary judgment
3 January 4 of 2017. In our motion, we essentially
4 have two grounds. The first is that there's no
5 genuine issue of material fact, but that SCDSS,
6 through its agents and employees, exercised at
7 least slight care and beyond in its investigative
8 efforts and handling of the matter between the
9 December 6, 2009, intake report received by DSS,
10 from the hospital, and the January 11, 2010, injury
11 sustained by the minor child, Owen [REDACTED] that it
12 was a devastating injury and that he -- he still
13 suffers from and will continue to suffer from
14 foreout his -- throughout his life and that we were
15 not grossly negligent, as a matter of law, by
16 virtue of the fact that there was at least slight
17 care that was exercised.

18 The second ground is that there's no evidence
19 that the injury to the child was triggered -- that
20 -- that triggered the December 6th intake report,
21 was the result of any act or omission of the father
22 of Owen [REDACTED] a young man named "Michael
23 [REDACTED] who later admitted to the second injury,
24 and that there was no notice that DSS should've had
25 adequate cause to suspect Mr. [REDACTED] and that he

1 would willfully and criminally injure the child 36
2 days later.

3 Your Honor, this -- this motion will
4 essentially come down to whether the Court
5 determines that what DSS did, between December 6th
6 -- the December 6th intake and the January 11
7 injury, amounts to at least slight care. And --
8 and -- or we've cited for Your Honor three cases,
9 that the plaintiff has cited, as well, and we've
10 handed those -- those -- three of those copies up
11 to you, Your Honor. Those cases are "Clyburn v.
12 Sumter County School District." That's a -- a
13 South Carolina Supreme Court case from 1994. It's
14 451 S.E. 2d 885. The next case and the one that we
15 principally rely on is "Etheridge v. Richland
16 School District 1." Again, it's a Supreme Court
17 case, 534 S.E. 2d 275. That's a 2000 case. And,
18 then, a case that I don't cite in my memorandum,
19 but the -- the plaintiffs do, and -- and it is an
20 applicable case, "Bass v. SCDSS." That's also a
21 Supreme Court case, and that is 780 Southeast
22 Second 252, and that's a 2015 case. Those would be
23 the three main cases, I think, Your Honor.

24 We've also handed up the Rainey opinion from
25 the Court of Appeals. That's actually an

1 unpublished opinion and has no precedential value,
2 but the plaintiff cited it, so -- so we've provided
3 it to Your Honor, as well.

4 And the -- the issue that we're arguing is a
5 fairly well-defined issue. If Your Honor, in
6 reviewing what it is we did, amounts to at least
7 slight care, under Etheridge, if -- if it is at
8 least slight care, it is not gross negligence as a
9 matter of law. And the fact that the defendant may
10 not have done everything it could possibly have
11 done, or maybe it could've done things better, or
12 maybe it could've done more, does not negate the
13 fact that it, at -- at least, did have slight care
14 and, therefore, is not grossly negligent, as a
15 matter of law, and summary judgment should be
16 granted. So that's the fairly narrowly defined
17 issue for Your Honor to look at.

18 THE COURT: Let me stop you there. I --

19 MR. FRAWLEY: Yes, sir.

20 THE COURT: You know, I -- I read -- I read the material
21 that was given, not that, and the one --one
22 question I had is -- and since I'm -- you know, I
23 -- I -- I was involved with the -- with the first
24 decision. It had to do with the Charlotte-
25 Mecklenburg --

1 MR. FRAWLEY: Yes, sir.

2 THE COURT: -- Hospital Authority -- is: What -- what
3 is the process that DSS must follow in taking --
4 what we're talking about is they should've removed
5 the child from the house based on -- at this point,
6 it seems to me, should've removed the child from
7 the house based on the December 6 incident.

8 MR. FRAWLEY: Yes, sir.

9 THE COURT: What would be -- what would DSS have to do
10 in order to do that?

11 MR. FRAWLEY: Your Honor, when a -- a report comes in,
12 the first stage of it is the -- the -- the response
13 to it, which -- which they clearly did. Ms. Tyler
14 was the on-call caseworker who responded that day.
15 She's supposed to go there. She's supposed to talk
16 to the reporter. She's supposed to talk to
17 collaterals who were there, talk to the parents,
18 which she did, hand out the brochures. She did all
19 that the first day. The next day, it gets -- it
20 gets transferred to Assessment, and that -- that
21 was done the next day. There were two staffings.
22 Now, once the intake comes in, DSS has to assess
23 whether there is a -- a threat of harm to the
24 child. They have 45 days to do that. And what
25 they have to do is look into it and determine if

1 there is -- if it is more likely than not that
2 there's a threat to the child. That's -- that's
3 supposed to be their criteria. That's what they
4 look at. Now, they have 45 days. If they need
5 more time, they can ask for an additional 15 days.
6 They could have up to 60 days.

7 THE COURT: Yeah. But, I mean, they can't -- this --
8 this first injury took place on December 6, and the
9 -- the second event was -- that was nearly fatal --

10 MR. FRAWLEY: -- 36 days later.

11 THE COURT: -- was January 11th?

12 MR. FRAWLEY: Yes, sir.

13 THE COURT: Well, I mean --

14 MR. FRAWLEY: Actually, the first injury was the 5th.
15 It was reported on the 6th.

16 THE COURT: That's right. The -- that's right. The --
17 the child was taken to Piedmont on the 5th.

18 MR. FRAWLEY: Yes, sir.

19 THE COURT: I mean . . .

20 MR. FRAWLEY: What -- what they're supposed --

21 THE COURT: They don't -- they don't -- they -- they
22 don't -- they can't sit for 45 days --

23 MR. FRAWLEY: No.

24 THE COURT: -- and -- and -- and -- to evaluate
25 something, and they didn't take -- and -- and the

1 -- and the -- and that the -- the elapsed time
2 between the first event and the second was not 45
3 days.

4 MR. FRAWLEY: No, sir. It was 36 days.

5 THE COURT: Well, so my question is: What do they need
6 to do -- I'm not interested in whether they had 45
7 days to assess it. What is the process, given the
8 evidence generated by the December 6 "information,"
9 I'll call it, by which they -- that they would've
10 had to go through to -- to remove the child at that
11 point?

12 MR. FRAWLEY: They have -- they have to investigate.

13 And -- and, in investigating, the first thing
14 that --

15 THE COURT: I'm talking about the due process part, and
16 I don't -- "due process" isn't the right word.
17 What -- what procedure do they go through, and
18 based on what do they -- what standard do they go
19 by to remove a child?

20 MR. FRAWLEY: Well, when -- when they go in there, they
21 -- they can either -- if -- if they -- they go in
22 and they talk to the parents, and the parents says,
23 "You're not taking our kid, and we didn't do
24 anything wrong," then their options are to talk to
25 the other people, the collaterals there, which they

1 did.

2 THE COURT: Obviously.

3 MR. FRAWLEY: And then, based on that, if they think
4 there's a threat of harm, and they're not getting
5 cooperation from the parents, they -- they have to
6 EPC, or put -- bring the child into emergency
7 protective custody. That, again, we -- we -- the
8 Bass case is a case that has some similarity to
9 this. That was a case in which there was a report
10 of suspected parental poisoning. DSS received a
11 report that there were two children of the Bass
12 family that were in Richland Memorial Hospital on
13 life support.

14 THE COURT: Let -- let -- let me back up. What -- what
15 DSS had, on December the -- after December the 6th,
16 is a -- a -- a report from -- from Levine
17 Children's Hospital that said this -- this child
18 had, if I remember right, two bruises on the brain.

19 MR. FRAWLEY: Subdural hematomas.

20 THE COURT: All right. Two bruises on the brain. And
21 -- and the -- the -- the physician and staff of the
22 hospital could not say that the injury was due to
23 abuse?

24 MR. FRAWLEY: Right. "Non-accidental trauma" is -- is
25 the term they use.

1 THE COURT: "Non-accidental trauma" is the word. That's
2 right. Now, given that, what is the process?
3 That's what I want to know.

4 MR. FRAWLEY: Well, the -- the process, at that point --
5 since they can't rely on -- on the reporter
6 actually telling them that this looks like abuse or
7 neglect, they then have to do an investigation.
8 And -- and they don't have the right to just remove
9 the child unless they think there's a threat of
10 harm to the child. And the issue here --

11 THE COURT: Based on what?

12 MR. FRAWLEY: Exactly. Based on what? The information
13 we got from the reporter was, "We think these are
14 just young kids who are not experienced enough as
15 parents," and it did not rise to the level yet, in
16 -- in DSS's mind, of -- of putting the child in --
17 in jeopardy yet. They felt, with a safety plan,
18 which is what they entered into -- Ms. Tyler had
19 them enter into that at that time --

20 THE COURT: Three of them.

21 MR. FRAWLEY: -- with a safety plan and, then, checking
22 a little further with the hospital to see if
23 there's some other indicia of -- of non-accidental
24 trauma. They -- they bought some time there. So
25 Ms. Hinnant, when the case was transferred to

1 Assessment the next morning -- they staffed the
2 next morning. Ms. Hinnant was the supervisor.
3 Dirvondra Hill was the caseworker who got it.

4 THE COURT: Uh-huh.

5 MR. FRAWLEY: Ms. Tyler was like a foster care worker,
6 and her supervisor was a lady named "Lola
7 Sutherland," who was also in foster care. They
8 just had it for that weekend. It got transferred
9 the morning of September 7th -- or December 7th,
10 and Ms. Hinnant made some phone calls to the social
11 workers at -- at the hospital, a "Ms. Newmark" and
12 a "Ms. McDonald," I think, to -- to find out, you
13 know, "Do -- do you guys have any information
14 indicating this is anything more than possibly an
15 accidental injury?" And they -- they did not get
16 any clear read from them. So the next thing they
17 have to do is do a home visit, which is what
18 Dirvondra Hill attempted to do that day, December -
19 -

20 THE COURT: Right.

21 MR. FRAWLEY: -- 7th.

22 THE COURT: Right.

23 MR. FRAWLEY: She went there. There was nobody there.

24 THE COURT: Right.

25 MR. FRAWLEY: She went back December 8th and tried

1 again. Nobody there.

2 THE COURT: Nobody there.

3 MR. FRAWLEY: She went back December 10th. Still,
4 nobody there. She went again -- in the meantime,
5 she sends out a home-visit letter saying, you know,
6 "We're -- we're going to come the morning of" -- I
7 think it was nine o'clock in the morning on
8 December 21st. "Y'all need to be there then." In
9 the interim, she still checks again, on December
10 17th, and does find Kayla Lythgoe, the mother, and
11 sees Ms. Lythgoe. But Ms. Lythgoe says, "I'm on my
12 way to work. The baby's not here. She's with --
13 he's with my -- my mom, and my husband's not here"
14 -- or "my boyfriend's not here, either." I don't
15 think they were married. So they -- they, again,
16 reaffirmed the December 21st date, when they were
17 going to meet. Ms. Hill did go there December 21st
18 and puts in her -- in her dictation, which we've
19 provided as a -- as a -- an appendix to our
20 memorandum for Your Honor to review. And, in that
21 visit, everything looked fine. They're -- they're
22 -- Mr. [REDACTED] on the floor playing with his son.
23 Everything looks fine. The house is presentable.
24 That's December 21st.

25 We send out -- Ms. Hill had sent out criminal

1 records checks to the York County Sheriff's
2 Department. Now, there's -- there's some dust been
3 raised about, "Well, you're supposed to do that
4 right away, not -- not ten days later." But the
5 issue -- that's less an issue because their -- when
6 they did get the results back from the criminal
7 records check, neither Lythgoe no -- nor Michael
8 [REDACTED] had any kind of criminal record. The one
9 who did have was the -- the maternal grandmother
10 who had a CDV from a few years ago. So, even had
11 that criminal records check gone out the same day
12 the report came in, we would not have found
13 anything out other than the fact that neither the
14 mom nor the dad, one who's 18, one who's 19, had
15 any kind of criminal record. So, while that's
16 something that the plaintiff has argued, that
17 really has nothing to do with -- with what
18 happened. On the 21st, Ms. Hill made the visit --
19 finally made the contact, after four unsuccessful
20 attempts.

21 THE COURT: Right.

22 MR. FRAWLEY: And then she and her supervisor, Ms.

23 Hinnant, again staffed it, I think, January 4th, a
24 week before the boy was hurt. Now, there had been
25 no injury between December 6th and the criminal

1 records check. There was no injury between
2 December 6th and the December 21st visit, the home
3 visit, when everything looked great and no -- no
4 injury between the -- the intake and the November
5 4th staffing. The injury happened a week later,
6 and -- and there was no indication, during any of
7 that time, that -- that -- that there should've
8 been an issue that would've caused removal of -- of
9 the child. Now, one of the -- the issues -- the --
10 the plaintiffs actually raised four questions in
11 their -- in their memorandum. They say, first,
12 "DSS's position that the only reasonable inference
13 from the record" --

14 THE COURT: Well, let -- let me do this.

15 MR. FRAWLEY: Yes, sir.

16 THE COURT: You tell me your side, and then I'll let
17 them tell me their side.

18 MR. FRAWLEY: Well, my side is that, if you look at what
19 DSS did, from the time they were called to the time
20 this young man was injured, they did exercise at
21 least slight care and beyond. I mean, they -- they
22 responded appropriately. The brochure was given
23 out, so Lythgoe and [REDACTED] knew what their legal
24 rights were. Ms. Tyler spoke with collaterals that
25 were there.

1 THE COURT: What is the nature of -- what is -- what is
2 the nature and the trigger that -- that -- that --
3 that -- well, the -- what triggers a safety plan?

4 MR. FRAWLEY: A --

5 THE COURT: There were three -- if I remember right,
6 there were three safety plans.

7 MR. FRAWLEY: There were. A safety plan is -- if -- if
8 there's a report and the assessment caseworker goes
9 there, the first thing she tries to do is -- is
10 assess it, see what's there and then determine --

11 THE COURT: No. Well, no, no -- stop. Hold -- hold on.
12 What -- what triggers the need for a safety plan?

13 MR. FRAWLEY: The report.

14 THE COURT: What is it that says -- what -- why does
15 this -- why does this lady, the -- the -- the
16 caseworker, say, "Okay. Parents, we've got to do a
17 safety plan"?

18 MR. FRAWLEY: Because there's been a report. There's
19 been a report, and either they're --

20 THE COURT: But you're telling --

21 MR. FRAWLEY: -- they're going to have to --

22 THE COURT: -- me the report -- you're telling me the
23 report showed no indication of any need for
24 anything?

25 MR. FRAWLEY: Well -- but there's a report. They

1 thought enough of it that there's a report. Once
2 there's a report, they've got to investigate, and
3 they've got to do something to stop the momentum,
4 make sure that there's safety in place. And that's
5 either going to be with a voluntary safety plan,
6 or, if -- if the parents balk at that and say,
7 "We're not going to do that. We saw our legal
8 rights in the brochure, and we're not going to let
9 you do this. We're not going to enter it," then
10 the next thing is Ms. Tyler would've had to call
11 law enforcement and would've had to have the child
12 taken into emergency protective custody if she felt
13 it warranted it at the time. Now, at that time,
14 the child was in a hospital. That's why the report
15 was only of -- of -- of medium importance.

16 THE COURT: You're talking about the time while the
17 child was still at CMC?

18 MR. FRAWLEY: Yes. She was -- she was still there while
19 the -- the kid's under some -- some level of care.
20 But that would've raised the issue and would've --
21 would've raised the antennas a little more for the
22 following day when Ms. Hinnant is saying, "Well,
23 you know, do -- do we let the child go home on the
24 7th, or do we require something else?" The
25 something else they could've required at that point

1 would have been taking the child into emergency
2 protective custody. Now, the hospital had no duty
3 to keep the -- keep the child longer.

4 THE COURT: They had -- they had no right to --

5 MR. FRAWLEY: Had --

6 THE COURT: -- keep the child.

7 MR. FRAWLEY: Had no -- no duty or right. And -- and --
8 and that was taken care of in -- in the motion for
9 summary judgment. So what should've happened at
10 that point is -- if there had not been a safety
11 plan, if they said, "No. We're not going to do
12 it," or if Ms. Tyler felt that a safety plan was
13 not going to be sufficient, based on the
14 information they had -- for instance, if -- if --
15 if the hospital said, "It looks like non-accidental
16 trauma to us," which had been their -- their
17 history -- usually, DSS and -- and the hospital
18 were pretty much on the same page with that stuff.

19 THE COURT: Uh-huh.

20 MR. FRAWLEY: It went through DSS, and I believe Ms.
21 Hinnant says it in -- in her deposition. It went
22 through DSS -- is that, "The hospital is -- is kind
23 of on the -- on the fence on this one. We're not
24 sure." So, if there's -- if there was no clear
25 indication of non-accidental trauma, then it's --

1 it's a judgment call with -- with -- with Ms.
2 Hinnant. You know, "Do we -- do we exercise an
3 emergency protective custody, bring an action, take
4 -- take the kid into foster care, or maybe place
5 him with -- with the grandparents?" -- which --
6 which would've -- you -- you try to -- you try to
7 place with family first. That probably would've
8 been their -- their first request -- "or do we --
9 do we go with a safety plan?" That -- that's where
10 they -- they had that. Your -- Your Honor's
11 question was, "What triggers a safety plan?"

12 THE COURT: Uh-huh.

13 MR. FRAWLEY: If they think that, given that -- that
14 report, "Something needs to be done to -- to
15 maintain the status quo and maintain some level of
16 safety with the child at this point." So they
17 entered into a safety plan. The -- the parents
18 were -- were willing and cooperative in doing that.

19 THE COURT: I understand.

20 MR. FRAWLEY: Okay.

21 THE COURT: And the -- and safety plan number one was
22 entered into while the child was still at CMC?

23 MR. FRAWLEY: Yes.

24 THE COURT: All right. When was number two?

25 MR. FRAWLEY: It -- there's some question about that

1 because Ms. -- Ms. Hill would've had to have gotten
2 the parents to sign it, and she couldn't get hold
3 of the parents.

4 THE COURT: That's what I thought.

5 MR. FRAWLEY: The 7th, she couldn't find them. The 8th,
6 she couldn't find them. The 10th, she couldn't
7 find them. When she finally got Kayla Lythgoe, on
8 the 17th, that's the first time there's another
9 signature by the parents, on the 17th.

10 THE COURT: All right.

11 MR. FRAWLEY: And then there were a couple others after
12 that. In fact, I think -- I think the fourth,
13 may've been after the -- after the second injury.

14 THE COURT: Well, why do you need -- what was the
15 difference in the safety plans between number one
16 and number three?

17 MR. FRAWLEY: Number one, the -- the child is in -- in
18 the hospital.

19 THE COURT: -- hospital. I understand that.

20 MR. FRAWLEY: And number two, the child's out of the
21 hospital, and there's -- they -- they have to have
22 -- because you don't have the hospital there taking
23 care of the child, you've got to have maybe a
24 little higher -- a little higher standard for --
25 for what -- what needs to be done for the -- what

1 the parents have to do.

2 THE COURT: Uh-huh.

3 MR. FRAWLEY: And I -- I don't specifically recall what

4 -- what was in that second safety plan--

5 THE COURT: And I have not --

6 MR. FRAWLEY: -- as we're here today.

7 THE COURT: Either -- either side, I have not read a --

8 I've read about the safety plans because I tried to

9 read the memos and -- and -- and things, and I --

10 and I'm familiar with the facts of the case, from

11 the last time I heard it, but is there -- is there

12 an exhibit, a safety plan that's an exhibit --

13 MS. HARRISON: (To the Court) I don't --

14 THE COURT: -- safety plans, plural?

15 MS. HARRISON: I don't believe the plaintiff submitted

16 the safety plans, but I'm happy to e-mail those to

17 you after the hearing.

18 MR. FRAWLEY: I --

19 THE COURT: Well, no.

20 MR. FRAWLEY: I believe I --

21 THE COURT: I need them now. This is the hearing.

22 MR. FRAWLEY: I believe I have it in there, Your Honor.

23 Let me double-check.

24 THE COURT: (To Ms. Harrison) I do know one thing: I

25 -- I -- I -- somehow I think I left your memo on my

1 desk, so let me go get that right quick.

2 MR. FRAWLEY: Your Honor, the first safety plan is

3 Appendix D to the defendant's memorandum.

4 THE COURT: Okay. I didn't print out the memorandum.

5 Do you have an another -- and extra copy of your

6 memo?

7 MR. FRAWLEY: I -- I -- I've got another copy.

8 THE COURT: She's going to give it to me.

9 MS. HARRISON: Of mine or --

10 MR. FRAWLEY: No. That -- that's yours

11 MR. FRAWLEY: I have an extra copy. I just -- I filed

12 one today.

13 THE COURT: All right. Thank you. I just printed out

14 the law part.

15 MR. FRAWLEY: You can hang on to that one, Your Honor. I

16 -- I've got another one.

17 THE COURT: Thank you.

18 MR. FRAWLEY: Appendix -- again, Appendix D is the --

19 the first safety plan.

20 THE COURT: Okay. Hang on one second. Let me see if I

21 can find that. A -- D, okay.

22 MR. FRAWLEY: And I may not have the second safety plan

23 in here. I do not have the second safety plan in

24 here. I have the -- the case transfer and

25 staffing.

1 THE COURT: What -- all right. I -- I -- I'm -- I'm
2 trying to read it. The first handwritten sentence,
3 not -- not the names at the top, says, "Owen
4 [REDACTED] admitted to CMC" -- something -- "on" --

5 MR. FRAWLEY: -- "with subdural hematoma."

6 THE COURT: Yeah. I got that. What's the next sentence
7 say?

8 MR. FRAWLEY: "Concerns of" --

9 THE COURT: Concerns?

10 MR. FRAWLEY: Yeah. "Concerns of" -- and then see the
11 caret below there -- "possible non-accidental
12 trauma."

13 THE COURT: Well, whose concerns?

14 MR. FRAWLEY: The hospital. That -- that -- that first
15 part there describes the safety threats, including
16 a description of when, how often, and under what
17 circumstances they are present, under influences
18 involved, and how parents and caregivers' access to
19 the children affect the safety threats. She's
20 basically restating what the -- what the intake
21 was.

22 THE COURT: I remember, from the -- from the prior
23 hearing, that -- that although the -- the -- the --
24 the reports from the -- was it an MRI?

25 MR. FRAWLEY: Yes, sir.

1 THE COURT: The reports from the MRI were -- were not --
2 "inconclusive" isn't the right word. I don't
3 remember right now, but -- but that, somewhere or
4 another, there was an exchange about -- there was
5 -- something was said about somebody having
6 concerns. And I -- I can't -- was it the doctor or
7 the -- some staff of -- of -- of Levine's Children
8 Hospital, or where did that come from?

9 MR. FRAWLEY: Well, it wasn't clear who made the intake
10 report, and -- and that's typically kept
11 confidential. We know it came from the hospital.
12 There was one nurse when our --

13 THE COURT: Oh, from --

14 MR. FRAWLEY: -- when our caseworker --

15 THE COURT: -- Piedmont --

16 MR. FRAWLEY: -- went there --

17 THE COURT: -- or CMC?

18 MR. FRAWLEY: From CMC.

19 THE COURT: Okay.

20 MR. FRAWLEY: The kid went to Piedmont first.

21 THE COURT: I -- I know.

22 MR. FRAWLEY: And, then, from there, he went to CMC.

23 And CMC --

24 THE COURT: I know.

25 MR. FRAWLEY: CMC is a -- is a -- they -- they are one

1 of the leading hospitals as far as abuse, neglect,
2 being able to recognize that.

3 THE COURT: Right.

4 MR. FRAWLEY: And the call came from CMC. Now, whether
5 it was a doctor or a nurse practitioner or a social
6 worker -- one of the nurses that Ms. Tyler saw,
7 when she went that first night, thought that Ms.
8 Tyler was there for purposes of relieving the
9 babysitter, didn't even indicate that -- that she
10 recognized that DSS had been called.

11 THE COURT: I'm sorry. Say that again. I beg your
12 pardon.

13 MR. FRAWLEY: When Ms. Tyler, the responding
14 caseworker --

15 THE COURT: Yeah.

16 MR. FRAWLEY: -- went there that night, one of the
17 people she talked to -- one of the medical
18 collaterals she spoke with was a nurse, and the
19 nurse appeared to think that Ms. Tyler was there --
20 DSS was there in order to relieve the babysitter as
21 opposed to --

22 THE COURT: Oh, I remember that. Yeah. Yeah. Yeah.

23 MR. FRAWLEY: I mean, she's the only one that had that.

24 THE COURT: Yeah.

25 MR. FRAWLEY: I mean, she obviously was misinformed,

1 but --

2 THE COURT: So, now, what we got here is there's a
3 report that says, "Concerns of non-accidental
4 trauma -- possible non-accidental trauma."

5 MR. FRAWLEY: Then the -- the --

6 THE COURT: The -- the safety action --

7 MR. FRAWLEY: -- handwriting after number one is to
8 describe the safety action. In other words --

9 THE COURT: Right.

10 MR. FRAWLEY: "What" --

11 THE COURT: I see that.

12 MR. FRAWLEY: "What's going to be the safety plan? What
13 -- what are you agreeing to do in this safety
14 plan?"

15 THE COURT: Talking about discharge. Okay. Now, it --
16 it -- it looks as if Mr. [REDACTED] the father, did
17 not sign this; is that right?

18 MR. FRAWLEY: Yes, sir.

19 THE COURT: Okay.

20 MR. FRAWLEY: And, frankly --

21 THE COURT: All right.

22 MR. FRAWLEY: -- I can't tell you why because my
23 understanding is that he was there. The --

24 THE COURT: What I remember.

25 MR. FRAWLEY: The dictation -- Ms. Tyler's dictation

1 indicates that she spoke to the mother and the
2 father.

3 THE COURT: Yeah. Well -- well, and it doesn't -- well,
4 it may not matter. Okay. That's -- that's number
5 one. Where is number two?

6 MR. FRAWLEY: The -- the second -- second safety plan?

7 THE COURT: Yeah.

8 MR. FRAWLEY: I --

9 THE COURT: Yes, sir.

10 MR. FRAWLEY: I -- I don't have that in my materials,
11 Your Honor.

12 THE COURT: (To Ms. Harrison) Do you-all have that?

13 MS. HARRISON: We right are looking on our server right
14 now, in a second.

15 THE COURT: We are, are we?

16 THE COURT: Okay. Go ahead, Mr. -- Mr. Frawley.

17 MR. FRAWLEY: Well, Your Honor, the plaintiffs basically
18 -- well, we'll get to that. I can talk about that
19 on -- in reply, I guess.

20 Your Honor, we're -- we're relying principally
21 on the -- the Etheridge and Clyburn lawsuits, from
22 the South Carolina Supreme Court, and then, also --
23 because the plaintiffs had cited it, the "Bass v.
24 DSS" case. Etheridge, we're -- and -- and Clyburn,
25 we're citing for the -- the proposition that gross

1 negligence is at least slight care.

2 THE COURT: Huh?

3 MR. FRAWLEY: And that, if you have -- and both of those
4 are summary judgment cases. Both of them say that,
5 while the issue of gross negligence is usually an
6 issue that is a jury issue, if there's only one --
7 one way of viewing it, then it can be a matter of
8 law for the Court. What Etheridge also says is
9 that, if there is evidence that at least slight
10 care was exercised, the fact that everything wasn't
11 done, that should've been done, or that things
12 weren't done as well as they could've been done,
13 doesn't negate the fact that slight care was
14 exercised, and the defendant's not grossly
15 negligent as a matter of law. Your Honor, both
16 Etheridge and Clyburn are school cases. Etheridge
17 involved, as I recall, a -- a --

18 THE COURT: -- a shooting in the hall.

19 MR. FRAWLEY: -- a shooting in the hallway, and Clyburn
20 involved a school bus --

21 THE COURT: -- school bus, knife.

22 MR. FRAWLEY: Yeah. One -- one girl had a -- had a
23 monkey wrench in her purse, and the other girl --
24 girl had a knife, and the girl with the monkey
25 wrench sued.

1 In the Etheridge case, the -- there was
2 evidence that the school had done certain things,
3 like -- and that's from Eau Claire High School, out
4 of Columbia, and there was evidence that the school
5 had gone to certain measures, such as closing
6 certain hallways, having teachers stand in their
7 doorways to monitor the kids between classes.

8 THE COURT: Uh-huh.

9 MR. FRAWLEY: The principal -- the principal having
10 walkie-talkies, hallway monitors having walkie-
11 talkies. They'd gone to some measures to try and
12 prevent hallroom -- or hallway violence. There was
13 an affidavit that was put in by a "Mr. Brown," who
14 was one of the monitors, and Mr. Brown was a little
15 disgruntled. He -- he said that -- that the
16 hallway monitors were not given the authority that
17 they should've had. They weren't given uniforms.
18 They weren't given --

19 THE COURT: -- nightsticks.

20 MR. FRAWLEY: Yeah -- nightsticks. I mean, there's --
21 there's things he said that -- that weren't done,
22 and, therefore, there -- there wasn't slight care.
23 And what the Court said in there was there was
24 evidence of at least slight care, and, despite what
25 Mr. Brown felt there maybe should've been, the fact

1 that there was evidence of slight care created --
2 well, it didn't create. I mean, that -- that meant
3 that there was no -- that there was no gross
4 negligence.

5 Clyburn's similar to that. They took some
6 measures to keep kids who were -- who were not
7 supposed to be on that bus, off.

8 THE COURT: Right.

9 MR. FRAWLEY: The school-bus driver was told to keep an
10 eye out for this girl. And then, still, somebody
11 got on the bus while the school-bus driver was
12 distracted. And then they had -- even though the
13 girl that was ultimately cut had -- had apparently
14 a monkey wrench -- so -- so she was ready to go
15 there. But they said that there was some slight
16 care exercised, and -- and it was not grossly
17 negligent as a matter of law.

18 THE COURT: Let -- let -- let me ask you another --

19 MR. FRAWLEY: Yes, sir.

20 THE COURT: -- fact of -- some fill in the blanks for
21 me. The -- the -- the -- Ms. Hill was the
22 caseworker, right?

23 MR. FRAWLEY: Dirvondra Hill, yes, sir.

24 THE COURT: The -- there were -- she showed up at the
25 house three times and found nobody there, right, in

1 December?

2 MR. FRAWLEY: Three times, nobody there --

3 THE COURT: Okay.

4 MR. FRAWLEY: -- the 7th, 8th, and 10th.

5 THE COURT: Okay. What -- what does -- what does that

6 trigger in the -- in the DSS process? I mean, the

7 -- were they unannounced, first of all? I -- I

8 don't remember. Were they unannounced visits?

9 MR. FRAWLEY: They -- they were unannounced.

10 THE COURT: Okay.

11 MR. FRAWLEY: What it triggered for her was she -- she

12 did a letter --

13 THE COURT: The letter. I remember the letter.

14 MR. FRAWLEY: -- that -- that said, "We're -- we're

15 setting it for the 21st. You need to be there."

16 But -- but she still showed up again on the 17th,

17 unannounced.

18 THE COURT: And saw the mother --

19 MR. FRAWLEY: Yeah. Kayla Lythgoe.

20 THE COURT: -- who was going to work?

21 MR. FRAWLEY: Yes.

22 THE COURT: And the baby wasn't there?

23 MR. FRAWLEY: Yes, sir.

24 THE COURT: Okay. When did she -- the letter was sent

25 the 9th, was it, or something like that?

1 MR. FRAWLEY: We're not clear the -- of the -- of the
2 date. The -- the letter does not have a date on
3 it. It was sent sometime before the 17th because,
4 when she met with Ms. -- Ms. Lythgoe, Ms. Lythgoe
5 indicated that she'd -- she'd gotten the letter and
6 the 21st was fine.

7 THE COURT: Okay. Okay. Anything else?

8 MR. FRAWLEY: I've handed up "Bass v. DSS" to Your
9 Honor.

10 THE COURT: Right.

11 MR. FRAWLEY: Bass, Your Honor, is -- is almost the --
12 the converse of this case. This was a situation in
13 which DSS got a report of suspected parental
14 poisoning. Two young children --

15 THE COURT: Autistic children.

16 MR. FRAWLEY: Autistic children. They were like five
17 and seven. The Besses actually had three. Only
18 two of them were there. All three of the kids, it
19 turned out, were given Clonidine to -- to kind of
20 slow -- help them sleep in the evening because they
21 couldn't sleep, and -- and Mama had to take care of
22 the -- the kids all the time. Dad worked third
23 shift, so, when the kids would come home from
24 school, Mama would have to get them ready for --
25 for dinner, for bed and everything, so they -- they

1 had -- Clonidine was -- it was prescribed. And the
2 prescription, that they had just refilled at Long's
3 pharmacy, which is a reputable pharmacy, had come
4 back, unbeknownst to them, a thousand times more
5 potent than -- than what should've been given. So
6 they -- they gave them the -- the -- the Clonidine,
7 and both kids, within four days of each other,
8 wound up in ICU at -- at Richland Memorial. So --
9 so we got a -- we got a report of that, so we sent
10 someone out right away, talked to the parents, and
11 the parents had no idea what was going on. The
12 medical people didn't know. They said, "We're --
13 we're checking on it. It looks like an over --
14 overdosing to us, but we don't know what." There
15 were -- there were blood tests being taken, but --
16 but they were inconclusive at that point. So our
17 caseworker did the investigation that day, talked
18 to the collaterals, the next day had a family
19 meeting and got them to enter into a safety plan
20 that said, "When they're released from the
21 hospital, until we find out what's going on,
22 they're going to stay with Aunt Linda, who's five
23 minutes up the road." And the parties agreed to
24 that, so the kids go with Aunt Linda. And they --
25 they start their investigation. They go to the

1 home. The home is in -- in great disrepair when
2 they go out there, but one of the reasons it's in
3 disrepair is because Mom and Dad have been at the
4 hospital all week with their sick kids.
5 Apparently, that doesn't register with the DSS
6 caseworkers that went out there, so one of the
7 reasons that they give for removing the kids -- or
8 -- or placing the kids with -- with the aunt is
9 that the house is in disrepair, and they're not
10 taking care of the kids. The -- the carpet smells
11 like urine, things that -- that got to that point
12 because they just weren't there to take care of the
13 house.

14 Well, 41 days into the -- into the
15 investigation, we find out that Long's Pharmacy
16 comes up and says, "Wait a minute. We messed up
17 the prescription." So the reason those kids have
18 been away from their parents for 41 days had
19 nothing to do with the parents. It had to do with
20 Long's Pharmacy.

21 So our people immediately say, you know,
22 "We're going to release them. Call a lawyer."

23 And they said, "Oh, we already got a lawyer."

24 And then, a little bit later, they sued Long's
25 Pharmacy and -- and DSS. Long's Pharmacy settled

1 out, and DSS tried the case. And they had an
2 expert witness, a fellow named "Mike Corey." And
3 Mr. Corey opined in the case that DSS did some
4 things right here. "We -- we liked their response
5 time. We liked what they did on the front end, but
6 they should've done their own analysis of the
7 Clonidine, and, because they didn't, and they
8 conducted a -- a deficient investigation after
9 that, I believe that was grossly negligent." And
10 he used the magic words to the jury. The jury came
11 back with a huge verdict. We -- we remitted it
12 down to the Tort Claims Act numbers and appealed
13 it. The Court of Appeals reversed it on the -- on
14 the -- basically, the -- the Etheridge grounds,
15 that there was evidence of at least slight care and
16 that Mr. Corey had not used the proper standard
17 before he opined that there was gross negligence.
18 Then that got appealed. The -- the Supreme Court
19 granted -- the Supreme Court heard it, and the
20 Supreme Court reversed it again, saying that there
21 was some evidence that went to the jury on the
22 gross-negligence issue, and that some evidence was
23 Mr. Corey's opinion that -- that it was at least
24 gross negligence. In other words, using the --
25 using the magic words. That case is

1 -- is kind of the converse of this one. DSS went
2 in there and removed the kids because they thought
3 that the -- that the kids were in jeopardy and --
4 and then wound up getting sued over that. In this
5 case, DSS did not have what they felt was
6 conclusive evidence that it was non-accidental
7 trauma. "Maybe we ought not be removing these
8 kids, even from these young parents," and they
9 chose to forego action -- further action at that
10 point and -- and tried to get into the -- into the
11 assessment. Both of these cases were -- were
12 within the 45-day assessment period. Bass was 41
13 days into it, with the kids staying with an aunt
14 who lived five minutes away, and --
15 THE COURT: Well, the bottom line in -- in Bass was that
16 there was -- it was a jury trial, A --
17 MR. FRAWLEY: Yes, sir.
18 THE COURT: -- and, B, the -- there -- there was
19 evidence of gross negligence.
20 MR. FRAWLEY: There -- there was their expert using the
21 words "gross negligence," as --
22 THE COURT: Well --
23 MR. FRAWLEY: -- opposed to -- still -- there was still
24 -- and here's the question I've had: If you -- if
25 you have evidence of slight care, it's not a

1 qualitative analysis. It's a quantitative
2 analysis. Is there evidence that you did
3 something, that something more than a "Steinke v.
4 LLR" drive-by, that the Court said, in that bungee-
5 jumping case from Myrtle Beach, that -- that I
6 believe the plaintiffs have cited, that a simple
7 drive-by is not going to be enough to trigger the
8 slight-care issue. Well, where -- where is the
9 bottom line where it does? If you've got evidence
10 of at least slight care, Etheridge says that's
11 evidence that there's no gross negligence.

12 THE COURT: Well, let -- let me stop you. I have not --
13 I haven't had a chance to read the Bass case like I
14 need to, but where does -- where is slight care
15 discussed in the Bass case?

16 MR. FRAWLEY: They -- they do discuss the -- let me pull
17 it up here. Gross negligence is discussed.

18 THE COURT: Well, I know that because the --

19 MR. FRAWLEY: No, I -- well, I'm trying to tell where
20 it's --

21 THE COURT: That's because there was testimony.

22 MR. FRAWLEY: -- where it shows up. It's shows up -- in
23 -- in the copy we've given you, on Pages 6 and 7,
24 it -- it --

25 THE COURT: Yes, sir.

1 MR. FRAWLEY: At the bottom of the left-hand column,
2 they're -- they're citing Etheridge. They're
3 citing Clyburn. "Richardson v. Hambright" is the
4 case that preceded Clyburn. And they say, "In
5 other words, it is the failure to exercise slight
6 care." They're just, again, citing cases there.

7 THE COURT: Where -- where are we here? What --

8 MR. FRAWLEY: That would be on the bottom of Page 7 of
9 -- of the copy I've given you, Your Honor --

10 THE COURT: Yes, sir.

11 MR. FRAWLEY: -- the left-hand column, at the very
12 bottom. And they're citing Etheridge and Clyburn
13 and "Richardson v. Hambright." The fifth line --
14 fourth line from the bottom, "and there's a failure
15 to exercise" --

16 THE COURT: Yeah. I see it.

17 MR. FRAWLEY: -- "slight care."

18 THE COURT: Yeah.

19 MR. FRAWLEY: Then the expert testimony is -- is in the
20 right-hand column, where they talk about what Mr.
21 Corey had seen.

22 THE COURT: Well, what I'm trying to distinguish is that
23 it doesn't look like -- I mean, they seem to -- is
24 there anywhere in the opinion where somebody says,
25 "It was not" -- that -- that there was not slight

1 care as a matter of law?

2 MR. FRAWLEY: No, sir.

3 THE COURT: Or are they just relying on the fact that,
4 "Well, there was evidence in the record that there
5 was gross negligence."

6 MR. FRAWLEY: It's that there was evidence in the record
7 that there was gross negligence. If you look on
8 the bottom left-hand column of Page 8 --

9 THE COURT: Okay.

10 MR. FRAWLEY: And -- and, at trial, it -- it is a little
11 different standard when it -- if something goes to
12 a jury -- any evidence goes to the jury, reliable
13 or whatever, if there's any evidence thereupon
14 which a -- a verdict can be granted, that's not
15 something a -- an appellate court is going to --
16 going to reverse.

17 THE COURT: I think you --

18 MR. FRAWLEY: And that's what they really focused on in
19 the Supreme Court.

20 THE COURT: Just out of curiosity, was there a -- a
21 directed verdict motion on the slight-care issue?

22 MR. FRAWLEY: Oh, yes, sir.

23 THE COURT: Okay.

24 MR. FRAWLEY: And we had a good trial judge. He -- he
25 -- he listened to it, and he respectfully disagreed

1 with us on it.

2 THE COURT: That happens.

3 MR. FRAWLEY: Yep. But, Your Honor, that -- that's
4 essentially -- I think Your Honor has an -- has an
5 understanding of our -- of our argument. I'll --
6 I'll defer to my memorandum for the rest of our
7 argument because there's nothing new that I would
8 be saying at this point, and I'll -- unless Your
9 Honor has any further questions --

10 THE COURT: No, sir.

11 MR. FRAWLEY: -- I'll --

12 THE COURT: I --

13 MR. FRAWLEY: -- I'll yield the floor to the plaintiffs.

14 THE COURT: I'm good. Thank you very much.

15 MR. FRAWLEY: Thank you, Your Honor.

16 MS. HARRISON: May it please --

17 THE COURT: Yes, ma'am.

18 MS. HARRISON: -- the Court? I'm Whitney Harrison here
19 today from McGowan, Hood, & Felder, on behalf of
20 the plaintiff. DSS's motion for a summary judgment
21 should be denied because evidence in the record
22 supports the finding of gross negligence.
23 Moreover, because it's a mixed question of fact and
24 law, it --

25 THE COURT: Slow -- slow down, so I --

1 MS. HARRISON: -- Oh --

2 THE COURT: -- and the court reporter --

3 MS. HARRISON: -- I apologize

4 THE COURT: -- can take this in.

5 MS. HARRISON: Sure. Of course, I apologize. Moreover,

6 because it's a mixed question of law and fact, it

7 should be left within the province of the jury.

8 While DSS suggests that there is only one

9 reasonable inference regarding the investigation

10 into Owen C.'s case, based on the first contact

11 that DSS had with Owen C., on December 6th, through

12 the January 11th second injury, that position is

13 unsupported by case law and evidence in the record.

14 Turning first --

15 THE COURT: Whoa. Whoa. Say what now? Say that again.

16 MS. HARRISON: Our position is that, based on the case

17 law with Bass, as well as evidence in the record,

18 it's -- there's more than one reasonable inference

19 to the evidence that's presented in this case, and,

20 for that reason, gross negligence -- or summary

21 judgment should not be granted.

22 THE COURT: Okay. But -- but that inference would have

23 to be -- no, no. That's --

24 MS. HARRISON: That inference, I believe, would have to

25 be in --

1 THE COURT: That -- that inference would have to raise a
2 question -- present the question or present the --
3 the conclusion, by inference, that there was not
4 slight care.

5 MS. HARRISON: I think, for DSS to have summary judgment
6 granted, their position would be that only one
7 inference, that there was slight care. And our
8 position is that there is evidence that
9 demonstrates that there was not slight care in a
10 variety --

11 THE COURT: And what is that?

12 MS. HARRISON: What is our evidence --

13 THE COURT: Yes, ma'am.

14 MS. HARRISON: -- of that? I'm -- I think it breaks down
15 into several areas, and would -- do you mind if I
16 speak to Bass first because I think it will give my
17 -- the evidence a little bit of context?

18 THE COURT: Sure.

19 MS. HARRISON: The "Bass v. DSS" case, I know we've gone
20 through the facts of it, but I think what's so
21 important about that case is that the Court, for
22 the first time, is acknowledging that DSS has a
23 role during the emergency setting, similar to this
24 first 24-hour period. Once there's been an
25 allegation or a report, the DSS rules and manual,

1 as well as our statutory code, states that DSS has
2 to act within 24 hours and come and meet this
3 child. So that's when the call goes, at five
4 o'clock, and then a DSS social worker arrives to
5 the hospital. And, so, what Justice Toal, in
6 writing for the majority, said was that, in Bass,
7 they a hundred percent did it right to pull those
8 kids out during the emergency 24 hours.

9 THE COURT: She says there's nothing -- no -- no
10 liability in the EPC part.

11 MS. HARRISON: Right. And what I think is so important
12 about the fact that Justice Toal distinguished this
13 EPC part and then the remainder is the Court's
14 recognizing that there is a distinction in the
15 investigation between the different duties and
16 obligations that DSS has during the different
17 stages of their investigation. And, so, I think,
18 when you look at the Clyburn case, when you look at
19 Etheridge, that was a one-time experience, whereas,
20 in DSS cases, we have a situation --

21 THE COURT: Clyburn was not a one-time experience.

22 MS. HARRISON: Okay. I apologize, Your Honor. I --

23 THE COURT: They're -- they're -- the -- the -- the --
24 that -- that -- that -- that trouble was brewing.

25 That's because they had tried ahead of time to head

1 off this -- this -- this -- even, I think, niece or
2 sister or something, from getting on the bus. That
3 was not a one-time experience. They were trying --
4 they had tried to insulate the -- the -- Clyburn
5 from this person, and they just failed.

6 MS. HARRISON: Well, let me --

7 THE COURT: And Etheridge, obviously, was a one-time
8 thing because they -- somebody came in the -- went
9 in the hall and shot and killed another kid.

10 MS. HARRISON: Right. And I think -- let me back away
11 then from Clyburn and just note that I think what's
12 significant about Bass is the fact that the Court
13 is kind of acknowledging there is a duty and an
14 obligation with DSS when they first make the
15 investigation, when they first come into a hospital
16 setting, in our case, compared to what's going on
17 in the assessment and the investigation that
18 evolves --

19 THE COURT: I don't -- I don't disagree with that.

20 MS. HARRISON: -- over 45 -- okay.

21 THE COURT: I don't disagree with that. I -- I mean, I
22 think -- I wouldn't say that -- I wouldn't -- I
23 wouldn't -- I wouldn't try to separate the phases
24 of the case. I just think there's an ongoing duty
25 to exercise slight care, at least.

1 MS. HARRISON: Yes, Your Honor. And I would say that
2 what Bass also represents is the fact that you can
3 have slight care at one portion, but maybe not at
4 another point. And that doesn't mean that --

5 THE COURT: Certainly.

6 MS. HARRISON: -- you can't have an -- or, therefore,
7 summary judgment is -- is broad scope of, "Was
8 there an exercise of slight care to the point that
9 you can grant summary judgment?" I feel like --
10 I'm going to go through three different ways in
11 which slight care was not present here, but I think
12 that's what the takeaway for -- at least in our
13 view, in reading of Bass, is.

14 THE COURT: Well, I mean, I don't -- Mr. Frawley
15 probably wouldn't disagree with that. There's --
16 you -- you -- you necessarily have to look at the
17 whole -- suppose these children -- suppose this had
18 been going on for -- not this case, but you have a
19 situation where there's -- there's -- there's --
20 there's constant observation and -- and
21 investigation of -- of a home setting because of
22 some -- for some good reason, and -- and you -- you
23 have to continue to exercise slight care. Maybe --
24 and I don't think you need to separate them is what
25 I'm trying to say. What it -- what you need to do

1 is tell me why -- what --

2 MS. HARRISON: Sure.

3 THE COURT: What are the -- where -- where was there the
4 absence of slight care?

5 MS. HARRISON: Absolutely. So I think that the first
6 one that we can look at is they failed to
7 thoroughly investigate, at the hospital, prior to
8 the release of -- so within the time period that --
9 on December 7th is when Owen C. was released to his
10 parents.

11 THE COURT: Uh-huh.

12 MS. HARRISON: And, so, our position is that -- when you
13 look at the policies and procedures that we've
14 provided in the appendix to our memorandum, the DSS
15 has listed out in its manual, certain factors that
16 you should be looking for when you're -- you have a
17 greater risk of abuse and neglect. And, included
18 within those, are: family structure, poverty,
19 having conditions --

20 THE COURT: Where -- tell me where you are in your -- in
21 your appendix.

22 MS. HARRISON: It's Exhibit 9, Pages 3 and 4.

23 THE COURT: Exhibit -- I -- is it in an appendix? I'm
24 sorry.

25 MS. HARRISON: Oh, yes, sir. May I hand this up?

1 THE COURT: Yeah. I don't have -- do I have that, or is
2 it in one of these notebooks?

3 MS. HARRISON: I'm not sure. Do you need a copy of our
4 memorandum?

5 THE COURT: No.

6 MS. HARRISON: Okay.

7 THE COURT: I've got what I need about that. The law
8 part?

9 MS. HARRISON: Yes, Your Honor.

10 THE COURT: Yeah. I've got that.

11 MS. HARRISON: Okay.

12 THE COURT: Okay. Now, you said Exhibit what?

13 MS. HARRISON: Exhibit 9, Pages 3 and 4.

14 THE COURT: Well, if I can find Exhibit 9. Does it have
15 a Bates stamp number?

16 MS. HARRISON: No, Your Honor, it doesn't.

17 THE COURT: Here we go. Exhibit 9. Okay. Pages 3 and
18 4?

19 MS. HARRISON: Yes, sir.

20 THE COURT: All right. Now --

21 MS. HARRISON: And --

22 THE COURT: Go ahead. Now, what --

23 MS. HARRISON: What DSS's done is they've identified
24 factors that, if these factors exist, there is a
25 higher chance of abuse and neglect. And, so, this

1 is kind of just in the front part of this section
2 of their manual. These are things that you're
3 going to be looking out for when a DSS worker is
4 investigating.

5 THE COURT: Right.

6 MS. HARRISON: And, at the time that the DSS workers
7 come to the hospital, they're aware that we've got
8 teenage parents. And, so, these factors include:
9 family structure, poverty, poor housing
10 conditions --

11 THE COURT: Where -- where are you? Where are you
12 reading?

13 MS. HARRISON: Oh, I'm just reading it from my notes.
14 It's on Page 4.

15 THE COURT: Yes, ma'am.

16 MS. HARRISON: And it is the second from the bottom
17 bullet point, "Prevention programs are
18 necessary" --

19 THE COURT: All right.

20 MS. HARRISON: -- "to strengthen families" --

21 THE COURT: All right.

22 MS. HARRISON: -- "and reduce the likelihood" -- and then
23 it goes into the factors that may contribute to an
24 increased risk. And, so, as you can see there, it
25 lists out about ten factors that, if these things

1 are identified, they are more likely that abuse and
2 neglect are going to be involved in the
3 circumstance. And, so, at the day that DSS comes,
4 on December 6th -- December 7th, they are aware
5 that, "We've got teenage pregnancy. We have
6 teenage parents," and that's -- so that's the first
7 one. But what they don't know is that -- DSS
8 hasn't been to the home, and, so, they're using
9 these factors to assess, "What is the risk factor?"
10 Should they involve the emergency custody, or do
11 they discharge this child to their parents? And,
12 so, what DSS has outlined is that you have to
13 determine whether or not there's a risk of harm to
14 release a child from the hospital, to his parents,
15 as it is in our situation. And, so, our position
16 is there wasn't a proper investigation into the
17 background of these parents when the DSS workers
18 were meeting with Kayla and Michael. And, so, DSS,
19 at this time, has not been to the home. They're
20 unaware of who lived with Owen. And, in fact,
21 what --

22 THE COURT: Who is Owen?

23 MS. HARRISON: Owen is the child.

24 THE COURT: Oh, okay. Okay.

25 MS. HARRISON: And we learn -- on December 21st is the

1 first time that DSS learned who actually lives in
2 this child's home. And, so, if their job was to be
3 assessing the risk of harm and whether or not they
4 should discharge this child to his parents, I -- we
5 believe that there is a failure to exercise slight
6 care of DSS on December 21st because --

7 THE COURT: Who lived in the home?

8 MS. HARRISON: It was the two parents and the child, but
9 what we learned from the deposition of Ms. Hill is
10 that she believed, until December 21st, that
11 Grandmother lived with those parents. And, so,
12 when they're assessing what the risk of harm is to
13 this child, on December 7th, we think there's a
14 failure to exercise slight care if DSS doesn't even
15 know who was living in the home, by their own
16 admission.

17 THE COURT: Would the -- would not the -- let me
18 translate it, I guess. The -- if -- if -- if there
19 is evidence of the failure to exercise slight care,
20 then there can be gross negligence, but would not
21 that gross negligence have to be the proximate
22 cause of injury to the child?

23 MS. HARRISON: I think that it can be one of the causes.

24 THE COURT: Wouldn't it have to be? You would have to
25 have causation, in fact -- and then some call

1 "proximate cause," whatever that is --

2 MS. HARRISON: Right.

3 THE COURT: -- to connect the -- the failure to visit
4 the home, for example, to the injury to the child.
5 What -- what -- and -- and you just cited the --
6 the -- the maternal grandmother, who apparently had
7 a CDV conviction.

8 MS. HARRISON: Yes, sir. I know.

9 THE COURT: But -- but that didn't have anything to do
10 with the injury to the child.

11 MS. HARRISON: I think it does because what we know is
12 that the DSS has qualified ten factors to say,
13 "There's a heightened risk of abuse to a child if
14 these factors are present." And, so, as to one of
15 the factors, it -- it's knowing the family
16 structure. And, here, DSS was unaware of that
17 family structure. And what's important about the
18 grandmother is she did have domestic violence
19 charges. And that is, yet again, another factor
20 into this family structure of what's going on with
21 this family. And, so, we're hitting another
22 element or another factor --

23 THE COURT: Well, what is the -- what is your contention
24 that the -- that the assessment of the family
25 structure should have resulted in?

1 MS. HARRISON: I think that a -- a proper assessment of
2 the family structure -- or of all of these factors
3 would've demonstrated that this child was at a high
4 risk of abuse and neglect. And we have an injury
5 where the hospital can't rule out abuse, and,
6 because of those two conditions, it was unsafe to
7 release this child back to his parents on December
8 7th. And, so --

9 THE COURT: And my question is: What is -- what -- what
10 -- what alternative remedial measures would -- is
11 it your -- your position that DSS should've taken
12 on December the, what, 9th, when the child was
13 released?

14 MS. HARRISON: I believe that they should've taken that
15 child into emergency custody, or they should have
16 found another --

17 THE COURT: And the basis --

18 MS. HARRISON: -- suitable home.

19 THE COURT: -- for that would've been what, other than
20 -- than the inconclusive evidence from the
21 hospital?

22 MS. HARRISON: I think the inconclusive evidence from
23 the hospital and our position that a proper
24 assessment, evaluating all ten of these factors,
25 was not done, and our expert spoke to that, saying

1 that they failed to --

2 THE COURT: Tell me how -- tell me how the failure to --
3 how the failure to -- to evaluate, assuming that
4 that was -- there was a failure to evaluate, just
5 for the sake of talking about it, how -- tell me
6 how the failure to follow that first bullet -- that
7 bullet point that you pointed to, proximately
8 caused injury to this child.

9 MS. HARRISON: Well, I think that had all those
10 assessments been done, that child would not have
11 been returned, and, therefore, would not have been
12 in the home to be subject to the second injury.
13 And I -- I would argue that a proximate cause,
14 oftentimes, inquiry is left to the jury on that.
15 And, so, I think that, based on the expert
16 affidavit that we've put forth, that was attached
17 to our complaint, that's in as an exhibit, as well
18 as our position that these factors -- had an
19 assessment been done using these factors, if they
20 had learned this information, this child would not
21 have been in the -- the hands of his abuser. And,
22 so, his second injury would not have occurred. Had
23 they --

24 THE COURT: Well, so -- so --

25 MS. HARRISON: -- properly investigated.

1 THE COURT: But doesn't that pre-suppose that the
2 failure to -- to do the investigation, based -- or
3 to -- to -- to assess each factor listed under that
4 bullet point contributed directly to the injury to
5 the child?

6 MS. HARRISON: I -- you know, I -- I think it's the fact
7 that had -- our position is, had a proper
8 assessment been done, that child would not have had
9 that second injury.

10 THE COURT: How can you say that? Because you don't --
11 I mean, essentially, what you're saying is: DSS
12 failed to take the child, and -- and -- and -- and
13 you're making your conclusion that a -- that --
14 that an investigation pursuant to this bullet point
15 -- and I'm -- and that's -- I'm trying to minimize
16 words -- pursuant to this bullet point, would have
17 resulted in a removal of the child. How can you
18 say that?

19 MS. HARRISON: I'm going to rely on what our expert has
20 put forth, that --

21 THE COURT: Well, now, I haven't read anything from an
22 expert.

23 MR. FRAWLEY: (To Ms. Harrison) It's Exhibit 12.

24 MS. HARRISON: Thank you.

25 MS. HARRISON: Exhibit 12.

1 THE COURT: Twelve?

2 MS. HARRISON: Yes, Your Honor.

3 THE COURT: Okay. Thank you.

4 MS. HARRISON: Thank you, Mr. Frawley.

5 THE COURT: Is this the affidavit of George Savarese?

6 MS. HARRISON: Yes, sir. And what you actually have

7 there, Your Honor, are two separate affidavits.

8 The first affidavit is what was attached to our

9 complaint.

10 THE COURT: Yes, ma'am.

11 MS. HARRISON: And, on Page 2 of that affidavit, on

12 Number 4, the first bullet point, he notes that,

13 "DSS failed to conduct an appropriate and

14 independent assessment in order to identify,

15 explore, and comprehend" --

16 THE COURT: Okay. Hold on. Let me just read it.

17 MS. HARRISON: Yes, sir.

18 THE COURT: Okay.

19 MS. HARRISON: And, then, the second affidavit is one

20 that you saw on -- the last time this case was

21 before you. It's where he -- the expert goes

22 through a further analysis, and he also, again,

23 comments on DSS's role and their failures.

24 THE COURT: It -- it --

25 MS. HARRISON: And it -- it's our position, that under

1 his expert affidavit, that we can make the analysis
2 that those factors played a role in the assessment
3 that Owen [REDACTED] received on December 6th and
4 December 7th. And, additionally, evidence has been
5 presented, throughout the depositions, of DSS's
6 reliance on the social workers that were working at
7 Levine during that time, and we would argue that it
8 was a failure for the reliance to abrogate their
9 own duty that they owed to Owen, pursuant to the
10 statute, to have their own inquiry. And I think
11 that if you look through the dictation notes that
12 are attached to both parties' memorandum, we see an
13 overwhelming reliance on what Levine was saying and
14 -- but yet still ruling out the fact that this
15 child was in danger despite the fact that the
16 doctor who was treating Owen said, "We can't tell
17 you if it's abuse or not." And, so, because of
18 that, we think that that warrants that level of
19 concern that should've been there for an emergency
20 setting and taking in that assessment at that time
21 and looking into what risk Owen was at under their
22 policies and procedures.

23 THE COURT: But -- but you'd reduce each of -- you would
24 -- you would assess each of those things that --
25 each of -- each of those points that the -- Mr.

1 Savarese -- Dr. Savarese makes as not just evidence
2 of negligence, but -- but of the failure to
3 exercise slight care?

4 MS. HARRISON: I would, Your Honor.

5 THE COURT: He doesn't do that.

6 MS. HARRISON: He does not do that. And I think, here,
7 what's important is the fact that we're -- we're
8 able to break down the different times in which DSS
9 had a role with this child because, certainly, they
10 did add a safety plan, but we don't really think
11 that, like, a safety plan, for example, is enough.
12 It's this failure to actually identify all of these
13 factors under the South -- under DSS's policies and
14 procedures, on Page 3 and 4, that we looked at, and
15 -- I'm sorry, Your Honor. Do you have a question?

16 THE COURT: Go ahead.

17 MS. HARRISON: And, so, under that -- and it's that
18 failure for them to assess and investigate, Dr.
19 Savarese said, that it was a proximate cause to the
20 injuries that this child sustained.

21 THE COURT: Okay.

22 MS. HARRISON: And we -- we would think that -- or we
23 believe that summary judgment, that that -- that is
24 enough to survive summary judgment. And, so, as
25 far as with an -- this investigation phase because

1 -- of our one of three, we're looking at the fact
2 that everyone knew that these were teenage parents.

3 THE COURT: Let -- let me ask you --

4 MS. HARRISON: Yes.

5 THE COURT: -- a question. This is -- this is what
6 confuses me about this: Are you in the position of
7 -- of saying, in effect, there is no evidence of
8 slight care?

9 MS. HARRISON: I think I'm in a position of saying it as
10 to the investigation.

11 THE COURT: You're not the moving party. I understand
12 that, but -- go ahead.

13 MS. HARRISON: And let me take a step back. I think
14 that's why I wanted to make sure I shared my view
15 of the "Bass v. DSS" case because I wanted to make
16 sure that I kind of honed in on the fact that I
17 think that they have a duty under a wide variety of
18 actions within the case. And, so, as to the
19 investigation that's taking place and their
20 decision to discharge this child to his parents on
21 December 7th, it's -- I do think that they failed
22 to exercise slight care when they were -- weren't
23 able to properly assess the risk of harm that this
24 child would be going back into because they didn't
25 speak with law enforcement, they didn't know about

1 the -- all of these different factors.

2 THE COURT: They did speak with law enforcement.

3 MS. HARRISON: They didn't until December 17th, and, so,

4 they sent this child home --

5 THE COURT: Which -- well, which showed what?

6 MS. HARRISON: I think it showed that they didn't

7 involve law enforcement, like they have a statutory

8 duty to do so.

9 THE COURT: Do you -- you don't think they have to -- to

10 perform each function itemized there on day one, do

11 you?

12 MS. HARRISON: I -- the statute requires that they

13 notify law enforcement within 24 hours of the --

14 THE COURT: They have a 45-day period within which to do

15 that.

16 MS. HARRISON: Not to law enforcement. They only have

17 24 hours.

18 THE COURT: Well, okay.

19 MS. HARRISON: Okay.

20 THE COURT: They called law enforcement.

21 MS. HARRISON: They did, ten days late. And I think

22 that that's significant because --

23 THE COURT: Can we agree that failing to call law

24 enforcement within 24 hours was not the proximate

25 cause of this child's injury?

1 MS. HARRISON: I can't because I think that, when you
2 look at the factors and the -- the ten factors of
3 these assessments, it includes domestic violence
4 and community violence. And, so, I think that they
5 were required to know what type of violence and
6 what risk of harm this child would be walking back
7 into or being brought back into. And, so, I they
8 were required for a reason, by the statute, to call
9 law enforcement. And, so I think it -- it plays a
10 role in their ability to properly assess this child
11 and the risk of harm prior to releasing the child
12 back to his parents. And, so, I do think that it
13 had a significant role. And I know Mr. Frawley
14 said that, you know, looking back, we know that it
15 didn't have a -- it wasn't that big of a deal
16 because, you know, there was a domestic violence
17 charge, but there was nothing else, and it was with
18 the grandmother, but I think it's so important
19 because the factors themselves define our ability
20 to know whether or not someone is going to be at a
21 higher risk of -- or of abuse and neglect. And I
22 think that we learn some of those answers by
23 calling law enforcement. And they're statutorily
24 required to do that within 24 hours. And, not only
25 did the supervisor, Ms. Hinnant, say, "We're going

1 to do that," on December 7th, to the hospital, she
2 wrote it down. And that never happened. It didn't
3 happen until the 17th, and we have a transcript of
4 Ms. Hinnant speaking to Lieutenant Miller of the
5 Sheriff's Office, in which he says, "I'm so
6 frustrated. Why haven't you called? You're
7 required to do this."

8 And she says, "Yeah. I know Ms. Hill didn't
9 do it, but" -- so she's -- not only do we have Ms.
10 Hill not taking action, we have a supervisor who's
11 aware of that. And I think that's so important
12 because, again, it gets back into DSS being able to
13 assess those factors of abuse and neglect right off
14 the bat, as they need to, in order to decide
15 whether or not this child is going to be at a risk
16 of harm.

17 THE COURT: Is a failure to assess every factor gross
18 negligence, automatically?

19 MS. HARRISON: I don't think so. I think it -- it's a
20 case-by-case basis on how those fit in together
21 because I think that there are times maybe where
22 it's -- you know, one factor may not be present.
23 But I think that, when you look at it as a whole,
24 what we have is DSS not acting as they're required
25 to do in taking action to make an -- an assessment,

1 to identify the potential harm. And, here, we're
2 -- they're not asking enough questions. They're
3 really just relying on what Levine social
4 workers . . .

5 THE COURT: I'm trying to figure out what question they
6 would ask.

7 MS. HARRISON: I think -- well, they would answer the
8 domestic and community violence questions by
9 calling law enforcement and finding out what harms
10 that would be. Then --

11 THE COURT: And they would -- and they would find
12 out --

13 MS. HARRISON: Uh-huh.

14 THE COURT: -- that this child lived with two parents
15 who had no criminal record.

16 MS. HARRISON: Well, the -- I believe the father had a
17 petty-theft charge from two years prior, and I -- I
18 think that just, again, allows them to kind of do
19 that balancing test to determine for the --
20 as --

21 THE COURT: Well, what is the lynchpin for taking a
22 child away from their parents?

23 MS. HARRISON: I think the lynchpin is whether or not
24 this child is going to be subject to harm. And I
25 think it's their --

1 THE COURT: Exactly.

2 MS. HARRISON: Uh-huh. So our position would just be
3 that a more thorough investigation would not have
4 released this child based on our expert affidavit.

5 THE COURT: Now, you're -- you're saying more than that.
6 What you're saying is a thorough investigation
7 would have resulted in this child being taken from
8 his parents and placed in emergency protective care
9 immediately upon release from the hospital.

10 MS. HARRISON: I mean, I think either of them, though,
11 result in a -- a failure of slight care, by DSS,
12 for either going into emergency custody or being in
13 a situation where they had properly assessed it and
14 known the actual risk.

15 THE COURT: Okay.

16 MS. HARRISON: The other two areas that we kind of have
17 categorized are the investigation and assessment,
18 after December 7th, and, for ten days, DSS had no
19 contact with the family, and, then, for 14 days,
20 DSS had no contact with this child. And we think
21 that that's a failure of slight care. The fact
22 that Ms. Hill was unable to find the parents or the
23 child in this -- as well as her supervisor --

24 THE COURT: You mean the showing up for unannounced
25 visits?

1 MS. HARRISON: Yes. And we've -- there's no evidence
2 that -- but for these showing up of unannounced
3 visits, that there's anything going on as far as
4 furthering this case, speaking to other collateral
5 sources. Additionally, we -- there's no evidence
6 that Ms. Hinnant took action, knowing that Ms. Hill
7 was unable to meet up with the family or with the
8 child. And we think that's a failure of slight
9 care because this child is leaving, knowing that no
10 doctor has been able to rule out neglect or abuse.
11 There's two brain injuries on this child, and no
12 one has laid eyes on this child for 14 days, and we
13 think that that's a failure of slight care.

14 And, then, our third argument is -- fits into
15 our discussion we've already had today about law
16 enforcement and the role that law enforcement would
17 have played in the analysis and the assessment and
18 the statutory duty that they have.

19 THE COURT: Somewhere in all this, I read that -- maybe
20 -- and I don't know whether it was Ms. Hill. Maybe
21 it was Ms. Hill said that, "While -- while -- while
22 these young parents may need training -- parental
23 training to be more aware of potential accidental
24 injury to this child, there was no evidence of" --
25 she -- there was -- there was no basis upon which

1 to assess -- that she -- after meeting with them,
2 she found no basis upon which to assess intentional
3 harm. Am I correct about that?

4 MS. HARRISON: I -- I think it's along those lines, yes,
5 Your Honor. And I -- I think that Ms. Hinnant has
6 a lot of contradicting positions because she tells
7 Lieutenant Miller, in their conversation, that
8 Levine had no suspicion of child abuse or neglect,
9 and that's not what Levine said. That's not what
10 the doctor said when we deposed her. And, so, I
11 think Ms. Hinnant -- one of the issues we raised is
12 there's a genuine issue of material fact as to what
13 Ms. Hinnant -- whether or not she could assess and
14 investigate the issues because she seems to
15 contradict herself over and over in the -- in the
16 evidence that's presented in the record. And, so,
17 because of that, I think it's a question of whether
18 or not she exercised slight care in her assessment
19 of the circumstances if she's going to say DSS --
20 or that the -- Levine doesn't have any suspicion of
21 harm or child abuse or neglect. And that's
22 certainly not what they said, and that's how --
23 what she represented to law enforcement when they
24 did finally speak ten days following --

25 THE COURT: Okay.

1 MS. HARRISON: -- Owen C.'s release.

2 THE COURT: Anything else?

3 MS. HARRISON: No, Your Honor. We'll rely on our
4 memorandum.

5 THE COURT: All right. Very briefly, Mr. Frawley,
6 anything in reply?

7 MR. FRAWLEY: Just briefly, Your Honor, the -- the case
8 is, as most cases are, the -- the product of 20/20
9 hindsight --

10 THE COURT: I know.

11 MR. FRAWLEY: -- after the fact, and -- and that --
12 that's typically the way it goes. This would be a
13 different case if this child was injured December
14 20th. Then the thing about -- "You -- you
15 should've looked more thoroughly when you were at
16 the hospital before you -- you released him" -- and
17 -- and then we -- we never --

18 THE COURT: Well, I don't necessarily agree with that.
19 I mean, it depends on what you would've discovered.

20 MR. FRAWLEY: Well, what we did discover, on the 21st --
21 after four attempts to visit, we did notice -- and
22 -- and Ms. -- Ms. Hill puts it in her dictation --
23 that -- that they -- they seemed to be fine, that
24 the child responded well. She -- I think she
25 describes the child as "vibrant," on the floor

1 dealing with the father. The house looks
2 appropriate. And --

3 THE COURT: What she said is, "The living room looks
4 appropriate." I don't know that she went through
5 the whole house.

6 MR. FRAWLEY: Well, I don't know. Maybe they didn't let
7 her in the bathrooms. I -- I don't know how that
8 works, but -- but she did visit the home. She was
9 there, and that's some measure of -- of care. And,
10 Your Honor, I would refer Your Honor -- in the --
11 the Bass case --

12 THE COURT: We're going over -- we're going over stuff
13 we've been over before.

14 MR. FRAWLEY: Well, in the Bass case, they -- they --
15 Chief Justice says, "This opinion should not be
16 read to impose on DSS a duty to conduct a post-EPC
17 investigation in a pre-EPC setting." Part of the
18 problem that DSS has, when they get called into
19 these cases, is there are exigent circumstances.

20 THE COURT: I know.

21 MR. FRAWLEY: You need to decide, and you need to decide
22 quickly. And you don't have all day or weeks to --
23 to do this, to -- to go over the ten -- the ten
24 topics. And -- and they -- the point is, if you
25 look at -- and we've made an exhibit to our -- to

1 our -- I think it's Exhibit B or C, but -- but that
2 the -- the dictation from -- from the time of the
3 intake, to the time of the January 11 injury,
4 that's the measure of what DSS did. If that
5 amounts to at least slight care, then they're not
6 grossly negligent as a matter of law. If it does
7 not, or, if Your Honor feels that after reviewing
8 the -- what we've both put up here, that there's a
9 genuine issue of material fact, that it does not
10 amount to at least slight care, then Your Honor
11 should -- should deny my motion for summary
12 judgment. But, Ms. Harrison's argument is almost a
13 classic Etheridge argument that, "You didn't do
14 enough," that this expert affidavit -- look at the
15 page there, where they've got the three bullet
16 points. He not only doesn't say they didn't
17 exercise slight care, he says, "They committed
18 negligent acts or omissions." He identifies it as
19 negligence.

20 THE COURT: I know.

21 MR. FRAWLEY: So there's a distinction there from this
22 case, and Mike Corey, sitting on the witness stand,
23 under oath, looking at the jury and saying, "They
24 were grossly negligent." There's a distinction
25 there, and I think that's an important distinction.

1 THE COURT: All right.

2 MR. FRAWLEY: Thank you, Your Honor.

3 THE COURT: I have -- I did not -- was not able to -- to

4 read the Bass case thoroughly before now, so I want

5 to do that before I -- before I rule. So let me

6 just hold on to everything. Can you give -- Ms.

7 Harrison, you had a rubber band around this thing.

8 Can I --

9 MS. HARRISON: Yes, Your Honor.

10 THE COURT: Where have I got it in the material we

11 already have here? It's like a 2-foot stack of

12 material. Is it already in some of this?

13 MS. HARRISON: I don't think, so, Your Honor. I --

14 THE COURT: All right.

15 MS. HARRISON: -- submitted it --

16 THE COURT: That will be good.

17 MS. HARRISON: -- on Friday. Thank you.

18 THE COURT: That will be good. All right. That will

19 conclude the hearing.

20 MR. FRAWLEY: All right. Thank you for --

21 THE COURT: I'll let you know.

22 MR. FRAWLEY: -- your patience, Your Honor.

23 MS. HARRISON: Thank you, Your Honor.

24 MR. FRAWLEY: Thank you.

25 (Whereupon the within hearing was

1 concluded at 3:46 p.m.)

2 (*This transcript may contain quoted material.

3 Such material is reproduced as read or quoted

4 by the speaker.)

5 (**Certificate accompanies sealed original

6 only.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COMMON PLEAS COURT
3 Elizabeth Hope Rainey,)
4 et al,)
5 Plaintiff,) TRANSCRIPT OF RECORD
6 -vs-) 2011-CP-46-4508
7 South Carolina Department)
8 of Social Services,)
9 Defendant.) May 18, 2017
York, South Carolina

10
11
12 B E F O R E:

13 HONORABLE S. JACKSON KIMBALL, JUDGE
14
15

16 A P P E A R A N C E S:

17 S. RANDALL HOOD, ESQUIRE
Attorney for the Plaintiffs

18 PATRICK JOHN FRAWLEY, ESQUIRE
19 Attorney for the Defendants
20
21
22

23 Linda D. Moffitt
24 Circuit Court Reporter
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Motion -- page 3.

No sworn testimony.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	calendar		32

1 THE COURT: First One is Rainey and Charlotte
2 Mecklenburg Hospital. I've got several of those people
3 here. Are you ready?

4 MR. HOOD: Yes, sir.

5 THE COURT: Of course this has to do not with the
6 hospital but with the D.S.S. side of it. This is the -- I
7 have it plaintiff's Rule 59(e) motion.

8 MR. HOOD: Yes, Your Honor.

9 THE COURT: Mr. Hood.

10 MR. HOOD: Randy Hood for the plaintiff, Your Honor.

11 THE COURT: First appearance.

12 MR. HOOD: First appearance in a while.

13 Your Honor, basically, this is simply a 59(e) motion,
14 so I don't want to regurgitate a lot of the stuff that was
15 argued in the motion for summary judgment because I think
16 it really gets down to one specific issue, and that is
17 whether there was any exercise of slight care or not. And
18 that really is the question here.

19 In order to basically get to that point though I
20 wanted to just do a little bit of background.

21 In this particular situation we all understand, we all
22 agree, that D.S.S. has a specific role in South Carolina,
23 and that is to protect and ensure the safety of children
24 who are at risk of abuse or neglect.

25 In this particular case D.S.S. has an office in York

1 County. They're supposed to be able to watch over the
2 children of York County. And they have certain duties,
3 rules and regulations, obligations and responsibilities.

4 Under Madison vs. Babcock they have -- they're
5 required to adhere to their policies and procedures that
6 have been enacted to help them do their job and to provide
7 this particular care for which the legislature has given
8 them the authority.

9 This case which was argued with the Carolinas Medical
10 Center case, it went up to the Court of Appeals. They
11 themselves actually said in that, that order, that D.S.S.
12 has this obligation in a case like this. It's their
13 obligation to protect a child, not the hospital's. And so
14 that's the backdrop of this. And so it really comes down
15 to was there an exercise of slight care or not.

16 And we all understand what happened in this case, that
17 on December the 5th of 2011 this child was taken to
18 Piedmont Medical Center and taken to Carolinas Medical
19 Center. He had two subdural hematomas.

20 Over four days he was hospitalized at Levine's up in
21 Charlotte, and the doctor there, Dr. Courtland, was not
22 able to determine whether it was a non-accidental trauma or
23 not. They didn't know whether it was non-accidental trauma
24 or not. But because they had a suspicion they have a legal
25 obligation to report it to D.S.S. because there's a

1 suspicion. Because of this suspicion they reported it to
2 D.S.S. D.S.S. then the next day on December the 6th, they
3 went to the hospital or maybe it was that night.

4 THE COURT: That same night.

5 MR. HOOD: Same night, December 5th. They went -- I
6 think it was 7:30 p.m., and it was somebody that was not
7 going to be the actual caseworker that's assigned as the
8 person that's on duty at that particular time to handle on
9 call.

10 THE COURT: Right.

11 MR. HOOD: She went at 7:30. She goes. She sees the
12 family and meets with the family.

13 And then a nurse at some point tells her -- a nurse,
14 not the doctor, but a nurse -- says it's non-accidental
15 trauma.

16 The doctor later says they can't determine whether it
17 is or not. I think it's really important because --

18 THE COURT: I don't recall ever having hearing anybody
19 tell me that a nurse said it was non-accidental.

20 MR. HOOD: I can tell you. I will get that.

21 THE COURT: I thought they were always cautious about
22 what's say, and you can't -- we can't say it was
23 non-accidental trauma.

24 MR. HOOD: There was a nurse that told it, and that's
25 in one of his -- I think it's in the -- the memo that was

1 filed in regard to the opposition of motion for summary
2 judgment that -- that -- and I will have Whitney find it.

3 THE COURT: Okay.

4 MR. HOOD: But they were told it was -- by this nurse
5 that it was non-accidental trauma. The doctor later said
6 they couldn't determine, but they had a suspicion, and
7 that's why it went to D.S.S. So D.S.S. has a duty and an
8 obligation.

9 They did their duty and their obligation. They went
10 to the hospital; they spoke to the family; they entered
11 into a safety plan. They did the things that they were
12 supposed to do on the 6th and 7th. We don't disagree with
13 that. We do not disagree with that. On the 6th and
14 7th they did what they were supposed to do, which is
15 exactly what happened in the Bass case. It was --

16 THE COURT: Is Bass the school bus or the schoolhouse?

17 MR. HOOD: No. That's a D.S.S. case. That's the
18 D.S.S. case, and that's the one that Mr. Frawley was
19 actually counsel in that case.

20 THE COURT: Right.

21 MR. HOOD: In the Bass case, which our Supreme Court
22 reversed the Court, the trial court, and the Court of
23 Appeals -- they reversed them, and they said that in that
24 particular case the first part of it D.S.S. was proper.
25 They did the right thing at the first part. But then

1 afterwards, their actions afterwards, or inactions, were
2 not proper and it was not an exercise of slight care.

3 THE COURT: I -- I -- let me say this. And I know the
4 contention always has been -- it was raised before -- that
5 I don't want to embarrass you. If you need to sit down,
6 sit down.

7 MR. HOOD: No. I'm good.

8 THE COURT: You're moving around.

9 MR. HOOD: I've been sitting down enough to kill a
10 cat.

11 THE COURT: Okay. We aired that out pretty
12 extensively, and I -- I agree with you that -- that one
13 does not just lump everything together and say, well, as a
14 whole there was slight care.

15 But my concern -- and it's very difficult looking
16 through this record -- was that it appears to me that at
17 the end of the day that -- that when the courts, appellate
18 courts, hear these things they -- they do make some sort of
19 global determination of slight care or not. In fact, in
20 the school bus case -- and I just remember the facts. I
21 don't remember the names.

22 MR. HOOD: Collins, Clyburn and Jepar [sic].

23 THE COURT: The one with the knife on the school bus.

24 MR. HOOD: That was Etheredge, I believe.

25 THE COURT: Okay.

1 MR. HOOD: Or Clyburn. Excuse me.

2 THE COURT: They -- one -- one failure of the school
3 bus driver was -- I think I'm getting this right -- but she
4 failed to see the person or keep the person who was the
5 assailant from getting on the bus somehow.

6 MR. HOOD: Sure.

7 THE COURT: Somehow the assailant got on the bus.
8 well, and certainly that was true. So there was -- there
9 was some question. There had to be then a question
10 answered about whether that failure was -- and my
11 recollection is in the school bus case the Court sustained
12 the grounds for summary judgment. I believe.

13 Isn't that right, Mr. Frawley?

14 MR. HOOD: They did.

15 THE COURT: The Court had to look at that fact, and
16 ultimately look at that fact on its own, and say does
17 that -- does that represent the failure to exercise at
18 least slight care.

19 And -- and while I don't disagree with anything you've
20 said, most of our back and forth with this, as Ms. Harrison
21 will tell you, has been whether or not any failure to do
22 something they could have done or that their regs say you
23 are supposed to do, like not contacting law enforcement for
24 ten days --

25 MR. HOOD: Sure.

1 THE COURT: -- is that standing alone failure to
2 exercise slight care. Well, it might be. But -- but at --
3 at a summary judgment stage in the other cases the courts
4 have looked at particular -- and I'm not just -- I'm really
5 going through the process I went through in trying to deal
6 with this in the first place --

7 MR. HOOD: Sure.

8 THE COURT: -- the courts actually looked at
9 particular acts and eventually said, well -- and again a
10 knife on a school bus case that -- while there was a
11 failure, it wasn't a failure to exercise slight care.

12 MR. HOOD: Sure.

13 THE COURT: And that's difficult.

14 MR. HOOD: I'd like to address what you're saying.

15 THE COURT: All right.

16 MR. HOOD: Okay. We're talking about Etheredge and
17 Clyburn are two cases where --

18 THE COURT: They're not D.S.S. for one thing.

19 MR. HOOD: Right. Well, right. And D.S.S. is charged
20 with a lot more responsibility than a school is, but, be
21 that as it may, looking at Etheredge and Clyburn, in the
22 case that you're talking about -- Etheredge -- in looking
23 at it at that standpoint in time on that Tuesday morning,
24 because the assailant wasn't there on Monday, the assailant
25 was there on Tuesday and got on the bus because they did

1 not see it, but then the bus driver tried to intervene at
2 the same time that the assailant was -- was slicing the
3 student.

4 THE COURT: And there was injury to the student.

5 MR. HOOD: A one time -- a one-time action, not seeing
6 that person and then getting on, even though they had tried
7 to. They looked on Monday, didn't see him; and they looked
8 on Tuesday and just didn't recognize him; and they got on.

9 They said that was the exercise of slight care, and
10 also I think trying to intervene. One day -- one day. It
11 happened. It was a period of 15 minutes that may have
12 transpired for this.

13 THE COURT: I understand.

14 MR. HOOD: Okay. What I did this morning, because I
15 wanted to really make sure I understood the gravity of
16 everything in this case. I ain't real sophisticated, and
17 I'm kind of thick.

18 THE COURT: You can't plead that now.

19 MR. HOOD: Sir?

20 THE COURT: You can't plead that now.

21 MR. HOOD: I made this chart.

22 THE COURT: Yeah.

23 MR. HOOD: December of 2009, January of 2010. On the
24 11th this happened. Nothing on the 10th; nothing on the
25 9th; nothing on the 8th.

1 THE COURT: That's right.

2 MR. HOOD: Nothing on the 7th; nothing on the 6th;
3 nothing on the 5th. On the 4th I think is --

4 THE COURT: what you're saying -- what you're saying
5 though is there was no contact in -- in that period of
6 time.

7 MR. HOOD: No. There doesn't appear to be anything
8 they were doing.

9 THE COURT: I believe there was something on the
10 9th where there -- where there was a meeting with the
11 D.S.S. people if I remember something.

12 MR. HOOD: But if they're not doing anything --

13 THE COURT: I understand.

14 MR. HOOD: Okay. To me this is what really got me,
15 Your Honor.

16 Okay. This happened on December the 5th. Subsequent
17 event happened on January the 11th. That's a period of 36
18 or 37 days.

19 This is a child who on December the 4th was a living,
20 breathing, thriving child, three months old, one year
21 almost to the day younger than my grandchild, and I think
22 of my grandchild --

23 THE COURT: Please don't do a jury argument.

24 MR. HOOD: No, no, no. I'm not doing a jury argument
25 because this goes to -- this goes to the Bass case, Your

1 Honor, because Bass cites Hollins, and it says
2 specifically -- it says specifically, Your Honor, "Gross
3 negligence has also been defined as a relative term and
4 means the absence of care that is necessary under the
5 circumstances."

6 That was not cited in the brief. That was not -- I
7 mean, that was not cited in the order that Your Honor
8 propounded. That was in the Bass case, and it cited the
9 Hollins case. The Hollins case was the 11-year-old child
10 where they did find gross negligence because there was a
11 disparate -- in the Etheredge case they talk about how
12 Hollins, they found it one way, Etheredge another, because
13 in that case that kid was 18, and in the other case the kid
14 was 11. The disparate age made a difference under the
15 circumstances.

16 In this particular case we have a three-month-old
17 child. These people went into the home of the pit bull,
18 and the monster that mauled this kid, they knew this, or
19 they should have known it, or if they didn't know it they
20 knew there was a suspicion of it, and basically did
21 nothing.

22 They went on -- they had a legal obligation. And Your
23 Honor even in footnote two seems to acknowledge there was
24 an exercise of -- there wasn't an exercise of slight care
25 in notifying law enforcement. Seems to be an

1 acknowledgment --

2 THE COURT: No. I don't acknowledge that.

3 MR. HOOD: Well, it says then --

4 THE COURT: In fact, there's a rule that says you've
5 got to notify them within 24 hours. They didn't do it.

6 MR. HOOD: If you have policies and procedures and you
7 have rules and regulations, our South Carolina Supreme
8 Court has said that that is negligence per se if you
9 violate that which may indicative of gross negligence or
10 recklessness.

11 THE COURT: I understand.

12 MR. HOOD: That's the black letter law.

13 THE COURT: I'm just telling you I didn't say that in
14 the footnote.

15 MR. HOOD: Well, you didn't say that in the footnote,
16 but it seems to be -- you say even if you do accept it, I
17 don't think that it would have made a difference in
18 addressing the causation argument. But causation is a jury
19 question. And when you really get down to it and when you
20 talk about footnote two, Your Honor --

21 THE COURT: Causation is not always a jury question.

22 MR. HOOD: It isn't. But you know what? In the
23 Hollins case --

24 THE COURT: All right. Let -- let me stop you.
25 We've been through a lot of this stuff already. Tell

1 me what I did wrong and let me respond to it and let's deal
2 with that. Carry on.

3 MR. HOOD: Well, I think that, one, that the Court was
4 simply wrong in saying that there was not an exercise of
5 slight care. And there's a lot of different things that we
6 contend where the Court made an improper finding in that
7 regard.

8 One would be when they looked at these particular
9 adults and what they did when they went in and they spoke
10 to them on the 21st. On the 21st they spoke to them.
11 There are supposed to be six different things that they're
12 supposed to do to try to create some kind of a plan. It's
13 supposed to meet four goals.

14 And that wasn't done, Your Honor, because what you
15 have is you have a situation with a child who had two
16 subdural hematomas. You have to protect the child if
17 there's a suspicion of abuse. You're leaving them in
18 the -- in the home of the only people that could have
19 harmed him.

20 There was no explanation. There was nothing with law
21 enforcement when law enforcement came. Your Honor has seen
22 a number of regurgitated stuff that you've seen. But law
23 enforcement said what the hell is the problem here.
24 Somebody beat this kid about the head. Somebody harmed
25 this kid. I need more information. You've got to get me

1 more information. That never happened. Even on January
2 the 4th -- January the 4th -- 17 days after --

3 THE COURT: So what is my error?

4 MR. HOOD: Finding that that's not the exercise --
5 finding that that is the exercise of slight care.

6 THE COURT: I didn't find that that was the exercise
7 of slight care. I found that -- that the record didn't
8 reflect the absence of slight care.

9 MR. HOOD: But to -- to reflect the absence of slight
10 care you have to --

11 THE COURT: It's always in context. I agree with you.

12 MR. HOOD: But there has to be. If you find that
13 there is an absence of slight care you have to find that
14 there was slight care, the converse must be true. And so
15 you're saying that it's slight care not to contact law
16 enforcement for ten days, being told by them on the
17 17th that --

18 THE COURT: What I'm -- what I'm saying to you is that
19 in the cases that I've read at every turn at some point the
20 Court that heard the case took a fact and said that it is
21 or isn't slight care at the summary judgment stage. That's
22 what I did.

23 MR. HOOD: And so Your Honor is saying that not
24 contacting them for ten days when they were contacted and
25 they told they should have given them more, they need more,

1 and they didn't do anything for -- until this kid was --
2 was basically a vegetative state and --

3 THE COURT: You're not going to tell me what I'm
4 saying.

5 MR. HOOD: No, sir. What -- I'm asking for that, Your
6 Honor. I'm asking for what your -- what --

7 THE COURT: I see no need to clarify the order in that
8 regard.

9 MR. HOOD: Well, the order that regard says there was
10 slight care because --

11 THE COURT: That's why you have a right of appeal.

12 MR. HOOD: Of course. But what we're saying here,
13 we're saying here today, Your Honor, is we think the Court
14 was improper. And I was explaining, because of the 10-day
15 delay and because of then when they were told that they
16 should have done something and then --

17 THE COURT: What you're telling me is I should have
18 said that the failure to exercise -- failure to -- the
19 10-day period, lapse of time, is a jury question as to
20 whether there was a failure to exercise slight care.

21 MR. HOOD: Yes, Your Honor. Much more artfully put.
22 Absolutely, absolutely, Your Honor, absolutely. I
23 apologize.

24 THE COURT: I understand. You said that. We've said
25 that.

1 what's next?

2 MR. HOOD: Not just that ten days, but them being told
3 by law enforcement on that day they need more information
4 because there's a concern and them not doing anything until
5 the child was injured, that 17-day delay.

6 THE COURT: You're telling me that law enforcement
7 doesn't have an obligation to contact the family whether or
8 not they have information?

9 MR. HOOD: No, Your Honor. I'm saying that there's
10 a -- there's an inference to be drawn when law enforcement
11 tells them they need more information, that D.S.S. should
12 get them their information so they can complete an
13 investigation.

14 THE COURT: You're not -- you're not asserting that
15 the temp -- the failure to contact law enforcement within
16 the regulatory time was a failure to exercise due care.
17 You're simply saying the failure to furnish information?

18 MR. HOOD: No, Your Honor, that's not what I'm saying,
19 because I think what's most instructive and what really,
20 really brings the point home, when this happened on January
21 the 11th law enforcement was contacted immediately. Law
22 enforcement goes, gets this guy, takes him in and puts him
23 on a polygraph, and he admits to everything.

24 THE COURT: We know that.

25 MR. HOOD: Right. So when they were -- when what was

1 done was proper happened, then he admitted it.

2 THE COURT: Law enforcement was notified of this
3 situation before that.

4 MR. HOOD: Ten days after the fact but --

5 THE COURT: Let's get that straight. It's ten days
6 after the hospitalization, the initial hospitalization.

7 MR. HOOD: After the initial hospitalization.

8 THE COURT: But well before the incident that we're
9 talking about.

10 MR. HOOD: which when you then look at the Hollins
11 case, it has an exact scenario where it says, because in
12 that case what the Court of Appeals had held was we
13 affirmed the grant of summary judgment, because the kid
14 was -- the child was supposed to drive home with the drama
15 teacher but didn't. And so they said it wouldn't have
16 mattered because the drama teacher would have taken him
17 home. But the Supreme Court said but we don't know that,
18 it doesn't happen, it didn't happen, that they didn't take
19 him home, so we don't know what effect that would have had.

20 It isn't a vacuum. what would have happened on
21 December the 7th if they had been notified the way they
22 were supposed to and there was the gravity and the nurses
23 told them non-accidental trauma, judge -- I mean, doctor
24 says I don't know what it is but there's a suspicion, law
25 enforcement may have come in and done what they did on the

1 11th.

2 THE COURT: My recollection is that one of the
3 hospital employees said that this looks -- looks to be --
4 this is paraphrase -- a lack of training and supervision.
5 They didn't say what happened, but their initial assessment
6 was likely a lack of parenting skills.

7 MR. HOOD: But that wasn't the responsibility of
8 D.S.S. D.S.S. had a responsibility, an independent duty --

9 THE COURT: That's one of their responsibilities.

10 MR. HOOD: Right.

11 THE COURT: But I --

12 MR. HOOD: And -- and the thing is when they're told
13 though by a medical provider -- I know it wasn't a
14 doctor -- but when they're told by a nurse that it's
15 non-accidental trauma, they're told by a doctor that they
16 don't know but there's a suspicion, they're leaving this
17 child in the company of the only people that could have
18 harmed it.

19 THE COURT: You know, I also recall that, despite the
20 fact that this young father acknowledged what he did, he
21 never admitted that the injuries which caused the
22 presentation to C.M.C. were done by him. Never.

23 MR. HOOD: But that's a jury question. That's a jury
24 question, Your Honor.

25 THE COURT: I think you're -- go ahead.

1 MR. HOOD: And just so -- I'll say that I would
2 tell -- I would advise the Court on December 7th around
3 9:00 a.m. the supervisor, Ms. Hinnant, went to Levine for a
4 face-to-face with Owen's family and any collateral sources
5 -- nurses, social workers. She noted in her dictation at
6 -- and this is the supervisor -- "The nurse said it was
7 non-accidental." At page 251.

8 THE COURT: Okay.

9 MR. HOOD: So the supervisor knows that a nurse has
10 told her it's non-accidental trauma. The doctor says they
11 aren't sure or not. And the only persons that they leave
12 this child in the -- in the -- in the responsibility,
13 supervision, care of are the only people that could have
14 hurt this child.

15 THE COURT: You know what troubles me mostly about
16 this is that multiple times, multiple times, it's
17 difficult, is that the only -- that the only action that
18 would have prevented the virtual destruction of this child
19 would have been an immediate removal of the child from the
20 home.

21 All of the -- all of the -- all of the attention to
22 investigation, all of the followup over the 10-day period
23 that didn't happen would have had to result in the removal
24 of the child from the home. And at the end of the day
25 that's -- that's the decision that D.S.S. had to make, are

1 we going to remove this child from the home and, if so,
2 when where are we going to put it. I think there was some
3 discussion about one of the maternal grandmothers.

4 MR. HOOD: Maternal grandmother, yes, Your Honor.

5 THE COURT: Or even an uncle or something. There was
6 something about an uncle.

7 MR. HOOD: Yes, sir.

8 THE COURT: So the only -- the only available relief,
9 the only available preventive, I guess, would have been
10 if -- if D.S.S. had immediately, as was originally alleged,
11 taken the child from the home. That was -- that's the only
12 thing that would have prevented this, and it didn't happen.
13 Anyway --

14 MR. HOOD: And my only comment to that, Your Honor, is
15 if -- if there had been immediate removal that would have
16 required that D.S.S. do a proper assessment and law
17 enforcement be contacted immediately.

18 That's what -- that would -- that's what would have
19 had to happened. But even if there was not immediate
20 removal there was 37 days that transpired between the time
21 that this child suffered the first injury and the second
22 injury.

23 And it is our contention that it's a jury question as
24 to whether or not any of those failures not to do those
25 things that we've alleged in our -- in our briefs that have

1 been submitted to Your Honor, and which we all are very
2 aware of, that it would have created a jury question.

3 THE COURT: Absolutely. Let me hear from Mr. Frawley.

4 MR. HOOD: Thank you, Your Honor.

5 MR. FRAWLEY: May it please the Court.

6 Your Honor, I don't know what to add to what we've
7 already written back on March 10th and argued on
8 March 13th before Your Honor on the issues. I think the
9 large part of what's been discussed up to this point is a
10 -- a revisiting of the issues that were heard by Your
11 Honor.

12 THE COURT: They asked me to reconsider it.

13 MR. FRAWLEY: Pardon me?

14 THE COURT: They asked me do reconsider.

15 MR. FRAWLEY: Yes, sir, yeah. We have argued that
16 D.S.S. exercised at least slight care between the
17 December 6th of 2009 intake when they got it and we
18 spent --

19 THE COURT: December 5.

20 MR. FRAWLEY: Right. Well, December 5, but I believe
21 our intake was December the 6th, the following day. They
22 went to the hospital on the 6th.

23 THE COURT: They went to the hospital on the 5th
24 that --

25 MR. FRAWLEY: On the 5th. D.S.S. got the intake on

1 December the 6th.

2 THE COURT: D.S.S. first went to the hospital on
3 December the 5th. That's all I'm saying.

4 MR. FRAWLEY: Okay. Well, that's fine. Between that
5 and the January the 10th -- January 11 of 2010 injury we
6 enumerated with D.S.S. We put in the dictation, which sets
7 out everything that they did.

8 We argued the Richardson vs. Hambright, Clyburn case,
9 the Etheredge case. And the plaintiffs argued in their
10 memorandum filed March 10 basically the four same points
11 that they're -- they're raising now.

12 THE COURT: What do you have to say about the Bass
13 case?

14 MR. FRAWLEY: Well, let's talk about the Bass case.

15 Ironically, the Bass case involved a claim against
16 D.S.S. because we removed the kids because we got -- we got
17 a claim from the hospital that there was suspected parental
18 poisoning.

19 THE COURT: Right.

20 MR. FRAWLEY: So --

21 THE COURT: That was an overdose of drug, prescription
22 overdose, right?

23 MR. FRAWLEY: Yes, sir. So we go there. We've got
24 learning-disabled kids on life support. We respond. The
25 doctors don't know what the problem is. The two parents

1 have no idea what's going on. They're scared. And we've
2 got no indication what the problem is, but it is pretty
3 clear at that point that it's some kind of medication,
4 whether overmedication by the parents. Negligently or
5 intentionally, we don't know.

6 Our caseworker does take possession of the medication,
7 but we never -- the expert has a problem with the fact that
8 we -- we never checked it. We did not in the 41 days --

9 THE COURT: Didn't do our own analysis.

10 MR. FRAWLEY: Right. We didn't do our own analysis,
11 even though he conceded that D.S.S. typically does not have
12 its own pharmacy experts. I guess we could have farmed it
13 out. That was his issue. But in that case --

14 THE COURT: The point was that there was an expert --
15 there was an expert. In that case all of that turned on
16 the fact that there was a statement by the expert in his
17 affidavit that this was -- this particular failure was the
18 failure to exercise slight care.

19 MR. FRAWLEY: Right.

20 THE COURT: If I remember right.

21 MR. FRAWLEY: Not in an affidavit, in trial testimony.

22 THE COURT: Trial testimony?

23 MR. FRAWLEY: That case actually got tried. Yes, sir.
24 We went to trial on that. We had a 5-day trial.

25 THE COURT: I'm sorry.

1 MR. FRAWLEY: And he -- he testified that D.S.S. did a
2 bunch of things right.

3 They -- they visited when should have; they talked to
4 collaterals; they requested medical records; they even got
5 the pharmaceuticals. But what they did not do was they did
6 not check those pharmaceuticals.

7 They went to the home. They visited the home.
8 They -- they had a home -- a family meeting. And they
9 chose at that point, because of what they determined was
10 the risk, that these kids needed to be taken out of the
11 home when the hospital released them.

12 THE COURT: Right.

13 MR. FRAWLEY: So that's what they did. But they
14 placed the children with an aunt who lived five minutes
15 away with whom these children were -- were familiar. So
16 they placed them with family.

17 I think Your Honor cited in footnote one to Your
18 Honor's order that D.S.S. when they -- they have a duty to
19 protect the kids, but when they do if they have to take
20 them out of the family, they have to do it in the least
21 intrusive manner possible.

22 So what they determined at that point, let's place
23 them with the aunt, which -- which happened.

24 Forty-one days later we find out that the problem
25 is -- is the miscompounding of the Clonidine that the kids

1 were given, a thousand times more potent. And the pharmacy
2 was -- was at fault for it. And as soon as that happened
3 the kids were immediately released.

4 Now, there's a couple of issues there. One was -- and
5 it's not really addressed in the Bass opinion -- but the
6 determination fact sheet once D.S.S. determined that --
7 that this is an indicated case, the reasons they put in
8 there had nothing to do with the original call-in about
9 suspected parental poisoning.

10 They talked about the house not being kept well,
11 about -- about Mrs. Bass having diabetes that had been
12 recently diagnosed and she didn't have her insulin straight
13 yet and she was a little over-mad to take care of these
14 three kids.

15 Now, that's not in the opinion, but when the original
16 reason D.S.S. was called in was suspected parental
17 poisoning, then 17 days later they reached the finding
18 early that there was a -- an indicated case of abuse and
19 neglect.

20 Their reasoning was you didn't keep your house right
21 and you weren't able to take care of the kids, more of a
22 neglect issue. They never addressed in that determination
23 fact sheet the -- the suspected poisoning at all. That was
24 another issue that the -- that the expert had.

25 So what you've got is an expert saying looks like, you

1 know, this stuff's good but over here you guys didn't do
2 very well, failure to exercise even slight care because you
3 did not test it and when you determined that there was
4 neglect you don't even refer back to the reason for the
5 initial calls. So that's what he talked about. But in his
6 testimony he earmarked a specific issue.

7 In this case they have Mr. Savarice [sic] -- and
8 his -- his thing has been handed up to Your Honor -- and
9 what Mr. Savarice says is generally where he's talking
10 about not only D.S.S. but also the hospital.

11 THE COURT: I thought that his affidavit, unless my
12 memory fails me -- it might -- referred -- was for the
13 purposes of dealing with C.M.C.

14 MR. FRAWLEY: It was. It was submitted in response to
15 C.M.C.'s summary judgment motion.

16 THE COURT: Yes.

17 MR. FRAWLEY: But he does address -- and that's
18 Exhibit 12 to the material they handed up to Your Honor --
19 in paragraph four on page two he says, "In my opinion with
20 a reasonable degree of professional certainty that the
21 defendant, South Carolina Department of Social Services,
22 defendant Carolinas Medical Center and their employees
23 and/or agents, committed negligent acts or omissions in
24 services and care rendered to Owen [REDACTED]."

25 Negligent. He doesn't say grossly negligent. He

1 never says failure to exercise slight care. In fact, Your
2 Honor asked plaintiff's counsel during the March 13 hearing
3 we had, you know, does your expert say anything in there
4 about failure to exercise slight care. And she concedes
5 that -- that, no, he doesn't, he doesn't say that. So --
6 so that's a different situation here in the [REDACTED] case.

7 The other thing is one of the things they're saying
8 that amounts to failure to exercise at least slight care is
9 the failure to turn over to law enforcement right away. We
10 agreed. We didn't turn over when we should have. It was
11 faxed December 16th. But had they done it right away they
12 would not have found any criminal record for Michael

13 [REDACTED] the 18-year-old father of Owen [REDACTED] --

14 THE COURT: Right.

15 MR. FRAWLEY: -- nor for Kayla Lythgoe, the
16 19-year-old mother of -- of the boy.

17 what they would have found is -- is that there was a
18 C.D.V. in the background of the maternal grandmother who --
19 Ms. Williams who was -- was the one that -- that, you know,
20 possibly could have gotten the kids that's been -- or the
21 child that has been suggested here.

22 So the fact that the contact to law enforcement was
23 not done timely, it was done by December 16th. If the
24 child had been injured before December 16th that may be
25 another matter. But even with that the Michael [REDACTED]

1 the father, never said that he was responsible for the two
2 hematomas resulting from the December 5th injury. He never
3 admitted to that. He admitted to what took place for the
4 second injury.

5 So that's like me driving through a traffic light to
6 get here. That's -- that's breaking the law and negligent,
7 but I didn't -- I didn't cause an accident. It's something
8 that happened in a vacuum. And if you look at the totality
9 of what D.S.S. did, it did amount to at least slight care.

10 Again, in Bass the expert focused on D.S.S.'s post
11 E.P.C. investigation. And there's even language in that --
12 that case that where -- where the Court says if it's an
13 E.P.C. removal issue it's typically associated with exigent
14 circumstances and time constraints.

15 That's exactly what happened in the [REDACTED] case. We
16 get called and we've got a day to investigate. And they
17 did investigate. Our -- our expert -- our caseworker tried
18 several times to go out to the house to do a home visit.
19 She finally did get a home visit December 17th, and that
20 home visit indicates a flourishing child, a clean living
21 room and the parents, you know, acting appropriately.

22 Now, there's mention by Mr. Hood that when D.S.S.
23 first reported that they were told by a nurse that it
24 suspected N.A.T. or non-accidental trauma.

25 We were also told by a nurse that they wondered why

1 D.S.S. was there to change the babysitter.

2 The first night that Ms. Tyler went there -- our
3 on-call case worker -- she talked to a nurse when she's
4 talking to collaterals, and the nurse that's there thinks
5 that we're there to change the babysitter. And that's in
6 the first day of dictation in that. And then I'm not going
7 to belabor because I'm arguing the same things I argued
8 back on the 13th.

9 we did not strike the blow. This is a tragic case.
10 we've got a seven-year-old little boy who was a beautiful
11 baby. I haven't see him in two and a half years. I saw
12 him two and a half years ago after a deposition. He was a
13 beautiful child then but obviously seriously impaired and
14 will be that way the rest of his life. And this is tragic.

15 But -- but D.S.S., despite our -- our duty to protect
16 children, we also have a duty to protect children and if
17 there's going to be a removal, we've got to have a good
18 reason for doing that.

19 Bass said that. You know, I'm getting Bass waved in
20 my face. And Bass says when you remove a child you better
21 have a good reason. And they did not have a doctor saying
22 that it was non-accidental trauma.

23 And we asked them several times. Krista Hinnant, the
24 supervisor, tried several times to find that out. And the
25 extent that we tried to look into that is laid out, the

1 level of at least slight care and beyond is laid out, in
2 the dictation that we put up to Your Honor.

3 You know, could we have done more? Sure. In
4 retrospect we could always have done more.

5 THE COURT: well, the only remedy was taking the child
6 immediately.

7 MR. FRAWLEY: Yes, sir. And at that time the
8 circumstances did not dictate it.

9 THE COURT: Okay.

10 MR. FRAWLEY: So we would ask that Your Honor -- Your
11 Honor...

12 THE COURT: I'm going to -- I'm going to -- I'm going
13 to do a simple form four order denying the motion and leave
14 all of this as an open book. I'm not going make any
15 additional findings. Stand on what you've got. To the
16 extent I'm wrong, somebody can point that out.

17 MR. HOOD: Thank you, Your Honor.

18 MR. FRAWLEY: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. HOOD: Your Honor, I did want to make this just a
21 court exhibit, this thing that I did.

22 THE COURT: Okay.

23 (Calendar marked Court's Exhibit No. 1.)

24 END OF REQUESTED TRANSCRIPT OF RECORD
25

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

I do further certify that I am neither of kin, counsel
nor interest to any party hereto.

Linda D. Moffitt

33

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

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

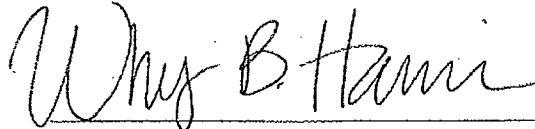
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Record on Appeal contains all materials proposed to be included by the parties and not any other materials. Specifically, the parties conferred on these materials through email on January 11, 2018 and January 12, 2018, and are in agreement with all materials presented to the Court in this Record on Appeal.

Respectfully submitted,



McGowan, Hood & Felder, LLC

Whitney B. Harrison
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100

January 22, 2018

RECEIVED
FEB 12 2018
SC Court of Appeals

RECEIVED
FEB 12 2018
SC Court of Appeals