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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
Guardian *ad Litem* to Owen C.,
a minor ..... Appellant,

v.

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

PETITION FOR REHEARING

The Respondent South Carolina Department of Social Services petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Elizabeth Hope Rainey, as the Guardian ad Litem to Owen C., a minor, v. South Carolina Department of Social Services,* Op. No. 5838 (S.C. Ct. App. filed July 21, 2021).

The grounds for the Respondent's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent's petition for rehearing is based on the Court's decision in *Rainey vs. South Carolina Department of Social Services*, Op. No. 5838 (S.C. Ct. App. filed July 21, 2021); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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ATTORNEYS FOR RESPONDENT

Lexington, South Carolina

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

In reversing in part, vacating in part, and remanding the lower court grant of summary judgment to the Respondent South Carolina Department of Social Services (hereinafter "SCDSS") in this matter, this Court has concluded that "[b]ecause the evidence in this case supports the reasonable inference that DSS failed to exercise slight care from the outset of its investigation regarding the Child's injuries, the circuit court erred in granting summary judgment." *Rainey, as GAL for Owen C., a minor v. South Carolina Department of Social Services*, Op. No. 5838 (S.C.Ct.App. filed July 21, 2021), p. 7. SCDSS respectfully submits that the following points were overlooked or misapprehended by this Court, and offers this Memorandum in support of the Respondent's Petition for Rehearing:

I. THE COURT HAS MISAPPREHENDED AND MISAPPLIED THE 24-HOUR REFERRAL TO LAW ENFORCEMENT REQUIREMENT OF *S.C.CODE ANN.* §63-7-980, AS THE FACTS OF THE INTAKE AND INVESTIGATION DECEMBER 6, 2009 DID NOT INDICATE A VIOLATION OF CRIMINAL LAW.

S.C. Code Ann. §63-7-980(B)(1) requires that "[w]here the facts indicating abuse or neglect *also appear to indicate a violation of criminal law*, [SCDSS] must notify the appropriate law enforcement agency of those facts within twenty-four hours of the department's *finding* for the purposes of police investigation." (Emphasis added). The Court misapprehended and misapplied the statutorily-mandated notice provision because the facts of the intake to which SCDSS responded December 6, 2009 did not indicate a violation of criminal law, and SCDSS had not made a finding as to the report, as required by the statute.

SCDSS received an intake December 6, 2009, at 5:01 p.m., reporting that a 2-month old baby with two subdural hematomas had been admitted to the hospital, raising the possibility of non-accidental trauma, although the report went on to indicate that the parents' behavior with the child had been "appropriate." *See*, SCDSS Intake Summary, R. pp. 77-81. On-call case worker Chandra Tyler responded to the hospital by 7:45 p.m., having face-to-face meetings with the parents of the child and collaterals—the paternal grandparents, a paternal uncle, and an unnamed nurse. *See*, SCDSS Case Dictation, (hereinafter "Dictation"), R. pp. 103-105. Ms. Tyler provided the parents with the DSS Brochure 3034 and the handbook entitled *Child Protective Services: A Guide For Parents*, advising them of the SCDSS procedure in Child Protective Services (CPS) cases and their right to representation by counsel, which both parents signed for, acknowledging receipt. Dictation, R. p. 105; *see also*, DSS Brochure 3034 (Feb. 03) and signed Acknowledgement. R. pp. 106-108. Ms. Tyler also had the parents sign a Safety Plan, pursuant to which the parents agreed to follow medical advice of the hospital, and not to remove the child

from the hospital until the child was medically discharged. Dictation, R. p. 103; SCDSS Safety Plan (12/6/09), R. p. 109. There is no evidence of any indication in the intake nor Ms. Tyler's initial contact that a violation of criminal law was suspected. In fact, the hospital nurse Ms. Tyler spoke with seemed unaware that there had even been a Child Protective Services call, and thought that Ms. Tyler was at the hospital to relieve the sitter who was present in the room with the child. *Cf.*, Dictation, R. p. 104, bottom paragraph ("The nurse seemed confused and said that they had no known concerns of non accidental trauma and that the social worker was not supposed to be calling for those reason [sic], but was to call to get DSS approval to remove the sitter for Owen's room."). *See also*, R. pp. 321, 340, Exhibit 12 to Plaintiff's Memorandum in Opposition to SCDSS Motion for Summary Judgment, p. 17 of second Affidavit (Appellant's Expert, George W. Savarese notes the incident, that the hospital staff had no apparent concerns for the child and that the December 6 injury was accidental, and communicated that lack of concern and "the notion that the child's injuries were likely accidental" to SCDSS). There were no facts indicating a violation of criminal law, nor was there yet a "finding" that would have triggered or otherwise warranted the 24-hour notice requirement under the statute.

Furthermore, contrary to this Court's footnote quoting the statute, SCDSS did not concede that it had failed to notify YCSD within the statutorily-mandated time period. *See*, *Rainey*, Op. No. 5838, pp. 3-4, fn. 1. The SCDSS on-call case supervisor Lola Sutherland and her successor case supervisor Krista Hinnant both spoke with Lt. W. J. Miller, of the York County Sheriff's Department (hereinafter "YCSD"), with whom the Department had a close working relationship, acknowledging in their calls with Lt. Miller that they "should've made the [law enforcement referral]," but the acknowledgements by Sutherland and Hinnant cited by the Court in its opinion are more in the nature of attempts by them to assuage Lt. Miller's frustration

with not being sooner notified than conceding that they had breached the statutorily-mandated requirement triggered by an indication of a violation of criminal law. *See*, *id.*, pp. 3-4. *Cf.*, *id.*, p. 4 (passages quoted by the Court from Sutherland's call with Lt. Miller, in which, while admitting she should have referred the matter sooner, Sutherland makes no mention of facts indicating a violation of criminal law). Counsel for SCDSS is aware of no such concessions made by SCDSS Counsel for purposes of this appeal, other than conceding that the notice to law enforcement was made ten days after the intake rather than 24-hours. The 24-hour notice was not required under the facts then existing and the statute.

Additionally, the Court's conclusion that SCDSS was "convey[ing] conflicting information to Lt. Miller in response to his effort to investigate the cause of the Child's injuries" is a misapprehension of the facts. *See*, *Rainey*, Op. No. 5838, p.11. In addition to the context of the intake report and Ms. Tyler's afore-mentioned contact with the hospital nurse, who thought Ms. Tyler was there to relieve the sitter, the responses Ms. Hinnant received from two separate medical social workers were inconclusive and conflicting, and indicated that even the treating physician, Dr. Courtland, was not able to definitively determine if the injury was accidental or non-accidental. SCDSS passed on what information it had to Lt. Miller, and the information it had received from the hospital was itself conflicting. *Cf.*, Dictation, R. p. 99 (The morning of December 7, 2009, Krista Hinnant contacted Levine Children's Hospital social worker Laura McDowell, inquiring into whether doctors thought the trauma was non-accidental. McDowell told Hinnant that she would speak with the doctors and report back to her.); *id.*, R. p. 98 (Hinnant spoke with a second social worker, Laura Newmark, at approximately 11:50 a.m. that morning, who told Hinnant that she was the social worker who had been working with the family, that she had spoken with the pediatric staff, and that they could not determine whether the child's injuries

were accidental or not. She told Hinnant that, although the family had no clear history of trauma, the hospital could not rule out trauma, but that there were no obvious findings of abuse or neglect, and that the hospital mostly had concerns about lack of supervision. Newmark further stated that Dr. Cheryl Courtland was working with the child, and that Dr. Courtland could not determine if the injuries were accidental or not at that point in time.).

Certainly Levine's medical team had suspicions of abuse, as the Court properly recognized on pp. 2-3 of its unpublished *Rainey v. Charlotte-Mecklenburg Hosp. Auth.*, No.2015-UP-209 (S.C.Ct.App. filed Apr. 22, 2015) opinion, as noted in this opinion, s*ee*, *Rainey*, Op. No. 5838, p. 11, fn. 6; but those suspicions were sufficient only for the hospital to comply with the reporting statute for suspected abuse or neglect. This Court, itself, noted the dilemma SCDSS faced with the conflicting medical information in acknowledging that the hospital had "*thoroughly tested* Child for physical evidence of abuse," yet the "results of these tests were *inconclusive* as to whether the Child had been abused." *Id.* (Emphasis added). The Levine medical team suspicions cited by this Court were just as conflicting, inconclusive, and enigmatic as the information SCDSS case supervisor Hinnant was attempting to divine from the medical social workers and recalcitrant doctors in December, 2009.

Even assuming the misapplication of the §63-7-980(B)(1) referral to law enforcement requirement is proper, there is no underlying evidence that makes that delay a contributing factor to the Child's injury, instead making a proximate cause argument while conveniently ignoring the absence of criminal history for the parents, with only the maternal grandmother—who had custody of the Child—having a criminal history for CDV. Hinnant Deposition, R. pp. 117-118, deposition p. 92, line 14 to p. 94, line 16. *See also*, Williams Deposition, R. p. 319, deposition p. 7, line 11 to p. 8, line 3 (Williams testified to convictions for the CDV in 2008 and a DUI). Even

had the request for a criminal history for Michael C. been timely sent, it would have yielded no history. Furthermore, after the January 11, 2010 injury to the Child, law enforcement did get involved, administered a polygraph test to the father, Michael C., who eventually confessed to having inflicted the recent injuries to the Child. Yet he did not admit to inflicting the injuries leading to the December 6, 2009 intake report to SCDSS, and there is no evidence that he played any role in the injury leading to the December 6, 2009 intake report.

Michael C. pled guilty to criminal charges and was incarcerated. The mother, Kayla Lythgoe, passed her polygraph, indicating, apparently, that she neither abused the child nor was aware that the father had abused him. There is no evidence that the father injured the child resulting in the first hospitalization. There is no evidence from the mother, or the maternal grandparents, or anyone indicating that Michael C. was a potential safety threat to the Child before the January 11, 2010 injury for any reason other than is young age, as was the same case with Ms. Lythcoe, the mother of the Child. The cornerstone scintilla of evidence from which the Court infers an issue of fact because of the misapplication of §63-7-980(B)(1) simply does not exist.

II. TO THE EXTENT THAT THE COURT RELIES UPON CONCERNS SET FORTH IN THE *BASS V. SCDSS* DECISION AND THE AFFIDAVITS OF GEORGE SAVARESE, THAT RELIANCE IS MISPLACED.

The Court notes in a footnote concerns set forth in an affidavit of George Savarese, Ph.D., the expert in clinical social work proffered by the Appellant, and cites *Bass v. SCDSS*, 414 S.C. 558, 780 S.E.2d 252 (2015) as authority for giving credence to opinions rendered by Mr. Savarese. *See*, *Rainey*, Op. No. 5838, p. 9, fn. 4.

The reliance upon *Bass* is misplaced because, in this case, as in *Bass*, there is no evidence that the Child's parents had injured him leading to the December 6, 2009 intake report, when SCDSS received the report and began its investigation, given the Hospital's inability to find non-accidental trauma. The *Bass* decision further undercuts the Appellant's argument given the Supreme Court's focus on the expert witness Michael Corey's stating the proper standard of care—gross negligence—as its cornerstone for reversing the Court of Appeals. *See, e.g., Bass*, 414 S.C. at 566-67, 780 S.E.2d 256. The Appellant's expert Savarese was clearly not aware of the proper gross negligence standard of care required by *S.C. Code Ann.* § 15-78-60(25) in offering his opinion—not once, but two times over a 20-month period—misstating the appropriate standard of care, never mentioning failure to exercise slight care, and opining that DSS was merely negligent. *See, e.g.*, Savarese Affidavits of August 4, 2011 and April 6, 2013, R. pp. 321-354. *See also, Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010)(Court found summary judgment appropriate because Plaintiff's experts failed to define the correct legal standard of care or opine how the Defendants breached the standard of care). Mr. Savarese's conclusory statements and inaccurate stating of the standard of care, as was the case with the expert in *Harris Teeter*, are inapposite to the *Bass* holding, do not create a genuine issue of material fact, and should be disregarded. *Id. See also, Bass*, 414 S.C. at 572, 780 S.E.2d at 259 (Supreme Court stating that, "Unlike the experts in *Harris Teeter*, in this case, Corey stated the proper standard of care and provided specific examples to support his opinion that DSS breached the standard of care.").

III. THE COURT'S INFERENCE THAT SCDSS CASEWORKER DIRVONDRA HILL'S PATTERN OF RECORDKEEPING AND MAKING SEVERAL UNSUCCESSFUL ATTEMPTS TO SCHEDULE A HOME ASSESSMENT WITH THE PARENTS AND CHILD "RAISES FURTHER QUESTIONS OF FACT AND OF CREDIBILITY" IS MISPLACED BECAUSE MS. HILL'S DISTATION WAS ENTERED WITHIN THE TIMEFRAME AFFORDED BY SCDSS POLICY AND PROCEDURE,

AND BECAUSE THERE IS NO EVIDENCE ON THE RECORD ORIGINALLY IMPUGNING MS. HILL'S CREDIBILITY FROM WHICH THE COURT SHOULD DRAW ANY SUCH INFERENCE.

In addition to the perceived delay of the referral to law enforcement relating to the misreading of *S.C. Code Ann.* §63-7-980(B)(1) discussed above, the Court further noted perceived delays on SCDSS Caseworker Dirvondra Hill's part in making her contact with the parents and child for a home assessment after several unsuccessful attempts, and in entering dictation, most notably the dictation of the December 21, 2009 home assessment and the day after the Child's January 11, 2010 injury, and has inferred from those perceived delays a "pattern of recordkeeping [that] raises further questions of fact and of credibility." *See, e.g., Rainey*, Op. No. 5838, p. 12, fn. 7. Such an inference is improper because there is no evidence in the record indicating that any act of or representation by Ms. Hill was ever misleading or inaccurate, nor contested by anyone associated with the Appellant or the family of the Child, and Ms. Hill's credibility should not be in question. There is nothing in the record indicating that Ms. Hill misrepresented or falsified anything, and to posit such an inference from the perceived delay in entering dictation and from that further infer an issue of fact is misplaced.

SCDSS Social Service Workers and Staff are to document the specifics of the case decision staffing in the CAPSS automated system in five working days of the decision, and to document routine case activity in CAPSS *no later than thirty calendar days after the activity.* SCDSS Human Services Policy and Procedure Manual, Chapter 7, Child Protective and Preventive Services, para. 38, R. 269.(Emphasis added). *See also, id.*, para 47, R. 273 ("All staff … [e]nsures that all documentation of actions in a case is completed in the CAPSS automated case record no later than 30 days after the action. Documents critical case activity, such as removals, court actions, or other as directed by supervisor, in no more than 10 days."). The entry

of the dictation of the December 21 home assessment twenty-two days after the assessment and the day after the January 11 injury to the child was within the thirty days set forth by Policy and Procedure, and the inference that it was improperly delayed is improper and unfounded. The inference that it calls Ms. Hill's credibility into question is similarly unfounded, as there is no evidence contesting the accuracy of the entry of the December 21 home visit and assessment. There is no contradiction posed by the family to Ms. Hill's characterization of what she saw December 21 and reported in her dictation. The timing was not ideal given the after-the-fact, forensic viewing, but it was within the parameters of SCDSS Policy and Procedure, and there is no evidentiary cornerstone contradicting the entry from which the Court can make the inference that Ms. Hill's credibility should be questioned or her relating of the facts be similarly questioned.

The Court further posits that, notwithstanding DSS's argument that Ms. Hill's repeated attempts to make unannounced home visits amounted to evidence of the "slight care analysis," a jury could find the attempted visits demonstrate the opposite, when considered with the record keeping, the failure to make a timely referral to law enforcement—both of which, as discussed above, are misapprehensions of the statute and the policy—the Court concludes that the sum presents a classic mix of law and fact, requiring the jury's determination on the question of gross negligence. *Rainey*, Op. No. 5838, p. 13.

Although in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803, under South Carolina case law, the meaning of the "scintilla of evidence rule" is not that, if there is any relevant testimony, amounting to a scintilla, it must be left to the jury to

determine its force and effect; rather, "[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views." *Crawford v. Town of Winnsboro*, 205 S.C. 72, __, 30 S.E.2d 841, 849 (1944) (emphasis in original). *Cited with approval* in *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946). *See also, Radcliffe*, 209 S.C. at 421, 40 S.E.2d at 630 ("[if] it be conceded that there may be deduced by a process of unusual *finesse* of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury." (emphasis in original)).

With respect, the Court's piling inference upon inference upon misapprehensions of a statute and policy from which the Court infers delayed referral to law enforcement and delayed entry of dictation, without bedrock evidentiary fact indicating the perpetrator of the injury to the Child was the author of the injury that led to the December 6, 2009 intake, when there is no evidence contrary to the substance of the dictation and no evidence from the family of the Child—the mother, the maternal grandmother—who best knew the father, Michael C.—indicating that Ms. Hill was wrong in her December 21 assessment and Michael C. posed a threat to the Child's welfare amounts to exactly the unusual *finesse* of reasoning that there is a scintilla of evidence that the Court in *Radcliffe* was discouraging.

IV. WHAT SCDSS DID DO AMOUNTED TO BEYOND SLIGHT CARE, AND WAS NOT GROSSLY NEGLIGENT UNDER THE *CLYBURN* AND *ETHEREDGE* CASES.

SCDSS received an intake December 6, 2009, at 5:01 p.m., reporting that a 2-month old baby with two subdural hematomas had been admitted to the hospital, raising the possibility of non-accidental trauma, although the report went on to indicate that the parents' behavior with the child had been "appropriate." *See*, SCDSS Intake Summary, R. pp. 77-81.

On-call case worker Chandra Tyler responded to the hospital by 7:45 p.m., having face-to-face meetings with the parents of the child and collaterals—the paternal grandparents, a paternal uncle, and an unnamed nurse. *See*, SCDSS Case Dictation, R. pp. 103-105. Ms. Tyler provided the parents with the DSS Brochure 3034 and the handbook entitled *Child Protective Services: A Guide For Parents*, advising them of the SCDSS procedure in Child Protective Services (CPS) cases and their right to representation by counsel, which both parents signed for, acknowledging receipt. Dictation, R. p. 105; *see also*, DSS Brochure 3034 (Feb. 03) and signed Acknowledgement. R. pp. 106-108. Ms. Tyler also had the parents sign a Safety Plan, pursuant to which the parents agreed to follow medical advice of the hospital, and not to remove the child from the hospital until the child was medically discharged. Dictation, R. p. 103; SCDSS Safety Plan (12/6/09), R. p. 109.

Oddly, the nurse Ms. Tyler spoke with seemed unaware of a CPS call, and thought that Ms. Tyler was at the hospital to relieve the sitter who was present in the room with the child. *Cf.*, Dictation, R. p. 104, bottom paragraph ("The nurse seemed confused and said that they had no known concerns of non accidental trauma and that the social worker was not supposed to be calling for those reason [sic], but was to call to get DSS approval to remove the sitter for Owen's room."). *See also*, R. pp. 321, 340, Exhibit 12 to Plaintiff's Memorandum in Opposition to SCDSS Motion for Summary Judgment, p. 17 of second Affidavit (Appellant's Expert, George

W. Savarese notes the incident, that the hospital staff had no apparent concerns for the child and that the December 6 injury was accidental, and communicated that lack of concern and "the notion that the child's injuries were likely accidental" to SCDSS).

The morning of December 7, 2009 Ms. Tyler and her supervisor, Lola Sutherland, had a staffing with the assessment case worker to whom the case was being assigned, Dirvondra Hill, and her supervisor Krista Hinnant. *See, e.g.*, Dictation, R. pp. 99-101; Deposition of Lola Sutherland (January 10, 2013)(hereinafter "Sutherland Deposition"), R. p. 111, deposition p. 27, line 19 to p. 28, line 20; Deposition of Krista M. Hinnant (January 10, 2013)(hereinafter "Hinnant Deposition"), R. p. 115, deposition p. 39, line 20 to p. 40, line 11; Deposition of Dirvondra Hill (January 14, 2013)(hereinafter "Hill Deposition"), R. p. 120, deposition p. 12, lines 9-17; SCDSS Case Transfer and/or Case Staffing form 3062 (December 7, 2009), R. pp. 122-123. At the initial staffing, it was discussed that Owen had two subdural hematomas, that the hospital social worker and a nurse had concerns that the injuries were the result of non-accidental trauma, but no doctor was saying that injuries were non-accidental, and that the child was ready for discharge from the hospital. Dictation, R. p. 101.

After the initial staffing and accepting the transfer of the case from the on-call caseworker Tyler, SCDSS Assessment Supervisor Hinnant and Assessment Caseworker Dirvondra Hill had a second staffing that same morning with SCDSS Legal. *See,* Dictation, R. pp. 101-102; Hinnant Deposition, R. pp. 115-116, deposition p. 39, line 20 to p. 40, line 6; p. 41, lines 6-11; SCDSS Case Transfer and/or Case Staffing Form 3062, Legal Staffing (December 7, 2009), R. p. 122. Later that morning, DSS supervisor Krista Hinnant contacted Levine Children's Hospital social worker Laura McDowell, inquiring into whether doctors thought the trauma was non-accidental. Dictation, R. p. 99. McDowell told Hinnant that she would speak

with the doctors and report back to her. *Id.* Hinnant spoke with a second social worker, Laura Newmark, at approximately 11:50 a.m., who told Hinnant that she was the social worker who had been working with the family, that she had spoken with the pediatric staff, and that they could not determine whether the child's injuries were accidental or not. *Id.*, R. p. 98. She told Hinnant that, although the family had no clear history of trauma, the hospital could not rule out trauma, but that there were no obvious findings of abuse or neglect, and that the hospital mostly had concerns about lack of supervision. *Id.* Newmark further stated that Dr. Cheryl Courtland was working with the child, and that Dr. Courtland could not determine if the injuries were accidental or not at that point in time. *Id.*

Hinnant staffed the matter with the DSS legal department, and authorized the discharge of the child to the care of his parents. Dictation, R. pp. 97-98; Hinnant Deposition, R. p. 113, deposition p. 31, line 18 to p. 32, line 19, R. p. 114, deposition p. 33, lines 3-17. Dirvondra Hill attempted a home assessment with the child later December 7, but found no one at home. Dictation, R. p. 102; Hill Deposition, R. p. 120, deposition p. 10, line 16 to p. 12, line 6. Ms. Hill followed up with attempted home visits December 8 and 10, but found no one at home. Dictation, R. pp. 95-96. Ms. Hill sent a "home attempt" letter to Michael C. and Kayla Lythgoe, indicating her unsuccessful attempts to visit the home, and scheduled a home visit for December 21 at 9:00 a.m. *See*, Hill Deposition, R. p. 121, deposition p. 35, line 6 to p. 36, line 6; Hill letter to Michael C./Kayla Lythgoe (undated), R. p. 126.

Ms. Hill sent criminal records check inquiries to the York County Sheriff's Department December 16, 2009 for Michael C., Kayla Lythgoe, and Charlotte Williams, the maternal grandmother. Dictation, R. p. 94; SCDSS Fax Sheets and Criminal History Requests, R. pp. 127-131.

Ms. Hill finally caught someone at home for a home visit and face-to-face interview with the mother, Lythgoe, on December 17. Dictation, R. pp. 93-94. Lythgoe was about to leave for work, so the visit was short; but she told Ms. Hill that the child was out with the grandmother while Lythgoe worked, and could not give a phone number at which she could be reached. Dictation, R. p. 93. Ms. Hill presented Lythgoe with a Safety Plan, which Lythgoe signed, and, after Lythgoe acknowledged having received the "home attempt" letter from DSS, she and Ms. Hill agreed to a meeting December 21 at 9:00 a.m., for Ms. Hill to inspect the home and meet all members of the household. Dictation, R. pp. 93-94.

Also on December 17, Ms. Hinnant spoke with a Lt. Miller of the York County Sheriff's Department, who told Hinnant the Department had received the law enforcement inquiry, but needed additional information. Hinnant provided the additional information to Lt. Miller. Dictation, R. p. 92. The criminal records check came back negative for the young parents, Kayla Lythgoe and Michael C., but indicated that the maternal grandmother, Charlotte Williams, had a criminal domestic violence conviction in her history. Hinnant Deposition, R. pp. 117-118, deposition p. 92, line 14 to p. 94, line 16. *See also*, Deposition of Charlotte Williams (July 20, 2012)(hereinafter "Williams Deposition"), R. p. 319, deposition p. 7, line 11 to p. 8, line 3 (Williams testified to convictions for the CDV in 2008 and a DUI).

Ms. Hill met with Michael C., Kayla Lythgoe, and the child at their home on December 21, 2009. Dictation, SCDSS 297-298, R. pp. 91-92. Ms. Hill read the allegations of the report and received a history from the mother and father of what had happened leading up to the child's hospitalization. *Id.* Ms. Hill noted that the home was "warm and organized in the living room,"

and observed that the child was on the floor with the father, describing the child as "vibrant lying on his back on a blanket kicking his feet and arms laughing and smiling as his father interacted with him." *Id.*, SCDSS 298, R. p. 92.

On January 4, 2010, Krista Hinnant and Ms. Hill staffed the case, resolving to get all medical records, follow up with the December 16 law enforcement inquiry, and assess the grandmother Charlotte Williams' home. Dictation, R. pp. 90-91; SCDSS Case Transfer and/or Case Staffing form 3062 (January 4, 2010), R. p. 132.

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

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

incident, enumerated those steps that the School District had taken to avert a further attack, and concluded that the only reasonable inference to be drawn from those facts was that the School District, at the very least, had exercised slight care, and was not grossly negligent as a matter of law).

V. CONCLUSION.

Based upon the foregoing discussion, the Respondent SCDSS respectfully requests that the Court rehear its decision in this case. The Respondent renews its request that this Court affirm the lower court grant of summary judgment.

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Social Services ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent South Carolina Department of Social Services' **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in this matter on Counsel for the Appellant by emailing electronic copies of each document to the Appellant's lead attorney of record, Whitney B. Harrison, and other counsel of record at their respective AIS E-mail Addresses, and by depositing paper copies of each document in in the United States Mail, postage prepaid on August 9, 2021, addressed to the Appellant's attorney of record, Whitney B. Harrison of McGowan, Hood & Felder, LLC, 1517 Hampton Street, Columbia SC 29201.

DAVIS FRAWLEY, LLC

s/ Patrick J. Frawley
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Lexington, South Carolina

August 9, 2021

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Since 1961

◊ American Board of Trial Advocates
Δ Certified Circuit Court Mediator

VIA EMAIL ONLY
August 9, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
ctappfilings@sccourts.org

RE: *Elizabeth Hope Rainey, as the appointed Guardian ad Litem to Owen Carduff, a minor, v. South Carolina Department of Social Services.*
Appellate Case No. 2017-001367; SCIRF File No. T81142; Our File No. 25701.02.

Dear Ms. Kitchings:

Attached to this e-mail and letter, please find the Respondent South Carolina Department of Social Services' **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing**, in Adobe Acrobat file format, which I submit for filing by e-mail pursuant to the Supreme Court's May 29, 2020 Amended Order regarding *Operation of the Appellate Courts during the Coronavirus Emergency.* I have also attached **Proof of Service** for the Petition and Memorandum on Counsel for the Appellant. Please file the Petition, Memorandum, and Proof of Service, and return acknowledgement to me that your office has received the filing by email.

I am forwarding payment of the filing fee to your office under separate cover by U.S. Mail.

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

Thank you and your staff in advance for your courtesy and assistance.

Yours very truly,

Patrick J. Frawley
/pjf;
Enclosures

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cc: (via email and U.S. Mail)
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