THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2021-001359

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

Respondent,

v.

South Carolina Department of
Social Services,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

Whitney B. Harrison
MCGOWAN, HOOD & FELDER, LLC
1517 Hampton Street
Columbia, SC 29201
Phone (803) 779-0100

S. Randall Hood
Jordan Calloway
Lara Harrill
1539 Health Care Drive
Rock Hill, SC 29732
Phone (803) 327-7800

Duane Shaw
Nathan J. Sheldon
SHAW LAW FIRM
1169 Ebenezer Road
Rock Hill, SC 29732
Phone (803) 329-4200
ATTORNEYS FOR RESPONDENT

Patrick J. Frawley
DAVIS FRAWLEY, LLC
140 East Main Street
PO Box 489
Lexington, South Carolina 29071
803-359-2512
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS.

CERTIFICATE OF COUNSEL.

Counsel for the Petitioner South Carolina Department of Social Services certifies that the Petition for Rehearing was filed and served August 9, 2021 and denied by the South Carolina Court of Appeals by Order dated October 21, 2021. Petitioner requested and was granted an extension through December 20, 2021 within which to serve and file its Petition for Writ of Certiorari by Order of the Honorable Patricia A. Howard, Clerk of Court for the South Carolina Supreme Court, dated November 23, 2021.

QUESTIONS PRESENTED.

I. Whether the Court of Appeals misapprehended and misapplied *S. C. Code Ann.* § 63-7-980 as requiring SCDSS to refer the matter to law enforcement within 24-hours of receiving the intake report, when the intake and investigation of December 6, 2009 did not indicate a violation of criminal law, as was required by the statute to trigger the 24-hour referral?

II. Whether the Court of Appeals' reliance upon concerns set forth in the *Bass v. SCDSS* decision and affidavits of the Plaintiff's expert witness was misplaced?

III. Whether the Court of Appeals' inferences and conclusion that the SCDSS Caseworker's pattern of record keeping and making several unsuccessful attempts before successfully scheduling a home visit assessment with the parents and child raised "questions of fact and of credibility" warranting reversal of the lower court grant of summary judgment were speculative, theoretical, and hypothetical, were not based upon SCDSS Policy and Procedure relating to timeframe requirements for entry of caseworker dictation, were not supported by nor based upon a scintilla of evidence disputing the Caseworker's account of the home visit assessment, and were contrary to this Court's prior rulings with regard to what constitutes a scintilla of evidence for purposes of reversing a grant of summary judgment?

IV. Whether the Court of Appeals' reversal of the lower court Order granting Summary Judgment to SCDSS is contrary to this Court's rulings in *Clyburn* and *Etheredge*?

STATEMENT OF THE CASE.

This matter was started with the filing of a Summons and Complaint in York County on December 1, 2011, naming the South Carolina Department of Social Services (hereinafter "SCDSS") as a Defendant, along with Charlotte-Mecklenburg Hospital Authority, d/b/a

Carolinas Medical Center, Bruce Bryant, as the Sheriff of York County, the York County Sheriff's Department, and York County, and alleging that the Plaintiff Elizabeth Hope Rainey (hereinafter "Rainey") was the duly appointed Guardian *ad Litem* for Owen C., a minor, born September 9, 2009 to Kayla Lythgoe and Michael C.[1], of York County, and that Owen C. had been hospitalized at Levine Children's Hospital, in Charlotte, North Carolina on December 4, 2009 for injuries that were suspected to be non-accidental trauma, that the York County office of SCDSS was alerted by medical social workers from the hospital that the injuries may have been non-accidental, but the hospital released the child to its parents on December 8, 2009, and that the child was again admitted to the hospital January 11, 2010 for more serious injuries that resulted from physical abuse by the father, which injuries have left the child permanently injured. *See, generally*, Complaint, R. pp. 19, 21-24, ¶¶ 9-31. The Complaint further alleged that the various Defendants failed to fulfill their respective duties owed the child, with SCDSS being accused of, essentially, failing to adequately investigate the intake report and failing to protect the child from further injury at the hands of his father after having received the intake report. *Id*., pp. 26-29, ¶¶ 37-47.

SCDSS answered January 9, 2012, interposing a qualified general denial, asserting, in part, that SCDSS received an intake report at 5:01 p.m. on December 6, 2009, responded to the Charlotte hospital by 7:45 p.m. the same day, and conducted an appropriately thorough and timely investigation, and took appropriate steps to protect the child, given the information that was available at the time. SCDSS also alleged affirmative defenses sounding in intervening negligence of third parties, South Carolina Tort Claims Act defenses under *S.C. Code Ann*. §15-

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

78-60(1), (2), (3), (4), (5), (12), (20), (23), and (25), and §15-78-120(b) as a bar to punitive damages. *See, generally*, Answer of the Defendant South Carolina Department of Social Services, R. pp. 44-50.

The remaining Defendants all answered, denying liability, and the parties engaged in discovery. The Defendant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center (hereinafter "the Hospital") filed and served a Motion for Summary Judgment on or about February 26, 2013, which motion was heard April 18, 2013 and granted by Order dated May 13, 2013. Following the August 14, 2013 denial of Rainey's Motion to Reconsider, Rainey dismissed the Defendant Bruce Bryant, as the Sheriff of York County, the York County Sheriff's Department, and York County, leaving SCDSS as the sole remaining Defendant in the case.

On September 5, 2013, SCDSS served its own Motion for Summary Judgment by U.S. Mail, filing the Motion September 9, 2013, stating as its grounds there was no genuine issue of material fact but that SCDSS, through its agents and employees, exercised at least slight care and beyond in its investigative efforts and handling of the matter subject of the action between the December 6, 2009 intake report received by SCDSS and the January 11, 2010 injury sustained by the minor child, and was not grossly negligent as a matter of law. The motion was made on the further grounds that there was no evidence that the original injury to the child that triggered the December 6, 2009 intake report was the result of any act or omission of the father of the child, such that SCDSS should have had cause to suspect that the father, Michael C., would willfully and criminally injure the child on January 11, 2010. *See*, SCDSS Motion for Summary Judgment (filed September 9, 2013) R. pp. 58-59.

Rainey appealed the granting of the Hospital's Motion for Summary Judgment and denial of the Motion to Reconsider on September 10, 2013, with the circuit court case being stayed pending the appeal. The South Carolina Court of Appeals affirmed the grant of summary judgment to the Hospital in Unpublished Opinion No. 2015-UP-209 dated April 22, 2015. Rainey petitioned for rehearing, which was denied, then petitioned for writ of certiorari to the South Carolina Supreme Court, which was denied on or about May 6, 2016.

SCDSS re-filed its Motion for Summary Judgment January 4, 2017, asserting the same grounds as its September 9, 2013 filing, and attaching the September 2013 Motion. *See,* SCDSS Motion for Summary Judgment (filed January 4, 2017), R. pp. 55-56. The motion was heard March 13, 2017 by the Honorable S. Jackson Kimball, Special Circuit Court Judge, and was granted by Judge Kimball. *See*, Order for Summary Judgment (March 31, 2017), R. pp. 3-9. Rainey filed a Motion to Alter or Amend and for Reconsideration April 4, 2017, which motion was heard by Judge Kimball May 18, 2017, and denied. Order (Rule 59(e) Motion)(May 24, 2017), R. pp. 12-13.

Rainey served and filed a timely Notice of Appeal on or about June 19, 2017. The matter was briefed by the parties and oral argument heard October 10, 2019. On July 21, 2021 the Court of Appeals issued its opinion reversing in part, vacating in part, and remanding. SCDSS petitioned for rehearing, which petition was denied. SCDSS now seeks review in the Supreme Court by way of its Petition for Writ of Certiorari.

STATEMENT OF FACTS.

Owen C. was born to Kayla Lythgoe, then 19 years old, and Michael C., then 18 years old. On December 4, 2009, when Owen was twelve weeks old, his parents took him to Piedmont

Medical Center (hereinafter "PMC") in Rock Hill for medical attention. On December 5, 2009 PMC physicians transferred Owen to Levine Children's Hospital (hereinafter "Levine") at Charlotte-Mecklenburg Hospital Authority ("CMHA") in Charlotte for further care. The following day, December 6, a CT scan by CMHA staff revealed a subdural hematoma, which raised suspicions of a non-accidental injury to Owen. Levine then notified the York County office of SCDSS that the child may have been the victim of non-accidental trauma.

SCDSS received an intake December 6, 2009, at 5:01 p.m., reporting that a 2-month old baby with two subdural hematomas had been admitted to the hospital, raising the possibility of non-accidental trauma, although the report went on to indicate that the parents' behavior with the child had been "appropriate." *See*, SCDSS Intake Summary, bates numbered SCDSS 0466 to -0470, 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"), pp. 309-311, R. pp. 103-105.[2] Ms. Tyler provided the parents with the DSS Brochure 3034 and the handbook entitled *Child Protective Services: A Guide For Parents*, advising them of the SCDSS procedure in Child Protective Services (CPS) cases and their right to representation by counsel, which both parents signed for, acknowledging receipt. Dictation, p. 311, 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

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

advice of the hospital, and not to remove the child from the hospital until the child was medically discharged. Dictation, SCDSS 309, 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, SCDSS 310, 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. p. 321, at 340, Exhibit 12 to Plaintiff's Memorandum in Opposition to SCDSS Motion for Summary Judgment, p. 17 of second Affidavit (Rainey's Expert, George W. Savarese noting the incident, that the hospital staff had no apparent concerns for the child, that the December 6 injury was accidental, and had 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, SCDSS 305-307, 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, SCDSS 307, 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, SCDSS 307-308, 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, SCDSS 305, 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*., SCDSS 304, 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 again with the DSS legal department, and authorized the discharge of the child to the care of his parents. Dictation, SCDSS 303-304, 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, SCDSS 308, 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, SCDSS 301-302, R. pp. 95-96. Ms. Hill sent a "home attempt" letter to Michael Carduff and Kayla Lythgoe, indicating her unsuccessful attempts to visit the home, and scheduled a home visit for December 21 at 9:00 a.m. *See*, Hill Deposition, 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 Carduff, Kayla Lythgoe, and Charlotte Williams, the maternal grandmother. Dictation, SCDSS 300, R. p. 94; SCDSS Fax Sheets and Criminal History Requests, SCDSS 457-461, 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, SCDSS 299-300, 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, SCDSS 299, 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, SCDSS 299-300, R. pp. 93-94.

Also on December 17, Ms. Hinnant spoke with 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, SCDSS 298, 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, SCDSS 296-297, R. pp. 90-91; SCDSS Case Transfer and/or Case Staffing form 3062 (January 4, 2010), R. p. 132.

On January 11, 2010, Michael C. and Kayla Lythgoe took their son to Piedmont Medical Center, and the nurse they spoke with—Elizabeth Super—later told Ms. Hill that she observed multiple bruises to the body, left leg, left hand, chest, and face of the child. Dictation, SCDSS 290; R. p. 84. The mother explained that the child had been "normal" on the previous day, but

the next morning was having seizures, and the parents apparently attempted to attribute the bruises to the child scratching himself. *Id*. The child was transferred, actively seizing, to Levine Children's Hospital ICU, in critical condition, on a ventilator. *Id*., SCDSS 289-291, R. pp. 83-35. CT scans were performed at PMC and Levine, which revealed up to five new areas of brain bleeds for the child different from the two he had in December. Skeletal CT scans were negative for fractures. *Id*. At one point the child was taken off of life support, with doctors opining that he was terminal, and he was moved to a Rock Hill hospice. The child did recover, but he has permanent brain damage and vision problems. He has been in the custody of the maternal grandparents.

Law enforcement got involved, administered a polygraph test to the father, Michael C., who eventually confessed to having inflicted the recent injuries to the child. He did not admit to inflicting the injuries leading to the December 6, 2009 intake report to SCDSS.

Michael C. pled guilty to criminal charges and was incarcerated. The mother, Kayla Lythgoe, passed her polygraph, indicating, apparently, that she neither abused the child nor was aware that the father had abused him. There is no evidence that the father injured the child resulting in the first hospitalization, which is the incident Rainey argues should have alerted SCDSS that the father was a potential safety threat to the child. There is no evidence from Lythgoe nor her parents that they suspected Michael C. of having previously injured the child, or otherwise posed a threat to the child's safety. Nor is there any evidence that they passed any such suspicions on to SCDSS.

ARGUMENTS.

I. The Court of Appeals misapprehended and misapplied the requirement of *S. C. Code Ann.* § 63-7-980 as requiring SCDSS to refer the matter to law enforcement within 24-

hours of receiving the intake report, when the intake and investigation of December 6, 2009 did not indicate a violation of criminal law, as was required by the statute to trigger the 24-hour referral.

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 of Appeals 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. As enumerated in the Statement of Facts, *supra*, at pp. 5-6, 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."). 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 the Court of Appeal'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 has made no such concessions for

purposes of this lawsuit and 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 by §63-7-980(B)(1) under the facts then existing.

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, themselves, 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 in the December 6, 2009 intake report, as the Court of Appeals properly recognized in its unpublished *Rainey v. Charlotte-Mecklenburg Hosp. Auth*., opinion[3], and noted in the Court's opinion in this case, 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 and report those suspicions to SCDSS to initiate the investigation. When SCDSS sought more substantive information—known facts or evidence—about whether the injury was non-accidental trauma that would have warranted Emergency Protective Services intervention, Levine's team was ambivalent. The Court of Appeals, 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 the Court of Appeals 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. It was error for the Court of Appeals to rely upon those inconclusive suspicions, unsupported by a scintilla of evidence supporting a finding of Non-Accidental Trauma, as a basis for reversing the lower Court's Order granting SCDSS's Motion for Summary Judgment. *Cf*., R. p. 321, at 340, Exhibit 12 to Plaintiff's Memorandum in Opposition to SCDSS Motion for Summary Judgment, p. 17 of second Affidavit, comment to third bullet point (Rainey's Expert, George W. Savarese, noting that risk assessment should be based upon known facts, not conjecture). That error was compounded by the Court's mis-reading and misapplication of the 24-hour requirement of §63-7-980(B)(1).

[3] No. 2015-UP-209 (S.C.Ct.App. filed Apr. 22, 2015).

Even assuming the Court's misapplication of the §63-7-980(B)(1) referral to law enforcement requirement was harmless, there is no underlying evidence that makes that delay a contributing factor to the child's injury, and the Court of Appeals further compounds its error in making a proximate cause argument while inexplicably ignoring the absence of criminal history for the parents, with only the maternal grandmother—who had custody of the Child—having had 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 sent within the 24 hours of DSS's December 6, 2009 receipt of the intake report, 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 January, 2010 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.

The Court of Appeals misread and misapplied §63-7-980(B)(1), and made unsupported factual inferences and conjecture based upon that misreading that were not based upon even a scintilla of evidence as a cornerstone. That was error, and that ruling should be examined and reversed.

II. The Court of Appeals' reliance upon concerns set forth in the *Bass v. SCDSS* decision and affidavits of the Plaintiff's expert witness was misplaced.

The Court of Appeals notes in a footnote its concerns set forth in an affidavit of George Savarese, Ph.D., the expert in clinical social work proffered by Rainey 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 Court's reliance on the Savarese opinion and the *Bass* decision is misplaced.

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 undercuts the Court of Appeals' reliance given the Supreme Court's focus in *Bass* 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. Rainey'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 of Appeals erred in that its inferences and conclusion that the SCDSS Caseworker's pattern of record keeping and making several unsuccessful attempts before

successfully scheduling a home visit assessment with the parents and child raised "questions of fact and of credibility" warranting reversal of the lower court grant of summary judgment were speculative, theoretical, and hypothetical, were contrary to SCDSS Policy and Procedure relating to timeframe requirements for entry of caseworker dictation, were not supported by nor based upon a scintilla of evidence disputing the Caseworker's account of the home visit assessment, and were contrary to this Court's prior rulings with regard to what constitutes a scintilla of evidence for purposes of reversing a grant of summary judgment.

In addition to the perceived delay of the referral to law enforcement relating to the mis-reading 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 was improper and was error 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 Rainey 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 in her dictation describing the December 21, 2009 home visit, and to posit such an inference from the perceived delay in entering dictation, and from that further infer an issue of fact warranting reversal of summary judgment was misplaced, ignored the logistical difficulties in getting work done inherent in the holiday season, and more importantly, was a misconception by the Court of Appeals of the SCDSS Human Services Policy and Procedure Manual dealing with documenting casefiles.

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 by the Court of Appeals that it was improperly delayed was improper and unfounded. The further inference that it should call Ms. Hill's credibility into question is similarly unfounded, as there is no *contrary* evidence contesting the accuracy of Ms. Hill's 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 from which a credibility issue should even be raised. The timing was not ideal given the unanticipated injury to the child, the entry made after-the-fact, and the forensic viewing and analysis; but the entry was made within the parameters of SCDSS Policy and Procedure, and there is no evidentiary cornerstone contradicting the entry from which the Court of Appeals should reasonably have impugned a DSS Caseworker's character and credibility, and question Ms. Hill's unrebutted relating of the facts of the December 21, 2009 home visit.

The Court of Appeals 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 of Appeals 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 (2009). Other than cases stating generally that a "mere scintilla of evidence" is sufficient to survive summary judgment, few recent cases actually set out what is—and what is not—a scintilla of evidence.

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 of Appeal's piling of inference upon inference upon misapprehensions of a statute and policy from which the Court infers delayed referral to law enforcement and credibility issues due to erroneously perceived "late" 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; or 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—those who best knew the father, Michael C., indicating that Ms. Hill was wrong or otherwise inaccurate in her December 21, 2009 assessment; that thought process amounts to exactly the unusual *finesse* of reasoning attempting to find an issue of fact or manufacture a scintilla of evidence that the Court in *Radcliffe* discouraged.

IV. The Court of Appeals' reversal of the lower court Order granting Summary Judgment to SCDSS is contrary to this Court's rulings in *Clyburn* and *Etheredge*.

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 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). 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, this 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).

As set forth in the Statement of Facts, pp. 5-6 *supra*, SCDSS began its level of care in this case when its on-call caseworker, Ms. Tyler, responded quickly after receiving the intake report December 6, 2009. Her efforts, and the efforts and level of care provided by SCDSS thereafter are enumerated in the Statement of Facts with cites to the Record. The SCDSS Case Dictation alone catalogs the level of care that SCDSS went to, and amounted to at least slight care and beyond, particularly given the short timeframe afforded SCDSS between receiving the intake report and the hospital's release of the child.

With regard to the failure to remove, Judge Kimball properly noted that SCDSS staff must consider numerous policy and procedure dictates in making judgments pertaining to action plans in individual cases. Order for Summary Judgment, R. p. 8. He further noted that the SCDSS Human Services Policy and Procedure Manual provided that interventions should be in the least intrusive manner possible, and that referral to court and removal of children should only be done when it is determined that children cannot be kept safely in their own home. *Id.*, pp. 8-9, and footnote 1. Without a definitive non-accidental trauma finding from the Hospital, despite the efforts of the SCDSS caseworkers and supervisors, SCDSS lacked the requisite facts for removal. This Court recognized the inherent difficulty in making removal decisions given the exigencies of such situations when, in reviewing the Court of Appeals decision in *Bass*, this Court found as a matter of law that DSS had not acted in a grossly negligent manner in the Emergency Protective Custody (EPC) removal of the *Bass* children, holding that EPC removal is typically associated with exigent circumstances and time constraints, and that the Court was not

imposing upon DSS "a duty to conduct the post-EPC investigation in a pre-EPC setting." *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 571, 780 S.E.2d 252, 258 (2015).

Owen C.'s injuries are tragic, but SCDSS did not strike the blows that injured the child, and there was nothing that SCDSS did or failed to do that could have prevented the injuries. Rainey's claim against SCDSS is made with total 20-20 hindsight, asserting that the caseworker, Ms. Hill, could have done more, or done it more quickly, or reached different conclusions from what she saw. Rainey further argues that the supervisor, Ms. Hinnant, should have spoken to one more hospital social worker, or another doctor or nurse before concluding that, with no medical opinion or definitive fact that the first injury was the result of non-accidental trauma, she should never-the-less have had DSS take custody of the child and remove him from the parents. Rainey makes a *qualitative* argument that what SCDSS did was not done soon enough, or not done well enough, or reached erroneous conclusions; that the efforts were *qualitatively* lacking. That is a simple negligence argument. *S.C. Code Ann*. §15-78-60(25) imposes a gross negligence standard on Rainey's claim; and in order to have survived Summary Judgment below, Rainey must have proffered at least a scintilla of evidence, creating a genuine issue of material fact that SCDSS failed to exercise even slight care. That is a *quantitative* analysis—did the efforts of SCDSS amount to at least slight care? Rainey failed to do that before Judge Kimball below, and Judge Kimball properly granted Summary Judgment.

The fact that SCDSS did not do *everything* that Rainey argues it should have done, after-the-fact, or that the Court of Appeals concludes should have been done more quickly, with no evidence to support that conclusion, does not detract from the efforts and level of care that SCDSS caseworkers and supervisors did exercise. The reversal of Judge Kimball's Order by the Court of Appeals flies in the face of the *Etheredge* and *Clyburn* rulings, and was error. SCDSS

was not grossly negligent as a matter of law. *Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278; *Clyburn*, 317 S.C. at 53-54, 451 S.E.2d at 888.

CONCLUSION.

Based upon the foregoing discussion, the Petitioner South Carolina Department of Social Services respectfully requests that this Court grant its Petition for Writ of Certiorari.

DAVIS FRAWLEY, LLC

s/ Patrick J. Frawley
Patrick J. Frawley; SC Bar No. 2118
140 East Main Street (29072)
PO Box 489
Lexington, South Carolina 29071-0489
803-359-2512
pat@oldcourthouse.com

ATTORNEYS FOR PETITIONER SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES

Lexington, South Carolina
December 20, 2021.

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. 2021-001359

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

v.

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

PROOF OF SERVICE

I do hereby certify that service of the Petition for Writ of Certiorari was made upon the Clerk of South Carolina Court of Appeals by email delivery to ctappfilings@sccourts.org pursuant to the Amended Order of the Supreme Court (2020-05-29-02): service upon all counsel of record was made placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of December addressed as follows:

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

Duane Shaw, Esquire
Nathan J. Sheldon, Esquire
Shaw Law Firm
1169 Ebenezer Road
Rock Hill, SC 29732

S. Randall Hood, Esquire
Jordan Calloway, Esquire
Lara Harrill, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Drive

Rock Hill, SC 29732

DAVIS FRAWLEY, LLC

BY: *s/Patrick J. Frawley*

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

Lexington, South Carolina
December 20, 2021

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

Davis | Frawley LLC
Attorneys at Law

Of Counsel
George S. Nicholson, Jr.

Francis C. Jones
(1919 – 1968)

Hubert E. Long
(1921 – 2000)

Robert K. Bouknight
(1931-2019)

Since 1961

◊ American Board of Trial Advocates
Δ Certified Circuit Court Mediator

December 20, 2021

VIA EMAIL
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. 2021-001359.

Dear Ms. Kitchings:

Attached by email, please find the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter. Please have them clocked-in and email file stamped copies to me.

Thank you in advance for your assistance with this matter.

Yours very truly,

Patrick J. Frawley
/pjf;
Enclosures

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

cc: Duane Shaw, Esquire
Nathan J. Sheldon, Esquire
Shaw Law Firm
1169 Ebenezer Road
Rock Hill, SC 29732

S. Randall Hood, Esquire
Jordan Calloway, Esquire
Lara Harrill, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732