THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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
Appointed Guardian *ad Litem* to
Owen C., a minor ……..Respondent,

v.

South Carolina Department of
Social Services……Petitioner.

Return

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Introduction

Summary judgment is a drastic remedy. Appreciating this gravity, our rules prohibit the grant of summary judgment if a mere scintilla of evidence creates a genuine issue of material fact. Rule 56, SCRCP.

This is a case with tragic facts and a lengthy procedural history. But the issue being reviewed is simple. The court of appeals found that based on the evidence presented there was a genuine issue of material fact as to whether DSS exercised slight care within the first twenty-four hours of DSS's investigation when it failed to contact law enforcement and later presented conflicting facts as to the circumstances that were unfolding during the twenty-four period—thereby, warranting reversal. *Rainey v. DSS*, (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 13 & 24). In addition to this reversable error, the court of appeals also expressed general concerns about the level of care throughout the course of the investigation based on the record, including DSS's record keeping. *Id.* at 23-26.

DSS now asks this Court, in contravention of the standard of review, to weigh the evidence presented to bypass the court of appeals' ruling—specifically, requesting this Court determine as a matter of law that law enforcement did not have to be contacted. This attempt ignores rules regarding preservation and waiver, along with the prohibition of weighing evidence in this posture and the evidentiary lens favoring the nonmoving party. In similar fashion, DSS attempts to cast doubt on the court of appeals' opinion by taking issue with the wholistic view of the evidence and corresponding concerns—shared both in dicta and the court's general perception of the evidence. Underlying these arguments is DSS's expressed displeasure with the court of appeals' view of the evidence—it contends the facts invite a different conclusion. Of course, DSS's suggestion

that there is a disagreement in how the evidence should be weighed only reinforces the conclusion that this case belongs with a jury and summary judgment was inappropriate.

Statement of the Case

As the court of appeals' decision explains, Owen C., a three-month old infant, arrived at a hospital "lethargic, not responsive" and there was a belief that "he was dead." (R.157). He was diagnosed with brain bleeding—an injury his parents, Michael and Kayla, could not explain. Concerns were raised that the injuries were non-accidental and DSS was contacted. (R.175, 202-204).

The next day, DSS assigned the case to Dirvondra Hill, and her supervisor, Krista Hinnant. (R.201). Ms. Hinnant was told that the CT scan showed "non-accidental trauma" and was told Owen C. suffered from a "non-accidental" injury. (R.200). She learned from a hospital social worker that "the hospital cannot determine whether the injuries are accidental or nonaccidental" and "the hospital still cannot rule out any trauma." (R.199). The hospital social worker also shared that the treating physician "stated that she cannot determine if the injuries are an accident or not at this point." *Id.*

Later in the afternoon, DSS determined that Owen C. could be released to his parents, Michael and Kayla. (R.198). Ms. Hinnant explained DSS would follow up with a home assessment that same day. *Id.* Additionally, she noted the following action items needed to occur: obtaining medical records from the hospitals and Owen C's pediatrician; ***contacting law enforcement***; following up with Owen C.'s doctor; and speaking with Owen C.'s grandmother. *Id.* At the time of his discharge, child abuse had not been ruled out and there was no explanation for the cause of Owen C.'s life threatening injuries.

In violation of the statutory requirement to contact law enforcement within twenty-four hours, DSS waited ten days before notifying law enforcement of the initial report of child abuse. (R.195; 213; 209).[1] In response to the delay, Lieutenant Miller called Ms. Hinnant, explaining the information provided by DSS was inadequate to understand the circumstances, especially given the delay in contact by DSS. (R.213; 216). Lieutenant Miller repeatedly expressed his frustration with DSS's lack of notice, stating "I guess the thing that bugs me the most is getting it ten days after."[2] (R.217). In response, Ms. Hinnant explained she asked Ms. Hill to make contact and "fussed at her" about the delay. (R.217). Moreover, she stated, "[Ms. Hill] should've made it as soon as she got the report when we staffed it from on-call," on December 7th. *Id.* Ms. Hinnant admitted to Lieutenant Miller that she knew the call had not been made within the twenty-four hours, as required by their policy, as well as statute. *Id.* Ms. Hinnant described the inaction as "unacceptable" because an injury like Owen C.'s requires reporting per DSS's policy, and characterized this failure as a "big problem." (R.218, 220, 224). Further, she misrepresented the hospital statements by telling Lieutenant Miller the hospital did not have "any suspicions" of child abuse. (R.212).[3]

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[1] DSS also allowed ten days to pass without contact with Owen C.'s family and fourteen days without contact with Owen C. (R.197; 202-03). Although Ms. Hill attempted unannounced visits on three occasions there was no contact or further investigation into Owen C.'s safety. *Id.* During the first encounter with a family member on December 17th, ten days following release, Ms. Hill briefly spoke to Kayla and confirmed the family would meet with her on December 21st. At the home visit on December 21st, Ms. Hill learned for the first time who lived in Owen C's home and made DSS's first contact with Owen C. since the hospital. (R.206).

[2] *See also,* (R.219), (explaining his immediate reaction to receiving DSS's paper worked included "What the hell?" regarding the delay, and an automatic concern that "*we've got some body that's done hurt this child*") (emphasis added).

[3] In addition to speaking with Ms. Hinnant, Lieutenant Miller expressed his frustration with DSS's failure to contact law enforcement to Ms. Sutherland—the initial supervisor to the case. (R.368). He explained DSS's failure "just infuriates the living hell out of me . . . ." Ms. Sutherland responded that she could not explain why law enforcement had not been notified for ten days. (R.372-73). Notably, during this call Ms. Sutherland stated, "nobody has an answer as to why or

A few weeks later, Owen C. was left alone with Michael. He shook Owen C. and dropped him down a set of concrete stairs. As a result of these injuries, Owen suffered an anoxic brain injury, causing blindness and deafness. After a period of hospice care, Owen C. was released from hospice with serious, permanent injuries.

Respondent, as Owen C.'s guardian *ad litem*, filed suit alleging negligence and gross negligence against DSS and other defendants, who have now been dismissed. DSS brought a motion for summary judgment arguing there were no genuine issues of material fact and that the agency was not grossly negligent because slight care was exercised in responding to the intake and conducting the investigation. (R.44).

In response, Respondent argued DSS oversimplified the duty owed to Owen C. and that evidence of slight care during one aspect of the investigation did not absolve DSS from exercising slight care at other stages. Additionally, Respondent asserted genuine issues existed surrounding: DSS's investigation prior to Owen C.'s release to his parents; DSS's investigation and assessment following Owen C.'s release; and DSS's failure to contact and communicate with law enforcement in violation of state law.[4]

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how that child was injured." (R.374). In sum, Lieutenant Miller repeatedly expressed his concerns about DSS's failure to call and the fact that no one could address how Owen C. was harmed resulting in such severe injuries. (R.381-82, 385).

[4] In support of this position, a variety of evidence was submitted including the affidavit of George Savarese, Ph.D., LCSW, an expert in clinical social work and social policy analysis, in which he opined that DSS failed "to conduct an appropriate and independent psychosocial assessment in order to identify, explore and comprehend the specifics of the risk for child abuse and re-injury related to [Owen C.]." (R.322). Dr. Savarese also found that DSS failed to "protect a vulnerable child from abuse and neglect." *Id.* He further offered a causation opinion, stating in his opinion "to a reasonable degree of professional certainty that the actions or inactions of the employees and/or agents of [DSS] . . . . contributed to the injuries and damages of Owen [C.]." *Id.*

A hearing was held on the motion where a majority of the discourse involved the role of *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 571, 780 S.E.2d 252, 258-59 (2015), and two genuine issues of material fact presented by Respondent's. (R.474-76). The genuine issues discussed at length were: (1) whether DSS had the requisite facts to make a determination regarding the risk of abuse and harm to Owen C. at the time of his release, and (2) whether DSS exercised slight care in fulfilling its duty to thoroughly investigate Owen C.'s case when law enforcement was not contacted within twenty-four hours as required by law. (R.452-72). The crux of the argument was that by failing to properly investigate the known factors of child abuse, which includes contacting law enforcement to gain pertinent information, DSS failed to exercise slight care when it returned the child into the hands of his abuser without the requisite knowledge to assess the risk of harm. (R.452-66).

The trial court held DSS was entitled to summary judgment because the standard required DSS only had to show "from the entire record" that it exercised slight care. (R.9). Additionally, in a footnote, the trial court held that even though DSS did not meet its statutory mandate to contact law enforcement within twenty-four hours, "that failure was not the proximate cause of the tragic injury" to the child. (R.9 n.2).

On appeal, Respondent argued the trial court used an incorrect standard for determining gross negligence and consequently failed to recognize genuine issues of material fact evidencing DSS's lack of slight care. In a unanimous opinion, the court of appeals agreed with Respondent that there were genuine issues of material fact as to whether slight care was exercised and reversed and remanded the case for trial.

Argument

I. DSS's failure to contact law enforcement and the evidence presented created a genuine issue of fact that should be submitted to a jury.

The legislature statutorily requires DSS to contact law enforcement within twenty-four hours if circumstances indicate a violation of criminal law—including neglect. S.C. Code Ann. § 63-7-980. For the first time in this litigation, DSS contends that law enforcement was not required to be called and requests this Court to find this as a matter of law—an obvious attempt to bypass the basis for reversal and remand. This argument is misplaced for three reasons.

First, this argument is unpreserved. DSS never raised nor argued that the factual circumstances did not warrant law enforcement being contacted or that section 63-7-980 was inapplicable. Rather, DSS has consistently argued that the failure to contact law enforcement was not the proximate cause of Owen C.'s injuries. *See* DSS's Brief, p. 20. DSS may not raise this argument for the first time. *See generally, S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (holding an issue must be raised and ruled upon to be preserved for appellate review).

Second, this argument is waived based on prior testimony and admissions. Ms. Hill and Ms. Hinnant both testified that it is DSS's responsibility to contact law enforcement, and Ms. Sutherland stated that a child with a subdural hematoma, like Owen C., would require a law enforcement referral within twenty-four hours. (R.208;171; 366). She further explained that in those types of injuries "***we're not the ones to decide***." (R.366). This sentiment was echoed by Lt. Miller. Ms. Hinnant, also, acknowledged law enforcement should have been called and it was "unacceptable" and a "big problem" that DSS failed to contact them. (R.218; 220; 224).

While DSS now asks this Court to determine whether law enforcement was required to be contacted twelve years later, evidence demonstrates that DSS admitted that contact should have

been made. DSS is barred from now asserting that no call was needed. *See* Rule 801(d)(2)(D), SCRE (holding statements by a party's agent in the scope of agency is an admission of a party opponent). Moreover, this assertion conflicts with DSS's established procedures, along with law enforcement's expectations, all of which were submitted to the trial court through exhibits and discussed in great detail by counsel for both parties.

Finally, to win and avoid a remand, DSS is trying to make its requested finding— that law enforcement was not required to be contacted— a matter of law. While DSS has pivoted to directing this Court to weigh evidence—which it recites at length, it simply does not matter. In this posture, it is neither DSS's place to request nor this Court's place to make the proposed factual determination. The only inquiry is whether evidence has been presented to create a genuine issue of material fact. S*.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (explaining a court is concerned with the existence of evidence, not its weight). As discussed, there is a more than a scintilla based on the testimony and evidence submitted that DSS's own employees and law enforcement believed law enforcement contact was required and the failure to do so was inexcusable.

In any event, DSS's attempt only highlights the court of appeals properly reversed the grant of summary judgment because the argument is replete with the weighing of factual matters—including DSS's new argument that law enforcement did not need to be contacted. *See generally*, *Brockbank v. Best Capital Corp*, 341 S.C. 372, 534 S.E.2d 688 (2000) (explaining summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law).

II. The court of appeals' reference to factual allegations in footnote 4 was not the basis of its decision nor is it binding on the trial court.

DSS misconstrues the court of appeals' reference to *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 571, 780 S.E.2d 252, 258-59 (2015) and George Savarese, PhD's affidavit in footnote 4.[5] DSS's contention that footnote 4 improperly relies on Respondent's expert affidavit contrary to *Bass* ignores the language of the opinion and the fact that the court was not relying on the affidavit to reverse the trial court. Pet'r's. Pet. for Cert., p.16.

A plain reading of the opinion demonstrates that the court of appeals referenced the affidavit to note its additional concerns beyond those expressed in the body of the opinion. *Rainey* Op., p.22. Those concerns mirror factual allegations in the complaint, evidence of protocols and procedures submitted by Respondent and corresponding testimony, and arguments made by counsel—all of which are independent of the expert's affidavit.[6]

While DSS correctly notes that affidavit speaks to a lesser standard, the court's reference is of no consequence. First, the court provided a myriad of factual reasons it had concerns separate from those referenced in the affidavit. All that was required was a scintilla, which is established

[5] The *Bass* decision was the focal point of this litigation. (R.452-472; 474-76). Specifically, Respondent asserted that DSS has a distinct duty of care with each undertaking. Rainey Br. p. 13-16; Rainey Reply Br., p.2. DSS, in (alarming) contrast, advocated for carte blanche immunity if slight care was demonstrated at any point during the course of DSS's services. DSS's Br. at p.21-24. DSS attempted to frame *Bass* as a case exclusively about expert testimony and gave no consideration to the other portions of the opinion in an effort to make *Bass* inapplicable. *Id.* The court of appeals found that *Bass* turned on the failure to exercise slight care in a specific stage of DSS's investigation. Such failure was evidenced by testimony of an expert and DSS employees at a jury trial.

[6] Additionally, this case does not require an expert. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177, 758 S.E.2d 501, 504 (2014) ("[T]he plaintiff in ordinary negligence cases does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge."); *Bramlette v. Charter–Med.–Columbia*, 302 S.C. 68, 72–73, 393 S.E.2d 914, 916 (1990) (holding expert testimony is not required to prove proximate cause).

without consideration of to the affidavit. Additionally, the affidavit was not the basis of the court's decision. Further, footnote 4 is dicta and is not binding on the trial court as evidence of failure to exercise slight care. *See generally*, *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining dicta is not binding). Footnote 4 is neither an endorsement of specific failures identified by the expert nor his credibility. Rather, there is evidence of potential issues of fact that far exceed the threshold of scintilla. For these reasons, the court of appeals' opinion does not need to be revisited and the Court should deny the petition.

III. The court of appeals' review of the evidence demonstrates genuine issues of material fact exist.

DSS's objection to the court's perception of the evidence is not surprising given the fact that evidence was viewed in the light most favorable to Respondent, as the standard requires. While DSS frames the review as one of an improper inference as to the recordkeeping, the court's review comports with the standard of review and evidence presented in the record. Disagreement with the import or characterization of the evidence is not a basis for disturbing the court of appeals' decision. Rather, it emphasizes that the evidence presented invites reasonable minds to differ or at least differ with DSS's view of its evidence; thereby, presenting a mixed question reserved for a jury's consideration. This view of the evidence is one of many independent concerns surrounding the exercise of slight care and not the basis of the reversal and remand. For these reasons, the court's opinion should be affirmed.

IV. The court of appeals' opinion is in accordance with prior precedent.

Although DSS suggests this opinion conflicts with precedent in determining whether DSS exercised slight care, such assertion is without merit. In so doing, DSS ignores that even when there is no dispute as to the evidence, summary judgment is not appropriate where there is a dispute as to the conclusion or inference to be "drawn from those facts and to clarify the

application of the law." *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). DSS simply disagrees with court of appeals' conclusion that a reasonable jury could find that it failed to act with slight care given the multitude of evidence presented—far beyond a scintilla. And that does not amount to the court of appeals erring as a matter of law. *See* Rainey Reply Br. p. 6 (explaining that if DSS's position is taken to fruition, summary judgment would always be granted if DSS undertakes any affirmative act).

Conclusion

Based on the forgoing reasons, DSS's petition for certiorari should be denied.

s/Whitney B. Harrison

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