

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

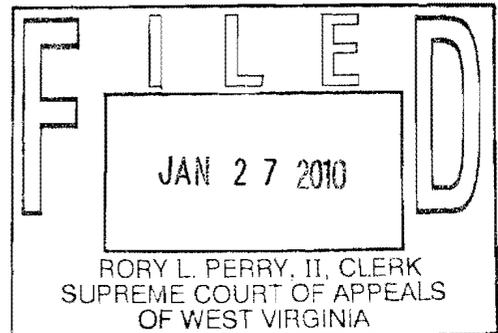
SUPREME COURT NUMBER

DOCKET NUMBER 35452

IN THE INTEREST OF:

Faith C , Sophia S , Madelyn S ;

Children Under the Age of Eighteen Years



FAITH C

BRIEF OF APPELLANTS.  
, SOPHIA S , AND MADELYN S

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Guardian-ad-Litem

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I.

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## I.

JURISDICTION

The Kanawha County Circuit Court had jurisdiction over this matter pursuant to Article VIII, § 6 of the West Virginia Constitution, §§ 49-6-1 et seq. and 51-2-2 of West Virginia Code, as well as Rule 1 of the West Virginia Rules of Procedure for Child Abuse and Neglect. This Court's jurisdiction is invoked under Article VIII, § 3 of the West Virginia Constitution, § 51-1-3 of West Virginia Code, Rule 1 of the West Virginia Rules of Appellate Procedure, as well as Rule 49 of the West Virginia Rules of Procedure for Child Abuse and Neglect.

## II.

NATURE OF PROCEEDINGS AND THE RULING BELOW

The Appellants (and the Respondent Children below), Faith C [redacted], Sophia S [redacted] (hereinafter, "the Appellant Child") and Madelyn S [redacted] (all children hereinafter referred to collectively as "the Appellants"), appeal the July 30, 2009, Disposition Order of the Kanawha County Circuit Court, the Honorable Tod J. Kaufman presiding, denying the State of West Virginia's and the undersigned Guardian-ad-Litem's motion to terminate the parental rights of the Appellee (and the Respondent Mother below), Sarah S [redacted] a.k.a. Sarah [redacted] (hereinafter, "the Appellee"), granting her a six-month post-disposition improvement period, and directing the West Virginia Department of Health and Human Resources (hereinafter, "the DHHR") to develop a plan of improvement in order to begin the process of reunification of the Appellants with the Appellee and the Appellants' Father (hereinafter, "the Father").

On August 25, 2009, the Circuit Court granted the undersigned Guardian-ad-Litem's Motion for Stay of Proceedings Pending Appeal, although, at the same time, the Circuit Court also increased the Appellee's supervised visitations with the Appellants to three (3) times per week. Despite the presence of the Circuit Court Judge's Court Reporter, the August 25, 2009, proceedings were not recorded and the Order reflecting the lower court's actions has not yet been entered.

### III.

#### STATEMENT OF THE FACTS AND OF THE CASE

On September 16, 2008, the State of West Virginia through its client, the DHHR, filed a child abuse and neglect petition alleging that the Appellants were abused and/or neglected by their parents within the meaning of West Virginia law. Specifically, the State of West Virginia alleged that on September 12, 2008, the Appellant Child, Sophia S , received second-degree burns to her legs and feet as a result of an intentional immersion in scalding water at her mother's residence.

The DHHR pointed its accusatory finger at the Appellee as the perpetrator of this horrendous act. Throughout the proceedings below, the parties were in agreement that the Father was not at the residence at the time of the incident and the only individuals present at that time were the Appellants and the Appellee. According to the State of West Virginia's two (2) testifying experts (both of them physicians at Cabell Huntington Hospital), the injuries sustained by the Appellant Child, Sophia S , were not consistent with accidental scalding of the child's feet and legs; nor were they consistent with the Appellee's explanation of the child's injuries. The State of West Virginia

pointed out that the Appellant's skin was burned so severely that the detectives, summoned to the Appellee's residence to investigate the incident, found pieces of Sophia S skin in the bathroom. According to the petition, the Appellant Child "continued to shed skin upon admission to the hospital." Eventually, because of the severity of the injuries to the Appellant, she was transferred from Cabell County Hospital in Huntington, West Virginia, to the Nationwide Children's Hospital in Columbus, Ohio, where, fortunately, the highly regarded specialists at the hospital's Burn Center were able to save Sophia S legs after prolonged treatment, recuperation and convalescence. The graphic pictures of the Appellant's injuries were admitted in the evidence during the proceedings in the court below. It appears that her wounds have, by now, healed.

The Appellee, while admitting neglect in her supervision of the Appellant, denied, at all times, any intentional submersion of her child in scalding water. Rather, the Appellee claimed that the Appellant, a twenty-(20)-month-old baby, climbed up onto the bathroom sink and, having turned the hot water on, burned herself instantaneously. The Appellee admitted to being outside her residence talking on her cell phone. Having heard what she first believed to be her other child's screams, the Appellee rushed into the bathroom, only to find Appellant Child on top of the bathroom vanity, her legs already severely burned.

During the course of the proceedings, the DHHR presented overwhelming medical evidence demonstrating that the injuries sustained by the Appellant, Sophia S, were intentionally inflicted upon her by the Appellee. Dr. Eduardo Pino, M.D., and Dr. David Henchman, M.D., two (2) experts from the only Burn Center in the State of West Virginia, i.e. Cabell Huntington Hospital, with combined experience of some forty-three (43) years in pediatrics, emergency medicine, and treatment of burns, testified that the

nature of the Appellant's injuries clearly demonstrated her immersion in scalding water by being held down. According to the two (2) State's experts, no other explanation of the Appellant Child's injuries could be consistent with the type of injuries sustained by the Appellant. See Transcripts (hereinafter, "T"), March 5, 2009, hearing (hereinafter "3-5-09"), pp. 16-76, and May 11, 2009, hearing (hereinafter, "5-11-09"), pp. 114-129. Having personally examined the Appellant, Dr. Pino and Dr. Henchman concluded that the "glove and stocking" circumferential burns encompassing the entire areas around the child's legs could lead to the singular conclusion – the Appellant Child was intentionally immersed in scalding water and held down. T, 3-5-09, p. 49. In fact, Dr. Pino opined that the Appellant's injuries were "a classic" example of immersion burns. T, 3-5-09, pp. 34, 37.

The description of the Appellant Child's injuries, elicited through the testimony of the DHHR's experts, was further confirmed by the reports from the Burn Center at the Nationwide Children's Hospital in Columbus, Ohio, all records admitted in the evidence by the lower court. There, Dr. Gail E. Besner, M.D., the Appellant's attending physician, apparently approved the following:

"Child Assessment Team was consulted and evaluation revealed bilateral circumferential burns to both feet extending to the mid calf on the right and to the ankle on the left (i.e. in an asymmetric stocking distribution). The mechanism of production of these burns was immersion into a scalding hot liquid. Child Assessment Team consultant indicated this pattern of burn injury was frequently inflicted. The patient also had an unexplained long linear bruise to the right thigh, which added concern for physical abuse.... Child Assessment Team agreed with the filing of a report of suspected physical abuse to Children's Services."

After further examining and treating the Appellant Child, Dr. Besner recommended:

“I agree with the prior filing of a report of suspected physical abuse on this child’s behalf. Sophia’s safety is of the utmost priority. She should not be discharged until Child Protective Services has determined a safety plan.”

The Appellee, having been provided by the Circuit Court with adequate time and ample financial resources to procure expert evidence, failed to present any evidence by anyone with a medical degree. Instead, the Appellee presented the testimony of a physician assistant, Gregory Porter, “an independent medical practitioner,” T, 5-11-09, p. 76, who in his brief, post-bachelor-degree career, participated, in some form, in “give or take” twenty-five (25) water submersion cases. T, 5-11-09, p. 109. Sadly, the State of West Virginia did not object to Mr. Porter’s expert qualifications, T, 5-11-09, p. 76, and the Circuit Court qualified Mr. Porter as an expert in “(e)mergency medicine(,) (p)rimary health care, emergency medicine, children,” T, 5-11-09, p. 76, even before the undersigned Guardian-ad-Litem had an opportunity to voir dire that witness. Mr. Porter disputed the findings of medical professionals “in the long run,” T, 5-11-09, p. 104, and, without the benefit of examining the Appellant Child, concluded that Sophia’s injuries were accidental.

In addition to that witness, the Appellee presented several self-serving witnesses and she also testified on her own behalf. The Appellee’s evidence ranged from self-professed love for her children, T, 5-11-08, p. 34, to the reiteration of the, apparently, same story the Appellee offered to anyone who would listen, T, 5-11-09, p. 31, to the lay detective’s assessment of the Appellee’s story being consistent with what he himself found at the scene, T, 5-11-09, p. 17, to the suggestion that Appellant Child is a climber, T, 5-11-09, pp. 62-66. While the Father tried to explain the bruise on the Appellant Child’s leg (perhaps her hip) resulted from the Appellant’s fall on a wooden plank, T, 5-11-09, pp.

67-68, no satisfactory explanation was given as to the etiology of that injury, the injury consistent with the application of significant force by the assailant in holding (or attempting to hold) the Appellant Child's legs down during her immersion. Nor was there any satisfactory explanation given to the fact that the Appellant Child, in her quest to allegedly reach the top of the vanity, did not dislodge any items precariously sitting on top of the commode bowl or the vanity itself.

The DHHR's rebuttal testimony of the two (2) previously mentioned expert witnesses only additionally underscored the intentional nature of the Appellant's injuries. In fact, Dr. Pino, having heard Mr. Porter's testimony, emphatically stated:

"The pictures that were shown to you of the typical submersion injury with the perineum and buttocks and all of that, is a typical burn that you would see if you were dumped into a bathtub. The case here is not a bathtub, a sink of some kind. So I would not expect – doesn't surprise me to see those types of burns not on the buttocks from being in the sink.

The distribution of the burns as far as one foot, one leg being more affected than (sic) the other, most likely she picked up the one foot." T, 5-11-09, pp. 116-117.

And Dr. Henchman, having also heard the testimony of Mr. Porter, succinctly opined: "I still believe the injuries, the burns are consistent with an immersion injury. I can't understand any other way it could have happened." T, 5-11-09, p. 129.

Despite the overwhelming medical evidence of the intentional nature of the Appellant's injuries, the Circuit Court decided to completely disregard the same. The lower court swept aside voluminous medical evidence in the form of the records from the Columbus, Ohio, Burn Center, ignored the unassailable testimony of two (2) medical experts, including one expert's explanation and critique of Mr. Porter's "medical" suggestions, and, instead, found the evidence of an accidental burning, without providing

the parties with any rationale from the Bench, and adopting, practically speaking, verbatim, the Proposed Order submitted by the Appellee. Without finding any fault whatsoever with the unassailable testimony of the State of West Virginia's expert medical doctors, the Honorable Tod J. Kaufman held that there was "some type of neglect." T, 5-11-09, p. 132. The lower court then found that "there was no clear and convincing evidence that there was intention in this case, absolutely not clear and convincing evidence that there was any intention. Neglect, yes." T, 5-11-09, p. 135.

Because of this Guardian's concern for the future safety and well-being of the Appellants and because of the overwhelming evidence of the intentional submersion of the Appellant, this Guardian seeks this Court's review of the Circuit Court's Final Disposition Order.

Pursuant to this Guardian's motion, the Circuit Court granted a motion to stay all proceedings pending this appeal. During the August 25, 2009, hearing on this Guardian's motion, the Circuit Court Judge claimed to "welcome" the review of his decision by this Honorable Court and professed to make the complete record of the proceedings below. However, since the proceedings took place at the Bench, the proceedings were not transcribed; hence, no transcript of the August 25, 2009, colloquy with the Circuit Court.

During said off-the-record proceedings, the Circuit Court agreed to maintain a status quo pending this appeal. Nevertheless, the lower court, entertained the Appellee's impromptu oral motion for greatly increased supervised visitation, with the eye towards the reunification of the family, the goal which this Guardian-ad-Litem and the DHHR object to, as far as the Appellee is concerned. The Appellants currently live with their respective fathers – specifically, the Appellant, Sophia S , was returned to her

biological father and the husband of the Appellee. The latter's visits with the Appellant Child are supervised by the DHHR-selected third party. Since the Appellant Child lives with her father, the Appellee does not stay in her husband's home.

#### IV.

##### ASSIGNMENT OF ERROR

The Kanawha County Circuit Court erred by refusing to terminate the parental rights of the Appellee where overwhelming medical evidence demonstrated the Appellant's severe injury caused by an intentional act of her immersion in scalding water by the Appellee at her residence.

#### V.

##### STANDARD OF REVIEW

"For appeals resulting from abuse and neglect proceedings ... we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." In re Emily, 540 S.E.2d 542, 549 (W.Va. 2000), cited in In re Amber Leigh J., 607 S.E.2d 372, 376 (W.Va. 2004).

"Also in Syllabus Point 1 of *In re Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

Although conclusions of law reached by a circuit court are subject to a *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused and neglected. These findings shall not be set aside by a reviewing court

unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Cited in In re Amber Leigh J., supra, at 376.

## VI.

### ARGUMENT

Only one glance at the color pictures depicting the horrendous injuries to the Appellant Child can convince an impartial observer of the circumferential nature of the burns sustained by Sophia S . The testimony of two (2) highly qualified medical experts, on direct examination, on cross-examination, and on rebuttal, was unassailable: the Appellant Child sustained second-degree burns as a result of an intentional immersion in scalding water. The content of the medical records from the Nationwide Children's Hospital in Columbus, Ohio, only confirmed the in-court testimony. The Appellant Child was held down; however, she managed to fight off the assault by lifting one of her feet up. Hence, non-symmetrical, albeit circumferential, injuries to her legs, a "classic stocking and/or glove" severe burn injury. With the minimal amount of splashing, there may have also been some burns from the scalding water to the Appellant Child's upper legs and perineum areas – all evidence consistent with the "dunking" or immersion of the Appellant Child in the Appellee's sink.

As already stated, the voluminous records from the National Children's Hospital in Columbus, Ohio, only further confirmed the testifying experts' assessment of the Appellant Child's severe injuries, particularly with respect to the circumferential burns to

both feet, further emphasizing the unexplained long linear bruise to the Appellant Child's right thigh, consistent with the force necessary to hold down the struggling Appellant Child during the immersion in scalding water.

The Circuit Court, however, ignored the overwhelming, if not uncontroverted, medical evidence. Instead, the Circuit Court chose to elevate the opinion of Mr. Porter, a paramedic who never saw, let alone examined, the Appellant Child, over the well-reasoned opinions of the highly trained medical experts, chose to believe a group of lay witnesses who presented the evidence of the Appellant Child's proclivity for climbing, and accepted as Gospel the Appellee's version of the events as expressed in her self-serving statements.

Of course, this Court cannot overturn the Circuit Court's findings simply because this Court would have decided this case differently. In re Interest of: Tiffany Marie S., supra. However, in light of the record viewed in its entirety, the Circuit Court's "account of the evidence" is simply implausible and this Court, the Guardian presses, must be left "with the definite and firm conviction that a mistake has been committed" upon review of the existing record. In re Amber Leigh J., supra, at 376.

This is not to say that the Appellee did not present any evidence in support of her claim of the accidental nature of the Appellant Child's injury. She herself testified and, having denied committing any intentional acts, admitted to neglect of her child. Her own lay witnesses attested to the Appellant Child's proclivity for climbing. And Mr. Porter offered evidence of the Appellant's accidental immersion in the scalding water. However, numerous problems arose (and still persist) in connection with the presentation of the Appellee's case.

First, the Appellee's testimony was, at a minimum, self-serving. Clearly, by offering an admission to an intentional act of severely burning her own child, the Appellee would have subjected herself to criminal prosecution. That much she acknowledged. T, 5-11-09, p. 43. Moreover, her chances for an improvement period in the present case would have, most certainly, been dashed had she admitted to an intentional act. Therefore, it came as no surprise that the Appellee offered mainly exculpatory testimony.

Secondly, the testimony concerning the Appellant's climbing skills have been discounted by the simple fact that the twenty-(20)-month-old very active climber did not dislodge any items present upon the commode bowl or the sink vanity, or simply, did not fall off the vanity during her frantic escape from the sink filled with 200 degrees Fahrenheit water. No one can seriously believe that the Appellant Child, in shock from the contact with scalding water, would not want to distance herself, as quickly as possible and as far away as possible, from the source of her unspeakable horror, no matter how incomprehensible the nature of the injury was to her mentally. It would further be an exercise in self-deception to believe that the Appellant Child lingered in the sink waiting for the boiling water not only to fill the sink, but to overflow it as well. And, finally, it would defy logic to believe that the badly injured Appellant Child stood on the vanity overflowing with the boiling water that had just scalded her, waiting for someone to rescue her.

Thirdly, the Appellee's theory of the Appellant Child's injury was, in and of itself, absurd. According to that theory, having reached the top of the sink vanity, the Appellant Child stood in the sink, turned on the boiling water, scalded herself, and, having burned herself, jumped out of the sink, and stood on the very narrow edge of the vanity until her

mother arrived to rescue the Appellant Child. Not only did the medical evidence disprove such a theory, but also the common sense dictated otherwise. A small, active, and vivacious child upon being scalded with the boiling water (hot enough to produce second degree burns and estimated by Dr. Henchman to be “close to 200 degrees” (Fahrenheit)), would have jumped out of the sink and would have, in all likelihood, fallen on the floor. She would have distanced herself as far from the boiling water as possible. She would not have stood on the edge of the sink, especially that the still-running water was overflowing the sink. T, 5-11-09, p. 29.

Finally, and most importantly, however, the overwhelming medical evidence belies the Appellee’s claims. Contrary to Mr. Porter’s theory, the evidence clearly and vividly demonstrates that the Appellant Child’s injury is not a “mixed burn.” The lines of demarcation of the Appellant Child’s severely burned skin and the normal, unaffected skin are as clear and visible as night and day. And the burns are clearly and visibly circumferential. Having viewed and reviewed the totality of the evidence in this case, it was obvious to at least three (3) experts from two (2) different Burn Centers, for the DHHR, and for this Guardian, that Sophia S was the victim of intentional underwater submersion. The only vocal participants of the proceedings below who did not accept this overwhelming evidence were Mr. Porter, the Appellee, and, sadly, the Circuit Court Judge.

The Appellee’s case was telling not by what evidence was presented, but by what evidence that was missing. Telling, indeed, was the conspicuous absence of any expert medical evidence, presented by anyone with a medical degree. Given an opportunity to seek and employ any experts in the field of (pediatric) burns, the Appellee presented the

testimony of a medical assistant whose education, knowledge and expertise were suspect and whose qualifications to opine were woefully inadequate. And while the Circuit Court Judge qualified Mr. Porter (with the DHHR's blessing), his testimony cannot outweigh the overwhelming and unassailable evidence offered by the State of West Virginia.

Again, it is not the substitution of the factual judgment of the lower court by this Court that this Appellant Child is seeking. Had the Circuit Court made detailed (or even adequate) findings of fact, or had the lower court provided feasible rationale for its rejection of the DHHR's medical evidence, the Appellant Child would, perhaps, reconsider her position. But in the absence of the lower court's clearly articulated rationale for its outright rejection of the DHHR's case, the Appellant Child is now left with the uneasy feeling that a reversible error was committed by the Kanawha County Circuit Court.

In sum, the findings of fact, presented by the Appellee in the Disposition Order, and adopted by the Circuit Court, are clearly erroneous. Both the DHHR and the Guardian-ad-Litem remain not only concerned for the future safety and wellbeing of all of the Appellants, but also remain convinced that even though some questionable evidence of the accidental injuries to Sophia S was submitted to the Circuit Court, overwhelming medical evidence demonstrates the intentional nature of her horrific injuries. Again, a simple review of the pictures admitted in the evidence must firmly and definitively convince any reviewing court that a mistake, and, thus, a reversible error, at the Circuit Court level has been committed.

VII.

CONCLUSION

For the foregoing reasons, the Appellants pray for a reversal of the lower court's decision and Order, and a remand to the Circuit Court of Kanawha County with directions to terminate the Appellee's parental rights, and for any further relief this Court may deem fair, just, and appropriate.

Respectfully submitted,  
Faith C  
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CERTIFICATE OF SERVICE

I, Matthew A. Victor, Guardian-ad-Litem for the Appellant Children, do hereby certify that on this 27<sup>th</sup> day of January, 2010, I served a true copy of the foregoing document by hand delivering the same to; and/or by placing the same in the U.S. Mail, postage prepaid, and addressed to; and by faxing the same to:

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