IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-SA-01036-COA

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES — **APPELLANT**

v.

S.W. — **APPELLEE**

DATE OF JUDGMENT:	05/25/2010
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JAMES P. STREETMAN III WADE G. MANOR DAVID LEE GLADDEN JR. JAMIE LEIGH HEARD
ATTORNEYS FOR APPELLEE:	J. BRAD PIGOTT CARLTON W. REEVES J. CLIFTON JOHNSON II
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JUDGMENT FOR PLAINTIFF FOR $500,000
DISPOSITION:	AFFIRMED - 05/29/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CARLTON, J., FOR THE COURT:

¶1. S.W.[1] filed a complaint against the Mississippi Department of Human Services (DHS) seeking damages he suffered resulting from DHS's negligence while he was placed in the legal custody of DHS as a minor. In *Mississippi Department of Human Services v. S.W.,* 974

[1] This Court uses fictitious names for the minor and his mother to protect the identity of the minor.

So. 2d 253, 264 (¶35) (Miss. Ct. App. 2007), this Court affirmed the circuit court's finding of liability based upon the breach of ministerial, nondiscretionary governmental duties by DHS, and this court reversed and remanded the case for a new trial on damages. The Mississippi Supreme Court subsequently denied certiorari. *Miss. Dep't of Human Servs. v. S.W.,* 973 So. 2d 244 (Miss. 2008).[2]

¶2. Upon remand, in lieu of a second trial, the parties allowed the circuit court to decide damages without submission of new evidence. DHS filed no motion in accordance with Mississippi Rule of Civil Procedure 52. The circuit court entered a $500,000 judgment in favor of S.W. DHS then filed a post-trial motion for reconsideration and amendment of judgment, requesting that the trial court reconsider S.W.'s entitlement to damages, which provided the court an opportunity to amend the judgment on that basis. However, DHS filed no motion seeking any additional findings of fact or conclusions of law pursuant to Mississippi Rule of Civil Procedure 52. The circuit court denied DHS's post-trial motion to reconsider and amend the judgment.

¶3. DHS appeals, claiming: (1) the circuit court erred in awarding anything more than nominal damages; (2) the circuit court's factual findings with regard to the alleged "occurrences" were contrary to the overwhelming weight of the evidence; (3) the circuit court's award of damages was without factual support, excessive, and based upon pure speculation; and (4) the circuit court's award of damages exceeded the statutory limitations

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[2] *See TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1019 (¶97) (Miss. 1997) (articulating the law-of-the-case doctrine).

of liability found in Mississippi Code Annotated section 11-46-15 (Rev. 2002). "Where a trial court sits without a jury, its findings of fact will not be disturbed so long as there is substantial evidence in the record to support them." *Callahan v. Ledbetter,* 992 So. 2d 1220, 1224 (¶8) (Miss. Ct. App. 2008); *see also Jordan v. McAdams,* No. 2010-CA-01333-COA, 2012 WL 1174468, at *4 (¶23) (Miss. Ct. App. Apr. 10, 2012) (Where no post-trial motion is filed requesting additional findings of fact and conclusions of law as allowed by Mississippi Rule of Civil Procedure 52, no deficiency will be found in the trial court's findings of fact for lack of more detail.). Since we find that the record reflects substantial evidence to support the award of damages and judgment of the trial court, we affirm.

FACTS

¶4. In the prior opinion of this Court, we affirmed the circuit court's findings of liability upon ascertaining that the record reflected that DHS breached nondiscretionary, ministerial, and affirmative duties to act as required by DHS policy and regulations and to fulfill its statutory duty to protect and care for S.W. while in the custody of DHS.[3] The underlying facts and the determination of liability were resolved in this Court's previous opinion.[4] This Court stated the facts as follows:

> On October 4, 1996, fourteen-year-old S.W. was placed in the care and custody of DHS after substantiated reports that his mother, T.W., beat him with an extension cord. Later that month, DHS placed S.W. in the Region VII Chemical Dependency Unit (CDU) in Ackerman, Mississippi. Upon his

[3] *See* Miss. Code Ann. § 43-15-5 (Rev. 2009).

[4] *See Grossnickle,* 716 So. 2d at 1019 (¶97).

arrival at CDU, S.W. met Larenzo Williams, a "youth care specialist" employed by CDU to assist the residents of the facility. S.W. alleged that shortly after his arrival at CDU, Williams engaged in sexual acts with him. Specifically, S.W. stated that he awoke to Williams inappropriately touching him under the covers. S.W. testified that this conduct went on twice a week for the entire time he was in CDU and that he never reported these instances of abuse because he feared reprisal from Williams in the form of punishment or a decrease in privileges and activities.

S.W. was later transferred by DHS to the Special Needs in State Placement (SNIPS) facility in Starkville, Mississippi, where he remained until he returned to the physical custody of T.W. on June 6, 1997. Shortly after S.W.'s transfer to the SNIPS facility, Williams was also transferred to the SNIPS facility. S.W. alleged that, upon his placement at SNIPS, Williams continued to engage in sexual acts with him such as, rubbing, touching and performing oral sex on him. S.W. stated that Williams would sometimes leave letters for him containing as much as sixty dollars. S.W. further stated that Rick Howard, another employee of SNIPS, regularly engaged in sexual acts with him including anal sex, which S.W. performed on Howard. S.W. testified that the sexual activity occurred frequently - up to two or three times a week. S.W. stated that things got "out of control" at SNIPS because Williams had more power over him. Williams had authority to impose various punishments on S.W. such as early bedtime, time-out and confinement to his room. Williams also had authority to take away various recreational activities such as watching television, playing with the other children, listening to the radio and using the telephone. S.W. testified that when he would resist Williams' sexual advances, he would sometimes lose his privileges or be bumped to a lower level of progression which made it more difficult for him to achieve the level which would allow him to return home.

On June 6, 1997, S.W. was released from SNIPS and returned to his mother's home; however, S.W. remained in DHS custody until December 1997. Williams sent numerous romantic cards and letters to S.W. at his mother's home. The cards and letters expressed Williams' love for S.W., his desire to have a "continuing relationship," and his frustration with S.W.'s failure to reciprocate. Williams also mailed pre-paid phone cards to S.W. to enable S.W. to call him inconspicuously. Despite S.W.'s effort to hide these items, T.W. eventually found them and contacted DHS to express her concern. Shortly thereafter a meeting was held with S.W., his mother, his grandmother, DHS social worker, Elsie Roarke, DHS regional director, Billie Sims, and

> DHS supervisor, Beth Leggett. In the presence of this group, S.W. was asked if he had been sexually abused by workers at SNIPS or CDU; he replied that he had not. DHS summarily determined that S.W. had not been abused. This meeting was the extent of DHS's investigation.
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> S.W. later brought a negligence action against DHS under the Mississippi Tort Claims Act (MTCA). The complaint sought compensatory and punitive damages as well as damages for mental and emotional distress. S.W. alleged that DHS neglected to carry out its duties to him while he was in their custody, which allowed him to be sexually abused. He alleged further that DHS failed to fully investigate the reported abuse and failed to ensure that he received medical treatment in the form of psychological counseling.
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> At trial, both Williams and Howard denied the allegations of sexual abuse. Williams testified that although he never engaged in any sexual activities with S.W., it probably would have happened because he had feelings for S.W. Williams admitted that he liked S.W. in the wrong way, as in love for another man. He stated that he had a desire for S.W. and had dreams of being with him. Williams' cards and letters were also introduced at trial.
>
> The trial court found that DHS breached its duty to protect and care for S.W. in three respects: (1) that DHS failed to make required monthly face-to-face contacts with S.W., (2) that DHS failed to sufficiently investigate the report of sexual abuse, and (3) that DHS failed to provide much needed counseling upon S.W.'s return home. The trial court determined that DHS's negligent conduct subjected S.W. to sexual abuse thereby causing him damages. Accordingly, judgment was entered in favor for S.W. awarding $750,000 in damages.

S.W., 974 So. 2d at 256-57 (¶¶2-7) (footnotes omitted).

¶5. In our prior opinion in this case, this Court evaluated whether the challenged governmental conduct was discretionary and, if so, whether the choice or judgment at issue involved social, economic, or political policy. *Id.* at 258-59 (¶11). After evaluation of the evidence in the record, the applicable statutes, DHS regulations and policy directives, this Court found the following challenged DHS governmental functions mandatory and not

discretionary: monitoring S.W.'s care and placement; investigating allegations of sexual abuse; and providing medical care to S.W. in the form of counseling. *Id.* at 259-260 (¶¶13-21). The record reflected substantial evidence showing that DHS possessed affirmative governmental duties to act to protect and care for S.W.,[5] a minor in its custody by court order. This Court stated:

> We find that the challenged governmental functions were mandatory in nature and the discretionary function exemption does not shield DHS from suit in this case.
>
> . . . .
>
> We affirm the findings of the trial judge that DHS breached each of the three duties identified in the order. Therefore, we affirm the trial judge's finding as to liability. However we reverse and remand the case for a new trial on damages and instruct the trial judge to include in his or her order findings of fact which clearly identify what damage, if any, is attributed to each of the three breaches respectively. We further instruct the trial judge to assess damages for each breach in accordance with the applicable statutory limitation pursuant to Section 11-46-15(1) and to specify in his or her findings of fact under which provision damages are awarded. In the event an appeal is taken from the new trial on damages only, this will ensure that the reviewing court therein will be able to sufficiently address any issues pertaining to the limitations of liability under the MTCA.

Id. at 260-64 (¶¶21-36).

¶6. Then, on remand of this case, rather than have a new trial on damages, the parties agreed to submit the issues of damages to the circuit court for a decision based upon the record already before the court. The parties submitted proposed findings of fact and

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[5] *See Fortenberry v. City of Jackson,* 71 So. 3d 1196, 1201 (¶13) (Miss. 2011) (acknowledging that in *S.W.,* 974 So. 2d at 256-260 (¶¶1-21), we held that DHS regulations constituted ministerial duties).

conclusions of law to the circuit judge, but DHS, as previously acknowledged, submitted no motion for findings of fact and conclusions of law in accordance with Mississippi Rule of Civil Procedure 52. The circuit court issued an Opinion and Order on March 25, 2010, where it ruled as follows:

> THIS CAUSE was previously tried by this [c]ourt and subsequently appealed by the [d]efendants[,] [DHS]. The Court of Appeals remanded this matter for a new trial as to damages only. The parties appeared in [c]ourt and agreed to allow the [c]ourt to decide the issue on remand without offering any new evidence other than proposed findings of facts and conclusions of law. This [c]ourt, after finding that liability has already been established, hereby assess[es] damages as follows:
>
> > 1. This [c]ourt finds that the [d]efendant breached its duties to the plaintiffs in three respects: 1) failing to make required face-to-face contacts with the plaintiff; 2) failing to properly investigate allegations of abuse; and 3) failing to provide counseling. As a result of these breaches, the [c]ourt finds that the plaintiff has experienced a great deal of emotional distress, mental pain, suffering, and humiliation. Accordingly, the plaintiff is entitled to an award of damages to be assessed against the defendant.
> >
> > 2. From the period of October 1996 through June 1997, DHS was obligated to have quarterly face-to-face visits with the plaintiff. During this period[,] DHS made only one visit, instead of the three required visits. For each visit DHS failed to initiate, the plaintiff is entitled to damages. The statutory cap for each occurrence during this period is $50,000. Miss. Code Ann. § 11-46-15(1)(a)[-](b). The [c]ourt finds that the plaintiff is entitled to $50,000 for each visit DHS failed to initiate during this period. Accordingly, for the period of October 1996 through June 1997, the plaintiff is entitled to $100,000.
> >
> > 3. For the period of July 1997 through December 1997, DHS was required to make monthly face-to-face visits. The record reflects DHS failed to make the monthly visits. For each visit DHS failed to initiate during this time period, the plaintiff is

entitled to damages. The [c]ourt finds that DHS missed six monthly visits which is tantamount to six separate occurrences. Therefore, the statutory cap for each occurrence during this time period is $250,000. Miss. Code Ann. § 11-46-15(1)(a[-])(b). The [c]ourt finds that plaintiff is entitled to $50,000 for each visit DHS failed to initiate during this period. Therefore, since DHS missed six monthly visits, the plaintiff is entitled to a sum of $300,000 for the missed visits during this time period.

4. The [c]ourt will now address DHS's failure to conduct an adequate investigation of abuse. The [c]ourt finds the failure to investigate to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the [c]ourt awards $50,000 for breach of the duty to investigate abuse.

5. Finally, this [c]ourt found that DHS breached it[s] duty to provide much needed counseling upon plaintiff's return home. The [c]ourt finds the failure to provide counseling to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the [c]ourt awards $50,000 [for] failure to provide counseling.

6. The [c]ourt finds that a [j]udgment should be entered in favor of the plaintiff and against the defendant in the following respects:

> a. Damages for failing to make face-to-face contact for the period of October 1996 - June 1997 – $100,000;
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> b. Damages for failing to make face-to-face contact for [the] period of July 1997 - December 1997 – $300,000;
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> c. Damages for failure to investigate – $50,000; [and]
>
> d. Damages for failure to provide counseling – $50,000.

Accordingly, the total damages awarded amounts to $500,000.

> **IT IS, THEREFORE, ORDERED AND ADJUDGED** that the [d]efendant is hereby ordered to pay $500,000 to [p]laintiff.
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> **IT IS FURTHER ORDERED AND ADJUDGED** that a [j]udgment containing the total amount of damages shall be presented by the plaintiff to the [c]ourt for entry on or before April 9, 2010.

¶7. On May 25, 2010, the circuit court entered a final judgment that awarded S.W. damages of $500,000 and post-judgment interest at the rate of 8% per annum. Post trial, DHS filed a motion for reconsideration and amendment of judgment, which the circuit court denied.

¶8. DHS now appeals.

STANDARD OF REVIEW

¶9. In this Court's previous opinion in *S.W.,* 974 So. 2d at 256-57 (¶8), this Court stated the proper standard of review:

> Claims brought under the MTCA are tried before the appropriate court without a jury. Miss. Code Ann. § 11-46-13(1) (Rev. 2002). The standard of review for a judgment entered following a bench trial is well settled. We review questions of law *de novo. Miss. Dep't of Mental Health v. Hall,* 936 So. 2d 917, 922 ([¶]6) (Miss. 2006). The proper application of the MTCA is a question of law. *City of Newton v. Lofton,* 840 So. 2d 833, 836 (¶7) (Miss. Ct. App. 2003). A trial judge is accorded the same deference regarding his findings as is a chancellor and his findings will not be disturbed where they are support by substantial, credible and reasonable evidence. *Jones v. Mississippi Transp. Comm'n,* 920 So. 2d 516, 518 (¶[3]) (Miss. [Ct. App. 2006)]). We will only disturb the trial judge's findings if the trial judge abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. *Id.* As the trier of fact, the trial judge "has the sole authority for determining the credibility of the witness[es]." *Thompson ex rel. Thompson v. Lee County Sch. Dist.,* 925 So. 2d 57, 62 ([¶]7) (Miss. 2006) (citations omitted).

DISCUSSION

¶10. In our prior opinion, this Court affirmed the circuit court's decision as to DHS's liability to S.W. This Court found that the record supported the circuit court's decision that DHS breached various affirmative, nondiscretionary, and ministerial duties owed to S.W., a minor in DHS's custody, to fulfill DHS's statutory obligations set forth in DHS regulations to protect and care for S.W. while in DHS's custody.[6] *S.W.,* 974 So. 2d at 264 (¶36). This Court, however, reversed the circuit court's award of damages because we found that the circuit court provided "an insufficient basis for review" of damages. *Id.* at (¶35). This Court held that "[t]he trial judge failed to disclose how he arrived at the $750,000 damage award" since he failed to attribute occurrences to assessment of damages. *Id.* This Court gave further guidance to the circuit judge on remand in stating the following:

> However[,] we reverse and remand the case for a new trial on damages and instruct the trial judge to include in his or her order findings of fact which clearly identify what damage, if any, is attributed to each of the three breaches respectively. We further instruct the trial judge to assess damages for each breach in accordance with the applicable statutory limitation pursuant to [s]ection 11-46-15(1) and to specify in his or her findings of fact under which provision damages are awarded. In the event an appeal is taken from the new trial on damages only, this will ensure that the reviewing court therein will be able to sufficiently address any issues pertaining to the limitations of liability under the MTCA.

Id. at 264 (¶36).

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[6] *See Miss. Transp. Comm'n v. Montgomery,* 80 So. 3d 789, 795 (¶19) (Miss. 2012). *See also* Miss. Code Ann. § 43-15-5(1) (DHS is required "to administer or supervise all public child welfare services," and to "provide for the care of dependent and neglected children in foster family homes or in institutions[.]").

¶11. In addition to the supreme court's denial of certiorari review of our prior opinion in this case, the supreme court cited our prior opinion in *S.W.* in *Fortenberry v. City of Jackson*, 71 So. 3d 1196, 1201 (¶13) (Miss. 2011), explaining that DHS converted discretionary functions into ministerial functions through its policy manual, setting forth specific duties in its agency regulations and policy directives. *See also In re EK*, 20 So. 3d 1216, 1227 n.2 (Miss. 2009) (acknowledging the special relationship of DHS and S.W. because S.W. was a child placed in DHS's custody, and DHS therefore possessed a duty to investigate).

¶12. Upon remand, the circuit court awarded damages to S.W., finding that due to the breached duties by DHS, S.W. suffered great emotional distress, mental pain and suffering, and humiliation. The circuit court set forth its findings as to the separate occurrences of breached ministerial, nondiscretionary duties to S.W. resulting in repeated harm.

I. Whether the Circuit Court Erred in Awarding Anything More than Nominal Damages.

II. Whether the Circuit Court's Award of Damages was Without Factual Support, Excessive, and Based Upon Pure Speculation.

¶13. DHS argues that S.W. failed to produce evidence to support an award of damages. DHS further contends that if any damages are to be allowed, then S.W. is only entitled to nominal damages.

¶14. DHS claims that since DHS employees were not the ones that sexually assaulted S.W., then no damages against DHS should be awarded. However, DHS's argument fails to acknowledge the consequences of the negligence stemming from the affirmative duties

breached by DHS to protect and care for S.W. while in their custody.[7] Mississippi negligence law recognizes that separate concurrent or successive acts or omissions of negligence can combine to produce an indivisible harm. *D&W Jones v. Collier*, 372 So. 2d 288, 292 (Miss. 1979).[8] The argument raised by DHS also fails to address the special relationship and duties owed to S.W. as a ward placed in its custody.[9] This argument was addressed in this Court's prior opinion. *S.W.,* 974 So. 2d at 263 (¶¶31-32). As we explained, the liability of the State springs from the duty owed to protect the specific victim, S.W., placed in its legal custody, not merely from whether the State possessed a duty to supervise the worker. The supreme court has acknowledged the special relationship existing between DHS and S.W., as a child in its legal custody. *See Fortenberry*, 71 So. 3d at 1201 (¶13); *Tunica County v. Gray*, 13 So. 3d 826, 832 (¶30) (Miss. 2009); *In re EK*, 20 So. 3d at 1227 n.2. Our supreme court has additionally explained that in *Entrican v. Ming,* 962 So. 2d 28, 36 (¶24) (Miss. 2007), a defendant tortfeasor may be "held liable for his failure to anticipate an easily-predicted intervening cause and to properly guard against it." The *Entrican* court

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[7] *See Fortenberry*, 71 So. 3d at 1201 (¶13); *Tunica County v. Gray*, 13 So. 3d 826, 832 (¶30) (Miss. 2009).

[8] *See generally Hannah v. Gulf Power Co.,* 128 F.2d 930, 931 (5th Cir. 1942); *Entrican v. Ming*, 962 So. 2d 28, 35-36 (¶¶24-25) (Miss. 2007). *See also* 57A Am. Jur. *Negligence* § 515 (2004) (discussing concurrent negligence); Restatement (Second) of Torts § 439 (1965).

[9] DHS "shall have authority and it shall be its duty to . . . administer and supervise the licensing and inspection of all private child placing agencies[.]" Miss. Code Ann. § 43-15-5(1).

explained that such events were foreseeable. *Id.*; *see also Pargas of Taylorsville, Inc. v. Craft*, 249 So. 2d 403, 408 (Miss. 1971) (finding defendant can be charged only with anticipating reasonable probabilities).

¶15. With respect to the performance of the duties owed to S.W. by DHS, as his legal custodian, testimony was given by S.W., S.W.'s DHS case workers, the DHS Rule 30(b)(6) witness,[10] other DHS employees, and employees of the Community Counseling Services (CCS). Susan Baker,[11] the Chief Operations Officer and Clinical Director for CCS, also testified and explained that CCS provided the services of the Choctaw Chemical Dependency Unit (CDU) in Ackerman, Mississippi, and the Special Needs in State Placement (SNIPS) facility in Starkville, Mississippi.[12] A legal guardian must consent to a child's admission to CDU or the SNIPS facility for treatment, and Baker provided that neither CDU nor the SNIPS facility assumed custodial responsibility for the children placed there. The record reflects that on September 17, 1996, DHS documented that it previously received a complaint of abuse of S.W. by his parent. The record shows that S.W. was placed in DHS custody for abuse and neglect on October 4, 1996, but S.W. was placed in CDU on September 14, 1996, prior to that order of custody.[13]

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[10] *See* M.R.C.P. 30(b)(6).

[11] Baker is also a psychiatric nurse.

[12] Baker testified that both the CDU and the SNIPS facility were now closed.

[13] The Hinds County Youth Court placed S.W. in DHS custody by order dated October 4, 1996, when he was fourteen years and eleven months old, and custody was returned to his mother on September 12, 1997.

¶16. S.W. testified that no one told him why he was going to CDU, and the record shows that his grandmother called DHS wanting S.W. to come live with her while he was at CDU. The record shows that DHS policy dictated that no child would be removed from a home unless the court order provided that the child's removal from his home was necessary in that continuation in the home would be contrary to his welfare. However, the record shows that DHS placed S.W. in CDU prior to issuance of the October 4, 1996 custody order and without a court order authorizing his removal.[14]

¶17. DHS remained the legal custodian responsible for S.W.'s care and protection until relieved by court order, and the record reflects no basis for admitting S.W. to CDU due to his mother's abuse and neglect of him by whipping him with a belt. In explaining that the CCS entities, CDU and SNIPS, took no responsibility for physical accountability of the children placed there, Baker provided that custody and custodial responsibility remained with the legal guardian, such as DHS, when a child was placed in DHS's custody. Baker's testimony reflects that CDU provided medical substance-abuse treatment and that SNIPS provided child care, but neither service provider agreed, accepted, or was awarded custody of the children placed therein. Baker further explained that CDU was not the appropriate

[14] Mississippi Code Annotated section 43-15-13 (Rev. 2009) sets forth statutory goals for children placed in DHS custody that include protecting and promoting the health, safety and welfare of the children, preventing unnecessary separation from their families, and assuring their safe and adequate care away from their homes in cases where they cannot be returned home or cannot be placed for adoption. Section 43-15-13(3) requires DHS to contact the natural parents and any interested relatives during the first two months of entry into the foster-care system.

placement for a child in the custody of DHS for only abuse and neglect. CDU placement required documented abuse of a substance more extreme than marijuana, and Baker did not recall S.W. using anything more extreme. CDU was not classified as a long-term facility, and the average stay was twenty-eight to thirty days.

¶18. However, S.W. remained at CDU for a longer period than the usual thirty days, even though he was in custody due to neglect and abuse, not substance abuse or any delinquency adjudication, and Baker noted that S.W. suffered from some depressive episodes at CDU due to being in DHS's custody. She also explained that during the relevant time period, three unrelated allegations of sexual abuse and two allegations of physical abuse occurred. She further explained that when S.W.'s allegations of abuse came to her attention, Ricky Howard and Lorenzo Williams had already been terminated.[15] S.W.'s case worker also explained that her notes reflected that in March 1997, S.W. always complained that he felt ready to be discharged, but she explained to him that some SNIPS staff must have felt that he was not ready, without inquiring herself as to why or who of the SNIPS staff determined S.W. was not ready for discharge. The record contains DHS's policy manual setting forth ministerial duties to act to care and protect children in its custody and the testimony establishing breach of those duties in the circuit court's findings.

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[15] Williams was terminated for inappropriate behavior in the workplace shortly before Baker became aware of the allegations. Howard lost his position as a part of downsizing since DHS cut funding from $205 a day to $141 a day. Baker stated that when funding was to be reduced even further, both CDU and the SNIPS facility closed because operating at such low levels of funding created dangerous conditions. The allegations against Howard were never investigated since he was no longer an employee.

¶19. S.W. was placed by the court into DHS's custody on October 4, 1996, and he remained in DHS's custody for over fourteen months, until September 1997. Throughout these months, DHS placed S.W. in CDU and the SNIPS facility. DHS regulations impose on its social workers a ministerial duty to use "face-to-face" consultations with each child under DHS supervision, at least once per quarter while any child resides in a licensed care facility, and at least once per month while the child resides elsewhere. A required component of the duties of a DHS social worker is to get the child's psychological condition assessed, and treated if recommended, by a mental-health professional. If personally transporting the child to such a professional is practically required for the child to get such treatment, then the DHS social worker is required to personally transport the child. If any evidence of adult abuse of a child arises during the child's custody with DHS, then DHS regulations require DHS to interview the alleged perpetrator, to interview the minor "privately, separately, and in a non-threatening place," and to make an unannounced visit to any residential facility involved. DHS regulations require these ministerial duties to be performed without discretion. DHS employees testified that DHS was obligated like a parent to children in its custody. The record shows S.W.'s case worker, Leggett, received an official reprimand for failing to follow procedure and policy to provide appropriate care and services to children and families in prevention, supervision, and custody cases.

¶20. The record reflects that nothing was done in violation of the statutory mandates of Mississippi Code Annotated section 43-15-13(3) (Rev. 2009) to contact any interested family members within the first two months of placement. The record shows that while placed in

the SNIPS facility by DHS, S.W. reported to a mental-health counselor that he felt picked on by staff and peers; that S.W.'s mental condition was depressed, upset, and angry; and that he was threatening to run away. Baker acknowledged documentation that S.W. was depressed at CDU. Also, the record shows that S.W. begged over the phone to no avail that DHS place him in a foster home. The record reflects S.W. provided substantial, credible evidence that DHS breached its duties to care for, to protect, and to supervise S.W. DHS breached these duties by inappropriately placing S.W. at CDU as a neglected and abused child; by doing so prior to receipt of a court order for custody or removal; and by failing to adequately supervise, protect, and care for him in accordance with DHS policies and regulations after leaving him in these facilities where he suffered repeated sexual abuse while in DHS custody.

¶21. When the State places a child in a state-regulated foster care, the State has entered into a special relationship with that child that imposes certain affirmative duties to be performed by the government custodian, as shown in the governing statutes, regulations, and policies of DHS. *See* Miss. Code Ann. § 43-15-5.[16] As noted, the record shows DHS placed S.W. at CDU prior to receipt of the October 4, 1996 custody order and without a removal order, over the request of his grandmother to place him with her. The record fails to reflect that

[16] *See generally Keyes v. Huckleberry House*, 936 F.2d 578 (9th Cir. 1991) (finding that a private facility might be found to be state actor if child was ward of the state and the state provided care through the private agency); *Harris ex rel. Litz v. Lehigh County Office of Children & Youth Servs*., 418 F. Supp. 2d 643 (E.D. Pa. 2005); *Jordan v. City of Philedelphia*, 66 F. Supp. 2d 638 (E.D. Pa 1999).

CDU was an appropriate placement for S.W., a child placed in its custody for abuse and neglect. DHS nonetheless placed him there despite the basis of his legal custody and mental-health needs, and DHS failed as his legal custodian to supervise or monitor his care and welfare at CDU or SNIPS, where he suffered sexual abuse. When S.W. was transferred to SNIPS from CDU, his initial abuser, Williams, was also transferred to SNIPS, where Williams continued to abuse S.W., and then later another worker, Howard, sexually abused S.W. The record supports the circuit court's findings that DHS failed to conduct two of its three mandatory quarterly visits between October 1996 and June 1997, and that DHS missed six monthly visits between June 1997 and December 1997 and failed to interview or provide counseling for S.W.

¶22. The record reflects substantial support for the circuit court's findings of negligence by DHS, and therefore the question before the circuit judge was whether the separate concurrent or successive negligent acts, or negligent omissions of its duty to act, by DHS constituted a substantial factor in bringing about the harm to S.W. *Glover ex rel. Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1277 n.11 (Miss. 2007); *Entrican*, 962 So. 2d at 36 (¶24). We note, as explained in *Entrican*, to be liable under negligence law, a particular defendant's negligence need not be the sole cause of the injury suffered if his negligence concurring with one or more efficient causes proximately causes the plaintiff's harm. *Entrican,* 962 So. 2d at 32 (¶12). The affirmative duties of DHS to protect and care for children placed in its custody and the nondiscretionary duties imposed by DHS's own policies and regulations provide evidence of duty and foreseeability. Precedent establishes

that the fact that DHS failed to foresee the extent of harm or the manner of harm does not prevent liability for its negligence. *See generally Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1143-45 (¶29-34) (Miss. 2004); *Doe ex rel. Doe v. Wright Sec. Servs., Inc.*, 950 So. 2d 1076, 1079 (¶12) (Miss. Ct. App. 2007). *See also* Restatement (Second) of Torts § 435 (1965).[17]

¶23. Under our standard of review, we must accord the circuit judge, as the factfinder sitting without a jury, the same deference regarding his findings as that of a chancellor in considering the assignments of error raised by DHS. *Jones v. Miss. Transp. Comm'n,* 920 So. 2d 516, 518 (¶3) (Miss. Ct. App. 2006). We will not disturb the circuit judge's findings "where they are supported by substantial, credible, and reasonable evidence." *Id.* In reviewing the circuit court's award of damages for emotional injuries, we acknowledge that a plaintiff seeking emotional damages as a result of ordinary negligence must show some resulting demonstrable harm, either physical or mental injury. *Evans v. Miss. Dep't Human*

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[17] DHS possesses authority to administer all public child-welfare services. Miss. Code Ann. § 43-15-5. At the time of placement of a child, DHS shall implement concurrent planning. Miss. Code. Ann. § 43-15-13(2)(f). "[DHS] shall administer a system of individualized plans and reviews once every six (6) months for each child under its custody within the State of Mississippi. . . . [DHS's] administrative review shall be completed on each child within the first three (3) months[.]" Miss. Code Ann. § 43-15-13(3). "To carry out these [statutory] duties, DHS has developed formal guidelines and procedures for the provision of social services in the areas of personal protection, prevention of abuse and neglect, and placement of children in out-of-home settings." *S.W.,* 974 So. 2d at 259 (¶12). "This operating procedure is outlined in detail in the DHS's policy manual." *Id.* "At bottom, the manual requires (1) weekly contact during the first month of placement and monthly contact thereafter, whether face-to-face, by telephone calls, or written correspondence. and (2) quarterly face-to-face contact." *Id.* at (¶15).

Servs., 36 So. 3d 463, 476 (¶52) (Miss. Ct. App. 2010) (citing *Ill. Cent. R.R. Co. v. Hawkins*, 830 So. 2d 1162, 1174 (¶26) (Miss. 2002)).

¶24. In *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (¶21) (Miss. 1999), the supreme court embraced the adoption of "the term 'demonstrable harm' in place of 'physical injury,' indicat[ing] that the proof may solely consist of evidence of a mental injury without physical manifestation." Therefore, "[i]n order to recover emotional distress damages resulting from ordinary negligence, [S.W.] must prove 'some sort of physical manifestation of injury or demonstrable harm, whether it be physical or mental, and that harm must have been reasonably for[e]seeable to the defendant.'" *Randolph v. Lambert*, 926 So. 2d 941, 946 (¶17) (Miss. Ct. App. 2006). We further acknowledge that a plaintiff bears the burden of going forward with sufficient evidence to prove damages by a preponderance of the evidence. *Paz v. Brush Engineered Materials, Inc.,* 949 So. 2d 1, 3 (¶5) (Miss. 2007) (quoting *Miss. Dep't of Mental Health v. Hall,* 936 So. 2d 917, 922 (¶7) (Miss. 2006)). "The assessment of damages constitutes a finding of fact,[18] and the appellate court reviews an award of damages under the clearly erroneous standard." *Greater Canton Ford Mercury, Inc. v. Lane,* 997 So. 2d 198, 206 (¶30) (Miss. 2008); *Thompson ex rel. Thompson v. Lee County Sch. Dist.,* 925 So. 2d 57, 72 (¶23) (Miss. 2006) ("It is primarily the province of the jury and in a bench trial the judge to determine the amount of damages to be awarded and the

[18] *See Gamble ex rel. Gamble v. Dollar Gen. Corp.,* 852 So. 2d 5, 11 (¶19) (Miss. 2003) ("[E]xpert testimony showing actual harm or proof of physical or mental injury is not always required.").

award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous."). Our standard of review requires that "a trial court's decision as to damages will not be disturbed so long as the ruling is supported by substantial, credible, and reasonable, evidence." *Ledbetter*, 992 So. 2d at 1230 (¶25).

¶25. In addressing the sufficiency of the evidence of damages in the record, we note that the record contains S.W.'s own testimony regarding the damages he suffered while in DHS custody. The record also shows medical documentation of manifestations of his mental injuries. Baker provided that S.W. was depressed over being in DHS custody while at CDU. At the Starkville facility, S.W. received individual therapy noting depression, anxiety, and anger. Additionally, the record shows that S.W. received treatment from other mental health professionals after his release from DHS custody. After release, S.W. first received treatment from a private psychiatrist at the Mississippi Neuropsychiatric Clinic, and later received therapy from Dr. David Byron Jones. The psychiatrist with the Mississippi Neuropsychiatric Clinic documented the impact of the abuse S.W. endured while in DHS custody, describing that S.W. suffered from constant anger and frustration causing him to respond with crying or violence to any disagreement with family. The psychiatrist also noted that S.W.'s entire attitude changed while in DHS custody.

¶26. Then, two years after his release from DHS custody, S.W. confided in another mental-health professional, Dr. Jones, a licensed professional counselor, regarding the abuses that he had endured. Dr. Jones determined that S.W. suffered from anxiety and depression from

the traumatic events and abuse that occurred while he was in DHS custody. Dr. Jones also found that S.W. could not cope with the trauma suffered, and S.W. needed counseling. As a result of the trauma, S.W. lacked the ability to trust others and exhibited anger and depression. The record shows that S.W. expressed an underlying heterosexual sexual preference, and he suffered from anger and confusion resulting from the homosexual sexual acts he was required to perform while in custody. At trial, seven years after release from DHS custody, S.W. testified that he still suffered from anger and that he cried all the time, as a result of the trauma and abuse suffered in DHS custody. DHS records reflect that DHS recommended S.W. receive mental-health treatment upon his release from treatment at CDU and SNIPS but while still in DHS custody. However, DHS failed to ensure he received that counseling even though DHS still maintained custody. The Mississippi Supreme Court has consistently held that where it has been shown that damage happened, then recovery of damages are not precluded because of uncertainty of extent of the damages. *Grossnickle*, 716 So. 2d at 1025 (¶133). *See also Nichols v. Stacks*, 485 So. 2d 1034 (Miss. 1986) ("The rule that damages, if uncertain, cannot be recovered applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent recovery.").

¶27. The circuit judge's award of damages is supported by substantial, credible evidence in the record as displayed by the following: S.W.'s own testimony; the individual therapy treatment at the Starkville facility for anxiety, anger, and depression; treatment by the psychiatrist with the Mississippi Neuropsychiatric Clinic describing manifestations of

depression, anxiety, gender-identity confusion, anger, inability to trust others, and coping difficulties; Dr. Jones's treatment for depression and anxiety; the overwhelming evidence of sexual abuse of S.W., negligent care, and inappropriate placement at CDU; the continued pursuit of S.W. by one of the perpetrators upon his release; and DHS's failure to properly investigate the reported abuse or provide S.W. with much needed counseling and psychological services. In addressing the sufficiency of the evidence in support of the circuit court's award of damages, we recognize that the supreme court has held that the harm need not have a physical manifestation, but the plaintiff must prove some sort of injury whether physical or mental. *Adams,* 744 So. 2d at 743 (¶21).[19] The record reflects that S.W. provided sufficient evidence of a demonstrable harm regarding his mental injuries as shown by evidence of the treatments of three mental-health professionals and his own testimony. We

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[19] The *Adams* court explained:

> It is undisputed that under Mississippi law, a plaintiff asserting a claim for mental anguish, whether as a result of simple negligence or an intentional tort, must always prove that the emotional distress was a reasonably foreseeable result of the defendant's conduct. In cases of intentional infliction of emotional distress, where the defendant's conduct was "malicious, intentional or outrageous," the plaintiff need present no further proof of physical injury. Where, as here, the defendant's conduct amounts to simple negligence, we take this opportunity to clarify that we have moved away from the requirement of proving some physical injury in addition to the proof of reasonable foreseeability. Our language in the previously cited cases, adopting the term "demonstrable harm" in place of "physical injury," indicates that the proof may solely consist of evidence of a mental injury without physical manifestation.

Adams, 744 So. 2d at 743 (¶21).

are mindful that in *Thompson,* 925 So. 2d at 62 (¶7), the Mississippi Supreme Court stated that the circuit judge, sitting as the factfinder, is the sole authority for determining the credibility of witnesses, and where there is conflicting evidence, the appellate court will give great deference to the findings of the circuit judge. The *Thompson* court further noted:

> It matters not what this Court may have done if placed in the trial court's fact-finding role. It matters only that in exercising our mandated appellate review, we can confidently determine the trial court's findings of fact "are supported by substantial, credible, and reasonable evidence."

Id. at 71 (¶20). Additionally, "[b]ecause of the jury verdict in favor of the appellee [S.W.], this Court resolves all conflicts in the evidence in [his] favor. This Court also draws in the appellee's favor all reasonable inferences which flow from the testimony given." *Sw. Miss. Reg'l Med. Ctr. v. Lawrence,* 684 So. 2d 1257, 1267 (Miss. 1996); *see Nichols*, 485 So. 2d at 1038; *Cain v. Mid-South Pump Co*., 458 So. 2d 1048, 1050 (Miss. 1984) (where reasonable certain damage occurred, then mere uncertainty as to amount will not preclude right of recovery of damages).

¶28. In this case, the circuit judge considered the evidence, weighed it, and found in favor of S.W. Since the evidence in the record provides substantial, credible evidence in support of the verdict of the circuit court, we find the first two assignments of error lack merit.

III. Whether the Circuit Court's Factual Findings with Regard to the Alleged "Occurrences" was Contrary to the Overwhelming Weight of the Evidence.

IV. Whether the Circuit Court's Award of Damages Exceeded the Statutory Limitations of Liability Found in Mississippi Code Annotated Section 11-46-15.

¶29. DHS argues that if S.W. was in fact entitled to an award of damages, the amount of damages awarded by the circuit court was outrageous, speculative, grossly excessive, and in excess of the statutory cap.[20] DHS claims that as a factual, legal, and practical matter, the circuit court's findings are unsound, and DHS asserts that S.W. did not establish that he suffered a separate injury valued at $50,000 for *each* of DHS's breaches. We must turn to the findings of the circuit court and the controlling law to review these allegations of error.

¶30. Our supreme court has explained that where wrongful conduct is repeated over a period of time, the wrongful conduct gives rise to a new cause of action each time it is repeated. *See Pierce v. Cook,* 992 So. 2d 612, 619 (¶25) (Miss. 2008); *see also Estate of Fedrick ex rel. Sykes v. Quorum Health Res., Inc.,* 45 So. 3d 641, 643 (¶¶8-9) (Miss. 2010) (finding that a nursing home's failure to provide nutrition to a patient could constitute a repeated injury).

¶31. On remand, the circuit court awarded S.W. a total of $500,000 in damages. As stated, the circuit judge specifically found as follows:

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[20] Mississippi Code Annotated section 11-46-15 sets forth the limits for the total award of damages:

> (a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars ($50,000.00);
>
> (b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00)[.]

1. This [c]ourt finds that the [d]efendant breached its duties to the plaintiffs in three respects: 1) failing to make required face-to-face contacts with the plaintiff; 2) failing to properly investigate allegations of abuse; and 3) failing to provide counseling. As a result of these breaches, the [c]ourt finds that the plaintiff has experienced a great deal of emotional distress, mental pain, suffering, and humiliation. Accordingly, the plaintiff is entitled to an award of damages to be assessed against the defendant.

2. From the period of October 1996 through June 1997, DHS was obligated to have quarterly face-to-face visits with the plaintiff. During this period[,] DHS made only one visit, instead of the three required visits. For each visit DHS failed to initiate, the plaintiff is entitled to damages. The statutory cap for each occurrence during this period is $50,000. Miss. Code Ann. § 11-46-15(1)(a)[-](b). The [c]ourt finds that the plaintiff is entitled to $50,000 for each visit DHS failed to initiate during this period. Accordingly, for the period of October 1996 through June 1997, the plaintiff is entitled to $100,000.

3. For the period of July 1997 through December 1997, DHS was required to make monthly face-to-face visits. The record reflects DHS failed to make the monthly visits. For each visit DHS failed to initiate during this time period, the plaintiff is entitled to damages. The [c]ourt finds that DHS missed six monthly visits which is tantamount to six separate occurrences. Therefore, the statutory cap for each occurrence during this time period is $250,000. Miss. Code Ann. § 11-46-15(1)(a)[-](b). The [c]ourt finds that plaintiff is entitled to $50,000 for each visit DHS failed to initiate during this period. Therefore, since DHS missed six monthly visits, the plaintiff is entitled to a sum of $300,000 for the missed visits during this time period.

4. The [c]ourt will now address DHS's failure to conduct an adequate investigation of abuse. The [c]ourt finds the failure to investigate to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the [c]ourt awards $50,000 for breach of the duty to investigate abuse.

5. Finally, this [c]ourt found that DHS breached it[s] duty to provide much needed counseling upon plaintiff's return home. The [c]ourt finds the failure to provide counseling to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the [c]ourt awards $50,000 [for] failure to provide counseling.

6. The [c]ourt finds that a [j]udgment should be entered in favor of the plaintiff and against the defendant in the following respects:

a. Damages for failing to make face-to-face contact for the period of October 1996 - June 1997 – $100,000;

b. Damages for failing to make face-to-face contact for [the] period of July 1997 - December 1997 – $300,000;

c. Damages for failure to investigate – $50,000; [and]

d. Damages for failure to provide counseling – $50,000.

Accordingly, the total damages awarded amounts to $500,000.

¶32. The record shows S.W. suffered repeated injury from being sexually abused and from the lack of care and protection while placed in DHS's custody. The record also shows DHS breached nondiscretionary, ministerial duties to protect and care for S.W. while he was in its custody, and S.W. was thereafter subjected to repeated acts of neglect, delinquency, misconduct, and sexual abuse. *See Fortenberry*, 71 So. 3d at 1201 (¶13) (acknowledging that DHS policy regulations addressed in *S.W.* constituted ministerial, nondiscretionary duties to act); *In re EK*, 20 So. 3d at 1227 n.2 (recognizing that a special relationship is created when a child is placed in DHS's custody).

¶33. The circuit court, sitting as the factfinder, found that DHS's failure to act, when required to do so by DHS regulations, breached specific and separate affirmative ministerial and nondiscretionary duties, and as a result, S.W. endured repeated abuse causing him severe emotional injury and harm. *See generally Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 795 (¶19) (Miss. 2012). The supreme court adheres to a strictly limited standard of review where the circuit judge sits as the finder of fact. Damages are not merely advisory and "generally will not be 'set aside unless so unreasonable as to strike mankind at first blush

as being beyond all measure, unreasonable in amount and outrageous.'" *Doe ex rel Doe v. N. Panola Sch. Dist.*, 906 So. 2d 57, 61 (¶9) (Miss. Ct. App. 2004); *see also Maldonado v. Kelly*, 768 So. 2d 906, 908 (¶4) (Miss. 2000); *Duggins v. Guardianship of Washington ex rel. Huntley*, 632 So. 2d 420, 430 (Miss. 1993); *Indep. Life & Accident Ins. Co. v. Peavy*, 528 So. 2d 1112, 1120 (Miss. 1988); *see generally Robertson v. Chateau Legrand Prop. Owner's Ass'n, Inc*., 39 So. 3d 931, 937-38 (¶¶18-23) (Miss. Ct. App. 2009) (discussing overt acts giving rise to new cause of action). The supreme court addressed foreseeability in *Glover*, 968 So. 2d at 1276-77 (¶29), and acknowledged the interdependent and intertwined relationship of foreseeability and proximate cause. *Glover* provided, in part, as follows:

> No citation of authority is necessary for the proposition that, to recover for injuries in a negligence claim, a plaintiff must prove that the defendant was negligent, and that such negligence was the proximate cause, or a proximate contributory cause, of the injuries. The legal definition of negligence is fairly simple, universally applied, and likewise needs no citation of authority. Negligence is doing what a reasonable, prudent person would not do, or failing to do what a reasonable, prudent person would do, under substantially similar circumstances. The simplicity of this definition of negligence obscures the complexity of the concept of proximate cause.

Id. The supreme court in *Glover* also explained that "[t]he test is slightly different in cases where a plaintiff's injuries are brought about by the negligence of more than one tortfeasor." *Id.* at 1277 n.11. "In such cases, the test is whether the negligence of a particular tortfeasor was a substantial factor in bringing about the harm." *Id*. (citation omitted). As noted, DHS placed S.W. in CDU's custody prior to court-ordered custody and with no removal order. While there, S.W. continuously suffered from a lack of protection and adequate care, as required by DHS policies and regulations, and S.W. suffered and endured repeated sexual

abuse. The supreme court in *Pierc*e, 992 So. 2d at 619 (¶25), explained that wrongful conduct that is repeated, until desisted, gives rise to a new cause of action for each time the wrongful conduct occurs. In this case, the breach by DHS of its ministerial duty to S.W., where an affirmative duty existed to protect and care for its ward, caused S.W. to be subjected to repeated sexual assaults and harm after each dereliction of duty by DHS. In *Pierce*, the supreme court provided as follows regarding a new cause of action for continual wrongful acts:

> We previously have defined the continuing tort doctrine as follows:
>
> [W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or *the tortious acts have ceased*, the period of limitations will not be extended on the ground of a continuing wrong.
>
> > A "continuing tort" is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.*
>
> *Stevens v. Lake*, 615 So. 2d 1177, 1183 (Miss. 1993) (emphasis in original) (quoting C.J.S. *Limitations of Actions* § 177 at 230-31 (1987)). A few years after *Stevens,* we again addressed the continuing tort doctrine in *Smith v. Franklin Custodian Funds, Inc.,* 726 So. 2d 144 (Miss. 1998). Addressing our decision in *Stevens,* we stated:
>
> > Indeed, we opined that continuing or repeated injuries can give rise to liability even if they persist outside the time period for the initial injury, but we noted that the defendant must commit repeated acts of wrongful conduct. *Stevens,* 615 So. 2d at 1183 (citing *Hendrix v. City of Yazoo City,* 911 F.2d 1102 (5th Cir. 1990)). We have held that we will not apply the continuing tort doctrine when harm reverberates from one

wrongful act or omission. *Id.*

Smith, 726 So. 2d at 148-49[.]

Id. (emphasis added).

¶34. In this case, the record supports the circuit court's award of damages for each separate breach of ministerial duties by DHS as a separate occurrence which caused S.W. to suffer repeated tortious damage and harm.[21] As previously noted, the record clearly shows that S.W. endured repeated sexual abuse as a result of the lack of supervision, protection, and appropriate care by DHS. This case does not involve a situation where harm reverberates from a single act or omission. *See id.* at 619-20 (¶¶25-26).[22] The circuit judge, as the factfinder, specified the separate breaches of ministerial duties, the occurrences here causing S.W. to suffer repeated damage due to the negligent conduct of DHS. The record reflects substantial support for the circuit court's findings and award of damages: the testimony of S.W.; the testimony of DHS witnesses, including the DHS Rule 30(b)(6) witness; statutes; DHS policy and regulations; and treatment of three mental-health providers showing manifestations of emotional damages. Since the record supports the findings and award of

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[21] *See Montgomery*, 80 So. 3d at 800 (¶41) (reversing and remanding denial of summary judgment because the trial court did not determine whether the Transportation Commission's failure to warn of the pothole on the highway was a discretionary function); *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1240-41 (¶29) (Miss. 1999) (finding the school district possessed statutory duty to control and discipline students and such duty was ministerial, not discretionary, in suit against school district for negligently failing to properly supervise students and maintain a safe environment).

[22] *See also Smith v. Franklin Custodian Funds, Inc.,* 726 So. 2d 144, 148-49 (¶¶17-18) (Miss. 1998); *Smith v. Sneed,* 638 So. 2d 1252, 1255-56 (Miss. 1994).

damages by the circuit judge, we must affirm the circuit court's decision. *Grossnickle*, 716 So. 2d at 1017 (¶86); *Woods v. Burns*, 797 So. 2d 331 (Miss. Ct. App. 2001). It is within the province of the factfinder to determine the amount of damages to be awarded. *Lewis v. Hiat*, 683 So. 2d 937, 941 (Miss. 1996). The award in this case by the circuit court is neither unreasonable nor outrageous and falls within the statutory caps[23] as explained in the findings of the circuit court. *See id.*

¶35. **THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING, P.J., AND RUSSELL, J., CONCUR. FAIR, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BARNES, ISHEE, ROBERTS AND MAXWELL, JJ.

GRIFFIS, P.J., DISSENTING:

¶36. The circumstances of this case are tragic. This is our second time to consider this case. Because I am of the opinion that the circuit court failed to follow our instructions in *Mississippi Department of Human Services v. S.W.*, 974 So. 2d 253, 260 (¶22) (Miss. Ct. App. 2007), I would reverse and remand this case for further proceedings. The circuit court has the responsibility to decide each element of S.W.'s claim and to issue findings of fact and conclusions of law. In our earlier decision, we instructed the circuit court to explain his

[23] *See* Miss. Code Ann. § 11-46-15.

factual findings as to the required elements of proximate cause and damages.[24] He did not follow our instruction. Therefore, I respectfully dissent.

I. The required elements of S.W.'s claim under the MTCA.

¶37. DHS's liability to S.W. is limited according to the provisions of the Mississippi Tort Claims Act (MTCA). Miss. Code Ann. § 11-46-1 et seq. DHS's liability concerns only whether DHS's acts or omissions were discretionary, which would result in immunity, or ministerial, which would not result in immunity. Section 11-46-9(d) provides that DHS, as a governmental agency, is immune from liability for any act "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused[.]"

¶38. This case concerns a number of functions by DHS, some of which were discretionary and some of which were ministerial. Our earlier opinion determined that there were three

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[24] The plurality seems to now say that the circuit court was not required to provide this Court with detailed findings of fact and conclusions of law. The plurality cites *Jordan v. McAdams*, 2010-CA-01333-COA, 2012 WL 1174468 (¶23) (Miss. Ct. App. Apr. 10, 2012), for the proposition that there can be "no deficiency in the trial court's finding of fact for lack of more detail" because DHS did not file a Mississippi Rule of Civil Procedure 52 motion. If indeed that is the case, this Court could have reviewed the record, as the plurality does here, in 2007. Instead, this Court unanimously determined that, unlike *Jordan*, the circuit court was required to provide additional findings of fact to complete our appellate review of the damages awarded. *S.W.*, 974 So. 2d at 264 (¶¶35-36). No Rule 52 motion was necessary to require the circuit court to provide findings of fact; this Court's earlier opinion required the additional detailed findings of fact. *See also Tricon Metals & Servs., Inc. v. Topp*, 516 So. 2d 236, 239 (Miss.1987) (trial courts "generally should find the facts specially and state and state its conclusions of law thereon" in complex cases). Moreover, just as we decided in 2007, to perform our appellate function, we must know what the trial court did and why.

separate categories of DHS's functions that were ministerial, and the discretionary-function exemption did not bar S.W.'s claim.[25] *S.W.*, 974 So. 2d at 258-60 (¶¶13-21).

¶39. The plurality refers to the "special relationship" that existed between DHS and S.W. The plurality cites three supreme court decisions for this proposition. *See Fortenberry v. City of Jackson*, 71 So. 3d 1196, 1201 (¶13) (Miss. 2011); *In re E.K.*, 20 So. 3d 1216, 1227 n.2 (¶42) (Miss. 2009); *Tunica County v. Gray*, 13 So. 3d 826, 832 (¶30) (Miss. 2009). However, none of these cases refer to a "special relationship" or in any way change the analysis under the MTCA. The fact that there was a "special relationship" between DHS and

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[25] The plurality cites *Fortenberry v. City of Jackson*, 71 So. 3d 1196 (Miss. 2011), as authority. In *Fortenberry*, the supreme court incorrectly described our holding in *S.W.* The supreme court characterized our earlier opinion as follows:

> While the Fortenberrys and Wallaces further provide statements made by the City engineer and complaints made by themselves and/or their neighbors over the course of a three-year period, no authority supports their assertions that the statements and complaints can convert a statutorily designated discretionary function into a ministerial one. They cite . . . . *Miss[issippi Department] of Human [Services] v. S.W.*, 974 So. 2d 253, 256 (Miss. Ct. App. 2007). There, we [sic] found that the use of a manual, which outlined preventive procedures, *converted the discretionary functions of DHS into ministerial functions. Id.* at 260. This case is different from *S.W.*, because no authority or action converts the City's decision from discretionary to ministerial.

Fortenberry, 71 So. 3d at 1201 (¶13) (emphasis added). This Court's opinion did not hold that governmental action could be "converted" "from discretionary to ministerial." *Id.*; *see S.W.*, 974 So. 2d at 260. Indeed, I am aware of no such authority. In *S.W.*, this Court did not decide that certain governmental functions could be *converted* from discretionary functions into a ministerial functions. *Id.* With the utmost respect for the supreme court, I can find no authority or evidence in this case, or any other case, to support the legal principle that the MTCA allows a government function to be *converted* from a discretionary to ministerial function. The supreme court's discussion of *S.W.* appears to have a factual flaw.

S.W. has no bearing on this case. This language is not included in the circuit court's March 25, 2010, opinion and order or in this Court's decision in *S.W.*, 974 So. 2d at 260 (¶22). S.W.'s right to recover from DHS is based on the MTCA. Further S.W.'s right to recover from DHS is determined solely based on whether DHS's acts or omissions are determined to be discretionary (immune) function or ministerial (not immune) function. *See* Miss. Code Ann. §11-46-9.

¶40. In *S.W.*, this Court held: "To prevail on a claim of negligence, the plaintiff has the burden of proving (1) duty, (2) breach of duty, (3) causation, and (4) damages, by a preponderance of the evidence." *S.W.*, 974 So. 2d at 260 (¶22) (citations omitted). The Court affirmed the circuit court's decision that DHS was liable to S.W. We found a duty and a breach of that duty, and we concluded that the three categories of duties were ministerial functions. Thus, we reversed and remanded for a new trial on the remaining elements, i.e., damages and causation. *Id.* at 264 (¶¶35-36).

¶41. Our decision was based on the premise that the circuit court had provided "an insufficient basis for review of" damages. *Id.* at 264 (¶¶35-36). Further, the Court held that "[t]he trial judge *failed to disclose how he arrived at* the $750,000 damage award." *Id.* at (¶35) (emphasis added). This Court ruled:

> The record of the proceedings below provides an insufficient basis for review of the issues presented under this assignment of error. The trial judge failed to disclose how he arrived at the $750,000 damage award. As noted above, the trial judge found that DHS breached three separate duties; *however, there is no finding in the order as to what damage, if any, was attributed to each of the respective breaches. This information is crucial for this Court to fully address the issues raised in this assignment of error because the separate breaches*

> *identified by the trial judge occurred during two separate periods of time, each carrying a different statutory limitation of liability* under subsection (1)(a) and (b) - whether the award complies with the statutory caps of [s]ection 11-46-15(1). *In the absence of such findings, we are unable to determine which statutory cap is applicable to limit damages awarded for each respective breach.* Therefore, from the trial judge's order, we are unable to arrive at a maximum monetary figure which S.W. is entitled to recover under Section 11-46-15(1). However, we find that under any calculation, the award of $750,000 is above the statutory limitation of [s]ection 11-46-15(1). We, therefore, reverse and remand for a new trial on damages only.
>
> CONCLUSION
>
> However we reverse and remand the case for a new trial on damages and instruct the trial judge to include in his or her order findings of fact which clearly identify what damage, if any, is attributed to each of the three breaches respectively. We further instruct the trial judge to assess damages for each breach in accordance with the applicable statutory limitation pursuant to [s]ection 11-46-15(1) *and to specify in his or her findings of fact under which provision damages are awarded. In the event an appeal is taken from the new trial on damages only, this will ensure that the reviewing court therein will be able to sufficiently address any issues pertaining to the limitations of liability under the MTCA.*

Id. at 264 (¶¶35-36) (emphasis added).

¶42. The issue now before this Court is whether the circuit court, on remand, properly explained (i.e., through findings of fact and conclusions of law) the required elements of damages and causation.

¶43. The plurality does not refer to the circuit court's opinion and order to substantiate its decision. Instead, the plurality attempts to justify the award based on facts that it has found in the record. This Court is to review and analyze the findings of fact and conclusions of law of the circuit court. I will not substitute my findings of fact for that of the circuit court. Instead, I review the circuit court's findings to determine whether it is "supported by

'substantial, credible, and reasonable evidence.'" *City of Jackson v. Presley*, 40 So. 3d 520, 522 (¶9) (Miss. 2010). The circuit court's conclusions of law, including the proper application of the MTCA, are reviewed de novo. *Id.*

¶44. On remand, the circuit court entered his findings of fact and conclusions of law in an opinion and order dated March 25, 2010. The circuit court ruled:

> 1. This Court finds that the Defendant breached its duties to the plaintiffs in three respects: 1) failing to make required face-to-face contacts with the plaintiff; 2) failing to properly investigate allegations of abuse; and 3) failing to provide counseling. As a result of these breaches, the Court finds that the plaintiff has experienced a great deal of emotional distress, mental pain, suffering, and humiliation. Accordingly, the plaintiff is entitled to an award of damages to be assessed against the defendant.

This paragraph does not contain actual factual findings. The plurality's opinion seems to recognize, albeit implicitly, that the circuit judge failed to make the required factual findings.

¶45. The next four paragraphs of the circuit court's March 25 order simply find that there were ten "occurrences." Then, the circuit court assessed $50,000 in damages for each "occurrence" and entered a final judgment in the total amount of $500,000.

¶46. We need to clarify the term "occurrence." This Court used the term "occurrence" in our earlier opinion. *S.W.*, 974 So. 2d at 263 (¶33). The MTCA does not define or use the term "occurrence." Miss. Code. Ann. § 11-46-1. The MTCA does consider the "act or omission" by a governmental entity or its employee. In section 11-46-15, the MTCA refers to the governmental entity's "acts or omissions occurring on or after [certain dates]" to determine the limitation of liability. The term "occurrence" is used in this case to substitute for the duty or "act or omission," or negligence, of the governmental agency or employee.

Hence, the term "occurrence" only refers to the basis of DHS's liability (i.e., duty and breach of duty), which are the first two elements of the claim. We must still decide the remaining elements, i.e., causation and damages. The "occurrence" must proximately cause damages for S.W. to recover.

¶47. The circuit court must quantify the total amount of damages incurred by S.W. and specify through factual findings the amount of the damages that were *proximately caused* by or contributed to by DHS's negligent ministerial (non-immune) acts or omissions. The plurality's opinion spends a great deal of time and effort to support its findings to uphold the damages award to S.W. I agree that S.W. was damaged by the sexual abuse he endured while at the CDU or SNIPS.[26] However, the circuit court must quantify S.W.'s damages and then explain, through factual findings, how DHS's "occurrences" caused or contributed to such damages.

¶48. When the trial judge sits as the trier of fact without a jury, the court may be required to "find the facts specially and state separately its conclusions of law thereon." M.R.C.P.

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[26] In *Fortenberry*, the supreme court referred to our opinion and wrote, "[The appellants] cite *Mississippi Department of Human Services v. S.W.*, in which the Court of Appeals had the difficult task of determining whether DHS was liable to a juvenile who had been sexually abused by the Department's employees. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253, 256 (Miss. Ct. App. 2007)." *Fortenberry*, 71 So. 3d at 1201 (¶13). Again, with great respect to the supreme court, I can find no evidence in this case, or in *S.W.,* to support the factual finding that S.W. was sexually abused by "the Department's employees."

S.W.'s sexual encounter with Larenzo Williams began while Williams was an employee of the CDU, a Mississippi Department of Mental Health facility. Also, the record does not support a finding that SNIPS was a DHS facility or that Howard was a DHS employee.

52(a). Here, the circuit judge was required to specifically state his findings of fact and conclusions of law. The circuit judge's analysis of the amount of damages S.W. sustained as a result of DHS's numerous breaches of duty is not specifically stated in his order. The circuit judge should have arrived at an amount of S.W.'s total damages, explained how the damages were calculated, and identified each occurrence to which the damages were allocated.

¶49. Here, it appears that the circuit judge simply identified ten "occurrences," with the categories that we decided were ministerial (i.e., non- immune) duties. The March 25 order does not reflect how the circuit court arrived at $50,000 for each occurrence or how the occurrences proximately caused the damages.

¶50. Because this Court directed the circuit court to give us the benefit of an explanation, through factual findings and conclusions of law, "under which provision damages are awarded factual findings," I expected to receive and review the court's factual findings that would explain his decision to award damages. *S.W.*, 974 So. 2d at 264 (¶¶35-36). There was no such explanation. The plurality's factual findings are impressive and convincing. However, the plurality does not refer to or review the circuit court's finding.

¶51. I cannot sufficiently address whether the damages awarded were the proximate result of DHS's "occurrences." Further, I certainly cannot sufficiently address the issues pertaining to the limitations of liability under the MTCA. I would again reverse and remand this case to the circuit court to comply with this Court's prior decision and, again, instruct the circuit court:

> to specify in his or her findings of fact under which provision damages are awarded. In the event an appeal is taken from the new trial on damages only, this will ensure that the reviewing court therein will be able to sufficiently address any issues pertaining to the limitations of liability under the MTCA.

Id.

II. The circuit court's order fails to address proximate cause and explain the basis for the award of damages.

¶52. In *S.W.*, this Court found three types of ministerial acts or omissions (i.e., duties) that DHS breached: (1) regular contact with the foster child, (2) investigation of reported abuse, and (3) provision of medical care (i.e., counseling). We concluded that DHS was not immune for its acts or omissions under these categories. *S.W.*, 974 So. 2d at 258-60 (¶¶13-21).

¶53. The question before this Court is not whether S.W. was sexually abused while in the custody of DHS, whether DHS failed to protect S.W., whether DHS had a special relationship with S.W., or whether DHS was negligent in its supervision of S.W. Instead, the ultimate question is whether S.W. can establish, by a preponderance of the evidence, that he suffered or incurred damages that were proximately caused by DHS's ministerial (non-immune) negligent acts or omissions.

¶54. The circuit court's only reference to proximate cause, in the March 25th order, stated:

> 1. This Court finds that the Defendant breached its duties to the plaintiffs in three respects: 1) failing to make required face-to-face contacts with the plaintiff; 2) failing to properly investigate allegations of abuse; and 3) failing to provide counseling. *As a result of these breaches,* the Court finds that the plaintiff has experienced a great deal of emotional distress, mental pain, suffering, and humiliation. Accordingly, the plaintiff is entitled to an award of damages to be assessed against the defendant.

(Emphasis added).

¶55. The record supports a finding that S.W. was damaged by the sexual abuse he incurred at the hands of Williams and Howard while S.W. was at CDU and SNIPS. However, the fact that DHS placed S.W. at CDU and SNIPS is not a basis for liability here. Those decisions were clearly discretionary acts, and DHS was immune for such actions. Likewise, DHS is immune from its discretionary decisions made in the supervision of S.W. and for part of the investigation.

¶56. To recover damages from DHS, S.W. must first show that DHS's ministerial (non-immune) negligent acts (DHS's failure to make required face-to-face contacts, DHS's failure to properly investigate allegations of abuse, and DHS's failure to provide counseling) were the proximate cause of damages to S.W. *S.W.*, 974 So. 2d at 258-60 (¶¶13-21). S.W. must prove his damages and causation. The language quoted above, from paragraph 1 of the circuit court's March 25 order, is the only finding of fact and conclusion of law we have as to the circuit court's decision on proximate cause and damages.

1. Damages

¶57. "Injury or damage to the person complaining is an essential element of actionable negligence." *Brown Oil Tools, Inc. v. Schmidt*, 148 So. 3d 685, 687 (Miss. 1963) (citing *Philips v. Delta Motor Lines, Inc.*, 108 So. 2d 409, 419 (Miss. 1959). The record contains sufficient evidence to award S.W. damages against DHS for pain and suffering, emotional distress and humiliation that were caused by DHS's negligent conduct. The record contains *absolutely no evidence* to support an award of damages for past or future medical expenses,

disfigurement or mutilation of the body, permanent or temporary disability, or loss of wages or wage earning capacity.

¶58. S.W. testified that he was angry and humiliated. He also testified that the events that occurred to him make him feel like a "gay man." He gave no further explanation. At the time of his testimony, S.W. was 21 years old, and he testified that he continues to engage in sex with men in exchange for money. I agree that this evidence is sufficient to base an award of damages to S.W.

¶59. The question is how much and whether the damages S.W. sustained were proximately caused by DHS's breaches of non-immune ministerial duties (i.e., the "occurrences"), which are recoverable, or DHS's breaches of discretionary duties, which are NOT recoverable. This is why we need an explanation (i.e., findings of fact) from the circuit court.

¶60. In *S.W.*, this Court specifically instructed "the trial judge to include in his or her order findings of fact which clearly identify what damage, if any, is attributed to each of the three breaches respectively." As I discussed in the previous section, I cannot find where the circuit judge followed our instructions. Instead, the circuit judge ruled that "[a]s a result of these breaches, the Court finds that the plaintiff has experienced a great deal of emotional distress, mental pain, suffering, and humiliation."

¶61. At this point, I expected the circuit judge to state his factual findings as to how much damages S.W. incurred as a result of the emotional distress, mental pain, suffering and humiliation that he incurred. The circuit court simply ignored our earlier instruction, and we are in almost the exact same position in this appeal.

¶62. The circuit court awarded $50,000 for each neglected face-to-face contact; $50,000 for DHS's inadequate investigation of the allegations of inappropriate behavior; and $50,000 for DHS's failure to provide adequate counseling upon S.W.'s replacement in his own home. The circuit judge offered no explanation how each neglected face-to-face contact, the inadequate investigation, or the failure to provide counseling *caused what amount of damages* to S.W. This Court's earlier opinion made clear that the circuit judge could not enter a lump-sum damages award. Instead, the circuit court was *expressly* required to explain his decision to award damages. He did not. I have absolutely no idea as to the circuit court's intended factual findings supporting the award of damages to S.W. The plurality has now given us the benefit of its factual findings.

¶63. As concerned as I am about the lack of the circuit court's findings as to S.W.'s damages, I am even more troubled by the circuit court's omission of findings of fact, or any actual discussion, about the element of proximate cause.

2. Proximate cause

¶64. For a plaintiff to prevail in a negligence action, the plaintiff must prove not only that the defendant was negligent but also that the plaintiff's injury was proximately caused by the defendant's negligence. "In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage." *Glover v. Jackson State Univ.*, 968 So. 2d 1267, 1277 (¶31) (Miss. 2007). "A defendant's negligence is the cause in fact of a plaintiff's damage where the fact finder concludes that, but for the defendant's negligence, the injury would not have occurred." *Id.*

at (¶32). The defendant's negligence is the legal cause if the "damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act." *Id*. at (¶33).

¶65. Recently, the supreme court quoted the following language from *Glover* articulating the following test for "cause in fact":

> but for the defendant's negligence, the injury would not have occurred. Stated differently, the cause in fact of an injury is that cause which, in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred.

Martin v. St. Dominic-Jackson Mem'l Hosp., 2009-CT-01365-SCT, 2012 WL 1130086 (Miss. Apr. 5, 2012) (quoting *Glover*, 968 So. 2d at 1277 (¶32)).

¶66. The circuit court must find that but for DHS's ministerial (non-immune) negligent acts or omissions, S.W.'s injury would not have occurred. Said differently, DHS's ministerial (non-immune) negligent acts or omissions must have been a substantial factor in bringing about S.W.'s injury, and without these acts or omissions the harm would not have occurred.

¶67. I will explain why I believe it is crucial for this Court to have the benefit of the circuit court's findings of fact as to the elements of damages and proximate cause, and I will use the categories of damages awarded in this case.

3. Damages for Failure to Conduct Quarterly Face-to-face Visits from October 1996 through June 1997

¶68. First, I consider the damages awarded for the failure to conduct quarterly face-to-face visits from October 1996 through June 1997. This is the time period that S.W. was in the physical custody of DHS. In the March 25, 2010 opinion and order, the circuit judge

concluded:

> 2. From the period of October 1996 through June 1997, DHS was obligated to have quarterly face-to-face visits with the plaintiff. *During this period DHS made only one visit, instead of the three required visits*. For each visit DHS failed to initiate, the plaintiff is entitled to damages. The statutory cap for each occurrence during this period is $50,000. Miss. Code Ann. § 11-46-15(1)(a)[-](b). The Court finds that the plaintiff is entitled to $50,000.00 for each visit DHS failed to initiate during this period. Accordingly, for the period of October 1996 through June 1997, the plaintiff is entitled to $100,000.00.

(Emphasis added).

¶69. The circuit court finds that DHS made one of three required visits. In our earlier opinion, this Court ruled:

> S.W. was admitted to CDU on October 4, 1996, later transferred to SNIPS, and returned home on June 6, 1997. The record reflects that *DHS made only two face-to-face contacts with S.W. during the nine months he resided in these facilities*. *One occurred on April 25, 1996* – six months into S. W.'s placement. *The other occurred on June 6, 1997*, when S.W. was driven from SNIPS to his mother's home by DHS social worker, Beth Leggett. By making only two face-to-face contacts in nine months[,] DHS breached its duty to care. Accordingly, we find that the trial judge did not err in so holding.

S.W., 974 So. 2d at 261 (¶26) (emphasis added).

¶70. Clearly, there is a contradiction between the factual finding of the circuit court and this Court's earlier statement of fact. We found that the circuit court was not in error for holding that DHS missed one of three visits; now the plurality holds that the circuit court was not in error for holding that DHS missed two of three required visits. I cannot reconcile this contradiction.

¶71. Regardless, during this time period, S.W. was at CDU and SNIPS. The record supports a finding that S.W.'s incurred damages during this time period. Yet, the circuit

judge does not explain what damages that S.W. incurred prior to the end of June 1997. The circuit judge also considers that the failure to make two of the three visits constitute separate occurrences, but does not explain why he makes this finding.

¶72. The circuit judge must explain how much damages S.W. sustained by these occurrences. The circuit court must also explain its findings regarding how this breach of duty, i.e., the failure to conduct two visits, proximately caused S.W. damages. In the one visit, S.W. did not reveal that he was having any sexual abuse or encounters. He did not reveal any problems at CDU or SNIPS. Certainly S.W. had the opportunity to inform DHS that he was being sexually assaulted or abused by employees of CDU or SNIPS during this face-to-face visit but he did not. S.W.'s failure to inform DHS of the sexual abuse during the visit that was conducted must be included in the circuit court's factual findings and analysis of proximate cause.

¶73. I would remand for the circuit judge to give us the benefit of his findings of fact before I consider the sufficiency of the evidence.

4. Damages for Failure to Conduct Monthly Face-to-face Visits from July 1997 through December 1997.

¶74. Next, I consider the damages awarded for the failure to conduct monthly face-to-face visits in the period of July 1997 through December 1997. During this the time period, DHS had legal custody of S.W., but he was in the physical custody of his mother, T.W. In the March 25, 2010 opinion and order, the circuit judge concluded:

> 3. For the period of July 1997 through December 1997, DHS was required to make monthly face-to-face visits. The record reflects DHS failed to make the

> monthly visits. For each visit DHS failed to initiate during this time period, the plaintiff is entitled to damages. The Court finds that DHS missed six monthly visits which is tantamount to six separate occurrences. Therefore, the statutory cap for each occurrence during this time period is $250,000.00. Miss. Code Ann. § 11-46-15(1)(a)(b). The Court finds that plaintiff is entitled to $50,000.00 for each visit DHS failed to initiate during this period. Therefore, since DHS missed six monthly visits, the plaintiff is entitled to a sum of $300,000.00 for the missed visits during this time period.

¶75. The circuit court awarded S.W. $300,000 for damages based on "occurrences" that happened while S.W. was in his mother's custody in June of 1997.[27] During this period, there were no further sexual encounters between S.W. and either Williams or Howard. In fact, T.W. revealed the possibility of sexual abuse, and there was a meeting with DHS officials. S.W. was asked if he had suffered any abuse. He said he had not.

¶76. The circuit court must provide us with factual findings that support the conclusion that S.W. has established causation and damages due to DHS's failure to conduct monthly face-to-face visits from July 1997 through December 1997. While I cannot find the evidence to support an award of damages for the failure to conduct monthly face-to-face visits from July 1997 through December 1997, I would remand for the circuit judge to give us the benefit of his findings of fact before I consider the sufficiency of the evidence.

¶77. However, since the plurality seeks to affirm this award, I will address further facts that were established in the record. The circuit court found that DHS made no visits during this

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[27] Actually, the damages for the failure to provide counseling and conduct an adequate investigation had to have occurred after S.W. had returned to the physical custody of his mother. Thus, $400,000 was awarded for the time period after he returned home and there were no further sexual encounters.

time and was required to make five. The record indicates that DHS did make at least five face-to-face contacts with S.W. According to the record, DHS's face-to-face visits during this time period actually occurred with S.W. on July 7, 1997; August 20, 1997; September 4, 1997; September 7,1997; and November 6,1997. Further, DHS made at least six attempts to have face-to-face contact with S.W. during this same time period, but these visits did not occur because S.W. was absent at the time of the scheduled in-home meetings, despite being advised of the appointments. Since DHS actually visited with S.W. on at least five occasions and attempted at least six more visits, the circuit court's finding that zero visits occurred during this time period was clearly unsupported by the evidence presented.

5. Damages for Failure to Conduct an Adequate Investigation of Abuse

¶78. Next, I consider the damages awarded for the failure to conduct an adequate investigation. In the March 25, 2010 opinion and order, the circuit judge concluded:

> 4. The Court will now address DHS's failure to conduct an adequate investigation of abuse. The Court finds the failure to investigate to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the Court awards $50,000.00 for breach of the duty to investigate abuse.

In *S.W.* this Court held:

> The manual sets forth the procedure by which investigations of reported abuse are to take place. Generally, the social worker is required first to investigate the report and subsequently to decide whether the report is substantiated based on the results of the investigation. As to the investigation, the manual requires, among other things, that (1) "children should be interviewed privately, separately, and in a non-threatening place[";] (2) "an unannounced visit is required" to the residential facility for interview with the administrator; (3) DHS review the facility's policy and procedures; and (4) the alleged perpetrator be interviewed. Administrative Manual Vol. IV, Section B, pages

2041-42.

> DHS's duty to investigate involves both ministerial and discretionary functions. DHS workers are certainly called upon to exercise their own policy-based judgment in deciding whether a report of abuse is substantiated. However, the decision whether to substantiate the report requires, as a precondition, that DHS conduct an investigation of the alleged abuse. *See T.M. v. Noblitt*, 650 So. 2d 1340, 1345 (Miss. 1995) ("While the duty to investigate was of a ministerial nature, the next step of deciding whether reasonable cause actually existed to report the incident was inarguably one which required personal discretion.").
>
> We find that DHS has no discretion to prematurely terminate an investigation without fully performing the outlined duties; to do so violates specific mandatory directives. To this extent, the discretionary function exemption does not bar a claim against DHS for S.W.'s claim of insufficient investigation.

S.W., 974 So. 2d at 259-60 (¶¶16-18).

¶79. Our earlier opinion recognized that the duty to investigate included both ministerial and discretionary functions. DHS lost immunity because "DHS has no discretion to prematurely terminate an investigation without fully performing the outlined duties." *Id.* at 260 (¶18). We recognized that certain parts of the investigation were discretionary and therefore immune. Thus, S.W. can recover from DHS, as to this non-immune ministerial negligent act, only if he can show that he was damaged as a proximate result of DHS's decision "to prematurely terminate an investigation without fully performing the outlined duties." *Id.* To award damages based on this finding, the circuit court must provide us with an explanation of the decision. The question is how S.W. was damaged because of DHS's "insufficient investigation." *Id.*

¶80. Instead, the circuit court provided no explanation as to the amount damages S.W.

incurred as a direct or contributing result of DHS's failure to conduct an adequate investigation. The circuit court only provides an amount, $50,000; but, the court does not explain how the $50,000 compensates S.W. for damages he incurred. The circuit judge ***must*** quantify the damages S.W. is entitled to recover because of DHS's decision "to prematurely terminate an investigation without fully performing the outlined duties" or because of the "insufficient investigation."

¶81. The circuit court also does not explain how DHS failed to conduct an adequate investigation. During the time the sexual encounters were happening, DHS did meet with S.W., and he did not reveal the fact that he was being sexually assaulted or abused. Even after he returned to his mother's custody, S.W. was asked if he had been sexually abused, and he said no. Either the circuit court or the plurality should be able to explain how these meetings were not an adequate investigation. More importantly, either the circuit court or the plurality should be able to quantify the damages S.W. sustained as a proximate result of the "insufficient investigation."

¶82. While I cannot find the evidence to support an award of damages for the failure to conduct an adequate investigation, I would remand for the circuit judge to give us the benefit of his findings of fact before I consider the sufficiency of the evidence.

6. Damages for Failure to Provide Counseling

¶83. In my opinion, this is the most difficult portion of the damages award to analyze. The circuit court awarded S.W. $50,000 for DHS's failure to provide S.W. counseling. In the March 25, 2010 Opinion and Order, the circuit judge concluded:

> 5. Finally, this Court found that DHS breached it[s] duty to provide much needed counseling upon plaintiff's return home. The Court finds the failure to provide counseling to be another breach of duty and therefore constitutes a separate occurrence. Therefore, the Court awards $50,000.00 [for the] failure to provide counseling.

There is no explanation as to the amount damages S.W. incurred as a direct or contributing result of S.W.'s lack of counseling.

In *S.W.*, this Court held:

> Again, we find that DHS's actions in performing its duty involve both ministerial and discretionary functions. DHS employees are required to call upon their own policy-based judgment to determine whether the child needs a particular service – in the instant case, mental health treatment. However, once the determination is made, DHS is ultimately required to ensure that the child receives the service. The duty to ensure that the child receives the needed service involves no policy-based judgment or discretion. . . . *DHS determined that S.W. needed counseling and made an appointment with Clayton Hodge but failed to ensure that he actually received the counseling for quite some time. We find that the discretionary function exemption does not bar S. W.'s claim for DHS's failure to ensure that his medical needs were being met.*

S.W., 974 So. 2d at 260 (¶20).

¶84. S.W. was required to show that the non-immune ministerial negligent act (i.e., DHS's failure to ensure S.W.'s medical needs were being met through needed counseling) proximately caused S.W. damages. The circuit court did not explain how he arrived at the amount of $50,000 to compensates S.W. for DHS's failure to provide "much needed counseling upon plaintiff's return home" or how the "failure to provide" such counseling proximately caused any damages to S.W.

¶85. In this Court's earlier opinion, we concluded that "DHS determined that S.W. needed counseling and made an appointment with Clayton Hodge but failed to ensure that he

actually received the counseling for quite some time." *Id.* The record reveals that twice a DHS employee provided T.W. with the name and telephone number of a psychologist who was ready, willing and able to meet with S.W. and offer his services to help S.W. After the name and number was first provided to T.W., a DHS employee inquired of T.W. whether S.W. had been to see the psychologist. T.W. stated that she had lost the information. The DHS employee then provided T.W. with the name and number again. Apparently, S.W. did not go see the psychologist because his mother, T.W., did not make the appointment.

¶86. If DHS provided S.W. with access to a mental-health professional, a psychologist, and T.W. simply did not contact the psychologist, it is difficult for me to understand how the court could find that S.W. proved that he was damaged by DHS's failure to provide counseling or, more importantly, how such could proximately cause any damages to S.W. Further, there is no evidence that S.W. suffered any damages because he did not see a psychologist.

¶87. Without the benefit of the circuit court's findings on this issue, I am of the opinion that this evidence would be sufficient to reverse and render any award of damages for the failure to provide medical care (i.e., counseling). Nevertheless, I would remand this issue to the circuit judge to give us the benefit of his findings of fact before I consider the sufficiency of the evidence.

III. The damages awarded were excessive.

¶88. As I have previously discussed, the circuit court's decision provides a minimal factual finding to support an award of damages.

¶89. The circuit court ordered DHS pay $500,000 in damages to S.W. I am not sure what damages S.W. incurred. I certainly do not know what damages the circuit court found S.W. had incurred. The plurality does provide its factual findings.

¶90. DHS argues that the award of $500,000 is flagrantly outrageous and extravagant in light of the evidence (or rather, the lack thereof) presented by S.W. at trial. Without an explanation as to the how the circuit court arrived at its award of $50,000 per breach, DHS also argues that the award is the result of guesswork, is grossly excessive, and cannot be sustained. *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 175-176 (¶46) (Miss. 2004) (citing *Frierson v. Delta Outdoor, Inc*., 794 So. 2d 220, 225 (¶14) (Miss. 2001)) (stating that the law limits speculation and conjecture and imposes duties of mitigation to the injured party and that damages may only be recovered when the evidence presented at trial removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty).

¶91. In Mississippi, where a damages award, such as this one, is "so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous" and is apparently, with all due respect, "actuated by passion, partiality, prejudice or corruption," a remittitur is proper. *Jackson Pub. Sch. Dist. v. Smith*, 875 So. 2d 1100, 1104 (¶19) (Miss. Ct. App. 2004). To determine whether an award is excessive, this Court should consider "[t]he amount of physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity and sex, age and health of the injured plaintiff." *Id.* Where evidence is absent or grossly inadequate,

the amount of the damages awarded should reflect the lack of evidence.

¶92. Again, in this case, the only evidence presented in support of an award for damages was S.W.'s vague testimony concerning his anger. There was no evidence presented to establish past or future medical expenses for treatment or therapy, physical manifestation of an emotional or mental injury, loss of wage earning capacity, disability, etc. I would like to be able to evaluate the award of damages. However, I do not have the necessary information before me.

¶93. The award of damages in this case will be difficult. S.W.'s damages may be incapable of exact measurement. Regardless, a plaintiff is still required to offer the best evidence available to him that may reduce those damages to an ascertainable figure. In *Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1050 (Miss. 1984), the supreme court held:

> [W]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances, all that can be required is that the evidence – with such certainty as the nature of the particular case may permit – lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.

As noted in *Cain*, a plaintiff under this rule cannot ignore information, methods and procedures available to him whereby he can accurately prove the amount of monetary damages and make a jury issue simply by testimony that he suffered some damage. *Id.*

¶94. Here, S.W. could have offered evidence of psychological treatment or therapy, a

medical opinion as to the effect of DHS's actions on his mental and emotional state, a decrease in his overall quality of life, disability, or the like. However, at trial, S.W. established nothing more than the fact that he was angry and humiliated. It seems to me that such testimony, alone, is insufficient to establish any award of damages, much less an award of $50,000 per breach of duty, for a total of $500,000.

¶95. Without an explanation in the form of findings of fact by the circuit court, I can only determine that the amount of the award was nothing more than a guess as to the amount of damages suffered by S.W. As such, I would not affirm the award of damages.

IV. The MTCA limits S.W.'s total award in this case to no more than $50,000.

¶96. The plurality finds that the award in this case falls within the statutory caps. I am of the opinion that the circuit court has not resolved this issue, and the failure to provide factual findings prevents this Court from a proper analysis of this issue.

¶97. DHS asks this Court to interpret the statutory limitation under the MTCA. DHS argues that the MTCA, specifically Mississippi Code Annotated section 11-46-15, limits the total award of damages to S.W. to $50,000 or, alternatively, $250,000. The consideration of this issue is complicated by the fact that DHS's tortious conduct occurred both before and after July 1, 1997.

¶98. The amount of damages that may be awarded in a claim subject to the MTCA is limited. Section 11-46-15 provides:

> (1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not

exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars ($50,000.00).

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

¶99. The circuit court awarded S.W. the total sum of $500,000. The circuit court awarded $50,000 for each of ten "occurrences," including each neglected face-to-face contact, DHS's inadequate investigation of the allegations of inappropriate behavior, and DHS's failure to provide adequate counseling upon S.W.'s replacement in his own home. The circuit court categorized the ten separate occurrences as follows:

a. Two (2) neglected face-to-face contacts occurred before July 1, 1997. Each occurrence was subject to [the] $50,000 limit.

b. Six (6) neglected face-to-face contacts, the inadequate investigation and the failure to provide counseling occurred after July 1, 1997. Each occurrence was subject to the $250,000 limit.

¶100. DHS contends that all of S.W.'s claims against DHS constitute one single occurrence under the MTCA and are subject to one limit on damages. *See* Miss. Code Ann. § 11-46-15. DHS argues that the language of section 11-46-15 is unambiguous and should be construed as written. The statute states unequivocally that "[i]n any . . . suit . . . liability shall not exceed the following for all claims" and sets forth the pertinent amount. Miss. Code Ann. § 11-46-15(1). Accordingly, DHS claims that it cannot be disputed that, as explicitly set forth in the statute, S.W.'s claims for damages, brought together in one suit and regardless of the number of theories of recovery, are subject to one damages limitation.

¶101. The question for this Court to decide is whether DHS's tortious conduct was one occurrence or ten separate occurrences.

¶102. In *Prentiss County Board of Education v. Beaumont*, 815 So. 2d 1135, 1137-38 (¶7) (Miss. 2002), the supreme court concluded that Mississippi is a "single occurrence" state, and liability per occurrence is limited to a statutory amount or the policy limits for any excess coverage purchased to cover such claims. In *Beaumont*, several individuals were injured in an accident with a school bus. *Id.* at 1135 (¶1). The school board had an automobile liability insurance policy with aggregate limits of $1,000,000 per occurrence. *Id.* at (¶2). Several other injured individuals settled their claims for approximately $450,000. *Id.* at (¶2). Beaumont went to trial and won a verdict of $800,000. *Id.* The trial court did not reduce the judgment to the remainder of the insurance policy limits. *Id.* The supreme court reversed and determined that Beaumont's recovery was limited to the difference between the policy limits and the amount of the prior settlement. *Id.* at 1137-38 (¶7). Thus,

regardless of the number of claimants, an automobile accident that involves several injured parties, under the MTCA, is but one occurrence, and the governmental entity's total liability was limited.

¶103. In *Allred v. Yarborough*, 843 So. 2d 727, 727-28 (¶1) (Miss. 2003), the court considered an accident between an employee of a state entity and another vehicle with three occupants who were injured in the accident. One of the injured individuals filed a lawsuit against the state entity. *Id.* at (¶2). An interpleader and declaratory-judgment action was filed, and the sum of $50,000 was interpled. *Id.* The trial court determined that the injured individuals could only collect the statutory limit under the MTCA of $50,000 for one accident. *Id.* at (¶3). The supreme court held that the trial court was correct to limit liability. *Id.* at 730 (¶11).

¶104. In *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 705 (Miss. 2005), the court considered the appeal of a $1,000,000 verdict in an MTCA action where an elderly lady fell after exiting a City of Jackson van while entering a University of Mississippi Medical Center ("UMMC") daycare center. The injured person sued the City, the driver, and UMMC. *Id.* at 707 (¶14). Her lawsuit was based in tort and on breach of an implied contract, relating to the agreement between the City and UMMC. *Id.* at (¶17). The court considered the MTCA. The court determined that Mississippi Code Annotated section 11-46-3 (Rev. 1997) granted immunity to the City and UMMC for the "breach of [an] implied term or condition of any warranty or contract." *Id.* at 711 (¶38). Further, the court determined that section "11-46-15 shall set 'the extent of the maximum amount of liability.'

In this case, the maximum liability under § 11-46-15 at the time of the incident, was $250,000." *Id.* at (¶39). As a result, the court concluded that both the contract and tort claims arose "from the same set of operative facts, and they allege the same damage." *Id.* at (¶40). The court further stated that "this Court has never held that a plaintiff may pursue two causes of action or theories and, having established liability under both, collect the same damages under both." *Id.* The court concluded:

> This Court recently held "that '[t]here can be but one satisfaction of the amount due the plaintiff for his damages' . . . . Thus, double recovery for the same harm is not permissible." *Medlin v. Hazlehurst Emergency Physicians*, 889 So. 2d 496, 500-01 (Miss. 2004).
>
> The trial court correctly held that the maximum recovery against the City for Mrs. Stewart's tort claim was $250,000. Her maximum recovery under her claim for breach of implied contract is also the same $250,000. However, these are the same damages awarded under two separate theories of recovery. As such, Mrs. Stewart's estate is entitled to only one recovery. Thus, she may recover no more than $250,000, whether for negligence, breach of contract, or both.

Estate of Stewart, 908 So. 2d at 711-12 (¶¶41-42).

¶105. Here, we have neither one automobile accident nor one slip-and-fall event. Indeed, I have found no Mississippi authority directly on point. This is the exact reason that it is so important for the circuit judge to explain his findings of fact and conclusion of law in detail.

¶106. S.W. commenced this litigation to recover damages due to the negligence of DHS. S.W. claims that DHS's negligence occurred over a fourteen-month period, beginning in October of 1996 and ending in December of 1997. S.W.'s claim of negligence does not point to one event but a series of events that occurred during this period. In fact, S.W. claims that

his damages were the result of the cumulative actions of DHS over that entire time period.

¶107. The plurality cites the continuing-tort doctrine in *Pierce v. Cook*, 992 So. 2d 612, 619 (¶25) (Miss. 2008). The plurality finds that continuing tort doctrine applies. I am not sure it does. After June of 1997, there was no "continuing or repeated injury" to S.W. through any further sexual abuse. *Id.* The underlying tortious acts had been completed. S.W.'s only remaining issues after June of 1997 were for "continual ill effects from [the] original violation." *Id.* The doctrine may apply if there were "continuing or repeated injuries," but "the defendant must commit repeated acts of wrongful conduct." *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144, 148-49 (Miss. 1998). The continuing-tort doctrine does not apply "when harm reverberates from one wrongful act or omission." *Id.* at 149.

¶108. At trial, S.W. did not establish, and the circuit judge did not find, a specific or separate injury that resulted from each of DHS's separate "occurrences." In fact, based on the plurality's analysis and factual findings, the evidence appears to only support a conclusion that S.W.'s damages were the result of the cumulative effect of DHS's acts, actually DHS's omissions, that occurred during the fourteen-month period. Thus, without the circuit court's detailed findings of fact and conclusions of law, this Court is not able to determine if each breach was a separate occurrence or whether the harm to S.W. simply "reverberates from one wrongful act or omission." *Pierce*, 992 So. 2d at 619 (¶25).

¶109. The circuit judge's order reveals that the judge improperly considered the statutory cap before he made a finding of damages for each occurrence. The MTCA does not set the

amount of damages to be awarded for each occurrence in this case. Section 11-46-15(1) states that the "*liability* shall not exceed" the applicable cap, not the total amount of damages. (Emphasis added). The MTCA merely provides a cap with which to reduce the award of damages, which must be based on the proof presented by S.W.

¶110. Without further explanation, the circuit judge awarded S.W. the amount of damages ($50,000) for each occurrence. With the record before us, I am at a loss to understand why a missed quarterly visit spanning a three-month period in which S.W. was being sexually abused multiple times per week results in the same amount of damages as a missed monthly visit in which S.W. resided with his mother. Without more, I simply cannot find substantial evidence to support such a finding or assess whether this was a single occurrence or multiple separate occurrences.

¶111. Because I do not find substantial evidence to support the circuit court's award of damages on remand, I would again remand this case for further proceedings on damages.

BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., JOIN THIS OPINION.