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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate (Court of Appeals) Case No. 2019-000951

K.S., a minor, by and through his Guardian ad Litem, James Seeger .....Petitioner,

v.

Richland School District Two.....Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPELAS

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INTRODUCTION

This petition asks this Court to issue a writ of certiorari to review the Court of Appeals' unpublished opinion in Guardian ad Litem, James Seeger v. Richland School District Two, Op. No. 2022-UP-312 (S.C. Ct. App. filed July 27, 2022). The Court of Appeals' opinion contravenes this Court's longstanding precedent concerning the directed verdict standard, complicates and confuses case law concerning recovery for mental injuries, leaves open the question of whether the Safe School Climate Act waives the South Carolina Tort Claims Act, and mistakes the role that Petitioner's expert testimony should have played in determining the appropriateness of the directed verdict motion.

The implications of allowing the Court of Appeals' opinion to stand are disturbing for the directed verdict and emotional distress standards, particularly. The Court of Appeals is wrong in deciding that a directed verdict was proper in this case. Firstly, the question of whether Respondent injured Petitioner was and is a fact question that should have been for the jury to determine. Petitioner presented extensive evidence of his injuries, including his expert's testimony; however, the lower court and Court of Appeals did not view that evidence in a light most favorably to Petitioner, as required by law. Secondly, the Court of Appeals relied on a new standard for recovery for mental injuries, leaving the area of law quite unsettled. Even if this Court finds this new standard proper, the facts of Petitioner's case would undoubtedly prevail under it. Thirdly, the Safe School Climate Act cannot exist in conjunction with the full effect of the South Carolina Tort Claims Act, because many of its provisions would be rendered meaningless. This decision would run in direct contradiction to longstanding standards

of statutory interpretation. Lastly, the issue of Petitioner's damages was not dispositive of the issue of the lower court's exclusion of Petitioner expert witness testimony; that expert testimony was not merely cumulative, but rather spoke directly to Petitioner's damages as well as other essential elements, and should have been considered by the lower court in its decision making.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on July 27, 2022. The Court of Appeals granted a consent motion to extend the deadline for Seeger to serve and file a petition for rehearing, which extended that deadline to August 26, 2022. Counsel for the Petitioner certifies that the petition for rehearing was served and filed on August 26, 2022. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on September 7, 2022. This petition for a writ of certiorari is timely served and filed.

QUESTIONS PRESENTED

1) Did the Court of Appeals err in failing to reverse the granting of Richland School District 2's motion for directed verdict?
2) Did the Court of Appeals err in instituting a new, baseless standard for mental injury?
3) Does Safe School Climate Act supersede the South Carolina Tort Claims Act?
4) Was the lower court's exclusion of Appellant's expert testimony improper?

STATEMENT OF THE CASE

Petitioner filed the initial complaint on January 18, 2017, against Richland School District 2, Jan A. Moody, Denise Barth, and David Holzendorf. Respondent,

Defendant Barth, and Defendant Holzendorf filed their answer on February 21, 2017. (R. pp. 18-39.) Petitioner filed an amended complaint on March 16, 2017, against Richland School District 2 for gross negligence and under the respondeat superior doctrine. (R. pp. 40-51.) Respondent filed its answer to the amended complaint on April 3, 2017. (R. pp. 52-59.) Respondent filed a motion in limine to exclude Petitioner's expert from testifying on February 7, 2019, and a motion for summary judgment on February 28, 2019; the lower court heard and denied both motions at the beginning of trial on May 28, 2019. (R. pp. 71-132.) The lower court also heard and rejected arguments raised in Petitioner's pre-trial brief that the legislature repealed the South Carolina Tort Claims Act by its later adoption of the Safe Schools Climate Act.

After three days of trial on May 30, 2019, the lower court granted Respondent's motion for directed verdict, stating:

> THE COURT: Moreover, I don't even know that the touching on October 20th satisfies physical injury. Black's Law Dictionary defines physical injury as physical damage to a person's body. There has been no testimony of any damage to [K.S.'s] person. In fact, I believe there was testimony that – that there were no physical scars, or no one saw anything, or at least there's no affirmative testimony that there was any damage to his body. . . . And when we talk about damages in – in these kinds of cases – let's see. Ralph Kind Anderson's charge – and he cites some cases. But (as read): "An injured party may recover for mental anguish brought about by bodily injury and suffering."

(R. pp. 453-54.) The lower court issued a Form 4 on June 7, 2019. (R. pp. 1-3.) Petitioner filed his appeal to the Court of Appeals on June 11, 2019. (R. pp. 132-33.)

The Court of Appeals affirmed the lower court's decision, holding that the conduct of the teacher employed by Respondent was not extreme or outrageous enough to cause a negligent infliction of emotional distress. Because, according to the Court of

Appeals, the issue of negligent infliction of emotional distress was dispositive, the Court did not address Petitioner's argument that the Safe School Climate Act waives Respondent's sovereign immunity under the Tort Claims Act, nor did it address the exclusion of Petitioner's expert witness testimony. Petitioner petitioned for rehearing, and that petition was denied.

This petition for certiorari followed.

ARGUMENT

I. The Court of Appeals erred in affirming the lower court's decision to grant the directed verdict motion.

Rule 50(a), SCRCP, sets forth that "[w]hen upon a trial the case presents only questions of law the judge may direct a verdict." As this Court is aware, in ruling on a directed verdict motion (and in review of a ruling on a directed verdict motion), lower and appellate courts alike must view "the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-23, 602 S.E.2d 772, 782 (2004). These rulings concern the existence or nonexistence of evidence, *not its weight*. *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479-80, 646 S.E.2d 162, 165 (Ct. App. 2007). Of course, statutory interpretation is a question of law, but when there is conflicting evidence about *whether* a statute applies, that is a question of fact to be left to the finder of fact (in this case, the jury). *Bursey v. S.C. Dep't of Health and Envtl. Control*, 369 S.C. 176, 185, 631 S.E.2d 899, 904 (2006).

To this point, in a recent case, the Court of Appeals addressed the issue of whether the trial court erred in refusing to grant a criminal defendant's motion for a directed verdict because the State failed to produce any evidence that the defendant

physically injured a minor. *State v. Robinson*, Op. No. 5930 (S.C. Ct. App. filed Aug. 3, 2022) (Davis Adv. Sh. No. 27 at 81). While the Petitioner in this case acknowledges the Court of Appeals' clarification that it "define[d] and g[a]ve effect to the term injuries for purposes of first-degree assault and battery," *Robinson* remains telling; "physical injury" is a broad term and should not be construed narrowly, particularly at the point of a directed verdict motion. *Id.* at 4. *Robinson* involved a victim that testified that the defendant's hand around her neck did not hurt but was merely "uncomfortable." *Id.* at 88. The Court of Appeals found this sufficient to defeat the defendant's motion for directed verdict. *Id.*

In both the *Robinson* opinion and in this opinion, the Court of Appeals cites multiple cases which did not contain evidence that a party's person was physically harmed or violently injured, but nonetheless in which there was evidence of injury within the meaning of assault and battery or negligent infliction of emotional distress, respectively. The difference is that in *Robinson*, the court continued that, line of logic and determined that a motion for directed verdict on the issue of injury would be improper. The Court of Appeals' opinion, confusingly, cites a slew of cases, many of which are also cited by Petitioner in his briefs, establishing that "suffering a nervous breakdown as a result of negligence would support a verdict, even if no other injury was sustained. However, the Court of Appeals goes onto decide that the first grader's injuries were insufficient *as a matter of law* and relies on a concurrence and an out-of-state case to further require that the Respondent's behavior also be "extreme," which the Court of Appeals determines *as a matter of law* this conduct was not.

In this case, neither the lower court nor the Court of Appeals viewed the evidence and all reasonable inferences in the light most favorable to the Petitioner. This was improper. There is not a complete lack of any physical injury, nor is there a complete lack of physical manifestation of an emotional injury. Sufficient evidence existed as to this issue to surpass Respondent's motion for summary judgment on this issue—the standards for summary judgment and directed verdicts are almost identical. The evidence presented by the child did not yield only one inference, and neither the lower court nor the Court of Appeals had the authority to decide the credibility or the weight of that evidence. That should have been left to the jury. A jury could have, and should have, determined whether the evidence presented by the child constituted physical injury or physical manifestation of an emotional injury. To decide otherwise would undermine precedent and vest too much authority in the courts to make decisions that it should not make.

II. The Court of Appeals' decision to require "extreme and outrageous conduct" is unprecedented not based on binding authority and runs contrary to case law.

The Court of Appeals relies on a concurrence to a South Carolina opinion and a Tennessee case to justify its new, unprecedented formulation of a rule regarding emotional injury. South Carolina has no primary authority suggesting that an emotional injury must have been caused by "extreme and outrageous conduct." *Turner v. A B C Jalousie Co. of N.C.*, 251 S.C. 92, 97-98, 160 S.E.2d 528, 530 (1968) (Lewis, J. concurring). Moreover, there is no case in South Carolina abandoning the physical manifestation rule or suggesting that emotional injuries must be "so serious or severe [that] a reasonable person would not be able to cope with the stress the circumstances

caused." *Camper v. Minow*, 915 S.E.2d 437, 446 (Tenn. 1996). Respectfully, the Court of Appeals' reliance on these secondary authorities is perplexing given the wealth of primary authority precedent in this jurisdiction to the contrary.

However, even if the Court of Appeals' institution of this new rule was proper, a jury could almost certainly determine that this teacher's meanspirited and cruel actions towards the first grader were extreme and outrageous, and that a reasonable person would not be able to cope with the stress of the circumstances. Those circumstances include that a child was *a child*. The Court of Appeals merely describes the conduct as "inappropriate and improper," but Petitioner would respectfully, but vehemently, disagree with that characterization.

If the conduct exhibited by the teacher at issue in this case was *not* extreme and outrageous, Petitioner is at a loss as to what conduct would meet that burden. Oddly enough, the facts of this case are not far off from the facts in *Turner*, which involved emotional injury as a result of "vile, profane, and abusive language." *Turner v. A B C Jalousie Co. of N.C.*, 251 S.C. at 95, 160 S.E.2d at 530. While, as far as the record shows, the teacher did not use profanity towards the child, she certainly used vile and abusive language. She told a child that she would "give [him] something to cry for," loudly proclaimed that the child "cried all day," yelled in the child's face to "[s]top being such a crybaby," and allowed other students to form a "No Crying Club" designed to exclude the child. (R. p. 587-588, 583-584, 153, line 18-p. 154, line 12.) Again, if this is not vile or abusive in this Court's view, particularly given that this conduct was coming from a person who should have been a trusted adult and was aimed at a child in her care, Petitioner is unsure what is. It is perplexing at best that the Court

of Appeals relied on the concurrence of a case that actually *supports* the Petitioner's position, only to affirm the lower court's decision.

Moreover, any reasonable person of *any* age, but particularly a reasonable *child*, would not be able to cope with the physical and verbal abuse of this teacher. That the victim of this conduct was a child is part of the circumstances here. Tort law frequently treats children differently from adults; the standard of care owed by children is judged by "the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances," not by that of a reasonable adult person. *Standard v. Shine*, 278 S.C. 337, 339, 295 S.E.2d 786, 787 (1982). Similarly, the standard of care owed by a party shifts and heightens where children are involved; "[c]hildren, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly." *Franks v. Southern Cotton Oil Co.*, 78 S.C. 10, 18, 58 S.E. 960, 962 (1907); *see also Madison ex rel. Bryant v. Babcock Center*, 371 S.C. 123, 638 S.E.2d 650 (2006) (holding that a mentally handicapped appellant "should be treated as the equivalent of a willful, immature child who really has no idea of what is best for her in determining whether [respondent] breached the duty of care owed to her," and that "[t]he precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury on remand."). Again, considering Petitioner's age and Respondent's employee's the role of a teacher, the child's inability to cope with the teacher's conduct is perfectly reasonable—practically self-evident— in these circumstances.

This teacher emotionally damaged a child for, at the very least, the remainder of his childhood. This teacher grabbed a child, hurting his arm. (R. pp. 587-88.) She did this in front of other students and staff. *Id.* She constantly taunted a child for crying, again, in front of other students, and all but encouraged other students to engage in similar behavior. (R. pp. 585-86; pp. 583-84; p. 244, line 17 – p. 245, line 9; p. 153, line 18 – p. 154, line 12; p. 154, line 20 – p. 156, line 3.) She regularly grabbed a child to remove him from the classroom. (R. p. 154, lines 13-19; p. 155, lines 12-19.) Petitioner accordingly asks that this Court evaluate whether the Court of Appeals' implementation of this new rule is proper and, if the Court finds it as such, whether the facts of this case are indeed merely "inappropriate." Any parent would, undoubtedly, view it differently.

a. The lower court's narrow construction of physical injury runs contrary to case law.

Petitioner can rationalize, to some extent, the Court of Appeals' desire to incorporate a new, modern standard regarding emotional distress. Much of the South Carolina case law on the issues of emotional distress and physical manifestation of emotional injury relied on in this case date back to the 1980s and 1990s—research and the public's understanding of mental heath has naturally, and extensively, evolved since then. However, this jurisprudence maintains a surprisingly broad view of emotional injury—the lower court's views are far more restrictive despite a growing acceptance and knowledge of mental health issues, and the Court of Appeals' views are in desperate need of clarification, if not reversal.

The lower court contended that "there [was] no affirmative testimony that there was any damage to [Petitioner's] body," and relies on Black's Law Dictionary's

definition of physical injury as "physical damage to a person's body." (R. pp. 453-54.) The lower court goes onto make the determination, contrary to the evidence, that the first grader's person was not "damaged," comparing the teacher's grab to "touching" a car, not "damaging" it. *Id.* This is problematic for several reasons. Firstly, Petitioner *did* affirmatively testify that his arm hurt during and after the teacher's grab. (R. p. 158, line 13 – p. 159, line 17.) A jury could easily find that this satisfies the physical injury requirement. Secondly, the lower court's reliance on Black's Law Dictionary is shortsighted— "damage" is not defined as scarring or bruising, as the lower court construed it within the context of physical injury. Rather, "damage" is defined as "physical harm that is done to . . . part of someone's body . . . . By extension, *any bad effect on something*." *Damage*, Black's Law Dictionary (10th ed. 2013). It is simply reasonable and logical that a person can be physically harmed but not maintain visible bruising, scarring, or scratches, but the lower court nonetheless arbitrarily set that bar. The teacher's grab in this case, among other conduct, undoubtedly caused a bad effect on the child. There was, at the very least, a fact question about that.

Further, looking beyond secondary authority, this view of the lower court and the Court of Appeals ignores the fact that Petitioner also presented thorough evidence of physical manifestation as a consequence of an emotional injury. This child and his parents offered extensive testimony and evidence regarding, among other behaviors, his ongoing depression, inability to sleep, and anger management issues. (R. p. 192, line 2 – p. 193, line 16; p. 210, lines 5-15; p. 231, line 23 – p. 234, line 5.) The lower court's determination and the Court of Appeals' holding in this opinion are inconsistent with the Court's longstanding jurisprudence on emotional distress, and what injuries

satisfy the physical manifestation requirement. *Dooley v. Richland Mem'l Hosp*.,5 283 S.C. 372, 375, 322 S.E.2d 669, 671 (1984) ("physical manifestation" of emotional injuries means whether a plaintiff can show "medical treatment or other objective evidence of physical injury"); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 350, 368 S.E.2d 477, 478 (Ct.App. 1988) (holding that emotional trauma can be a bodily injury for the purposes of insurance); *Kinard v. Augusta Sash & Door Co*., 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985) (holding that a "physical manifestation" includes crying, weight loss, sleep disturbances, inability to do housework, difficulty in socializing, and the inability to tolerate stress); *Ford v. Hutson*, 276 S.C. 157, 165, 276 S.E.2d 776, 780 (1981) (physical manifestation of mental injury has also been held to include shaking, nausea, cramps, hysteria, depression, headaches, spastic colon, knotting of the intestinal tract, stiffness and numbness); *Doe by Doe v. Greenville Hosp. Sys*., 323 S.C. 33, 38–39, 448 S.E.2d 564, 567 (Ct. App. 1994) (holding that the fact that the victim of a sexual molestation suffered no physical wounds was "not determinative" as to whether the victim had suffered an injury, and that the victim nonetheless was entitled to recover damages for her severe mental injury).

Petitioner urges this Court to grant his petition, if not to reverse the Court of Appeals' decision (which it respectfully should), then to clarify this area of law that the Court of Appeals' decision has muddied. Either way, Petitioner vehemently maintains that, under whatever standard this Court adopts, he is at least entitled to a jury determination as to whether his injuries were to sufficient to warrant recovery from Respondent. It is reasonable and logical that physical harm can cause extreme emotional distress, regardless of the physical implications and particularly to a child.

Should the Court maintain the Court of Appeals' incorporation of the new standard posed by its opinion, the jury is responsible for determining whether the teacher's conduct was outrageous or extreme. There is an issue of material fact that requires reversal of directed verdict.

III. As a matter of statutory interpretation, the Safe School Climate Act supersedes the South Carolina Tort Claims Act.

The lower court explicitly expressed confusion on this issue during its hearing for summary judgment: "[F]rankly . . . there are no cases really that explain this. . . . Maybe the Supreme Court can hash out – I don't know – or the Court of Appeals." (R. p. 144, lines 13-25.) The Court of Appeals did not address this issue. However, in the event that this Court reverse the Court of Appeals' decision regarding the directed verdict motion and Appellant's damages, this Court *must* address this issue to determine which standard of care applies here, and to provide much-needed clarification to the lower courts.

A court must presume that the legislature did not intend a futile act, but rather intended its statutes to accomplish something. *Denene, Inc. v. City of Charleston,* 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). Statutes in apparent conflict should, if reasonable possible, be construed as to allow both to stand and give effect to each. *Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988). If two statutes are incapable of any reasonable reconcilement, the more recent statute passed will prevail and *impliedly* repeal the earlier statute to the extent of the inconsistency. *City of Newberry v. Public Serv. Comm'n*, 287 S.C. 404, 339 S.E.2d 124 (1986); *Ward v. Cobb*, 204 S.C. 275, 28 S.E.2d 850 (1944); *Pearson v. Mills Mfg. Co.*, 82 S.C. 506, 64 S.E. 407 (1909).

The Safe School Climate Act ("SSCA") sets forth and requires local school districts to adopt certain policies to prohibit, prevent, and remedy harassment and bullying, which it defines as a "gesture, an electronic communication, *verbal*, physical or sexual act" that "harm[s] a student physically or *emotionally*, or plac[es] a student in reasonable fear of personal harm." S.C. Code Ann. § 59-63-140 (emphasis added). The statute further explicitly sets forth that, while the SSCA does not create tort liability, it does not alter it, either—courts must not interpret the statute "to prevent a victim from seeking redress pursuant to another available civil or criminal law." S.C. Code Ann. § 59-63-150(A). "[R]edress pursuant to another available civil" law would certainly include recovery under any negligence theory, since the government is liable for torts like a private individual. *See* S.C. Code Ann. § 15-78-40. Moreover, the South Carolina Tort Claims Act ("SCTCA") is not a remedy—the SCTCA does not set forth or create a cause of action. Accordingly, the two statutes can be reasonably reconciled to this extent.

The Court could, as the Respondent argued, read the SSCA to not alter the SCTCA; that is, victims seeking redress would still have to work within the confines and restrictions of the SCTCA. However, that reading would render S.C. Code Ann. § 59-63-150(B) unnecessary and superfluous. § 59-63-150(B) states:

> A school employee or volunteer who promptly reports an incident of harassment, intimidation, or bullying to the appropriate school official designated by the local school district's policy, and who makes this report in compliance with the procedures in the district's policy, is *immune* from a cause of action for damages arising from failure to remedy the reported incident.

(Emphasis added.) If the General Assembly intended the SSCA to be read in conjunction and in full harmony with the SCTCA, *all* government employees would be immune so long as they have acted within the scope of their employment under S.C. Code Ann. § 15-78-70. S.C. Code Ann. § 59-63-150(B) would be futile. This was obviously not the General Assembly's intent. The General Assembly had to have intended to *remove* immunity from individuals and entities engaging in bullying or failing to remedy bullying after a report. To the extent that these two statutes are irreconcilable yet address the same issue of governmental immunity, the Court must read the SSCA to repeal the immunity typically granted under the SCTCA in negligence actions arising out of school bullying. *See Capco of Summerville, Inc. v. J.H. Gayle Construction Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (holding that a later specific statute will apply over an earlier, general one where the two statutes address an identical issue).

The two statutes are further inconsistent with regard to damages, but this inconsistency is easily reconcilable by the SSCA's implicit repeal of the SCTCA's restrictions of damages. The SCTCA sets a damage cap and eliminates punitive damages. *See* S.C. Code Ann. § 15-78-120. The SSCA asserts that is does not "create or alter tort *liability*," not damages. S.C. Code Ann. § 59-63-150(A). Accordingly, this provision of the SSCA could and should be read to alter and deem inapplicable statutory provisions relating to caps and punitive damages.

To interpret the SSCA as *not* a repeal to the SCTCA would render the SSCA ineffectual. School districts could refuse to adopt the policy; school districts could

refuse to enforce the policy; school districts could completely avoid liability in civil suits arising out of school bullying. Surely, the General Assembly did not intend that.

Accordingly, this Court should find that the gross negligence standard and damage restrictions do not apply to the instant case, and Appellant has sufficiently proved the existence of a question of fact.

IV. The lower court erred in excluding Petitioner's expert witness testimony.

The Court of Appeals also did not address this issue, asserting that the issue of damages was "dispositive". Neither the lower court, Respondent nor the Court of Appeals dispute that Dr. McEvoy was a qualified expert, so Petitioner does not address that argument here.[1] To the extent that the lower court found the testimony "cumulative," and the Court of Appeals found the testimony "would not have made a difference," they were wrong.

a. Dr. McEvoy's testimony was not cumulative.

The lower court excluded Dr. Alan McEvoy's testimony, ruling that it was "cumulative at best" and "beat the policy to death." (R. p. 432, line 18 – p. 433, line 20. "Cumulative" evidence has been defined as evidence which "adds very little to the probative force of other evidence in the case," such that " if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates." *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996). Evidence is not cumulative if it tends to

[1] To the extent that this Court disagree with Petitioner's assumption and find Dr. McEvoy's qualification an issue, Petitioner incorporates his Final Brief to the Court of Appeals by reference in an effort to keep this Petition succinct.

establish the same general result, but does so by proof of a new and distinct fact. *Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 198 S.E. 395, 398-99 (1938). Moreover, courts must resist the temptation to "second-guess a lawyer's strategy; the lawyer makes choices based on the law as it appears at the time, the facts disclosed . . . and his [or her] best judgment as tot the attitudes and sympathies of judge and jury." *Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987).

Whether Petitioner was a victim of bullying was a central issue at trial. Respondent consistently challenged whether the teacher's action damaged the child, and sought to minimize the nature and duration of the child's suffering. Dr. McEvoy sought to rebut this theory, and that rebuttal went far beyond "repeating the definition of bullying" and other policy issues—he testified that the teacher's conduct was quite bad, and went on far too long. (R. p. 500, line 19 – p. 502, line 22; p. 505, line 6 – p. 506, line 3.) Dr. McEvoy offered testimony and opinions on: the standard of care (R. p. 466, lines 20-25; p. 468, line 10 - p. 469, line 21); the impact of teacher on student bullying on student (R. p. 475, line 25 - p. 478, line 1; p. 478, line 15 - p. 479, line 19; p. 480, line 20 - p. 481, line 12); the impact of a teacher yelling at a child: (R. p. 480, line 13 - p. 482, line 7); Respondent's responsibility: (R. p. 482, line 18 - p. 483, line 18); why do principals make bad investigators (R. p. 483, line 19 - p. 485, line 6); what Respondent should have done (R. p. 487, line 3 - p. 488, line 13); the warning signs of bullying (R. p. 488, line 23 - p. 491, line 3; p. 518, line 7 - p. 520, line 25); why parents do know their child is being bullied (R. p. 488, lines 14-22; p. 491, lines 5 - 24; p. 520, line 2 - p. 521, line 14); the lack of effective training (R. p. 496, line 15 - p. 498, line 18; p. 522, line 15 - p. 523, line 11); opinions regarding the effectiveness of

Respondent's policy (R. p. 498, line 13 - p. 499, line 10; p. 504, line 259 - p. 507, line 9); relationship between the failure to comply with policy and impact on K.S (R. p. 500, line 16 - p. 501, line 6; p. 502, lines 14-22; p. 515, line 19 - p. 516, line 23; p. 523, line 6 - p. 525, line 20); the effectiveness of Respondent's principal as an investigator (R. p. 510, line 2 - p. 511, line 12); the Respondent's ineffectiveness of training of students (R. p. 514, line 10 - p. 515, line 3); opinions as to the corruption of the role of the teacher (R. p. 532, line 15 - p. 533, line 12); and that bullying does not require a pattern (R. p. 535, line 23 - p. 537, line 3.)

Clearly, this testimony reaches far beyond reiterating policy. The testimony presents evidence of every essential element to Appellant's cause of action, including damages. Further, should this Court decide that the SCTCA applies in full force to the SSCA (which it should not), this testimony would speak extensively to Respondent's gross negligence. Particularly in light of the directed verdict and damages issues, the lower court should not have excluded Dr. McEvoy's testimony, and this Court should reverse that decision.

b. The expert testimony *did* speak to Petitioner's damages.

The Court of Appeals had it backwards: the expert's testimony *would* have made a difference to the issue of damages. As discussed above, Dr. McEvoy's testimony spoke extensively to Petitioner's damages; this testimony lies among the other wealth of evidence that at least presents a fact question as to the child's damages, and further shows causation. This Court cannot say for certainty that the lower court's exclusion of the testimony and the Court of Appeals' failure to consider the substance of the testimony and its relation to the directed verdict motion were harmless—the

testimony could have reasonably affected the result of the trial. *See Briggs v. Richardson*, 288 S.C. 537, 539-40, 343 S.E.2d 653, 655 (Ct. App. 1986). Again, Petitioner asks that this Court reverse the decision to exclude this testimony.

CONCLUSION

The amount of damages suffered by the child is a question for the jury. Whether the teacher's conduct was extreme and outrageous, should the Court decide to implement that rule, is a question for the jury. The lower court should not have granted Respondent's motion for a directed verdict, nor should it have excluded Petitioner's expert testimony which speaks directly to the issue behind the directed verdict. The General Assembly's intent behind the Safe School Climate Act is plain; to the extent that the South Carolina Tort Claims Act interferes with that intent, the Court should find that the SSCA waives it.

In a light most favorable to Petitioner, the record is far from lacking *any* evidence at all to support the Petitioner's position; rather, it is replete with evidence in his favor. All he needed was some. To decide otherwise would truncate our motion for directed verdict standard and heighten our standard for recovery for emotional injury to an unfounded and baseless degree.

WHEREFORE Petitioner prays for an order granting rehearing in this case.

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Respectfully submitted,

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K.S., a minor, by and through his Guardian ad Litem, James Seeger .....Petitioner,

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing Petition for Writ of Certiorari on the date given below by emailing it to Respondent's counsel at the addresses noted below.

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/s/ Sarah M. Larabee
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Columbia, South Carolina
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