

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

---

Supreme Court Number: 2022-001408

---

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

v.

Richland County School District Two ..... Respondent

---

RESPONDENT'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI

---

HALLIGAN MAHONEY WILLIAMS  
SMITH FAWLEY & REAGLE, PA

Thomas K. Barlow, S.C. Bar No. 8995  
tbarlow@hmwlegal.com

1301 Gervais Street, Suite 1400  
P.O. Box 11367  
Columbia, SC 29211  
(803) 254-4035

Attorney for Respondent

Other Counsel of Record:

Sarah M. Larabee, Esquire  
Andrew S. Radeker, Esquire  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
Attorneys for Petitioner

RECEIVED

NOV 07 2022

S.C. SUPREME COURT

TABLE OF CONTENTS

PAGES

Table of Authorities ..... ii

I. QUESTIONS PRESENTED.....1

II. STATEMENT OF THE CASE.....1

III. STATEMENT OF FACTS .....3

IV. ARGUMENT.....7

    A. Petitioner Has Not Identified Any Special And Important Reasons  
    For This Court To Grant A Writ of Certiorari .....7

    B. The Court of Appeals Properly Upheld The Directed Verdict On The Ground  
    that K.S. Could Not Recover Damages For Purely Emotional Injury On A  
    Gross Negligence Claim .....8

    C. The Safe School Climate Act Did Not Repeal Or Supersede The Tort Claims  
    Act.....12

    D. The Trial Court Properly Excluded Expert Testimony Of Dr. Alan McEvoy  
    That Was Cumulative, Unhelpful, And Had Significant Potential to Confuse  
    The Jury .....13

V. CONCLUSION.....17

**TABLE OF AUTHORITIES**

**PAGES**

**CASE LAW:**

*Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) ..... 3, 7, 10

*Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984) ..... 3, 8

*Latham v. Latham*, 2014 WL 10417616 (S.C. Com. Pl.) ..... 3, 8

*Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) ..... 7, 8, 10

*Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68 (2007) ..... 8, 10

*Pope v. Barnwell Cnty. Sch. Dist. No. 19*, No. 1:16-CV-01627-JMC, 2017 WL 1148741, (D.S.C. Mar. 28, 2017) ..... 8

*Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305, (2007) ..... 9

*Doe v. North Greenville Hosp.*, 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995) ..... 9

*Doe by Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994) ..... 11

*State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011) ..... 14

*State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) ..... 15

*State v. Dial*, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) ..... 15

*State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003) ..... 15

*State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) ..... 15

*State v. Jamison*, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007) ..... 15

*State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013) ..... 15

*State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991) ..... 15

*State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) ..... 15

*Stewart v. State Farm Mutual Auto Insurance Company*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000) ..... 9

**COURT RULES:**

Rule 242(b), SCACR..... 7

**OTHER AUTHORITIES:**

F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* § 2A (4th ed. 2011).....9

Restatement (Second) of Torts § 436A.....2,9

Black’s Law Dictionary, Injury (11<sup>th</sup> ed 2019) .....2,9

## **I. QUESTIONS PRESENTED**

1. Do the factors set forth in SCACR 242(b) support a writ of certiorari?
2. Did the Court of Appeals Properly Uphold the Directed Verdict on the Ground that Appellant Could Not Recover for Pure Emotional Distress Without Physical Injury on a Gross Negligence Claim?
3. Did the Trial Court Properly Hold that the Safe School Climate Act Does Not Supersede the Tort Claims Act?
4. Did the Trial Court Properly Exclude the Testimony of Alan McEvoy, Ph.D.?

## **II. STATEMENT OF THE CASE**

This lawsuit was brought against the Respondent, Richland School District Two (“Richland Two”), pursuant to the South Carolina Tort Claims Act. Appellant, K.S., through his father, James Seeger, filed his initial complaint on January 18, 2017, and his amended complaint on March 16, 2017. Richland Two filed its answer to the initial complaint on February 16, 2017, and its answer to the amended complaint on April 3, 2017. In his amended complaint, K.S. alleged that during the first two months of the 2011-2012 school year, he was “bullied” by his teacher, Jan Moody. (Amd. Compl. ¶¶ 12-20, R. pp. 42-43). Specifically, K.S. alleged that Ms. Moody, on multiple occasions, subjected him to verbal abuse causing him to cry. (Amd. Compl. ¶¶ 12-20, R. pp. 42-43). K.S. sought to recover damages from Richland Two for emotional distress that he claimed he suffered from alleged mistreatment by Ms. Moody during his first two months of first grade in 2011. (Amd. Compl. ¶¶ 30, 39, 48, R. pp. 45-47). K.S.’s amended complaint did not include a claim for assault or battery or any individual claims against Ms. Moody.

On February 7, 2019, Richland Two filed a motion in limine to exclude testimony

of Dr. Alan McEvoy, an expert K.S. proffered to testify regarding teacher bullying of students, the purported standard of care, and damages. (Pl. Second Supplemental Answers to Interrogatories, No. 3, R. pp. 664-665). On February 28, 2019, Richland Two filed a motion for summary judgment. (Def. Motion for Summary Judgment, R. pp. 87). Both parties submitted supporting memoranda of law. (Def. Mem. In Support, Pl. Mem. In Opp. R. pp. 89, 105).

The instant action was called for trial on May 28, 2019. Prior to trial, the judge heard and denied Richland Two's motion in limine and motion for summary judgment. (R. pp. 139, 150). Additionally, the trial judge heard and denied K.S.'s arguments that the South Carolina Tort Claims Act had been repealed or superseded by the adoption of the Safe School Climate Act, S.C. Code Ann. § 59-63-110, *et seq.* (R. pp. 144-145). During K.S.'s case in chief, Richland Two renewed its motion in limine to exclude testimony of Dr. McEvoy, which the trial judge granted. (R. p. 433). On the third day of trial, K.S. rested his case and Richland Two moved for a directed verdict on several grounds. The trial judge granted directed verdict on the ground that K.S. could not recover damages solely for emotional distress on the claims pleaded without proof of any physical injury. (R. pp. 453-455). Her ruling was as follows:

[t]he damages claimed are, in fact, purely emotional damages . . . 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 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. . . Restatement Second of Torts, § 436A (as read), 'If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm or emotional disturbance and it results in such

emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

(R. pp. 453, 455). The trial judge further cited *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985), *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 375 322 S.E.2d 669, 671 (1984), and Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 at \*4 (S.C. Com. Pl.), as persuasive authority supporting her decision. (R. pp. 454-455). The trial judge issued a Form 4 Order on June 7, 2019. (Form 4 Order, R. p. 1). The present appeal was timely filed by K.S. on June 11, 2019. (Notice of Appeal, R. p. 132). The Court of Appeals affirmed the trial court in an unpublished opinion dated July 27, 2022. Petitioner filed a motion for rehearing with the Court of Appeals, which was denied on September 7, 2022. Petitioner timely filed a Petition for Certiorari to the Court of Appeals, to which Respondent now responds.

### **III. STATEMENT OF FACTS**

During the 2011-2012 school year, K.S. was a first-grade student at North Springs Elementary School. (R. p. 169). Jan Moody was K.S.'s teacher for the first two months of K.S.'s first grade year. (R. p. 169). At the time of the events that are the subject of this case, Ms. Moody had been a teacher for more than thirty years and had a solid teaching record in Richland Two with no major disciplinary issues. (R. pp. 258, 283-284, 421, 594-595). She was employed with Richland Two under a continuing contract, essentially giving her "tenure" under the South Carolina Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-410 *et seq.* (R. pp. 420-421).

K.S. testified that during late September and the first part of October 2011, he was frequently the target of intimidation or "bullying" by Ms. Moody because she was mean to him and yelled at him. (R. p. 153). K.S. testified that as a result of this treatment, he

felt sad, and that Ms. Moody made him cry. (R. pp. 155-157). Once K.S.'s parents and North Springs administrators became aware of the alleged mistreatment, K.S. was placed in a new classroom on October 20, 2011, and had no further contact with Ms. Moody, who was placed on administrative leave pending an investigation and decision regarding her status. (R. pp. 171, 215, 420-422). Following the investigation, Ms. Moody was permitted to resign in lieu of termination. (R. pp. 421-422). Ms. Moody's only warning or reprimand in her file as of her resignation date in November 2011 involved a situation in 2009 where she had checked to make sure female second grade students were wearing underwear after it had been reported that underwear had been discarded in the garbage can in the girls' restroom. (R. pp. 272-274).

The Seeger family did not make any complaints to the Richland Two district office about how the school principal, David Holzendorf, handled the investigation of the alleged mistreatment toward K.S. (R. p. 422). Specifically, there were no reports between November 2011 and the filing of the lawsuit that the Seegers were dissatisfied with how the situation with Ms. Moody was handled. (R. p. 422). K.S. successfully finished elementary school without any documented emotional or psychiatric issues. (R. pp. 229-230). K.S. was not diagnosed with anxiety and depression until 2018, approximately seven years after K.S.'s encounters with Ms. Moody. (R. pp. 229, 313-314). K.S. was not prescribed any medications for mental or emotional issues until 2018. (R. pp. 172, 313). At the time of trial, K.S. was 14 and going into the ninth grade. (R. pp. 152). The following is a summary chronology of relevant events from the evidence at trial:

- **8/15/11** – First day of school for students. K.S.'s mother also began working at

North Springs Elementary, K.S.'s school, as an attendance secretary. (R. pp. 434, 439).

- 9/29/11 – Ms. Moody made a statement in a loud voice to a student (not K.S.) that he would not be able to read a book because it was above his reading level, which was overheard by Tabitha Glover, media center specialist, and Susan Garris, her assistant. Ms. Glover and Ms. Garris reported the incident to the principal, Dr. David Holzendorf. (R. pp. 236-237, 241).

- 10/10/11 – Ms. Moody told Ms. Glover, “don’t give [K.S.] any special treatment or, praise. He has been crying non-stop in the classroom all day and he does not deserve anything” and “of course he’s good for you, he has cried all day in my class,” referring to K.S. (R. p. 244). The parties dispute whether this incident was contemporaneously reported to the North Springs administration. (R. pp. 246, 257, 370-371, 385).

- 10/18/11 – Ms. Moody met with Dr. Holzendorf, former North Springs Elementary School Principal, and K.S.'s parents to talk about K.S.'s continual crying in her class. (R. p. 410).

- 10/20/11 – K.S. dropped his lunch tray in the school cafeteria. Ms. Moody took K.S. by the arm and made him sit at a table by himself after he could not stop crying. (R. pp. 158, 372, 374). Belinda Fenwick, a custodian, told the health room assistant, Ms. Wilson, who in turn told Ms. Seeger. (R. pp. 376-377). Mr. and Ms. Seeger then reported the cafeteria incident to Dr. Holzendorf. (R. pp. 372-377). The Seegers then met with Dr. Holzendorf and Jennifer Germann, North Springs Assistant Principal. (R. pp. 377-379). Dr. Holzendorf agreed to transfer K.S. to Ms. Shipman's class for the remainder of first grade. (R. pp. 383, 395).

Dr. Holzendorf and Ms. Germann interviewed Ms. Wilson, health room assistant, and Ms. Fenwick, custodian who reported the cafeteria incident. (R. pp. 373, 376-377).

- 10/21/11 – Dr. Holzendorf and Dr. Karen Lovett, Richland Two's Executive Director of Human Resources, interviewed Mr. Goins, custodian, and Ms. Moody. Dr. Holzendorf met again with Mr. Seeger. (R. p. 395).

- 10/21/11 – 11/1/11 – Mr. Seeger made additional allegations of Ms. Moody isolating K.S. from other students in class as part of an alleged "no crying club." Dr. Holzendorf obtained and reviewed video of the cafeteria incident and met further with related arts teachers, including Ms. Garris and Ms. Glover, to obtain additional information about Ms. Moody's treatment of K.S. (R. p. 373). Dr. Holzendorf received reports that K.S. was doing very well in Ms. Shipman's class. (R. p. 390).

- 11/1/11 – School Resource Officer was notified of cafeteria incident. (R. pp. 418-419).

- 11/3/11 – Dr. Holzendorf and Dr. Lovett met with Ms. Moody. Ms. Moody was placed on administrative leave. (R. p. 386).

- 11/16/11 – Ms. Moody's employment with Richland Two ended. (R. p. 387).

Prior to the incidents alleged in this case, Richland Two had adopted policies preventing bullying, harassment, and intimidation of students by both students and adults. (Tr. Exh. 1, R. pp. 551-556, R. pp. 282, 317). In addition, it had provided training to both students and adults regarding bullying, including how to identify and report bullying and specifying consequences of bullying. (Tr. Exh. 2, R. pp. 557-578, R. pp. 235). Prior to the end of September 2011, Ms. Moody had never been accused of bullying or harassing a student in more than 30 years of teaching.

K.S. testified that when Ms. Moody took him by the arm on October 20, 2011, “she would claw my arm with her nails.” (R. p. 159). K.S. offered no evidence that he suffered physical injury or received any treatment from this touching. (R. pp. 228, 310-311, 418). K.S.’s medical expert further confirmed that he had never been told of any physical injury to K.S. resulting from Ms. Moody’s treatment of K.S., and had assumed that if a physical injury had existed, he would have been so advised. (R. p. 311). K.S. offered no other evidence of any possible physical injury or physical symptoms of alleged emotional distress.

#### **IV. ARGUMENT**

##### **A. Petitioner Has Not Identified Any Special And Important Reasons For This Court To Grant A Writ of Certiorari.**

SCACR 242(b), **Considerations Governing Review**, provides as follows:

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of these criteria are met. First, the application of the law as it applies to negligence-based claims of emotional distress unaccompanied by physical injury is not a novel issue

and has been fairly well settled under *Ford v. Hutson*, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985); and *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 375 322 S.E.2d 669, 671 (1984).

Second, there was no dissent, or even a concurring opinion in the Court of Appeals. Third, K.S. has not identified any decision of the Supreme Court which is in conflict with the Court of Appeals' decision in this case. Fourth, it is undisputed that no constitutional issues or federal questions are involved in this case. Finally, Respondents respectfully submit that the Court of Appeals made a full review of the record in this case and certiorari review is not needed to read behind the Court of Appeals. Thus, the factors set forth in SCACR 242(b) strongly support a denial of certiorari in this case.

**B. The Court of Appeals Properly Upheld The Directed Verdict On The Ground That K.S. Could Not Recover Damages For Purely Emotional Injury On A Gross Negligence Claim.**

South Carolina appellate courts have recognized only three ways that a plaintiff may recover damages for emotional distress in a tort case: (1) when it accompanies a physical injury, such as in a car accident, (2) by way of a claim for intentional infliction of emotional distress or outrage where severe emotional distress occurs as a result of extreme and outrageous conduct by the defendant; *see Ford*, 276 S.C. at 160, 276 S.E.2d at 777; *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007), and (3) negligent infliction of emotional distress in the bystander context, first recognized in *Kinard*, 286 S.C. at 582, 336 S.E.2d at 467. The development of South Carolina law regarding the recovery of damages for purely emotional distress is clearly outlined in Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 at \*4

(Ct. Com. Pl. 2014). *See also, Pope v. Barnwell Cnty. Sch. Dist. No. 19*, No. 1:16-CV-01627-JMC, 2017 WL 1148741, at \*11 (D.S.C. Mar. 28, 2017) (no general negligence cause of action for alleged emotional distress only). The primary reasons for courts' reluctance to impose liability for purely emotional harm include the subjective nature of the injury and corresponding difficulties of proof, the indefinite extension of the emotional consequences of a given act, and the fact that imposing a general duty to use due care to protect the emotional well-being of others would invite wasteful litigation over often trivial matters. *See F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts* § 2A (4th ed. 2011). Section 436A of the Restatement (Second) of Torts, cited by the trial court, further reflects these principles.

In this case, K.S. did not, and could not, state a claim for outrage or intentional infliction of emotional distress against Richland Two. Additionally, K.S. could not establish a claim for negligent infliction of emotional distress because South Carolina courts have expressly limited that claim to "bystander recovery." *See Kinard*, 286 S.C. at 582-83, 336 S.E. 2d at 467 (recognizing negligent infliction of emotional distress as a cause of action only for bystanders witnessing accidents involving close relatives). *See also, Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007); *Stewart v. State Farm Mutual Auto Insurance Company*, 341 S.C. 143, 154, 533 S.E.2d 597, 603, (Ct App 2000); *Doe v. North Greenville Hosp.*, 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995).

Further, K.S. did not offer evidence from which the jury could have determined that he suffered a "physical injury" that would support an award of damages for emotional distress on a gross negligence theory. As the trial court properly noted,

“physical injury” is defined as “physical damage to a person’s body.” INJURY, Black’s Law Dictionary (11th ed. 2019). K.S. offered no evidence of any physical damage to his body. K.S.’s testimony was limited to Ms. Moody leading him by the arm to a cafeteria table and feeling her nails on his arm. (R. pp. 154-155, 158, 159). Mr. Seeger’s testimony confirmed that Ms. Moody did not inflict any cuts, bruises, scratches, or other injury to K.S.’s body. (R. pp. 227-230). Additionally, no physical injury was ever reported to Richland Two. (R. p. 418). Likewise, K.S.’s medical expert similarly confirmed no physical or bodily injuries had ever been claimed or reported to him or other physicians or counselors. (R. p. 311).

K.S.’s reliance on cases decided before *Ford* and *Kinard*, which hold that “physical manifestation” of emotional distress is sufficient to support damages on a negligence (or gross negligence) claim, is misplaced for two reasons. First, if a plaintiff could recover on a negligence theory merely by showing physical symptoms of emotional distress, there would be no need for an intentional infliction of emotional distress<sup>1</sup> or a bystander negligent infliction of emotional distress claim<sup>2</sup>, as one could simply allege “physically manifested emotional distress caused by negligence,” a much lower threshold. Second, even if physical manifestation of emotional distress was enough to prove damages without physical injury in a gross negligence case, K.S. did not offer any evidence of physical manifestation of emotional distress besides crying, and he was not diagnosed with any mental or emotional condition until seven years after the alleged

---

<sup>1</sup> An intentional infliction of emotional distress claim requires distress “severe” such that “no reasonable man could be expected to endure it.” *Hansson*, 374 S.C. at 356, 650 S.E.2d at 70.

<sup>2</sup> The Supreme Court confirmed a very narrow, rather than expanded claim for emotional distress allegedly caused by negligence which specifically incorporates the physical manifestation requirement of earlier cases. *See Kinard*, 286 S.C. at 582, 336 S.E.2d at 467. There would be no need for *Kinard*’s bystander limitation if “physical manifestation” were sufficient to support

incident. (R. pp. 229-230). The Court of Appeals also properly held that K.S. had not shown, as a matter of law, that the teacher's conduct was so extreme and outrageous to support a claim for solely mental injury against Richland Two.

Finally, *Doe by Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994), upon which K.S. relied, is inapposite to this case.<sup>3</sup> In that case, the minor plaintiff sued the hospital after a hospital employee had sexually assaulted her. While plaintiff Mary Doe did not sustain a physical injury from the sexual assault, the Court noted that "the record [was] replete with evidence that Mary Doe suffered a severe mental injury *as a result of the sexual assault*," and that she "exhibited physical problems *from the attack* in that she reportedly broke out in hives." *Doe*, 323 S.C. at 38, 448 S.E.2d at 567 (*emphasis added*).

Taking a first-grade student by the arm to move him to a different location is very far from the sexual assault and battery committed in *Doe* that was almost certain to result in serious emotional injury to the minor plaintiff. Further, unlike the plaintiff in *Doe*, K.S. sustained absolutely no physical manifestation of injury from Ms. Moody moving him by the arm to a different table, and offered no evidence of "severe mental injury" arising from any physical act of Ms. Moody. Unlike *Doe*, any emotional injury of K.S. was attributable solely to Ms. Moody's verbal, rather than physical acts. (R. pp. 310-311). Thus, *Doe* is distinguishable on three bases: that the unwanted physical touching in *Doe* caused the plaintiff's injuries, that Mary Doe's mental injury was "severe," and that Mary Doe had actual, physical manifestations of her mental injury caused by the physical, sexual assault. Accordingly, the Court of Appeals properly limited *Doe* to its

---

purely emotional damages in any ordinary negligence case, as K.S. urges.

<sup>3</sup> K.S. did not argue the applicability of *Doe by Doe* to the trial court, further demonstrating that it

context and declined to recognize a cause of action that would permit students to sue “mean” or “strict” teachers for hurt feelings and emotional upset that otherwise would not support an intentional infliction of emotional distress claim. If K.S. could recover damages for emotional distress based on the testimony and claims alleged in this case, it would render the intentional infliction of emotional distress cause of action and forty years of precedent completely superfluous, and impermissibly expand the limited cause of action for negligent infliction of emotional distress beyond the bystander context. Consequently, the purely emotional injuries allegedly sustained by K.S. from Ms. Moody picking on or “bullying” him are not recoverable under South Carolina law by way of the theories alleged in this case. Therefore, the Court of Appeals properly upheld the trial court’s directed verdict, and this Court should deny certiorari.

**C. The Safe School Climate Act Did Not Repeal Or  
Supersede The Tort Claims Act.**

---

While not at all relevant to the directed verdict ruling in the case and not addressed by the Court of Appeals, K.S. continues to argue that the Safe School Climate Act, S.C. Code Ann. § 59-63-110, *et seq.*, “repealed” the Tort Claims Act. This argument is directly foreclosed by the language of the Safe School Climate Act, which does not itself create a cause of action and specifically and unambiguously provides:

(A) This article must not be interpreted to prevent a victim from seeking redress pursuant to another available civil or criminal law. **This section does not create or alter tort liability.**

S.C. Code Ann. § 59-63-150(A) (*emphasis added*). K.S. makes a tortured attempt to create an ambiguity where there is none. He asks this Court to find that a statement

---

is not applicable to this case.

confirming that the Safe School Climate Act **does not alter tort liability** actually was intended to alter tort liability.

The tort liability, if any, of Richland Two, exists only because the Tort Claims Act provides for limited waiver of its sovereign immunity. *See* S.C. Code Ann. § 15-78-20. Whatever tort liability the Tort Claims Act created for Richland Two is expressly “not altered” by the Safe School Climate Act.

From this clear language, K.S. extrapolates elimination of damages caps and full liability for punitive damages. Clearly, if the legislature sought to revoke all Tort Claims Act immunity for “bullying” cases and expose school districts to unlimited liability, it would have used language other than “this section does not create or alter tort liability.” As such, even if the argument were relevant to the directed verdict on appeal in this case, the Safe School Climate Act did not repeal the Tort Claims Act, create new liability, or otherwise “alter tort liability” under the Tort Claims Act.

**D. The Trial Court Properly Excluded Expert Testimony Of  
Dr. Alan McEvoy That Was Cumulative, Unhelpful, And  
Had Significant Potential To Confuse The Jury.**

Because its ruling on the negligent infliction claim was dispositive, the Court of Appeals did not reach the issues of admissibility regarding Petitioner’s proffered expert witness. However, K.S. has continued to argue that the exclusion of his “bullying expert” was error.

Richland Two initially filed a motion *in limine* to exclude the testimony of Dr. McEvoy, which the trial court heard prior to trial. In initially denying the motion, the trial court held that Richland Two’s objections to Dr. McEvoy’s qualifications, reliability of his testimony, and the need for an expert to explain any issue in the case to the jury

went to the weight of the evidence, rather than its admissibility. (R. pp. 150-151).

On the third day of the trial,<sup>4</sup> K.S. sought to introduce into evidence and play for the jury the two-hour, *de bene esse* deposition of Dr. McEvoy. (R. p. 430, lines 20-22). Richland Two renewed its objections to Dr. McEvoy's testimony based on the motion *in limine* filed before trial. (R. p. 431, line 16-p.432, line 1). In addition, based on the length of the trial to that point and K.S.'s counsel's extensive questioning of numerous witnesses on Richland Two policy and alleged violations of policy, Richland Two objected under Rule 403, SCRE, on the grounds that Dr. McEvoy's testimony would be unnecessarily cumulative and have the potential to confuse the jury. (*Id.*) The trial court agreed, finding:

Having heard all of the witnesses testify, I'm actually going to grant the motion and exclude the witness. His testimony would be cumulative at best . . . my initial impression was that his commentary regarding teacher-on-student bullying may be instructive in some way. But now having a full grasp of the scope of the interactions alleged between K.S. and Ms. Moody, I don't think there's anything particularly unique about the situation. There's been testimony about the actual damages sustained by K.S. And so testimony regarding theoretical, speculative – I mean, and frankly, I think we've beaten the policy to death through witness after witness. And so yet another person trying to tell these jurors the definition of bullying . . . or whatever it is, is simply unnecessary, cumulative, would have the potential to confuse the jury as to the ultimate issue they are to decide in this case.

(R. p. 433, lines 2-20).

"The admission of evidence is within the circuit court's discretion and will not be

---

<sup>4</sup> The trial started on Tuesday, May 28, 2019.

reversed on appeal absent an abuse of that discretion.” *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). “A trial court has particularly wide discretion in ruling on Rule 403 objections.” *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (“A trial judge’s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.” (citation omitted)); *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) (“The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion.”); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (“We review a trial court’s decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court’s judgment.”); *State v. Jamison*, 372 S.C. 649, 652, 643 S.E.2d 700, 701 (Ct. App. 2007) (“The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party.”); *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (“Generally, the admission of expert testimony is a matter within the sound discretion of the trial court.” (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991))); *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”).

In his case in chief, K.S. questioned several school employees and administrators at great length about Richland Two Policy JICAA, Harassment, Intimidation or Bullying, and its application to the facts of the case, presumably to show the jury that the policy was ineffective, and/or that Richland Two failed to follow the policy, and that failure allowed Ms. Moody to cause K.S. emotional harm. Policies JICAA, JICAA-R, and GCQF, were used as exhibits and the following witnesses were questioned about their meaning and application to the facts of the case: Susan Garris (R. p. 251, line 5-p. 253, line 3); Denise Barth (R. p. 259, line 7-p. 271, line 19, p. 275, line 16-p. 280, line 6); David Holzendorf (R. p. 319, line 21-p. 348, line 17, p. 356, line 17-p. 365, line 24); and Karen Lovett (R. p. 399, line 14-p. 408, line 10, p. 425, line 11-p. 427, line 1, p. 428, line 6-p. 429, line 4). It simply would have been cumulative for counsel to play a two-hour *de bene esse* deposition that essentially walked yet another witness through the same policies and asked the purported expert to essentially make counsel's repeated argument that Ms. Moody bullied K.S., and Richland Two did not follow its policies related to alleged bullying of students. (R. p. 468, line 11-p. 469, line 16, p. 491, line 25-p. 492, line 23, p. 493, line 15-p. 496, line 18, p. 499, line 22-p. 501, line 16, p. 503, line 9-p. 509, line 18, p. 514, line 24 -p. 515, line 15). The jury was fully capable of deciding those issues without Dr. McEvoy essentially re-hashing earlier testimony on the penultimate day of the trial. Further, Dr. McEvoy's testimony as to the potential effects of bullying on students in general<sup>5</sup>, where K.S., his father, and a treating expert had already testified as to alleged specific effects on K.S. arising out of Ms. Moody's

---

<sup>5</sup> Dr. McAvoy testified that he had never interviewed, let alone provided any treatment to K.S., or even spoken to any witness in the case. (R. p. 472, lines 19-21).

conduct, would also have been both cumulative and unhelpful to the jury. (R. pp. 158-161, 162-168, 182-183, 191-213, 222-226, 287-307).

In addition, Dr. McEvoy's testimony had very real potential to confuse the jurors as to the ultimate issues in the case, which were: 1) under the Tort Claims Act, whether Richland Two was grossly negligent in its supervision of K.S. and/or Ms. Moody, and 2) whether K.S. could prove causation and recoverable damages as a result of the alleged gross negligence. The term "bullying" has no independent legal significance in South Carolina. Further, Dr. McEvoy's testimony incorporating simple negligence, rather than a gross negligence standard, was likely to confuse the jury as to the applicable standard for determining liability. (R. p. 494, line 15-p. 495, line 15). Accordingly, permitting an expert witness to testify that K.S. was "bullied" had the strong potential to mislead the jury into thinking that proof of Ms. Moody bullying K.S. was a dispositive issue in the case. Dr. McEvoy's testimony that Ms. Moody bullied K.S. and that Richland Two violated its policies would have been completely without reference to the proper Tort Claims Act gross negligence standard the jury would have been asked to consider. In summary, K.S. was not entitled to introduce Dr. McEvoy's cumulative testimony to "drive home" the misleading mantra that proof of "bullying" somehow is proof of both gross negligence and a legally compensable injury worthy of damages, particularly when K.S. made the same argument for two full days through witnesses his counsel chose to call. As such, the trial court did not abuse its discretion in properly excluding Dr. McEvoy's testimony under Rule 403, SCRE.

## V. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

HALLIGAN MAHONEY WILLIAMS  
SMITH FAWLEY & REAGLE, PA

s/ Thomas K. Barlow  
Thomas K. Barlow, Esquire  
S.C. Bar No. 8995  
tbarlow@hmwlegal.com  
P.O. Box 11367  
Columbia, South Carolina 29211  
(803) 254-4035  
*Attorney for Respondent*

November 7, 2022  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

---

Supreme Court Number: 2022-001408

---

RECEIVED  
NOV 07 2022  
S.C. SUPREME COURT

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

v.

Richland County School District Two ..... Respondents

---

**PROOF OF SERVICE**

---

I certify that I have served the **RESPONDENT'S RETURN TO PETITION FOR CERTIORARI** on counsel for Respondent, by depositing a copy of it in the U.S. Mail, postage prepaid, on November 7, 2022, addressed to Sarah M. Larabee, Esquire, Andrew S. Radeker, Esquire, Harrison, Radeker & Smith, P.A., Post Office Box 50143, Columbia, South Carolina 29250 and via email [sarah@harrisonfirm.com](mailto:sarah@harrisonfirm.com) and [drew@harrisonfirm.com](mailto:drew@harrisonfirm.com).

HALLIGAN MAHONEY WILLIAMS  
SMITH FAWLEY & REAGLE, PA

By: s/ Thomas K. Barlow  
Thomas K. Barlow, S.C. Bar No. 8995  
[tbarlow@hmwlegal.com](mailto:tbarlow@hmwlegal.com)  
P.O. Box 11367  
Columbia, South Carolina 29211  
(803) 254-4035  
Attorney for Respondent