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S.C. SUPREME COURT

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 Case No. 2022-001408

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

v.

Richland School District Two.....Respondent.

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v.

Richland School District Two.....Respondent

APPELLANT’S FINAL REPLY BRIEF

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LEGAL ARGUMENT

I. Respondent improperly restates the facts.

Respondent included a statement of the facts which clearly were not presented in the light most favorable to the non-moving party. This Court is required—like the trial court—to view the evidence in the most favorable to K.S.. Ralph v. McLaughlin, 428 S.C. 320, 339, 834 S.E.2d 213, 223 (Ct. App. 2019); Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

II. Negligence is the appropriate cause of action.

Respondent cites no cases that state mental health damages can only be recovered by alleging outrage or negligent infliction of mental distress causes of action. Moody would the proper party to assert a claim of outrage. K.S. is pursuing the party that allowed Moody's conduct to continue. Respondent's negligent failure to follow South Carolina law and its own policies led to the damages suffered by K.S. Respondent itself was not the bully. Instead, the Respondent negligently allowed the bully—Moody—to continue after it is undisputed the principal first received notice of bad conduct. (R. p. 354, lines 7-20; p. 356, lines 6-16; R. p. 356, line 19-p. 357, line 3; R. p. 551-556, 581-582, 585-586). There was also testimony that Dr. Holzendorf was informed of a specific incident involving the K.S. and Moody prior to the cafeteria but failed to act. (R. p. pg. 188, line 110-pg. 189, line 15; pg. 210, line 18-pg. 211, line 12.) The failure to act is what caused K.S. to suffer damages. The appropriate cause of action in that instance is negligence.

The cases cited by Respondent instead supports K.S.'s contention that negligence is the appropriate cause of action. In the case which Respondent principally relies, the Supreme Court in Ford v. Hutson, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981) held:

Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical injury suit.

The Supreme Court in Ford then cites Mack v. S.-Bound R. Co., 52 S.C. 323, 29 S.E. 905, 906 (1898) in which the plaintiff was allowed to recover for “fright” when a train going in excess of the speed limit killed plaintiff’s mule while plaintiff managed to avoid with relatively minor physical injuries mainly consisting of bruises. However, the plaintiff suffered from physical manifestations of his fear including “nervous system was shocked,” his mind was “partially destroyed,” his reason was “unbalanced,” and for a long time was “made ill and sick” from the terrible shock to his nervous system. Id. The Supreme Court in Mack affirmed that the jury were properly instructed that shock, fright and emotional upset which produces injury to a person’s physical health is properly recoverable under a negligence cause of action. Id. 29 S.E. at 909 (1898). The Supreme Court concluded by holding:

Here is a physical injury [referring to the plaintiff’s nervous breakdown], as serious, certainly, as would be the breaking of an arm or leg. Does the complaint show that defendant’s negligence was the proximate cause of that injury? If so, the action will, of course, lie.

Id., 29 S.E. 910(clarification added.)

The Supreme Court in Ford, by citing Mack, did not overrule the “long accepted” concept of allowing a recovery for mental health injuries in personal injury suits. Ford, supra. The Supreme Court in Ford also cited Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 607–08, 103 S.E.2d 265, 272 (1958) which recognized that damages associated with shock, fright, and upset was actionable even in the absence of physical impact. The Supreme Court in a footnote in Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70, fn. 1 (2007), reaffirmed the concept that a mental health injury which produce a physical manifestation is actionable under

a negligence theory and did overrule that line of cases. The real question is whether there was a sufficient mental health injury, and the Supreme Court definitively ruled that such questions are for the jury. Padgett, *supra*.

The difference in the cases cited by Respondent, and the evidence in the light most favorable to the K.S. can be best be summarized in this quote:

Respondent relies upon Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265, for support of his contention that under this testimony it was for the jury to say whether or not Mr. Huntley's death was proximately caused by the defendants' negligent act. But that case does not support such contention. There, recognizing the rule in Mack v. South Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898), we upheld recovery for physical injury sustained as a consequence of shock, fright, and emotional upset directly caused by the defendant's negligent act, though there was no physical impact. Here, the claimed emotional upset and consequent acceleration of physical deterioration resulted not from the defendants' negligent act, but from Mr. Huntley's concern, at first, over his wife's condition, and from his fretting over the delay in settlement of his claims. Distinction between the Padgett case and the one at bar is obvious. In the former, the plaintiff's fright was a natural, immediate, and foreseeable result of the negligent operation of the defendant's truck whereby it crashed into the plaintiff's home; the ensuing physical consequences were no less the direct result of the negligent act than were the shock and fright that attended it. In the instant case Mr. Huntley's injury was nothing more than a trivial bruise; of itself it entailed, so far as the record indicates, no shock, fright or emotional upset. His concern over his wife's possible injuries was apparently short-lived, and according to Dr. Perry it ended when 'he saw that she was going to be all right.' The worry that respondent would couple to appellant's negligent act so as to make that act the proximate cause of the death of his intestate concerned not the negligent act itself but the decedent's impatience or dissatisfaction with the progress of negotiations or litigation looking to settlement of his claims, which included a claim for damage to his automobile. To uphold his contention would be to extend the concept of proximate cause far beyond the scope contemplated in the Padgett case or any other precedent in this jurisdiction, and, we think, beyond reason.

Roscoe v. Grubb, 237 S.C. 590, 594–95, 118 S.E.2d 337, 339 (1961)

There is certainly sufficient evidence in the record that K.S., like the plaintiff in Mack, suffered from a mental injury from which a jury could have reasonably ruled in his favor. K.S. testified he is still afraid of Moody. (R. p. 157, lines 5-8); (R. p. 164, line 2-p. 165, line 1); and often feels anxious, hopeless, and has trouble sleeping. (R. p. 165, line 5-pg. 167, line 17.) Mr.

Seeger testified K.S. still has anxiety and angry outbursts in the months and years since the incident. (R. p. 192, line 2-p. 193, line 16.) Mr. Seeger also described K.S. as being “fidgety,” his “anxiety level was through the roof,” and that he (K.S.) chewed all of his nails off continually.” (R. p. 203, lines 14-20.) Mr. Seeger also testified that there are some period of time where K.S. is depressed, easily angered, and will not come out of his room and has trouble sleeping. (R. p. 209, lines 10-13; p. 209, lines 5-15.) K.S. has received in-office therapy from a series of psychologists after being removed from Moody’s class (R. p. 193, line 19-p. 194, line 20; p. 126 lines 3-9; p. 200, line 9-p. 203, line 3; p. 205, line 5-p. 208, line 3); the assistance of a school counselor during the rest of his elementary school time. (R. p. 204, line 17-p. 205, line 4.) K.S. also sees a psychiatrist who prescribes him medication including Zoloft. (R. p. 208, lines 4-19.) K.S. has improved with medication, but K.S. struggles even with medication. (R. p. 208, line 21-p. 210, line 4.) The days K.S. does not take his medication are “rough.” (R. p. 209, lines 7-9.) K.S. also presented expert testimony, Dr. David Englert, who testified as to his mental health treatment and diagnoses. Dr. Englert testified that K.S. has had several diagnoses over the years since the incident. These diagnoses included oppositional defiance and adjustment disorder. (R. p. 312, line 25-p. 312, line 4.) Dr. Englert also opined that it took time for K.S.’s depressive disorder to be diagnosed. (R. p. 293, line 1-pg. 297, line 4.)

Respondent has also attempted to distinguish Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 38–39, 448 S.E.2d 564, 567 (Ct. App. 1994) by relying upon the phrase “sexual assault.” The facts of Doe show this assertion is specious. Doe was under the legal age of consent at the time she had sexual intercourse with an employee of the Defendant. This made the sexual intercourse illegal despite Doe’s willing participation and constituted a sexual assault pursuant to S.C. Code Ann. § 16–3–655. This Court held fact that Doe did not suffer “an actual physical injury

at the time of the assault”—the illegal sexual intercourse—was not determinative of whether Doe had suffered damages. Id. This Court also held that the liability of the defendant was based on the failure to prevent a second instance after being informed of the first. Doe by Doe, 323 at 40–41, 448 S.E.2d at 568 (Ct. App. 1994). This is the exact scenario that was in evidence before the trial judge. In Doe, this Court held the denial of a directed verdict was appropriate. This Court should find the grant of a directed verdict was inappropriate in the instant action.

K.S. is advocating for a recovery which has been the law of the State of South Carolina for more than 120 years. A reversal would not—despite Respondent’s histrionics—do damage to the unalleged causes of action.

CONCLUSION

For these reasons, K.S. respectfully requests this Court REVERSE the decision of the trial court to exclude the testimony of his expert witness, direct a verdict, and to declare that the Safe School Climate Act has repealed the South Carolina Tort Claims Act. K.S. respectfully requests this Court remand the instant action for a new trial.

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CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies Appellants' Final Brief and Final Reply Brief
complies with Rule 211(b), South Carolina Appellate Court Rules.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err in granting a directed verdict to the Respondent?
- II. Does South Carolina require a plaintiff in a negligence action to prove a significant physical injury in conjunction with mental health injuries?
- III. Did the trial court err in excluding the testimony of Appellant's expert witness?
- IV. Does the Safe School Climate Act waive the South Carolina Tort Claims Act under the facts of the instant action?

STATEMENT OF THE CASE

Appellant filed the initial complaint on January 18, 2017. (R. p. 18-31) Respondent filed an answer on February 21, 2017. (R. p. 32-39) Appellant filed an amended complaint on March 16, 2017, and the Respondent filed an amended answer on April 3, 2017. (R. p. 40-59.) Respondent filed a motion in limine to exclude Appellant's expert from testifying on February 7, 2019. (R. p. 64-70.) Respondent also filed a motion for summary judgment on February 28, 2019. (R. p. 87-88.) The parties submitted memoranda of law which briefed the subjects for trial. (R. p. 71-86, R. p. 89-131.) The instant action was called for trial on May 28, 2019. The trial judge heard and denied Respondent's motions at the beginning of trial. The trial judge also heard and rejected arguments raised in Appellant's pre-trial brief that the South Carolina Tort Claims Act had been repealed by the later adoption of the Safe Schools Climate Act.

After three days of trial, the trial judge directed a verdict on May 30, 2019 finding:

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 Kian'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.** I could touch the hood of your car. That might be an unwanted touching. Maybe a car is a bad thing, because it's not so closely to the person that it'd be an assault. But I'll use it as an example. I can touch it, or I can scratch it with my key. One is damage, and the other is not. An unwanted touching would be an assault for which Ms. Moody would be liable. And when we talk about damages in -- in these kinds of cases -- let's see. Ralph King 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. p. 453-454)(Emphasis added.)

The trial issued a Form 4 on June 7, 2019. (R. p. 1-3.) The instant appeal was filed on June 11, 2019. (R. p. 132-133.)

STANDARD OF REVIEW

When reviewing the circuit court's ruling on a directed verdict motion, this court must apply the same standard as the circuit court “by viewing 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, 27-28, 602 S.E.2d 772, 782 (2004). An appellate court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). “When the evidence yields only one inference, a directed verdict in favor of the moving party is proper.” Wright v. Craft, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006). “On the other hand, the [circuit] court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt.” Id. “When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010).

When ruling on a motion for a directed verdict, the trial court is concerned with 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) “Certain situations involve mixed question of law and fact. Statutory interpretation is a question of law. But whether the facts of a case were correctly applied to a statute is a question of fact. Bursey v. S.C. Dep't of Health & Env'tl. Control, 369 S.C. 176, 185, 631 S.E.2d 899, 904 (2006), overruled on other grounds by Allison v. W.L. Gore & Assocs., 394 S.C. 185, 714 S.E.2d 547 (2011).

STATEMENT OF THE FACTS

K.S. was a first grader at Respondent's North Springs Elementary ("North Springs") in the fall of 2011. K.S. attended kindergarten at North Springs, and he had no disciplinary or behavioral issues that year. (R. p. 435, lines 3-7.) K.S. loved kindergarten and had no issues going to school. (R. p. 152, line 21-p. 153, line 10; p. 179, line 19-p. 180, line 9.) Prior to first grade, K.S. was a normal five year old boy without anxiety issues. (R. p. 435, line 14-22) K.S.'s mother, Gina, is employed by Respondent as the attendance secretary at North Springs at the beginning K.S.'s first grade year. (R. p. 434, lines 13-21.) K.S.'s father, James, is a retired U.S. Army Master Sergeant. (R. p. 173, lines 17-20.)

K.S. was assigned to Jan Moody's (hereinafter "Moody") first grade class¹. (R. p. 163, lines 14-15.) Mr. & Mrs. Seeger testified that K.S. began to cry before going to school just a few weeks into his first grade school year. (R. p. 181, line 23-p. 181, line 12; p. 437, lines 13-22.) K.S.'s crying was described by his mother as "shaking upset." (R. p. 439, lines 15-24.) K.S. also complained of stomach aches as an excuse not to go to school. (R. p. 437, line 23-p. 419, line 5.) K.S.'s crying was described by his father as "deep breathing and sobbing. The look in his eye was of fear." (R. p. 182, line 25-p. 183, line 8.)

The Seegers then reached out to Moody and the school administration to find out what was causing K.S.'s crying, apprehension, and terror regarding school. Ms. Germann, an assistant principal and the grade level administrator, told Mrs. Seeger that K.S. was a "mama's boy and he misses his mom, and he wants an excuse to come see you." (R. p. 118, lines 9-15) The Seegers set up a parent teacher conference with Moody. Mr. Seeger also sent K.S. little notes of encouragement, and ate lunch with K.S. in the cafeteria. (R. p. 616-617; R. p. 184, lines 5-24; p.

¹ K.S. is now in the 9th grade.

214, lines 20-24.) Moody gave the appearance of wanting to help. (R. p. 443, lines 6-8.) Mr. Seeger thought Moody was a nice person and had no idea that she was the problem until later. (R. p. 214, lines 7-17.)

Mr. & Mrs. Seeger finally learned of Moody's inappropriate conduct towards K.S. because of an incident that occurred in the school cafeteria on October 20, 2011 (hereinafter 'the cafeteria incident.') K.S. accidentally dropped his tray of food in the cafeteria as he was leaving the line. Cafeteria worker Belinda Fenwick later gave the following written statement to North Spring's principal Dr. David Holzendorf:

"I then told him [K.S.] to go and get another lunch tray, and he went back through the serving line and come out with a corn dog. His teacher Ms. Moody approached him very harshly to go and get another tray. [...] I observed his teacher (Ms. Moody) **grab him very forcefully by his arm** and tell him as she was walking him with him back to the table '**I will give you something to cry for.**' I feel that no student should ever be treated the way he was treated.

(R. p. 587-588)(Emphasis added)

At trial, K.S. testified as follows:

Q Okay. Now, I mentioned the cafeteria. Tell the --tell the jury what happened in the cafeteria.

A I was going through the lunch line with my corn dog and a drink. And once I walked out, I handed the lunch lady my ticket to buy the lunch. And when I saw Ms. Moody, I dropped my tray. And then when the lunch ladies came over and helped me clean it up and Ms. Moody started walking over, and then **she grabbed my arm** and told me to go get another corn dog. So I went through and just grabbed a corn dog. And then she yelled at me to go get a tray. So I went and got a tray. And then the lady, like, took the other meal off and put that meal on. So then she grabbed my arm took me to another table, where I sat alone.

Q Okay. When -- when you're talking about her grabbing your arm, what -- can you tell the jury exactly how it happened?

A **She would claw my arm with her nails.**

Q **Did it hurt?**

A **Yes.**

Q **Did it make you feel good that she was doing that, or did it make you more scared?**

A **Made me more scared.**

Q Do you remember her saying anything to you in the --in -- in the

cafeteria?

A Yes.

Q Okay. What do you remember her saying?

A **She said, "Stop crying or I'll make you something to cry about."**

(R. p. 158, line 13-p. 159, line 17.)(Emphasis added.)

The encounter was also captured on the school's video surveillance system. Both Mr. Seeger and Dr. Holzendorf testified as to their recollection of what the video showed². Mr. Seeger testified that the grab was "forceful grab and pull." (R. p. 189, lines 10-16.) Dr. Holzendorf testified that he could not determine Moody's forcefulness but that the video confirmed Ms. Fenwick's observation of physical contact. (R. p. 379, lines 11-21.) Mrs. Seeger learned from the school nurse that something involving K.S. and Moody had happened in the cafeteria. (R. p. 441, 16-22.) Mrs. Seeger then informed her husband. (R. p. 441, line 25-p. 423, line 4.) Mr. Seeger testified that K.S. began "bawling" when he saw him after the cafeteria incident. (R. p. 187, lines 21-23³) The Seegers then brought this incident to the attention of Dr. Holzendorf and demanded a response. (R. p. 189, line 20-pg. 190, line 7.) When he was being lead to his new classroom, K.S. began to cry because he said "Moody's in the hallway." (R. p. 190, lines 16-25.)

Unknown to K.S.'s parents but known to Respondent, Moody was in a downward spiral of unprofessional conduct in the fall of 2011. On September 29, 2011, two members of the school staff, Media Specialist Tabitha Glover and her assistant, Susan Garris, witnessed Moody act inappropriately towards a different, unidentified student ("Student A.") Both Ms. Glover and Ms. Garris considered Moody's interaction with Student A to be a violation of the Respondent's anti-bullying policy, Policy JICFAA and JICFAA-R (hereinafter "JICFAA." (R. p. 551-556, 581-582, 585-587.)

² The video was not entered into evidence or shown to the jury.

³ The trial transcript contains a scrivener's error. Mr. Seeger testified "immediately" not "immunity."

JICFAA prohibits “acts of harassment, intimidation or bullying of a student by students, staff and third parties” that “interfere with or disrupt a student's ability to learn and the school's responsibility to educate its students in a safe and orderly environment.” (R. p. 551-556.) Harassment, intimidation and bullying are defined by JICFAA and the South Carolina Safe School Climate Act⁴ as

a gesture, an electronic communication, or a written, **verbal, physical**, or sexual act that **is reasonably perceived to have the effect of:**

(a) **harming a student** physically **or emotionally** or damaging a student's property, **or placing a student in reasonable fear of personal harm** or property damage; **or**

(b) **insulting or demeaning a student** or group of students **causing substantial disruption in, or substantial interference** with, the orderly operation of the school.

(R. p. 552)(Emphasis added.)

Both Glover and Garris observed Moody humiliating Student A in front of Moody's entire class by saying “Oh my gosh, there is no way you can read that book,[sic] you will not be able to read word one in that book, so [sic] so put it back and pick out another one.” (R. p. 581-582, 585-586) Ms. Glover testified that Moody **yelled** that comment loud enough that the entire class heard her comment. (R. p. 237, lines 14-25.)(Emphasis added.) Ms. Garris testified that Moody's statement was so loud that she (Garris) and Moody's entire class heard it in the large media center. (R. p. 252, lines 8-25.) Ms. Glover and Ms. Garris thought the comment was very embarrassing to Student A, inappropriate, and intimidating. (R. p. 180, lines 1-9; pg. 182, lines 22-24; pg. 204, line 8-pg. 205, line 5.) Ms. Glover testified that she felt “distraught” even thinking about how Moody spoke to Student A. (R. p. 238, lines 17-25.) Ms. Glover reported Student A responded to Moody's outburst by crying when Moody embarrassed him in front of his entire class. (R. p. 239, lines 12-22; p. 249, lines 4-7.) JICFAA requires all employees of Respondent to report violations to the

⁴ S.C. Code § 59-63-120(1)

school's principal. (R. p. 551-556.) Both testified that they immediately reported the September 29th incident to Dr. Holzendorf. (R. p. 241, lines 11-19; p. 252, line 16-p. 253, line 3.)

Dr. Holzendorf recalled that he had spoken to both Ms. Garris and Ms. Glover regarding the September 29th incident involving Student A. (R. p. 354, lines 7-20) Dr. Holzendorf testified that he thought Moody's comments to Student A did not serve a legitimate education purpose and were "demeaning." (R. p. 354, lines 6-16.) Dr. Holzendorf acknowledged that Moody's comments emotionally harmed Student A and fit one of the definitions of bullying under the district's policy. (R. p. 551-556; R. p. 356, line 19-pg. 357, line 3.) Dr. Holzendorf testified that he could not recall whether he had spoken with Moody, the grade level administrator, Student A, Student A's parents, or any of the other students in Moody's class which would have included K.S. (R. p. 350, lines 8-15; p. 366, line 24-p. 367, line 10) Dr. Holzendorf could not recall any of the actions that he had taken that would be consistent with the "prompt and thorough investigation" of the incident involving Student A as required by JICFAA. (R. p. 532-537; R. p. 357, lines 4-12.) Dr. Holzendorf's contemporaneously made notes did not reflect any sort of interactions with Moody regarding the September 29th incident. (R. p. 635-654; R. p. 349, line 22-p. 350, line 6.) Dr. Holzendorf conceded that the lack of documentation meant it was "likely" he did not even speak to Moody about the September 29th incident. (R. p. 635-654; R. p. 343, line 22-p. 344, line 6.) Dr. Holzendorf testified that at the time in his judgment he did not feel the September 29th incident warranted action. (R. p. 393, lines 16-21.) Holzendorf admitted he began an investigation of Moody on October 20th, and not September 29th. (R. p. 380, lines 8-11.) Dr. Holzendorf also admitted that he did not impose any of the required sanctions on Moody for violating JICFAA on September 29, 2011. (R. p. 551-556; p. 393, line 4-21.)

Dr. Karen Lovett, Respondent's Executive director for human resources, testified she did

not know about the September 29th incident involving Student A until much later. (R. p. 396, line 19-p. 397, line 3; p. 398, lines 19-22.) Dr. Lovett was of the opinion—after much prodding—that the September 29th incident violated JICFAA. (R. p. 398, line 19-p. 401, line 18.) Dr. Lovett also testified that the statement on September 29th was embarrassing to Student A. (R. p. 402, lines 10-14.) Dr. Lovett testified—again after much prodding—that Dr. Holzendorf should have initiated an investigation of Moody and contacted the district after receiving the September 29th incident report. (R. p.655-661; R. p. 404, line 22-p. 405, line 13.) Dr. Lovett also acknowledged that waiting 21 days to investigate the allegations of Moody’s misconduct did not fit the definition of “promptly” and was not reasonable. (R. p. 406, lines 3-14.) Dr. Lovett also testified that she did not see any evidence of a “thorough” investigation of the September 29th incident as required by JICFAA. (R. p. 406, line 15-p. 408, line 8.) Moody stated to Dr. Holzendorf and Dr. Lovett when Respondent finally started its investigation that the September 29th incident occurred on a “very dark, ugly day” in her life. (R. p. 416, lines 1-14; R. p. 609-613). This “very dark, ugly day” was part of the personal issues which Dr. Lovett testified was one of the reasons Respondent took action against Moody. (R. p. 412, line 21-pg. 414, line 6.)

The second incident involving Moody—and the first incident documented by Respondent between Moody and K.S.—occurred on October 10, 2011 (“the October 10th incident.”) Ms. Glover and Ms. Garris again witnessed Moody act inappropriately towards K.S. regarding his crying. Ms. Glover wrote that Moody stated when her class arrived “in a loud tone ‘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.’” (R. p. 585-586.) Ms. Garris wrote that Moody loudly proclaimed when she came back to the media center after hearing that K.S. had behaved normally “Of course he’s good for you, he has cried all day in my class.” (R. p. 583-584.) Ms. Glover testified the

incident involving K.S. occurred either the next time or the second time Moody's class came to the media center after the September 29th incident. (R. p. 244 line 15-pg. 245, line 6.) Ms. Glover elaborated on the incident in her trial testimony that Moody's statement was said loudly in front of the whole class. (R. p. 244, line 17-p. 245, line 9.) Ms. Glover observed K.S. immediately put his head down and begin to sob. (R. p. 245, lines 10-16.)

Ms. Glover testified unequivocally that she informed Dr. Holzendorf of the October 10th incident within 24 hours after observing Moody's treatment of K.S. (R. p. 246, line 10-p. 247, line 15.) Ms. Garris testified that she hand delivered her written report regarding the October 10th incident directly to Dr. Holzendorf on or about October 10th or 11th. (R. p. 255, line 18-p. 256, line 12.) Dr. Holzendorf's recollection was the meeting with Ms. Glover occurred sometime after the cafeteria incident. (R. p. 358, line 19-p. 359, line 20.) Mr. Seeger had no idea the October 10th incident had even occurred until much later. (R. p. 196, lines 4-10.) Moody did not deny the incident on October 10th or her statement in the media center regarding K.S. when questioned about it by Dr. Lovett on November 3, 2011. (R. p. 489, lines 14-17; R. p. 601-604.) Dr. Lovett also testified that Dr. Holzendorf should have started an investigation on October 10th if he had received the complaints from Ms. Glover and Ms. Garris. (R. p. 411, lines 14-21.)

On October 18, 2011, Dr. Holzendorf documented a meeting that occurred between Moody and himself. (R. p. 596-597.) In that meeting, Moody informed Dr. Holzendorf that K.S. had been crying in her classroom "for the last three weeks." (R. p. 596-597.) Dr. Holzendorf testified at trial that "for the last three weeks" would have put the beginning of the crying episodes into sometime in September. (R. p. 370, lines 10-15.) The "for the last three weeks" would have placed the beginning of K.S.'s crying before the first incident involving Student A. And yet, Dr. Holzendorf still did nothing. Dr. Holzendorf elaborated that he thought the "missing his dad" statement was in

relation to a deployment by Mr. Seeger. (R. p. 368, lines 1-24; p. 394, lines 3-17.) Dr. Holzendorf was unaware of Mr. Seeger's deployment status and took no steps to find out. (R. p. 375, lines 3-17.) The only time Mr. Seeger was ever deployed overseas occurred during Operation Desert Storm long before K.S. was born. (R. p. 175, lines 14-15.) Mr. Seeger did travel within the United States for work, but K.S. had never experienced any episodes of crying while Mr. Seeger was traveling. (R. p. 177, line 15-p. 177, line 23.) Dr. Holzendorf admitted that he did not consult with the school counselor, Ms. Williams, regarding K.S.'s crying. (R. p. 369, lines 7-9; p. 371, lines 10-21.)

Dr. Holzendorf finally initiated an investigation into Moody's conduct after the October 20th cafeteria incident. (R. p. 601-627.) A recorded recollection prepared by Dr. Lovett contains the following statement from Dr. Holzendorf:

DH: Through different incidents, those statements came out as we were expanding our investigation. The media specialist came to me that day, concerned about the tone Ms. Moody used. I didn't put the two situations together until later.

(R. p. 612.)

Dr. Lovett testified that Moody should no longer be in a classroom. (R. p. 412, lines 18-25.) Dr. Lovett also testified she did not think Moody could return and be effective in the classroom "in her present state of mind." (R. p. 420, lines 2-5.) Dr. Lovett testified that the three incidents meant that Moody was far beyond corrective action and that "She was just not in a –a mental state of mind to be with children at that point in time." (R. p. 420, lines 21-25.) Dr. Lovett testified that Moody was capable of being a teacher as September 29 but lost that ability sometime by October 20. (R. p. 427, line 23–p. 428, line 5.) Moody was allowed to resign in lieu of termination by the district. (R. p. 416, line 15-p. 417, line 2.)

It was only after the October 20th cafeteria incident that K.S. finally opened up to Mr. &

Mrs. Seeger regarding Moody's treatment of him in class. K.S. related specific past incidents. K.S. testified that Moody would get in his face and loudly yell "Stop being such a crybaby." (R. p. 153, line 18-p. 154, line 12.) K.S. also testified that Moody would isolate him grabbing him by the arm, putting him in the hall, and would not let him participate in class activities. (R. p. 154, lines 13-19.) K.S. testified that Moody's conduct also included unwanted physical touching and grabbing. (R. p. 155, lines 12-19) K.S. testified that Moody encouraged other class members to make critical comments about K.S. in his presence, and allowed the students to form a "No Crying Club" to exclude K.S. from class activities. (R. p. 154, line 20-p. 156, line 3.) Moody confiscated the encouraging notes Mr. Seeger had included in K.S.'s lunch. (R. p. 616-617, 625-627.) Moody did not deny taking the notes but added she wanted K.S. to write notes to her. (R. p. 601-604.) K.S. also testified that Moody would grab him "forcefully" and put him the hall. (R. p. 155 lines 12-19.) K.S. testified that the grabbing and yelling started about a week after school started. (R. p. 157, lines 22-23) Moody's explanation as to why she isolated K.S. was because other students were "fussing" about K.S.'s crying. (R. p. 601-604.)

K.S. testified that he was afraid—and still is afraid—of Moody. (R. p. 157, lines 5-8.) K.S. testified that he takes medication to help him feel better. (R. p. 164, line 2-p. 165, line 1.) K.S. also testified that often feels anxious, hopeless, and trouble sleeping. (R. p. 165, line 5-p. 167, line 17.) Mr. Seeger testified that K.S. still has issues of anxiety, angry outbursts in the months and years since the incident. (R. p. 192, line 2-p. 193, line 16.) Mr. Seeger also testified while the "sadness and darkness of his eyes wasn't as pronounced" that K.S. was not the same. (R. p. 195, lines 11-20.) Mr. Seeger testified that over time he and his wife began to find out "how profoundly affected he [K.S.] was." (R. p. 198, lines 3-9.) Mr. Seeger also described K.S. as being "fidgety," his "anxiety level was through the roof," and that he (K.S.) chewed all of his nails off continually."

(R. p. 203, lines 14-20.) Mr. Seeger also testified that there are some period of time where K.S. is depressed, easily angered, and will not come out of his room. (R. p. 209, lines 10-13.) K.S. also has trouble sleeping. (R. p. 210, lines 5-15.)

K.S. received in-office therapy from a series of psychologists after being removed from Moody's class. (R. p. 193, line 19-p. 194, line 20; pg. 126, lines 3-9; p. 200, line 9-p. 203, line 3; p. 205, line 5-p. 208, line 3.) K.S. also received assistance of a school counselor during the rest of his elementary school time. (R. p. 204, line 17-p. 204, line 4.) K.S. also sees a psychiatrist who prescribes K.S. medication including Zoloft. (R. p. 208, lines 4-19.) K.S. has improved with medication, but K.S. struggles even with medication. (R. p. 209, line 21-p. 210, line 4.) The days K.S. does not take his medication are "rough." (R. p. 209, lines 7-9.)

Appellant also presented expert testimony from a forensic psychologist, Dr. David Englert. Dr. Englert testified that K.S. has persistent depressive disorder with anxious mood. (R. p. 287, lines 11-17; p. 294, lines 13-17.) Dr. Englert testified that K.S. started suffering mental health issues—specifically persistent depressive disorder—as a direct response to the events in 2011 involving Moody. (R. p. 296, line 25-p. 297, line 4; p. 302, line 21-p. 303, line 3.) Dr. Englert also opined K.S.'s mental health issues were not related to either his mother or the litigation. (R. p. 304, line 9-p. 305, line 15.) Dr. Englert opined that K.S.'s struggles began well before he was a teenager. (R. p. 315, line 24-p. 316, line 112.) Dr. Englert interviewed K.S. and observed K.S. "crying and shaking" at the mere mention of Moody's name. (R. p. 297, lines 8-23.) Dr. Englert opined that K.S.'s reaction was an authentic psychological reaction to the mere mention of Moody's name. (R. p. 298, lines 3-10.)

Appellant also proffered Dr. Alan McEvoy as an expert via a video recorded deposition on the subject of teacher-versus-student bullying and school district responses to teacher-versus-

student bullying. (R. p. 469, lines 17-21.) Respondent opposed Dr. McEvoy's acceptance as an expert by filing a motion in limine. The trial court did not permit Dr. McEvoy's deposition to be presented to the jury on the grounds that Dr. McEvoy's testimony was cumulative with other evidence. (R. p. 432, line 18-p. 433, line 20.)

LEGAL ARGUMENT

I. The trial court incorrectly directed a verdict on the issue of mental health damages.

The trial court erred in directed a verdict in favor of Respondent by finding the Appellant had not proved he had suffered an injury in Appellant's negligence action. The Supreme Court has held whether a plaintiff that sustained physical or bodily injury as a consequence of the shock, fright and emotional upset was a jury question. Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 606–08, 103 S.E.2d 265, 271–72 (1958). Emotional distress is properly recoverable under a negligence theory if there is a physical manifestation of those injuries. Babb v. Lee Cty. Landfill SC, LLC, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). A “physical manifestation” of emotional injuries means whether a plaintiff can show “medical treatment or other objective evidence of physical injury.” Dooley v. Richland Mem'l Hosp.,⁵ 283 S.C. 372, 375, 322 S.E.2d 669, 671 (1984).

The trial court clearly misapprehended the definition of “bodily injury” for the purposes of whether to submit the instant action to the jury. The Supreme Court answered this question many years ago when it held:

“In order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body.

⁵ Dooley was a case involving negligent infliction of mental distress when the hospital mistakenly told the Plaintiff Parents that their child was dead. The South Carolina Supreme Court has only allowed negligent infliction of mental distress for bystander liability. Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985). The Appellant's parents have not asserted any claim in the instant action. Appellant instead alleged a first party negligence claim. Dooley and Kinard are cited herein to demonstrate the types of evidence used to prove a mental health injury.

Having her nervous system injured and being made sick, in the manner she testified, constitutes bodily injury, and for which she should be entitled to recover damages in proportion to such injury, provided the proof establishes negligence on the part of defendant....”

Spaugh v. A. C. L. Railroad Co., 158 S.C. 25, 155 S.E. 145, 147 (1930)(Emphasis added)

The Supreme Court in Spaugh also held “suffering from a nervous breakdown, as a result of defendant's negligence, would support a verdict for the plaintiff, independent of any other injury she sustained.” Spaugh, *supra*. In Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 38–39, 448 S.E.2d 564, 567 (Ct. App. 1994), this Court—citing Spaugh—held 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. This Court held in Doe by Doe held the record “replete with evidence” that Doe had suffered “a severe mental injury.” *Id.* Citing Doe by Doe, the United States District Court of South Carolina found that suffering from severe emotional trauma including major depressive episodes was a sufficient mental injury upon which to base damages even in the absence of physical wounds. Zimbelman v. Savage, 745 F. Supp. 2d 664, 681 (D.S.C. 2010) Also citing Spaugh, this Court has held that emotional trauma can be a bodily injury for the purposes of insurance. State Farm Mut. Auto. Ins. Co. v. Ramsey, 295 S.C. 349, 350, 368 S.E.2d 477, 478 (Ct. App.), *aff'd*, 297 S.C. 71, 374 S.E.2d 896 (1988). The amount of damages suffered in a personal injury action is also a question for the fact-finder. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App. 2011); Hicks v. Herring, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965).

The Supreme Court in Dooley held the evidence that the Dooleys received no medical treatment for being “upset and nervous” and taking medication that had previously proscribed was insufficient as “objective evidence” of a mental health injury. Instead, a plaintiff alleging mental health injury must demonstrate a “physical manifestation” of the mental health injury. Dooley,

supra. A “physical manifestation” has been held to include crying, weight loss, sleep disturbances, inability to do housework, difficulty in socializing, and the inability to tolerate stress. Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985); Landreth v. Reed, 570 S.W.2d 486, 488 (Tex. Civ. App. 1978). A 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. Ford v. Hutson, 276 S.C. 157, 165, 276 S.E.2d 776, 780 (1981)

In the light most favorable to the Appellant, the Appellant proved a sufficient injury beyond “mere emotional discomfort.” Appellant and Appellant’s witnesses testified as to Appellant’s bodily injuries. Appellant himself testified he was grabbed and clawed by Moody. (R. p. 156, line 13-p. 157, line 17.) Respondent has not seriously contested that Moody grabbed K.S.’s arm in the cafeteria only the amount of force used. (R. p. 374, lines 11-21.) The actions of Moody putting her hands on K.S. “concerned” Dr. Holzendorf. (R. p. 588-593.) Mr. Seeger testified as to K.S.’s profound changes in emotions and demeanor. Mr. Seeger testified that K.S. still has issues of anxiety, angry outbursts in the months and years since the incident. (R. p. 192, line 2-p. 193, line 16.) Mr. Seeger also testified while the “sadness and darkness of his eyes wasn’t as pronounced” that K.S. was not the same. (R. p. 195, lines 11-20.) Mr. Seeger also testified that there are some periods of time where K.S. is depressed, easily angered, and will not come out of his room. (R. p. 209, lines 10-13.) K.S. also has trouble sleeping. (R. p. 210, lines 5-15.) Mr. Seeger also testified that Appellant has significantly changed in his response to discipline. (R. p. 231, line 23-p. 234, line 5) Appellant still suffers from a significant meltdown anytime Moody is mentioned. (R. p. 231, line 23-p. 234, line 5) Appellant and other witnesses testified to K.S.’s physical manifestations of psychological injury. Appellant’s expert opined that K.S. has a mental health diagnosis—his

nervous system has become sick—as result of his experiences. K.S. now takes medication—Zoloft—for depression.

Thus, whether the injuries inflicted on him were sufficient to cause damages is a question of fact that should have been left to the jury.

II. Appellant has proved the failure to exercise slight care by the Respondent.

The Appellant proved gross negligence by Respondent sufficient to submit to a jury to in the instant action. The Tort Claims Act exception regarding the failure to follow the law or policies is also subject to the gross negligence standard pursuant to the South Carolina Supreme Court precedent. Policies JIFAA and GCQF constitute a self-adopted standard of care, and the failure to follow its policies is relevant if even if the Tort Claims Act still applies.

To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Bloom v. Ravoir, 339 S.C. 417, 529 S.E.2d 710 (2000). A duty of care unquestionably exists between Appellant and Respondent. The Tort Claims Act provides that a governmental entity will not be liable for a loss resulting from any “responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student,... except where the responsibility or duty is exercised in a grossly negligent manner.” S.C. Code Ann. § 15–78–60(25); Doe v. Greenville Cty. Sch. Dist., 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007). A court will read into the Tort Claims Act language a gross negligence standard where cases in which at least one of the asserted exceptions contains the gross negligence standard while other asserted exceptions do not. Steinke v. S.C. Dep’t of Labor, Licensing & Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). When an

exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. Id.

The Tort Claims Act also provides:

(f) “Loss” means bodily injury, disease, death, **or damage** to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, **or** death, pain and suffering, **mental anguish**, and any other element of actual damages recoverable in actions for negligence, **but does not include the intentional infliction of emotional harm.**

S.C. Code Ann. § 15-78-30(f)(Emphasis added.)

Gross negligence is defined as “the failure to exercise slight care.” Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014). It has also been defined as “the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” Doe v. Greenville Cty. Sch. Dist., supra. Gross negligence “is a relative term, and means the absence of care that is necessary under the circumstances.” Id. Gross negligence is ordinarily a mixed question of law and fact. Faile v. S.C. Dep’t of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002) In the context of bad conduct by an employee, the liability of the governmental agency starts when it becomes aware of allegations of inappropriate conduct. Doe v. Greenville Cty. Sch. Dist., supra.

When the evidence supports but one reasonable inference, it is solely a question of law for the court, otherwise it is an issue best resolved by the jury. Clyburn v. Sumter County School District # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. Faile, supra. Moreover, the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner. Id.; Jackson v. South Carolina Dep’t of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct.App.1989); aff’d, 302 S.C. 519, 397 S.E.2d 377 (1990).

The general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002). In a given case, a court may establish and define the standard of care by looking to the common law, statutes, administrative regulations, industry standards, or a Respondent's own policies and guidelines. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006); Hurd v. Williamsburg Cty., 363 S.C. 421, 426–27, 611 S.E.2d 488, 491 (2005). Evidence of a deviation from its own internal policies is relevant to show that Respondent deviated from the standard of care, and is properly admitted to show the element of breach. Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005); Caldwell v. K–Mart Corp., 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct.App.1991).

The evidence in this case shows there is a question of fact whether Respondent failed to exercise slight care by failing to follow its own procedures and properly investigate the actions of Moody and remove Appellant from her classroom as soon as possible. It is also a question of fact of what did the Respondent know and when did it—particularly Dr. Holzendorf—know it.

Respondent employees Susan Garris and Tabitha Glover submitted oral and written reports to Principal Dr. Holzendorf documenting what they had heard Ms. Moody say to her students including K.S. (R. p. 581-586.) Even though K.S. was not the target, K.S. was in the media center during the first incident. (R. p. 249, lines 1-3.) K.S.'s crying in class began about this same time according to Moody's own report to Holzendorf. (R. p. 596-600.) Both Ms. Garris and Ms. Glover testified that they immediately reported the incident to Dr. Holzendorf. (R. p. 241, lines 11-19; p. 252, line 16-p. 253, line 3.) Dr. Holzendorf recalled that he had spoken to both Ms. Garris and Ms. Glover regarding the September 29th incident. (R. p. 354, lines 7-20.) Ms. Glover testified she informed Dr. Holzendorf of the October 10th incident involving Moody and K.S. within 24 hours.

(R. p. 246, line 110-p. 247, line 15.) Ms. Garris testified that she hand delivered her written report of what she observed directly to Dr. Holzendorf on or about October 10th or 11th. (R. p. 255, line 18-p. 256, line 12.) Dr. Holzendorf admitted he started his investigation of Moody on October 20, 2011. (R. p. 430, lines 8-12.)

In the light most favorable to the Appellant, Ms. Glover and Ms. Garris followed Respondent's JIFAA policy after witnessing two incidents of "bullying, intimation and harassment." In the light most favorable, both Ms. Glover and Ms. Garris spoke to Dr. Holzendorf and submitted written reports regarding Moody's conduct on the days the incidents took place. Dr. Holzendorf took no corrective action towards Ms. Moody before October 20, 2011 despite two prior reports given to him regarding Moody's bullying conduct towards Student A and K.S. Dr. Holzendorf was required to take action by two separate policies, JIFAA and GCQF, to "promptly and thoroughly" investigate a report of "bullying, harassment and intimidation" and report receipt of the allegation to the Respondent. Resolving the factual disputes in Appellant's favor, Dr. Holzendorf did nothing despite receiving two reports of misconduct.

"Slight care" in this context means the failure to act despite receiving a complaint. Smart by Clark v. Hampton Cty. Sch. Dist. No. 2, 315 S.C. 192, 195, 432 S.E.2d 487, 489 (Ct. App. 1993). Policies JIFAA and GCQF do not contain discretionary language. They both contain mandatory language requiring action, and no action occurred until after the damage had been done.

For these reasons, the instant action should be remanded for trial.

III. The trial court erred in excluding the testimony of Appellant's expert witness on school bullying.

The trial court erred when it ruled that the testimony of Appellant's expert, Dr. Alan McEvoy, should be excluded. The trial court made the following comment:

THE COURT: Well, and one of the reasons that motions in limine need to be renewed is, you know, because they're not final decisions, or those objections need to be renewed. And they're always very difficult for the Court to make a decision, not having heard the testimony of the witnesses and not knowing the case the way, of course, the parties and counsel know the case.

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. I-- I mean, 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 that there's anything particularly unique about the situation.

There's been testimony as to 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 -- 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.** And therefore, the motion to exclude the testimony of Dr. Alan McAvoy is granted.

(R. p. 432, line 18-p. 433, line 20.)(Emphasis added.)

A. The trial court did not properly apply Rule 403, SCRE to Dr. McEvoy's testimony.

The trial court relied upon Rule 403, SCRE to exclude Dr. McEvoy's testimony. Judge Richard Posner offered the following definition of "cumulative" evidence:

Evidence is "cumulative" when it adds very little to the probative force of the other evidence in the case, so 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).

Cumulative evidence has also been "tersely defined as additional evidence of the same kind to the same point." Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 398-99 (1938). Evidence is not cumulative in the legal sense if it tends to establish the same general result but does so by proof of a new and distinct fact. Id. Black's Law Dictionary defines

“cumulative evidence” as “[a]dditional evidence of the same character as existing evidence and that supports a fact established by the existing evidence (esp. that which does not need further support).” Black’s Law Dictionary 577 (7th ed.1999). For instance, a party was not allowed, pursuant to Rule 403, FRE⁶, to enter evidence of uncharged statute that forbade driving a boat while intoxicated when the record contained evidence of intoxication. Littleton v. McNeely, 562 F.3d 880, 891 (8th Cir. 2009).

In contrast, the admission of five 9-1-1 recordings from various witness was not cumulative when the recordings were used as evidence to show that the accused had not slept through a shootout. United States v. Edwards, 540 F.3d 1156, 1162–63 (10th Cir. 2008). The admission of testimony of three different witnesses who testified as to the defendant’s flight from prosecution was not cumulative because each witness testified to different portions of the flight. United States v. Urbina, 431 F.3d 305, 312 (8th Cir. 2005). The Arizona Court of Appeals held that two experts regarding the same issue but offering meaningfully differing opinions was not cumulative. Felipe v. Theme Tech Corp., 334 P.3d 210, 216–17 (Ariz. Ct. App. 2014). The North Carolina Court of Appeals held that the testimony of an expert was not cumulative when the expert offered an opinion of a character trait that was stridently opposed by the prosecution. State v. Tatum-Wade, 747 S.E.2d 382, 387 (N.C. Ct. App. 2013). The Texas Court of Appeals held the admission of photos of a victim’s injuries was not cumulative with the testimony of an officer describing those injuries. Hill v. State, 392 S.W.3d 850, 856 (Tex. App. 2013). This Court ruled that the admission of a mug shot photo was not cumulative because the defendant’s challenge of the accuracy of the lineup was a central issue in the trial. State v. Stephens, 398 S.C. 314, 322, 728 S.E.2d 68, 72 (Ct. App. 2012).

⁶ Rule 403, FRE, is no longer identical to Rule 403, SCRE after December 1, 2011. However, this Court has already ruled the difference between the federal and South Carolina rule is “stylistic only.” State v. Gray, 408 S.C. 601, 617, 759 S.E.2d 160, 169 fn. 5 (Ct. App. 2014)

The issue of whether K.S. was the victim of bullying was the paramount issue during trial. It was not and had not been conceded by Respondent. Respondent also consistently challenged during the course of the trial whether Moody's actions had damaged K.S. Respondent's defense theory sought to minimize both the nature and duration of K.S.'s treatment by Moody. Said differently, Respondent said that Moody's treatment of K.S. was not that bad and did not go on that long. The following exchanges are indicative of this theory:

Q And then, the cafeteria incident happened. And later that day, you were switched to a new class, correct?

A Yes.

Q To Ms. Shipman's class?

A Yes, ma'am.

Q And you never saw Ms. Moody again, right?

A Yes, ma'am.

Q Okay. And you were happy when you moved to the new class, correct?

A Yes, ma'am.

Q And your mood got better?

A Yes, ma'am.

Q You didn't cry in school anymore?

A Yes.

Q And things went back to normal for you?

A Yes, ma'am.

(R. p. 171, lines 5-21)

Q All right. You would agree that there other stressors and other things that make K.S. anxious and upset as a teenager, other than just thinking about Ms. Moody in first grade?

A That's why we didn't pursue any medical -- prescription medicine or seeing if there was a -- a diagnosis.

Q Yeah. He gets upset, for example, if you ground him?

A Yeah.

Q Take his electronic away?

A Yes.

Q All right. Not getting to hang out with friends?

A Yes.

(R. p. 230, lines 9-22)

Q Yeah. All right. And it's not unusual for a 6-year-old not getting his way to cry?

A Yes. That's true.

(R. p. 310, lines 23-25)

Q Any one thing that happened here that's serious enough to be bullying to you?

A The October 20th incident led to a -- to a -- for us to believe -- and I really believe that the October 20th incident -- incident, based on my experience, the seven years that I was principal, would alone triggered the same reaction that I had, whether the October 10th or ---

Q Sure.

A --- or the October -- or the September 29th incident took place. You know, I've had situations where we've --we've done the same thing, so ---

Q All right.

A Yeah.

Q So that took care of the problem?

A As far as I know.

(R. p. 389, line 22-p. 391, line 11.)

To rebut this theory, Dr. McEvoy testified that Moody's conduct was that bad and it went on far too long. (R. p. 500, line 19-p. 502, line 22; p. 505, line 6-p. 506, line 3.)

Dr. McEvoy's testimony also went far beyond just "repeating the definition of bullying." 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 not figure it out (R. p. 488, lines 14-22; p. 491, lines 5-24; (R. 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

9-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 Holzendorf 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.)

The District placed Dr. Holzendorf in charge of interpreting and enforcing policy JICFAA. (R. p. 551-556.) Dr. Holzendorf testified he had not been specifically trained on JICFAA beyond watching some slides. (R. p. 317, lines 10-15.) Dr. Holzendorf did not know the warning signs of bullying. (R. p. 317, lines 10-15.) Dr. Holzendorf testified that he did not think Moody's behavior on September 29th was bullying or warranted an investigation. (R. p. 393, lines 16-21.) Respondent's counsel also elicited the following testimony from Dr. Holzendorf:

Q All right. Is -- is crying an unusual response for a 6-year-old who gets fussed at by an adult?

A No.

Q All right. Any report of this student crying, other than that particular day?

A Not that I'm aware of.

Q All right. Would you expect a first-grader to be able to get over getting fussed at by a teacher?

A I would imagine, eventually. Yeah.

Q Sure.

A More than likely, they would -- the next day it would probably be over.

(R. p. 381, lines 8-19)

The trial court's comment that the policy "had been beaten to death" also belies a level of second guessing Appellant's trial strategy and not an assessment of the merits of Dr. McEvoy's testimony. Trial courts must resist the temptation to "second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed ... and his

best judgment as to the attitudes and sympathies of judge and jury.” Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir.1987).

B. Dr. McEvoy should have been admitted as an expert.

“The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the trial court's discretion.” Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010); State v. Harris, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995). A circuit court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law. State v. Jones, 423 S.C. 631, 638, 817 S.E.2d 268, 271 (2018). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003).

Rule 702, SCRE, provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education[] may testify thereto in the form of an opinion or otherwise.” A witness is allowed to testify as an expert as long as the witness has “acquired by study or practical experience such knowledge of the subject matter of [their] testimony as would enable [them] to give guidance and assistance to the jury in resolving a factual issue [that] is beyond the scope of the jury's good judgment and common knowledge.” State v. Anderson, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014). “Th[e] language [in Rule 702] makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. It makes clear that any such knowledge might become the subject of expert testimony.” Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Reliability is a central feature of Rule 702 admissibility. Id.

Thus, the trial court was required to make three inquiries: whether “the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” Watson, 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,” although he “need not be a specialist in the particular branch of the field.” Id. Finally, the substance of the testimony must be reliable. Id. It is this final requirement of reliability which is the central feature of the inquiry. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

However, “the reliability of a witness's testimony is not a pre[]requisite to determining whether or not the witness is an expert.” State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012). “The expertise, [the] reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony.” Id. at 388, 728 S.E.2d at 474-75. “[A]ll expert testimony, not just scientific expert testimony, must be vetted for its reliability prior to its admission at trial.” Id. at 388, 728 S.E.2d at 474. The admissibility of *scientific* evidence depends upon “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991)(Emphasis in original.) However, the Supreme Court requires a review on an *ad hoc* basis for nonscientific testimony because it has declined to set a general test due to the multitude of challenges which may arise. Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012). Thus, there is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence. State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015). Reliability is established by a nonscientific expert by when he or she

applies his knowledge gained from his or her training and experience to a set of facts. Whaley, supra.

1. Beyond ordinary knowledge of juror

Does the proffered witness possess more knowledge that the jury would have common knowledge? If that answer is “yes” then that is all Rule 702 requires. State v. Mealor, 425 S.C. 625, 652, 825 S.E.2d 53, 68 (Ct. App. 2019). Stated differently, is the subject matter beyond the ordinary knowledge of the jury? If so, an expert may be allowed to explain the matter to the jury. Watson, 389 S.C. at 446, 699 S.E.2d at 175. Respondent did not make any argument to point that prevention of teacher-versus-student bullying and school district responses to teacher-versus-student bullying are topics within the common knowledge of the jury.

Dr. McEvoy testified he has a doctorate degree in sociology. (R. p. 462, lines 3-8). Dr. McEvoy testified that he studies the topic of school bullying with a particular emphasis on teacher vs. student bullying. (R. p. 462, lines 18-22.) Dr. McEvoy has taught classes on the sociology of education, deviant behavior, and patterns of violence. (R. p. 462, line 22-p. 463, line 10.) Dr. McEvoy has conducted “dozens” of in-service training sessions for schools and reviewed their policies on teacher vs. student bullying. (R. p. 463, lines 11-15.) Dr. McEvoy published numerous papers and what he believes to be the first study on teacher vs. student bullying in 2005, and published the largest study in the country on teachers who bully students in 2018. (R. p. 463, line 16- p. 464, line 5.) Dr. McEvoy started studying teacher vs. student bullying in the 1990s. (R. p. 464, line 6-p. 446, line 7.) McEvoy testified that he was familiar with the national standard of care as well as the standard of care adopted by Respondent. (R. p. 467, lines 3-20; p. 468, line 10-p. 464, line 16.) Dr. McEvoy also testified he had written several books on the impacts on trauma victims. (R. p. 525, lines 2-20.)

There was no evidence before the trial court that the typical juror has an understanding of any of these issues. Dr. McEvoy testified that he has conducted what he believes to be the first major study of the teacher-on-student bullying issue in 2005. (R. p. 463, line 16-p. 464, line 5.) Dr. McEvoy also testified that is very little research on teacher-on-student bullying while in contrast there is a lot of research on the subject of student-on-student bullying. (R. p. 473, line 17-p. 474, line 11.)

Clearly, Dr. McEvoy had more knowledge than the jury on the topic of teacher-on-student bullying and related topics.

2. Requisite Knowledge

Second, the expert must have “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,” although he “need not be a specialist in the particular branch of the field.” Watson, supra. Dr. McEvoy testified he has “acquired by study or practical experience such knowledge of the subject matter” on the topics of teacher-versus-student bullying and school district responses to teacher-versus-student bullying. Dr. McEvoy testified he has a doctorate degree in sociology. (R. p. 462, lines 3-8). He has been continuously employed as a university professor since 1975. (R. p. 462, 9-13.) Dr. McEvoy testified that he studies the topic of school bullying with a particular emphasis on teacher vs. student bullying. (R. p. 462, lines 18-22.) Dr. McEvoy has taught classes on the sociology of education, deviant behavior, and patterns of violence. (R. p. 462, line 22-p. 463, line 10.) Dr. McEvoy has conducted “dozens” of in-service training sessions for schools and reviewed their policies on teacher vs. student bullying. (R. p. 463, lines 11-15.) Dr. McEvoy published numerous papers and what he believes to be the first study on teacher vs. student bullying in 2005, and the largest in 2018. (R. p. 463, line 16-p. 464, line 5.) Dr. McEvoy started studying teacher vs. student bullying in the 1990s. (R. p. 464, line 6-p. 465, line

7.) Dr. McEvoy has testified six or seven times on behalf of both students and districts. (R. p. 466, lines 15-20.). Dr. McEvoy testified that he reviewed Respondent's anti-bullying policy, all of the depositions, as well as his own research to prepare for his testimony. (R. p. 466, line 21-pg. 9, 2.) Dr. McEvoy testified that he was familiar with the national standard of care as well as the standard of care adopted by Respondent. (R. p. 467, lines 3-20; p. 468, line 10-p. 469, line 16.) Dr. McEvoy also testified he had written several books on the impacts on trauma victims. (R. p. 525, lines 2-20.)

Respondent also raised Dr. McEvoy's unfamiliarity with an alleged South Carolina standard of care for teacher vs. student bullying. Dr. Lovett testified in her deposition, one of the depositions relied upon by Dr. McEvoy, as follows:

Q: Are there any national or state standards regarding the investigation of teacher/staff abuse of students?

A: Not that I'm aware of. We abide by our district board policy.

(R. p. 129, lines 16-20)

Q: But you're in -- at least, this is the policy that you go by when you're investigating allegations of teacher bullying or harassment towards students?

A: Yes.

Q: So this is -- this policy is what guides --should guide you, but should also guide the certified staff and classified staff?

A: This is one of several, yes.

Q: Are there any other policies that govern the certified or classified staff concerning teacher or certified staff conduct toward children regarding harassment or bullying?

A: This is the bullying policy. There is a staff conduct policy, but this is the bullying policy.

Q: Is the staff policy inconsistent or consistent with the bullying policy?

A. It's consistent.

(R. p. 130, line 15-p. 131, line 7⁷.)

A court may establish and define the standard of care by looking to the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016); Madison ex rel. Bryant, supra. Evidence of a party's deviation from its own internal policies is relevant to show the party deviated from the standard of care, and is properly admitted to show the element of breach. Peterson, supra; Caldwell, supra. The breach of a national standard of care is applicable to a breach of duty by a school district. Elledge, supra.

Respondent has not proffered an alternative standard of care apart from the two cited by Dr. McEvoy. Dr. Lovett—the witness that conducts investigations for Respondent—testified she was “unaware” of either a “national” or a “South Carolina” standard of care for investigating abuse of a student by a teacher or staff member. Instead, Dr. Lovett testified that the standard of care that Respondent by is the standard contained within their policy⁸. This is the same policy that Dr. McEvoy testified he reviewed in preparing for his testimony, and that this standard was consistent with the national standard known to Dr. McEvoy. Thus, Respondent’s policy is the only standard of care relevant in the instant action. Roddy, supra; Elledge, supra.

The Supreme Court abandoned the “locality” rule in actions in medical negligence actions in 1981; accountants in 1990, and legal malpractice actions in 1996. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 437–38, 472 S.E.2d 612, 614 (1996); King v. Williams, 276

⁷ R. p.471, lines 18-23.

⁸ Respondent’s policy was adopted pursuant to passed the Safe School Climate Act, S.C. Code § 59-63-110, *et. seq.* which required all South Carolina school districts before January 1, 2007 adopt anti-bullying policies. There has been no argument that Respondent’s policy is inconsistent or contrary to the Safe School Climate Act. Thus, Dr. McEvoy is familiar with the state standard of care such as it exists by and through Respondent’s policy.

S.C. 478, 279 S.E.2d 618 (1981); Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990). Thus, Respondent's assertion that Dr. McEvoy's testimony should be excluded for his alleged lack of knowledge regarding a "South Carolina" standard is specious.

Respondent has also raised that Dr. McEvoy has never been employed as a teacher within South Carolina. The Supreme Court has previously ruled that an expert "need not be a specialist in the particular branch of the field" to provide testimony. Watson, supra. The Supreme Court has also held that an expert need not be licensed in the State of South Carolina to provide expert testimony. J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 374–75, 635 S.E.2d 97, 103–04 (2006).

3. Reliability.

Dr. McEvoy testified that he applied his reviewed JICFAA, all of the depositions, as well as his own research to prepare for his testimony. (R. p. 466, line 21-p. 467, 2.) An expert is given wide latitude in determining the basis of his testimony." Bass v. S.C. Dep't of Soc. Servs., 414 S.C. 558, 572, 780 S.E.2d 252, 259 (2015). Respondent made no showing that Dr. McEvoy failed to apply his education and experience to the facts of this case.

Dr. McEvoy's testimony is also consistent with experts that provide testimony as to causation. A negligence claim may be established by circumstantial evidence showing that, through the exercise of reasonable diligence, Respondent should have known of Moody's abusive classroom conduct. Such testimony can be rendered by an expert witness testifying within the scope of their expertise. 5 Star, Inc. v. Ford Motor Co., 408 S.C. 362, 370–71, 759 S.E.2d 139, 143–44 (2014). Even testifying using the words "negligent" is permissible in the instance where gross negligence is involved. Bass, supra. This is the only instance in his trial testimony in which Dr. McEvoy uses the word "negligence" or variations thereof:

Q. What is it about in particular Dr. Holzendorf that – and his relationship to the policy that created a problem in this case?

A. My sense of Dr. Holzendorf is that he's probably a decent man. He was new to the job. And he was never given -- He was supposed to read the policy, but he was never given any guidelines on how to implement the policy particularly involving teacher conduct, how to investigate. He had no clue. The analogy I would use is, I remember teaching my two children how to drive when they were teenagers. And it would have been negligent of me to give them the keys to the car and say go off and drive without doing any training. And I think that's exactly what happened. The policy, that was the keys to the car. That was --And he was never trained on how to drive it. He was never trained on how to use it. So he made mistakes. He was negligent in some ways. He didn't follow the policy, according to all the testimony from Lovett and others, that he was confronted with some pretty egregious behavior, and he didn't follow policy. But he was also not trained to follow policy. So there was fault or negligence on his part up to a point, but also on the system itself that didn't train him.

(R. p. 494, pg. 36, line 15-p. 495, line 14.)

Dr. McEvoy's testimony is entirely consistent with the testimony that was allowed by the Supreme Court in Bass. Therefore, this testimony should be deemed reliable enough to be presented to the jury.

C. Importance of Dr. McEvoy's testimony

The importance of Dr. McEvoy's testimony—and the prejudice from its exclusion—can be demonstrated in the following exchange between Dr. McEvoy and Respondent's counsel:

This exchange is important in light of Respondent's repeated assertion that K.S. was not bullied. For instance:

Q: All right. As far as K.S. goes, the removal of him from Jan Moody's class and the removal of Jan Moody from the school solved the Seeger problem didn't it, as related to Jan Moody?

A: I would have to say it solved the problem of him having to have contact with her. It did not solve all the problems she created. And clearly, the testimony based upon the parents and even K.S.'s own testimony and the testimony of the therapist, he is still suffering from problems years later. He is now 12 years old, and it is six years later, and he is still suffering from what looks like something that parallels with PTSD.

Q: You don't question that at all, Dr. McEvoy, that a seventh or eighth grade boy is claiming to be suffering from getting yelled at or having to deal with a mean teacher for a couple months of first grade?

A: This child was subject to systematic trauma and what I would call emotional terrorism for a period of time and it has done damage, it has done emotional damage. The parents testified to this and the professional therapist has testified to this, so I rely on that judgment.

(R. p. 502, line 10-p. 503, line 9)

For the reasons set forth herein, it was an abuse of discretion to exclude Dr. McEvoy's testimony.

IV. The General Assembly repealed the South Carolina Tort Claims Act when it passed the Safe School Climate Act.

Respondent is not/was not entitled to a directed verdict under gross negligence because the General Assembly has repealed the South Carolina Tort Claims Act as it relates to the failure to follow the Safe Schools Climate Act. As a result, Appellant must prove Respondent's negligence by a preponderance of the evidence instead of a higher gross negligence standard. Additionally, the burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense. Niver v. South Carolina Dept. of Hwy. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct.App.1990).

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 412–13, 526 S.E.2d 716, 719 (2000); Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. State v. Baker, 310 S.C. 510, 427 S.E.2d 670 (1993). Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation. Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2d 153 (1988). In construing a statute, a court must assume the General Assembly was aware of past statutes, and a court is to give effect

to all the words in a statute. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997); Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Courts also must follow the rule of construction which states “*expressio unius est exclusio alterius*” or “*inclusio unius est exclusio alterius*” which means that “to express or include one thing implies the exclusion of another, or of the alternative.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000).

A court must presume 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). Courts are constrained to avoid a construction that would read a provision out of a statute, and must reconcile conflicts if possible. Ballard v. Ballard, 314 S.C. 40, 443 S.E.2d 802 (1994). Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to 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); Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984); Stone & Clamp, General Contractors v. Holmes, 217 S.C. 203, 60 S.E.2d 231 (1950). If, however, the statutes are incapable of any reasonable reconciliation, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy. 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 South Carolina Tort Claims Act, like all other statutes, is subject to repeal by the General Assembly. The South Carolina Supreme Court has previously held that the damages caps in the South Carolina Tort Claims Act were repealed by the General Assembly’s later adoption of the South Carolina Uniform Contribution Among Tortfeasors Act. Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994). To avoid an implied repeal, the General Assembly since Southeastern Freight has included specific exclusionary or exemption

language in a later passed statute. For instance, the General Assembly specifically excluded the South Carolina Tort Claims Act from tort reform in S.C. Code Ann. § 15-32-240. The South Carolina General Assembly last modified the exemptions to the waiver of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60 and S.C. Code Ann. § 15-78-70 on May 25, 2005. The General Assembly last modified the definitions under the Tort Claims Act, S.C. Code Ann. § 15-78-30, on April 16, 2008.

The Safe School Climate Act, S.C. Code § 59-63-110, *et. seq.* became effective on June 12, 2006. The purpose of the Safe School Climate Act was to require school districts to develop policies for the prevention of harassment, intimidation, or bullying. S.C. Code § 59-63-140(C) S.C. Code § 59-63-120 defines harassment, intimidation, or bullying as “gesture, an electronic communication, or a written, verbal, physical or sexual act” that is reasonably perceived to have the effect of “harming a student physically or emotionally, or placing a student in reasonable fear of personal harm.” S.C. Code § 59-63-130 forbids “a person” from engaging in acts of harassment, intimidation or bullying” of a student. The General Assembly required the various school districts in South Carolina pursuant to S.C. Code Ann. § 59-63-140 to adopt policies designed to detect and deter intimidation, harassment and bullying. S.C. Code Ann. § 59-63-140(A) does not create or mention a specific consequence if a school district fails to adopt a policy.

Safe School Climate Act contains the following provision:

(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.

(B) **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.**

S.C. Code Ann. § 59-63-150(Emphasis added)

S.C. Code Ann. § 59-63-150 both complements and conflicts with various provisions of the Tort Claims Act. For instance, the Tort Claims Act abrogated South Carolina's sovereign immunity making this state's governmental entities liable for their torts “in the same manner and to the same extent as ... private individual[s] ..., subject to the limitations upon liability and damages, contained herein.” S.C. Code Ann. § 15-78-40; Trousdell v. Cannon, 351 S.C. 636, 642, 572 S.E.2d 264, 267 (2002). S.C. Code Ann. § 59-63-150(A) and S.C. Code § 15-78-40 do not conflict. While the Safe School Act does not create a private right of action for a victim of bullying⁹, it does not prevent a victim from suing under a negligence theory since the government is liable for torts like a private individual. S.C. Code Ann. § 15-78-40. The Safe School Act does not contain a provision which excludes the repeal of the Tort Claims Act. This the only logical way to read S.C. Code Ann. § 59-63-150(A) to give full effect to the “create or alter” language.

In contrast, the language within the Safe School Climate Act is irreconcilable with the Tort Claims Act. S.C. Code Ann. § 59-63-150(A) is irreconcilable with the language within S.C. Code Ann. § 15-78-120 which sets a damage cap and eliminates punitive damages. It is also irreconcilable with S.C. Code Ann. § 15-32-240¹⁰. S.C. Code Ann. § 59-63-150(A) plainly states that it “must not be interpreted to prevent a victim from seeking redress pursuant to another available civil or criminal law.” The second part of S.C. Code Ann. § 59-63-150(A) states this provision does not “create or alter tort liability.” Neither the Tort Claims Act nor the Noneconomic Damages Statutes are torts, but are instead are statutes. This, S.C. Code Ann. § 59-

⁹ The Safe School Climate Act makes bullying, harassment and intimidation synonymous. Undersigned counsel uses “bullying” for the sake of simplicity but means all three prohibited behavior.

¹⁰ S.C. Code Ann. § 15-32-240 was made effective on July 1, 2005 which is before the effective date of the Safe School Climate Act.

63-150(A) provision should be rationally read to alter **statutory** provisions relating to caps and punitive damages.

S.C. Code Ann. § 59-63-150(B) is also irreconcilable with S.C. Code Ann. § 15-78-50(a), S.C. Code Ann. § 15-78-60(17), and S.C. Code Ann. § 15-78-70(a) which provide a governmental entity is only liable for “official duty” torts. Thus, the Safe School Climate Act’s obvious enforcement mechanism is to remove immunity for school districts for the failure to adopt and comply with their policies. Under the doctrine of *respondeat superior*, an employer is vicariously liable for injuries to a third party resulting from torts its employee commits within the scope of employment. Froneburger v. Smith, 406 S.C. 37, 52, 748 S.E.2d 625, 633 (Ct. App. 2013). A Appellant seeking recovery from an employer under a theory of *respondeat superior* must establish that the employment relationship existed at the time of the injuries and the employee was acting within the scope of employment. Armstrong v. Food Lion, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006). An employer can be liable for negligent hiring and supervision when the “employer knew or should have known that employing a specific person created an undue risk of harm to the public.” James v. Kelly Trucking Co., 377 S.C. 628, 632, 661 S.E.2d 329, 331 (2008). “Negligent hiring cases ‘generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.’ ” Kase v. Ebert, 392 S.C. 57, 64, 707 S.E.2d, 456, 459 (Ct. App. 2011) (quoting Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005)).

S.C. Code Ann. § 59-63-150(B) would be superfluous since all government employees are immune in their individual capacities if 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) is only necessary if the General Assembly intended to remove immunity from the entities and individuals either engaging in bullying or who fails to remedy the bullying after a report. This is clearly what the General

Assembly intended in light of its explicit refusal to create a separate private right of action but authorize suit under other civil or criminal law.

The only other way to interpret S.C. Code Ann. § 59-63-150(B) would be that the Safe School Climate Act did not repeal the Tort Claims Act. However, this would lead to several absurd results. A school district could refuse to adopt the policy pursuant to S.C. Code Ann. § 59-63-140. A school district could adopt a policy but yet refuse to enforce it. In either instance, the school district would be allowed to rely on the exemptions in S.C. Code Ann. § 15-78-60(4) and (17) to avoid liability when a child was the victim of bullying. This is the very absurd result the Respondent certainly will advocate for in response.

For these reasons, this Court should find that the gross negligence standard does not apply and that Appellant has sufficiently proved the existence of a question of fact.

CONCLUSION

For these reasons, Appellant respectfully requests this Court REVERSE the decision of the trial court to exclude the testimony of his expert witness, direct a verdict, and to declare that the Safe School Climate Act has repealed the South Carolina Tort Claims Act. Appellant respectfully requests this Court remand the instant action for a new trial.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHALND COUNTY
Richland County Circuit Court
Jocelyn Newman, Circuit Court Judge

RECEIVED
Jun 30 2020
SC Court of Appeals

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies Appellants' Final Brief and Final Reply Brief
complies with Rule 211(b), South Carolina Appellate Court Rules.

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Jul 15 2020

SC Court of Appeals

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Richland School District Two..... Respondent.

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court Properly Grant Respondent’s Motion for Directed Verdict on the Ground that Appellant Could Not Recover for Pure Emotional Distress Without Physical Injury on a Gross Negligence Claim?
2. Should the Trial Court Have Granted a Directed Verdict on the Ground that Appellant Could Not Prove a Gross Negligence Claim?
3. Did the Trial Court Properly Exclude the Testimony of Alan McEvoy, Ph.D.?
4. Did the Trial Court Properly Hold that the Safe School Climate Act Does Not Supersede the Tort Claims Act?

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 (1985), *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), and Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 (Ct. Com. Pl. 2014), 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).

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 Garriss, her assistant. Ms. Glover and Ms. Garriss 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. STANDARD OF REVIEW

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Arthurs v. Aiken Cnty.*, 338 S.C. 253, 260-61, 525 S.E.2d 542, 546 (Ct. App. 1999). “The trial court is concerned only with the existence or non-existence of evidence.” *Id.* When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. *Id.* Although the court is required to view the facts in the light most favorable to the nonmoving party, a court cannot ignore facts unfavorable to that party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *See Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000). It is not sufficient that one creates an inference that is not reasonable or an issue of fact that is not genuine. *Id.* The judge is not required to single out one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine or material. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002). However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. *Fay v. Grand Strand Reg’l Med. Ctr.*, 412 S.C. 185, 193, 771 S.E.2d 639, 643 (Ct. App. 2015). The courts have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. *Bell v. Bank of Abbeville*, 211 S.C. 167, 44

S.E.2d 328 (1947). Finally, this Court can affirm on any ground appearing in the record. See Rule 220(c), SCACR; *Sims v. Amisub of S.C.*, 408 S.C. 202, 214, 758 S.E.2d 187, 194 (Ct. App. 2014).

V. ARGUMENTS

A. **The Trial Court Properly Granted Richland Two's Motion For 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 v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 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 (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*, 341 S.C. 143 at 154, 533 S.E.2d 597 at 603, *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 distress¹ or a bystander negligent infliction of emotional distress claim², 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 incident. (R. pp. 229-230).

Finally, *Doe by Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994), upon which K.S. relies, is inapposite to this case.³ 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

¹ 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.

² 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 purely emotional damages in any ordinary negligence case, as K.S. urges.

³ K.S. did not argue the applicability of *Doe by Doe* to the trial court, further demonstrating that it is not applicable to this case.

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, *Doe* cannot, and should not, be extended to provide 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 trial court properly granted the

directed verdict and this Court should affirm.

B. As An Additional Sustaining Ground, K.S. Did Not Establish Gross Negligence As A Matter Of Law.

As correctly noted by the trial court, the South Carolina Tort Claims Act provides the exclusive remedy in tort actions against Richland Two. S.C. Code Ann. §§ 15-78-20(b), -30(d), -30(h). In passing the Act, the South Carolina Legislature intended to waive the State's sovereign immunity under certain circumstances while, at the same time, not subjecting the State to unlimited or unqualified liability. S.C. Code Ann. § 15-78-60. As an additional safeguard, the Legislature expressly provided that the Act's exceptions to the waiver of immunity "must be liberally construed in favor of limiting the liability" of covered entities. See S.C. Code Ann. § 15-78-20(f).

Section 15-78-60(25) is directly applicable to K.S.'s claims. It provides that a governmental entity is not liable for a loss resulting from the entity's exercise of a:

responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student . . . *except when the responsibility or duty is exercised in a grossly negligent manner.*

(*emphasis added*). It is undisputed that this immunity and the gross negligence standard apply to this case.

Gross negligence is "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); *Clyburn v. Sumter Cnty. Sch. Dist. No. 17*, 317 S.C. 50, 451 S.E.2d 885 (1994); *Richardson v. Hambright*, 296 S.C. 504, 374 S.E.2d 296 (1988). Gross negligence also has been defined as a failure to exercise even slight care. *Id.* While gross negligence ordinarily is a

mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887. Further, a governmental entity need not “disprove” gross negligence or notice; the burden is on the plaintiff to prove gross negligence. *Stewart v. Richland Mem’l Hosp.*, 350 S.C. 589, 567 S.E.2d 510 (Ct. App. 2002). Finally, the fact that a school district could have done more will not negate the fact that it exercised slight care. *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277. As long as school officials made some effort to take precautions to protect students from foreseeable harm, they will have exercised slight care and therefore cannot be held liable. *Id.* The ultimate conclusion generally hinges on whether a school district “knew or should have known” of the need to exercise control over the given situation. *Moore v. Berkeley Cnty. Sch. Dist.*, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1998).

In the present case, just as in *Etheredge* and *Clyburn*, the evidence supports but one reasonable inference—that Richland Two exercised at least slight care to protect the emotional well-being of K.S. after notice of Ms. Moody’s treatment of him. The evidence at trial showed that Richland Two adopted policies prohibiting intimidation, harassment, and bullying and trained employees and students regarding inappropriate conduct by teachers and students and how to address potential misconduct. (R. pp. 282, 317, 551-556, 557-578). The policies clearly prevent teacher intimidation, bullying, and other misconduct toward students. Moreover, Richland Two provided training for employees and students, emphasizing that bullying was not tolerated. (R. pp. 235, 557-578). The student training also stressed how students should report bullying of themselves or other students. (R. pp. 557-578). Finally, school officials took multiple actions to address K.S.’s crying and to determine the root of the crying, which included speaking directly with K.S., several

parent-teacher conferences, and developing a plan to address the crying. (R. pp. 184-185, 368, 382-383, 440).

Prior to the end of September in the 2011 school year, Richland Two had no reason to suspect that Ms. Moody presented a potential hazard to the emotional well-being of students in her class or would be likely to “pick on” K.S. or other students. Once school administrators became aware of Ms. Moody’s actions toward K.S. in the fall of 2011, they took prompt action to move K.S. to a new classroom with a different teacher. (R. pp. 171, 190, 443). Specifically, on the day of the cafeteria incident, which involved Ms. Moody moving K.S. to another table, K.S. was immediately transferred to a new teacher. (R. pp. 171, 190). The alleged conduct that K.S. characterizes as bullying, specifically the statement “don’t give K.S. any special treatment” occurred on October 10, 2011, and K.S. was moved to a new class, with a new teacher, approximately seven school days later. (R. pp. 217, 219-220, 390). Further, Ms. Moody ultimately resigned her employment in lieu of termination and K.S. never encountered her again. (R. p. 416). K.S. went back to normal and his crying stopped in the new class. (R. pp. 191, 217, 390, 443). At the very least, these efforts constitute “slight care” to prevent and address the injuries K.S. alleged in this case. K.S.’s argument that Richland Two should have done more to discover or address Ms. Moody’s behavior a few days sooner does not negate Richland Two’s actual efforts or render them less than “slight care.” *See Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277.

Moreover, there is simply no legal duty for a South Carolina school district to protect the general emotional well-being of a first-grade student. K.S.’s claim that Ms. Moody did not use proper methods to address his crying in class fundamentally alleges

“educational malpractice” by Ms. Moody or her supervisors, which is clearly foreclosed by *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003). Thus, K.S. did not establish a gross negligence claim as a matter of law and this Court should affirm on that additional ground.

C. As An Additional Sustaining Ground, K.S. Failed To Establish Proximate Cause As Matter Of Law.

As part of his gross negligence claim, K.S. was required to prove by a preponderance of the evidence that that: (1) Richland Two owed him a duty of care, (2) Richland Two breached that duty by a grossly negligent act or omission, (3) Richland Two’s breach was the actual and proximate cause of K.S.’s injury, and (4) K.S. suffered an injury or damages. *Rice v. Sch. Dist. of Fairfield*, 317 S.C. 87, 93, 452 S.E.2d 352, 355 (Ct. App. 1994); *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245 (2007). “If the plaintiff fails to prove any one of these elements, the action will fail.” *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). In addition to failing to prove the second and final elements, K.S. failed to prove that Richland Two’s actions or inactions were the proximate cause of his alleged injuries. “Proof of proximate cause requires proof of both causation in fact, and legal cause.” *Oliver v. South Carolina Dep’t of Highways & Pub. Trans.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). In order to prove causation in fact, a plaintiff must prove that the injury would not have occurred but for the defendant’s negligence. *Vinson*, 324 S.C. at 400, 477 S.E.2d at 721. Further, a plaintiff must prove that the injury was foreseeable, *i.e.*, that the injury occurred as a natural and probable consequence of the defendant’s negligence. *Id.*

In this case, there was no foreseeable nexus between Richland Two’s alleged 2011 actions or inactions and K.S.’s 2018 depression and anxiety diagnosis. Further, K.S.

offered no proof or records of any treatment before 2017 related to his brief time in Ms. Moody's class. Specifically, the testimony at trial and the evidence in the record shows that after K.S. was moved to a new class with a new teacher, he was back to normal and was no longer crying. (R. pp. 191, 217, 390, 443). It was not foreseeable that the October 10, 2011 library incident and the October 20, 2011 cafeteria incident would cause the delayed onset of anxiety and depression approximately seven years later. These alleged highly subjective and delayed injuries simply were not a natural and probable consequence of Richland Two's actions or inactions, which K.S. was required to prove. *See Vinson*, 324 S.C. at 400, 477 S.E.2d at 721.

Based on the evidence in the record, no reasonable juror could find an affirmative causal link between the alleged inaction of Richland Two in 2011 and K.S.'s alleged emotional harm diagnosed in 2018. This Court should affirm for this additional reason.

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

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,⁴ 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*

⁴ The trial started on Tuesday, May 28, 2019.

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 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 Garriss (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 general⁵, 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 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

⁵ 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).

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.

**E. In The Alternative, Dr. McEvoy’s Testimony Was Inadmissible
And Should Have Been Excluded Under Rule 702, SCRE.**

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The qualification of a witness as an expert is within the trial court's discretion. *Fields v. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d. 80, 85 (2008). In determining the admissibility of expert testimony, South Carolina courts make three inquiries. First, the court must determine whether ‘the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.’

Graves v. CAS Med. Sys., Inc., 401 S.C 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *Id.* Finally, the substance of the testimony must be reliable. *Id.* The final inquiry is the central feature of the analysis. *Id.* Only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. See *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Importantly, the party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. See *State v. Harris*, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995) (party presenting expert must show witness possesses, either through study or experience, specialized knowledge that makes him better qualified than jury to form opinion on particular subject). *State v. Henry*, 329 S.C. 266, 274, 495 S.E.2d 463, 466-67 (Ct. App. 1997).

**1. K.S. Failed to Show that Dr. McEvoy’s Testimony
was Beyond the Ordinary Knowledge of the Jury**

K.S. sought to qualify Dr. McEvoy as an expert witness on the subject of teacher-versus-student bullying and school district responses to teacher-versus-student bullying. (R. p. 469). Dr. McEvoy was expected to testify “as to the Defendant’s standard of care, breach of that standard of care, Plaintiff’s damages, and the causation of Plaintiff’s damages.” (Pl. Second Suppl. Response to Interrogs., R. pp. 664-665). The substance of Dr. McEvoy’s testimony was that teachers, as well as peers, are capable of “bullying” students, and he believed that Richland Two failed to act to prevent Ms. Moody from

bullying K.S. and causing him emotional distress. Without Dr. McEvoy's testimony, the jury would have been fully capable of determining all relevant ultimate issues in the case, which were: 1) whether Richland Two was grossly negligent and failed to exercise slight care 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 jury simply had no need for an "expert" to read Richland Two policies to them, tell them that K.S. had been "bullied" (without reference to the proper legal standard, as discussed above), and that a student bullied by a teacher might suffer emotional distress. While Dr. McEvoy might have acquired more knowledge than most jurors on the general subject matter of "teacher bullying of students," his testimony did not encompass facts or opinions beyond their general knowledge and should have been excluded on that basis.

**2. K.S. Failed to Show that Dr. McEvoy had the
Requisite Knowledge and Skill to Qualify as an
Expert in this Case**

A proposed expert witness must have acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. *State v. White*, 372 S.C. 364, 374, 642 S.E.2d 607, 612 (Ct. App. 2007). In this case, K.S. offered insufficient evidence to support the qualifications of Dr. McEvoy as an expert to testify regarding Richland Two's standard of care, breach of that standard of care, K.S.'s damages, and the causation of K.S.'s damages. Specifically, as it relates to Richland Two's standard of care, Dr. McEvoy had no knowledge, experience, training, or education specifically related to South Carolina standards of care. At the time of his deposition, Dr. McEvoy was employed at Northern

Michigan University and had previously been employed at Wittenberg University in Ohio. (R. p. 470). Dr. McEvoy had never worked in South Carolina and had only been to South Carolina once for a golf outing ten to twelve years ago. (*Id.*) Further, Dr. McEvoy had never appeared as a presenter at a conference in South Carolina nor conducted any training in South Carolina. (R. p. 471). Dr. McEvoy had no experience or study of South Carolina laws or regulations as related to qualifications or employment of teachers, supervision of teachers, or supervision of students. (*Id.*) Furthermore, Dr. McEvoy had never held a certificate or license to teach in a K-12 setting in any state nor had he ever been employed by a public school district. (*Id.*) Dr. McEvoy conceded that he had not reviewed any training materials or programs used by South Carolina school districts other than Richland Two. (R. p. 472). Finally, Dr. McEvoy had never been qualified as an expert witness in South Carolina and could not identify any case in which he had been qualified as an expert on the subjects for which his testimony was proffered. (R. p. 473).

Dr. McEvoy's generalized study of teacher-student bullying, which was in a nascent stage at the time of the events at issue in this case, simply does not qualify him to testify as an expert witness in a South Carolina Tort Claims Act case. Finally, Dr. McEvoy has a Ph.D. in Sociology; he is not a licensed psychologist or psychiatrist, or therapist of any sort. (R. p. 474). Thus, he simply lacked the specialized knowledge and training to be qualified as an expert in the areas K.S. sought to qualify him. Accordingly, his testimony should have been excluded for that additional reason.

3. K.S. Failed to Show that Dr. McEvoy's Testimony was Reliable

In non-scientific expert testimony challenges, the court "must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable." *Graves*, 401 S.C.

at 75, 735 S.E.2d at 656. “Thus, while a challenge to an opinion’s reliability generally goes to weight and not admissibility, this ‘familiar evidentiary mantra’ may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible.” *Id.*

In addition to Dr. McEvoy’s lack of technical and specialized knowledge, Dr. McEvoy testified that there is very little research on national standards of teachers bullying students. (R. p. 473). Further, he testified that “there’s research on the long-term effects of trauma, particularly to teacher bullying is not as much known.” (R. p. 524). Dr. McEvoy testified that his article based on a study in 2017 and published in 2018 discussing teacher bullying was the first of its kind. (R. p. 474). Thus, there are extremely limited published articles and studies on the topic, not relied upon or applied by other qualified individuals, and limited data that would assist the trier of fact to understand the evidence or to determine a fact at issue in this case. Dr. McEvoy indicated that most of the research and most of the attention is focused on peer-on-peer bullying, which was not an issue in this case. (R. p. 527).

K.S. thus did not establish that Dr. McEvoy’s testimony was reliable and it should have been excluded on that final ground.

F. Dr. McEvoy’s Testimony Was Irrelevant To The Directed Verdict And Thus, Any Error In Excluding It Was Harmless.

The trial court’s directed verdict ruling was based solely on K.S.’s failure to offer evidence of physical injury required to support an award of damages for emotional distress pursuant to a gross negligence theory under the Tort Claims Act. It is undisputed that Dr. McEvoy’s testimony would not have addressed whether K.S. had sustained a physical injury, but rather, would have been offered to establish that Richland Two did not follow

an alleged standard of care as set forth in its policies. Because the Trial Court properly granted Richland Two a directed verdict on K.S.'s failure to prove damages, the exclusion of Dr. McEvoy's testimony, even if erroneous, would not have altered the outcome. Accordingly, even if the trial court erred in excluding Dr. McEvoy's testimony, it would not be reversible. *See State v. Miller*, 367 S.C. 329, 336, 626 S.E.2d 328, 332 (2006) (holding error is harmless if, after reviewing the entire record, the reviewing court finds the error "could not reasonably have affected the result of the trial"); *Briggs v. Richardson*, 288 S.C. 537, 539–40, 343 S.E.2d 653, 655 (Ct. App. 1986). *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive); *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

G. 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, 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 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.

VI. CONCLUSION

The Trial Court properly directed a verdict in Respondent’s favor as clearly established by the record and applicable law. Accordingly, the Court should affirm the Trial Court’s ruling.

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July 15, 2020

Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

C.A. No.: 2019-000951

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

v.

Richland School District Two..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies Respondent's Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Richland School District Two, Respondent.

Appellate Case No. 2019-000951

Appeal From Richland County
Jocelyn Newman, Circuit Court Judge

Unpublished Opinion No. 2022-UP-312
Heard April 5, 2022 – Filed July 27, 2022

AFFIRMED

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Respondent.

PER CURIAM: James Seeger, acting as Guardian ad Litem for his son, K.S., appeals a circuit court order directing a verdict in favor of Richland School District Two (Richland Two). The lawsuit alleged Richland Two was grossly negligent in failing to promptly investigate and admonish K.S.'s first grade teacher (Teacher). There does not appear to be any dispute that Teacher directed inappropriate language at K.S. and that K.S. was psychologically harmed. The circuit court directed a verdict based on the reasoning that K.S.'s mental injuries were not recoverable absent a physical injury. We affirm, but for slightly different reasons.

FACTS

North Springs Elementary, located in Richland Two, assigned K.S. to Teacher's first grade class in 2011. K.S. stopped wanting to go to school shortly after the school year began. K.S. got upset at home in the mornings and cried at school throughout the day. K.S. said the crying was because he missed Seeger, but an incident in the school cafeteria some months after school began revealed K.S. was continually upset over interactions with Teacher.

A worker in the cafeteria witnessed Teacher "approach[ing K.S.] very harshly" after K.S. dropped his food tray. Teacher then grabbed K.S. "very forcefully by his arm" and walked him to a table after he got a new tray. This made K.S. cry. The cafeteria worker reported hearing Teacher say "I will give you something to cry for." Teacher left K.S. to eat alone at the table.

K.S. testified Teacher clawed him with her fingernails when she grabbed him, which hurt. Seeger testified he could not remember whether there were scratches on K.S.'s arm; did not remember including anything about fingernails, scratches, or cuts in emails he sent the school principal following the incident; and did not take any pictures. A forensic psychologist who provided expert testimony stated he assumed he would know if Teacher physically injured K.S. but had no knowledge of her doing so, nobody told him she did, and K.S.'s medical records did not indicate she did. Richland Two's Director of Human Resources testified nobody reported a physical injury to her.

When the Seegers learned what happened, they asked the principal to move K.S. to a new class. The principal did so immediately. K.S. cried on the walk to his new class because he saw Teacher in the hallway, but he stopped crying after he met his new teacher.

After changing classes, K.S. eventually shared Teacher had mistreated him before the cafeteria incident, including by confiscating encouraging notes from Seeger

and allowing the other students in the class to form a "no crying club" that excluded K.S.

Richland Two opened an investigation into Teacher after the incident in the cafeteria. The investigation revealed two faculty members in the school's media center had previously reported Teacher to the principal after witnessing her treat students in a concerning manner. These reports occurred before the cafeteria incident described above.

The first report involved Teacher yelling at a child in front of all of the students in her class to pick a different book to read. Teacher exclaimed "there [was] no way" the child could read "one word" of the book, which made the child "sob."

The second report involved K.S. Teacher apparently told those in the media center to not give K.S. any special treatment or praise because he did not deserve anything for crying all day in her class. Then, when Teacher picked up her class from the media center and learned K.S. had behaved well, she reportedly said, "of course he was good for you, he has cried all day in my class." K.S. heard both sets of comments and was upset by them.

The principal apparently did not take any action after either of these reports. Seeger asserts this inaction was a violation of Richland Two's antibullying policy.

The parties tried the case for three days. During trial, Seeger proffered expert testimony from Dr. Alan McEvoy, an academic specializing in teacher bullying and school district responses. Dr. McEvoy's testimony described the national standard of care and his professional opinion that Richland Two breached the national standard as well as its own policy, which was consistent with the national standard. The circuit court excluded the testimony, deeming it cumulative with other testimony about the school's antibullying policy.

Richland Two moved for a directed verdict at the close of trial. There was ample testimony throughout trial about the negative impact K.S.'s experience in Teacher's class had on his mental health. K.S. suffers from anxiety, depression, angry outbursts, and trouble sleeping to this day (he is now in high school). He has seen a number of therapists and a psychologist, takes prescription medication, and had to go to tutoring because the experience affected his performance at school.

As we mentioned at the beginning, the circuit court granted Richland Two's motion for a directed verdict because it found the damages were "purely emotional damages" that were not brought about by bodily injury and did not result in bodily injury.

ISSUES

1. Did the circuit court err in directing a verdict in favor of Richland Two because K.S. suffered purely emotional injuries?
2. Does the Safe School Climate Act waive the South Carolina Tort Claims Act?
3. Did the circuit court err in excluding the testimony of Seeger's expert?

STANDARD OF REVIEW

"In an appeal from the grant of a directed verdict, [an appellate court] must, like the trial court . . . , view the evidence in a light most favorable to the non-movant" *Miller v. FerrellGas, L.P., Inc.*, 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011). "When viewed in that light, if there is any evidence that may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury." *Id.* "[T]his rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997), *superseded on other grounds by statute*, S.C. Code Ann. § 15-36-10(C)(1) (Supp. 2012), *as recognized in Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014).

ANALYSIS

The core dispute in this case is whether Seeger's claim satisfies the standard to prove a claim for damages that are purely emotional (put differently, purely mental) in nature. Seeger argues all that is required to survive a directed verdict in a case for mental health damages is some evidence of a physical manifestation of those damages. To that end, he contends K.S.'s anxiety, depression, angry outbursts, and trouble sleeping are sufficient physical manifestations.

Richland Two argues directing a verdict was proper because Seeger's claim is a claim for negligent infliction of emotional distress, that plaintiffs in South Carolina can only recover for negligent infliction of emotional distress in two situations, and that neither situation applies.

As far as we have been able to discover, South Carolina currently recognizes negligent infliction of emotional distress in three contexts. First, South Carolina recognizes negligent infliction of emotional distress in the "bystander" context—

when a plaintiff observes a defendant's negligence cause the death or serious injury of a relative. *See Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985) (finding a mother who witnessed the severe injury of her daughter could recover damages for emotional distress). Because K.S. did not observe the death or serious injury of a relative, "bystander" recovery is irrelevant.

Second, South Carolina recognizes actions for negligent infliction of emotional distress when a plaintiff suffers emotional distress in addition to physical injuries. *See Boan v. Blackwell*, 343 S.C. 498, 502, 541 S.E.2d 242, 244 (2001) (stating a plaintiff may recover for mental anguish that accompanies a physical injury).

Teacher's grabbing K.S.'s arm in the cafeteria is undoubtedly evidence of physical contact. Still, the evidence does not demonstrate the grab physically harmed K.S. K.S. testified that it hurt when Teacher grabbed him, but Seeger testified he could not remember whether there were scratches on K.S.'s arm; did not remember including anything about fingernails, scratches, or cuts in emails he sent the school principal; and did not take any pictures. A forensic psychologist testified he assumed he would know if Teacher physically injured K.S. but had no knowledge of her doing so and that K.S.'s medical records did not indicate physical injury. Richland Two's Director of Human Resources testified nobody reported a physical injury to her. We therefore agree that there is no evidence K.S.'s mental anguish accompanied a physical injury.

The third species of negligent infliction of emotional distress claims applies when emotional trauma proximately causes bodily injury. *See Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 608, 103 S.E.2d 265, 272 (1958) ("If the respondent's bodily injury was proximately caused by the shock, fright and emotional upset as a result of the negligence and willfulness of the appellant, he was entitled to recover such damages as would compensate him for the injury so sustained."); *Strickland v. Madden*, 323 S.C. 63, 67, 448 S.E.2d 581, 584 (Ct. App. 1994) ("[T]o the extent [the plaintiff] can prove her bodily injury was proximately caused by her emotional trauma she may recover for such trauma . . ."). These authorities appear to be Seeger's chief support for why he believes the circuit court's decision to direct a verdict was incorrect.

We do not wish to diminish—in any way—the negative effects K.S. undoubtedly experienced. Even so, we respectfully disagree with the argument that the evidence in this case meets the standard set by these precedents. Some cases suggest suffering from a nervous breakdown as a result of negligence would support a verdict, even if no other injury was sustained. *See, e.g., Spaugh v. A. Coast Line R. Co.*, 158 S.C. 25, 30, 155 S.E. 145, 147 (1930) ("Suffering from a

nervous breakdown, as a result of defendant's negligence, would support a verdict for the plaintiff, independent of any other injury she sustained."); *see also Turner v. A B C Jalousie Co. of N.C.*, 251 S.C. 92, 96, 160 S.E.2d 528, 530 (1968) ("[Respondent] specifically alleges that as a result of the conduct of the appellant 'her nervous system collapsed'. Such is an allegation of physical or bodily injury."). But one of those same cases counsels that if a plaintiff whose sole damage is a nervous breakdown is going to prevail, the defendant's conduct must be exceedingly bad such that severe emotional distress would be expected to follow in a reasonable person. *See, e.g., Turner*, 251 S.C. at 97-98, 160 S.E.2d at 530 (Lewis, J. concurring) ("I construe the opinion of the Chief Justice to hold that the complaint states a cause of action for severe emotional distress resulting in physical or bodily injury, recklessly, willfully and wantonly caused by the alleged extreme and outrageous conduct of the agent of defendant in using, under the circumstances, vile, profane and abusive language towards plaintiff."). Our cases on this type of claim are dated, but this view aligns with more modern authority in other jurisdictions. *See, e.g., Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (abandoning the physical manifestation rule and applying the general negligence approach but only for emotional injuries so serious or severe a reasonable person would not be able to cope with the stress the circumstances caused). We think these formulations of the rule are correct. Nobody questions that Teacher's conduct was inappropriate and improper. It nevertheless does not reach the extreme level required, even if we view that conduct in the light most favorable to Seeger.

This conclusion controls the case and makes it unnecessary to address Seeger's other issues. Seeger argues he only had to prove negligence by a preponderance of the evidence rather than gross negligence because the Safe School Climate Act waives Richland Two's sovereign immunity under the Tort Claims Act. However, and as we have described, Seeger cannot meet the bar of proving a negligent infliction of emotional distress claim. Seeger also argues the circuit court should not have excluded the testimony of his expert about the standard of care, but because Seeger cannot prove damages for the reasons given above, the expert's testimony would not have made a difference. On both points, the fact Seeger lacks a cause of action for negligent infliction of emotional distress is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court does not need to review remaining issues when its determination of a prior issue is dispositive).

AFFIRMED.

THOMAS, MCDONALD, and HEWITT, JJ., concur.

RECEIVED

Aug 10 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

MOTION FOR EXTENSION
OF TIME TO SERVE AND FILE
PETITION FOR REHEARING

Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker, & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

Appellant hereby moves, pursuant to Rule 263(b), SCACR, for a 10-day extension of the time in which to serve and file Appellant's petition for rehearing in this case. The grounds for this motion are that there is good cause to grant the requested extension, as the following shows:

1. The deadline for service and filing of Appellant's petition for rehearing in this case is currently tomorrow, August 11, 2022.
2. Appellant's counsel who is writing this petition was hired by Appellant for representation in this case today, August 10, 2022.
3. This hampers the ability to get the petition for rehearing done under the existing deadline.
4. Appellant's counsel believes there is good cause to grant the requested extension.

WHEREFORE Appellant prays for a 10-day extension to August 22, 2022, of the time in which to serve and file the Appellant's petition for rehearing.

Respectfully submitted,

/s/ Sarah M. Larabee

Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker, & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant

August 10, 2022

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Aug 10 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing motion to substitute counsel, notice of appearance, and motion for extension of Appellant's petition for rehearing on the date given below by emailing it to Appellant's previous counsel and counsel for the Respondent at the addresses noted below.

Jacob J. Modla, jmodla@jasontaylor.com
Thomas K. Barlow, tbarlow@hmwlegal.com

/s/ Sarah M. Larabee
Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Attorneys for Appellant

August 10, 2022

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Aug 10 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

MOTION TO SUBSTITUTE APPELLANT'S COUNSEL

Appellant hereby moves, pursuant to Rule 264, SCACR, and all other applicable law, for an order substituting Sarah M. Larabee, Esquire, and Andrew S. Radeker, Esquire, for Jacob J. Modla, Esquire, as Appellant's counsel in the above-captioned action. Mr. Modla's no longer represents the Appellant in this case; Ms. Larabee and Mr. Radeker now represent the Appellant.

WHEREFORE Appellant prays for an order substituting Sarah M. Larabee, Esquire, and Andrew S. Radeker, Esquire, for Jacob J. Modla, Esquire, as Appellant's counsel in this appeal.

[signature block on following page]

Respectfully submitted,

/s/ Sarah M. Larabee

Sarah M. Larabee

S.C. Bar No. 105298

Andrew S. Radeker

S.C. Bar No. 73743

Harrison, Radeker, & Smith, P.A.

Post Office Box 50143

Columbia, South Carolina 29250

(803) 779-2211

AND

/s/ Jacob J. Modla

Jacob J. Modla

S.C. Bar No. 63031

The Law Offices of Jason E. Taylor, P.C.

115 Elk Ave

Rock Hill, SC 29730

(803) 328-0898

August 10, 2022

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Aug 10 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing motion to substitute counsel, notice of appearance, and motion for extension of Appellant's petition for rehearing on the date given below by emailing it to Appellant's previous counsel and counsel for the Respondent at the addresses noted below.

Jacob J. Modla, jmodla@jasontaylor.com
Thomas K. Barlow, tbarlow@hmwlegal.com

/s/ Sarah M. Larabee
Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Attorneys for Appellant

August 10, 2022

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

NOTICE OF APPEARANCE

The undersigned hereby gives notice of their appearance on behalf of the Appellant in the above-captioned case and requests that all documents that are not served on them electronically in this case be furnished to them at the address below.

Respectfully submitted,

/s/ Sarah M. Larabee

Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker, & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
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Attorneys for Appellant

August 10, 2022

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing motion to substitute counsel, notice of appearance, and motion for extension of Appellant's petition for rehearing on the date given below by emailing it to Appellant's previous counsel and counsel for the Respondent at the addresses noted below.

Jacob J. Modla, jmodla@jasontaylor.com
Thomas K. Barlow, tbarlow@hmwlegal.com

/s/ Sarah M. Larabee
Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Attorneys for Appellant

August 10, 2022

RECEIVED

Aug 11 2022

SC Court of Appeals

From: [Thomas K. Barlow](#)
To: [Sarah Larabee](#)
Cc: [Sheneka S. Lodenquai](#); [Drew Radeker](#); [Rhonda Schaub](#)
Subject: Re: Seegar v. Richland School District Two, Appellate Case No. 2019-000951
Date: Wednesday, August 10, 2022 5:40:29 PM
Attachments: [image001.png](#)
[image001.png](#)

Hey Sarah no objection welcome to the case

TKB

On Aug 10, 2022, at 9:36 AM, Sarah Larabee <sarah@harrisonfirm.com> wrote:

Good afternoon, Mr. Barlow and Ms. Lodenquai,

Our firm has just been hired by the Appellant for representation in the above-captioned case. The deadline for the petition for rehearing is tomorrow—would you two be agreeable to a fifteen day extension? We would greatly appreciate it!

Looking forward to working with you.

Best,

Sarah Larabee



923 Calhoun Street,
Columbia, South Carolina 29201
Post Office Box 50143,
Columbia, South Carolina 29250
Telephone: (803) 779-2211
Facsimile: (803) 779-6700
www.harrisonfirm.com

This e-mail message contains confidential, privileged information intended solely for the addressee. Please do not read, copy or disseminate it unless you are the addressee. If you have received it in error, please call us (collect) at (803) 779-2211 and ask to speak with the message sender. Also, we would appreciate your forwarding the message back to us and deleting it from your system. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) Thank you.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Aug 11 2022

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

I certify that I have served the foregoing exhibit to Appellant's motion for extension of Appellant's petition for rehearing on the date given below by emailing it to Appellant's previous counsel and counsel for the Respondent at the addresses noted below.

Jacob J. Modla, jmodla@jasontaylor.com
Thomas K. Barlow, tbarlow@hmwlegal.com

/s/ Sarah M. Larabee
Sarah M. Larabee
S.C. Bar No. 105298
Andrew S. Radeker
S.C. Bar No. 73743
Attorneys for Appellant

August 11, 2022

The South Carolina Court of Appeals

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

v.

Richland School District Two, Respondent

Appellate Case No. 2019-000951

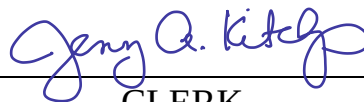
The Honorable Jocelyn Newman
Richland County
Trial Court Case No. 2017CP4000323

ORDER

The time for serving and filing the petition for rehearing is hereby extended until August 26, 2022.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

cc:

Thomas Kennedy Barlow, Esquire
Sheneka Shante Lodenquai, Esquire
Jacob John Modla, Esquire
Sarah Megan Larabee, Esquire
Andrew Sims Radeker, Esquire

FILED
Aug 12 2022

The South Carolina Court of Appeals

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

v.

Richland School District Two, Respondent

Appellate Case No. 2019-000951

The Honorable Jocelyn Newman
Richland County
Trial Court Case No. 2017CP4000323

ORDER

Counsel for appellants move the Court for an order to substitute attorneys Sarah M. Larabee and Andrew S. Radeker for Jacob J. Modla. No return to the motion was filed. Accordingly, the motion is hereby Granted. Jacob J. Modla is hereby relieved as counsel. Sarah M. Larabee and Andrew S. Radeker will remain as counsel for appellants in this appeal.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

cc:

Thomas Kennedy Barlow, Esquire
Sheneka Shante Lodenquai, Esquire
Jacob John Modla, Esquire
Sarah Megan Larabee, Esquire
Andrew Sims Radeker, Esquire

FILED
Aug 23 2022

RECEIVED
Aug 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PETITION FOR REHEARING

The Appellant, K.S., a minor, by and through his guardian ad litem, James Seeger, hereby respectfully moves and petitions, pursuant to Rule 221(a), SCACR, as well as all other applicable law, for an order granting rehearing in this case and submits the memorandum below in support of the same. In an effort to keep this petition succinct, particularly with regard to the arguments not addressed by the court's opinion, Appellant incorporates herein by reference his previously submitted briefs, making by reference those same arguments here. This petition does not restate the briefs, except by incorporation, any more than is needed to address the misapprehensions evident from the opinion issued in this case.

In an opinion issued on July 27, 2022, this court held that a first grader did not make a sufficient showing of physical injury, and thus could not prove, with *any* of the

evidence presented, the damages required for his negligent infliction of emotional distress claim. This, in the court's view, made the lower court's decision to grant Respondent's motion for a directed verdict proper. The court further ruled that its ruling on this issue was dispositive, and a ruling on the other issues regarding the South Carolina Tort Claims Act and the lower court's exclusion of the child's expert testimony was unnecessary.

Appellant respectfully urges the court to reexamine its holding in this case. While the opinion is unpublished, the court's narrow view of physical injury and physical manifestation of an emotional injury may have negative implications for future negligent infliction of emotional distress claims. Moreover, the court's decision may have far-reaching consequences to our state's longstanding, strict standard regarding motions for directed verdict. The opinion in this case is inconsistent with existing jurisprudence, including an opinion this court issued a week after this one.

Appellant respectfully submits that the court may have overlooked or misapprehended certain points in this case, as the following shows:

I. The lower court should have denied Respondent's motion for a directed verdict.

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 Env'tl. Control*, 369 S.C. 176, 185, 631 S.E.2d 899, 904 (2006).

To this point, in a recent case, this court 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 Appellant in this case acknowledges the court's 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 "uncomfortable." *Id.* at 88. The court found this sufficient to defeat the defendant's motion for directed verdict. *Id.*

In both the *Robinson* opinion and in this opinion, the court 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. Here, confusingly, the court cites a slew of cases, many of which are also cited by Appellant,

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 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 state, *as a matter of law*, this conduct was not. *See infra* § II.

In this case, neither the lower court nor this court viewed the evidence and all reasonable inferences in the light most favorable to the Appellant. There is not a complete lack of any physical injury, nor is there a complete lack of physical manifestation of an emotional injury. The evidence presented by the child did not yield only one inference, and neither the lower court nor this court had the authority to decide the credibility 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’s decision to require “extreme and outrageous conduct” is unprecedented not based on binding authority.

The court 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’s 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’s 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 merely describes the conduct as “inappropriate and improper,” but Appellant 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, Appellant 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 the 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, Appellant is unsure what is. It is perplexing at best that the Court relies on the concurrence of a case that actually *supports* the Appellant'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 Appellant's

age and the role of a teacher, Appellant'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. She did this in front of other students and staff. She constantly taunted a child for crying, again, in front of other students, and all but encouraged other students to engage in similar behavior. She regularly grabbed a child to remove him from the classroom. Appellant accordingly asks that this court reevaluate whether its 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.

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

The lower court contended that “there [was] no affirmative testimony that there was any damage to [Appellant's] body,” and relies on Black's Law Dictionary's definition of physical injury as “physical damage to a person's body.” 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. This is problematic for several reasons. Firstly, Appellant *did* affirmatively testify that his arm hurt during and after the teacher's grab. 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 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 court ignores the fact that Appellant also presented thorough evidence of physical manifestation as a consequence of an emotional injury. Appellant offered extensive testimony and evidence regarding, among other behaviors, his ongoing depression, inability to sleep, and anger management issues. The lower court's determination and this court's 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).

It is further reasonable and logical that physical harm can cause extreme emotional distress, particularly to a child. Determining whether “the evidence in this case meets the standard set by these precedents” is not up to this court or the lower court—it should have been up to the jury. It is a fact issue. The jury is responsible for determining whether the Respondent injured the child, and to what extent. Should the court maintain its 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.

IV. 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 (which it respectfully should not), is a question for the jury. The lower court should not have granted Respondent’s motion for a directed verdict. In a light most favorable to Appellant, the record is far from lacking *any* evidence at all to support the Appellant’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 Appellant prays for an order granting rehearing in this case.

Respectfully submitted,

/s/ Sarah M. Larabee

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August 26, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Aug 26 2022

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PROOF OF SERVICE

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

Thomas K. Barlow, tbarlow@hmwlegal.com

/s/ Sarah M. Larabee

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Andrew S. Radeker

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Attorneys for Appellant

August 26, 2022

The South Carolina Court of Appeals

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

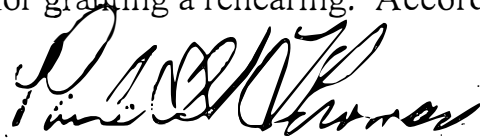
v.

Richland School District Two, Respondent

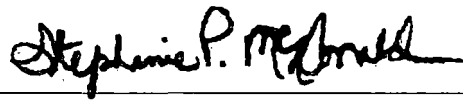
Appellate Case No. 2019-000951

ORDER

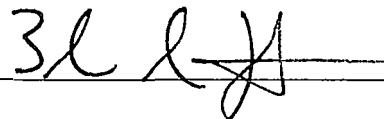
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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Sarah Megan Larabee, Esquire

Andrew Sims Radeker, Esquire
The Honorable Jeanette W. McBride

FILED
Sep 07 2022
