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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 SeegerPetitioner,

v.

Richland School District Two.....Respondent.

PETITIONER'S BRIEF

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES/QUESTIONS PRESENTED 1

STATEMENT OF THE CASE2

STATEMENT OF FACTS3

STANDARD OF REVIEW 15

ARGUMENT 16

I. There is evidence in the record that the School District’s employee caused injury to the first grader.17

II. The Court of Appeals departed from precedent concerning recoverability of emotional and psychological damage. 19

III. The conduct that caused the child’s injuries was extreme and outrageous by any civilized reckoning.23

IV. There is evidence in the record that the School District’s gross negligence caused K.S.’s injuries. 25

V. The Safe School Climate Act repealed inconsistent provisions in the Tort Claims Act to the extent of the inconsistency.29

VI. Petitioner’s expert witness should have been allowed to testify.35

a. Dr. McEvoy’s testimony was not cumulative. 35

b. The expert testimony *did* speak to Petitioner’s damages.37

CONCLUSION38

TABLE OF AUTHORITIES

CASES

<u>Armstrong v. Food Lion,</u> 371 S.C. 271, 639 S.E.2d 50 (2006)	34
<u>Babb v. Lee Cnty. Landfill SC, LLC,</u> 405 S.C. 129, 747 S.E.2d 468 (2013)	21
<u>Bankers Trust of South Carolina v. Bruce,</u> 275 S.C. 35, 267 S.E.2d 424 (1980)	30
<u>Blackmon v. White,</u> 825 F.2d 1263 (8th Cir. 1987)	36
<u>Bloom v. Ravoira,</u> 339 S.C. 417, 529 S.E.2d 710 (2000)	26
<u>Briggs v. Richardson,</u> 288 S.C. 537, 343 S.E.2d 653 (Ct. App. 1986)	38
<u>Burnett v. Family Kingdom, Inc.,</u> 387 S.C. 183, 691 S.E.2d 170 (Ct. App. 2010)	16
<u>Burse v. S.C. Dep't of Health & Envtl. Control,</u> 369 S.C. 176, 631 S.E.2d 899 (2006)	16, 17
<u>Caldwell v. K-Mart Corp.,</u> 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991)	28
<u>Camper v. Minow,</u> 915 S.E.2d 437 (Tenn. 1996)	22
<u>Capco of Summerville, Inc. v. J.H. Gayle Construction Co.,</u> 368 S.C. 137, 628 S.E.2d 38 (2006)	35
<u>City of Newberry v. Public Serv. Comm'n,</u> 287 S.C. 404, 339 S.E.2d 124 (1986)	30
<u>Clyburn v. Sumter County School District # 17,</u> 317 S.C. 50, 451 S.E.2d 885 (1994)	27

<u>Denene, Inc. v. City of Charleston,</u> 352 S.C. 208, 574 S.E.2d 196 (2002)	30
<u>Doe by Doe v. Greenville Hosp. Sys.,</u> 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994)	20, 26, 27
<u>Dooley v. Richland Mem'l Hosp.,</u> 283 S.C. 372, 322 S.E.2d 669 (1984)	20
<u>Elam v. S.C. Dep't of Transp.,</u> 361 S.C. 9, 602 S.E.2d 772 (2004)	15, 17
<u>Elledge v. Richland/Lexington Sch. Dist. Five,</u> 352 S.C. 179, 573 S.E.2d 789 (2002)	27
<u>Faile v. S.C. Dep't of Juvenile Justice,</u> 350 S.C. 315, 566 S.E.2d 536 (2002)	27
<u>Ford v. Hutson,</u> 276 S.C. 157, 276 S.E.2d 776 (1981)	20
<u>Franks v. Southern Cotton Oil Co.,</u> 78 S.C. 10, 58 S.E. 960 (1907)	24
<u>Froneburger v. Smith,</u> 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013)	33
<u>Hicks v. Herring,</u> 246 S.C. 429, 144 S.E.2d 151 (1965)	23
<u>Hodges v. Rainey,</u> 341 S.C. 79, 533 S.E.2d 578 (2000)	30
<u>Hopper v. Terry Hunt Constr.,</u> 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007)	16, 17
<u>Hurd v. Williamsburg Cty.,</u> 363 S.C. 421, 611 S.E.2d 488 (2005)	28
<u>In re Decker,</u> 322 S.C. 215, 471 S.E.2d 462 (1995)	30
<u>I'On, L.L.C. v. Town of Mt. Pleasant,</u> 338 S.C. 406, 526 S.E.2d 716 (2000)	30

<u>Jackson v. South Carolina Dep't of Corr.</u> , 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989)	27
<u>Johnston v. Belk-McKnight Co. of Newberry</u> , 188 S.C. 149, 198 S.E. 395 (1938)	36
<u>Kinard v. Augusta Sash & Door Co.</u> , 286 S.C. 579, 336 S.E.2d 465 (1985)	20
<u>Law v. S.C. Dep't of Corr.</u> , 368 S.C. 424, 629 S.E.2d 642 (2006)	15
<u>Lloyd v. Lloyd</u> , 295 S.C. 55, 367 S.E.2d 153 (1988)	30
<u>Madison ex rel. Bryant v. Babcock Center</u> , 371 S.C. 123, 638 S.E.2d 650 (2006)	24, 28
<u>Niver v. South Carolina Dept. of Hwy. & Pub. Transp.</u> , 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990)	29
<u>Padgett v. Colonial Wholesale Distrib. Co.</u> , 232 S.C. 593, 103 S.E.2d 265 (1958)	21
<u>Pearson v. Mills Mfg. Co.</u> , 82 S.C. 506, 64 S.E. 407 (1909)	30
<u>Peterson v. Nat'l R.R. Passenger Corp.</u> , 365 S.C. 391, 618 S.E.2d 903 (2005)	28
<u>Smart by Clark v. Hampton Cty. Sch. Dist. No. 2</u> , 315 S.C. 192, 432 S.E.2d 487 (Ct. App. 1993)	29
<u>Solanki v. Wal-Mart Store No. 2806</u> , 410 S.C. 229, 763 S.E.2d 615 (Ct. App. 2014)	27, 28
<u>Southeastern Freight Lines v. City of Hartsville</u> , 313 S.C. 466, 443 S.E.2d 395 (1994)	31
<u>Spaugh v. A. C. L. Railroad Co.</u> , 158 S.C. 25, 155 S.E. 145 (1930)	21

<u>Standard v. Shine,</u> 278 S.C. 337, 295 S.E.2d 786 (1982)	24
<u>State v. Baker,</u> 310 S.C. 510, 427 S.E.2d 670 (1993)	30
<u>State v. Robinson,</u> 437 S.C. 226, 878 S.E.2d 8 (Ct. App. 2022)	17, 18
<u>State Farm Mut. Auto. Ins. Co. v. Ramsey,</u> 295 S.C. 349, 368 S.E.2d 477 (Ct. App. 1988)	20
<u>Steinke v. S.C. Dep't of Labor, Licensing & Regulation,</u> 336 S.C. 373, 520 S.E.2d 142 (1999)	26
<u>Trousdell v. Cannon,</u> 351 S.C. 636, 572 S.E.2d 264 (2002)	32
<u>Turner v. A B C Jalousie Co. of N.C.,</u> 251 S.C. 92, 160 S.E.2d 528 (1968)	22, 23
<u>United States v. Williams,</u> 81 F.3d 1434 (7th Cir. 1996)	36
<u>Ward v. Cobb,</u> 204 S.C. 275, 28 S.E.2d 850 (1944)	30
<u>Whitner v. State,</u> 328 S.C. 1, 492 S.E.2d 777 (1997)	30
<u>Wilder v. Blue Ribbon Taxicab Corp.,</u> 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011)	23
<u>Wright v. Craft,</u> 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006)	15

STATUTES

S.C. Code Ann. § 15-32-240	31, 33
South Carolina Tort Claims Act, S.C. Code Ann § 15-78-10, <i>et seq.</i>	2, 3, 25, 29, 31, 32, 33, 34, 35
S.C. Code Ann § 15-78-30	31

S.C. Code Ann § 15-78-30(f)	27
S.C. Code Ann § 15-78-40	32, 33, 35
S.C. Code Ann § 15-78-50(a)	33
S.C. Code Ann § 15-78-60	31
S.C. Code Ann § 15-78-60(4)	34
S.C. Code Ann § 15-78-60(17)	33, 34
S.C. Code Ann § 15-78-60(25)	26
S.C. Code Ann § 15-78-70	31, 33, 34
S.C. Code Ann § 15-78-120	33
Safe School Climate Act, S.C. Code Ann. § 59-63-110, <i>et seq.</i>	2, 3, 29, 31, 32, 33, 35
S.C. Code Ann. § 59-63-120	31
S.C. Code Ann. § 59-63-130	32
S.C. Code Ann. § 59-63-140	32, 35
S.C. Code Ann. § 59-63-140(C)	31
S.C. Code Ann. § 59-63-150	32, 33, 34

COURT RULES

Rule 50(a), SCRCP	17
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OTHER SOURCES

<u>Black’s Law Dictionary</u> (10th ed. 2013)	3, 19
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STATEMENT OF ISSUES/QUESTIONS PRESENTED

- I. Did the Court of Appeals err in failing to reverse the granting of Richland School District 2's motion for directed verdict?**
- II. Did the Court of Appeals err in instituting a new, baseless standard for mental injury?**
- III. Does Safe School Climate Act supersede the South Carolina Tort Claims Act?**
- IV. Was the lower court's exclusion of Petitioner's expert testimony improper?**

STATEMENT OF THE CASE

This Court has granted certiorari to review the Court of Appeals' decision in Guardian ad Litem, James Seeger v. Richland School District Two, Op. No. 2022-UP-312 (S.C. Ct. App. filed July 27, 2022). That decision affirmed the grant of a directed verdict to the Respondent, Richland School District Two (hereinafter, sometimes "the school district"), in a trial about the school district's responsibility for damage done to K.S. (hereinafter, sometimes, "the child" or "the first grader") by the cruel and abusive actions of his first grade teacher, Jan Moody, who was an employee of the school district. Though the record contained evidence that Moody grabbed the child's arm forcefully and that this caused the child to experience physical pain (App'x p. 158, line 13 – p. 159, line 17), the Court of Appeals upheld the directed verdict on the grounds that the child had not shown any evidence of an injury. The Court of Appeals also held that the child's psychological injuries were not recoverable because the conduct that caused them – all part of a pattern of deliberate bullying of a first grader by his teacher – was not extreme or outrageous enough.

Determining that its decision was dispositive, the Court of Appeals did not reach Petitioner's issues concerning 1) the effect of the Safe School Climate Act, S.C. Code § 59-63-110, *et. seq.*, on the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, and 2) the exclusion of the testimony of an expert witness at trial.

Petitioner filed the initial complaint. (App'x p. 18-31.) Respondent answered that complaint. (App'x p. 32-39.) Petitioner amended his complaint, and the Respondent answered the amended complaint. (App'x p. 40-59.)

As trial approached, Respondent filed a motion in limine to exclude Petitioner's expert witness from testifying. (App'x p. 64-70.) Respondent also filed a motion for summary judgment. (App'x p. 87- 88.) The parties submitted memoranda of law which briefed the subjects for trial. (App'x p. 71-86, R. p. 89-131.)

The trial judge heard and denied Respondent's motions at the beginning of trial. The trial judge also heard and rejected arguments raised in Petitioner'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, ruling as follows:

THE COURT: Moreover, I don't even know that the touching on October 20th satisfies physical injury. Black's Law Dictionary defines physical injury as physical damage to a person's body. There has been no testimony of any damage to [K.S.]'s person. In fact, I believe there was testimony that -- that there were no physical scars, or no one saw anything, or at least there's no affirmative testimony that there was any damage to his body. 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."**

(App'x p. 453-454) (emphasis added.)

The trial issued a Form 4 noting the direct verdict ruling. (App'x p. 1-3.) Petitioner appealed, which resulted in the Court of Appeals' decision on which this Court granted certiorari.

STATEMENT OF 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. (App'x p. 435, lines 3-7.) K.S. loved kindergarten and had no problems with going to school. (App'x p. 152, line 21-p. 153, line 10; p. 179, line 19-p. 180, line 9.) Before first grade, K.S. was a normal five-year-old boy without anxiety problems. (App'x p. 435, line 14-22) K.S.'s mother, Gina, was employed by Respondent as the attendance secretary at North Springs at the

beginning K.S.'s first grade year. (App'x p. 434, lines 13-21.) K.S.'s father, James, is a retired U.S. Army Master Sergeant. (App'x p. 173, lines 17-20.)

K.S. was assigned to Moody's first grade class. (App'x p. 163, lines 14-15.) Mr. and Mrs. Seeger testified that K.S. began to cry before going to school just a few weeks into his first grade school year. (App'x 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." (App'x p. 439, lines 15-24.) K.S. also complained of stomach aches as an excuse not to go to school. (App'x 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." (App'x 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." (App'x 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. (App'x p. 616-617; p. 184, lines 5-24; p. 214, lines 20-24.) Moody gave the appearance of wanting to help. (App'x p. 443, lines 6-8.) Mr. Seeger thought Moody was a nice person and had no idea that she was the problem until later. (App'x p. 214, lines 7-17.)

Mr. and 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. 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.

(App'x 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."*

(App'x 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 showed. Mr. Seeger testified that the grab was a "forceful grab and pull." (App'x 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. (App'x p. 379, lines 11-21.) Mrs. Seeger learned from the school nurse that something involving K.S. and Moody had happened in the cafeteria. (App'x p. 441, 16-22.) Mrs. Seeger then informed her husband. (App'x p. 441, line 25-p. 423, line 4.) Mr. Seeger testified that K.S. began "bawling" when he saw him after the cafeteria incident. (App'x p. 187, lines 21-23.) The Seegers then brought this incident to the attention of Dr. Holzendorf and demanded a response. (App'x p. 189, line 20-pg. 190, line 7.) When he was being led to his new classroom, K.S. began to cry because, as he said, Moody was in the hallway. (App'x p. 190, lines 16-25.)

Unknown to K.S.'s parents – but known to the school district – 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"). (App'x p. 551-556, 581-582, 585-587.)

The JICFAA policy 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.” (App’x p. 551-556.) Harassment, intimidation and bullying are defined by JICFAA and the South Carolina Safe School Climate Act 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.

(App’x p. 552)(emphasis added).

Both Glover and Garris observed Moody humiliating Student A in front of Moody (and K.S.)’s entire class by saying, “Oh my gosh, there is no way you can read that book, you will not be able to read word one in that book, so put it back and pick out another one.” (App’x p. 581-582, 585- 586.) Ms. Glover testified that Moody **yelled** that comment loud enough that the entire class heard her contact. (App’x p. 237, lines 14-25.) 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. (App’x p. 252, lines 8-25.) Ms. Glover and Ms. Garris thought the comment was very embarrassing to Student A, inappropriate, and intimidating. (App’x p. 180, lines 1-9; pg. 182, lines 22-24; pg. 204, line 8-pg. 205, line 5.) Ms. Glover testified that she felt “distracted” even thinking about how Moody spoke to Student A.

(App'x 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. (App'x p. 239, lines 12- 22; p. 249, lines 4-7.) JICFAA requires all employees of Respondent to report violations to the school's principal. (App'x p. 551-556.) Both Ms. Glover and Ms. Garris testified that they immediately reported the September 29th incident to Dr. Holzendorf. (App'x 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. (App'x 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." (App'x 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. (App'x 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.) (App'x 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. (App'x 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. (App'x 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. (App’x 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. (App’x p. 393, lines 16-21.) Holzendorf admitted he began an investigation of Moody on October 20th, and not September 29th, which was when he was informed that Moody had bullied one of her students rather blatantly. (App’x 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. (App’x 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. (App’x 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. (App’x p. 398, line 19-p. 401, line 18.) Dr. Lovett also testified that the statement on September 29th was embarrassing to Student A. (App’x 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. (App’x p.655-661; 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. (App’x 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. (App’x 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. (App’x 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. (App’x p. 412, line 21-pg. 414, line 6.)

The second incident involving Moody—and the first incident actually documented by Respondent between Moody and K.S.—occurred on October 10, 2011 (“the October 10th incident.”) This was before the school district had taken any action on its knowledge of Moody’s cruel behavior toward a student. Ms. Glover and Ms. Garris again witnessed Moody act inappropriately, this time toward K.S., who was 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.’” (App’x 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.” (App’x 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. (App’x p. 244 line 15-pg. 245, line 6.) Ms. Glover elaborated on the incident in her trial testimony that Moody’s statement was again said loudly in front of the whole class. (App’x p. 244, line 17-p. 245, line 9.) Ms. Glover observed K.S. immediately put his head down and begin to sob. (App’x 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. (App’x 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 either October 10th or 11th. (App'x p. 255, line 18-p. 256, line 12.) Dr. Holzendorf's recollection was the meeting with Ms. Glover occurred sometime after the cafeteria incident. (App'x p. 358, line 19-p. 359, line 20.) Mr. Seeger had no idea the October 10th incident had even occurred until much later. (App'x 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. (App'x p. 489, lines 14-17; R. p. 601-604.) Dr. Lovett also testified that Dr. Holzendorf should have started an investigation on October 10th in response to the complaints from Ms. Glover and Ms. Garris. (App'x p. 411, lines 14-21.)

On October 18, 2011, Dr. Holzendorf documented a meeting that occurred between him and Moody. (App'x p. 596-597.) In that meeting, Moody informed Dr. Holzendorf that K.S. had been crying in her classroom "for the last three weeks." (App'x 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. (App'x 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. (App'x 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. (App'x 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. (App'x 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. (App’x 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. (App’x 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. (App’x 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.

(App’x p. 612.)

Dr. Lovett testified that Moody should no longer be in a classroom. (App’x 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.” (App’x 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.” (App’x 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. (App’x p. 427, line 23–p. 428, line 5.) Moody was allowed to resign in lieu of termination by the district. (App’x p. 416, line 15-p. 417, line 2.)

It was only after the October 20th cafeteria incident that K.S. finally opened up to his parents 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.”

(App’x 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. (App’x p. 154, lines 13- 19.) K.S. testified that Moody’s conduct also included unwanted physical touching and grabbing. (App’x 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. (App’x p. 154, line 20-p. 156, line 3.) Moody confiscated the encouraging notes Mr. Seeger had included in K.S.’s lunch. (App’x p. 616-617, 625-627.) Moody did not deny taking the notes but added she wanted K.S. to write notes to her. (App’x p. 601-604.) K.S. also testified that Moody would grab him “forcefully” and put him the hall. (App’x p. 155 lines 12- 19.) K.S. testified that the grabbing and yelling started about a week after school started. (App’x 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. (App’x p. 601-604.)

K.S., was in ninth grade at the time of the trial, testified that he was afraid—and still is afraid—of Moody. (App’x p. 157, lines 5-8.) K.S. testified that he takes medication to help him feel better. (App’x p. 164, line 2-p. 165, line 1.) K.S. also testified that often feels anxious, hopeless, and has trouble sleeping. (App’x p. 165, line 5-p. 167, line 17.) Mr. Seeger testified that K.S. still has anxiety and angry outbursts in the months and years since the incident. (App’x p. 192, line 2-p. 193, line 16.) Mr. Seeger also testified that, while the “sadness and darkness of his eyes wasn’t as pronounced[,]”K.S. was not the same. (App’x 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.” (App’x 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.” (App’x p. 203, lines 14-20.) Mr. Seeger also testified that there are periods of time when K.S. is depressed, easily angered, and will not come out of his room. (App’x p. 209, lines 10-13.) K.S. continues to have trouble sleeping. (App’x p. 210, lines 5-15.)

K.S. received in-office therapy from a series of psychologists after being removed from Moody’s class. (App’x 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. (App’x p. 204, line 17-p. 204, line 4.) K.S. sees a psychiatrist who prescribes K.S. medication, including Zoloft. (App’x p. 208, lines 4-19.) K.S. has improved with medication, but K.S. struggles even with medication. (App’x p. 209, line 21-p. 210, line 4.) The days K.S. does not take his medication are “rough.” (App’x p. 209, lines 7-9.)

Petitioner also presented expert testimony from a forensic psychologist, Dr. David Englert. Dr. Englert testified that K.S. has persistent depressive disorder with anxious mood. (App’x 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. (App’x p. 296, line 25-p. 297, line 4; p. 302, line 21-p. 303, line 3.) Dr. Englert opined K.S.’s mental health issues were not related to either his mother or the litigation. (App’x p. 304, line 9-p. 305, line 15.) Dr. Englert opined that K.S.’s struggles began well before he was a teenager. (App’x 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. (App'x 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. (App'x p. 298, lines 3-10.)

Petitioner 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. (App'x 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. (App'x p. 432, line 18-p. 433, line 20.)

To date, a jury has not been given the chance to hold the school district accountable for its failure to protect K.S.

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. Burse 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).

ARGUMENT

The Court of Appeals’ opinion defies the directed verdict standard and complicates and confuses the law concerning recovery for mental injuries.

The implications of allowing the Court of Appeals’ opinion to stand are disturbing for the directed verdict and psychological/emotional injury standards, especially. The Court of Appeals was wrong to decide that a directed verdict was proper in this case. The question of whether Respondent’s conduct injured Petitioner was and is a fact question that should have been for the jury to determine. Petitioner presented evidence of his injuries, including expert testimony; however, the lower court and Court of Appeals did not view that evidence in a light most favorably to Petitioner. The Court of Appeals created and then relied on a new standard for recovery for

mental injuries, one at odds with precedent. Even if this Court were to find this strange new standard proper, the facts of this case would still meet that standard.

I. There is evidence in the record that the School District’s employee caused injury to the first grader.

Rule 50(a), SCRCPP, 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). Rulings on directed verdict motions are required to 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). Burse v. S.C. Dep’t of Health and Envtl. Control, 369 S.C. 176, 185, 631 S.E.2d 899, 904 (2006).

In a recent case, the Court of Appeals addressed the issue of whether the trial court erred in refusing to grant a criminal defendant’s motion for a directed verdict because the State failed to produce any evidence that the defendant physically injured a minor. State v. Robinson, 437 S.C. 226, 878 S.E.2d 8 (Ct. App. 2022). While that opinion “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. Robinson involved a child victim who testified that the defendant’s hand

around her neck did not hurt but was merely “uncomfortable.” Id. at 88. The Court of Appeals found this sufficient to defeat the defendant’s motion for directed verdict. Id.

In both the Robinson opinion and in its opinion in this case, the Court of Appeals cited 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. The difference is that in Robinson, the Court of Appeals ruled consistently with those cases and determined that a directed verdict on the issue of injury would be improper. The Court of Appeals’ opinion here, confusingly, cited a slew of cases, many of which are also cited by Petitioner in his briefs, establishing that suffering a nervous breakdown as a result of negligence would support a verdict, even if no other injury was sustained. The Court of Appeals went onto decide, though, that the first grader’s injuries here were insufficient *as a matter of law* and relies on a concurrence and an out-of-state case to further require that the injury-causing behavior also be “extreme,” which the Court of Appeals determined *as a matter of law* this conduct was not.

In this case, neither the lower court nor the Court of Appeals viewed the evidence and all reasonable inferences in the light most favorable to the Petitioner. This was improper. There is not a complete lack of any physical injury, nor is there a complete lack of physical manifestation of an emotional injury. As discussed in detail in the statement of facts above, in addition to the large amount of evidence of psychological injury, K.S. testified that Moody repeatedly grabbed him. (App’x p. 154, lines 13- 19; p. 155, lines 12-19.) The evidence presented here did not yield only one inference, and neither the lower court nor the Court of Appeals had the authority to decide the credibility or the weight of that evidence. That should have been left to the jury. A jury could have,

and should have, determined whether the evidence presented by the child constituted physical injury or physical manifestation of an emotional injury.

This Court should reverse and remand for a trial.

II. The Court of Appeals departed from precedent concerning recoverability of emotional and psychological damage.

Historically, this state’s jurisprudence has maintained a broad view of emotional injury. The lower court’s views, far from being reactionary, are much more restrictive than precedent authored in the past despite a growing acceptance and knowledge of mental health issues, and the Court of Appeals’ views are in desperate need of clarification, if not reversal.

The lower court decided that “there [was] no affirmative testimony that there was any damage to [Petitioner’s] body,” and relied on what the lower court said was Black’s Law Dictionary’s definition of physical injury as “physical damage to a person’s body.” (App’x pp. 453-54.) The lower court went onto make the determination, contrary to the evidence, that the first grader’s person was not “damaged,” comparing Moody grabbing the child’s arm to “touching” a car, not “damaging” it. *Id.* This is wrong for several reasons. Petitioner *did* affirmatively testify that his arm hurt during and after the teacher’s grab. (App’x p. 158, line 13 – p. 159, line 17.) A jury could easily find that this satisfies the physical injury requirement. The lower court’s reading of Black’s Law Dictionary is incomplete — “damage” is not limited to scarring or bruising, as the lower court construed it within the context of physical injury; rather, “damage” is defined in Black’s Law Dictionary as “physical harm that is done to . . . part of someone’s body By extension, *any bad effect on something.*” Black’s Law Dictionary “damage” (10th ed. 2013) (emphasis added). It is 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. And fact questions are for the jury.

Petitioner also presented thorough evidence of physical manifestation as a consequence of an emotional injury. The child, his parents, and his doctor offered extensive testimony and evidence regarding, among other behaviors, his ongoing depression, inability to sleep, and anger management problems. (App'x p. 192, line 2 – p. 193, line 16; p. 210, lines 5-15; p. 231, line 23 – p. 234, line 5.) The lower court's determination and the Court of Appeals' holding in this opinion are inconsistent with the Court's longstanding jurisprudence on emotional distress, and what injuries satisfy the physical manifestation requirement. 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); Dooley v. Richland Mem'l Hosp., 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"); 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 mental 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).

This 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 Cnty. Landfill SC, LLC, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013).

The trial court misapprehended the definition of “bodily injury” for the purposes of whether to submit the instant action to the jury. This 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.

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).

In the light most favorable to the Petitioner, the Petitioner proved a sufficient injury beyond “mere emotional discomfort.” Petitioner and Petitioner’s witnesses testified as to Petitioner’s bodily injuries. Petitioner himself testified he was grabbed and clawed by Moody. (App’x 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. (App’x p. 374, lines 11-21.) The actions of Moody putting her hands on K.S. “concerned” Dr. Holzendorf. (App’x 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. (App’x 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. (App’x 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. (App’x p. 209, lines 10-13.) K.S. also has trouble sleeping. (App’x p. 210, lines 5-15.) Mr. Seeger also testified that Petitioner has significantly changed in his response to discipline. (App’x p. 231, line 23-p. 234, line 5) Petitioner still suffers from a significant meltdown anytime Moody is mentioned. (App’x p. 231, line 23-p. 234, line 5) Petitioner and other witnesses testified to K.S.’s physical manifestations of psychological injury. Petitioner’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.

The Court of Appeals relied 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). There is also no case in South Carolina abandoning the physical manifestation rule or suggesting that emotional injuries must be “so serious or severe [that] a reasonable person would not be able to cope with the stress the circumstances caused.” Camper v. Minow, 915 S.E.2d 437, 446 (Tenn. 1996). Respectfully, the Court of Appeals’ reliance

on these secondary authorities is perplexing given the wealth of precedent in this jurisdiction to the contrary.

It is reasonable and logical that physical harm can cause extreme emotional distress, regardless of the physical implications – and especially to a child. Should this Court maintain the Court of Appeals' incorporation of the new standard authored its opinion, the jury is still responsible for determining whether the teacher's conduct was outrageous or extreme. 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). There is an issue of material fact here that requires reversal of directed verdict and remand for trial.

III. The conduct that caused the child's injuries was extreme and outrageous by any civilized reckoning.

Were this Court to deem proper the Court of Appeals' new rule on emotional injuries, a jury could still determine that this teacher's meanspirited and cruel actions towards the first grader K.S. 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 the child was *a child*. The Court of Appeals merely describes the conduct as "inappropriate and improper," but Petitioner would respectfully, though vehemently, disagree with that incomplete and misleading characterization.

If the conduct exhibited by the teacher at issue in this case was *not* extreme and outrageous, Petitioner is at a loss as to what conduct would meet that burden. Oddly enough, the facts of this case are not far off from the facts in Turner, which involved emotional injury as a result of "vile, profane, and abusive language." Turner, 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 arguably did far worse and

certainly used vile and abusive language. She told a child that she would “give [him] something to cry for,” loudly proclaimed to his classmates that the child “cried all day,” yelled in the child’s face to “[s]top being such a crybaby,” and egged on other students to form a “No Crying Club” designed to exclude the child. (App’x p. 587-588, 583-584, 153, line 18-p. 154, line 12.) Again, if this is not vile or abusive in this Court’s view, particularly given that this conduct was coming from a person who should have been a trusted adult and was aimed at a child in her care, Petitioner is unsure what would be.

A reasonable person of *any* age, but particularly a reasonable *child*, would not be able to cope with the physical and verbal abuse this teacher visited on this first grader. That the victim of this conduct was a child is part of the circumstances here and only makes it more likely that a jury would find this conduct extreme and outrageous. 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 Petitioner “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 K.S.’s age and Respondent’s employee’s role as a teacher, the child’s inability to cope with the teacher’s conduct is perfectly reasonable—practically self-evident—in these circumstances. A jury could certainly conclude that.

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

Even were this Court – wrongly – to adopt the Court of Appeals’ standard on emotional injury, there would still be facts in this record that require reversal of the directed verdict and remand for trial.

IV. There is evidence in the record that the School District’s gross negligence caused K.S.’s injuries.

The Petitioner 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 under this Court’s precedent.

Policies JIFAA and GCQF constitute a self-adopted standard of care, and the failure to follow those policies is relevant.

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. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). A duty of care existed between the child and the school district, and no one has contended otherwise. 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, even if 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 to be 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 rests with the jury. Faile, supra. Even 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 party'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 about whether Respondent failed to exercise slight care by failing to follow its own procedures and properly investigate the actions of Moody and remove Petitioner from her classroom as soon as possible. There are also questions of fact about what the Respondent knew and when it knew it. Viewed in the light most favorable to K.S., Respondent knew of a situation it could easily address and did nothing about it. That is a failure to exercise any care, and, thus, a failure to exercise slight care. E.g., Solanki, 410 S.C. at 237.

As discussed at length above, Dr. Holzendorf took no corrective action towards 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 Petitioner'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.

In the light most favorable to the child, the evidence shows that the school district, despite knowing of Moody’s behavior for quite some time, did nothing about it, only taking action after being confronted by K.S.’s parents. That was a failure to exercise even slight care. Indeed, it seems the essence of a failure to exercise even slight care. Had even slight care been exercised, injury to the first grader involved in these facts could have been avoided.

This case should have gone to the jury, and this Court should reverse and remand it for trial.

V. The Safe School Climate Act repealed inconsistent provisions in the Tort Claims Act to the extent of the inconsistency.

Respondent was also 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 failure to comply with the Safe Schools Climate Act. As a result, Petitioner’s burden at trial was and is to prove Respondent’s negligence by a preponderance of the evidence, instead of a higher gross negligence standard. The burden of establishing an exception to the waiver of immunity (e.g., under the Tort Claims Act) is on the governmental entity asserting the defense, and the Respondent did not meet that burden here. Niver v. South Carolina Dept. of Hwy. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990). While Petitioner is entitled to reversal and remand even if this Court rules against him on this particular issue, the Court should address this question for the sake of the bench and bar.

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); In re 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). Where there is repugnancy between statutes, the last statute passed will prevail, in an implicit repeal of 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 implicit 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). In S.C. Code § 59-63-120, it 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.” Its language in 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).

This section 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 bullying, 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 is 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, some language within the Safe School Climate Act is irreconcilable with the Tort Claims Act. Language of 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. § 15-32-240. The words of S.C. Code Ann. § 59-63-150(A) plainly states that the Safe School Climate Act “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.” (Emphasis added.) Neither the Tort Claims Act nor the Noneconomic Damages Statutes are torts but are, instead, statutes. This S.C. Code Ann. § 59-63-150(A) provision should be rationally read to alter **statutory** provisions relating to caps and punitive damages.

The language of 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. What logically follows is that the Safe School Climate Act’s 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 plaintiff 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).

If S.C. Code Ann. § 59-63-150(B) did not implicitly repeal parts of the Tort Claims Act, it 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. The dictates of S.C. Code Ann. § 59-63-150(B) are 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 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. 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 General Assembly wrote this new law to avoid.

The Safe School Climate Act sets forth and requires local school districts to adopt certain policies to prohibit, prevent, and remedy harassment and bullying, which it defines as a “gesture, an electronic communication, *verbal*, physical or sexual act” that “harm[s] a student physically or *emotionally*, or plac[es] a student in reasonable fear of personal harm.” S.C. Code Ann. § 59-63-

140 (emphasis added). The statute further explicitly sets forth that, while the Safe School Climate Act does not create tort liability, it does not alter it, either—courts must not interpret the statute “to prevent a victim from seeking redress pursuant to another available civil or criminal law.” S.C. Code Ann. § 59-63-150(A). “[R]edress pursuant to another available civil” law would certainly include recovery under any negligence theory, since the government is liable for torts like a private individual. See S.C. Code Ann. § 15-78-40. The South Carolina Tort Claims Act is not a remedy—the Tort Claims Act does not set forth or create a cause of action. Logically, the way to read these statutes together is that the Safe School Climate Act repeals the immunity typically granted under the Tort Claims Act in negligence actions arising out of school bullying. See Capco of Summerville, Inc. v. J.H. Gayle Construction Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (holding that a later specific statute will apply over an earlier, general one where the two statutes address an identical issue). Otherwise, why enact it?

VI. Petitioner’s expert witness should have been allowed to testify.

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

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

The lower court excluded Dr. Alan McEvoy’s testimony, ruling that it was “cumulative at best” and “beat the policy to death.” (App’x p. 432, line 18 – p. 433, line 20. “Cumulative”

¹ To the extent qualification an issue, Petitioner incorporates his final brief to the Court of Appeals by reference.

evidence has been defined as evidence which “adds very little to the probative force of other evidence in the case,” such that “ if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates.” United States v. Williams, 81 F.3d 1434, 1443 (7th Cir. 1996). Evidence is not cumulative if it tends to establish the same general result, but does so by proof of a new and distinct fact. Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 398-99 (1938). Moreover, courts must resist the temptation to “second-guess a lawyer’s strategy; the lawyer makes choices based on the law as it appears at the time, the facts disclosed . . . and his [or her] best judgment as tot the attitudes and sympathies of judge and jury.” Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987).

Whether Petitioner was a victim of bullying was a central issue at trial. Respondent consistently challenged whether the teacher’s action damaged the child, and sought to minimize the nature and duration of the child’s suffering. Dr. McEvoy sought to rebut this theory, and that rebuttal went far beyond “repeating the definition of bullying” and other policy issues—he testified that the teacher’s conduct was quite bad, and went on far too long. (App’x p. 500, line 19 – p. 502, line 22; p. 505, line 6 – p. 506, line 3.) Dr. McEvoy offered testimony and opinions on: the standard of care (App’x p. 466, lines 20-25; p. 468, line 10 - p. 469, line 21); the impact of teacher on student bullying on student (App’x 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: (App’x p. 480, line 13 - p. 482, line 7); Respondent’s responsibility: (App’x p. 482, line 18 - p. 483, line 18); why do principals make bad investigators (App’x p. 483, line 19 - p. 485, line 6); what Respondent should

have done (App'x p. 487, line 3 - p. 488, line 13); the warning signs of bullying (App'x p. 488, line 23 - p. 491, line 3; p. 518, line 7 - p. 520, line 25); why parents do know their child is being bullied (App'x p. 488, lines 14-22; p. 491, lines 5 - 24; p. 520, line 2 - p. 521, line 14); the lack of effective training (App'x p. 496, line 15 - p. 498, line 18; p. 522, line 15 - p. 523, line 11); opinions regarding the effectiveness of Respondent's policy (App'x p. 498, line 13 - p. 499, line 10; p. 504, line 259 - p. 507, line 9); relationship between the failure to comply with policy and impact on K.S (App'x p. 500, line 16 - p. 501, line 6; p. 502, lines 14-22; p. 515, line 19 - p. 516, line 23; p. 523, line 6 - p. 525, line 20); the effectiveness of Respondent's principal as an investigator (App'x p. 510, line 2 - p. 511, line 12); the Respondent's ineffectiveness of training of students (App'x p. 514, line 10 - p. 515, line 3); opinions as to the corruption of the role of the teacher (App'x p. 532, line 15 - p. 533, line 12); and that bullying does not require a pattern (App'x p. 535, line 23 - p. 537, line 3.)

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

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

The Court of Appeals had it backwards: the expert's testimony *would* have made a difference to the issue of damages. As discussed above, Dr. McEvoy's testimony spoke extensively to Petitioner's damages; this testimony lies among the other wealth of evidence that at least

presents a fact question as to the child's damages, and further shows causation. This Court cannot say for certainty that the lower court's exclusion of the testimony and the Court of Appeals' failure to consider the substance of the testimony and its relation to the directed verdict motion were harmless—the testimony could have reasonably affected the result of the trial. See Briggs v. Richardson, 288 S.C. 537, 539-40, 343 S.E.2d 653, 655 (Ct. App. 1986).

The decision to exclude this testimony was improper, and it provides still another basis for reversal and remand.

CONCLUSION

What kind of a society are we? The kind that bends and stretches the law, even going so far as to reinvent it, just to shield from justice those who failed in their responsibility to protect a child? I think not. I hope not.

The trial court erred in directing a verdict, and the Court of Appeals erred in affirming that decision. The school district can and should stand trial for its wrongs and the damage they did to a first-grade child. Existing precedent requires reversal and remand. This Court should reverse and remand for a trial in which the school district will face a jury.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Petitioner

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