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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION

Richard M. Gergel, of the United States District Court, District of South Carolina, Charleston Division

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Appellate Case No.: 2023-000922

Candise Gore ……..…….……..….. Plaintiff,

v.

Dorchester County Sheriff's Office;
Dorchester County; Carol Brown;
Keisha Baldwin; Sheriff L.C. Knight;
Richard Darling; Sharon Branch;
Wanda Taylor; and Willis Beatty..……..……Defendants.

BRIEF OF PLAINTIFF

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* All Legislative Materials cited other than citations to the final version of the South Carolina Tort Claims Act were referenced and reproduced at the South Carolina Department of Archives and History located at 8301 Parklane Road, Columbia, South Carolina 29223.

CERTIFIED QUESTION

Does the bar under the South Carolina Tort Claims Act of claims of "intentional infliction of emotional harm," S.C. Code [Ann.] § 15-78-30(f), apply to claims of reckless infliction of emotional distress?

STATEMENT OF THE CASE

On June 18, 2020, Plaintiff was subjected to a search at the Dorchester County Detention Center after an arrest for domestic violence that lacked probable cause.[1] She was forced to remove her tampon in the presence of Detention Center staff, to spread her buttocks and vaginal body cavity, and to squat and cough. Plaintiff was not placed into the general prison population, and there was no reasonable basis to conduct a full strip search or to require that she remove her tampon in the presence of Detention Center personnel.

On February 16, 2023, Plaintiff filed a Second Amended Complaint which included allegations that Defendant Dorchester County Sherriff's Office's conduct "was reckless" and was "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community," and that because of Defendants' conduct, she suffered shock, humiliation, shame and anxiety. Plaintiff further asserts various state and federal causes of action, including a claim under the South Carolina Tort Claims Act for reckless infliction of emotional distress.

Counsel for Defendants filed a motion to dismiss asserting that Plaintiff's claim styled "Reckless Infliction of Emotional Distress" was improper and subject to dismissal on the grounds that "[o]utrage and intentional infliction of emotional distress are specifically not permitted by the South Carolina Tort Claims Act" pursuant to S.C. Code § 15-78-30(f).

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[1] In the case's current posture, the Court is not asked to make any factual determinations but instead is asked to simply answer a narrow question of law. The facts and procedural history of the underlying case, or more precisely allegations from the Plaintiff's Second Amended Complaint and details regarding the Defendant DCSO's Motion to Dismiss are provided to the Court only for context. The entire collection of documents pertinent to this case, including the Plaintiff's Second Amended Complaint, are available at www.pacer.gov under case number 2:22-cv-02322-MHC-RMG, and may be requested from the United States District Court pursuant to Rule 244(b), SCACR.

The South Carolina Tort Claims Act defines a recoverable loss under the statute as any loss "recoverable in actions for negligence," but explicitly excludes losses from "the intentional infliction of emotional harm." S.C. Code § 15-78-30(f). The question of whether the bar to claims of "intentional infliction of emotional harm" includes claims of reckless infliction of emotional distress has been the subject of some uncertainty in recent years.

When the South Carolina Supreme Court first recognized the tort of outrage, otherwise known as intentional infliction of emotional distress, it relied upon Section 46 of the Restatement (Second) of Torts. *Ford v. Hutson*, 276 S.E.2d 776, 778 (S.C. 1981). The Restatement (Second) of Torts defines the tort of outrage as applying to "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress . . ." The comment section of Section 46 distinguishes between "intention and recklessness," noting that the tort applies where the tortfeasor "acts recklessly . . . in deliberate disregard of the high degree of probability that the emotional distress will follow." Rest. (2d) of Torts, § 46, comment (i).

In *Bass v. South Carolina Department of Social Services*, 780 S.E.2d 252, 260-61 (S.C. 2015), the South Carolina Supreme Court implicitly recognized the viability of a reckless infliction of emotional distress claim under the South Carolina Tort Claims Act, although ultimately ruling that the record evidence was not sufficient to constitute the tort of outrage.

Since *Bass*, the federal courts in the District of South Carolina over recent years have begun to develop their own jurisprudence on the issue that the certified question presents. In the case of *Anderson v. Dorchester County*, 2:20-cv-2084 DCN-MGB (March 30, 2021), the Honorable David Norton held that S.C. Code § 15-78-30(f) prohibited all claims of outrage or intentional infliction of emotional distress claims against government entities, even those based in recklessness. *Id*. at 33. Norton based his reasoning on two points. First, that "South Carolina

courts have long treated recklessness conduct as possessing and element of willfulness," and second, that it was ". . . hard to believe that the South Carolina legislature would explicitly exclude from recovery any loss caused by 'the intentional infliction of emotional harm,' but not exclude from recovery the very same harm when the emotional distress was inflicted recklessly" *Id*. at 33.

To date, no case in the Supreme Court of South Carolina or South Carolina Court of Appeals has made such holdings regarding S.C. Code § 15-78-30(f), with the *Bass* decision seeming to point the other way in terms of recovery for infliction of emotional distress based in recklessness.

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right" *Shaw v. Psychmedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (Citing *Drury Dev. Corp. v. Found Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

ARGUMENT

I. THE SOUTH CAROLINA TORT CLAIMS ACT DOES NOT PROHIBIT CLAIMS OF OUTRAGE/INFLICTION OF EMOTIONAL DISTRESS BASED IN RECKLESSNESS

The portion of the South Carolina Tort Claims Act relevant to this inquiry prohibits recovery from a loss stemming from "the intentional infliction of emotional harm." S.C. Code § 15-78-30(f). For the reasons stated *infra*, Plaintiff respectfully contends this prohibition does not extend to the tort of outrage based in recklessness.

A. This Court Should Follow the Spirit of its Prior Precedent in *Bass* and not use Section 15-78-30(f) as a Prohibition on Outrage Claims based in Reckless Conduct

Section 15-78-30(f) was raised and remained in the background of this Court's ruling in *Bass v. South Carolina Department of Social Services*, 414 S.C. 558, 780 S.E.2d 252 (S.C. 2015) when it was decided in 2015. *See id.*, 780 S.E.2d at 565 n.4 (The court addressed S.C. Code § 15-78-30(f) as a defense raised by the opposing party but chose not to apply the code section as a prohibition to recovery in the case).

At the trial level years earlier, the jury returned a general verdict form for the plaintiff Bass family for $4,000,000.00 after being asked to decide whether defendant South Carolina Department of Social Services (herein "SC-DSS") committed gross negligence and recklessly inflicted emotional distress on said Plaintiffs. Record on Appeal Vol. 1 of 2, p.7, *Bass v. S.C. Dep't of Soc. Servs.*, No. 5093, slip op. (Ct. App. Feb. 27 2013) (rev'd on other grounds) 414 S.C. 558 (S.C. 2015), 780 S.E.2d 252. In post-trial motions, counsel for SC-DSS argued *inter alia* that S.C. Code § 15-78-30(f) barred losses for the tort of intentional infliction of emotional distress or outrage. *Bass*, R. at 3. The Honorable Ferrell Cothran, Jr. rejected this argument, finding that "DSS argues that the S.C. Tort Claims Act expressly forbids claims of intentional infliction of emotional distress and, therefore, the [p]laintiffs' cause of action for outrage should be dismissed. The basis for this position is that outrage is commonly called the 'intentional infliction of emotional distress.' However, the case law is clear that a plaintiff can prove outrage by either the *intentional* or *reckless* infliction of emotional distress." *See Bass* R. at 1-4. (emphasis in original) (Judge Cothran further cited *Todd v. South Carolina Farm Bureau*, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472

(S.C. 1985) for this proposition that recovery under the tort of outrage is also available based in recklessness rather than mere intentional conduct) *id.* at 3.

The South Carolina Court of Appeals further raised this issue in their Opinion on the case, and again refused to apply S.C. Code § 15-78-30(f) as a bar, stating ". . . the Basses asserted their intentional infliction of emotional distress was based in DSS's reckless rather than intentional conduct. South Carolina courts have long recognized that an individual's conduct can be so gross as to amount to recklessness" *Bass v. South Carolina Dep't of Soc. Servs.*, No. 5093, slip op. (Ct. App. Feb. 27, 2023) (rev'd on other grounds) at 7 (citing *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011); *Jeffers v. Hardemann*, 231 S.C. 578, 582, 99 S.E.2d 402, 404 (1957); 18 S.C. Jur. Negligence § 9 (2012) ("Recklessness is a higher degree of negligence than gross negligence.")). This reasoning directly opposes the reasoning reached in the federal case in *Anderson* years later.

The Court of Appeals was free to hold that the recklessness argument was moot because Section 15-78-30(f) barred recovery from the tort of outrage, yet declined to do so, instead going into alternate considerations of the claim by stating that because gross negligence was not established, it would naturally follow that recklessness could not be established by the plaintiffs where gross negligence does not exist. *Id*. at 7.

When reaching this Court in *Bass v. South Carolina Dep't of Soc. Servs.*, 780 S.E.2d 252 (S.C. 2015), the Opinion explicitly mentioned S.C. Code § 15-78-30(f) in footnote 4 but again refused to apply Section 15-78-30(f) as a bar to the plaintiffs' Outrage claim, instead finding that the Bass family had not presented evidence that DSS's conduct "was so extreme and outrageous" that it "exceeded all possible bounds of decency." *Id.* at 576.

The approach taken towards S.C. Code § 15-78-30(f) in *Bass* at all levels is contrary to the reasoning reached later in the federal court. Answering this Certified Question before the court "no" would maintain consistency with the *Bass* decision and the South Carolina Tort Claims Act in general. The SCTCA makes clear throughout that damages are recoverable based on reckless conduct through the exceptions in Section 15-78-60 and explicitly draws a clear line between reckless and intentional conduct. *See generally* S.C. Code §§ 15-78-10 through 15-18-220 (while exceptions are listed to exclude the Act from covering employee conduct which "constitutes . . . intent to harm" through S.C. Code § 15-78-60(17) or the "intentional infliction of emotional harm" through S.C. Code § 15-78-30(f), the Act further supports recovery based on theories of gross negligence and recklessness throughout its exceptions listed in Sections 15-78-60, specifically Sections 15-78-60(12), 15-78-60(25), 15-78-60(30), and 15-78-60(31) [30 and 31 directly mention recklessness]).

Accordingly, the jurisprudence in *Bass* should be followed and expanded by answering this Certified Question "no."

B. The Plain Meaning of S.C. Code § 15-78-30(f) Only Prohibits Recovery for Loss Due to the Intentional–Not Reckless–Infliction of Emotional Harm

Under South Carolina jurisprudence, courts are to look to the plain meaning of a statute before any other considerations. *See Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing *Kennedy v. South Carolina Ret. Sys.*, 345 S.C. 339, 549 S.E.2d 243 (2001)) (The first question of statutory interpretation is whether the statute meaning is clear on its face). "If the statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing statutory rules of interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 545 S.E.2d 890, 892 (1995). *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870

(2001) (Where the statute language is plan and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning); *Timmons v. S.C Tricentennial Comm'n,* 175 S.E.2d 805, 817 (S.C. 1970) ("Legislative history can only be resorted to for the purpose of solving doubt, not for the purpose of creating it.").

In the present case before this Court, the full statutory section reads as follows:

> "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 § 15-78-30(f). In the *Wade* case, the Court found that Section 15-78-70(d) of the South Carolina Tort Claims act was ambiguous because it was unclear what phrase the description "under this chapter" modified. *Id.* at 229. The greater context was whether the "under this chapter" phrase affected the scope of the settlement clause in Section 15-78-70(d).

When analyzing the plain meaning of the statutory section 15-78-30(f), the clear operation of the passage is to define the word "loss" under the SCTCA. The passage includes a catch-all that reads "and any other element of [] damages recoverable in actions for negligence . . ." then ends with the phrase "but does not include the intentional infliction of emotional harm."

Because the subject matter of the statute is defining "loss" under the Act, the plain meaning of this passage reads that damages are not recoverable for emotional harm that was intentionally inflicted. There is no mention to specific claims or causes of action save for "actions for negligence" listed in the phrase before the exception portion of the statute. The language does not state "but does not include *actions for the intentional infliction of emotional distress*" nor

does it state "does not include *actions for Outrage*." The passage simply reads "does not include the intentional infliction of emotional harm."

When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Georgia-Carolina Bail Bonds v. County of Aiken*, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (citing *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994); *Carolina Alliance for Fair Employment v. S.C. Dept of Labor, Licensing, & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999); *see also Parsons v. Georgetown Steel*, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) (Where the terms of a relevant statute are clear, there is no room for construction)). Given the context, the passage is unambiguous because when pertaining to the definition of loss, the applicable passage clearly pertains to loss, and the loss of emotional harm that is intentionally inflicted is not recognized by the Act. *See Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Assn*, 306 S.C. 339, 412 S.E.2d 377 (1991) (The terms must be construed in context and their meaning determined by looking at the other terms used in the statute).

The opposing view would have the Court transpose the literal words "intentional infliction of emotional harm" in the context of loss, to mean the tort of intentional infliction of emotional distress or outrage and all that it includes. The opposing view would then have the Court extend the plain meaning of these words to reach reckless conduct and effectively blur the line between reckless and intentional conduct to smother losses or damages gleaned from the reckless infliction of emotional harm. This would not only place words into Section 15-78-30(f) that are not contained in the statute, but extinguish a category of losses that are clearly allowed based on the rest of the statutory passage, i.e., mental anguish stemming from actions for negligence,

which is at heart connected with the legal concept of recklessness. *See Berberich*, 709 S.E.2d at 612 ("Recklessness is a higher degree of negligence than gross negligence."). Such a reach would violate this Court's rules of interpretation based on statutory construction and torture the wording of S.C. Code § 15-78-30(f) beyond its plain meaning. *See Municipal Assn of South Carolina v. AT&T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)) ([T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." *Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Assn*, 306 S.C. 339, 412 S.E.2d 377 (1991)). "Under the plain meaning rule, it is not the courts place to change the meaning of a clear and unambiguous statute." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005).

C. Even if S.C. Code § 15-78-30(f) is Held to be Ambiguous, there is Nothing in the Legislative History of the South Carolina Tort Claims Act to Suggest that Recovery Based in Reckless Conduct is Prohibited

Moreover, if S.C. Code § 15-78-30(f) is held to be ambiguous, the legislative history of Section 15-78-30(f) suggests that the phrase "intentional infliction of emotional harm" was meant to define the state of mind of the tortfeasor more than any broad reaching tort definition. The final wording of Section 15-78-30(f) was adopted in January of 1985, the same month that the bill was introduced. *See* H.J. 425, 106th Gen. Assemb., Reg. Sess. (S.C. 1985); (defines "loss" identically to how it is currently defined in S.C. Code § 15-78-30(f)).

The minutes from the House Judiciary Committee meeting the previous day show that Section 15-78-30(f) was changed multiple times during that meeting. *Discussion on the*

Governmental Tort Claims Act: Meeting on H.J. 425 Before the H.R. Judiciary Comm., 106th Gen. Assemb., Reg. Sess. (S.C. Jan. 22, 1985) (Meeting Minutes pp. 1-2). Based on the available records, the applicable[2] previous version precluded not only recovery from "the intentional infliction of emotional harm," but also pain and suffering and mental anguish. Id. at 1-2; *see also* SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION, SCTLA CONCERNS WITH THE PROPOSED SOUTH CAROLINA TORT CLAIMS ACT, *presented at Meeting on H.J. 425 Before the H.R. Judiciary Comm., 106th Gen. Assemb., Reg. Sess. (S.C. Jan. 22, 1985).* ("the definition of 'loss' excludes pain and suffering, mental anguish, and the intentional infliction of emotional harm.").

While not all discussion on Section 15-78-30(f) is included in the Minutes, the first change referenced is from Representative Short, who moved to "transpose the words, pain and suffering, to be under the including list where it says, 'including lost wages, etc.,' it will read, 'including lost wages, pain and suffering, and economic loss to the person who suffered the injury, disease, or death, but does not [](sic) mental anguish or the intentional infliction of emotional harm." *Discussion on the Governmental Tort Claims Act: Meeting on H.J. 425 Before the H.R. Judiciary Comm.*, 106th Gen. Assemb., Reg. Sess. (S.C. Jan. 22, 1985) (Meeting Minutes pp. 1-2)

During the same meeting, the Judiciary Committee further responded and discussed the changes as follows:

> [Representative Rogers] would further move to strike subsection (f). After some discussion, Mrs. Toal restated the proposed amendment for Mr. Rogers as follows to be subsection (f): "'Loss' means bodily injury, disease, death, damage to tangible personal property, including lost wages and economic loss, pain and suffering, mental anguish, or any other actual damage recoverable for negligent conduct."

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[2] A previous version is attached to the January 9, 1985 Judiciary Committee Meeting Minutes that amends Section 1-11-140 instead of adding Chapter 78, and uses the term "[i]njury" rather than "loss," which it defines as "death, injury to a person, damage to or loss of property, or any other injury or loss that a person may suffer to his person or property as a result of a tortious act as defined herein." H. 2813,105th Gen. Assemb., Reg. Sess. (S.C. 1983). It appears this version was entirely abandoned.

Id. at 2. One day later, on January 23, 1985, the House Judiciary Committee attached a bill to it's January 22, 1985 minutes with a version that had Section 15-78-30(f) as it is today, and no further changes were made. *See* H.J. 425, 106th Gen. Assemb., Reg. Sess. (S.C. 1985) ("Loss" is defined in this version of the bill as "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 excludes "the intentional infliction of emotional harm").

It is instructive that in prior versions, additional categories of damages–rather than specific claims, torts, or causes of action–are placed into the exclusion category with "the intentional infliction of emotional harm" language. If the Legislature truly intended to ban recovery for the tort of outrage in general, they could have easily worded this section coupled with mental anguish as "the infliction of emotional harm," as that would have covered both emotional harm that was inflicted intentionally or recklessly. To the contrary, the showing that the emotional harm phrase was at one point bunched in with further categories of damages–coupled with the final product of the South Carolina Tort Claims Act and its approach to gross negligence and recklessness–shows that the Legislature did not intend to prohibit recovery for emotional harm that was inflicted recklessly. *See generally* S.C. Code §§ 15-78-10 through 15-18-220 (while exceptions are listed to exclude the Act from covering employee conduct which "constitutes . . . intent to harm" through S.C. Code § 15-78-60(17) or the "intentional infliction of emotional harm" through S.C. Code § 15-78-30(f), the Act further supports recovery based on theories of gross negligence and recklessness throughout its exceptions listed in Sections 15-78-60,

specifically Sections 15-78-60(12), 15-78-60(25), 15-78-60(30), and 15-78-60(31) [30 and 31 directly mention recklessness]). *See also Bass v. S.C. Dep't of Soc. Servs.*, No. 5093, slip op. (Ct. App. Feb. 27 2013) (rev'd on other grounds) 414 S.C. 558 (S.C. 2015) ("South Carolina courts have long recognized that an individual's negligent conduct can be so gross at to amount to recklessness") (citing *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011); *Jeffers v. Hardemann*, 231 S.C. 578, 582, 99 S.E.2d 402, 404 (1957); 18 S.C. Jur. Negligence § 9 (2012) ("Recklessness is a higher degree of negligence than gross negligence.")).

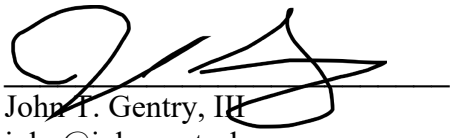
The meaning of S.C. Code § 15-78-30(f) is plain, and if the court finds said meaning is not plain, its legislative history shows evidence of the wording indicating a state of mind rather than a tort. Accordingly, the argument that this language should be "liberally construed in favor of limiting the liability of the government entity," by applying S.C. Code § 15-78-200 to these circumstances do not pass muster, as both the words of the statute and/or the legislative history is clear. *See Wade v. Berkeley* County, 348 S.C. at 230 (S.C. 2002) (S.C. Code § 15-78-200 does not override the court's interpretation of an SCTCA statutory passage when the legislative history is clear).

CONCLUSION

Respectfully, the Court should answer this Certified Question "no." The plain meaning of S.C. Code § 15-78-30(f) does not prohibit the reckless infliction of emotional harm or distress and/or the tort of outrage which includes recklessness as a means of satisfying the elements. Moreover, the limited legislative history available does not show any specific intention to create a blanket ban on losses due the tort of outrage when based in reckless conduct, and instead shows that the "intentional infliction of emotional harm" is treated equally with categories of damages such as pain and suffering and mental anguish rather than as a classification of tort. Finally, the

case history defining the tort of outrage in *Bass* that has analyzed outrage claims against governmental entities without regard to Section 15-78-30(f) as a prohibition on said claims, all provides a strong indication that S.C. Code § 15-78-30(f) does not prohibit claims of reckless infliction of emotional distress.

Respectfully submitted,



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Signed in Charleston, SC
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