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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Supreme Court Number: 2022-001408

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

v.

Richland County School District Two..... Respondent

BRIEF OF RESPONDENT

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I. QUESTIONS PRESENTED

1. Did The Court Of Appeals Properly Uphold The Directed Verdict On The Ground That Petitioner Could Not Recover For Pure Emotional Distress Upon The Evidence Presented?
2. As An Additional Sustaining Ground, Should The Trial Court Have Directed A Verdict For Respondent On Petitioner's Gross Negligence Claim?
3. Did the Trial Court Properly Exclude The Testimony Of Alan McEvoy, Ph.D.?
4. Did The Trial Court Properly Hold That The Safe School Climate Act Does Not Supersede The Tort Claims Act?

II. STATEMENT OF THE CASE

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

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

of Dr. Alan McEvoy, an expert K.S. proffered to testify about bullying of students, the purported standard of care, and damages. (App'x pp. 664-665). On February 28, 2019, Richland Two filed a motion for summary judgment. (App'x p. 87). Both parties submitted supporting memoranda of law. (App'x pp. 89, 105).

The instant action was called for trial on May 28, 2019. Prior to trial, the judge heard and denied Richland Two's motion in limine and motion for summary judgment. (App'x pp. 139, 150). Additionally, the trial judge heard and denied K.S.'s arguments that the South Carolina Tort Claims Act had been repealed or superseded by the adoption of the Safe School Climate Act, S.C. Code Ann. § 59-63-110, *et seq*. (App'x pp. 144-145). During K.S.'s case in chief, Richland Two renewed its motion in limine to exclude testimony of Dr. McEvoy, which the trial judge granted. (App'x pp. 432-433). On the third day of trial, K.S. rested his case and Richland Two moved for a directed verdict on several grounds. The trial judge granted directed verdict on the ground that K.S. could not recover damages solely for emotional distress on the claims pleaded without proof of any physical injury. (App'x pp. 453-455). Her ruling was as follows:

> [t]he damages claimed are, in fact, purely emotional damages . . . Moreover, I don't even know that the touching on October 20th satisfies physical injury. Black's Law Dictionary defines physical injury as physical damage to a person's body. There has been no testimony of any damage to [K.S.]'s person. In fact, I believe there was testimony that there were no physical scars, or no one saw anything, or at least there's no affirmative testimony that there was any damage to his body. . . Restatement Second of Torts, § 436A (as read), 'If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm or emotional disturbance and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

(App'x pp. 453, 455). The trial judge further cited *Kinard v. Augusta Sash & Door Co*., 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985), *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 375 322 S.E.2d 669, 671 (1984), and Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 at *4 (S.C. Com. Pl.), as persuasive authority supporting her decision. (App'x pp. 454-455). The trial judge issued a Form 4 Order on June 7, 2019. (App'x p. 1). K.S. timely appealed to the Court of Appeals on June 6, 2019. (App'x p. 132). The Court of Appeals affirmed the trial court in an unpublished opinion dated July 27, 2022. Petitioner filed a motion for rehearing with the Court of Appeals, which was denied on September 7, 2022. Petitioner timely filed a Petition for Certiorari to the Court of Appeals, which was granted on May 24, 2023. Respondent timely responds to Petitioner's brief filed June 23, 2023.

III. STATEMENT OF FACTS

During the 2011-2012 school year, K.S. was a first-grade student at North Springs Elementary School. (App'x p. 169, lines 17-21). Jan Moody was K.S.'s Teacher for the first two months of K.S.'s first grade year. (Id.). At the time of the events that are the subject of this case, Teacher had been in her profession for more than thirty years and had a solid teaching record in Richland Two with no major disciplinary issues. (App'x p. 258, lines 6-11, p. 283, line 3 – p. 284 line 25, p. 421, lines 1-25, pp. 594-595). She was employed with Richland Two under a continuing contract, essentially giving her "tenure" under the South Carolina Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-410 *et seq*. (App'x p. 420, line 9 – p. 421 line 25).

K.S. testified that during late September and the first part of October 2011, he was frequently the target of intimidation or "bullying" by Teacher because she was mean to

him and yelled at him. (App'x p. 153, lines 16-24). K.S. testified that as a result of this treatment, he felt sad, and that Teacher made him cry. (App'x pp. 155, line 4 – p. 157 line 16). Once K.S.'s parents and North Springs administrators became aware of the alleged mistreatment, K.S. was placed in a new classroom on October 20, 2011, and had no further contact with Teacher, who was placed on administrative leave pending an investigation and decision regarding her status. (App'x p. 171, lines 5-21, p. 215 lines 3-13, p. 420, line 9 – p. 422 line 8). Following the investigation, Teacher was permitted to resign in lieu of termination. (Id.). Teacher's only warning or reprimand in her file as of her resignation date in November 2011 involved a situation in 2009 where she had checked to make sure female second grade students were wearing underwear after it had been reported that underwear had been discarded in the garbage can in the girls' restroom. (App'x p. 272, line 9 – p. 274 line 10).

The Seeger family did not make any complaints to the Richland Two district office about how the school principal, David Holzendorf, handled the investigation of the alleged mistreatment toward K.S. (App'x p. 422, lines 9-25). Specifically, there were no reports between November 2011 and the filing of the lawsuit that the Seegers were dissatisfied with how the situation with Teacher was handled. (Id). K.S. successfully finished elementary school without any documented emotional or psychiatric issues. (App'x p. 229, line 20 – p. 230 line 24). K.S. was not diagnosed with anxiety and depression until 2018, approximately seven years after K.S.'s encounters with Teacher. (App'x p. 313, line 13 – p. 314 line 9). K.S. was not prescribed any medications for mental or emotional issues until 2018. (App'x p. 172, lines 3-10, p. 313 lines 13-18). At the time of trial, K.S. was 14 and going into the ninth grade. (App'x p. 152, lines 1-14).

The following is a summary chronology of relevant events from the evidence at trial:

- **8/15/11** – First day of school for students. K.S.'s mother also began working at North Springs Elementary, K.S.'s school, as an attendance secretary. (App'x p. 434, lines 13-21, p. 439 lines 6-10).

- **9/29/11** – Teacher made a statement in a loud voice to a student (not K.S.) that he would not be able to read a book because it was above his reading level, which was overheard by Tabitha Glover, media center specialist, and Susan Garris, her assistant. Ms. Glover and Ms. Garris reported the incident to the principal, Dr. David Holzendorf. (App'x p. 236, line 12 – p. 237 line 25, pp. 585-586).

- **10/10/11** – Teacher told Ms. Glover, "don't give [K.S.] any special treatment or praise. He has been crying non-stop in the classroom all day and he does not deserve anything" and "of course he's good for you, he has cried all day in my class," referring to K.S. (App'x p. 244, lines 7-23, pp. 585-586).

- **10/18/11** – Teacher met with Dr. Holzendorf, former North Springs Elementary School Principal, and K.S.'s parents to talk about K.S.'s continual crying in her class. (App'x p. 410, lines 6-24).

- **10/20/11** – K.S. dropped his lunch tray in the school cafeteria. Teacher took K.S. by the arm and made him sit at a table by himself after he could not stop crying. (App'x p. 158, line 13 – p. 159 line 2, p. 372 lines 1-13, p. 374 lines 2-21). Belinda Fenwick, a custodian, told the health room assistant, Ms. Wilson, who in turn told Ms. Seeger. (App'x p. 376, line 20 – p. 377 line 13). Mr. and Ms. Seeger then reported the cafeteria incident to Dr. Holzendorf. (App'x pp. 372-377). The Seegers then met with Dr. Holzendorf and Jennifer Germann, North Springs Assistant Principal. (App'x p. 378, line

20 – p. 379 line 22). Dr. Holzendorf agreed to transfer K.S. to Ms. Shipman's class for the remainder of first grade. (App'x p. 383, line 20 – p. 384 line 20).

Dr. Holzendorf and Ms. Germann interviewed Ms. Wilson, health room assistant, and Ms. Fenwick, custodian who reported the cafeteria incident. (App'x p. 372, lines 21-23, p. 376, line 23 – p. 377 line 17).

- **10/21/11** – Dr. Holzendorf and Dr. Karen Lovett, Richland Two's Executive Director of Human Resources, interviewed Mr. Goins, custodian, and Teacher. Dr. Holzendorf met again with Mr. Seeger. (App'x p. 378, lines 7-24, p. 395, line 5 – p. 396 line 14).

- **10/21/11 – 11/1/11** – Mr. Seeger made additional allegations of Teacher isolating K.S. from other students in class as part of an alleged "no crying club." Dr. Holzendorf obtained and reviewed video of the cafeteria incident and met further with related arts teachers, including Ms. Garris and Ms. Glover, to obtain additional information about Teacher's treatment of K.S. (App'x p. 385, lines 3-14). Dr. Holzendorf received reports that K.S. was doing very well in Ms. Shipman's class. (App'x p. 390, lines 18-23).

- **11/1/11** – School Resource Officer was notified of cafeteria incident. (App'x p. 418, line 25 – p. 419 line 24).

- **11/3/11** – Dr. Holzendorf and Dr. Lovett met with Teacher, who was placed on administrative leave. (App'x p. 386, lines 17-19).

- **11/16/11** – Teacher's employment with Richland Two ended. (App'x p. 387).

Prior to the incidents alleged in this case, Richland Two had adopted policies preventing bullying, harassment, and intimidation of students by both students and adults. (App'x pp. 282, 317, 551-556). In addition, it had provided training to both students and

adults regarding bullying, including how to identify and report bullying and specifying consequences of bullying. (App'x pp. 235, 557-578). Prior to the end of September 2011, Teacher had never been accused of bullying or harassing a student in more than 30 years of teaching.

K.S. testified that when Teacher took him by the arm on October 20, 2011, "she would claw my arm with her nails." (App'x p. 159, lines 3-11). K.S. offered no evidence that he suffered physical injury or received any treatment from this touching. (App'x p. 228, line 3 – p. 229 line 19, p. 310, line 11 – p. 311 line 12, p. 418, lines 13-24). K.S.'s medical expert further confirmed that he had never been told of any physical injury to K.S. resulting from Teacher's treatment of K.S. and had assumed that if a physical injury had existed, he would have been so advised. (App'x p. 311). K.S. offered no other evidence of any possible physical injury or physical symptoms of alleged emotional distress.

IV. STANDARD OF REVIEW

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Arthurs v. Aiken Cnty.*, 338 S.C. 253, 260-61, 525 S.E.2d 542, 546 (Ct. App. 1999). "The trial court is concerned only with the existence or non-existence of evidence." *Id.* When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. *Id.* Although the court is required to view the facts in the light most favorable to the nonmoving party, a court cannot ignore facts unfavorable to that party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *See Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533

S.E.2d 597, 600 (Ct. App. 2000). It is not sufficient that one creates an inference that is not reasonable or an issue of fact that is not genuine. *Id.* The judge is not required to single out one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine or material. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002). However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. *Fay v. Grand Strand Reg'l Med. Ctr.*, 412 S.C. 185, 193, 771 S.E.2d 639, 643 (Ct. App. 2015). The courts have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. *Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947). Finally, this Court can affirm on any ground appearing in the record. *See* Rule 220(c), SCACR; *Sims v. Amisub of S.C.*, 408 S.C. 202, 214, 758 S.E.2d 187, 194 (Ct. App. 2014).

V. ARGUMENTS

A. The Trial Court Properly Granted Richland Two's Motion For Directed Verdict On The Ground That K.S. Could Not Recover Damages For Purely Emotional Injury On A Gross Negligence Claim.

South Carolina appellate courts have recognized three ways that a plaintiff may recover damages for emotional distress in a tort case: (1) when it accompanies a physical injury, such as in a car accident; (2) by way of a claim for intentional infliction of emotional distress (IIED) or outrage where severe emotional distress occurs as a result of

extreme and outrageous conduct by the defendant; *see Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68, 70 (2007); and (3) negligent infliction of emotional distress in the bystander context, first recognized in *Kinard*, 286 S.C. at 582, 336 S.E.2d at 467. The development of South Carolina law regarding the recovery of damages for purely emotional distress is clearly outlined in Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 (Ct. Com. Pl. 2014). *See also*, *Pope v. Barnwell Cnty. Sch. Dist. No. 19*, No. 1:16-CV-01627-JMC, 2017 WL 1148741, at *11 (D.S.C. Mar. 28, 2017) (no general negligence cause of action for alleged emotional distress only). The primary reasons for courts' reluctance to impose liability for purely emotional harm include the subjective nature of the injury and corresponding difficulties of proof, the indefinite extension of the emotional consequences of a given act, and the fact that imposing a general duty to use due care to protect the emotional well-being of others would invite wasteful litigation over often trivial matters. *See F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts* § 2A (4th ed. 2011). Section 436A of the Restatement (Second) of Torts, cited by the trial court, further reflects these principles.

The Court of Appeals also properly acknowledged decisions which hold that bodily or physical injury proximately caused by "shock, fright, and emotional upset" as a result of the "negligence and willfulness" of a defendant may be sufficient to permit a recovery in tort under prior law. *See Padgett v. Colonial Wholesale Distrib. Co*, 232 S.C. 593, 608, 103 S.E.2d 265, 272 (1958*); Dooley v. Richland Mem. Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984)[1].

[1] A few post *Ford* and *Kinard* cases have cited to *Padgett's* "bodily injury caused by emotional trauma" without analysis of *Ford* and *Kinard's* more rigorous standards for proof of emotional

1. The Court Of Appeals' Standard For Negligent Infliction Of Emotional Distress Is Appropriate, And It Properly Applied That Standard To This Case.

Respondent agrees with Petitioner's position that the current state of the law on the recoverability of pure emotional damages that do not accompany direct physical injury on a negligence claim would benefit from clarification. For example, the *Padgett* holding is difficult to square with *Ford*, which requires a showing of emotional distress "so severe no reasonable person could be expected to endure it" and *Kinard's* "emotional distress [that] manifests itself by physical symptoms capable of objective diagnosis. . . established by expert testimony." *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007).

A potentially lower standard of proof for recovery on a pure negligence theory would make the IIED claim meaningless or superfluous. "Physical injury resulting from emotional distress," or Petitioner's urged standard of mere "physical manifestation of emotional injury" (Pet. Brief, pp. 20-21), undoubtedly is a lower standard than emotional distress "so severe no reasonable person could be expected to endure it." A plaintiff could further avoid the need to meet the very high standard of showing outrageous intentional or reckless conduct well beyond ordinary negligence or even gross negligence by merely alleging a negligent infliction of emotional distress claim under Petitioner's theory. As the Court of Appeals properly recognized, at a minimum, any extension of the negligent infliction of emotional distress claim beyond the bystander context must presumably incorporate at least the same severity of injury safeguards as the IIED claim. *See Camper*

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distress and without resolving the open question left by *Dooley* about the viability of a claim for pure emotional distress based on simple negligence. *See Strickland v. Madden*, 323 S.C. 63, 67, 448 S.E.2d 581, 584 (Ct. App. 1994); *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 475 (S.C. 2013).

v. Minor, 915 S.W. 437, 446 (Tenn. 1996). The Court of Appeals also properly recognized the need for a heightened standard of fault beyond garden-variety negligence, as recognized in Judge Lewis' concurrence in *Turner v. ABC Jalousie Co. of NC*, 251 S.C. 92, 96, 160 S.E.2d 528, 530 (1968), to support a non-bystander negligent infliction claim. This is also entirely consistent with *Ford's* admonition that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious" *Ford*, 276 S.C. at 166, 276 S.E.2d at 780.

With these authorities in mind, Petitioner did not pursue an IIED claim against Richland Two and a bystander claim was inapplicable based on the facts alleged. The Court of Appeals first properly upheld the directed verdict in this case to the extent K.S. claimed that Teacher's touching of him constituted a physical injury that would permit him to recover for accompanying emotional distress. *See Boan v. Blackwell*, 343 S.C. 498, 502, 541 S.E.2d 242, 244 (2001).

As the trial court properly noted, "physical injury" is defined as "physical damage to a person's body." INJURY, Black's Law Dictionary (11th ed. 2019). K.S. offered evidence of physical touching, but not any evidence of any physical damage to his body. K.S.'s testimony was limited to Teacher leading him by the arm to a cafeteria table and feeling her nails on his arm. (App'x pp. 154-155, 158, 159). Mr. Seeger's testimony confirmed that Teacher did not inflict any cuts, bruises, scratches, or other injury to K.S.'s body. (App'x p. 228, line 3 – p. 230 line 24). Additionally, no physical injury was ever reported to Richland Two. (App'x p. 418, lines 13-24). Likewise, K.S.'s medical expert similarly confirmed no physical or bodily injuries had ever been claimed or

reported to him or other physicians or counselors. (App'x p. 311, lines 1-12).

State v. Robinson, 437 S.C. 226, 878 S.E.2d 8 (2022), which Petitioner cites in support of the argument that K.S. suffered an actual "physical injury" at the hands of Teacher, is completely inapposite to this case. *Robinson* involved the construction of a criminal statute, S.C. Code § 16-3-600(c(1)(a)(i), as to whether an actual physical injury versus a legal injury, as statutorily defined, was required for a conviction of first degree assault and battery under that statute. Construing that statute, the Court of Appeals held that a legal injury was sufficient; if an "act involves the nonconsensual touching of the private parts of a person" it is enough to constitute assault and battery in the first degree without proof of actual physical injury under the statute.

Obviously, S.C. Code § 16-3-600(c) is not implicated in this case. There is no South Carolina opinion in the negligence context that holds that a "legal injury," arising from a mere touching or physical contact that does not also produce a physical injury can support a claim for pure emotional distress damages. As such, Petitioner's attempt to transfer *Robinson's* application of a specifically-worded criminal statute to the tort context is unavailing.

a. Petitioner Did Not Forecast Proof Of Emotional Injuries So Serious Or Severe That A Reasonable Person Would Not Be Able To Cope With The Stress The Circumstances Caused.

With regard to the "severity" element of an IIED claim (and by extension, a negligent infliction claim under the Court of Appeals' standard), this Court has held "the court plays a significant gatekeeping role in analyzing a defendant's motion for summary judgment." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72 (citing Restatement (Second) of Torts § 46 cmt. J, "It is for the court to determine whether on the evidence severe

emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed."). As the Restatement section cited in *Hansson* counsels**:**

> Emotional distress ... includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

Restatement (Second) of Torts § 46 cmt. j.

Based on the evidence of emotional injury submitted, the only outward sign of K.S.'s emotional injury was crying. In the light most favorable to K.S., he expressed anxiety and angry outbursts, and was fidgety and bit his nails. (App'x p. 209, lines 10-13). K.S. was not diagnosed with any anxiety or depression until his teenage years. (App'x p. 172, lines 3-9, p. 313 lines 13-18). This is akin to similar evidence that did not meet the high threshold for submission to the jury in IIED cases. *See Hansson*, 374 S.C. at 358-59, 650 S.E.2d at 72 (lost sleep and grinding teeth); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 169, 708 S.E.2d 218, 224 (Ct. App. 2011), *aff'd*, 410 S.C. 346, 764 S.E.2d 912 (2014)(holding that testimony of nerves being "shot," high blood pressure requiring medication, and digestive problems not sufficient to meet the severity standard); *Shipman v. Glenn*, 314 S.C. 327, 328-29, 443 S.E.2d 921, 922 (1994)(emotional upset and distress requiring plaintiff to leave work early and living in fear for career insufficient to meet severity standard).

b. Teacher's Conduct Was Not Sufficiently Extreme To Support A Verdict Under The Court of Appeals' Standard.

Like the Court of Appeals, Respondent believes Teacher's conduct was inappropriate, improper, and inexcusable. It is undisputed that this conduct effectively ended Teacher's employment with Richland Two.

However, Teacher's inappropriately expressed and handled frustration with K.S.'s crying in class simply does not reach the level of extreme and outrageous conduct sufficient to support damages based on evidence that K.S.'s only outward manifestation of emotional injury was crying and that he was not diagnosed with any anxiety or depression until his teenage years. (App'x p. 172, lines 3-9, p. 313 lines 13-18). While the Court of Appeals' "extreme" standard is not well defined, by analogy, the appellate courts of this state have set a high bar for the extreme and outrageous conduct necessary to support an intentional infliction of emotional distress claim. *See, e.g. Shipman*, 314 S.C. at 328-29, 443 S.E.2d at 922 (holding a supervisor's actions of verbally abusing and threatening an employee with cerebral palsy with the loss of her job and ridiculing the employee's speech impediment to the extent the employee was physically ill and had to leave work early was insufficient to state a claim for intentional infliction of emotional distress); *Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989)(finding allegations that supervisor built a case to justify firing the plaintiff by loading her with responsibility while stripping her of authority and by changing the manner of performing certain duties and then accusing her of not following directions insufficient as a matter of law to constitute the tort of outrage); *but see McSwain v. Shei*, 304 S.C. 25, 27, 402 S.E.2d 890, 891-92 (S.C. 1991), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002) (holding that jury could find outrageous and

intolerable the conduct of an employer who forced employee to perform exercises that exposed her incontinence problem to others).

2. Even if the Supreme Court Were To Adopt The Standard Urged By Petitioner, The Court of Appeals Properly Upheld The Directed Verdict Because A Reasonable Jury Could Not Have Found That K.S.'s Alleged Emotional Distress Caused Him A Physical Injury.

Even assuming continued viability of the *Padgett* "physical injury caused by emotional distress" standard or some modification of that standard short of that adopted by the Court of Appeals, the injuries which K.S. claimed and for which proof was offered fell well short of any "physical injury" that would support an award of damages on his gross negligence theory. Not only did Teacher's physical contact with K.S. not cause an injury, but his claimed emotional response did not cause him a "physical injury" sufficient to support a recovery of damages under the *Padgett* standard. K.S. did not offer any evidence of any physical manifestation of emotional distress besides crying, and he was not diagnosed with any mental or emotional condition until seven years after the alleged incident. (App'x p. 229, line 20 – p. 230 line 24). He simply offered no evidence of any physical or bodily injury that was caused by his claimed emotional injuries.

Richland Two certainly did not and does not condone Teacher's conduct. Her treatment of K.S. and other students ended her employment. Nevertheless, the purely emotional injuries allegedly sustained by K.S. from Teacher singling him out and picking on him are not recoverable under South Carolina law on any theory alleged in this case.[2] Therefore, the trial court properly granted the directed verdict and this Court should also affirm.

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

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

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

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

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

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

[2] As noted, K.S. opted not to pursue potentially viable claims directly against Teacher.

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

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

address K.S.'s crying and to determine the root of the crying, which included speaking directly with K.S., several parent-teacher conferences, and developing a plan to address the crying. (App'x pp. 184-185, 368, 382-383, 440).

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

Moreover, there is simply no legal duty for a South Carolina school district to protect the general emotional well-being of a first-grade student. K.S.'s claim that

Teacher did not use proper methods to address his crying in class fundamentally alleges "educational malpractice" by Teacher or her supervisors, which is clearly foreclosed by *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003). Thus, K.S. did not establish a gross negligence claim as a matter of law and this Court should affirm on that additional ground.

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

Richland Two initially filed a motion *in limine* to exclude the testimony of Dr. McEvoy, which the trial court heard prior to trial. In initially denying the motion, the trial court held that Richland Two's objections to Dr. McEvoy's qualifications, reliability of his testimony, and the need for an expert to explain any issue in the case to the jury went to the weight of the evidence, rather than its admissibility. (App'x pp. 150-151).

On the third day of the trial,[3] K.S. sought to introduce into evidence and play for the jury the two-hour, *de bene esse* deposition of Dr. McEvoy. (App'x p. 430, lines 20-22). Richland Two renewed its objections to Dr. McEvoy's testimony based on the motion *in limine* filed before trial. (App'x p. 431, line 16 – p. 432 line 1). In addition, based on the length of the trial to that point and K.S.'s counsel's extensive questioning of numerous witnesses on Richland Two policy and alleged violations of policy, Richland Two objected under Rule 403, SCRE, on the grounds that Dr. McEvoy's testimony would be unnecessarily cumulative and have the potential to confuse the jury. (*Id).* The Trial Court agreed, finding:

> Having heard all of the witnesses testify, I'm actually going to grant the motion and exclude the witness. His testimony

[3] The trial started on Tuesday, May 28, 2019.

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

(App'x p. 433, lines 2-20).

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)); *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) ("The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion."); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment."); *State v. Jamison*, 372 S.C. 649, 652, 643 S.E.2d 700, 701 (Ct. App. 2007) ("The qualification of a witness as an expert and the admissibility of his or her testimony

are matters left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party."); *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) ("Generally, the admission of expert testimony is a matter within the sound discretion of the trial court." (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)); *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

In his case in chief, K.S. questioned several school employees and administrators at great length about Richland Two Policy JICAA, Harassment, Intimidation or Bullying, and its application to the facts of the case, presumably to show the jury that the policy was ineffective and/or that Richland Two failed to follow the policy and that failure allowed Teacher to cause K.S. emotional harm. Policies JICAA, JICAA-R, and GCQF were used as exhibits and the following witnesses were questioned about their meaning and application to the facts of the case: Susan Garris (App'x p. 251, line 5 – p. 253 line 3); Denise Barth (App'x p. 259, line 7 – p. 271 line 19, p. 275, line 16 – p. 280 line 6); David Holzendorf (App'x p. 319, line 21 – p. 348 line 17, p. 356, line 17 – p. 365 line 24); and Karen Lovett (App'x p. 399, line 14 – p. 408 line 10, p. 425, line 11 – p. 427 line 1, p. 428, line 6 – p. 429 line 4). It simply would have been cumulative for counsel to play a two-hour *de bene esse* deposition that essentially walked yet another witness through the same policies and asked the purported expert to essentially make counsel's repeated argument that Teacher bullied K.S. and Richland Two did not follow its policies related to alleged bullying of students. (App'x p. 468, line 11 – p. 469 line 16, p. 491,

line 25 – p. 492 line 23, p. 493, line 15 – p. 496 line 18, p. 499, line 22 – p. 501 line 16, p. 503, line 9 – p. 509 line 18, p. 514, line 24 – p. 515 line 15). The jury was fully capable of deciding those issues without Dr. McEvoy essentially re-hashing earlier testimony on the penultimate day of the trial. Further, Dr. McEvoy's testimony as to the potential effects of bullying on students in general[4], where K.S., his father, and a treating expert had already testified as to alleged specific effects on K.S. arising out of Teacher's conduct, would also have been both cumulative and unhelpful to the jury. (App'x pp. 158-161, 162-168, 182-183, 191-213, 222-226, 287-307).

In addition, Dr. McEvoy's testimony had very real potential to confuse the jurors as to the ultimate issues in the case, which were: 1) under the Tort Claims Act, whether Richland Two was grossly negligent in its supervision of K.S. and/or Teacher, and 2) whether K.S. could prove causation and recoverable damages as a result of the alleged gross negligence. The term "bullying" has no independent legal significance in South Carolina. Further, Dr. McEvoy's testimony incorporating simple negligence, rather than a gross negligence standard, was likely to confuse the jury as to the applicable standard for determining liability. (App'x p. 494, line 15 – p. 495 line 15). Accordingly, permitting an expert witness to testify that K.S. was "bullied" had the strong potential to mislead the jury into thinking that proof of Teacher "bullying" K.S. was a dispositive issue in the case. Dr. McEvoy's testimony that Teacher bullied K.S. and that Richland Two violated its policies would have been completely without reference to the proper Tort Claims Act gross negligence standard the jury would have been asked to consider. In summary, K.S. was not entitled to introduce Dr. McEvoy's cumulative testimony to "drive home" the

[4] Dr. McAvoy testified that he had never interviewed, let alone provided any treatment to K.S., or even spoken to any witness in the case. (App'x p. 472, lines 19-21).

misleading mantra that proof of "bullying" somehow is proof of both gross negligence and a legally compensable injury worthy of damages, particularly when K.S. made the same argument for two full days through witnesses his counsel chose to call. As such, the Trial Court did not abuse its discretion in properly excluding Dr. McEvoy's testimony under Rule 403, SCRE.

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

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

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

The qualification of a witness as an expert is within the trial court's discretion. *Fields v. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d. 80, 85 (2008). In determining the admissibility of expert testimony, South Carolina courts make three inquiries. First, the court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Graves v. CAS Med. Sys., Inc.*, 401 S.C 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)). Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *Id.* Finally, the substance of the testimony must be reliable. *Id.* The final inquiry is the central feature of the analysis. *Id*. Only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is

reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009). Importantly, the party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. *See State v. Harris*, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995) (party presenting expert must show witness possesses, either through study or experience, specialized knowledge that makes him better qualified than jury to form opinion on particular subject). *State v. Henry*, 329 S.C. 266, 274, 495 S.E.2d 463, 466-67 (Ct. App. 1997).

1. K.S. Failed To Show That Dr. McEvoy's Testimony Was Beyond The Ordinary Knowledge Of The Jury.

K.S. sought to qualify Dr. McEvoy as an expert witness on the subject of teacher-versus-student bullying and school district responses to teacher-versus-student bullying. (App'x p. 469). Dr. McEvoy was expected to testify "as to the Defendant's standard of care, breach of that standard of care, Plaintiff's damages, and the causation of Plaintiff's damages." (App'x pp. 664-665). The substance of Dr. McEvoy's testimony was that teachers, as well as peers, are capable of "bullying" students, and he believed that Richland Two failed to act to prevent Teacher from bullying K.S. and causing him emotional distress. Without Dr. McEvoy's testimony, the jury would have been fully capable of determining all relevant ultimate issues in the case, which were: 1) whether Richland Two was grossly negligent and failed to exercise slight care in its supervision of K.S. and/or Teacher, and 2) whether K.S. could prove causation and recoverable damages as a result of the alleged gross negligence. The jury simply had no need for an "expert" to read Richland Two policies to them, tell them that K.S. had been "bullied" (without

reference to the proper legal standard, as discussed above), and that a student bullied by a teacher might suffer emotional distress. While Dr. McEvoy might have acquired more knowledge than most jurors on the general subject matter of "teacher bullying of students," his testimony did not encompass facts or opinions beyond their general knowledge and should have been excluded on that basis.

2. KS. Failed To Show That Dr. McEvoy Had The Requisite Knowledge And Skill To Qualify As An Expert In This Case.

A proposed expert witness must have acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. *State v. White*, 372 S.C. 364, 374, 642 S.E.2d 607, 612 (Ct. App. 2007). In this case, K.S. offered insufficient evidence to support the qualifications of Dr. McEvoy as an expert to testify regarding Richland Two's standard of care, breach of that standard of care, K.S.'s damages, and the causation of K.S.'s damages. Specifically, as it relates to Richland Two's standard of care, Dr. McEvoy had no knowledge, experience, training, or education specifically related to South Carolina standards of care. At the time of his deposition, Dr. McEvoy was employed at Northern Michigan University and had previously been employed at Wittenberg University in Ohio. (App'x p. 470). Dr. McEvoy had never worked in South Carolina and had only been to South Carolina once for a golf outing ten to twelve years prior to the trial. (*Id).* Further, Dr. McEvoy had never appeared as a presenter at a conference in South Carolina nor conducted any training in South Carolina. (App'x p. 471). Dr. McEvoy had no experience or study of South Carolina laws or regulations as related to qualifications or employment of teachers, supervision of teachers, or

supervision of students. (*Id).* Furthermore, Dr. McEvoy had never held a certificate or license to teach in a K-12 setting in any state nor had he ever been employed by a public school district. (*Id).* Dr. McEvoy conceded that he had not reviewed any training materials or programs used by South Carolina school districts other than Richland Two. (App'x p. 472). Finally, Dr. McEvoy had never been qualified as an expert witness in South Carolina and could not identify any case in which he had been qualified as an expert on the subjects for which his testimony was proffered. (App'x p. 473).

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

3. K.S. Failed To Show That Dr. McEvoy's Testimony Was Reliable.

In non-scientific expert testimony challenges, the court "must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable." *Graves*, 401 S.C. at 75, 735 S.E.2d at 656. "Thus, while a challenge to an opinion's reliability generally goes to weight and not admissibility, this 'familiar evidentiary mantra' may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible." *Id.*

In addition to Dr. McEvoy's lack of technical and specialized knowledge, Dr. McEvoy testified that there is very little research on national standards of teachers

bullying students. (App'x p. 473). Further, he testified that "there's research on the long-term effects of trauma, particularly to ---Teacher bullying is not as much known." (App'x p. 524, lines 12-13). Dr. McEvoy testified that his article based on a study in 2017 and published in 2018 discussing bullying was the first of its kind. (App'x p. 474). Thus, there are extremely limited published articles and studies on the topic, not relied upon or applied by other qualified individuals, and limited data that would assist the trier of fact to understand the evidence or to determine a fact at issue in this case. Dr. McEvoy indicated that most of the research and most of the attention is focused on peer-on-peer bullying, which was not an issue in this case. (App'x p. 527).

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

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

The trial court's directed verdict ruling was based solely on K.S.'s failure to offer evidence of physical injury required to support an award of damages for emotional distress pursuant to a gross negligence theory under the Tort Claims Act. It is undisputed that Dr. McEvoy's testimony would not have addressed whether K.S. had sustained a physical injury, but rather, would have been offered to establish that Richland Two did not follow an alleged standard of care as set forth in its policies. Because the Trial Court properly granted Richland Two a directed verdict on K.S.'s failure to prove damages, the exclusion of Dr. McEvoy's testimony, even if erroneous, would not have altered the outcome. Accordingly, even if the trial court erred in excluding Dr. McEvoy's testimony, it would not be reversible. *See State v. Miller*, 367 S.C. 329, 336, 626 S.E.2d 328, 332 (2006) (holding error is harmless if, after reviewing the entire record, the reviewing court

finds the error "could not reasonably have affected the result of the trial"); *Briggs v. Richardson*, 288 S.C. 537, 539–40, 343 S.E.2d 653, 655 (Ct. App. 1986). *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive); *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

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

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

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

S.C. Code Ann. § 59-63-150(A) (*emphasis added*). K.S. makes a tortured attempt to create an ambiguity where there is none. He asks this Court to find that a statement confirming that the Safe School Climate Act **does not alter tort liability** actually was intended to alter tort liability.

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

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

VI. CONCLUSION

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

Respectfully submitted,

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