THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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CERTIFIED QUESTION

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

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Case No. 2023-000922

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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.

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# REPLY BRIEF

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### I. S.C. CODE § 15-78-30(f) DOES NOT PROHIBIT OUTRAGE CLAIMS BASED IN RECKLESS CONDUCT

#### A. The Wording and Plain Meaning of S.C. Code § 15-78-30(f) Does Not Include a Prohibition on Reckless Conduct

The tort of Outrage can be proven either through intentional or reckless conduct (Restatement (2d) of Torts, § 46, comment (i)), but the Defendants are attempting to stretch that proposition into the plain meaning of the language in S.C. Code § 15-78-30(f), which only precludes the "***intentional*** infliction of emotional harm," *Id.* (emphasis added). Moreover, Defendants' argument that ". . . the very definition of intentional infliction of emotional distress fully covers allegations of reckless conduct . . . ," (Def.s' Brief at 4, ¶ 2) when pertaining to making allegations in pleadings or elements of a cause of action, does not apply to the wording in S.C. Code § 15-78-30(f), as statutes must be read based on their plain 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).

#### B. There Appears to be no Precedent in the State Courts Holding that Infliction of Emotional Distress based Exclusively in Recklessness is Barred by Section 15-78-30(f) of the South Carolina Tort Claims Act

Defendants argue that the term of art "intentional infliction of emotional harm" is "specific language for a cause of action . . ." Def.s' Brief at 6, ¶ 1. If this was the case, the South Carolina Legislature would have simply used the term "tort of Outrage" or "tort of Intentional Infliction of Emotional Distress" instead of "intentional infliction of emotional harm." Moreover, the South Carolina Legislature consciously chose not to include the word "reckless" or "recklessness" in

S.C. Code § 15-78-30(f). *Id.* Based on the rules of statutory construction, it is accordingly inappropriate to transpose a greater multifaceted meaning to the term "intentional infliction of emotional harm" when the lawmakers had the opportunity to explicitly expound on the language and chose not to do so. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) ("Under the plain meaning rule, it is not the courts place to change the meaning of a clear and unambiguous statute.").

Moreover, Plaintiff's pleading of the relevant cause of action in this case excludes any mention of intentional conduct, Pl's. Second Am. Compl. at 17-18 (ECF No. 40), S.C. Code § 15-78-30(f) should not preclude its viability in this case. Contrary to the Defendants' contention, emotional distress as part of the tort of outrage/intentional infliction of emotional distress is an element of damage, as the emotional distress is the damage inflicted onto the plaintiff in such a claim. *See* Restatement (2d.) of Torts, Comment (j) (stating one element is that "the actions of the defendant cause the plaintiff emotional distress . . ."). Because this emotional distress can be recklessly inflicted, and because S.C. Code § 15-78-30(f) does not address emotional distress that is inflicted recklessly, the plain meaning of the wording must control and recovery from emotional distress or harm inflicted recklessly must not be precluded.

Defendants go on cite two South Carolina Court of Appeals cases–both of which pre-date the *Bass* case (*Bass v. SC Dept. of Social Services*, 742 S.E.2d 667, 403 S.C. 184 (Ct. App. 2013)–as well as various South Carolina trial court orders for support of their argument. *See* Def.s' Brief at n.2, n.3. Addressing first the 2011 cases from the South Carolina Court of Appeals, the *Trask v. Beaufort County* case involved an alleged tort of intentional infliction of emotional distress claim that was made against the County Coroner individually. *Trask v. Beaufort Cty.*, 392 S.C. 560, 709 S.E.2d 536 (Ct. App. 2011). Before even reaching the issue in the case pertaining to Section 15-

78-30(f), the intentional infliction of emotional distress claim in the case against the coroner was clearly precluded by S.C. Code 15-78-50 as it was brought against an individual rather than the entity and that is what the Court of Appeals held. Moreover, while S.C. Code § 15-78-30 was addressed in the case subsequently by the Court of Appeals, there is no indication the plaintiffs alleged or made arguments that the statements the coroner made were based solely in recklessness. *Id.* In *Densmore v. City of Greenville*, 2011 WL 11733107 (Ct. App. 2011), there was again no argument or issue brought up that indicated the plaintiff alleged that the intentional infliction of emotional distress was based solely in recklessness. Moreover, this opinion is unpublished and is explicitly labeled as a case that should not be relied on for precedential value.

Of the many state trial court cases cited by Defendants, it appears that none of the cases raise the issue of whether S.C. Code § 15-78-30(f) precludes an Outrage claim based solely in recklessness as is presented in this case. Moreover, many of the cases appear to not even have been contested by the Plaintiff. *See Clay v. City of North Charleston Police*, 2011-CP-10-09621 (plaintiff's attorney did not appear at the motion hearing where defense counsel moved to strike the claim for intentional infliction of emotional distress and intentional infliction of emotional distress claim was not solely based in recklessness); *see also Jane Doe v. Palmetto Richland Memorial Hospital*, 2000-CP-40-00371 (the plaintiff's attorney consented to striking the intentional infliction of emotional distress claim and intentional infliction of emotional distress claim was not solely based in recklessness).

C. <u>The *Bass* Cases are Relevant to Infliction of Emotional Distress Claims Based in Recklessness in relation to the Tort Claims Act in the State Courts</u>

Finally, Defendants argue that the *Bass* cases have no precedential value regarding this issue. Def.s' Brief at 8-9. In the Court of Appeals decision in *Bass*, the wording of the opinion addresses the Basses' argument regarding the reckless vs. intentional designation. Verbatim, the Court of

Appeals states as follows ". . . 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.*, 742 S.E.2d 667, 403 S.C. 184 (Ct. App. 2013) (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 response shows that the Court of Appeals went to some effort to differentiate reckless versus intentional conduct while it directly addressed the plaintiff's argument relevant to this issue in a manner consistent with the position of the Plaintiff in this case. Moreover, prior cases from the Court of Appeals that were offered by Defendants in their brief–for example, the *Trask v. Beaufort County* case– show that when given the opportunity, the Court of Appeals will not explore the merits of an infliction of emotional distress claim when there is a statutory provision of the South Carolina Tort Claims Act that defeats the claim. *See Trask v. Beaufort Cty.*, 392 S.C. 560, 709 S.E.2d 536, 573 (Ct. App. 2011) (When addressing infliction of emotional distress claim against coroner, Court of Appeals immediately cited S.C. Code § 15-78-50 and § 15-78-30 to dismiss the claim without addressing the merits).

Moreover, this Court saw fit to cite S.C. Code § 15-78-30(f), albeit in footnote, in the *Bass* Supreme Court decision and address the merits of the Outrage claim against the governmental entity. *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). Accordingly, the Plaintiff maintains the relevance of these

*Bass* decisions to the current inquiry and re-asserts the arguments previously made to re assert that the certified question be answered in the negative.

## 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 distress and/or the tort of outrage which includes recklessness as a means of satisfying the elements. Moreover, Defendants have not offered any additional case law that actually addresses the recklessness argument, and Plaintiff maintains her contention that the *Bass* cases gives the framework for precedent that claims for infliction of emotional distress based solely in recklessness are not prohibited due to S.C. Code § 15-78-30(f).

Respectfully submitted,

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Signed in Charleston, SC
September 6, 2023

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