STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Michael G. Nettles
12th Judicial Circuit Court Judge
Trial Court Case No.: 2021-CP-21-02121

Appellate Case No.: 2024-001454

IN RE Hannah Secka individually and as parent and guardian for the minor, M.Y.S., Appellants,

v.

Florence County School District One and Florence County Sheriff's Department, Respondents.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

This appeal arises from a civil action filed by Hannah L. Secka (on behalf of her then minor son, M.Y.S.), against Florence School District One (District or FSD1) and the Florence County Sheriff Department (FCSD), asserting causes of action for gross negligence/recklessness and breach of fiduciary duty. (ROA R. pp.44-54). The causes of action are based a wide range of misconduct including assault, battery, hazing, harassment, discrimination, and violations of special education law. (ROA R. pp. 44-54). Namely, Appellants assert that M.Y.S., a disabled student, was allegedly subjected to physical and emotional abuse by school staff and students and that the District failed to act on multiple reports of misconduct. (ROA R. pp. 44-54).

Following a full opportunity for discovery, Respondent filed a Motion and Memorandum of Law in Support of its Motion for Summary Judgment. (ROA R. pp. 76-96). After a hearing on February 20, 2024, the Circuit Court granted summary judgment in favor of the Respondent on March 5, 2024, finding that the Appellants failed to establish a genuine issue of material fact to proceed with the tort-based claims and that the cause of action for breach of fiduciary duty should be dismissed as a matter of law. (ROA R. pp. 20-30). Appellants filed a Motion for Reconsideration in response to the Circuit Court's decision. (ROA R. pp. 223-230). The Circuit Court thereafter issued an order denying that Motion on September 4, 2024. (Included in DOM, excluded in ROA, attached herewith as **Exhibit 1**). Appellants now appeal those decisions.

FACTS

This is a South Carolina Tort Claims Act ("SCTCA") case. M.Y.S. was a student in the District at all times relevant to this action. The Complaint alleges various incidents of gross negligence on the part of the District between 2017 and 2019 that harmed M.Y.S. (ROA R. pp. 44-54).

M.Y.S. attended Sneed Middle School during the 2017-2018 school year. (ROA R. p. 48, ¶ 15). He was a student at West Florence High School during the 2018-2019 and 2019-2020 school

year. (ROA R. p. 48, ¶ 15). The Court noted that M.Y.S. received some special education services under the Individuals with Disabilities Education Act ("IDEA"), and Appellants have previously initiated a number of challenges against the District under the IDEA's due process provisions. (ROA R. pp. 20-21). As part of the services provided to him, M.Y.S. had an Individual Education Program to address various conditions with the potential to impact his education, including Autism Spectrum Disorder, narcolepsy, cerebral palsy, depression, anxiety, and P.T.S.D. (ROA R. p. 21). M.Y.S. also had a Behavior Intervention Plan to address his negative behaviors—he had an extensive discipline record—which included the services of a one-to-one aid to assist him with tasks and not disturbing the class. (ROA R. p. 21). However, M.Y.S. took regular education, diploma-track courses, and he graduated. He also played on the football team during his freshman and sophomore years. (ROA R. p. 21).

Appellants filed their Complaint on September 29, 2021, which included causes of action for Gross Negligence/Recklessness and Breach of Fiduciary Duty, alleging "grossly negligent hiring, retention, and supervision" of the District's employees who are alleged to have either 1) "threatened, bullied, intimidated and, harassed" M.Y.S.; or 2) failed to prevent M.Y.S. from getting into a "tussle" with two of his teammates in the locker room. (ROA R. pp. 44-54).

> The specific allegations as set out in the Complaint and still at issue are as follows:
>
> That on or about May 29, 2018, [District Employee] Kathy Luhrs wrote an obscene phrase on M.Y.S. with a black chemical marker without his consent. Compl. ¶ 16. (R. p. 22, lines 25-27; ROA R. p. 48).
>
> That on or about October 17, 2018, M.Y.S. was attacked by several students in West Florence High School's athletic locker room resulting in physical injuries to his face and back. Compl. ¶ 17. (R. p. 22, lines 29-31; ROA R. p. 48).

The Complaint also asserts the following conclusory allegations:

> That on various occasions, during the academic school year 2018-2019, [District employees] Matthew Dowdell, Jeff Lee, Christopher Coleman, and Lisa Doyles threatened, bullied, intimidated, and harassed M.Y.S. Compl. ¶ 18. (R. p. 22, lines 33-35; ROA R. p. 48).

In deposition testimony, M.Y.S. described the incidents that led him to make such allegations.

Particularly, M.Y.S. complained that Mr. Dowdell would not let M.Y.S. play in football games and so M.Y.S. did not "get to enjoy [his] actual football high school experience." ([ROA lacks complete deposition transcript identified in DOM]). M.Y.S. testified: "I guess, it was their way of like, making sure I don't get hurt, which was I – I'm assuming that that was what they were doing." ([ROA lacks complete deposition transcript identified in DOM]).

M.Y.S. complained that Mr. Coleman "harassed" him by letting other students go through the metal detectors at the school's entrance while searching M.Y.S.'s bag "extra, extra hard . . . as if he's trying to have a reason to – to get [him] in trouble, basically." (ROA R. p. 291, line 18-p. 292, line 3). M.Y.S. said he "would feel very singled out because of that." (ROA R. p. 292, line 4).

M.Y.S. complained that Ms. Doyles almost "failed [him]," but he admitted he was able to salvage his grade. ([ROA lacks complete deposition transcript identified in DOM]; see also, ROA R. p. 292, lines 7-15). He also claimed that Ms. Doyles made a comment that made it seem like she was comparing him to a disabled character in a popular young adult novel, which made M.Y.S. "mad when she said that." ([ROA lacks complete deposition transcript identified in DOM]; see also ROA R. p. 292 lines 15-20).

M.Y.S. also alleged that his eighth-grade teacher, Ms. Luhrs, wrote on his arm with a marker. When testifying regarding this incident, M.Y.S. stated that he did not remember exactly what happened but recalled that the teacher was talking about tattoos and then began drawing on several students' hands and arms. ([ROA lacks complete deposition transcript identified in DOM] ROA R. p. 185, line 1-p. 186, line 24). M.Y.S. recalled that the teacher wrote "loyality" [sic] on his arm, misspelling the word, "loyalty." ([ROA lacks complete deposition transcript identified in DOM]; ROA R. p. 186, lines 18-21). M.Y.S. testified that he "didn't really too much appreciate

that" and that he "just tried to wash it off." ([ROA lacks complete deposition transcript identified in DOM]; ROA R. p. 186, lines 22-24).

Finally, the Complaint alleged that on or about October 17, 2018, M.Y.S. was "attacked" by his fellow teammates in the football locker room." Compl. ¶ 17. (R. p. 22, lines 29-31; ROA R. p. 48, ¶ 17). M.Y.S. claimed that his football coach, Coach Lee, failed to investigate the incident, which M.Y.S. described as a "tussle," and that it made him feel "like everybody else was just against [him], basically." ([ROA lacks complete deposition transcript identified in DOM]). In deposition testimony, M.Y.S. stated that the "tussle" lasted for a "little minute" and involved two other teammates who hit him and whom he hit back. ([ROA lacks complete deposition transcript identified in DOM]; ROA R. p. 192, line 21-p. 193, line 25). M.Y.S. described his injuries from this incident as "like, a little whelp or whatever" right above his lip (but no bleeding) and "little scrapes, little scratches" on his back. ([ROA lacks complete deposition transcript identified in DOM]; ROA R. p. 194, line 20-p. 195, line 24). Importantly, M.Y.S. stated that no one in the locker room would have seen this incident occurring because it was "too congested with players." ([ROA lacks complete deposition transcript identified in DOM]; see also ROA R. p. 191, line 17-p. 191, line 3).

Additionally, the record contains evidence that M.Y.S. previously denied that this incident occurred. M.Y.S. provided a statement to an investigator from the United States Department of Education's Office of Civil Rights ("OCR") saying that he did not remember being assaulted by his teammates. (ROA R. p. 34; p. 81, last ¶; p. 296, line 21-p. 297, line 10). OCR's report also notes that M.Y.S. told Coach Lee "that he had not been assaulted by his teammates but that he got bumped accidently in the basketball gym before practice." (ROA R. p. 297, lines 8-10). Finally, a police report that Appellant Secka filed several months afterwards regarding this incident states that M.Y.S. "told his mother that they were rough housing around in the locker room after

practice." (ROA R. p. 114; p. 297, lines 11-14). In sum, the only record evidence as to what occurred in the locker room are the several conflicting statements made by M.Y.S.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (internal citation omitted). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Medical Univ. of S.C. v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004) (internal citation omitted). Our supreme court has established "[t]he plain language of Rule 56(c) mandates the entry of summary judgment. . .against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357058, 650 S.E.2d 68, 71 (2007) (quoting *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545–46 (1991)). Additionally, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (clarifying that the "mere scintilla" standard does not apply under Rule 56(c) and rejecting contrary precedent).

ARGUMENT

I. Appellants have included new issues, arguments, and information not raised before or considered by the Trial Court below, which should not be considered by this Court.

This Court must disregard new arguments, information, and documentation raised by Appellants if the arguments, information, and documentation are introduced on appeal and have not been considered below. In Appellants' lengthy brief, as well as in their Designation of Matter, Appellants have included a litany of facts, arguments, and documents that were never presented to the lower court in opposition to the motion for summary judgment or the motion for reconsideration.

As an initial matter, the rules are clear that a record on appeal "**shall not . . . include matter which was not presented to the lower court . . . .**" Rule 210(c), SCACR (emphasis added). Here, a majority of the materials in the Appellants' Designation of Matter were not presented to the court below. In fact, several of those documents were never disclosed in discovery. Specifically, items 3, 5, 6, 8, 11-12, 14-33, 36-40, 45-51, 53-61, 63-64, and 66 in Appellants' Designation of Matter were not introduced to the trial court. Accordingly, this Court should disregard these materials and exclude them from the record and the contentions based upon them.

Secondly, Appellants' Initial Brief raises numerous factual allegations and conclusions for the first time, often related to issues or complaints that are completely immaterial to the issues under appeal. Rather than focus on the appeal, Appellants have used their brief as another avenue to publish and pursue their dissatisfaction with the Respondent District.[1] The new allegations and conclusions include, but are not limited to, their disagreement with the quality of Appellants'

[1] Appellants have a history of pursuing administrative complaints against the Respondent District and its employees, including numerous IDEA due process hearing requests that resulted in a lawsuit for repetitive, abusive, and bad faith requests; complaints with the Office of Civil Rights, State Department of Education Complaints, and teacher misconduct complaints.

former counsel, alleged perjury during IDEA administrative hearings, wrongful termination claims in a separate school district, instances of bribery in due process hearings, violations of mandatory reporter obligations, separate Title IX allegations/litigation related to other students, and allegations of sexual assault.[2] A "great number of reported cases in South Carolina[], and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and **absolute necessity** of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review **only when they are raised to and ruled on by the lower court**." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (emphasis added); *see also Herron v. Century BMW,* 396 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.' ")

Here, the Appellants failed to properly raise, present, or preserve a significant majority of the identified allegations in their Initial Brief and Designation Matters on Appeal as needed for appellate review, and this Court therefore should deem those contentions waived and not consider them as part of this appeal.

II. Appellants have abandoned two of the six issues identified in their Statement of Issues on Appeal

Appellants identify six issues in their Initial Brief for consideration by the Court. However, two of these issues are mere statements of issues on appeal without any supporting authority or argument. Those issues include the following:

[2] Appellants have included what they present as deposition testimony of M.Y.S. in the body of their brief. While the majority of the transcript provided in the brief is correct, Appellants have altered the deposition testimony to include language with sexual connotations. Please see page 25 of Appellants Final Brief which adds the words "penis area" to page 90 the deposition testimony of M.Y.S.

"Did the Circuit Court err by misinterpreting Rule 60(b)(2) and Rule 59(b) for Corrections based on Clerical Mistakes, Oversights and Omissions, Grounds for Relief of an Order, or Newly Discovered Evidence? (*Expert Data*)"; and

"Did the Circuit Court err by denying Plaintiffs the right to a trial by jury pursuant to the Seventh Amendment of the unties States Constitution and preclude evidence that can determine the truth as a matter of law?"

Appellants' failure to argue issues in their initial brief renders those issues abandoned. The SCACR require appellants to file a brief containing, in part, a section containing statements of the issues on appeal and a section containing an argument of each issue listed in the statement of issues on appeal. Rule 208, SCACR. Matters not listed in the statement of issues on appeal or not argued in the argument section are considered abandoned and the Court need not consider them. Rule 208, SCACR; *see also Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42, 535 S.E.2d 642, 647 (2000) (noting that failure to include an argument for issues raised on appeal effectively renders that issue abandoned); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An Appellants may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the Appellants' brief."); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal); *Muir v. C.R. Bard, Inc.,* 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999) (noting that conclusory arguments may be treated as abandoned); *S.C. Dep't of Prob., Parole & Pardon Servs. ex rel. State v. Reynolds*, 343 S.C. 465, 468, 540 S.E.2d 480, 482 (Ct. App. 2000) (noting that statements without authority and that are conclusory amount to an abandonment of an issue of appeal); *Hunt v. Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) ("Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.").

Here, Appellants list the two aforementioned issues in their statement of issues on appeal, but they fail to include supportive authority or argue these points in the argument section of their brief. Appellants therefore have abandoned these issues, and the Court is not required to consider them. With these issues being abandoned, Respondent offers no further argument against them.

III. Appellants Failed To Properly Preserve Arguments Within Their Brief Related to A Cause of Action for Breach of Fiduciary Duty

Although Appellants contend that the trial court erred in dismissing a separate cause of action asserting a breach of fiduciary duty, Appellants failed to include this point/argument as part of their statement of issues on appeal—either generally or specifically. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. Rule 208(B)(1), SCACR; *see also State v. Hughes*, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) (no point will be considered which is not set forth in the statement of the issues on appeal).

Even assuming, *arguendo*, that Appellants have, through some combination of wording within the statement of issues on appeal and the briefing, adequately raised the issue of fiduciary duty for consideration by this Court, the cause of action as alleged is not supported by law. In support of their position that a fiduciary relationship exists, Appellants states that "since M.Y.S was a student at [a high school within the District], we believe that [the District] may have incurred a fiduciary duty to protect M.Y.S from harm." *See* Appellants' Initial Brief, p. 50. In short, Appellants allege a fiduciary duty exists due to M.Y.S. being a student within the school district.

However, South Carolina does not recognize a fiduciary duty in a school-student setting. *See Doe v. Greenville Cnty School District*, 375 S.C. 63, 72, 651 S.E.2d 305, 309-10 (2007) (upholding the trial court's dismissal of the plaintiffs' cause of action for breach of fiduciary duty against school district, as well as dismissal of the cause of action for breach of an assumed duty *in loco parentis*); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 [2003] ("We decline to recognize the relationship between advisor and student as a fiduciary one.").

Accordingly, Appellants failed to preserve this argument for consideration and, even had it been properly preserved, the trial court properly dismissed the cause of action as matter of law because South Carolina does not recognize a fiduciary relationship between a school and its students.

IV. The Trial Court properly concluded that Appellants failed, as a matter of law, to establish a compensable loss under the Tort Claims Act Regarding the Actions and Supervision by District employees.

The SCTCA defines a compensable "loss" 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 does not include the intentional infliction of emotional harm*."

S.C. Code § 15-78-30(f) (emphasis added). Thus, the Act requires pleading and proof of "bodily injury, disease, death or damage to property" and only once one of those is established, a person may pursue damages that include pain and suffering, mental anguish, etc. *See Dooley v. Richland Memorial Hosp*., 283 S.C. 372, 322 S.E.2d 669 (1984) (rejecting parents' cause of action for emotional distress in part because the parents "failed to make any showing of physical injury to support their claim."). Otherwise, Appellants are pursuing the equivalent of an infliction of emotional distress claim– whether negligent, reckless or intentional infliction of emotional distress – none of which may proceed as a matter of law.

Based on the pleadings and arguments before it, the trial court originally addressed Appellant's claims arising from interactions with Employees Dowdell, Lee, Coleman, Doyes, and Luhrs as a claim for negligent infliction of emotional distress claim. However, in South Carolina, there is no general negligence cause of action solely for alleged emotional distress. *See Pope v. Barnwell Cnty. Sch. Dist. No. 19*, 2017 WL 1148741, at *11 (D.S.C. Mar. 28, 2017) (no general negligence cause of action for alleged emotional distress only). In fact, South Carolina only

permits recovery for negligent infliction of emotional distress "in the very limited context of situations involving bystander trauma" where "(a) the negligence of the defendant must cause death or serious physical injury to another; (b) the plaintiff bystander must be in close proximity to the accident; (c) the plaintiff and the victim must be closely related; (d) the plaintiff must contemporaneously perceive the accident; and (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony." *Stephens v. United States*, 2017 WL 217965, at *3 (D.S.C. Jan. 19, 2017) (citing *Kinard v. August Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985)).

Even after considering both Appellants' deposition testimony, which offers no support for compensable emotional distress, Appellants have not established any bodily or physical impact resulting in physical injury or harm to M.Y.S. nor have they established any manifestation of physical symptoms arising from the incidents involving Employees Dowdell, Lee, Coleman, Doyes, or Luhrs. *See K.S., by and through Seeger v. Richland School District Two*, 445 S.C. 111, 912 S.E.2d 240 (2025). Based on the record, there is absolutely no support, and certainly no question of material fact, that either Appellants had presented facts to support the elements of negligent infliction of emotional distress based on bystander liability.

As part of their Motion for Reconsideration, Appellants argued that they had pled and established a question of triable fact that would allow them to proceed with a claim of reckless infliction of emotional distress. However, just as the SCTCA does not permit a cause of action for intentional infliction of emotional harm, it does not permit a case of action for reckless infliction of emotional harm. Indeed, the South Carolina Supreme Court has found that reckless infliction of emotional distress is not a "loss" actionable under the SCTCA. *See Gore v. Dorchester County Sheriff's Office*, 442 S.C. 438; 900 S.E.2d 423 (2024).

In *Gore*, the Supreme Court answered the following certified question from the United States District Court: "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?" The court answered this question in the affirmative. *Id.* Specifically, the court held that "[r]eckless infliction of emotional distress is merely a subset of intentional infliction of emotional distress [and] there is no separate cause of action in South Carolina for the reckless infliction of emotional distress." *Id.* at 440. The *Gore* court further ruled that reckless intentional infliction of emotional distress is not a loss under the SCTCA. *Id.* at 442-43. Based on this precedent, Appellants have not established a loss under the SCTCA for any form of infliction of emotional distress. Therefore, the Circuit Court correctly dismissed all claims and causes of action premised on infliction of emotional distress.

V. The Trial Court Properly Concluded that Appellants Failed to Establish A Genuine Issue of Material Fact Establishing Gross Negligence By the District or its Employees, Including During the Supervision of Appellant Student or Application of Its Policies and Procedures.

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 is ordinarily a mixed question of law and fact, when, as here, 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. The ultimate conclusion hinges on whether a school district "knew or should have known" of the need

to exercise control over a given situation. *Moore v. Berkeley Cnty. Sch. Dist.*, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1998).

A. Trial Court Properly Concluded That Appellants Failed to Establish A Genuine Issue of Material Fact Tending To Show That the Respondent Was Grossly Negligent As to the Supervision of Appellant Student In the Locker Room

1. Appellants Did Not Establish a Genuine Issue of Material Fact Supporting Grossly Negligent Supervision Related to the Locker Room Incident

Section 15-78-60(25), 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). Initially, the Trial Court correctly ruled that Appellants have not created a genuine issue of fact as to whether the locker room incident actually happened, much less the corresponding injury in the form of a scrapes or whelp. In fact, the only evidence in the record about what occurred in the locker room comes either directly or indirectly from M.Y.S. The record contains evidence showing that M.Y.S. has given conflicting statements as to whether this incident happened as he now claims. As outlined in the facts above, M.Y.S. has provided three prior, more contemporaneous statements indicating no attack occurred, before providing a different accounting in his deposition. It is axiomatic that "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of [several] conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp*., 736 F.2d 946, 960 (4th Cir. 1984).

The Trial Court also correctly concluded that Appellants did not present any evidence regarding the District's efforts at supervision in the locker room. However, the presence or absence of District employees in the locker room at the time is of no consequence because M.Y.S. testified that no one saw this "tussle" or could have seen it because the interaction, as M.Y.S.

described it, arose spontaneously, was brief and minor, and the locker room was too crowded with students dressing out for practice.

2. Trial Court Properly Concluded That Respondent Is Immune for Claims of Negligent Supervision Regarding the Locker Room Pursuant to The Tort Claims Act

Finally, Section 15-78-60(20), another SCTCA defense, shields the District from liability for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal acts of third persons." Appellant Secka admitted in her deposition that the alleged attack was a criminal act by the boys involved. She also filed a police report.

Immunity does not apply when the basis of the claim is that the gross negligence of the governmental entity or its employees "created a reasonably foreseeable risk of such third party conduct." *Moore*, 326 S.C. at 590, 486 S.E.2d 12 (citing *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 247, 391 S.E.2d 546, 549 (1990)). Here, however, Appellants have not demonstrated a genuine issue of material fact tending to show that the District had prior notice of a situation that created a reasonably foreseeable risk of criminal acts. M.Y.S. has not asserted that he had any trouble with these students previously, nor did he complain about any prior incidents with other students in the locker room. Thus, Appellants have not demonstrated any genuine issue of material fact regarding the locker room incident.

B. Trial Court Properly Concluded That Appellants Failed to Establish A Genuine Issue of Material Fact Tending To Show That the Respondent Was Grossly Negligent In Following Its Policies.

1. Appellant Did Not Establish A Genuine Question of Material Fact That Respondent's Alleged Failure to Implement Or Enforce Its Polices Caused Any Alleged Loss By Appellants.

Appellants' Initial Brief focuses on wide array of policies and laws that they believe were violated, including how and why. However, the relevant allegations and information related to

policy enforcement considered by the Circuit Court related to Appellants' arguments regarding enforcement and implementation of the Safe Schools Act and Respondent's code of conduct. See Complaint ¶ 23(a) (R. p. 23, lines 27-28). The record includes no evidence to support the position that a lack of policy or a grossly negligent failure to enforce those policies led to any SCTCA loss. In fact, much of Appellants' argument related to enforcement of policies focuses on Appellants' disagreement with how policies were applied AFTER circumstances and situations involving M.Y.S. were identified by Appellants. While Appellants have certainly included a large compilation of laws and policies and how they believe those were violated, there is nothing in the record to support a grossly negligent implementation failure that caused a loss to Appellants.

2. Respondent Is Immune for Claims of Gross Negligence Related to Policy Implementation Pursuant to The Tort Claims Act.

To the extent Appellants attempt to hold the District liable for some shortcomings in its policies or policy implementation, the SCTCA provides immunity in that regard. Specifically, S.C. Code Ann. § 15-78-60(4) states that a governmental entity is not liable for a loss resulting from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." S.C. Code Ann. § 15-78-60(4).

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CONCLUSION

For the reasons outlined above, this Court should affirm the Trial Court's Order granting Respondent's Motion for Summary Judgment.

Respectfully Submitted:

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By: *s/Meredith L. Seibert*

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May 7, 2026
Columbia, South Carolina

EXHIBIT “1”

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE IN Re: Hannah J. Secka, individually and as parent and guardian for the minor, M.Y.S., Plaintiff(s), v. Florence County School District One and Florence County Sheriff's Department, Defendant(s).	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT Civil Action No.: 2021-CP-21-02121 **PROPOSED ORDER**

This matter comes before the Court upon Plaintiffs' Rule 59(e) and Rule 60(b) Motion for Reconsideration of the Court's March 5, 2024 Order Granting Defendant Florence County School District One's Motion for Summary Judgment. A hearing was held on this matter on August 21, 2024. Darryl Caldwell of Caldwell Law Firm, LLC appeared on behalf of Plaintiffs, Hannah J. Secka, individually and as parent and guardian of MYS. Meredith L. Seibert, of Duff Freeman Seibert, L.L.C., appeared on behalf of Florence County School District One (Defendant District). After reviewing the pleadings, the prior order, the motion for reconsideration, the parties' memoranda, the arguments of counsel, and relevant case law, the Court denies Plaintiffs' Motion for Reconsideration of the order granting Defendant District summary judgment.

I. LEGAL STANDARD

Rule 59(e), SCRCP provides a mechanism for a party to request that a court review a prior order. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument

has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The rule itself does not provide any further standards, and South Carolina case law, absent the guidance as to when to file, is also lacking in this regard. However, "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Id. at* 22, 602 S.E.2d at 779. Thus, when considering a Rule 59(e) motion to dismiss, our courts may look to the Federal Rules of Civil Procedure for guidance on the applicable standard. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."). The Fourth Circuit Court of Appeals has laid out three grounds that might justify amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). "To qualify for reconsideration under the third exception, an order cannot merely be 'maybe or probably' wrong; it must be 'dead wrong,' so as to strike the Court 'with the force of a five-week-old, unrefrigerated dead fish.'" *United States v. Mooney*, 2023 WL 3026316, at *3 (D.S.C. Apr. 20, 2023) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009).

In their motion for reconsideration, Plaintiffs allege that they are entitled to relief pursuant to Rule 59(e) on the grounds that they believe the Court's Order failed to recognize there was a genuine issue of material fact as to the "loss" suffered by Plaintiffs, including a loss resulting from reckless infliction of emotional harm, and failed to fully consider the expert testimony of Dr. Sterling Harris presented by Plaintiff as to violation of District policies.

II. LAW/ANALYSIS

A. Plaintiffs Are Not Entitled to Relief Pursuant to Rule 59(e), SCRCP – Motion to Alter to Amend a Judgment

1. Plaintiffs have failed, as a matter of law, to establish a compensable loss under the Tort Claims Act regarding the actions of District employees.

Plaintiffs assert that there is a genuine issue of fact as to whether M.Y.S. suffered a "loss" as defined by the Tort Claims Act ("TCA"). Plaintiffs focus on only two of the several incidents raised in their Complaint: the incident when M.Y.S.'s 8th grade English teacher, Ms. Luhrs, wrote on his arm with a Sharpie (the "Sharpie incident"), and the incident when M.Y.S. was in high school and alleges he was "attacked" in the locker room (the "locker room incident").

Regarding the Sharpie incident (as well as the other instances of alleged bullying, intimidation, and harassment by other District employees), the Court correctly determined that Plaintiffs failed, as matter of law, to establish a compensable TCA "loss." The Court correctly determined that M.Y.S. suffered no physical injury from the Sharpie incident, but rather claimed only emotional distress. The arguments in Plaintiffs' Motion In Opposition to Summary Judgment reiterate this point, stating: "M.Y.S. testified on multiple occasions he was *made uncomfortable* when he was touched without his consent or permission by Kathy Luhrs." Motion in Opposition, p. 3 (emphasis added). Being "made uncomfortable" does suffice for emotional harm and makes clear there was no physical injury such that Plaintiffs can establish a viable TCA loss. Moreover, as addressed in the original order and in more detail below, Plaintiffs have failed to establish a compensable Tort Claims Act "loss" under any theory related to the infliction of emotional distress.

The other incident that Plaintiffs cite – the "tussle" in the locker room – was not decided on the basis of whether there was a TCA "loss."[1] Rather, the Plaintiffs failed to establish a genuine issue of material fact that the District was grossly negligent as to the supervision of its employees or students under any of the various theories alleged. As noted in the original order, Plaintiffs have not created a genuine issue of fact as to whether the locker room incident actually happened. The only evidence in the record about what occurred in the locker room comes from M.Y.S. The record contains evidence showing that M.Y.S. has given conflicting statements as to whether this incident happened as he now claims. It is axiomatic that "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of [several] conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.,* 736 F.2d 946, 960 (4th Cir. 1984). However, what was clear in the record was that Plaintiffs failed to establish a genuine issue of material fact tending to show that the District was grossly negligent as to the supervision of its employees or students, including in the locker room under several theories. Although this Court considered the testimony of Plaintiff's expert regarding general standards and expectations, the reality is that Plaintiffs presented no evidence regarding the level of supervision in the locker room. Even if they had, MYS testified to circumstances that no one had seen the "tussle" nor could they have.

[1] Although not dispositive, to the extent a finding is warranted, this Court finds that Plaintiffs failed to establish a genuine issue of material fact as to whether MYS suffered a loss during the alleged "tussle" in the locker room. The only evidence in the record of that the incident even occurred is four conflicting statements of MYS. See *Barwick v. Celotex Corp*., 736 F.2d 946, 960 (4th Cir. 1984).

2. Plaintiffs have failed, as a matter of law, to establish a cause of action for emotional distress caused by the District's "extremely reckless" conduct.

The Court previously found that Plaintiffs had not established compensable instances of emotional distress, nor had they established a cause of action for negligent infliction of emotional distress. However, Plaintiffs assert that the Court erred by failing to consider Plaintiff "pled facts sufficient to establish sufficient to establish damages for emotional distress because a reasonable jury could find the conduct of District employees to be "extremely reckless," thus alleging that the Court erred by not allowing them to proceed on this claim. (Plaintiffs' Memo In Support of Motion for Reconsideration p. 5). However, the South Carolina Supreme Court case law confirms that reckless infliction of emotional distress is not a "loss" actionable under the TCA. See *Gore v. Dorchester County Sheriff's Office*, 442 S.C. 438; 900 S.E.2d 423 (2024)

In *Gore*, the Supreme Court answered the following certified question from the United States District Court: "Does the bar under the South Carolina Tort Claims Act of claims of "intentional infliction of emotional harm," S.C. Code [Ann.] § 15-7830(f), apply to claims of reckless infliction of emotional distress?" The court answered this question in the affirmative. Initially, the court held that "[r]eckless infliction of emotional distress is merely a subset of intentional infliction of emotional distress [and] there is no separate cause of action in South Carolina for the reckless infliction of emotional distress." *Id*. at 13. The court further ruled that reckless intentional infliction of emotional distress is not a loss under the TCA

Thus, the Court reaffirms its finding that Plaintiffs have failed to establish a compensable Tort Claims Act "loss" under any theory related to the infliction of emotional distress.

3. Plaintiffs have failed, as a matter of law, to establish Tort Claim Act liability based on an alleged violation of District policy.

Plaintiffs assert that the Court failed to fully consider the expert testimony provided by Plaintiff's expert witness, Dr. Harris. As a result, Plaintiffs' Motion for Reconsideration was accompanied by a "clarifying" affidavit further specifying that District personnel violated District policy JICRAA-R and GBEB based on the English teacher's actions (writing on MYS' arm).

As an initial matter, the "clarifying affidavit" is not proper and cannot be considered as part of Rule 59(e) Motion for Reconsideration. This additional evidence Plaintiff has presented as part of the Rule 59(e) motion was available and could have been presented when they filed their response in opposition to the Defendant District's Motion for Summary Judgment. However, they chose to focus on other aspects of Mr. Harris' testimony and opinions. See *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)(A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not); *Green v. Johnson*, 2024 WL 180690 (Ct. App. 2024)(master erred in considering evidence presented for the first time during a hearing on Rule 59(e) motion)*; Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843 (Ct. App. 2009)(court could not consider document that was submitted to the family court only as an attachment to Rule 59(e) motion.

However, even if this Court were to consider and adopt the conclusions in the clarifying affidavit, Plaintiffs' have still failed to establish a recoverable claim pursuant to the Tort Claims Act. In fact, the Tort Claims Act provides a governmental entity is not liable for a loss resulting from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." S.C. Code Ann. § 15-78-60(4). The affidavit of Plaintiff's

expert witness serves only to establish an additional affirmative defense for Defendant District had there been a loss associated with the English teacher's action, which there was not.

B. Plaintiffs Are Not Entitled to Relief Pursuant to Rule 60(b), SCRCP - Relief from Judgment or Order

Although the majority of Plaintiffs' memorandum and arguments were premised on Rule 59(e), SCRCP, Counsel for Plaintiffs' motion was also brought pursuant to Rule 60(b), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Perry v. Heirs at Law of Gadsden,* 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct.App.2003). Rule 60(b) provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" for one of five listed reasons, to include: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. In their memorandum and in the course of arguments, Plaintiffs did not specify which of the five grounds entitled them to relief. In the complete absence of any facts or arguments that could reasonably support the contention that Rule 60(b)(1) and (3)-(5) are applicable, this Court considered whether Plaintiffs were entitled to relief pursuant to Rule 60(b)(2), to include consideration of the "clarifying affidavit" submitted by Plaintiffs with their Motion for Reconsideration.

Plaintiffs rely heavily on the "clarifying affidavit" submitted with their Motion for Reconsideration, asserting that if the affidavit cannot be considered as part of a Rule 59(e) Motion

for Reconsideration, Rule 60(b) permits such an affidavit to establish the grounds for relief. However, the standards for new evidence is generally the same for Rule 59(e) and Rule 60(b) motions. See *Fassett v. Evans*, 364 S.C. 42, 40, 610 S.E. 2d 841, 846 (Ct. App. 2005)(court did not abuse discretion in denying Rule 60(b) motion where new evidence included in affidavits was known to and available to movant at time of final order).

However, even after consideration of the affidavit, Plaintiffs have failed to establish a basis for relief pursuant to Rule 60(b)(2). As noted above, Rule 60(b)(2), SCRCP, states that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). The term "newly discovered evidence" is a term of art and refers to evidence which existed at the time of the final judgment, order, or proceeding but which had not been discovered by the proponent of the Rule 60(b)(2) motion. *Crawford v. Celanese Corp.*, No. 2017-CP-42-04429, 2019 WL 11276400, at *2 (S.C.Com.Pl. Nov. 25, 2019). To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching."). *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007); *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005). However, Plaintiffs have not established the existence of newly discovered evidence, through the affidavit or otherwise. Our courts are clear that evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and

(2) in the party's possession. *Lanier* at 218, 612 S.E.2d at 459. See *Fassett v. Evans* at 50 (noting the difference between newly discovered evidence and newly presented evidence). In addition, Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007).

Based on the standards established by South Carolina courts, the information contained in the affidavit is not newly discovered evidence for purposes of Rule 60(b)(2). Here, though the affidavit was completed on March 13, 2024, shortly after this Court's Order granting Defendant District summary judgment, the information was known to and readily available to the Plaintiffs at the time of the original motion and Plaintiff's response. In fact, Plaintiffs' own memorandum references that Dr. Harris testified to the same conduct and alleged policy violation in both his deposition and original affidavit that is referenced in the clarifying affidavit. See Plaintiffs' Memorandum in Support of Motion for Reconsideration p. 5. The information he shared and the basis for same is merely newly presented, not newly discovered. Therefore, Plaintiffs have failed to present evidence that entitles them to relief pursuant to Rule 60(b)(2) due to newly discovered evidence.

III. CONCLUSION

Accordingly, after due deliberation, review of the pleadings, the prior order, the motion for reconsideration, the parties' memoranda, the arguments of counsel, and relevant case law, Plaintiff's Motion for Reconsideration is denied.

IT IS SO ORDERED.

Honorable Michael G. Nettles
Twelfth Judicial Circuit

September __, 2024
Florence, South Carolina

Florence Common Pleas

Case Caption:	Hannah J Secka , plaintiff, et al VS Florence County School District One , defendant, et al
Case Number:	2021CP2102121
Type:	Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140