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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY**
**Court of Common Pleas**

**Jocelyn Newman, Circuit Court Judge**

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**C.A. No.: 2019-000951**

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

v.

Richland School District Two..... Respondent.

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# RESPONDENT'S FINAL BRIEF

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## I. STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court Properly Grant Respondent's Motion for Directed Verdict on the Ground that Appellant Could Not Recover for Pure Emotional Distress Without Physical Injury on a Gross Negligence Claim?

2. Should the Trial Court Have Granted a Directed Verdict on the Ground that Appellant Could Not Prove a 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. Appellant, 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, Jan Moody. (Amd. Compl. ¶¶ 12-20, R. pp. 42-43). Specifically, K.S. alleged that Ms. Moody, on multiple occasions, subjected him to verbal abuse causing him to cry. (Amd. Compl. ¶¶ 12-20, R. pp. 42-43). K.S. sought to recover damages from Richland Two for emotional distress that he claimed he suffered from alleged mistreatment by Ms. Moody during his first two months of first grade in 2011. (Amd. Compl. ¶¶ 30, 39, 48, R. pp. 45-47). K.S.'s amended complaint did not include a claim for assault or battery or any individual claims against Ms. Moody.

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 regarding teacher bullying of students, the purported standard of care, and damages. (Pl. Second Supplemental Answers

to Interrogatories, No. 3, R. pp. 664-665). On February 28, 2019, Richland Two filed a motion for summary judgment. (Def. Motion for Summary Judgment, R. pp. 87). Both parties submitted supporting memoranda of law. (Def. Mem. In Support, Pl. Mem. In Opp. R. 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. (R. 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*. (R. 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. (R. p. 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. (R. 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.

(R. pp. 453, 455). The trial judge further cited *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465 (1985), *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), and Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 (Ct. Com. Pl. 2014), as persuasive authority supporting her decision. (R. pp. 454-455). The trial judge issued a Form 4 Order on June 7, 2019. (Form 4 Order, R. p. 1). The present appeal was timely filed by K.S. on June 11, 2019. (Notice of Appeal, R. p. 132).

## III. STATEMENT OF FACTS

During the 2011-2012 school year, K.S. was a first-grade student at North Springs Elementary School. (R. p. 169). Jan Moody was K.S.'s teacher for the first two months of K.S.'s first grade year. (R. p. 169). At the time of the events that are the subject of this case, Ms. Moody had been a teacher for more than thirty years and had a solid teaching record in Richland Two with no major disciplinary issues. (R. pp. 258, 283-284, 421, 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*. (R. pp. 420-421).

K.S. testified that during late September and the first part of October 2011, he was frequently the target of intimidation or "bullying" by Ms. Moody because she was mean to him and yelled at him. (R. p. 153). K.S. testified that as a result of this treatment, he felt sad and that Ms. Moody made him cry. (R. pp. 155-157). 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 Ms. Moody, who was placed on administrative leave pending an investigation and decision regarding her status. (R. pp. 171, 215, 420-422). Following the investigation, Ms. Moody was permitted to

resign in lieu of termination. (R. pp. 421-422). Ms. Moody'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. (R. pp. 272-274).

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. (R. p. 422). Specifically, there were no reports between November 2011 and the filing of the lawsuit that the Seegers were dissatisfied with how the situation with Ms. Moody was handled. (R. p. 422). K.S. successfully finished elementary school without any documented emotional or psychiatric issues. (R. pp. 229-230). K.S. was not diagnosed with anxiety and depression until 2018, approximately seven years after K.S.'s encounters with Ms. Moody. (R. pp. 229, 313-314). K.S. was not prescribed any medications for mental or emotional issues until 2018. (R. pp. 172, 313). At the time of trial, K.S. was 14 and going into the ninth grade. (R. pp. 152). 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. (R. pp. 434, 439).
- **9/29/11** – Ms. Moody 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. (R. pp. 236-237, 241).

- **10/10/11** - Ms. Moody 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. (R. p. 244). The parties dispute whether this incident was contemporaneously reported to the North Springs administration. (R. pp. 246, 257, 370-371, 385).

- **10/18/11** - Ms. Moody 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. (R. p. 410).

- **10/20/11** - K.S. dropped his lunch tray in the school cafeteria. Ms. Moody took K.S. by the arm and made him sit at a table by himself after he could not stop crying. (R. pp. 158, 372, 374). Belinda Fenwick, a custodian, told the health room assistant, Ms. Wilson, who in turn told Ms. Seeger. (R. pp. 376-377). Mr. and Ms. Seeger then reported the cafeteria incident to Dr. Holzendorf. (R. pp. 372-377). The Seegers then met with Dr. Holzendorf and Jennifer Germann, North Springs Assistant Principal. (R. pp. 377-379). Dr. Holzendorf agreed to transfer K.S. to Ms. Shipman's class for the remainder of first grade. (R. pp. 383, 395).

Dr. Holzendorf and Ms. Germann interviewed Ms. Wilson, health room assistant, and Ms. Fenwick, custodian who reported the cafeteria incident. (R. pp. 373, 376-377).

- **10/21/11** - Dr. Holzendorf and Dr. Karen Lovett, Richland Two's Executive Director of Human Resources, interviewed Mr. Goins, custodian, and Ms. Moody. Dr. Holzendorf met again with Mr. Seeger. (R. p. 395).

- **10/21/11 – 11/1/11** – Mr. Seeger made additional allegations of Ms. Moody 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 Ms. Moody's treatment of K.S. (R. p. 373). Dr. Holzendorf received reports that K.S. was doing very well in Ms. Shipman's class. (R. p. 390).

- **11/1/11** - School Resource Officer was notified of cafeteria incident. (R. pp. 418-419).
- **11/3/11** - Dr. Holzendorf and Dr. Lovett met with Ms. Moody. Ms. Moody was placed on administrative leave. (R. p. 386).
- **11/16/11** - Ms. Moody's employment with Richland Two ended. (R. 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. (Tr. Exh. 1, R. pp. 551-556, R. pp. 282, 317). 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. (Tr. Exh. 2, R. pp. 557-578, R. pp. 235). Prior to the end of September 2011, Ms. Moody had never been accused of bullying or harassing a student in more than 30 years of teaching.

K.S. testified that when Ms. Moody took him by the arm on October 20, 2011, "she would claw my arm with her nails." (R. p. 159). K.S. offered no evidence that he suffered physical injury or received any treatment from this touching. (R. pp. 228, 310-311, 418). K.S.'s medical expert further confirmed that he had never been told of any physical injury to K.S. resulting from Ms. Moody's treatment of K.S., and had assumed that if a physical injury had existed, he would have been so advised. (R. 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 only 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 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.

In this case, K.S. did not, and could not, state a claim for outrage or intentional infliction of emotional distress against Richland Two. Additionally, K.S. could not establish a claim for negligent infliction of emotional distress because South Carolina courts have expressly limited that claim to "bystander recovery." *See Kinard*, 286 S.C. at 582-83, 336 S.E. 2d at 467 (recognizing negligent infliction of emotional distress as a cause of action only for bystanders witnessing accidents involving close relatives). *See also, Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007), *Stewart*, 341 S.C. 143 at 154, 533 S.E.2d 597 at 603, *Doe v. North Greenville Hosp.*, 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995).

Further, K.S. did not offer evidence from which the jury could have determined that he suffered a "physical injury" that would support an award of damages for emotional distress on a gross negligence theory. 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 no evidence of any physical damage to his body. K.S.'s testimony was limited to Ms. Moody leading him by the arm to a cafeteria table and feeling her nails on his arm. (R. pp. 154-155, 158, 159). Mr. Seeger's testimony confirmed that Ms. Moody did not inflict any cuts, bruises, scratches, or other injury to K.S.'s body. (R. pp. 227-230). Additionally, no physical injury was ever reported to Richland Two. (R. p. 418). 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.

(R. p. 311).

K.S.'s reliance on cases decided before *Ford* and *Kinard*, which hold that "physical manifestation" of emotional distress is sufficient to support damages on a negligence (or gross negligence) claim, is misplaced for two reasons. First, if a plaintiff could recover on a negligence theory merely by showing physical symptoms of emotional distress, there would be no need for an intentional infliction of emotional distress[1] or a bystander negligent infliction of emotional distress claim[2], as one could simply allege "physically manifested emotional distress caused by negligence," a much lower threshold. Second, even if physical manifestation of emotional distress was enough to prove damages without physical injury in a gross negligence case, K.S. did not offer any evidence of 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. (R. pp. 229-230).

Finally, *Doe by Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994), upon which K.S. relies, is inapposite to this case.[3] In that case, the minor plaintiff sued the hospital after a hospital employee had sexually assaulted her. While plaintiff Mary Doe did not sustain a physical injury from the sexual assault, the Court noted that "the record [was] replete with evidence that Mary Doe suffered a severe mental injury

[1] An intentional infliction of emotional distress claim requires distress "severe" such that "no reasonable man could be expected to endure it." *Hansson*, 374 S.C. at 356, 650 S.E.2d at 70.
[2] The Supreme Court confirmed a very narrow, rather than expanded claim for emotional distress allegedly caused by negligence which specifically incorporates the physical manifestation requirement of earlier cases. *See Kinard*, 286 S.C. at 582, 336 S.E.2d at 467. There would be no need for *Kinard's* bystander limitation if "physical manifestation" were sufficient to support purely emotional damages in any ordinary negligence case, as K.S. urges.
[3] K.S. did not argue the applicability of *Doe by Doe* to the trial court, further demonstrating that it is not applicable to this case.

*as a result of the sexual assault*," and that she "exhibited physical problems *from the attack* in that she reportedly broke out in hives." *Doe*, 323 S.C. at 38, 448 S.E.2d at 567 (*emphasis added*).

Taking a first-grade student by the arm to move him to a different location is very far from the sexual assault and battery committed in *Doe* that was almost certain to result in serious emotional injury to the minor plaintiff. Further, unlike the plaintiff in *Doe*, K.S. sustained absolutely no physical manifestation of injury from Ms. Moody moving him by the arm to a different table and offered no evidence of "severe mental injury" arising from any physical act of Ms. Moody. Unlike *Doe*, any emotional injury of K.S. was attributable solely to Ms. Moody's verbal, rather than physical acts. (R. pp. 310-311). Thus, *Doe* is distinguishable on three bases: that the unwanted physical touching in *Doe* caused the plaintiff's injuries, that Mary Doe's mental injury was "severe," and that Mary Doe had actual, physical manifestations of her mental injury caused by the physical, sexual assault. Accordingly, *Doe* cannot, and should not, be extended to provide a cause of action that would permit students to sue "mean" or "strict" teachers for hurt feelings and emotional upset that otherwise would not support an intentional infliction of emotional distress claim. If K.S. could recover damages for emotional distress based on the testimony and claims alleged in this case, it would render the intentional infliction of emotional distress cause of action and forty years of precedent completely superfluous and impermissibly expand the limited cause of action for negligent infliction of emotional distress beyond the bystander context. Consequently, the purely emotional injuries allegedly sustained by K.S. from Ms. Moody picking on or "bullying" him are not recoverable under South Carolina law by way of the theories alleged in this case. Therefore, the trial court properly granted the

directed verdict and this Court should 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 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 Ms. Moody'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. (R. 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. (R. pp. 235, 557-578). The student training also stressed how students should report bullying of themselves or other students. (R. 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. (R. 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 Ms. Moody 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 Ms. Moody'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. (R. pp. 171, 190, 443). Specifically, on the day of the cafeteria incident, which involved Ms. Moody moving K.S. to another table, K.S. was immediately transferred to a new teacher. (R. 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. (R. pp. 217, 219-220, 390). Further, Ms. Moody ultimately resigned her employment in lieu of termination and K.S. never encountered her again. (R. p. 416). K.S. went back to normal and his crying stopped in the new class. (R. 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 Ms. Moody'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 Ms. Moody did not use proper methods to address his crying in class fundamentally alleges

"educational malpractice" by Ms. Moody 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. As An Additional Sustaining Ground, K.S. Failed To Establish Proximate Cause As Matter Of Law.

As part of his gross negligence claim, K.S. was required to prove by a preponderance of the evidence that that: (1) Richland Two owed him a duty of care, (2) Richland Two breached that duty by a grossly negligent act or omission, (3) Richland Two's breach was the actual and proximate cause of K.S.'s injury, and (4) K.S. suffered an injury or damages. *Rice v. Sch. Dist. of Fairfield*, 317 S.C. 87, 93, 452 S.E.2d 352, 355 (Ct. App. 1994); *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245 (2007). "If the plaintiff fails to prove any one of these elements, the action will fail." *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). In addition to failing to prove the second and final elements, K.S. failed to prove that Richland Two's actions or inactions were the proximate cause of his alleged injuries. "Proof of proximate cause requires proof of both causation in fact, and legal cause." *Oliver v. South Carolina Dep't of Highways & Pub. Trans.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). In order to prove causation in fact, a plaintiff must prove that the injury would not have occurred but for the defendant's negligence. *Vinson*, 324 S.C. at 400, 477 S.E.2d at 721. Further, a plaintiff must prove that the injury was foreseeable, *i.e.*, that the injury occurred as a natural and probable consequence of the defendant's negligence. *Id.*

In this case, there was no foreseeable nexus between Richland Two's alleged 2011 actions or inactions and K.S.'s 2018 depression and anxiety diagnosis. Further, K.S.

offered no proof or records of any treatment before 2017 related to his brief time in Ms. Moody's class. Specifically, the testimony at trial and the evidence in the record shows that after K.S. was moved to a new class with a new teacher, he was back to normal and was no longer crying. (R. pp. 191, 217, 390, 443). It was not foreseeable that the October 10, 2011 library incident and the October 20, 2011 cafeteria incident would cause the delayed onset of anxiety and depression approximately seven years later. These alleged highly subjective and delayed injuries simply were not a natural and probable consequence of Richland Two's actions or inactions, which K.S. was required to prove. *See Vinson*, 324 S.C. at 400, 477 S.E.2d at 721.

Based on the evidence in the record, no reasonable juror could find an affirmative causal link between the alleged inaction of Richland Two in 2011 and K.S.'s alleged emotional harm diagnosed in 2018. This Court should affirm for this additional reason.

### D. 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. (R. pp. 150-151).

On the third day of the trial,[4] K.S. sought to introduce into evidence and play for the jury the two-hour, *de bene esse* deposition of Dr. McEvoy. (R. p. 430, lines 20-22). Richland Two renewed its objections to Dr. McEvoy's testimony based on the motion *in*

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

*limine* filed before trial. (R. 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 would be cumulative at best . . . my initial impression was that his commentary regarding teacher-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 Ms. Moody, 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.

(R. 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 Ms. Moody 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 (R. p. 251, line 5-p. 253, line 3); Denise Barth (R. p. 259, line 7-p. 271, line 19, p. 275, line 16-p. 280, line 6); David Holzendorf

(R. p. 319, line 21-p. 348, line 17, p. 356, line 17-p. 365, line 24); and Karen Lovett (R. 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 Ms. Moody bullied K.S. and Richland Two did not follow its policies related to alleged bullying of students. (R. 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[5], where K.S., his father, and a treating expert had already testified as to alleged specific effects on K.S. arising out of Ms. Moody's conduct, would also have been both cumulative and unhelpful to the jury. (R. 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 Ms. Moody, 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. (R. p. 494, line 15-p. 495, line 15). Accordingly, permitting an

[5] 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. (R p. 472, lines 19-21).

expert witness to testify that K.S. was "bullied" had the strong potential to mislead the jury into thinking that proof of Ms. Moody bullying K.S. was a dispositive issue in the case. Dr. McEvoy's testimony that Ms. Moody 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 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.

### E. 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. (R. 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." (Pl. Second Suppl. Response to Interrogs., R. 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 Ms. Moody 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 Ms. Moody, 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. K.S. 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. (R. 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 ago. (*Id).* Further, Dr. McEvoy had never appeared as a presenter at a conference in South Carolina nor conducted any training in South Carolina. (R. 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. (R. 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. (R. 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. (R. 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. (R. 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." (R. p. 524). Dr. McEvoy testified that his article based on a study in 2017 and published in 2018 discussing teacher bullying was the first of its kind. (R. 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. (R. 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.

### F. 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).

### G. 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 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, 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 Trial Court's ruling.

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY**
**Court of Common Pleas**

**Jocelyn Newman, Circuit Court Judge**

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**C.A. No.: 2019-000951**

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

v.

Richland School District Two..... Respondent.

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## CERTIFICATE OF COUNSEL

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The undersigned counsel hereby certifies Respondent's Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules

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