**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, Plaintiffs | : | No. 1:23-cv-00286 (Judge Christopher C. Conner) |
| v. | : | CIVIL ACTION |
| RED LION AREA SCHOOL DISTRICT, JASON M. HOFFMAN, M.A., OFFICER MARC GREENLY, L.D., a minor, D.M., a minor, T.F., a minor, C.H., a minor, W.G., a minor, and C.A., a minor, Defendants | : | JURY TRIAL DEMANDED |

**REPLY BRIEF IN SUPPORT OF DEFENDANT W.G.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Respectfully submitted,

GRIFFITH, LERMAN, LUTZ & SCHEIB

Dated: July 13, 2023

By: _____

MICHAEL B. SCHEIB, ESQ. #63868
JAMES F. LOGUE, ESQ. #202170
110 South Northern Way
York, Pennsylvania 17402
Telephone (717) 757-7602
Fax (717) 757-3783
mscheib@gslsc.com
jlogue@gslsc.com
Attorneys for W.G., minor Defendant

SAXTON & STUMP

Dated: July 13, 2023

By: /s/ Carrie Evans Wilson

CARRIE EVANS WILSON, ESQUIRE
Attorney I.D. No. 307186
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone (717) 556-1077
Fax (717) 441-3810
cwilson@saxtonstump.com
Attorney for W.G., minor Defendant

## I. PROCEDURAL HISTORY

In the interest of judicial economy, the procedural history as set forth in Defendant, W.G.'s Brief in Support of Motion to Dismiss will not be set forth herein.

## II. STATEMENT OF FACTS PERTINENT TO DEFENDANT W.G.

Likewise, the facts set forth in Defendant, W.G.'s Motion to Dismiss and Brief in Support will not be reiterated.

## III. STATEMENT OF QUESTIONS INVOLVED

**A. Whether Plaintiffs' claim for gross negligence must be dismissed because Plaintiffs have failed to identify an applicable duty of care and because Plaintiffs have failed to allege sufficient facts tying Decedent's death to W.G.'s actions?**

**Suggested answer: In the affirmative.**

**B. Whether Plaintiffs' claims for intentional infliction of emotional distress must be dismissed because Plaintiffs have failed to allege conduct that is sufficiently severe and outrageous to meet the legal standard?**

**Suggested answer: In the affirmative.**

## IV. LEGAL STANDARD

Defendant, W.G., incorporates the Legal Standard as set forth in his Brief in Support of Motion to Dismiss.

## V. ARGUMENT

### A. Count V - Plaintiffs' Claim for "gross negligence and/or recklessness" - must be dismissed as a matter of law, as Plaintiffs have failed to identify an applicable duty of care.

In support of Plaintiffs' argument that they have sufficiently pled a cause of action for gross negligence and/or recklessness, Plaintiffs assert that "society and our courts recognize bullying as a harm deserving of legal redress." Indeed, if this Court were to agree with such an assertion and allow such claims to proceed against the alleged "bullies," it would not only open the floodgates for essentially each child to have legal standing for being bullied at some point in their childhood, it would allow all children to accuse an entire group of "bullies" of acting in concert and with identical mindsets and motives.[1]

Plaintiffs site to multiple websites and subjectively written articles in support of their argument, which are dicta at best. The single case that Plaintiffs refer to (which is a Massachusetts criminal case) is completely divergent from the facts alleged in the instant matter. In Commonwealth v. Carter, 52 N.E.3d 1054 (Mass. 2016), a single juvenile female sent her boyfriend a text message, essentially urging him to kill himself. She instructed him when and how to do so, and chastised him

[1] There is "no institutional need to send judges off on [a] 'mission-almost-impossible' to prevent and cure the effects of school bullying when legislators 'are able to amass the stuff of actual experience and cull conclusions from it.'" Morrow v. Balaski, 719 F.3d 160 (3d Cir. 2013) (internal citations omitted).

when he delayed in doing so. Carter is completely distinguishable from the instant matter and should not be considered persuasive.

**B. Plaintiffs have failed to allege sufficient facts tying W.G.'s alleged action(s) to Decedent's death.**

With respect to Plaintiffs' contention that Defendants' reliance on Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000) is "entirely misplaced," Plaintiffs once again depend upon their misplaced reliance upon internet articles and a single, and completely distinguishable case from the state of Massachusetts. Plaintiffs cannot meet any of the five (5) factors as stated in Althaus with respect to Defendant W.G., let alone the very important second factor: the social utility of the actor's conduct. Plaintiffs only plead one (1) isolated individual action by Defendant, W.G., *to wit*, the lollipop "incident" that occurred at least one year prior to Decedent's death.[2]

The fact of the matter is that while the death of Zachary Kirchner was undoubtedly tragic, the Plaintiffs are asking this Court to establish a very broad and terrifying standard. The precedent that would result could allow almost any middle school and/or high school student to bring a cause of action against essentially any child that ruins their day, calls them a name, excludes them from a group, makes a derogatory comment, cuts them from the team, etc. While it is unfortunate that Zachary Kirchner was diagnosed with certain disabilities, there are methods and

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[2] "Run-of-the-mill schoolyard fights, **isolated** or random acts of violence, or matters where a school played no part in exacerbating the threat" would not fall under limited circumstances described in D.R. v. Middle Bucks Area Vocational School, 972 F.2d 1364 (3d Cir. 1992). Morrow, 719 F.3d at 201 (emphasis added).

outlets available for thousands of children with similar disabilities, *to wit*, therapy, home schooling, support groups, etc.[3]

It is a complete stretch to tie Defendant, W.G.'s isolated comment to Zachary Kirchner's unfortunate suicide.

### C. The Estate and Matthew Kirchner's Claim for Intentional Infliction of Emotional Distress Does Not Meet The Applicable Legal Requirements.

As Plaintiffs correctly state, to establish a claim or intentional infliction of emotional distress, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998) *quoting* Buczek v. First Nat'l Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. 1987).

With respect to Defendant, W.G., the limited allegation against him individually, as opposed to the "bully group", is that he made one (1) single lollipop joke and/or reference to Zachary Kirchner. Such an isolated event does not even begin to scratch the surface of being classified as going "beyond all possible bounds of decency". *See* Morrow, 719 F.3d at 201, *supra.*

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[3] With increased availability of private schooling, homeschooling, private tutoring, online and distance education, and charter schools, modern families have more options to satisfy the compulsory school laws. School authority over students has significantly eroded in favor of parental control and private sources of assistance. Morrow v. Balaski, 719 F.3d 160, 183 (3d Cir. 2013) (citing New Jersey v. T.L.O., 469 U.S. 325, 336, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

According to the Restatement (Second) of Torts:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) of Torts § 46 comment d at 73 (1965).

Examples of the types or conduct required include the intentional and wanton acts of mishandling a decedent's body, Papieves v. Kelly, 263 A.2d 118 (Pa. 1970), and the intentional misstatement of a decedent's cause of death, Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super. 1981).

Further, Plaintiff, Matthew Kirchner, fails to plead that he was present for the isolated lollipop "event" referenced in Paragraph 41 of Plaintiff's Amended Complaint. Recovery for intentional infliction of emotional distress is unavailable to a plaintiff who was not physically present and did not personally witness the alleged conduct of the actors. Taylor v. Albert Einstein Med Ctr., 754 A.2d 650 (Pa. 2000).

## VI. CONCLUSION

Zachary Kirchner's suicide was undoubtedly tragic. Minor Defendant W.G., however, has only been accused of making a single joke about a lollipop one (1) or more years before Decedent took his own life. The law unequivocally does not support the imposition of civil liability against a minor for this, or even worse, verbal conduct. As such, Plaintiffs' First Amended Complaint against W.G. should be dismissed, with prejudice.

Respectfully submitted,

GRIFFITH, LERMAN, LUTZ & SCHEIB

Dated: July 13, 2023

By: _____

MICHAEL B. SCHEIB, ESQ. #63868
JAMES F. LOGUE, ESQ. #202170
110 South Northern Way
York, Pennsylvania 17402
Telephone (717) 757-7602
Fax (717) 757-3783
mscheib@gslsc.com
jlogue@gslsc.com
Attorneys for W.G., minor Defendant

SAXTON & STUMP

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By: /s/ Carrie Evans Wilson

CARRIE EVANS WILSON, ESQUIRE
Attorney I.D. No. 307486
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone (717) 556-1077
Fax (717) 441-3810
cwilson@saxtonstump.com
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANT W.G.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** was served upon the below-listed counsel via the Court's ECF Notification system with respect to the above-captioned matter:

Nathaniel L. Foote, Esquire
Renee E. Franchi, Esquire
Andreozzi & Foote
4503 North Front Street
Harrisburg, PA 17110
nate@vca.law
renee@vca.law
*(Counsel for Plaintiffs)*

David J. MacMain, Esquire
Tricia M. Ambrose, Esquire
MacMain Leinhauser, PC
433 West Market Street, Suite 200
West Chester, PA 19382
dmacmain@macmainlaw.com
tambrose@macmainlaw.com
*(Counsel for Defendants Red Lion Area School District and Jason M. Hoffman, M.A.*

Anthony R. Sherr, Esquire
Sherr Law Group, LLC
101 West Airy Street, Suite 100
Norristown, PA 19401
tsherr@sherrlawgroup.com
*(Counsel for Defendant Officer Marc Greenly)*

Anthony T. Lucido, Esquire
Jason A. Statler, Esquire
Johnson, Duffie, Stewart & Weidner
301 Market Street
P.O. Box 109
Lemoyne, PA 17043-0109
atl@jdsw.com
alucido@johnsonduffie.com
jasonstatler@johnsonduffie.com
*(Counsel for Defendant L.D., a minor)*

Rolf E. Kroll, Esquire
Claire, A. Murtha, Esquire
Margolis Edelstein
214 Senate Avenue, Suite 402
Camp Hill, PA 17011
rkroll@margolisedelstein.com
cmurtha@margolisedelstein.com
*(Counsel for Defendant T.F., a minor)*

GRIFFITH, LERMAN, LUTZ & SCHEIB

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MICHAEL B. SCHEIB, ESQ. #63868
JAMES F. LOGUE, ESQ. #202170
110 South Northern Way
York, Pennsylvania 17402
Telephone (717) 757-7602
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**CERTIFICATE OF WORD COUNT COMPLIANCE**

I, MICHAEL B. SCHEIB, ESQUIRE, counsel for W.G., minor Defendant, hereby certify that the foregoing Brief complies with the word count limits of Pa. M.D. Local Rule 7.08. Pursuant to the word processing system used to prepare the Brief, the word count is 1,855.

GRIFFITH, LERMAN, LUTZ & SCHEIB

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MICHAEL B. SCHEIB, ESQ. #63868
JAMES F. LOGUE, ESQ. #202170
110 S. Northern Way, York, PA 17402
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Attorneys for Defendant, W.G., a minor