IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3483 EDA 2017

NICOLE B., individually and on behalf of N.B.,
Appellant,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
JALA PEARSON,
JASON JOHNSON,
Appellees.

BRIEF FOR APPELLANT

On Appeal from the Judgment of the
Court of Common Pleas of Philadelphia County,
Civil Trial Division, April Term 2014, No. 3745

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I. STATEMENT OF JURISDICTION

Appellate jurisdiction is proper because this appeal arises from a final order. Pa. R.A.P. 341(a). The Philadelphia Court of Common Pleas entered final judgment on October 4, 2017 after it denied Nicole B.'s motion to remove nonsuit. *See Bilig v. Skvarla*, 853 A.2d 1042, 1046 (Pa. Super. Ct. 2004) (holding that an "appeal properly lies from the judgment entered after denial of a motion to remove nonsuit"). Nicole B. timely filed her notice of appeal on October 10, 2017.

On November 17, 2017, this Court ordered Nicole B. to show cause as to why 42 Pa. C.S. § 762(a)(7), which grants the Commonwealth Court jurisdiction over appeals involving "[i]mmunity waiver matters," does not apply to this appeal. Nicole B. responded that this appeal involves no immunity waiver matters, and the Court discharged the order.

A case involves immunity waiver matters if "at least one party is a local agency and the case is governed at least in part by [the] Political Subdivision Tort Claims Act." *See Brady Contracting Co. v. W. Manchester Twp. Sewer Auth.*, 487 A.2d 894, 896 (Pa. Super Ct. 1985). Although the School District of Philadelphia is a local agency, the Tort

Claims Act does not at all govern this case. This case involves only Pennsylvania Human Relations Act (PHRA) claims, and cases involving only PHRA claims do not require "interpretation and application of the provisions of the" Tort Claims Act. *See id.* at 897. The PHRA expressly provides for liability against political subdivisions, so the Tort Claims Act is irrelevant to PHRA claims. *See* 43 P.S. § 954(b), (l); *Philadelphia v. Pa. Human Relations Comm'n*, 684 A.2d 204, 208 (Pa. Commw. Ct. 1996) ("[The Tort Claims Act] does not prevent an action under the PHRA."); *Phillips v. Heydt*, 197 F. Supp. 2d. 207, 223 (E.D. Pa. 2002) (recognizing that the PHRA "negat[es] the immunity available under the Tort Claims Act").[1]

II. ORDER OR OTHER DETERMINATION IN QUESTION

The order in question is the trial court's order denying Nicole B.'s motion to remove nonsuit. The trial court granted nonsuit after finding that Nicole B.'s claims are neither cognizable under the PHRA nor

[1] Even if this Court were to find that this appeal falls within the reach of § 762(a)(7), the Court could retain jurisdiction. Since the Tort Claims Act does not apply to PHRA claims, transfer to the Commonwealth Court would be unnecessary. *See Newman v. Thorn*, 518 A.2d 1231, 1236 (Pa. Super. Ct. 1986) ("[I]f resolution of the immunities issue merely requires this [C]ourt to apply well-settled principles of law, transfer to the Commonwealth Court serves little purpose.").

timely.[2] Nicole B. challenged both findings in her motion to remove nonsuit, but on September 14, 2017, the trial court denied the motion:

> And Now, this 14th day of September, 2017, after consideration of Plaintiff's Motion for Post-Trial Relief Pursuant to Rule 227.1(a)(3) to Remove Nonsuit, Item Numbers 1 through 8 only, and the Defendants' Joint Responses in Opposition, it is hereby **ORDERED** that the Plaintiff's Motion, Item Numbers 1 through 8 only, is **DENIED**.

Item Numbers 1 through 8 of Nicole B.'s motion addressed the trial court's timeliness finding. Upholding its finding that Nicole B.'s claims are untimely, the trial court did not need to reconsider its finding that the claims are not cognizable under the PHRA.

If this Court reverses the trial court's nonsuit decision, several of the trial court's evidentiary rulings are also pertinent to this appeal.

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Scope of Review

The scope of review "is determined by whether the trial court cites a finite set of reasons for its decision . . . or leaves open the possibility that it would have [reached its decision] for reasons other than those it

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[2] The trial court issued the findings in a bench opinion. The bench opinion is appended. *See* Pa. R.A.P. 2111(b).

specified." *See Morrison v. Dep't of Pub. Welfare*, 646 A.2d 565, 570 (Pa. 1994) (internal quotation marks omitted). Here, the trial court offered two legal reasons for its decision: (1) Nicole B.'s claims are not cognizable under the PHRA because the PHRA provides schoolchildren no protection against discriminatory student-on-student harassment, and (2) Nicole B.'s claims are untimely because minority does not toll PHRA claims. The trial court neither identified other legal reasons nor indicated that Nicole B.'s evidence was insufficient—the court never examined the evidence presented at trial. This Court's scope of review is therefore limited to the trial court's two stated legal reasons. *See id.* ("[If] the trial court indicates that the reasons it gives are the only basis for [its decision,] an appellate court can only examine the stated reasons." (internal quotation marks omitted)). If this Court finds that the reasons lack merit, remand is necessary to allow the trial court to make factual findings and apply the PHRA to the findings.

But in the interest of judicial economy, if this Court vacates nonsuit, it should also review the trial court's rulings excluding as irrelevant evidence offered by Nicole B. Addressing the rulings now will streamline this case, eliminating the need for a subsequent appeal

challenging the rulings. *See InfoSAGE, Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616, 636 (Pa. Super. Ct. 2006) (considering, "in the interests of judicial economy," issues that the trial court did not address in its final order).

Standard of Review

This appeal turns on two questions of statutory interpretation: (1) whether the PHRA provides a cause of action that protects schoolchildren from severe or pervasive harassment that is based on a protected characteristic and (2) whether minority tolls PHRA claims. The first question turns on this Court's reading of the PHRA, and the second turns on the Court's reading of the PHRA and Pennsylvania's minority tolling statute. "[R]eview of [these] legal questions is de novo and plenary." *See Ramalingam v. Keller Williams Realty Grp., Inc.*, 121 A.3d 1034, 1048 (Pa. Super. Ct. 2015).

If this Court reaches the trial court's evidentiary rulings, it can vacate them only if the trial court "abused its discretion or committed an error of law." *Rachlin v. Edmison*, 813 A.2d 862, 869 (Pa. Super. Ct. 2002) (internal quotation marks omitted).

IV. STATEMENT OF THE QUESTIONS INVOLVED

Question 1

The PHRA provides schoolchildren a cause of action for indirect discrimination. A school district indirectly discriminates against a child if it knows he is being denied educational privileges or advantages because of a protected characteristic but it fails to "take corrective measures." *See Pa. Human Relations Comm'n v. Chester Sch. Dist.*, 427 Pa. 157, 165 (1967). N.B.'s school district knew that, because of his sex, he was being denied the educational privileges and advantages of a safe, non-hostile school environment, but the district failed to take corrective measures.

Can schoolchildren like N.B. state a cause of action under the PHRA?

Question 2

Part A

Section 962(e) of the PHRA provides for equitable tolling, which applies when a person, through no fault of his own, is unable to timely pursue his PHRA claims. Minors in Pennsylvania lack the legal

capacity to bring their own claims, so they, through no fault of their own, are unable to timely pursue their PHRA claims.

Does § 962(e) toll a minor's PHRA claims?

Part B

Pennsylvania's minority tolling statute applies to any claim for which a minor is "entitled to bring a civil action." *See* 42 Pa. C.S. § 5533(b)(i). A PHRA claim entitles a minor to bring a civil action in the courts of common pleas. *See* 43 P.S. § 962(c)(1).

Does the minority tolling statute apply to PHRA claims?

Question 3

A court cannot deem evidence irrelevant without considering the elements of the plaintiff's claims. Evidence is relevant if it is "of consequence" to the elements of the plaintiff's claims. *See* Pa.R.E. 401. Here, though, the trial court excluded as irrelevant evidence offered by Nicole B. without considering the elements of her claims.

Did the trial court abuse its discretion in excluding the evidence?

V. STATEMENT OF THE CASE

Facts[3]

When N.B. was a fourth grader at the William C. Bryant School in the School District of Philadelphia, three students harassed him because he did not conform to gender stereotypes. (The harassment was also racially charged.) This harassment was "continual and a pattern."[4] School District officials, including Jala Pearson (Bryant's principal) and Jason Johnson (N.B.'s teacher), knew about the harassment, yet they did nothing. So it continued for weeks, culminating in the three aggressors raping N.B. in a school bathroom while screaming "give it to the fag."[5]

The three aggressors began harassing N.B. on September 14, 2011, his first day at Bryant.[6] N.B. was eight years old and had just transferred to Bryant from a religious private school.[7] He had never

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[3] The facts are presented in the light most favorable to Nicole B. *See Canizares v. Philadelphia*, 639 A.2d 882, 883 (Pa. Commw. Ct. 1994) ("[T]he appellate court must when reviewing a compulsory nonsuit, view all of the evidence in the light most favorable to the appealing party.").

[4] School Police Officer Pamela Williams Trial Testimony, R. 79a.

[5] Michael Bradley, Ph.D., Trial Testimony, R. 83a.

[6] *See* N.B. Trial Testimony, R. 53a–54a.

[7] *See* Nicole B. Trial Testimony, R. 68a; Michael Bradley, Ph.D., Trial Testimony, R. 81a.

been exposed to sexual epithets, much less unwanted sexual contact.[8] But because he did not conform to norms about masculinity, every day the aggressors called him "faggot," "gay," "homo," "bitch," "pussy," "dick eater," and "soft-ass bitch."[9] Every day they battered him—they punched him all over his body, kicked him, pushed him in the back, and shoved him.[10] They broke his glasses; dumped his books out of his backpack; cornered him in school bathrooms; and threatened him, telling him, "We're going to get your black ass" and "We're going to kill you, bitch."[11] They urged him to kill himself by jumping out a window or by overdosing on pills.[12] And on multiple occasions even before they raped him, they bullied him into unwanted sexual acts: they forced him

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[8] *See* Nicole B. Trial Testimony, R. 70a; Michael Bradley, Ph.D., Trial Testimony, R. 81a.

[9] N.B. Trial Testimony, R. 54a–55a, 57a; School Police Officer Pamela K. Williams Trial Testimony, R. 78a–79a; Nicole B. Trial Testimony, R. 69a. The aggressors also called N.B. "black nigger," "black Einstein," and "black ass." N.B. Trial Testimony, R. 55a, 58a.

[10] N.B. Trial Testimony, R. 54a–55a, 58a; Nicole B. Trial Testimony, R. 71a; School Police Officer Pamela K. Williams Trial Testimony, R. 77a.

[11] N.B. Trial Testimony, R. 56a; School Police Officer Pamela K. Williams Trial Testimony, R. 77a; Michael Bradley, Ph.D., Trial Testimony, R. 81a; Nicole B. Trial Testimony, R. 71a.

[12] N.B. Trial Testimony, R. 61a.

to watch a video of two men having sex,[13] and they made him hump a flagpole while a group of students watched and laughed.[14]

This sexual harassment impeded N.B.'s education. Because of it, he limited his classroom participation and hid in bathrooms throughout the school day.[15]

N.B. and Nicole B. immediately, and repeatedly, reported the aggressors' verbal and physical harassment to Johnson, Pearson, and other school officials. On N.B.'s first or second day at Bryant, he told the dean of students and Johnson about the harassment.[16] Likewise, Nicole B. reported the harassment to Johnson.[17] She told Johnson about the slurs that the aggressors were calling N.B. and about the aggressors' physical assaults.[18] Neither the dean nor Johnson took corrective action though; the harassment escalated after N.B.'s and Nicole B.'s reports.[19] Therefore, N.B. and Nicole B. not only kept reporting the harassment to the dean and Johnson but also began

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[13] *Id.*, R. 60a.

[14] Michael Bradley, Ph.D., Trial Testimony, R. 81a.

[15] *See id.*; Michael Bradley, Ph.D., Psychological Evaluation, R. 166a.

[16] *See* N.B. Trial Testimony, R. 56a–57a; Teacher Daniel Coffin Trial Testimony, R. 94a (identifying the dean of students at Bryant).

[17] Nicole B. Trial Testimony, R. 70a.

[18] *Id.*

[19] *See* N.B. Trial Testimony, R. 57a; Michael Bradley, Ph.D., Trial Testimony, R. 81a.

reporting it to Pearson.[20] Nicole B., for example, twice spoke to Pearson in person about the harassment, informing Pearson that the aggressors were harassing N.B. daily.[21]

Despite N.B.'s and Nicole B.'s efforts, no school officials took corrective measures to stop the sexual harassment.[22] Disregarding the School District's own anti-bullying policy, no one investigated the harassment.[23] Nor did anyone discipline the aggressors.[24] No one even took the simple step of separating N.B. from the aggressors during school.[25]

This indifference to sexual harassment was not just typical at Bryant—under Pearson it was an official practice. Pearson told teachers not to report student misconduct, including sexual harassment, because she feared that such reports would damage her reputation as a principal.[26] And when teachers reported misconduct,

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[20] *See* N.B. Trial Testimony, R. 58a–59a; Nicole B. Trial Testimony, R. 72a–73a.

[21] Nicole B. Trial Testimony, R. 72a–73a.

[22] *See* Malcolm Smith, Ph.D., Trial Testimony, R. 90a–91a.

[23] *Id.*, R. 89a–91a.

[24] *Id.*, R. 92a.

[25] *Id.*

[26] *See* Affidavit of Teacher Cheryl Currie, R. 152a; Deposition Testimony of Teacher Beth Kline, R. 131a.

Pearson ignored the reports.[27] Also, the Bryant administration ignored both Bryant's and the School District's anti-harassment and anti-bullying policies; the administration did not disseminate the policies to teachers.[28]

Consequently, N.B. was not the only child who suffered sexual harassment at Bryant: sexual harassment was rampant. Boys harassed girls in girls' bathrooms;[29] students bullied others, assaulting them and calling them "homo," "fag," "dick," "gay," "black bitch," and "black whore";[30] boys groped girls' breasts and buttocks;[31] and students verbally and physically harassed female teachers.[32] A group of students called one female teacher "cunt," "bitch," "fat ass," and "white bitch," and one of the students urinated on the teacher.[33]

Nor was N.B. the only child who was terrorized by the three aggressors. At least two of the aggressors were known among Bryant

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[27] *See* Affidavit of Teacher Tracy Mountney, R. 138a–39a; Affidavit of Teacher Melissa Kadish, R. 157a–58a.

[28] *See* Affidavit of Teacher Tracy Mountney, R. 143a; Deposition Testimony of Teacher Tracy Mountney, R. 133a–34a; Affidavit of Teacher Cheryl Currie, R. 151a–52a.

[29] Affidavit of Teacher Tracy Mountney, R. 138a.

[30] *See id.*, R. 137a–38a; Affidavit of Teacher Cheryl Currie, R. 149a–50a.

[31] Affidavit of Teacher Cheryl Currie, R. 149a.

[32] Affidavit of Teacher Tracy Mountney, R. 136a–37a; Affidavit of Teacher Melissa Kadish, R. 155a.

[33] Affidavit of Teacher Tracy Mountney, R. 136a–37a.

staff for sexually harassing other children.[34] One of them, for example, was known (1) to wag his tongue at others while simulating self-stimulation, (2) to simulate sex with objects, (3) to force others to engage in sexually explicit conversations, and (4) to accost those that he viewed as "gay" or "homo."[35] Bryant staff reported this conduct to the Bryant administration, but the administration ignored the reports.[36]

Bryant's indifference to sexual harassment emboldened the three aggressors.[37] After several weeks of harassing N.B. without facing any consequences, the aggressors raped him in a school bathroom.[38] Near the end of October 2011, the aggressors ran into a bathroom while N.B. was urinating, and one of them put him in a chokehold.[39] The others

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[34] *Id.*, R. 141a–43a.

[35] *Id.*

[36] *See id.* The administration should have followed up on the reports with not only disciplinary interventions but also behavioral and special education interventions. *See* Second Amended Answers to Expert Witness Interrogatories Pertaining to Felicia Hurewitz, Ph.D., R. 189a–94a. The aggressor had significant education deficits that caused frustration and contributed to his harassing and bullying. *See id.* Indeed, one of the aggressor's teachers believed that he required a special education school, not a general education school like Bryant. *See id.*, R. 190a.

[37] *See* Malcolm Smith, Ph.D., Trial Testimony, R. 88a (testifying that, if a school fails to address harassment, "in most cases [the] bullies and harassers [will be] persistent and [the conduct] will escalate").

[38] N.B. Trial Testimony, R. 62a.

[39] *Id.*

grabbed his hands.[40] One then took off his own pants and rubbed his penis against N.B.'s penis.[41] The others chanted, "give it to the fag."[42] N.B. begged them to stop, clenched his butt cheeks, and yelled for help.[43] The aggressor who rubbed his penis on N.B. then circled around N.B. and thrust his penis into N.B.'s anus.[44] The aggressors finished the rape and told N.B. that they would kill him and his family if he told anyone.[45] When N.B. returned to his fourth-grade classroom (Johnson's classroom), he began throwing up.[46]

Fearing for his life, N.B. did not immediately tell anyone about the rape. He continued attending Bryant, and the three aggressors continued harassing him.[47] But on November 4, 2011, N.B. broke down and told his mother what the aggressors did.[48] That same night, Nicole B. contacted the police and reported the rape to Bryant.[49]

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[40] *Id.*
[41] *See id.*, R. 64a–65a.
[42] Michael Bradley, Ph.D., Trial Testimony, R. 83a.
[43] *Id.*
[44] N.B. Trial Testimony, R. 62a.
[45] *Id.*, R. 66a; Michael Bradley, Ph.D., Trial Testimony, R. 83a.
[46] N.B. Trial Testimony, R. 65a.
[47] *Id.*, R. 66a.
[48] Nicole B. Trial Testimony, R. 74a.
[49] *Id.*, R. 74a–75a; School Police Officer Pamela K. Williams Deposition Testimony, R. 107a.

Rather than helping Nicole B. and N.B., Pearson and another School District official tried to cover up Nicole B.'s report.[50] Wanting to avoid bad publicity, Pearson and an associate superintendent directed Bryant's school police officer, Pamela K. Williams, to omit from her official statement that Nicole B. reported rape.[51] They directed Williams to misrepresent that Nicole B. reported only bullying.[52] When Williams refused, the associate superintendent tried to pressure Williams by reporting her as insubordinate to the chief of the School District's police department.[53] This ploy failed. Williams explained to her supervisor that she had a valid reason for rebuffing Pearson and the associate superintendent: they were asking her to falsify an official statement to cover up a child's rape.[54]

The Philadelphia Police Department ultimately arrested the three aggressors for sexual assault.[55] After the arrest, Pearson issued a report stating that Johnson was negligent in failing to supervise his students on the day of the rape and in failing to report the harassment

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[50] School Police Officer Pamela K. Williams Deposition Testimony, R. 101a–02a, 127a.

[51] *Id.*, R. 100a–01a, 104a–05a, 127a.

[52] *See id.*, R. 110a.

[53] *See id.*, R. 114a–18a.

[54] *Id.*, R. 118a.

[55] Jala Pearson Unsatisfactory Incident Report, R. 201a.

leading up to the rape.[56] Pearson further concluded that Johnson's negligence contributed to the rape.[57]

The three aggressors' sexual harassment still haunts N.B. Since fourth grade, he has attempted suicide multiple times; has spent countless months in hospitals and residential treatment facilities; and has developed posttraumatic stress disorder, attention deficit hyperactivity disorder, and an anxiety disorder.[58] Further, his access to education has been jeopardized: he can no longer participate in regular education—he requires special education services to benefit from school.[59]

Procedural History

In January 2014, when N.B. was eleven years old, Nicole B. filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging that the School District discriminated against N.B. by, among other things, ignoring the severe and pervasive sexual

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[56] *Id.*, R. 202a.

[57] *Id.*

[58] *See* Michael Bradley, Ph.D., Psychological Evaluation, R. 167a–68a, 172a–73a; Michael Bradley, Ph.D., Trial Testimony, R. 85a–86a.

[59] *See* Michael Bradley, Ph.D., Psychological Evaluation. R. 168a.

harassment that he suffered at Bryant.[60] *See* 43 P.S. § 955(i)(1) (banning public accommodations from "either directly or indirectly" discriminating against an individual); 43 P.S. § 962(c) (requiring PHRA claimants to file a PHRC complaint before filing a complaint in state court). A few months later Nicole B. filed a second PHRC complaint, raising similar claims against Pearson and Johnson. Finding both complaints untimely, the PHRC dismissed them and issued right-to-sue letters informing Nicole B. that she had exhausted her administrative remedies.

On April 28, 2014, Nicole B. filed an original action in the Philadelphia Court of Common Pleas against the School District, Pearson, and Johnson (collectively, "Defendants"). She raised the same PHRA claims.[61] Defendants sought dismissal based on the statute of limitations. They argued in a motion for judgment on the pleadings that, because Nicole B.'s PHRC complaints were untimely, she did not properly exhaust her administrative remedies. *See Vincent v. Fuller Co.*, 616 A.2d 969, 974 (Pa. 1992) ("[O]ne who files a complaint with the

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[60] January 2014 PHRC Complaint, R. 10a–11a. Nicole B. also alleged that the School District ignored severe and pervasive racial harassment. *Id.*, R. 11a–12a.

[61] Nicole B. also included tort claims in her complaint, but she withdrew those claims at trial.

[PHRC] that is later found to be untimely cannot be considered to have used the administrative procedures provided in the [PHRA]."). The court denied the motion. In doing so, it necessarily determined that minority tolls PHRA claims. Absent minority tolling, Defendants would have prevailed under *Vincent*.

Nicole B. later amended her complaint, and Defendants filed preliminary objections, again arguing that Nicole B.'s claims are time-barred. The court overruled the objections.

After discovery,[62] Defendants moved for summary judgment. For a third time, Defendants argued that Nicole B.'s claims are time-barred, and for a third time, the court rejected the argument. Defendants also argued that the PHRA provides no cause of action protecting schoolchildren from student-on-student harassment. The court rejected that argument too.

Nicole B. and Defendants then litigated a six-day bench trial,[63] after which Defendants moved for nonsuit, yet again arguing that Nicole B.'s claims are time-barred and that the PHRA provides no cause

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[62] During discovery the court twice sanctioned Defendants for misconduct.

[63] The trial court excluded as irrelevant a substantial amount of evidence offered by Nicole B., including the testimony of Bryant teachers, Bryant's school police officer, and an expert witness.

of action protecting schoolchildren from student-on-student harassment. The trial judge, the Honorable Frederica A. Massiah-Jackson, granted the motion, thereby reversing the court's prior legal rulings on minority tolling and the scope of the PHRA's protections. Nicole B. moved to remove nonsuit, but Judge Massiah-Jackson denied the motion. This appeal followed.[64]

VI. SUMMARY OF ARGUMENT

The PHRA affords children broad protections against discrimination, and minority tolling secures the protections by ensuring that children can enforce them. The trial court's decision upends this legislative scheme. Under the decision, Pennsylvania's schools can operate as dens of discriminatory harassment, and no PHRA rights are subject to minority tolling. Children are left to fend for themselves in school, and only those children lucky enough to have vigilant parents can secure their PHRA rights.

The trial court erred in entering nonsuit. The PHRA provides a cause of action that protects children from discriminatory student-on-student harassment, and minority tolls PHRA claims.

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[64] Judge Massiah-Jackson did not order Nicole B. to file a statement of errors complained of on appeal, so no statement is attached. *See* Pa. R.A.P. 2111(d).

First, the PHRA does not permit school districts to ignore, and thus condone, severe or pervasive harassment based on a protected characteristic. The PHRA prohibits school districts from "indirectly" denying a child educational "privileges" or "advantages" based on sex, race, national origin, religion, or disability. *See* 43 P.S. § 955(i)(1). This ban on indirect discrimination requires a school district to intervene when it knows a child is suffering severe or pervasive harassment based on one of those characteristics. That harassment denies a child the educational privileges and advantages of a safe, non-hostile school environment, and a school district indirectly discriminates against a child if it knows he is suffering such a denial but fails to "take corrective measures." *See Chester Sch. Dist.*, 427 Pa. at 165.

Second, under § 962 of the PHRA, minority tolls a child's PHRA claims. Section 962(e) states that PHRA claims are subject to equitable tolling, which applies "when a party, through no fault of its own, is unable to assert its right in a timely manner." *DaimlerChrysler Corp. v. Pennsylvania*, 885 A.2d 117, 119 n.5 (Pa. Commw. Ct. 2005). This protection applies to child victims of discrimination. A child, through

no fault of his own, cannot timely assert his PHRA rights—legally, he is unable to assert his rights until turning 18.

But even if § 962 does not provide for minority tolling, Pennsylvania's minority tolling statute applies to PHRA claims. The statute suspends the limitation periods for any claim for which a minor is "entitled to bring a civil action." *See* 42 Pa. C.S. § 5533(b)(i). A "civil action" is an action "commenced and conducted in a court of record, involving . . . claims for damages or equitable relief." *East v. Workers' Comp. Appeal Bd.*, 828 A.2d 1016, 1022 (Pa. 2003). And a person with a PHRA claim is entitled to bring this type of action; a PHRA claimant has a right to "bring an action in the courts of common pleas" for "legal or equitable relief." *See* 43 P.S. § 962(c)(1).

Along with vacating nonsuit, this Court should vacate the trial court's rulings excluding as irrelevant evidence offered by Nicole B. A court cannot exclude evidence as irrelevant without considering whether the evidence is "of consequence" to the elements of the plaintiff's claims. *See* Pa.R.E. 401. But because the trial court found that Nicole B. did not set forth cognizable claims, it never considered the elements of her indirect discrimination claims.

VII. ARGUMENT

Passed in 1955 and amended and expanded numerous times, the PHRA is an ambitious civil rights statute. The legislature designed it to keep Pennsylvania on the right side of history. The PHRA provides broad protections to Pennsylvania's citizens and directs courts to construe the protections "liberally." *See* 43 P.S. § 962(a). This ensures that the PHRA eradicates discrimination no matter the form it takes. The trial court's decision, though, overrides this design, depriving Pennsylvania's most vulnerable citizens of protection against a common and dangerous form of discriminatory harassment.[65] The decision defies legislative intent and puts Pennsylvania on the wrong side of history.

The PHRA's ban on indirect discrimination protects children from discriminatory student-on-student harassment. School districts cannot subject children to such harassment by adopting a policy of indifference towards it. That is to say, school districts cannot "implicitly and effectively make [a child]'s endurance of sexual[, religious, racial, or

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[65] "Student-on-student sexual harassment is a pervasive problem in primary and secondary schools throughout our nation." *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 547 (N.J. 2007) (internal quotation marks omitted).

disability] intimidation a 'condition' of her" schooling.[66] *See Bundy v. Jackson*, 641 F.2d 934, 946 (D.C. Cir. 1981).

In holding otherwise, the trial court's decision recasts the PHRA as an unambitious, second-class civil rights statute. Other states' antidiscrimination laws, as well as federal civil rights statutes, protect schoolchildren from discriminatory student-on-student harassment. For example, New Jersey's Law Against Discrimination, which Pennsylvania courts have looked to in interpreting the PHRA, "permits a cause of action against a school district for student-on-student harassment." *L.W.*, 915 A.2d at 547; *see also Kryeski v. Schott Glass Techs.*, 626 A.2d 595, 598 (Pa. Super. Ct. 1993) (citing for support a New Jersey decision interpreting the Law Against Discrimination). So too does the Missouri Human Rights Act, Washington's Equal Education Opportunity Law, the Vermont Public Accommodations Act,

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[66] When a school district acts as a bystander to discrimination, it becomes part of the discrimination. *See* Sandra K.M. Tsang et al., *Bystander Position-Taking in School Bullying: The Role of Positive Identity, Self-Efficacy and Self-Determination*, 5(1) Int. J. Child Health Hum. Dev. 103, 105 (2012) (finding that, when a school district "stand[s] aside and keep[s] silent while observing" bullying, it provides "silent consent and becomes part of the victimizing process"); *T.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289, 302 (E.D.N.Y. 2011) ("[T]he problem of bullying is also a problem of the unresponsive bystander, whether that bystander is a classmate . . . or an educator . . . ." (internal quotation marks omitted)).

and so on. *See Doe v. Kan. City*, 372 S.W.3d 43, 51–52 (Mo. Ct. App. 2012) ("[The Missouri Human Rights Act]'s prohibition against indirectly denying another of the benefits of a public accommodation encompasses a claim against a school district for student-on-student sexual harassment."); *Mercer Island Sch. Dist. v. Office of Superintendent of Pub. Instruction*, 347 P.3d 924, 936 (Wash. Ct. App. 2015) ("A school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known." (internal quotation marks omitted)); *Washington v. Pierce*, 895 A.2d 173, 181 (Vt. 2005) ("[T]he [Vermont Public Accommodations Act] encompasses hostile school environment claims based on peer harassment.").

But the trial court's decision does not simply nullify the PHRA's ban on indirect discrimination in schools—the decision jeopardizes all rights that children have under the PHRA. Denying child victims of discrimination the protection of minority tolling, the decision transforms a child's PHRA rights into artificial promises. Absent minority tolling, the rights are contingent on a child having a vigilant

parent who can and will enforce them.[67] Many children are not so lucky. The legislature did not in one breath grant children robust rights against discrimination and in the next breath compromise those rights by denying children the protection of minority tolling.

A. The PHRA provides a cause of action against school districts for student-on-student harassment: an action for indirect discrimination.

1. A school district indirectly discriminates against a child if it ignores severe or pervasive harassment based on a protected characteristic.

Under the PHRA, public accommodations—such as school districts—can neither directly nor indirectly discriminate against a person. *See* 43 P.S. § 955(i)(1); § 954(l) (defining "public accommodations" as including "kindergartens, primary and secondary schools, [and] high schools"). Section 955(i) of the PHRA prohibits "any public accommodation" from "either directly or indirectly" denying "to any person because of h[er] race, color, sex, religious creed, ancestry, national origin, handicap[,] or disability" any "accommodations, advantages, facilities[,] or privileges" that it offers. § 955(i)(1). A public

[67] What's more, absent minority tolling, parents would be incentivized to embrace a hyper-litigious strategy when their children are harassed at school. Rather than attempting to work cooperatively with a school district, parents would have to rush to file a PHRC complaint. But when it comes to educational disputes, litigation should be a last resort. Parents who give a school district opportunities to correct a failure before turning to litigation should be applauded, not penalized.

accommodation indirectly discriminates against a person if it knows he is being denied its accommodations, advantages, facilities, or privileges because of a protected characteristic, but it fails to "take corrective measures."[68] *See Chester Sch. Dist.*, 427 Pa. at 165.

This ban on indirect discrimination protects children like N.B. It requires school districts to take corrective measures when a child, due to a protected characteristic, is denied the privileges and advantages of a safe, non-hostile school environment. A child who faces severe or pervasive harassment at school is denied equal access to school; he is forced to attend school under "abusive," "alter[ed]" conditions. *See Infinity Broad. Corp. v. Pa. Human Relations Comm'n*, 893 A.2d 151, 158 (Pa. Commw. Ct. 2006) (defining "severe or pervasive harassment" as harassment that is "sufficiently severe or pervasive to alter the conditions of [a public accommodation] and create an abusive . . . environment" (internal quotation marks omitted)); *T.K.*, 779 F. Supp. 2d at 293 ("Bullying and inappropriate peer harassment in its many forms

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[68] This form of indirect discrimination is analogous to the indirect discrimination often seen in disability discrimination cases. *See Medvic v. Compass Sign Co.*, 2011 U.S. Dist. LEXIS 89275, at *24–25, 2011 WL 3513499, at *8 (E.D. Pa. Aug. 10, 2011) ("There are two types of discrimination: direct and indirect. . . . Indirect discrimination occurs when an employer does not make a reasonable accommodation [for a person with a disability.]").

provides an unacceptable toxic learning environment."); *Doe*, 372 S.W.3d at 52 ("[A] student's sexually harassing and sexually assaulting another student has the potential to deny the aggrieved student the full and equal use and enjoyment of the advantages, facilities, services, and privileges of the public school."). The child is denied a basic privilege afforded to other students: the chance to learn in an educational setting free from dangerous hostility.

Applying § 955(i) to the school context, the Pennsylvania Supreme Court in *Chester School District* confirmed that the PHRA requires school districts to intervene when a child is suffering severe or pervasive harassment based on a protected characteristic. There, the lower court interpreted § 955(i) as banning only "intentional or affirmative" discriminatory acts by school districts. *Chester Sch. Dist.*, 427 Pa. at 165 (internal quotation marks omitted). But the Supreme Court rejected that interpretation. *Id.* After noting that the PHRA must "be construed liberally for the accomplishment of [its] purposes," the Court found that, when a school district "has the power to take corrective measures" to stop discrimination against a child but fails to

act, the "failure to act" constitutes indirect discrimination under the PHRA. *See id.* at 165–66 (internal quotation marks omitted).

But even putting aside the Supreme Court's decision in *Chester School District*, another Supreme Court decision, *Chmill v. Pittsburgh*, supports a reading of § 955(i) that requires school districts to address discriminatory student-on-student harassment. 412 A.2d 860 (Pa. 1980). In *Chmill*, the Court stated that the PHRA "should be construed in light of principles . . . which have emerged relative to" federal civil rights statutes. *See id.* at 871 (internal quotation marks omitted). And federal courts have long held that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 permit claims against school districts that ignore discriminatory student-on-student harassment. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (holding that Title IX provides a cause of action for student-on-student sexual harassment); *Whitfield v. Notre Dame Middle Sch.*, 412 Fed. App'x 517, 521 (3d Cir. 2011) (not precedential) ("[A student] may sue a school . . . for its failure to address a racially hostile environment [under Title VI].").

In finding that the PHRA provides no protection to schoolchildren from severe or pervasive harassment based on a protected characteristic, the trial court considered neither § 955(i)'s ban on indirect discrimination nor *Chmill*. Instead it simply concluded that Nicole B. has not raised a cognizable claim because Pennsylvania appellate courts have not yet "addressed claims for student hostile school environment." *See* Bench Op. at 52.

That reasoning fails. The absence of a decision applying a legal protection does not sustain the conclusion that the protection is nonexistent. *See Walmsley v. Philadelphia*, 872 F.2d 546, 554 (3d Cir. 1989) (Aldisert, J., dissenting) (noting that a proposition cannot be sustained "merely by negative evidence"). The absence could be explained by, for instance, a lack of opportunity to apply the protection. Indeed, no Pennsylvania cases exist applying the Thirteenth Amendment's ban on slavery, yet we know the ban applies in Pennsylvania.

But perhaps more importantly, the trial court's conclusion violates the basic tenets of the PHRA. The PHRA is Pennsylvania's flagship antidiscrimination statute, designed to eradicate discrimination in the

state. Yet under the trial court's decision, the PHRA permits Pennsylvania's schools to become nests of discriminatory harassment. The PHRA permits a school district to ignore white students calling an African American child the N-word and hanging nooses in his locker. It allows a school district to close its eyes to a mob of students scrawling swastikas on a Jewish child's belongings and terrorizing him in hallways, during gym class, and at lunch. It lets a school district brush aside school-wide sexual harassment and turn its back on students sexually assaulting, bullying, and raping a fourth grader.

This cannot be.

2. The corrective-measures standard is the proper standard for indirect discrimination claims arising from student-on-student harassment.

Although Pennsylvania appellate courts have yet to consider a PHRA claim against a school district for ignoring severe or pervasive student-on-student harassment based on a protected characteristic, the standard for such a claim is no different than for other indirect discrimination claims. A district violates a child's PHRA rights if (1) the child, because of a protected characteristic, is denied educational privileges or advantages, (2) the district knows about the denial, and (3) the district fails to "take corrective measures." *See Chester Sch. Dist.*,

427 Pa. at 165; *Hoy v. Angelone*, 691 A.2d 476, 480 (Pa. Super. Ct. 1997) ("Liability will exist where [a public accommodation] knew or should have known of the harassment and failed to take prompt remedial action.").

This corrective-measures standard mirrors the standard that the New Jersey Supreme Court set forth in *L.W.* for student-on-student harassment claims.[69] The *L.W.* Court held: "[A] school district may be found liable under [New Jersey's Law Against Discrimination] for student-on-student sexual orientation harassment that creates a hostile educational environment when the . . . district knew or should have known of the harassment, but failed to take action reasonably calculated to end [it]." *L.W.*, 915 A.2d at 550. This standard, the *L.W.* Court explained, requires fact-finders to "determine the reasonableness of a school district's response to peer harassment in light of the totality of the circumstances." *Id.* at 551. Relevant circumstances include, among other things:

- "the students' ages, developmental and maturity levels";

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[69] It also parallels the standard that Missouri courts apply to student-on-student harassment claims under the Missouri Human Rights Act. *See Doe*, 372 S.W.3d at 54 ("[A] school district can be held liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action.").

- "school culture and atmosphere";
- "rareness or frequency of the conduct";
- "duration of harassment";
- "extent and severity of the conduct";
- "whether violence was involved";
- "history of harassment within the school district, the school, and among individual participants";
- "effectiveness of the school district's response";
- "whether the school district considered alternative responses"; and
- "swiftness of the school district's reaction."

Id.

The corrective-measures standard, too, requires a fact-intensive reasonableness analysis that takes into account these circumstances. A court must consider the totality of the circumstances and determine whether the school district's response to the harassment was reasonably calculated to correct it. The response can be considered a "corrective measure" only if it was reasonably calculated to correct the harassment.

Defendants, however, may argue that on remand this court should direct the trial court to apply the more burdensome deliberate-indifference standard, a standard found in federal school-hostile-

environment cases. The deliberate-indifference standard, Defendants have previously asserted, is the proper standard because Nicole B.'s claims are essentially school-hostile-environment claims and should be governed by the same standard as federal school-hostile-environment claims. Absent the existing Pennsylvania precedent articulating a standard for PHRA indirect discrimination claims, this argument would warrant close consideration; the PHRA should usually be interpreted in light of federal principles. But federal principles cannot supplant existing Pennsylvania precedent.[70]

B. Minority tolls PHRA claims.

1. Section 962 of the PHRA subjects a child's PHRA claims to tolling.

Section 962(e) states: "The time limits for filing under any complaint or other pleading under this act shall be subject to . . . equitable tolling." 43 P.S. § 962(e). This provision shields children from the PHRA's limitation periods.

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[70] Under either the corrective-measures or deliberate-indifference standard, Nicole B. has set forth sufficient evidence to avoid nonsuit. Taking the evidence in the light most favorable to Nicole B., N.B. suffered constant sexual harassment as soon as he began attending Bryant; Defendants were immediately on notice of the harassment; Defendants were aware that the harassers had a history of hostile conduct; Defendants were also aware for years that a sexually hostile environment existed at Bryant; and yet Defendants took no action to protect N.B. or otherwise correct the hostile environment.

Equitable tolling protects a party who, "through no fault of [his] own, is unable to assert [his] rights in a timely manner." *DaimlerChrysler Corp.*, 885 A.2d at 119 n.5. Applying this definition, Pennsylvania courts have identified specific circumstances that trigger equitable tolling under the common law. *See, e.g.*, *DEEK Inv., L.P., v. Murray*, 157 A.3d 491, 497 (Pa. Super. Ct. 2017). Because courts have not identified minority as one of the circumstances, the trial court held that § 962(e) does not toll a child's PHRA claims. *See* Bench Op. at 51. But the question here is whether equitable tolling under § 962(e) protects children, not whether equitable tolling under the common law does. The PHRA's driving canon of construction—that the PHRA must be liberally construed—resolves this question of statutory interpretation.

Applying the above definition of "equitable tolling," it is fair to read "equitable tolling" in § 962(e) as protecting children. A child victim of discrimination is a party who, through no fault of his own, cannot timely assert his PHRA rights: "[U]nder the law of this Commonwealth minors have *never* been permitted to initiate their own suits, even if they were old enough and wise enough to do so. . . . [T]he law . . .

prevent[s] minors, simply because of their status as minors, from bringing suit." *De Santis v. Yaw*, 434 A.2d 1273, 1276 (Pa. Super. Ct. 1981) (emphasis in original).

Because it is fair to read "equitable tolling" in § 962(e) as protecting children, it must so be read. The legislature's command to construe the PHRA's protections liberally appears just a few paragraphs above § 962(e), in § 962(a). A narrower reading of "equitable tolling" would defy that legislative command. It would defy the PHRA's driving canon of construction.

2. Even if the PHRA does not itself provide for minority tolling, Pennsylvania's minority tolling statute applies to PHRA claims.

The minority tolling statute suspends the limitation periods for any claim for which a minor is "entitled to bring a civil action." *See* 42 Pa. C.S. § 5533(b)(i). And a person with a PHRA claim is entitled to "bring an action in the courts of common pleas" for "legal or equitable relief." *See* 43 P.S. § 962(c)(1). Accordingly, the minority tolling statute "suspend[s] the running of any limitation period for any [PHRA] claim that accrues while a person is a minor." *See Fancsali v. Univ. Health Ctr.*, 761 A.2d 1159, 1164 n.6 (Pa. 2000).

In holding that the minority tolling statute does not apply to PHRA claims, the trial court concluded that the PHRA does not entitle claimants to bring a civil action. The trial court relied on the Pennsylvania Supreme Court's decision in *East*, which held that the minority tolling statute does not apply to workers' compensation claims. But *East* does not support the trial court's decision. Instead, *East* confirms that PHRA claimants have a right to bring a civil action.

The *East* Court held that a claimant can "bring a civil action" if he can "commence[] and conduct[] in a court of record" an action for "damages or equitable relief." *See East*, 828 A.2d at 1022. The Court then determined that workers' compensation claimants cannot bring such an action—they can bring only an administrative action. "In enacting the [Workers' Compensation] Act, the Legislature *replaced* what was previously a civil action with a[n] . . . administrative system of substantive, procedural, and remedial laws, which provide the *exclusive* forum for redress of [work place] injuries." *Id.* at 1020 (emphases in original). Therefore, workers' compensation claimants cannot commence an action in a court of record; they can only file an administrative claim with a Workers' Compensation Judge, appeal the

Judge's ruling to the Workers' Compensation Appeals Board, and then seek "limited" review of the Board's decision in the Commonwealth Court. *See id.* at 1017–19.

Not so for PHRA claimants. Although PHRA claimants must participate in PHRC proceedings, their access to a court of record is not limited to administrative appeals. They have a right to "commence[] and conduct[] in a court of record" an action for "damages or equitable relief." *See id.* at 1022. The PHRA establishes a "civil right" against discrimination, 43 P.S. § 953, and it specifically provides that claimants "shall be able to bring an action in the courts of common pleas of the Commonwealth based on" that right, *see* 43 P.S. § 962(c)(1); *Carney v. Pa. Human Relations Comm'n*, 404 A.2d 760, 764 (Pa. Commw. Ct. 1979) ("[T]he procedures before the PHRC and the right to sue in the court of common pleas together constitute the statutory remedy [for a PHRA claimant.]" (emphasis omitted)). A claimant can file with the PHRC, obtain a right-to-sue letter, and bring an original action for "legal or equitable relief" in a court of common pleas. *See* 43 P.S. § 962(c)(1). Indeed, that's what happened in this case. Nicole B. filed an

original action in the court of common pleas after obtaining a right-to-sue letter.

Under *East*, then, the minority tolling statute on its face applies to PHRA claims because PHRA claimants have a right to bring a civil action. *See East*, 828 A.2d at 1022.

But even assuming that, despite *East*, the plain language of the minority tolling statute is unclear and therefore not dispositive, the purpose of the statute shows that the legislature intended it to apply to PHRA claims. The minority tolling statute, at the very least, is subject to multiple interpretations when it comes to PHRA claims, and if the text of a statute is ambiguous, this Court may look to the statute's purpose to ascertain legislative intent. *See* 1 Pa. C.S. § 1921(c). It may consider "[t]he mischief to be remedied," "[t]he object to be attained," and "[t]he consequences of a particular interpretation." *Id.* These considerations show that the minority tolling statute applies to PHRA claims.

Before the legislature enacted the minority tolling statute, many minors did not have "an equal opportunity to bring a cause of action." *See Foti v. Askinas*, 639 A.2d 807, 809 (Pa. Super. Ct. 1994). The

legislature enacted the statute to remedy this inequity and to "protect the rights of minors." *See id.* Reading the statute as excluding PHRA claims would thwart that purpose. Ironically, such a reading would deny minors an equal opportunity to protect their PHRA right to equal opportunity. Only with "good fortune" would minors be able to protect their right against discrimination in employment, housing, and public accommodations. *See Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 692 P.2d 280, 286 (Ariz. 1984). Minors cannot enforce this right "unless someone else, over whom [they] ha[ve] no control, learns about it, understands it, is aware of the need to take prompt action, and in fact takes such action." *See id.*; *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983). And that someone must do all this in a mere six months. *See* 43 P.S. § 959(h) (requiring PHRA claimants to file a PHRC complaint within six months of the last act of discrimination).[71]

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[71] This six-month limitation period further distinguishes PHRA claims from workers' compensation claims. Because that period is so brief, minority tolling is critical for child victims of discrimination. Child workers are in a less precarious position. The statute of limitations for workers' compensation claims is three years, *Kraeuter v. Workers' Comp. Appeal Bd.*, 82 A.3d 513, 518 (Pa. Commw. Ct. 2013), and because children cannot work until age 16 absent special parental permission, child workers usually reach majority before the three years expire, *see* 43 P.S. § 40.8(a). Therefore, reading the minority tolling statute to exclude PHRA claims has far harsher "consequences" than reading it to exclude workers' compensation claims. *See* 1 Pa. C.S. § 1921(c).

Beyond the text and purpose of the minority tolling statute, the Pennsylvania Supreme Court's decision in *Chmill* militates in favor of finding that the statute applies to PHRA claims. In concluding that federal civil rights precedent should inform courts' approach to the PHRA, *Chmill* recognized that the legislature intended the PHRA's protections to be at least as robust as those of federal civil rights statutes. *See Chmill*, 412 A.2d at 871. But a finding that the minority tolling statute does not apply to PHRA claims would leave child victims of discrimination worse off under the PHRA than under federal civil rights statutes. Courts have long held that the minority tolling statute applies to federal civil rights claims. *See Gaudino v. Stroudsburg Area Sch. Dist.*, 2013 U.S. Dist. LEXIS 102382, at *15–16, 2013 WL 3863955, at *6 (M.D. Pa. July 23, 2013) (applying the statute to claims under Title IX, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973); *Weidow v. Scranton Sch. Dist.*, 2009 U.S. Dist. LEXIS 73622, at *21, 2009 WL 2588856, at *7 (M.D. Pa. Aug. 19, 2009) (applying the statute to claims under the ADA and Section 504); *McKellar v. Pa. Dep't of Educ.*, 1999 U.S. Dist. LEXIS 2194, at *11, 1999 WL 124381, at *4 (E.D. Pa. Feb. 23, 1999) (same).

Finally, because the minority tolling statute applies to PHRA claims, it applies to all PHRA limitation periods. The statute "suspend[s] the running of *any* limitation period for any claim that" allows a minor to bring a civil action. *See Fancsali*, 761 A.2d at 1164 n.6 (emphasis added). The PHRA sets forth two limitation periods: a victim of discrimination has six months to file a PHRC complaint, and after the PHRC issues a right-to-sue letter, the victim has two years to commence an action in a court of common pleas. Defendants might argue that the minority tolling statute does not apply to the limitations period for PHRC complaints—the limitation period at issue in this case—because, according to Defendants, PHRC complaints commence an administrative, not a civil, action. Besides contravening *Fancsali*, this argument is at odds with the text of the minority tolling statute.

The minority tolling statute guarantees all minors "the same time for commencing a[] [civil] action after attaining majority as is allowed to others." 42 Pa. C.S. § 5533(b)(i). This guarantee requires tolling of all limitation periods for a claim. *See Fancsali*, 761 A.2d at 1164 n.6. Absent tolling of all limitation periods, many minors would not simply be deprived the "same time" for bringing a civil action after attaining

majority—they would have *no time* to bring a civil action after attaining majority. PHRA cases are demonstrative. A PHRA claimant must exhaust his administrative remedies with the PHRC before suing in a court of common pleas. *See* 43 Pa. C.S. § 962(c). If a claimant does not comply with the six-month limitation period for PHRC complaints, his PHRA claims are time-barred and he cannot bring a civil action. *See Vincent*, 616 A.2d at 974. So, absent tolling, a minor who is discriminated against but fails to file a PHRC complaint within six months would have no time for commencing an action after attaining majority.

C. The trial court abused its discretion in excluding as irrelevant evidence offered by Nicole B.

A court cannot exclude evidence as irrelevant without first considering whether the evidence is "of consequence" to the elements of the plaintiff's claims. *See* Pa.R.E. 401. When evidence makes an element more or less likely, the evidence is relevant. *See Commonwealth v. Schley*, 136 A.3d 511, 518–19 (Pa. Super. Ct. 2016) (reversing a trial court decision to exclude evidence because the evidence was of consequence to an element of the defendant's charged offense). Here, though, the trial court excluded as irrelevant material

evidence offered by Nicole B. without considering whether the evidence was of consequence to the elements of her PHRA indirect discrimination claims. The trial court therefore abused its discretion in excluding the evidence.

The trial court excluded as irrelevant, among other evidence:

- The testimony of Felicia Hurewitz, Ph.D.—an expert who would have testified that Defendants failed to implement appropriate interventions to prevent student-on-student harassment and bullying;

- Testimony from a Bryant teacher that Pearson discouraged Bryant staff from reporting sexual harassment;

- Testimony from Bryant's school police officer that Defendants attempted to cover up the rape of N.B.;

- Deposition testimony from a Bryant teacher that (1) Pearson ignored student-on-student harassment and bullying and (2) Defendants failed to address the misconduct of the aggressors who raped N.B.; and

- The report drafted by Pearson stating that Johnson failed to address the aggressors' harassment of N.B. and that the failure contributed to the rape of N.B.

But in excluding this evidence, the trial court did not consider the elements of Nicole B.'s PHRA indirect discrimination claims. Finding

that Nicole B. did not set forth cognizable claims,[72] the court never took the necessary step of identifying the elements of the claims.[73]

This court should vacate all the trial court's rulings excluding as irrelevant evidence offered by Nicole B. so that the trial court can consider in the first instance whether Nicole B.'s evidence is "of consequence" to the elements of her indirect discrimination claims. *See* Pa.R.E. 401.

VIII. CONCLUSION

Education, under the PHRA and the United States Constitution, "is a right which must be made available to all on equal terms." *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). When a school district ignores discriminatory student-on-student harassment, it flouts this basic right of citizenship. Severe or pervasive harassment based on a protected characteristic denies a child equal access to school. The child is denied educational privileges or advantages solely because of the color of his skin, his religious beliefs, his disability status, or his gender.

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[72] Even at the start of trial, during argument on Defendants' motions in limine, the trial court noted that Nicole B. did not allege a viable cause of action. *See* Trial Transcript August 1, 2017, R. 51a.

[73] Further, even assuming that the trial court implicitly identified elements for Nicole B.'s claims, the court did not identify the proper elements—the elements dictated by the corrective-measures standard.

A school district must take corrective measures when it knows a child is suffering this discrimination. That's not too much to ask. It's what many other states demand. But more importantly, it's what the legislature intended when it enacted a robust antidiscrimination statute designed to keep Pennsylvania on the right side of history.

Nicole B. respectfully requests that this Court vacate nonsuit; vacate the trial court's relevancy-based evidentiary rulings; and remand for a new trial, directing the trial court to apply the corrective-measures standard.

Respectfully submitted,

/s/ Kevin Golembiewski

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