RECORD NO. 19-2203

In The
United States Court of Appeals
For The Fourth Circuit

JANE DOE,

Plaintiff – Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This appeal arises from a jury verdict that the Fairfax County School Board lacked "actual knowledge" of reports that Jane Doe was sexually harassed by a classmate on a school trip, and thus was not liable under Title IX. It is undisputed that Doe told Assistant Principal Hogan that Jack Smith had touched her breasts and genitals despite her physical resistance, and that her mother told Hogan that Doe had been sexually assaulted. It is also undisputed that the district court upheld the verdict on one basis: that, despite having been told about a "sexual assault," school officials somehow did not understand they had received a report of sexual harassment.[1]

That was legal error. A school's receipt of a report alleging sexual harassment establishes actual knowledge; the school's subjective understanding of the report is irrelevant. *See* OpeningBr.30-34. Under controlling law, there was no evidence for the jury's verdict. For this reason, and others discussed below, Doe is entitled to a new trial, or at least remand for reconsideration of her new-trial motion.

The Board's response proffers an even narrower actual-knowledge standard with no legal basis: Not only must an official subjectively understand that a report alleges sexual harassment, however obvious it may be, but he must *substantiate* that report. BoardBr.35-40. That invented standard would turn Title IX on its head, allowing schools to avoid liability by failing to train staff and refusing to probe

[1] Sexual assault is a form of sexual harassment. *See* OpeningBr.1 & n.1.

students' allegations—inaction Title IX prohibits. For good reason, the Board's rule simply is not the law.

ARGUMENT

I. The School Board Misstates the Standard of Review.

For starters, the Board mistakenly claims this Court should review all evidence in the light most favorable to it as the "prevailing party." BoardBr.2 (citing *Roe v. Howard*, 917 F.3d 229, 233 (4th Cir. 2019)). The standard the Board cites applies to an appeal of a denial of a motion for judgment as a matter of law (JMOL). *See Roe*, 917 F.3d at 233. It is inapplicable to Doe's grounds for appeal, which concern the denial of Doe's motion for a new trial and threshold legal issues. *See* OpeningBr.25 (explaining standards of review for each issue). Only the Board's argument for affirmance on alternative grounds arises from a JMOL motion. *See* BoardBr.52-57. As the moving party below, the Board concedes that this Court must view the evidence in the light most favorable to *Doe*. *Id*. at 53 (citing *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 391 (4th Cir. 2014)).

II. The District Court Paid Lip Service to the Correct Standard for Assessing Doe's New-Trial Motion, But Did Not Apply It.

Although the district court recited the correct standard for considering whether to grant a new trial, it clearly did not apply that standard. The court recognized it was required to weigh the evidence and exercise its independent judgment. *Williams v. Nichols*, 266 F.2d 389, 392-93 (4th Cir. 1959); J.A. 3371-72.

But it abandoned that standard, denying the motion based on its inability to "divine" what evidence the jury had credited. J.A. 3372

The Board seizes on the fact that the court *recited* the proper standard and compares this case to *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), arguing that this Court is reluctant to reverse where a district court notes the correct standard. BoardBr.47. The comparison is unavailing.[2]

Ellis reviewed a decision that stated the correct standard and, in the same sentence, summarily denied the new-trial motion without explaining the credibility or weight it assigned conflicting testimony. Add. 5. Because the district court offered no analysis, the panel held it could not conclude that "the court failed to exercise its independent judgment after weighing all of the evidence." *Ellis*, 745 F.2d at 298 (internal quotation marks omitted).

Here, the district court *did* explain its reasoning: "The Court has no way to divine what evidence the jury believed was more credible or the weight that the jury gave to specific evidence. As a result, the existence of evidence supporting the jury's verdict prevents the Court from ordering a new trial." J.A. 3372. That explanation cannot be reconciled with the correct standard. An inability to read jurors' minds would only "prevent[] the Court from ordering a new trial" if the court could not

[2] The *Ellis* district court opinion is unavailable online. It is an Addendum to the Joint Appendix.

weigh the evidence independently. That weighing is prohibited on a JMOL motion but *required* on a new-trial motion. *Williams*, 266 F.2d at 392-93*; see also West v. Richmond, F. & P. R.R. Co.*, 528 F.2d 290, 292 (4th Cir. 1975) (court applied correct standard because it weighed evidence). Accordingly, if this Court does not order a new trial, it should remand for reconsideration of Doe's motion under the correct standard. *See Williams*, 266 F.2d at 393.

III. The Jury Found Doe was Sexually Harassed.

To distract from its untenable legal arguments, the Board tries to turn this appeal into a referendum on whether Doe was sexually harassed. It wants this Court to forget that, before reaching the actual-knowledge element of the special verdict, the jury found Doe had experienced severe, pervasive, and objectively offensive sexual harassment. J.A. 3324. The Board never argued that finding was unlawful, and that issue is not before this Court. Nonetheless, the Board devotes much of its brief to misrepresenting the assault, how Doe described it to Hogan, and the verdict.

In returning a favorable verdict on that element, the jury clearly credited Doe's testimony, rather than Smith's inconsistent account. *See, e.g.*, J.A. 1330:25-1333:8, 1336:12-24 ("Q [to Smith]: So you've changed [your story] three times, right? A: I guess."). The Board suggests the jury may have believed Doe was sexually harassed only "in her own mind," based on a supposed mismatch between her definition of consent and the law's. BoardBr.43 n.3. But the jury's finding that the harassment

was "severe, pervasive, and offensive *to a reasonable person*" leaves no room for such trivialization. J.A. 3324 (emphasis added).[3]

IV. Under the Correct Actual-Knowledge Standard, Doe is Entitled to a New Trial or Reconsideration of her New-Trial Motion.

The district court erred on two grounds related to the meaning of actual knowledge: Contrary to its conclusion, there is no evidence to support the jury's actual-knowledge verdict, and the court applied the wrong actual-knowledge standard in reviewing Doe's new-trial motion. OpeningBr.34-43. The Board's opposition depends on an invented actual-knowledge standard irreconcilable with controlling law.

A. Actual Knowledge is Established by a Report Alleging Sexual Harassment.

Courts are unanimous that a school's receipt of a report alleging sexual harassment establishes actual knowledge. *See, e.g.*, *Doe v. Galster*, 768 F.3d 611, 614 (7th Cir. 2014) ("To have actual knowledge of an incident, school officials must have witnessed it or received a report of it."); *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 700-01 (4th Cir. 2007) (en banc) (actual knowledge established by student's allegation); OpeningBr.30-31 (collecting cases). For example, the

[3] There is no basis for the Board and its *amici*'s suggestion that Hogan could have concluded Doe's allegation of nonconsensual sexual touching was unsubstantiated based on a disagreement with Doe's view of consent. *See* BoardBr.43; NSBABr.15. The record contains no evidence that Hogan knew Doe's view of "consent."

Supreme Court held in *Davis* that students' complaints about a classmate's sexual harassment—unsubstantiated by the school—were sufficient to establish actual knowledge. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649 (1999).[4]

Whether a report establishes actual knowledge depends on its content, not the recipient's interpretation. *See, e.g.*, *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247-48 (10th Cir. 1999); OpeningBr.30-32 (collecting cases). A report of the alleged abuse "in question" is insufficient when it does not describe sexual harassment. *Baynard v. Malone*, 268 F.3d 228, 237-38 (4th Cir. 2001); *see also Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008) (victim reported only that "boys were bothering her"). This is an objective standard that turns on the definition of sexual harassment: unwelcome conduct of a sexual nature. *See* OpeningBr.37-38. Simply put, an official who receives a report alleging conduct that constitutes sexual harassment has "actual knowledge" of that alleged harassment..

Although the Board's brief could lead a reader to think otherwise, actual knowledge is *not* about the reasonableness of a school's investigation and conclusion. That goes to the final element of Title IX liability, deliberate indifference. *E.g.*, *Davis*, 526 U.S. at 648, 651 (school's response to alleged

[4] The Board's *amici* argue that *Davis* requires knowledge of "acts" of sexual harassment because it does not mention "allegations." NSBABr.6. But *Davis* found "complaints" and "reports" about "acts" of harassment sufficient for actual knowledge. 526 U.S. at 649.

harassment goes to deliberate indifference); *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 689-91 (4th Cir. 2018) (evaluating reasonableness of university's response to reported harassment for purposes of deliberate indifference); *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 77 (4th Cir. 2016) (school not deliberately indifferent where it adequately investigated reported harassment). Even if a school concludes a report is unfounded, it still knows about the *allegation*. OpeningBr.39-41.

The Board disputes this well-established law, pushing a novel actual-knowledge standard endorsed by no court. By its telling, a school only has actual knowledge when an appropriate person 1) subjectively recognizes that a report alleges sexual harassment, no matter how obvious it may be, then 2) substantiates the report. Both fabricated requirements fly in the face of existing law.

1. The School Board's "Subjective Understanding" Requirement is Legally Wrong.

The Board and its *amici* do not cite a single case endorsing the proposition that an official who receives a report alleging sexual harassment only has actual knowledge if he subjectively understands the report concerns sexual harassment. Rather, all their cases involve officials who failed to *prevent* harassment after receiving reports of *other* conduct from which they could have inferred a "substantial risk" of the harassment the plaintiff ultimately suffered.

The Board relies primarily on *Baynard*, which held that a school did not have knowledge of a teacher's *unreported* abuse of the student-plaintiff. 268 F.3d at 233, 237-38. The defendant might have inferred that the plaintiff was at "substantial risk" of abuse based on reports he had been seen sitting in the teacher's lap and the teacher had abused an alumnus 15 years earlier. *Id.* at 233, 237-38. But that was insufficient to establish "actual knowledge of the discriminatory conduct *in question*." *Id.* at 238 (emphasis added); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998) (teacher's inappropriate classroom commentary did not provide actual knowledge of sexual abuse).

The Board's reliance on *Farmer v. Brennan* is similarly misplaced. There, a prisoner contended a warden had failed to *prevent* her rape by another prisoner, to which he should have known she was at "substantial risk" because she was transgender. 511 U.S. 825, 830-32 (1994). The Court held that, to be liable for failing to *prevent* injuries, an official must infer from available facts that "a substantial risk of serious harm exists." *Id.* at 837; *see also Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1994) (explaining how knowledge is evaluated for "substantial risk" analysis).[5]

[5] *Rosa H. v. San Elizario Independent School District*, 106 F.3d 659 (5th Cir. 1997), a pre-*Gebser* opinion, is also inapposite because it involved a defendant's failure to *prevent* harassment based on reports of *other* conduct. *Id.* at 659.

These "substantial risk" cases are inapposite. Doe does not argue that the Board should have prevented the assault based on reports indicating a "substantial risk" that Smith would sexually assault her. Doe challenges the Board's failure to respond properly to the reported assault *after* it occurred. And Hogan did not need to "infer" from Doe or her mother's reports that they alleged Smith had sexually assaulted Doe. Thus, Doe's case is analogous not to *Baynard* but to *Jennings* and the many other cases where a school allegedly failed to respond appropriately to reports of sexual harassment—and where actual knowledge turned on the reports' contents, not officials' understanding. *See* OpeningBr.30-32 (collecting cases).

The Board cannot distinguish these cases. Regarding *Murrell*, for example, it argues that the principal's subjective belief that a report concerned consensual sex did not foreclose the court from finding actual knowledge of harassment because the assailant admitted assaulting the victim; the principal therefore "*must have known*" of the harassment. BoardBr.38. But *Murrell* held that the report alleging the sexual assaults established actual knowledge on its own. 186 F.3d at 1247; *see also infra* page 13 (discussing Board's treatment of *Jennings*).

The Board has no real answer to Doe's argument that its fabricated actual-knowledge standard would encourage schools to promote ignorance so officials would not recognize sexual harassment reports—a failure that would normally constitute deliberate indifference. OpeningBr.32-33. It merely asserts that Doe does

not cite "real-world examples to support her parade of horribles." BoardBr.39. That is because the court below is the *first* to require that an official subjectively understand a report of sexual harassment for what it is. The parade would only start if this Court adopts that standard.

2. The School Board's Substantiation Requirement is Legally Wrong.

The Board's invented substantiation requirement fares no better than its "subjective understanding" rule: It cannot be reconciled with the many cases, including *Davis* and *Jennings*, where unsubstantiated reports established actual knowledge. *See supra* pages 5-6. If the Board were right, a school's failure to investigate a report would shield it from liability: No investigation would mean no substantiation. Yet Title IX *prohibits* such inaction. *Davis*, 526 U.S. at 654; *Murrell*, 186 F.3d at 1248; NWLCBr.23-24.

In requiring that a school substantiate an allegation of harassment before it "knows" of it, the Board conflates the actual knowledge and deliberate indifference elements required for Title IX liability. Actual knowledge of an allegation triggers a school's duty to act; the reasonableness of its actions, including any investigation and conclusion, relate to deliberate indifference—not to whether the school had actual knowledge of the alleged harassment. *See supra* pages 6-7 (citing cases). Any other rule would put the cart before the horse, requiring a school to investigate a report only if it has *already* substantiated it.

The Board suggests that *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015) requires substantiation for actual knowledge. BoardBr.39. To the contrary, *Hill* held administrators had actual knowledge that the harasser "had *allegedly* inappropriately touched a female student." 979 F.3d at 971 (emphasis added). The principal's conclusion that "'[n]othing could be proven' regarding the allegation" was no obstacle. *Id*. at 961.[6]

The Board fear-mongers that, if a student's unsubstantiated complaint establishes actual knowledge, schools will be "liabl[e] based on mere gossip or rumors." BoardBr.40; *see also* NSBABr.4. Again, however, liability requires proof of subsequent deliberate indifference. *Davis*, 526 U.S. at 646-47. Besides, reports and rumors are different. Doe's case clearly concerns the former: Hogan received reports about the specific assault from Doe and her mother. *See, e.g.*, J.A. 2515. Gossip too vague to give the school an opportunity to remediate the harm—the purpose of the actual knowledge requirement, *Gebser*, 524 U.S. at 289—might be insufficient to establish knowledge.

[6] Also citing *Hill*, the Board's *amici* wrongly assert actual knowledge requires a school to know the harassment was severe and pervasive. NSBABr.7. But *Hill* analyzed a school's actual knowledge of alleged harassment *separately* from whether the known alleged harassment was sufficiently severe, pervasive, and objectively offensive to be actionable. 797 F.3d at 971-72.

The Board's "gossip" cases only bolster Doe's position: There, the schools' responsibilities were triggered once they received reports that educators were harassing the student-plaintiffs; earlier vague rumors about the teachers' *other* conduct were insufficient for actual knowledge. *Wyler v. Conn. State Univ. Sys.*, 100 F. Supp. 3d 182, 189-93 (D. Conn. 2015); *Romero v. City of New York*, 839 F. Supp. 2d 588, 597, 606-09 (E.D.N.Y 2012).

3. The School Board's Exception Proves the Rule that a Report Alleging Sexual Harassment Establishes Actual Knowledge.

Facing a wall of authority demonstrating that an allegation alone establishes actual knowledge, the Board and its *amici* concede *some* reports are sufficient. BoardBr.38-39; NSBABr.8-9. But this exception is irreconcilable with their proposed rule. No report can substantiate itself. The Board cannot have it both ways.

Having admitted that some reports alleging sexual harassment suffice, the Board and its *amici* must explain why others—including Doe and her mother's—do not. To do so, they invent requirements from whole-cloth. They suggest a report may be sufficient if it includes "vivid details," BoardBr.39, or if it is "unequivocal[] and/or repeated," NSBABr.8. If the Board is going to fabricate policy, it should design a better one: Children generally cannot alert adults to abuse with repeated, detailed, strongly-worded accounts. NWLCBr. 25-26. Yet, in this case, these criteria would pose no obstacle. Hogan received multiple reports of the assault, Doe

provided significant detail in two interviews and a written statement, and Doe remained consistent that the sexual contact was unwelcome. OpeningBr.10-13.

Still, the criteria are legally baseless. The Board and its *amici* cannot cite any case where a plaintiff's report, to an appropriate person, of the sexual harassment she experienced was insufficient to establish actual knowledge. Underscoring that actual knowledge indeed turns on reports' contents, *amici* rely on cases where the reports simply did not allege sexual harassment. NSBABr.9. In one, the victim reported only that "boys were bothering her." *Rost*, 511 F.3d at 1119. For its part, the Board hypothesizes that the student's report in *Jennings* was sufficient because it included "vivid details." BoardBr.39. But *Jennings* never suggests a less vivid report alleging the same conduct would be insufficient. The Board's attempts to reconcile its rule with controlling law only prove how wrong it is.

B. Doe Is Entitled to a New Trial Because No Evidence Supports the Jury's Verdict Under the Correct Actual-Knowledge Standard.

The district court erred in denying Doe's new-trial motion because, assessed under the correct, objective standard, there is no evidence to support the jury's actual-knowledge verdict. In its response, the Board forfeits any argument that such evidence exists: It only argues that there is evidence if the Court applies its erroneous actual-knowledge standard. BoardBr.43-45; *see also W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226 (4th Cir. 2019) (appellee forfeits arguments not made in opposition brief).

The Board's decision not to argue it can win under the proper standard is understandable given the undisputed facts. The record establishes that Hogan received a report from Doe's mother that Smith "sexual[ly] assault[ed]" Doe. *See, e.g.*, J.A. 1299:2-7; 1613:9-12. There is no dispute that Hogan also received reports from Doe that Smith had touched her breasts and genitals, despite her physical resistance, and she was "so shocked and scared that [she] did not know what to say or do." *See, e.g.*, J.A. 1207:21-1208:6; 2515; 2516. The Board does not, and cannot, dispute that these reports allege conduct that, as a matter of law, constitutes sexual harassment. "Sexual assault" and unwanted sexual touching without "consent" are sexual harassment by definition. OpeningBr.37-39. And the jury found that Doe experienced severe, pervasive, and objectively offensive sexual harassment. J.A. 3324.

In the face of undisputed evidence of Hogan's actual knowledge, the best the Board can do is cite the easily distinguishable *Richard P. ex rel. R.P. v. School District of City of Erie*, No. 03-390, 2006 WL 2847412 (W.D. Pa. Sept. 30, 2006), *aff'd*, 254 F. App'x 154 (3d Cir. 2007). There, the record supported the jury's no-actual-knowledge verdict because plaintiffs lacked undisputed evidence that the assistant principal had received a report of nonconsensual sexual activity—a far cry from Doe's case. *Id*. at *3-4.

The Board also purports to identify evidence that Hogan did not subjectively understand the reports to allege harassment. BoardBr.43. Any such evidence would be irrelevant. *Supra* page 6. But it also does not exist. Hogan never testified that she did not know Doe's mother's report of "sexual assault" was a report of sexual assault. Hogan only explained that she had already concluded no sexual assault occurred, J.A. 1299:9-10—which is not relevant to the Board's knowledge of the *allegation*. OpeningBr.39-41. That report alone establishes actual knowledge. Plus, Hogan's testimony that she did not think Doe alleged sexual harassment concerned the *first part* of Doe's interview; by the end of the second part, Hogan understood. *See* OpeningBr.38 n.7.[7]

In short, under the correct standard, all evidence shows Hogan had actual knowledge of an allegation of sexual harassment. This Court should reverse and order a new trial.

[7] The Board cites two other snippets of trial testimony as supposed evidence that Hogan did not understand the nature of Doe's report. See BoardBr.43 (citing 1261:8-11, 1281:14-16). The first is, again, Hogan's recounting of Doe's description of events in the first half of the interview. J.A. 1261:8-11. The second goes to how Hogan's reached her *conclusion* that Doe was not sexually assaulted, not whether Hogan understood Doe *alleged* sexually assault. J.A. 1281:14-16.

C. Alternatively, Doe is Entitled to Reconsideration of her New-Trial Motion Because the District Court Assessed Evidence of Actual Knowledge Under the Wrong Standard.

The district court did not accept the Board's fabricated actual-knowledge standard in full; it understood that actual knowledge requires an allegation, not substantiation. J.A. 2477:21-25. But it denied a new trial based on officials' subjective understanding of the reports they received, not the reports' contents. OpeningBr.34-46. The Board does not dispute this was the basis for the denial. *See* BoardBr.35-39. Accordingly, if this Court does not grant a new trial, it should remand for reconsideration of Doe's motion under the correct standard. *See Williams*, 266 F.2d at 393.

V. The District Court Failed to Remedy Known Jury Confusion, Causing a Miscarriage of Justice.

The Board does not contest the core of Doe's arguments regarding the district court's instructions: The jury was confused about the meaning of "actual knowledge," and the court failed to ameliorate that confusion. OpeningBr.46-52. The Board has therefore forfeited any meaningful opposition. Rather than address Doe's jury-confusion arguments head-on, the Board quibbles over the admissibility of secondary evidence and overstates Doe's influence on the instructions. Neither argument works.

A. The District Court's Instructions Caused Jury Confusion.

The jury was unquestionably confused about what "actual knowledge" meant and what evidence it could consider. OpeningBr.18-20, 47-50. The Board does not, and cannot, dispute this: It is clear from the three separate questions the jury posed about "actual knowledge." J.A. 3294-95.

The Board ignores this clear evidence of jury confusion in the trial record, choosing instead to attack the admissibility of Doe's brief quotes from a juror's post-verdict statements in newspaper articles. BoardBr.48-50. But those statements merely confirm what the trial transcript makes clear: that the jury was confused by the district court's "actual knowledge" instructions.[8] Because the trial transcript alone proves Doe's argument, there is no "procedural[] default[]" on this point, as the Board suggests. BoardBr.48.[9]

That aside, the newspaper articles *are* properly part of the record. A court may consider *post-deliberation* juror statements as supporting evidence that a jury was confused. *Lawlor v. Zook*, 909 F.3d 614, 634-45 (4th Cir. 2018) (juror confusion

[8] The Board argues for the first time that the post-verdict comments are "untrue," BoardBr.49-50, but the juror explained how he *interpreted* the instructions, not what they in fact said. J.A. 3390.

[9] The Board claims Doe cannot cite to a juror's post-verdict news statements to show confusion because she did not cite the articles in her new-trial motion. BoardBr.48. This is wrong. Doe cited the juror's news statements in her reply brief on that motion. Dkt. 342 at 5 n.1.

evident from jury questions and juror's post-deliberation recollection of the court's instruction). And the district court did not grant the Board's motion to strike the articles. J.A. 3405. The Board has not cross-appealed and has not pressed this Court to reverse the evidentiary ruling as an alternative ground for affirmance. Nor could it. All reversal would do is slightly reduce the amount of evidence available showing the jury's indisputable confusion.

In any event, aside from quibbling over the admissibility of news articles that only bolster what the trial record plainly shows, the Board has no response to the fact that the jury was confused about the actual-knowledge standard. The remaining question is whether the district court did its job to remedy that confusion. It did not.

B. The Judge Did Not Ameliorate the Confusion.

The district court did not have discretion on this point: A "helpful response is *mandatory*" to remedy juror confusion regarding a central issue in the case. *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037-38 (4th Cir. 1975) (emphasis added). Not only did the district court fail to ameliorate the confusion, it caused it. *See* OpeningBr.49-50 (describing court's use of "actual notice" throughout trial and "actual knowledge" in jury instructions, and its refusal to instruct on their connection, as Doe requested).

The Board does not contest these facts. Instead, it suggests that *Davis* and *Baynard* prohibited the court from instructing the jury on "actual notice" because

that term could be misconstrued to mean "constructive notice." BoardBr.42. Nonsense. In fact, those cases show the opposite: "actual notice" and "actual knowledge" mean the same thing. OpeningBr.50; NWLCBr.12 n.2. Accordingly, if it had explained the concept, the district court could have used "actual knowledge" alone.

But it did not. To the contrary, the court instructed the jury throughout the trial that evidence of witnesses' reports to school officials was evidence of "actual notice." OpeningBr.16-17. It then abandoned that term and instructed the jury on "actual knowledge" without ever connecting the terms or otherwise explaining that evidence admitted for purposes of "actual notice" went to "actual knowledge"—even *after* the jury sought clarification as to what evidence it could consider for that element. OpeningBr.17-19. That courts assign the same meaning to the two terms of art does not mean a jury would know to do the same based on the words' ordinary lay meanings. NWLCBr.21-22. Indeed, the jury continued to struggle with the meaning of "actual knowledge" after the court said to "give the words their ordinary meaning." J.A. 2454:2-17.

The instructions' flaws should have been apparent to the court from the start, and again when the jury repeatedly expressed confusion. Given the obvious prejudice to Doe, that pre-verdict error warrants reversal. *See* OpeningBr.51-52. And the verdict made the instruction's deficiencies even clearer. The district court had

the opportunity to fix this miscarriage of justice by ordering a new trial. Its failure to do so was an abuse of discretion. *See* OpeningBr.46-51.

Here again, the Board has no real answer. Instead, it claims Doe's arguments fail because the judge *partially* adopted her proposed response to *one* jury question. BoardBr.40-41. But challenges like Doe's go to the instructions *as a whole*, not each piece separately. *Noel v. Artson*, 641 F.3d 580, 586 (4th Cir. 2011). Doe's counsel repeatedly proposed alternative instructions and registered objections on the same grounds raised here. *See, e.g.*, J.A. 240, 1896:8-23; 1908:25-1911:2, 2454:2-20; 2469:19-2470:10. Yet the district court refused to include "actual notice" in an instruction after using the term throughout the trial, and rejected the concrete explanations Doe suggested. *See, e.g.* J.A. 1909:25-1910:7, 3373; *compare* J.A. 240 *with* J.A. 3315.

In responding to the jury's second of three questions, the judge adopted *part* of Doe's suggestion, instructing the jury that actual knowledge turned on an *allegation* of sexual harassment. J.A. 2464:18-20; 2477:21-2478:4, 3261. But Doe's counsel argued the instruction should also answer the jury's final question about the evidence it could consider, using the two concrete options the jury presented: actual knowledge could be proven by a "compilation of information about an event," not the school's "conclusion" about the information. J.A. 2469:19-2470:10, 3261. The district court rejected Doe's request, never answering the final question.

That the court adopted part of Doe's instruction for one response does not erase her consistent objections throughout the proceedings. *See City of Richmond, Va. v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 453 (4th Cir. 1990) ("[W]here 'the district court was fully aware of the plaintiff's position,' and the district court had obviously considered and rejected that position, strict enforcement of Rule 51 would 'exalt form over substance.'"); Fed. R. Civ. P. 46 ("When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection.").

In sum, Doe is entitled to a new trial because the district court abused its discretion on this threshold issue of providing proper, clear instructions on a key element of her claim. Even if the court thought its "allegation" instruction would remedy the confusion, it was obvious post-verdict that it had not. The district court abused its discretion by failing to grant a new trial to correct that miscarriage of justice.

VI. The District Court Abused its Discretion by Failing to Provide a Spoliation Instruction.

The district court also abused its discretion because its failure to give a spoliation instruction on key evidence the Board destroyed resulted in a miscarriage of justice. *See* OpeningBr.43-46. The Board claims a spoliation instruction was not warranted because its destruction of documents was unintentional. BoardBr.50-51. However, the court found "there's *significant* evidence from which a jury could find

that [the Board destroyed the records] *willfully*." J.A. 2307:20-21 (emphasis added).[10]

For example, the Board wiped its security office computer *after* Doe filed suit, not, as it suggests, before. J.A. 1424:4-25; BoardBr.51. The Board is also wrong that it had no responsibility to maintain those records prior to Doe filing suit. BoardBr.51. The Board knew it was required to retain records related to harassment allegations pursuant to its Resolution Agreement with the U.S. Department of Education and Virginia law. *See* J.A. 702:2-25, 722:12-13, 2680 (citing VA law). And the district court determined "the county had reasonable belief that litigation might occur." J.A. 2304:16-17; *see also Broccoli v. Exhostar Comms. Corp.*, 229 F.R.D. 506, 510-11 (D. Md. 2005). But the Board destroyed these records nonetheless.

Brianna Murphy and Smith typed their statements into the computer the Board wiped. J.A. 568:9-570:8; Dkt. 158-9 at 5-6 (64:9-65:12). The Board minimizes Murphy's report, but it relayed Doe's account, told to Murphy soon after the assault, so is clearly relevant to the Board's actual knowledge. Even if the district court did not initially recognize how prejudicial that deletion would be, it knew after the verdict and failed to correct the resulting miscarriage of justice.

[10] Contrary to the Board's suggestion, the district court rejected the Board's request to allow an adverse inference from the unavailability of Doe's texts to a boy she dated in her senior year. J.A. 2305:4-6.

VII. No Alternative Ground Justifies Affirmance.

The Board is wrong that affirmance is warranted on the two grounds set forth in its JMOL motion, which argued that a reasonable jury could not find 1) the sexual harassment Doe experienced denied her access to education and 2) the Board acted with deliberate indifference. *See* BoardBr.52-57. The district court properly denied that motion. J.A. 1888:17-25. Reviewing the district court's decision de novo, this Court must view the evidence in the light most favorable to Doe and draw all reasonable inferences in her favor. *Russell*, 763 F.3d at 391.

A. A Reasonable Jury Could—and Did—Find Doe Was Denied Equal Access to Education.

With good reason, the jury found, as part of its special verdict, that the sexual assault "effectively deprived [Doe] of equal access to the educational opportunities or benefits provided by the School Board." J.A. 3324. To demonstrate educational deprivation, the harassment must have had a "concrete, negative effect" on the plaintiff's education or access to school resources. *Davis*, 526 U.S. at 654. Diminished attendance and participation, a decline in performance, lost enjoyment in school programming, and severe emotional distress are prime example of such negative effects. *See, e.g.*, *Jennings*, 482 F.3d at 699-700. On its own, "the continuing presence of the harasser may so alter the terms and conditions of education that" it impedes the victim's education. *Wills v. Brown Univ.*, 184 F.3d 20, 37 (1st Cir. 1999).

At trial, Doe presented ample evidence from which a jury could find the assault impeded her access to education. Her grades and attendance declined. J.A. 2542-43; J.A. 1765:11-20. Before the assault, when Doe was a sophomore, she received As and a B+ on her final exams, was absent three times, and was never tardy. J.A. 2542. In Doe's junior year, she received a D+, B-, and C on her final exams, taken shortly after the assault, was absent 17 times, and was tardy four times. J.A. 2543.

Doe also withdrew from classroom discussions. J.A. 617:15-25; 1755:2-10. To avoid seeing Smith, Doe was forced to "attend" band practice, once her favorite class, from a windowless practice room away from her bandmates. *E.g.*, J.A. 1614:2-1615:3; 1753:21-1755:21. The only other "choice" Hogan gave her was to quit band altogether. J.A. 1614:14-16. Doe missed the band's end-of-year concert to avoid Smith. J.A. 1839:25-1840:2. She also avoided the hallway where she and her band friends usually congregated. J.A.1754:3-7. She experienced severe emotional distress, including heightened anxiety and nightmares that interfered with her functioning in and out of school. J.A. 1558:10-1559:9; 2544-2582. A reasonable jury, like the jury that returned a verdict for Doe on this question, could find the harassment impeded Doe's access to education.

B. A Reasonable Jury Could Find Deliberate Indifference.

The Board is also wrong that no reasonable jury could find it was deliberately indifferent. For starters, the Board is incorrect that only Hogan's knowledge and response are relevant to whether it acted with deliberate indifference. BoardBr.33-34. Doe's appeal on the actual-knowledge issue focuses on Hogan because there is "no evidence" that she lacked actual knowledge—the standard of review on that issue. But, as Doe argued below, the *clear weight* of the evidence demonstrates that Taylor and Banbury also had actual knowledge. *See* Dkt. No. 337 at 4-8.

In any event, for purposes of assessing deliberate indifference, the school's response is evaluated as a whole and is not limited to actions of the official with actual knowledge. *See, e.g.*, *Galster*, 768 F.3d at 617-18, 620-21 (evaluating schools' full response, including actions by non-administrators whose knowledge was not attributed to the school, for purposes of deliberate indifference).

A school is deliberately indifferent when its response, or lack thereof, to reported sexual harassment "is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Whether a school acted with deliberate indifference "will often be a fact-laden question," *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n.12 (5th Cir. 1994), for a jury to assess based on the "totality of the circumstances," *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 180 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009). "[A] half-hearted

investigation or remedial action will [not] suffice to shield a school from liability." *S.B.*, 819 F.3d at 77.

After spending most of its brief arguing it had no knowledge of the alleged sexual harassment, the Board insists it promptly and appropriately responded to the reports. BoardBr.54-55. But Doe presented ample evidence to allow a reasonable jury to find deliberate indifference:

- Baranyk, under Hogan's supervision, discouraged Doe from taking legal action, telling Doe the most she could charge Smith with was battery, the Board was liable for nothing, and any suit would fail because she did not know where the bus was during the assault. J.A. 1745:10-17. "[W]here an institution . . . discourages the victim from reporting the act to law enforcement, this has been seen as an indication of deliberate indifference." *S.S. v. Alexander*, 177 P.3d 724, 738 (Wash. Ct. App. 2008).
- Hogan and Baranyk threatened Doe, but not Smith, with punishment for having sexual contact on a school trip. J.A. 1334:6-8, 1735:10-11; 1748:2-12; *see also Murrell*, 186 F.3d 1247-48 (holding plaintiff could show deliberate indifference where school disciplined her, but not her accused harasser).
- When interviewing Doe, Hogan and Baranyk treated Doe as if she were the wrongdoer, even though Doe made clear she had not consented to the sexual activity. J.A. 1207:21-1208:4. They intimidated Doe with "angry" and

"menacing" tones, "yelling at her" as she sobbed. J.A. 1746:6-7, 1747:24-25. Baranyk asked "accusatory questions," like what she was wearing and why she did not scream. J.A. 1745:18-23.

- Far from conducting a thorough investigation, Hogan failed to interview a number of students whom Smith, Doe, and Board employees had identified as sources of information about the assault and Doe's immediate reaction. Among these were Aveesh Kachroo (J.A. 1178:1-1180:16), Emily Jorgensen (J.A. 474:24-475:25, 2512), and Victoria Staub (J.A. 1190:15, 1720:9-1721:9, 2483, 2512); *see also* J.A. 1871:3-6. Karoline Davis, who both Smith and Doe named as a witness, approached Taylor to provide information but, at Hogan's instruction, Taylor refused to interview Davis. J.A. 963:21-967:3, 1281:17-24, 2516, 2518; *see also* J.A. 1180 (17-19).
- Based on limited "evidence," and despite Smith's denying, then admitting, to Hogan that he had "grabbed" Doe, J.A. 1330:25-1333:3, Hogan prematurely concluded the Board could not find Smith sexually assaulted Doe, J.A. 1221:4-10.
- The Board failed to document its investigation and destroyed the few records it did create, in violation of its Resolution Agreement with the U.S. Department of Education to track allegations of bullying and harassment, J.A. 702:2-25, 720:22-721:8, 2613, 2632; OpeningBr.14.

- Taylor testified that she did not understand Staub's report, which she received on the band trip, concerned sexual harassment. J.A. 384:25-386:1, 940:24-941:1. And the Board insists, wrongly, that Hogan never understood Doe's report to allege sexual assault. BoardBr.43. If credited, that testimony would demonstrate that the Board misclassified reports of sexual harassment. *See Hill*, 797 F.3d at 974 (finding school could be deliberately indifferent where it misclassified reports of sexual harassment); OpeningBr.33.
- The Board took no action to protect Doe, separate her from Smith, offer emotional support, or notify her parents while she was on the five-day school trip, despite having received multiple reports alleging harassment. *See*, *e.g.*, J.A. 384:25-386:1, 849:9-850:2; OpeningBr.10.

In short, Doe presented evidence that the Board treated her with hostility and skepticism, conducted only a partial, slipshod investigation, inappropriately inferred consent from irrelevant details, threatened only her with disciplinary action, and discouraged her from reporting to law enforcement. Though the Board disputes these facts, *Doe*'s account must be credited here. *See Russell*, 763 F.3d at 391. Because a reasonable jury could conclude that the Board acted with deliberate indifference, this is not an alternative ground on which the Court could affirm the decision below.

CONCLUSION

The Court should vacate the judgment below, reverse the district court's denial of Appellant Doe's motion for a new trial, and remand for a new trial. Alternatively, the Court should remand for reconsideration of Doe's motion for a new trial under the correct legal standards.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: April 6, 2020

/s/ Lauren A. Khouri
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of April, 2020, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Lauren A. Khouri
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ADDENDUM

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MEMORANDUM OF THE COURT
dated February 18, 1983

Plaintiff moves for a new trial asserting a number of grounds in support thereof. The motion will be DENIED. The complaints will be commented upon seriatim.

Was the Jury Verdict Against the Clear Weight of the Evidence?

The plaintiff first seeks a new trial under Rule 59 (a) of the Federal Rules of Civil Procedure that the jury verdict in favor of the defendant was against the clear weight of the evidence. The argument is made that plaintiff's version of the death of his decedent from Toxic Shock Syndrome caused by a tampon manufactured by the defendant was supported by the evidence of five medical experts, Doctors Mann, Crockford, Psimas, Reingold, and Via, while the defendant's position that the death was not due to Toxic Shock Syndrome was suppported by the testimony of only three expert Doctors, namely, Harvey, Edmondson, and Avery. The evidence was conflicting and the jury resolved it in favor of the defendant.

The medical testimony took several days to develop on both sides. It was thoroughly argued to the jury. The interest of any doctor in the outcome of the case was totally explored. It was in the province of the jury to determine the weight and credibility of witnesses. The matter has been capably handled and argued by two very competent counsel.

Exercising its independent judgment after weighing all of the evidence, this Court finds that the verdict of the jury was not against the clear weight of the evidence, nor based on evidence which was false, nor does it represent any miscarriage of justice. Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 354 (4th Cir. 1941).

Rulings of the Court

a

Consumer Complaints

Plaintiff offered Exhibit 39, consisting of a packet of consumer complaints received by International Playtex, Inc. The complaints dated back to 1977. Those offered in Court dealt with a variety of grievances. The range of protests include: that the tampon's plastic inserter caused lacerations; that the tampons failed to absorb; that they were hard to remove; that hard to remove tampons had left some residue of fiber; that the tampons were uncomfortable; that there was discomfort during removal; vaginitis, difficulties with the applicator and that tampon strings broke on occasion.

The plaintiff said he wanted the consumer complaints in evidence to show that the defendent, International Playtex, Inc. had notice that there were irritations arising from users of their product. The Court stated to the jury that consumer complaints had indeed been received and that the company acknowledged such receipt. The Court

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told the jury that the individual complaints would not be admitted; that the truth or falsity of such complaints were not for decision here. Some of the complaints came from doctors and some came from individuals. In fact, the Court's statement to the jury went much further than the actual complaints themselves. In addition to the grievances included in Exhibit 39, the Court told the jury that there had been other complaints that dealt directly with TSS (which Exhibit 39 nowhere mentioned); that there had been reports of deaths caused by Playtex tampons; that there had been consumer reports of serious illness and toxic shock syndrome associated with Playtex tampons. The Court told the jury, however, that we were not trying those individual complaints, but would allow the jury to receive the information that complaints had been received to show that the company had notice of complaints. Specifically, the record (page 972) indicates the Court's statement to the jury as follows:

> THE COURT: Now, ladies and gentlemen, as I said to you on yesterday, the company admits that they received notices from claimants claiming that they were adversely affected by Playtex tampons and in connections with TSS.
>
> The company, Playtex, defendant, admits that in June -- I think the 26th, but it doesn't make any difference -- in June, 1980, for the first time, they received word from a Doctor Shrands, who was with the CDC, that there was a possible connection between reports of Toxic Shock Syndrome in ladies who were using tampons. This was the first report they had of that.

They admit they received in September, 1980, reports from an individual who claimed that a lady had died as a result of TSS, which that report complained had been incurred by the use of a Playtex tampon.

Thereafter, they received numerous complaints, after September, 1980, from people, consumers, who complained either personally or through others, that they had been adversely affected by Playtex tampons, worn during a menstrual period and its connection with Toxic Shock Syndrome.

All of those things the company has admitted, and I have refused to admit, as I told you yesterday, in the light of that admission, individual complaints that came in because we would be in the position, you and I -- or I -- of having to try each one of these individual complaints. Was there anything to it? Was it true? Was it their tampon? All of that sort of thing.

And I admit this stipulation, which the parties have agreed to, to show that the Playtex company had notice, but not for you to assume that every one of these complaints are not admitted for the truth or falsity of those complaints. They are admitted only for the purpose -- they could have been false, let's assume -- but they were notice to the company. And the company agrees that they had this notice, beginning in June, that there was a connection, not necessarily with them, but a connection between tampons and TSS. Beginning in September, 1980, three months later, they had their first report of a fatality from a person claiming to have -- the person claiming to have been -- who died of TSS, or claiming to have died of that, as a result of a Playtex tampon, and they agree that they had other numerous reports thereafter.

And, I'll repeat that I am not giving you this information to allow you to surmise on the truth or falsity of those complaints, but only that the complaints were in fact received and that the company, by virtue of the complaints, had notice. (R. 972.)

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b

Certain Reports Not Admitted

Plaintiff seeks a new trial on grounds that certain reports or studies were excluded from evidence. Specifically, the plaintiff points to Center for Disease Control Study No. 1 (CDC 1), Center for Disease Control Study No. 2 (CDC 2), a Utah study, a Tri-State study, and two Federal Register synopses, the latter only summaries of some of the foregoing studies. While tables from these reports were not allowed as specific exhibits at trial, the relevant and pertinent information therein was extracted and made available to the jury by statements from the Court and by the testimony of witnesses. Thus, if the failure to admit the full exhibits and tables was error at all, it was harmless and is not grounds for a new trial.

Nearly all of the information in the exhibits, in which the plaintiff indicated any interest, when offered from a proper source, was admitted. In some cases as many as six or seven witnesses testified to the same information contained in the studies. For instance, with regard to the three studies, CDC 1, CDC 2, and the Utah study, plaintiff's attorney plainly said that he was interested in only three pages from these exhibits and designated those pages as Butensky Deposition Exhibits 7a, 7b, and 7c. Exhibit 7a was simply the cover sheet

of the Utah study, entitled "Toxic - Shock Syndrome, Case Control Study, Utah." Added to the cover sheet were two attached sheets, Exhibits 7b and 7c. This is all of CDC 1, CDC 2, and the Utah study which the plaintiff indicated he wanted before the jury. On pages 94 and 95 of the Butensky Deposition, plaintiff's attorney stated: " . . . I am not going to put the whole study [Utah study] in." He follows this saying that he is only interested in three pages, which he offers as Butensky Deposition Exhibit 7a, the title sheet referred to above, 7b and 7c. Exhibit 7b is a table entitled, "Total Number of TSS Cases (Probable) Reported to CDC." The Table shows 28 deaths reported, 4 attributed to Rely (a Procter & Gamble product), 3 to Playtex, and twenty-one "unknown." Exhibit 7c is a table entitled, "Total Number of TSS cases (Definite) reported to CDC," reporting 344 cases, 80 attributable to Rely, 38 attributable to Playtex, 31 attributable to Playtex, 31 attributable to Tampax, 18 attributable to "other and 197 attributable to "unknown." The problem the Court found with its admitting these two Tables, amon other evidential difficulties, was that they were offered t..rough the deposition takne of an official of Playtex (Butensky) who knew nothing of the underlying source of the information in the reports and knew nothing of the methodology under which CDC acquired and reported its data. The report was reflective of a background of different tampons or different manufacturers, made of entirely different material with

60%, or more, of the total cases attributed to "unknown." The Court had the advantage, available with a deposition, of being able to read ahead in the testimony to see if there was to be any explanation of the methodology which would secure for the reported information some essence of reliability or trustworthiness, and, frankly, none appeared.

The obvious benefit to the plaintiff of the two Tables was solely in the recitation of three deaths being attributed to Playtex tampons. On the record, however, without the Tables, at least six witnesses testified that the CDC had reported that three deaths (the figure appearing in both Tables) were attributable to Playtex Tampons. Likewise, the Court declined to Exhibit 7c, a Table purporting to show that of 344 TSS cases, 38 were attributed to Playtex, including the same 3 deaths in Exhibit 7b, because the methodology of the study was unknown to the witness through which it was offered and there was insufficient indication of its trustworthiness or reliability. The correctness of the Court's decision became evident later in the trial in light of the testimony of other witnesses that the only information CDC had was quickly collected on an emergency speed-up from their telephone inquiries to reported cases. There was nothing to insure that the case was TSS; that the information was reliable, as to the brand involved, whether the user was an exclusive user of a single product; whether

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the TSS victim was a claimant against any manufacturer; or contemplated making any claim. In any event, the information that 3 TSS deaths were attributed by CDC to Playtex is firmly established by other evidence. As to the other Table, the President of Playtex, Bregman, testified on Page 658 of the Record that CDC report showed 300 TSS cases and 28 deaths overall, essentially what the Table showed. Plaintiff's Exhibit 12, a telegram in evidence from FDA to Butensky, dated September 26, 1980, recited the same information.

Additionally, in lieu of the admission of the actual reports, the Court instructed the jury that these studies indicated, (1) that there was a statistical relationship between use of tampons and the contraction of Toxic Shock Syndrome, and (2) that the company agreed that it had notice of this information contained in the studies. A reference by plaintiff's attorney to advice, supposedly in CDC 2, that 50 out of 50 TSS cases reportedly used tampons was offered to the jury, in that same language, in Plaintiff's Exhibit 10. Acknowledgment by the defendant company that it was aware of the report of the association between tampon use and TSS was also made in answers to interrogatories; in the testimony of the president of Playtex, at trial, and in his deposition; in the testimony of the Chief Research official of Playtex, both at trial and in his deposition; and from

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the testimony of four other officers and officials of Playtex, Inc. Furthermore, these officials on at least five occasions stated to the jury that the studies indicated that the higher the absorbency of the tampon used, the higher the risk of TSS. The so-called "Tri-State Study," Exhibit 30, which the plaintiff offered, was not admitted for several reasons, but the gist of the relevant information contained in that exhibit was put before the jury on numerous occasions. The vehicle for offering the "Tri-State Study" at trial was to proffer to Dr. Butensky of Playtex, on deposition, a letter dated May 13, 1981, from Dr. Michal Osterholm, not a medical doctor, to Dr. Butensky. In that letter Dr. Osterholm includes another letter he had sent to Dr. Ann Holt of the Federal Drug Administration to which certain preliminary tables were attached. The Osterholm letter begins by saying that comments regarding chemical composition and construction of tampons will be sent later. It was pointed out, at trial, that this was not the "Tri-State Study;" that the "Tri-State Study was not issued until a year later in April, 1982, and that the Osterholm report was only preliminary information which had not been finalized and was being forwarded to FDA to expedite proposed "labelling" rules. In the form offered, and through this witness, it was clearly not admissible as a completed study. The fact remains, however, that the pertinent conclusions contained therein were testified

by two, three, and sometimes four or more witnesses. The Osterholm letter found a connection between the absorbency factor entailing a higher risk of TSS. This information was clearly presented to the jury in other oral testimony at trial. Its conclusions of the higher risk of Rely, or the less risk of Tampax or Slender, were not admitted in light of the lack of testimony regarding the composition of materials in other tampons (except that Rely had already been identified as composed of totally different materials than Playtex). The other Table in that Report in which the plaintiff showed any marked interest were "Odds Ratio," Tables #3 and #4. The attorney for the plaintiff indicated that he did not understand them and that was clear from the exchange in the depositions. Such Table would surely have been confusing and misleading under Evidence Rule 403. The information, lastly, was about tampons marketed for a period ending September 1, 1980, nearly a year prior to the incident and product here involved. Suffice it to say, that no one was offered that had had any connection with the authorship of the report who could explain the mathematical computations or what was relevant in the figures published.

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c

Statements of Dr. Shands

Attorney for the plaintiff raises the objection that a witness was allowed to testify that Dr. Shands, of CDC, had told him in early June that she had seen no reason for tampons being a contributing factor to TSS. The plaintiff says that this is hearsay and inadmissible. The Court points out that Exhibit 10, offered by the plaintiff and admitted by the Court, contains this quote from Dr. Shands: "Her [Dr. Shands] best information at the time was that 25 of 30 cases were tampon users. She was not particularly concerned since that number approximated the market shares and, most importantly, she could see no reason for tampons being a contributing factor." This is the same information accepted from the plaintiff and to which the plaintiff now objects as being testified to by Dr. Butensky.

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Failure to Instruct

Plaintiff's attorney also objects that the Court would not grant him an instruction that the defendant's failure to call Dr. John Bartlett of Johns Hopkins University, as an expert wintess, would indicate Dr. Bartlett's testimony would be adverse to the

defendant. This is patently frivolous. Dr. Bartlett was listed as a possible witness in ear'y answers to interrogatories. The defendant, in its case, did not call the doctor, listed as a possible expert witness, but this does not trigger the instruction which the plaintiff's attorney requested and which was denied. Defendant notified plaintiff nearly 50 days before trial that it would not call Dr. Bartlett. The adverse inference rule is not applicable to an expert witness who is equally available to each side and not an employee of either party. Indeed, Dr. Bartlett was not a material witness within the gambit of the requested information.

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e

Federal Register Synopses

The plaintiff complains that two exc ts from issues of the Federal Register were not allowed in evidence. The two proffered exhibits, numbers 33 and 55, were nothing but a perfunctory publishing by the FDA of proposed rules dealing with labelling of tampon products. The information contained in the publications were only telescoped resumes of the studies conducted by various organizations, CDC, etc. All the information contained in the Federal Register notes was before the jury from at least five, six, or seven witnesses. The

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resumes contained in the Federal Register were hearsay; did not pretend to contain all of the information which the studies had covered; and was merely a restatement that statistics had been developed showing an association between tampon use and reported TSS cases.

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Playtex's Testing

The plaintiff contends that the Court was in error in allowing Dr. Butensky, Research Chief for International Playtex, Inc., to testify about tests performed by Playtex by Gibralter Laboratories. International Playtex contracted for most of the testing of its products and the testimony dealing with such tests was from business records properly kept, and themselves fully admissible if called for. The fact that those tests were performed at a time when Dr. Butensky was not in charge of research of Playtex neither added nor subtracted from his ability to recite what was done and what conclusions were reached.

An Order will be entered contemporaneously with the filing of this Memorandum DENYING the Motion for a New Trial.

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ORDER OF THE COURT
dated February 18, 1983

On accord with the Memorandum filed in this matter contemporaneously herewith;

It is ORDERED:

That the Motion for a New Trial is DENIED.

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