

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 5**

APPEAL NO. B159310

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Appellant, Cross-Respondent and Cross-Appellant,

v.

JANIS ADAMS,
Respondent, Cross-Appellant and Cross-Respondent.

Case No. BC235667

Appeal from a Judgment and Post-Trial Orders of the
Superior Court of Los Angeles County
Honorable Kenneth R. Freeman, Judge

**APPELLANT, CROSS-RESPONDENT
AND CROSS-APPELLANT'S
SUPPLEMENTAL RESPONDING BRIEF
AFTER TRANSFER FROM THE SUPREME COURT
(CALIFORNIA RULES OF COURT, RULE 13(b))**

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
I. FACTUAL RECAP	2
II. PROCEDURAL RECAP.....	3
A. Jury Trial And Special Verdict	3
B. Post-Trial Motions And Rulings.....	4
C. Proceedings On Appeal	5
III. THE SUPREME COURT’S <i>CARTER</i> DECISION.....	6
IV. ARGUMENT	8
A. The <i>Carter</i> Decision Bears On Only One Issue Before This Court And Does Not Alter This Court’s Previous Determination To Remand This Case For A New Trial.....	8
B. Adams Argues A Distinction Without A Difference	9
C. The Parties Have Already Briefed The Remaining Arguments In Adams’ “Supplemental” Brief.....	10
1. This Court review’s the trial court’s order granting a new trial for an abuse of discretion.....	10
2. The trial court correctly determined that the jury had not been adequately or correctly instructed, thus warranting a new trial.	10
3. Counsel’s argument could not and did not cure the instructional defects	11
4. The District’s control over its students is limited in important respects relevant to this case.....	11
D. This Case Raises Numerous Additional Issues, None Of Which Are Addressed In Or Impacted By <i>Carter</i> , And All Of Which Remain To Be Decided By This Court	13

TABLE OF CONTENTS
(continued)

	Page
CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Carter v. Cal. Dept. of Veteran's Affairs</i> (2003) 109 Cal.App.4th 469.....	6
<i>Carter v. Cal. Dept. of Veteran's Affairs</i> (2003) 7 Cal.Rptr.3d 315.....	7
<i>Carter v. Cal. Dept. of Veteran's Affairs</i> (2004) 121 Cal.App.4th 840.....	7
<i>Carter v. California Department of Veteran's Affairs</i> (2006) 38 Cal.4th 914.....	passim
<i>Hata v. Los Angeles County Harbor/UCLA Med. Ctr.</i> (1995) 31 Cal.App.4th 1791.....	10
<i>Lane v. Hughes Aircraft Co.</i> (2000) 22 Cal.4th 405.....	10
<u>Statutes</u>	
Government Code section 12940, subdivision (j)(1).....	1, 6, 7, 8
<u>Rules</u>	
Cal. Rules Ct., Rule 13(b)(2)	10

INTRODUCTION

Plaintiff Janis Adams argues incorrectly that the Supreme Court's decision in *Carter v. California Department of Veteran's Affairs* (2006) 38 Cal.4th 914, somehow alters this Court's August 17, 2004 conclusion that this case must be remanded for a new trial. As explained in detail below, however, *Carter* does not alter this Court's decision affirming the trial court's order granting a new trial. Indeed, *Carter* addresses only one of several issues presented by this appeal, many of which do not concern the instructional arguments addressed in Adams' Supplemental Brief.

In *Carter*, the Supreme Court held that a 2003 amendment to Government Code section 12940, subdivision (j)(1) ("Section 12940(j)(1)"), a provision of California's Fair Employment and Housing Act, or FEHA, clarified rather than changed the law. (*Carter*, 38 Cal.4th at p. 930.) Importantly, the Court also found that the liability imposed by Section 12940(j)(1) prior to that 2003 amendment had been ambiguous. (*Id.* at pp. 918, 926.) Therefore, although the 2003 amendment was clarifying in nature, the Supreme Court concluded that remand was necessary to ensure the proper and now explicit standard of liability was in fact applied there. (*Id.* at pp. 930-931.)

Similarly, here, in affirming the trial court's order granting a new trial, this Court held that a new trial was necessary to ensure the standard of liability now set forth explicitly in amended Section 12940(j)(1) is applied in this case. (Aug. 17, 2004 Unpublished Opinion ("Op.") at pp. 12-14.) In reaching its conclusion, this Court found the 2003 amendment to Section 12940(j)(1) changed rather than clarified the law. Thus, although this Court's reasoning differed from the Supreme Court's reasoning in *Carter*, the result is the same. Namely, the case must be remanded for a new trial to ensure that the now explicit standard of employer liability is applied in this case.

But, even if this Court determines that *Carter* alters this Court's previous conclusion (which it does not), this Court must still consider the many remaining issues on appeal that are not impacted by the *Carter* decision. Each of these issues independently warrants a new trial; all of them together compel it. The trial court was well within its discretion in ordering a new trial.

I. FACTUAL RECAP

This case arises from unquestionably juvenile and offensive conduct, including the publication of an anonymous underground newspaper entitled the "Occasional Blow Job" ("OBJ"), by unidentified students at defendant Los Angeles Unified School District's (the "District") Palisades Charter High School. The District took immediate and aggressive steps to stop the offensive student conduct and to protect plaintiff Janis Adams, a then-teacher at Palisades High. For example, the school Principal (1) informed campus police and other school officials of the conduct; (2) consulted with the District's legal department for guidance on what legally could be done to stop the offensive student conduct, which implicated among other things the students' First and Fourth Amendment rights; (3) increased LAUSD Police patrols on and off campus; (4) offered counseling to the faculty, including Adams, who herself utilized those services; (5) suspended students suspected to be involved with the OBJ; and (6) actually transferred approximately five students who were also suspected to be involved with the OBJ, only to be ordered by a federal district court to take one such student back despite the sexually harassing conduct involved. (*See* Appellant's Opening Br. at pp. 8-13.)

Despite its best efforts, and in large part because the perpetrators could not be identified and the District was limited legally in what it could do, the District was unable to stop the OBJ from being distributed during

the 1999-2000 school year. Adams took a medical leave of absence following that school year, and in September 2000, she filed a lawsuit against the District alleging various claims, only one of which (her sexual harassment claim under FEHA) went to trial.

II. PROCEDURAL RECAP

A. Jury Trial And Special Verdict

A three-week jury trial was held on Adams' FEHA claim against the District. As explained in the District's earlier briefing, the trial was fatally flawed in many respects. For example, Adams failed to satisfy her burden of proof at trial. Rather than demonstrate that there were immediate and appropriate corrective actions that the District legally could have taken in response to sexual harassment that the District knew or should have known about, counsel for Adams merely argued that the multiple and aggressive steps that the District took were not enough. (*See* Appellant's Opening Br. at pp. 14, 16, 28-35; Appellant's Reply/Cross-Resp. Br. at pp. 13-25.) The trial court also improperly permitted the jury to hear irrelevant and highly prejudicial evidence unrelated to sexual harassment, all of which served to inflame the jury and to disadvantage the District. (*See* Appellant's Opening Br. at pp. 14-15, 18-19; Appellant's Reply/Cross-Resp. Br. at pp. 41-43.)

At the close of trial, the trial court refused to instruct the jury on essential elements of Adams' claim. For example, the trial court refused to give instructions addressing the District's lack of control over the alleged student harassers and the District's inability legally to take certain actions. (*See* Appellant's Opening Br. at p. 18; Appellant's Reply/Cross-Resp. Br. at pp. 43-47.)

Not surprisingly, following this flawed trial, the jury returned a special verdict in Adams' favor. And again, fatal errors occurred – this time in both the special verdict and the jury's award of damages. The

special verdict prepared by Adams' counsel was deficient as a matter of law as it omitted a required element of Adams' claim. (See Appellant's Opening Br. at pp. 37-40; Appellant's Reply/Cross-Resp. Br. at pp. 25-28.) And, evidencing the highly inflammatory nature of the irrelevant evidence improperly admitted at trial and the subsequent instructional error, the jury awarded Adams an astounding \$1.1 million in economic damages (three times more than what she had requested) and an additional \$3.25 million in emotional distress damages. (See Appellant's Opening Br. at p. 18; Appellant's Reply/Cross-Resp. Br. at pp. 36-41.)

B. Post-Trial Motions And Rulings

Following the jury verdict and judgment in Adams' favor, the District filed the following post-trial motions:

- a Motion for Judgment Notwithstanding the Verdict ("JNOV"), arguing that (i) Adams had no legally viable claim under FEHA and (ii) even if her claim were viable, she failed to satisfy her evidentiary burden at trial as a matter of law;
- a Motion to Vacate the Judgment, arguing that the special verdict did not support judgment in Adams' favor; and
- a Motion for New Trial, arguing among other things, that the damages awards were excessive, the jury was improperly instructed, and irrelevant and inflammatory evidence was improperly admitted at trial.

The trial court granted the District's Motion for New Trial, but denied its Motion to Vacate and Motion for JNOV. The trial court based its order granting a new trial on the following three separate and independent grounds: (1) the jury's damages awards were excessive, not supported by the evidence, and "so grossly disproportionate as to raise a presumption that it was the result of passion or prejudice" [10 CT 2083-2084], (2) the court improperly refused to give the District's Special Jury Instruction Nos. 7 and 8, which, had they been given, "it is quite likely the verdict would have been different" [10 CT 2084-2086], and (3) the court improperly admitted

“irrelevant and manifestly prejudicial” evidence, “prevent[ing] defendant from receiving a fair trial” [10 CT 2087-2088].

In denying the District’s Motion for JNOV and Motion to Vacate, the trial court held that (1) Adams had stated a viable claim under FEHA [10 CT 2086-2087], (2) Adams had carried her burden of proof [RT 3117:7-10], and (3) the special verdict prepared by Adams’ counsel was in fact deficient as a matter of law, but the deficiency was invited by the District and therefore not grounds for relief from the judgment [10 CT 2086 (finding omission of the word “appropriate” in the special verdict “was error” and as a result the special verdict “impose[s] a standard of liability against the employer that is not supported by law”)].

C. Proceedings On Appeal

Both parties appealed. Adams appealed the order granting a new trial and the District appealed the order denying the Motion for JNOV and the order denying the Motion to Vacate the Judgment. The District also filed a protective cross-appeal from the judgment.

On August 17, 2004, this Court affirmed the trial court’s order granting a new trial. (Op. at pp. 2, 14.) This Court based its decision, however, on a ground not considered by the trial court. Specifically, this Court’s decision was based on an amendment to the FEHA that occurred in 2003, after trial and after the trial court had ordered a new trial (the “2003 amendment”). The 2003 amendment added language to Section 12940(j)(1) explicitly stating an employer potentially could be held liable when non-employees sexually harass employees.

This Court affirmed the new trial order on the ground that the 2003 amendment changed the law and applied retroactively to this case. This Court concluded a new trial was required so that a jury could be instructed on the new law. In light of its ruling, this Court declined to rule on the

multiple other issues raised by the parties on appeal. (Op. at pp. 11, 12 (finding all other issues “moot”).)

The Supreme Court granted review, but held the case pending its decision in the companion case: *Carter v. California Department of Veteran’s Affairs*. The Supreme Court decided *Carter* on June 8, 2006. *Carter v. Cal. Dept. of Veteran’s Affairs* (2006) 38 Cal.4th 914. The Supreme Court then transferred this case back to this Court with instructions to vacate the August 17, 2004, Opinion and to reconsider the matter in light of *Carter*. Thus, the case is now before this Court for the second time.

III. THE SUPREME COURT’S *CARTER* DECISION

The plaintiff in *Carter* was a nurse at defendant California Department of Veteran’s Affairs (the “VA”). In the course of her employment with the VA, the plaintiff provided nursing care for Elber Brown, a resident at a VA facility. Mr. Brown was not employed by the VA. Plaintiff alleged that Mr. Brown sexually harassed her. After the VA’s unsuccessful attempts to stop the harassment, plaintiff Carter went on administrative leave and subsequently filed a lawsuit against the VA, alleging a FEHA sexual harassment claim based on Mr. Brown’s conduct. After trial, the jury returned a special verdict in Carter’s favor and awarded damages. The VA appealed.

Division Two of the Fourth Appellate District reversed, holding that the FEHA did not apply to claims of non-employee sexual harassment against employees. (*Carter v. Cal. Dept. of Veteran’s Affairs* (2003) 109 Cal.App.4th 469, 476, 487-488.) While that Court of Appeal’s decision was pending before the Supreme Court in 2003, the Legislature amended Section 12940(j)(1) so that it explicitly permitted such claims. The issue then became whether that 2003 amendment applied to cases already tried

and pending on appeal, such as *Carter* and this case. The Supreme Court transferred the case back to the Court of Appeal with instructions to reconsider the matter in light of the 2003 amendment. (*Carter v. Cal. Dept. of Veteran's Affairs* (2003) 7 Cal.Rptr.3d 315.) On reconsideration, the Court of Appeal held that the 2003 amendment did not apply to that case. (*Carter v. Cal. Dept. of Veteran's Affairs* (2004) 121 Cal.App.4th 840, 863.) *Carter* again appealed to the Supreme Court, and the Court again granted review.

The “sole issue” the Supreme Court addressed in *Carter* was “whether the 2003 amendment to section 12940, subdivision (j)(1), which expressly imposes liability on employers when nonemployees sexually harass employees, may be applied to conduct preceding its enactment.” (*Carter*, 38 Cal.4th at p. 922.) The Supreme Court held that the 2003 amendment applies to conduct preceding its enactment because, as the Court concluded, the amendment merely clarified existing law. (*Id.* at p. 930.)

Although the Supreme Court held that the 2003 amendment clarified rather than changed the law, the Court acknowledged that, prior to the amendment, the meaning of Section 12940(j)(1) had not been clear. The Supreme Court stated that the provision had been “somewhat ambiguous” and that “the former statute was ambiguously worded.” (*Carter*, 38 Cal.4th at p. 926.) The Court even stated that “prior to the amendment, section 12940, subdivision (j)(1), seemed to apply to employers and employees only.” (*Id.* at p. 918.)

In light of this pre-2003 amendment ambiguity, the Court found it necessary to remand the matter to ensure the proper law was indeed applied in that case. (*Id.* at pp. 930-931 (“We therefore conclude we should remand the matter to the Court of Appeal in order to allow the court to consider

whether the trial court adequately addressed the material issues that are now expressly provided.”.)

In doing so, the Court squarely rejected Carter’s argument that, if the law was simply clarified, remand was unnecessary since the law had not changed. Recognizing that the prior version of Section 12940(j)(1) directed employers to “take all reasonable steps necessary to prevent harassment from occurring,” the Court nonetheless held that this broad “reasonableness” standard “may not have afforded either the [defendant] or the jury the opportunity to focus on the explicit elements articulated in amended subdivision (j)(1).” (*Id.*)

Other than the 2003 amendment, the *Carter* decision does not address any other issue relevant to this case. For example, the *Carter* decision does not address issues unique to public schools or how the FEHA is to be applied to student harassers.

IV. ARGUMENT

A. **The *Carter* Decision Bears On Only One Issue Before This Court And Does Not Alter This Court’s Previous Determination To Remand This Case For A New Trial.**

Carter bears on only one issue presented here: whether the 2003 amendment applies to this case. The Supreme Court has held that it does.

This holding, however, does not alter the result already reached by this Court and the trial court – namely that this case must be retried. Indeed, this Court already concluded (consistent with the Supreme Court’s *Carter* decision) that the 2003 amendment applies here. And, based on that conclusion, this Court affirmed the trial court’s order for new trial. (Op. at pp. 12-13.)

Also consistent with *Carter*, this Court held that a new trial is necessary so that a jury may be properly and accurately instructed on the

law. This Court found that the instructions given to the jury did not adequately reflect the 2003 amendment:

Although the jury was vaguely instructed as to the “reasonableness of an employer’s remedy” and “the remedy’s ability to persuade potential harassers to refrain” from harassment, no instructions were given that were materially consistent with the 2003 amendment to section 12940, subdivision (j)(1).

(Op. at p. 12.)

The Supreme Court in *Carter* made a strikingly similar observation, stating that “the broad rubric of reasonableness may not have afforded either the VA or the jury the opportunity to focus on the explicit elements articulated in the amended subdivision (j)(1).” (*Carter*, 38 Cal.4th at p. 930.) In light of this, the Supreme Court remanded the case to ensure that “the material issues that are now expressly provided” were adequately addressed at trial. (*Id.* at p. 931.)

The same result is required here.

B. Adams Argues A Distinction Without A Difference.

In an attempt to have this Court change the result of its previous decision, Adams argues a distinction without a difference. Adams contends that *Carter* is at odds with this Court’s previous decision because *Carter* held that the 2003 amendment clarified the law while this Court previously held that the 2003 amendment changed the law. (Supp. Br. at pp. 2, 4.) While this is true, this distinction makes no difference for present purposes. As explained above, under either analysis, the result here is the same – the matter must be remanded for a new trial so that the jury may be properly and accurately instructed on the law.¹

¹ Indeed, in 2002 (i.e., well before the 2003 amendment expressly stated the elements of plaintiff’s claim) the trial court believed the jury had not adequately been instructed, even under the former “ambiguous” statute. [10 CT 2084-2086; and *Carter*, 38 Cal.4th at p. 926 (finding “former

C. The Parties Have Already Briefed The Remaining Arguments In Adams' "Supplemental" Brief.

Other than the impact of *Carter* on this case, the parties have already briefed the arguments Adams makes in her Supplemental Brief. In other words, rather than serving as a useful supplement, Adams' brief is improperly cumulative. (See Cal. Rules Ct., Rule 13(b)(2) ("Supplemental briefs must be limited to matters arising after the previous Court of Appeal decision in the cause, unless the presiding justice permits briefing on other matters."))² The District will address each issue briefly and refer the Court to the relevant portions of the parties' previous briefs.

1. This Court review's the trial court's order granting a new trial for an abuse of discretion.

As the District previously has explained, this Court reviews the trial court's order granting a new trial under the extremely deferential abuse of discretion standard. (Appellant's Reply/Cross-Resp. Br. at pp. 35-36. See also Cross-Appellant's Reply Br. at p. 6. See *Hata v. Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 31 Cal.App.4th 1791, 1800; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

2. The trial court correctly determined that the jury had not been adequately or correctly instructed, thus warranting a new trial.

Adams has already argued, and the District has already refuted, that Special Instruction No. 7 was not necessary.³ (See Resp./Cross-Appellant's

(continued...)

statute was ambiguously worded").] This further supports the conclusion that this case must be remanded for a new trial.

² Other than the Supreme Court's decision in *Carter*, all of the cases Adams cites in her "Supplemental" Brief were decided *before* briefing on appeal in this case closed in 2003. (See Supp. Br. Table of Authorities.)

³ The District also refuted Adams' argument that Special Instruction No. 8 was not required. (See Appellant's Reply/Cross-Resp. Br. at pp. 43-47.)

Br. at pp. 75-79; Appellant's Reply/Cross-Resp. Br. at pp. 43-47; Supp. Br. at pp. 3-6.) The District explained that Special Instruction No. 7 was essential to clarify for the jury that the element of control over the alleged harasser was critical to the proper evaluation of Adams' claim. This is especially true in cases such as this when, despite the employer's best efforts, the harassment does not stop. (*See* Appellant's Reply/Cross-Resp. Br. at pp. 43-47.) Moreover, as explained above, this element of control is now an express element of Adams' claim. (*See* Section IV(A) above; and *Carter*, 38 Cal.4th at p. 931, remanding to ensure proper focus on "explicit elements articulated" by the 2003 amendment.) Adams' argument addressing Special Instruction No. 7 is simply an improper repeat of her prior briefs. (*Compare* Supp. Br. at pp. 3-6, *with* Resp./Cross-Appellant's Br. at pp. 77-78, and Cross-Appellant's Reply Br. at pp. 16-17.)

3. Counsel's argument could not and did not cure the instructional defects.

Adams argues again that any instructional defects were cured by counsel's argument. (*See* Resp./Cross-Appellant's Br. at pp. 75-79; Cross-Appellant's Reply Br. at pp. 20-21; Supp. Br. at pp. 6-7.) As the District explained, however, this simply was not possible here. (Appellant's Reply/Cross-Resp. Br. at pp. 46-47.) It is well-settled (and for good reason) that argument by counsel is not evidence and is not the law by which the jury is bound. (*Id.*) Indeed, the jury in this case was specifically instructed that statements and arguments by counsel are not evidence. [6 CT 1112, 1139.]

4. The District's control over its students is limited in important respects relevant to this case.

Adams again argues that the District not only had the ability to stop the harassment at issue here, but was required by law to do so. (Resp./Cross-Appellant's Br. at pp. 51-58, 76-77; Cross-Appellant's Reply Br. at pp. 12-13, 15; Supp. Br. at pp. 7-9.)

As the District has explained, however, there are real limitations on the amount of control it has over student conduct generally and the conduct at issue here specifically. For example, just to name a few: (a) the District was unable at the time to identify who was responsible for publication of the OBJ; (b) the District's effort to transfer the suspected, but unconfirmed, student ring-leader of the OBJ was shot down by a federal court, requiring the District to accept that student back to its campus despite his sexually harassing conduct; (c) the District must comply with the First Amendment; and (d) similarly, the District must comply with the Fourth Amendment. (For a more detailed discussion of these and other constraints on the District's control over its students, *see* Appellant's Reply/Cross-Resp. Br. at pp. 18-21.)

The trial court also found compelling the indisputable differences between schools and other employers, stating:

The court recognizes there are substantial differences between school districts and other employers. For example,

(1) public schools cannot, by reason of various and significant constitutional and due process limitations, exercise the level and nature of control over student conduct that private employers can exercise over adult employees;

(2) hostile acts may be committed by children;

(3) schools are fundamentally unlike an adult workplace in many ways, including that children may regularly interact with each other and others in a manner that would be unacceptable among adults;

(4) a school, unlike the usual private workplace, is and must remain a marketplace of ideas, especially since schools are tasked with transforming necessarily critical and rebellious teenagers into constructive and productive adults during their high school years;

(5) a teacher voluntarily elects to teach (and makes the affirmative effort to obtain particular credentials to teach) in

the challenging high school environment, to some extent trading protection against offensive conduct for the professional challenge and stimulation for that unique marketplace of ideas;

(6) sexual harassment is usually rooted in the harasser's abuse of a superior power position while, in a school, the teacher is the one with the authority, not the harassing student; and

(7) the agency principles that dominate analyses of employer liability for harassment of employees by other employees or independent contractors do not apply in the context of student perpetrators, because a student is not an agent of the school district.

[10 CT 2084-2085.] Thus, in claiming such limitations on the District's ability to act "do not exist" (Supp. Br. at p. 9), Adams stretches the law, not to mention the imagination.

D. This Case Raises Numerous Additional Issues, None Of Which Are Addressed In Or Impacted By *Carter*, And All Of Which Remain To Be Decided By This Court.

As noted above and addressed in detail in the parties' previous briefs, this case raises multiple issues, only one of which was addressed by the *Carter* Court. Beyond the limited issue addressed in *Carter* (whether an employee could state a FEHA claim against her employer based on sexual harassment by a non-employee), this case also raises the following issues for decision by this Court:

- The District's Motion for JNOV: Should the trial court have granted the District's Motion for JNOV and entered judgment in favor of the District, based on the fact that Adams failed to satisfy her burden to present substantial evidence that the District failed to take immediate and appropriate corrective action regarding sexually harassing conduct about which the District knew or should have known? (*See* Appellant's Opening Br. at pp. 28-35; Appellant's Reply/Cross-Resp. Br. at pp. 13-25.)

- The District's Motion to Vacate the Judgment: Should the trial court have granted the District's Motion to Vacate the Judgment and entered judgment in favor of the District, based on the fact that the special verdict is indisputably insufficient as a matter of law to support the judgment against the District? (See Appellant's Opening Br. at pp. 35-40; Appellant's Reply/Cross-Resp. Br. at pp. 25-28.)

- The District's Motion for New Trial: Excessive Damages: Did the trial court abuse its discretion when it granted a new trial on the ground that the jury's damage awards were excessive as a matter of law and not supported by the evidence? (See Appellant's Reply/Cross-Resp. Br. at pp. 35-41.)

- The District's Motion for New Trial: Irrelevant and Prejudicial Evidence: Did the trial court abuse its discretion when it granted a new trial on the separate and independent ground that irrelevant and highly prejudicial evidence was improperly admitted at trial? (See Appellant's Reply/Cross-Resp. Br. at pp. 41-43.)

- The District's Motion for New Trial: Special Jury Instruction Nos. 7 and 8: Did the trial court abuse its discretion when it granted a new trial on the separate and independent ground that it erred – even before the 2003 amendment – in refusing to instruct the jury with the District's special instructions 7 and 8, which would have given the jury the opportunity to consider the unique circumstances involved in this case alleging student-on-teacher sexual harassment, such as the amount of control a school can legally and practically exercise over its students? (See 10 CT 2085; Appellant's Reply/Cross-Resp. Br. at pp. 43-47.)

Neither the Supreme Court in *Carter* nor this Court in its August 17, 2004 Opinion addressed any of these issues. (Op. at pp. 11, 12.)

CONCLUSION

For all of the above reasons and those previously briefed by the District, this Court should (i) reverse the trial court's order denying the District's Motion for JNOV and denying the District's Motion to Vacate the Judgment, and (ii) direct that judgment be entered in favor of the District. In the alternative, this Court should affirm the trial court's order granting a new trial.

Dated: October 27, 2006

Respectfully submitted,

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