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Aug 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000951

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

v.

Richland School District Two.....Respondent.

PETITION FOR REHEARING

The Appellant, K.S., a minor, by and through his guardian ad litem, James Seeger, hereby respectfully moves and petitions, pursuant to Rule 221(a), SCACR, as well as all other applicable law, for an order granting rehearing in this case and submits the memorandum below in support of the same. In an effort to keep this petition succinct, particularly with regard to the arguments not addressed by the court's opinion, Appellant incorporates herein by reference his previously submitted briefs, making by reference those same arguments here. This petition does not restate the briefs, except by incorporation, any more than is needed to address the misapprehensions evident from the opinion issued in this case.

In an opinion issued on July 27, 2022, this court held that a first grader did not make a sufficient showing of physical injury, and thus could not prove, with *any* of the

evidence presented, the damages required for his negligent infliction of emotional distress claim. This, in the court's view, made the lower court's decision to grant Respondent's motion for a directed verdict proper. The court further ruled that its ruling on this issue was dispositive, and a ruling on the other issues regarding the South Carolina Tort Claims Act and the lower court's exclusion of the child's expert testimony was unnecessary.

Appellant respectfully urges the court to reexamine its holding in this case. While the opinion is unpublished, the court's narrow view of physical injury and physical manifestation of an emotional injury may have negative implications for future negligent infliction of emotional distress claims. Moreover, the court's decision may have far-reaching consequences to our state's longstanding, strict standard regarding motions for directed verdict. The opinion in this case is inconsistent with existing jurisprudence, including an opinion this court issued a week after this one.

Appellant respectfully submits that the court may have overlooked or misapprehended certain points in this case, as the following shows:

I. The lower court should have denied Respondent's motion for a directed verdict.

Rule 50(a), SCRCP, sets forth that "[w]hen upon a trial the case presents only questions of law the judge may direct a verdict." As this court is aware, in ruling on a directed verdict motion (and in review of a ruling on a directed verdict motion), lower and appellate courts alike must view "the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-23, 602 S.E.2d 772, 782 (2004). These rulings concern the existence or nonexistence of evidence, *not its weight*. *Hopper v. Terry Hunt Constr.*, 373 S.C. 475,

479-80, 646 S.E.2d 162, 165 (Ct. App. 2007). Of course, statutory interpretation is a question of law, but when there is conflicting evidence about whether a statute applies, that is a question of fact to be left to the finder of fact (in this case, the jury). *Bursey v. S.C. Dep't of Health and Envtl. Control*, 369 S.C. 176, 185, 631 S.E.2d 899, 904 (2006).

To this point, in a recent case, this court addressed the issue of whether the trial court erred in refusing to grant a criminal defendant's motion for a directed verdict because the State failed to produce any evidence that the defendant physically injured a minor. *State v. Robinson*, Op. No. 5930 (S.C. Ct. App. filed Aug. 3, 2022) (Davis Adv. Sh. No. 27 at 81). While the Appellant in this case acknowledges the court's clarification that it "define[d] and g[a]ve effect to the term injuries for purposes of first-degree assault and battery," *Robinson* remains telling; "physical injury" is a broad term and should not be construed narrowly, particularly at the point of a directed verdict motion. *Id.* at 4. *Robinson* involved a victim that testified that the defendant's hand around her neck did not hurt, but was "uncomfortable." *Id.* at 88. The court found this sufficient to defeat the defendant's motion for directed verdict. *Id.*

In both the *Robinson* opinion and in this opinion, the court cites multiple cases which did not contain evidence that a party's person was physically harmed or violently injured, but nonetheless in which there was *evidence* of injury within the meaning of assault and battery or negligent infliction of emotional distress, respectively. The difference is that in *Robinson*, the court continued that line of logic and determined that a motion for directed verdict on the issue of injury would be improper. Here, confusingly, the court cites a slew of cases, many of which are also cited by Appellant,

establishing that "suffering a nervous breakdown as a result of negligence would support a verdict, even if no other injury was sustained." However, the court goes onto decide that the first grader's injuries were insufficient, *as a matter of law*, and relies on a concurrence and an out-of-state case to further require that the Respondent's behavior also be "extreme," which the court state, *as a matter of law*, this conduct was not. *See infra* § II.

In this case, neither the lower court nor this court viewed the evidence and all reasonable inferences in the light most favorable to the Appellant. There is not a complete lack of any physical injury, nor is there a complete lack of physical manifestation of an emotional injury. The evidence presented by the child did not yield only one inference, and neither the lower court nor this court had the authority to decide the credibility of that evidence. That should have been left to the jury. A jury could have, and should have, determined whether the evidence presented by the child constituted physical injury or physical manifestation of an emotional injury. To decide otherwise would undermine precedent and vest too much authority in the courts to make decisions that it should not make.

II. The court's decision to require "extreme and outrageous conduct" is unprecedented not based on binding authority.

The court relies on a concurrence to a South Carolina opinion and a Tennessee case to justify its new, unprecedented formulation of a rule regarding emotional injury. South Carolina has no primary authority suggesting that an emotional injury must have been caused by "extreme and outrageous conduct." *Turner v. A B C Jalousie Co. of N.C.*, 251 S.C. 92, 97-98, 160 S.E.2d 528, 530 (1968) (Lewis, J. concurring). Moreover, there is no case in South Carolina abandoning the physical manifestation rule or

suggesting that emotional injuries must be "so serious or severe [that] a reasonable person would not be able to cope with the stress the circumstances caused." *Camper v. Minow*, 915 S.E.2d 437, 446 (Tenn. 1996). Respectfully, the court's reliance on these secondary authorities is perplexing given the wealth of primary authority precedent in this jurisdiction to the contrary.

However, even if the court's institution of this new rule was proper, a jury could almost certainly determine that this teacher's meanspirited and cruel actions towards the first grader were extreme and outrageous, and that a reasonable person would not be able to cope with the stress of the circumstances. Those circumstances include that a child was *a child*. The court merely describes the conduct as "inappropriate and improper," but Appellant would respectfully, but vehemently, disagree with that characterization.

If the conduct exhibited by the teacher at issue in this case was *not* extreme and outrageous, Appellant is at a loss as to what conduct would meet that burden. Oddly enough, the facts of this case are not far off from the facts in *Turner*, which involved emotional injury as a result of "vile, profane, and abusive language." *Turner v. A B C Jalousie Co. of N.C.*, 251 S.C. at 95, 160 S.E.2d at 530. While, as far as the record shows, the teacher did not use profanity towards the child, she certainly used vile and abusive language. She told a child that she would "give [him] something to cry for," loudly proclaimed that the child "cried all day," yelled in the child's face to "[s]top being such a crybaby," and allowed other students to form a "No Crying Club" designed to exclude the child. (R. p. 587-588, 583-584, 153, line 18-p. 154, line 12.) Again, if this is not vile or abusive in the Court's view, particularly given that this

conduct was coming from a person who should have been a trusted adult and was aimed at a child in her care, Appellant is unsure what is. It is perplexing at best that the Court relies on the concurrence of a case that actually *supports* the Appellant's position, only to affirm the lower court's decision.

Moreover, any reasonable person of *any* age, but particularly a reasonable *child*, would not be able to cope with the physical and verbal abuse of this teacher. That the victim of this conduct was a child is part of the circumstances here. Tort law frequently treats children differently from adults; the standard of care owed by children is judged by "the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances," not by that of a reasonable adult person. *Standard v. Shine*, 278 S.C. 337, 339, 295 S.E.2d 786, 787 (1982). Similarly, the standard of care owed by a party shifts and heightens where children are involved; "[c]hildren, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly." *Franks v. Southern Cotton Oil Co.*, 78 S.C. 10, 18, 58 S.E. 960, 962 (1907); *see also Madison ex rel. Bryant v. Babcock Center*, 371 S.C. 123, 638 S.E.2d 650 (2006) (holding that a mentally handicapped appellant "should be treated as the equivalent of a willful, immature child who really has no idea of what is best for her in determining whether [respondent] breached the duty of care owed to her," and that "[t]he precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury on remand."). Again, considering Appellant's

age and the role of a teacher, Appellant's inability to cope with the teacher's conduct is perfectly reasonable—practically self-evident— in these circumstances.

This teacher emotionally damaged a child for, at the very least, the remainder of his childhood. This teacher grabbed a child, hurting his arm. She did this in front of other students and staff. She constantly taunted a child for crying, again, in front of other students, and all but encouraged other students to engage in similar behavior. She regularly grabbed a child to remove him from the classroom. Appellant accordingly asks that this court reevaluate whether its implementation of this new rule is proper and, if the court finds it as such, whether the facts of this case are indeed merely "inappropriate." Any parent would, undoubtedly, view it differently.

III. The lower court's narrow construction of physical injury runs contrary to case law.

The lower court contended that "there [was] no affirmative testimony that there was any damage to [Appellant's] body," and relies on Black's Law Dictionary's definition of physical injury as "physical damage to a person's body." The lower court goes onto make the determination, contrary to the evidence, that the first grader's person was not "damaged," comparing the teacher's grab to "touching" a car, not "damaging" it. This is problematic for several reasons. Firstly, Appellant *did* affirmatively testify that his arm hurt during and after the teacher's grab. A jury could easily find that this satisfies the physical injury requirement. Secondly, the lower court's reliance on Black's Law Dictionary is shortsighted— "damage" is not defined as scarring or bruising, as the court construed it within the context of physical injury. Rather, "damage" is defined as "physical harm that is done to . . . part of someone's body . . . . By extension, *any bad effect on something*." *Damage*, Black's Law

Dictionary (10th ed. 2013). It is simply reasonable and logical that a person can be physically harmed but not maintain visible bruising, scarring, or scratches, but the lower court nonetheless arbitrarily set that bar. The teacher's grab in this case, among other conduct, undoubtedly caused a bad effect on the child. There was, at the very least, a fact question about that.

Further, looking beyond secondary authority, this view of the court ignores the fact that Appellant also presented thorough evidence of physical manifestation as a consequence of an emotional injury. Appellant offered extensive testimony and evidence regarding, among other behaviors, his ongoing depression, inability to sleep, and anger management issues. The lower court's determination and this court's holding in this opinion are inconsistent with the court's longstanding jurisprudence on emotional distress, and what injuries satisfy the physical manifestation requirement. *Dooley v. Richland Mem'l Hosp*.,5 283 S.C. 372, 375, 322 S.E.2d 669, 671 (1984) ("physical manifestation" of emotional injuries means whether a plaintiff can show "medical treatment or other objective evidence of physical injury"); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 350, 368 S.E.2d 477, 478 (Ct.App. 1988) (holding that emotional trauma can be a bodily injury for the purposes of insurance); *Kinard v. Augusta Sash & Door Co*., 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985) (holding that a "physical manifestation" includes crying, weight loss, sleep disturbances, inability to do housework, difficulty in socializing, and the inability to tolerate stress); *Ford v. Hutson*, 276 S.C. 157, 165, 276 S.E.2d 776, 780 (1981) (physical manifestation of mental injury has also been held to include shaking, nausea, cramps, hysteria, depression, headaches, spastic colon, knotting of the intestinal tract,

stiffness and numbness); *Doe by Doe v. Greenville Hosp. Sys*., 323 S.C. 33, 38–39, 448 S.E.2d 564, 567 (Ct. App. 1994) (holding that the fact that the victim of a sexual molestation suffered no physical wounds was "not determinative" as to whether the victim had suffered an injury, and that the victim nonetheless was entitled to recover damages for her severe mental injury).

It is further reasonable and logical that physical harm can cause extreme emotional distress, particularly to a child. Determining whether "the evidence in this case meets the standard set by these precedents" is not up to this court or the lower court—it should have been up to the jury. It is a fact issue. The jury is responsible for determining whether the Respondent injured the child, and to what extent. Should the court maintain its incorporation of the new standard posed by its opinion, the jury is responsible for determining whether the teacher's conduct was outrageous or extreme. There is an issue of material fact that requires reversal of directed verdict.

IV. Conclusion

The amount of damages suffered by the child is a question for the jury. Whether the teacher's conduct was extreme and outrageous, should the court decide to implement that rule (which it respectfully should not), is a question for the jury. The lower court should not have granted Respondent's motion for a directed verdict. In a light most favorable to Appellant, the record is far from lacking *any* evidence at all to support the Appellant's position; rather, it is replete with evidence in his favor. All he needed was some. To decide otherwise would truncate our motion for directed verdict standard and heighten our standard for recovery for emotional injury to an unfounded and baseless degree.

WHEREFORE Appellant prays for an order granting rehearing in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing Petition of Rehearing on the date given below by emailing it to Respondent's counsel at the addresses noted below.

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