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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-10-7699
Appellate Case No. 2013-000084

Jane Doe — Appellant,

v.

Charles Smith, Charleston County School District and James Island High School — Respondents.

Petition for Rehearing

July 11, 2014

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Appellant, Jane Doe ("Doe"), by and through counsel, files the following petition for rehearing pursuant to SCACR Rules 221 and 240. The Court of Appeals, by order filed June 30, 2014, affirmed the order of the trial court granting summary judgment to Charles Smith ("Smith"), Charleston County School District ("District"), and James Island High School ("High School") on Doe's claims for breach of fiduciary duty, outrage, and gross negligence. Doe contends the court overlooked or misapprehended the issues on appeal. The basis for the Appellant's petition is as follows:

ARGUMENT

I. DOE PRESENTED AT LEAST A SCINTILLA OF CORROBORATING EVIDENCE TO SUPPORT HER REPRESSED MEMORY CLAIM. THEREFORE, THE APPLICATION OF THE DISCOVERY RULE AND THE SUFFICIENCY OF THE CORROBORATING EVIDENCE ARE QUESTIONS OF FACT FOR THE JURY.

The court of appeals concluded that Doe failed to present corroborating evidence that meets the requirements of Moriarty v. Garden Sanctuary of God, 341 S.C. 320, 534 S.E.2d 672 (2000)(stating a plaintiff must present at the summary judgment stage and at trial expert witness testimony to prove the abuse and repressed memory[1] as well as independently verifiable, objective evidence that corroborates the repressed memory claim in order to assert the discovery rule).

Objective verifiability may be satisfied by corroborating evidence, for example:

(1) admission by the abuser; or

(2) a criminal conviction; or

(3) documented medical history of childhood sexual abuse; or

(4) contemporaneous records or written statements of the abuser, such as diaries or letters; or

(5) photographs or recordings of the abuse; or

(6) an objective eyewitness's account; or

[1] The court of appeals did not indicate that there was any deficiency in the expert witness testimony presented by Doe. Accordingly, Doe will focus primarily on the corroborating evidence requirement.

(7) evidence the abuser had sexually abused others; or

(8) proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.

Id.

The primary reasons for requiring corroborating evidence are the disagreement among the psychological and medical communities about the validity of repressed memory syndrome, the danger a plaintiff's memories could be faked or implanted during therapy, and the desire that a plaintiff not have the ability to control the running of the statute of limitations solely by allegations whose only support is contained within the plaintiff's mind. Moriarty at 335-336, 680. The testimony of both Doe's and Respondents' expert witnesses, as more fully set forth in Doe's brief on appeal, make clear that repressed memory syndrome is a valid psychological disorder and that Doe suffered from it. They both further testified that there was no evidence of fake or implanted memories during therapy. Thus, two of the primary reasons for requiring corroborating evidence are, in this case, inapplicable.

Even if objective verifiability is still required in the face of competent expert testimony, Doe presented a documented medical history of childhood sexual abuse,[2] contemporaneous written statements of the abuser (Smith),[3] and a chain of facts and circumstances - including classic grooming activities from Smith,[4] Smith's concealment of Doe's suicide attempt in his

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[2] *See, e.g.* affidavit of Heidi Zinzow, medical records of Tanya Bolton, MUSC, and others. (R. p. 1414-1416; R. p. 2553-2561; R. p. 2543-2552; R.. p. 2562-2566).

[3] *See, e.g.* a handwritten note from Respondent Smith to Doe from her 1989 James Island High School yearbook. (R. p. 2542).

[4] *See, e.g.* affidavit of Heidi Zinzow, deposition testimony of the 30(b)(6) representative of James Island High school, and the deposition testimony of Respondent Smith. (R. p. 1414-1416; R. p. 905, pp. 43:5 – R. p. 907, pp. 50:22; R. p. 782, pp. 92:11 – R. p. 783, pp. 93:25; R. p. 786, pp. 105-108).

classroom,[5] and other incidents involving inappropriate conduct on Smith's behalf [6] which have sufficient probative force to produce a reasonable inference, in the light most favorable to Doe, that the sexual abuse occurred.

Despite this, the court held that Doe failed to present evidence of corroborating evidence of her repressed memory claim. In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving part, Doe, is only required to submit a mere scintilla of evidence. Turner v. Milliman, 392 S.C. 116708 S.E.2d 766 (2011). In determining whether any triable issues of fact exist at the summary judgment stage, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326673 S.E.2d 801 (2009). Doe's corroborating evidence is, at the very least, a scintilla of evidence of corroboration that makes summary judgment improper. It is then a matter for the jury to consider the weight to be given the evidence. Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 36 (Ct. App. 1994).

Given that Doe presented at least a scintilla of corroborating evidence, the two prongs of expert testimony and corroborating evidence required under Moriarty have been satisfied for summary judgment purposes. The final issue is whether application of the discovery rule and the

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[5] *See* Smith's deposition testimony. (R. p.793, pp. 135:23 – p.795, pp.143:25; R. p. 796, pp. 147:14-21). This could reasonably be inferred as conduct amounting to a cover up to avoid any questioning by the authorities of Smith and Doe's relationship.

[6] *See* Smith's deposition testimony and the deposition testimony of the 30(b)(6) representative of James Island High School. (R. 767, pp.31 – R. p. 770, pp.43; R. p. 780, pp. 82-83; R. 782, pp. 90 – R. 784, pp.98; R. p. 810, pp. 202:21 – pp. 203:17; R. p. 811, pp. 208: - R. 813, pp. 213:13, R. p. 903, pp. 36:21 – R. p. 904, pp.38:19; R. p. 905, pp.43:5 – R. p.906, pp.47:22).

existence of corroborating evidence remain questions of fact for the jury. The answer is "yes." Moriarty at 338, 681.[7]

Doe still bears the burden of proving at trial that she repressed memories of the abuse and that corroborating evidence supports her claim. However, the testimony of Doe and both of the expert witnesses supports the conclusion that Doe was in fact abused, in fact suffered from repressed memory, and in fact did not recall the repressed memories until early 2007. Thus, *the jury* must determine whether the corroborating evidence presented is sufficient corroboration to support the conclusion that sexual abuse occurred and when Doe repressed the memories and recalled the abuse, such that a person of common knowledge and experience would be on notice that some right of hers has been invaded or that some claim against another party might exist.

Doe submits the court of appeals erred in affirming the circuit court's grant of summary judgment because Doe submitted sufficient expert testimony to prove the abuse and repressed memory and more than a scintilla of corroborating evidence which would support her claims of abuse. As such, the grant of summary judgment by the circuit court and the affirmance by the court of appeals was in error.

II. DOE'S GROSS NEGLIGENCE CLAIM DOES NOT REQUIRE THE DISTRICT TO HAVE PRIOR KNOWLEDGE OF SMITH'S SEXUAL ABUSE TO SURVIVE SUMMARY JUDGMENT.

The court of appeals concluded that Doe presented no evidence that the District knew or had

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[7] Stating that the application of the discovery rule contained in S.C. Code Ann. § 15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury. *See also* Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (whether a claimant knew or should have known that they had a cause of action is question for the jury); Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989) (application of discovery rule to a claim is a question of fact for jury), *overruled on other grounds by* Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995); Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998) (in determining whether statute of limitations begins to run under discovery rule, jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action).

reason to know of a need to exercise control over Smith to prevent him from abusing Doe, relying upon Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) and Moore v. Berkeley County School District, 326 S.C. 584, 486 S.E.2d 9 (1997). Both of these cases apply only to the District's duty with respect to Smith's conduct that is outside the scope of employment, however, and are therefore not applicable.

Contrary to court's decision, in order for Doe to establish liability against the District, it is not necessary the District should have contemplated the particular event which occurred. Young v. Tide Craft, 270 S.C. 453, 242 S.E.2d 671 (1978). It is sufficient that the District should have foreseen its negligence would probably cause injury to someone. Childers v. Gas Lines, Inc., 248 S.C. 316, 149 S.E.2d 761 (1966). The District may be held liable for anything which appears to have been a natural and probable consequence of its negligence. Greenville Memorial Auditorium v. Martin, 301 S.C. 242391 S.E.2d 546 (1990).

The evidence presented demonstrates that Smith clearly was acting within the scope of his employment when he taught and coached Doe, both on school grounds and during extracurricular activities. Smith routinely would take Doe in his car from school to practice and to her home. According to the Respondents, this conduct of transporting students was not only within the scope of his employment but common place at the time. The Respondents' knew of Smith's trips with Doe and others, yet did not to prevent this from happening, did nothing to warn Smith or Doe that this was inappropriate conduct, and did nothing to otherwise take any reasonable measure to protect Doe or to supervise Smith during these trips. Whether the sexual assaults resulted from the District's grossly negligent conduct with respect to these rides, taken within the scope of Smith's employment with the District, is a question for the jury.

The duty of supervision exists as a matter of law pursuant to S.C. Code Ann. § 15-78-60(25), and the District is liable to Doe for her loss when their responsibility to supervise is exercised in a grossly negligent manner. Grooms v. Marlboro County Sch. Dist., 307 S.C. 310, 313 (Ct. App. 1992). Accordingly, a duty of care applied to the District with respect to these activities and a jury could reasonably conclude that the District was grossly negligent in its discharge of this duty. Moreover, the burden of establishing a limitation upon liability is upon the District asserting it as an affirmative defense. Doe by Roe v. Orangeburg County Sch. Dist. No. 2, 329 S.C. 221, 223-224 (Ct. App. 1997). The evidence presented demonstrates that the District did absolutely nothing to monitor or otherwise supervise Smith when he gave students, including Doe, rides to and from school related activities. Viewing this in the most favorable light to Doe, there was sufficient evidence from which a jury could find that Doe's injuries were foreseeable and that the District was liable. As such, the grant of summary judgment by the circuit court and the affirmance by the court of appeals was in error.

CONCLUSION

For the foregoing reasons, order filed by the court of appeals on June 30, 2014 should be vacated, and the summary judgment granted in favor of the Respondents should be reversed and the case set for a jury trial.

July 11, 2014

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Attorney for Appellant

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Jane Doe, Appellant,

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Charles Smith, Charleston County School District and James Island High School, Respondents.

Proof of Service

I certify that I have served the Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2014, addressed to the attorneys of record, Robin Jackson at Senn Legal LLC, P. O. Box 12279, Charleston, SC 29422 and Stephen Brown, Wilbur Johnson, Brian Quisenberry, and Russell Hines at Young Clement Rivers, LLP, 25 Calhoun Street, Suite 400, P.O. Box 993, Charleston, SC 29402.

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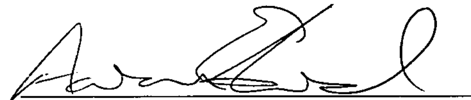

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July 11, 2014

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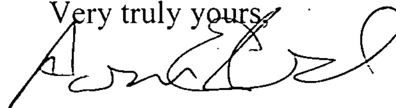
Via Fedex Overnight
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 292101

Re: Jane Doe v. Charleston County School District, James Island High School and Charles Smith
Case No.: 2010-CP-10-7699
Appellate Case No.: 2013-000084

Dear Madam Clerk:

Enclosed for filing please find the original and seven copies of the Petition for Rehearing and the Proof of Service in the above referenced matter. Please file the originals and return one file-stamped copy to our office in the enclosed, self-addressed, stamped envelope. By copy of this letter to Robin Jackson, Stephen Brown, Wilbur Johnson, Brian Quisenberry, and Russell Hines, attorneys for the Respondents, I am alerting them to this communication with the Court.

Very truly yours,



Aaron E. Edwards

AEE/cms
Enclosures

cc: Robin Jackson, Esq.
Stephen Brown, Esq.
Wilbur Johnson, Esq.
Brian Quisenberry, Esq.
Russell Hines, Esq.
Jane Doe

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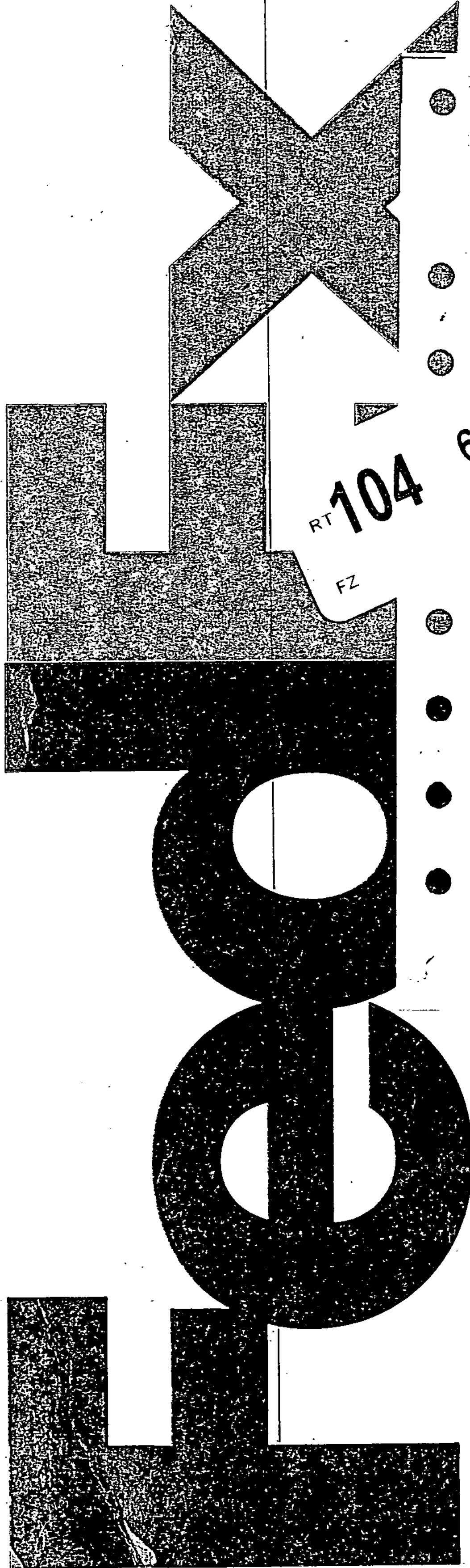

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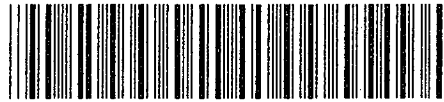

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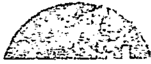

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