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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Circuit Court Case No.: 2010-CP-10-7699
Appellate Case No.: 2013-000084 (Court of Appeals)
Appellate Case No.: 2014-002057 (Supreme Court)

Jane Doe, Petitioner,

v.

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

RESPONDENT SMITH'S RETURN TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE STATUTE OF LIMITATIONS EXPIRED DESPITE DOE'S CLAIM OF REPRESSED MEMORY.
 - A. WHETHER DOE PRESENTED A SCINTILLA OF EVIDENCE TO SUPPORT HER REPRESSED MEMORY CLAIM PURSUANT TO MORIARTY V. GARDEN SANCTUARY CHURCH OF GOD.
 - B. WHETHER DOE PRESENTED EVIDENCE SUFFICIENT TO MEET THE REQUIREMENTS FOR THE TESTIMONY OF THE EXPERT WITNESSES.

2. WHETHER THE COURT CONSTRUED ALL FACTUAL INFERENCES IN FAVOR OF DOE.

3. DID THE SCHOOL DISTRICT OWE A DUTY TO DOE?¹
 - A. DOES DOE'S GROSS NEGLIGENCE CLAIM REQUIRE THE DISTRICT TO HAVE PRIOR KNOWLEDGE OF SMITH'S SEXUAL ABUSE TO SURVIVE SUMMARY JUDGMENT.

¹ Question 3 only applies to Respondent Charleston County School District. It is identified here as a Question Presented as it was identified by Petitioner, but Respondent Smith makes no argument as to this question, as the allegations are not against him.

COUNTER-STATEMENT OF THE CASE

This matter is based on a claim of sexual battery against a student by a teacher, brought against the teacher, Mr. Charles Smith, the school, and the Charleston County School District, dating back to 1988-89, when these instances are alleged to have occurred.

This action was filed by petitioner Doe on November 20, 2007. Thereafter, petitioner amended her complaint to include James Island High School as a defendant and further amended it to change the causes of action. The amended complaint alleges causes of action for breach of fiduciary duty, gross negligence and outrage against all defendants. Petitioner alleged in her complaint that during the 1988-1989 school year she was sexually assaulted on several occasions by Mr. Smith, both on and off the school's campus. Smith was both a teacher and the school's softball coach during this school year. Petitioner claims that though the alleged abuse occurred over a period of time, she repressed the memories of the abuse until 2007. Respondent Smith denies all allegations of abuse and asserts that the same never occurred. Additionally, Respondent Smith asserts that the statute of limitations has expired on this claim. The School and School District face additional allegations and have additional defenses. This brief only addresses the appeal as to Mr. Smith.

On July 23, 2012, the court heard Respondent Smith's motion for summary judgment and considered all evidence submitted by both sides. (R. 1417-22, 1427). On September 24, 2012, the court signed the Order granting summary judgment to the Respondent Smith. (R. 18-29). The order was based on Doe's failure to file the case within the applicable statute of limitations. The court found that Doe failed to satisfy the objective verifiability requirements set forth in *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150 (Ct. App. 1999); *aff'd by Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000). The court also found that the claims for intentional

infliction of emotional distress and punitive damages are not recoverable under the South Carolina Tort Claims Act. The Petitioner filed a motion for reconsideration, which was denied by the court on December 13, 2012. (R. 30). In January, 2013 Petitioner filed a notice of appeal. By unpublished *per curiam* decision dated June 30, 2014 the Court of Appeals affirmed the trial court's ruling. The Petitioner then filed a petition for rehearing which was denied by order filed August 25, 2014.

STATEMENT OF FACTS

Petitioner alleges that while she was a second year freshman at James Island High School, more than twenty (20) years ago, during the 1988-1989 school year, she was sexually assaulted by then teacher and coach, Charles Smith. (R. 2248-9). Petitioner was in one of Smith's Geography classes, and was practicing with Smith's softball team. Petitioner alleges that she does not know the dates of the assaults, but claims they occurred on unknown dates between September 1988, when the school year began and February 13, 1989. February 13, 1989 is when the Petitioner allegedly attempted to commit suicide by taking an unknown amount of caffeine pills. (R. 2562-66).

The Petitioner has alleged five (5) separate assault incidents occurring at an unknown points and in unknown order during this time period. Petitioner asserts that three incidents occurred in the classroom, while the entire class of students were present. First, Mr. Smith brushed his hand across her breast while leaning over to answer a question. (R.193, pp.88:10-20). She has also admitted that this touch may have been inadvertent, and not performed in a sexual manner. (R. 193, pp. 89:10-11). Second, that when the Petitioner went to the front of the classroom to ask him a question, Mr. Smith put his hand under her skirt and rubbed the outside of her vagina. When he removed his hand, he sniffed his fingers. (R. 195, pp. 97:6-19). The third instance was again when she says she went to

his desk, and claims he took her hand and put it on his penis through his pants. (R. 198, pp. 99:25-100:7). All of these acts are alleged to have occurred in front of a room of 9th grade students. The Petitioner further alleges that Smith touched her breast and kissed her inside a horse stable, where he was boarding his horse. (R. 194, pp. 91:4-6). The final allegation of sexual assault is alleged to have taken place in Mr. Smith's vehicle after softball practice. Petitioner claims that Smith stopped the vehicle on the way home, pulled out his penis and she performed oral sex on him. (R. 198-9, pp. 101:11-102:9). The last incident, Petitioner claims, was the oral sex incident in the vehicle. She further asserts that there were no further incidents after her suicide attempt on February 13, 1989. Petitioner admitted in her deposition that during the times of these alleged assaults and after, she "froze", she was "uncomfortable" and after the oral sex incident, "[a]ll I remember is going home, going into my room, closing my door and holding onto my cat crying." (R. 198, pp. 98:4-8; pp. 100:1-5; R. 197, pp. 105:2-4).

On February 13, 1989, the Petitioner claims she attempted suicide by taking a handful of Vivarin caffeine pills after school. (R. 2562-66). After taking the pills at the drinking fountain, she went to Mr. Smith's classroom, and stumbled inside. When she told him she had taken an overdose of pills, he called for the nurse to contact 911 and he walked her around with the nurse until the ambulance arrived and took her to the hospital. (R.199, pp. 113:20-22; R. 792, pp. 131:3-24). The Petitioner claims she has no recollection of anything that occurred between taking the pills and throwing them up at the hospital. (R. 199, pp. 113:11-16, 23-25; R. 200, pp. 114:1-4). Petitioner returned to school and the softball team after the alleged suicide attempt and finished out the 1988-1989 school year both in Mr. Smith's class and on his softball team until she became ineligible due to bad grades. (R. 2248-9). The following year, she returned to the school, as a third year ninth

grader. (R. 2248). At the end of the 1989-1990 school year, she dropped out. (R. 2249). Mr. Smith continued as both a teacher and coach at James Island High School until his retirement in 2008.

Petitioner worked as a detention officer for the Charleston County Sheriff's Office, but was terminated for inappropriate conduct. (R. 1449). It was during her time as a detention officer in 2007, that she claims she suddenly remembered being sexually assaulted by Mr. Smith approximately 19 years prior. She claims that until her epiphany in 2007, she had no recollection of anything that had occurred in her life between sometime after the alleged assault and/or suicide attempt, through age 18.

This is the second allegation the Petitioner has made that she was sexually abused by being forced to perform oral sex, followed by an allegation of memory repression. She also asserts that she has memory lapses in her life from birth to age 10, ages 15-18, and spotty recall through adulthood. (R.179, pp. 33:18-20; R. 197, pp. 105:9-14). The first allegation of abuse stems from Petitioner's assertion of sexual abuse by a babysitter between the ages of 4 and 6. (R. 178, pp. 29:23-25). She claims she was forced to perform oral sex on the babysitter. (R. 179, pp. 30:3-4). She also claims that she repressed the memories of such abuse until 1995-96. (R. 179, pp. 33:16-20). She has no explanation for why the allegedly repressed memories of the same kind of alleged abuse surfaced in the 1990's, but the second alleged abuse allegations did not come forward until 2007.

Mr. Smith asserts that he acted properly and had no relationship with the Petitioner other than that of a teacher-student and coach-player. He asserts that there was no sexual contact of any kind. (R. 802, pp.171:6-14). While he admits that he occasionally gave her and other members of the softball team a ride home after practice or games, he asserts that this was common place in the 1980's and that many coaches did the same. (R. 782, pp. 82:16-83:20). Smith denies sexually assaulting

anyone and further asserts that no inappropriate behavior took place. (R. 767, pp. 31:14-24).

ARGUMENT

I. **PETITIONER DOES NOT QUALIFY FOR ANY EXTENSIONS OF THE STATUTE OF LIMITATIONS.**

A. **THERE IS NO INDEPENDENTLY VERIFIABLE EVIDENCE OF ABUSE TO SUPPORT PETITIONER'S REPRESSED MEMORY ASSERTION.**

Doe claims that at some unknown point after the last alleged abuse incident in 1988 or 1989, she involuntarily repressed all memories relating to her life between the ages 15 and 18. Sometime later, she has memories of being 18 years old and older, but had no memories of any part of her life from the period of time between ages 15 and 18, until 2007. In 2007, she claims she suddenly started having dreams of Mr. Smith standing over her laughing, and that those dreams have turned into memories. (R. 206, pp. 138:10-20). Therefore, she asserts that she is entitled to use 2007 as the date she was first aware of the abuse, and the applicable date for the running of the statute of limitations. This is not supported by the evidence, and the Petitioner does not meet the required criteria.

In order to prevent cases like this being a battle of the experts, this Court added the requirement of objective verifiability. *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999), *aff'd by Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000). "Objective verifiability" is required for the application of the discovery rule with eight ways to objectively verify the abuse:

- (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

(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.

At the beginning of this case, the Petitioner only pointed to the attempted suicide as their “proof of a chain of facts or circumstances.”(R. 115, lines 15-20). Now, however, she has removed this allegation, because by making the suicide attempt the event that points to the abuse, she inevitably loses her argument that she did not have knowledge of harm at the time. (R. 106, line 18 through R. 107, line 4). Now, that argument has disappeared and the Petitioner has set forth several new attempts: (1) a documented medical history of childhood sexual abuse, (2) contemporaneous statements of the abuser, (3) an unknown chain of facts and circumstances, including classic grooming, (4) Smith’s concealment of suicide attempt, and (5) other incidents involving inappropriate conduct by Smith. None of these meets the threshold.

First, there is no documented history of childhood sexual abuse, other than the mentions by the Petitioner, as an adult, that it happened. There are no documents from doctors or others, *during her childhood*, that have been produced to show abuse, despite the fact that as a teenage athlete, she would have had to see doctors for things like sports physicals and vaccinations. Second, the Petitioner has submitted a yearbook entry from Coach Smith. (R. 2542). This entry makes no mention of any sexual relationship or abuse by him. He tells her to practice more in order to make the softball team, and to quit arguing so much. He was both her teacher and her coach during that school year. Likely, there are several students from that time frame, who have similar entries in their

yearbooks. The Petitioner has not shown any evidence that anything in that entry is sexually related.

Third, the Petitioner sets forth, generically, “a chain of facts and circumstances, including classic grooming.” There is no evidence that in doing things such as giving the Petitioner a ride home after practice, Smith treated Doe any differently than he treated any other student. He testified that he gave rides to a number of his students and players as did other coaches. (R. 767, pp. 31:14-24). Fourth, the statement that Smith concealed Doe’s suicide attempt is preposterous. When Doe entered Smith’s classroom and told him she had taken pills, he testified that he yelled down the hallway for someone to get the nurse.(R. 792, pp. 131:3-12). But for the fact that this occurred over 20 years ago, there would probably be quite a few people who heard that and would remember it. The school nurse came and EMS came to the school, into the classroom and put her on a stretcher and took her to the hospital. (R. 792, pp. 131:18-20). Mr. Smith did not conceal anything. He reported it to the nurse. The Petitioner has produced no policies or procedures showing that Smith, in February 1989, was required to do anything beyond notifying the nurse.

Finally, the Petitioner claims “other inappropriate conduct.” Only two incidents have arisen in Mr. Smith’s career where he was “accused” of inappropriate conduct, and both occurred years after Doe dropped out and left the school and neither shows any propensity for sexual abuse. Mr. Smith caught two students making out in the hallway. When he tried to corral them to the office, they ran in two different directions and he was unable to catch them. He was reprimanded for not physically holding on to them as he escorted them and told he handled the situation “inappropriately.” (R. 773, pp. 56:9 through R. 774, pp. 58:9). Additionally, again, years later, Mr. Smith was teaching a swimming class. A female student lost her top. As Mr. Smith was helping clear the pool so she could find it, she thought he might have looked at her. Mr. Smith was cleared. (R.

812, pp. 210:18 through R. 813, pp. 213:22). Neither of these instances has any bearing on this case.

Even in the light most favorable to the Petitioner, there is no objectively verifiable evidence to support the application of the discovery rule in 2007.

B. PETITIONER HAS NOT MET HER BURDEN OF PROOF WITH REGARD TO EXPERT TESTIMONY.

Though the expert witnesses will testify that the Petitioner appears to meet the qualifications for repressed memory, none can say to a reasonable degree of medical certainty when the memories were repressed or when she recovered them. When asked about the earlier alleged episode of abuse, the experts could not tell when those memories were allegedly repressed or recovered either. The prior episode of similar abuse which Doe also claims was repressed at some unknown point, was recovered, according to her, in the mid 1990's. The experts could not explain why some previously repressed memories of abuse would be recovered in the 1990's and memories of these incidents would not. They can only say that they *believe* that at some point she repressed the memories and at some later point, she recovered them. This is not enough to bypass the statute of limitations. Petitioner knew at the time of the events, what was going on, and that she was being harmed. She was fifteen (15) years old, was getting her drivers license, and going out for a sporting team. She knew right from wrong. Her own testimony, statements to doctors and other written statements show that she claims that at the time he was abusing her, she was fearful, "frozen" and crying. This is evidence of knowledge of harm. Under *Doe v. Crooks*, the Petitioner does not need to understand the extent of the harm, just the fact of it. 364 SC 349, 613 S.E.2d 536 (2005). Like the plaintiff in the *Crooks* case, the Petitioner "was aware of the abuse while it was occurring." *Id.* at 537. Because she knew at the time, the statute is only tolled due to her being a juvenile. She is not entitled to any

additional tolling, because there is no objectifiable evidence of when she repressed the memories, and no expert testimony regarding the same.

II. THE COURT PROPERLY CONSTRUED THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PETITIONER.

“A motion for summary judgment shall be granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E. 2d 868, 874 (2001)(quoting Rule 56(c), SCRCPP); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). Summary judgment is appropriate when “there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986), and “where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986).

Petitioner argues that the court failed to construe a number of “factual inferences” in the light most favorable to her when considering summary judgment and that if the court had in fact construed such facts in the most favorable light to her, she would have overcome summary judgment. Petitioner fails to acknowledge that many of the facts delineated by the court are not “construed” but are in fact, statements from Petitioner’s own mouth. The facts Petitioner claims were not properly construed are: (1) that “freezing” and being “uncomfortable” while she was being fondled was evidence of knowledge of harm, but that her “freezing” should instead be construed as showing an act “so shocking” that she could not process it; (2) that on its face, the yearbook entry from Smith

shows nothing unusual, when Doe claims it shows an “unusual relationship” that included sexual contact; and (3) that the alleged silence with regard to Petitioner’s suicide attempt demonstrates that he did not want any inquiry into their relationship.

With regard to number three, the Petitioner has not presented one shred of evidence that Mr. Smith was “silent” about the suicide attempt of Petitioner. To the contrary, all evidence is that he yelled out from his classroom, and summoned the nurse and an ambulance who transported Petitioner from his classroom to the hospital. (R. 792, pp. 131:3-24). The court is being asked to disregard the only evidence in the case about this situation. Petitioner’s testimony was that she didn’t remember. Therefore, the only evidence in this case about the suicide attempt at the school, is based on the records, and the records show that Smith contacted someone who called 911.

The second claim, regarding the statement in the yearbook, was not improperly weighed by the trial court. The statement in the yearbook is what it is. On its face, it makes absolutely no mention of any inappropriate relationship between Smith and Doe, and it would be improper for the court to read such into the entry. The court merely ruled that on its face, there is no reference to an inappropriate sexual relationship between the two.

With regard to number one, while the burden of summary judgment is on the defendants to show that there are no questions of fact for a jury, Petitioner has the burden of overcoming the statute of limitations by showing objective verifiability. Therefore, it is Petitioner’s burden to show that she had absolutely no knowledge of harm until 2007. The facts stand, as Petitioner wrote them in her own statement. Though she did not put them out there until 2007, they are clearly statements of how she felt at the time of the incidents. In her September 11, 2007, statement to the Sheriff’s Office, she wrote, “I remember wanting to die after that happened.” (R. 2240, line 18). She also wrote that she

was too embarrassed to tell anyone and “I remember thinking that I wanted him to pay for what he had done to me.” (R. 2240, line 18). Petitioner clearly writes that she is remembering things. This shows that she had the feelings during the incidents, or she would not have them to “remember.”

In her December 7, 2007 statement to police, she wrote, “I remember anxiety feeling from being at the stables.” (R. 2244, line 7-8). She stated that “I remember the anxiety....I remember being scared because of what he did.” (R. 2244). As to another incident, she stated, “I remember feeling scared..... I was very scared and did not know what to do.” (R. 2244). Finally, in her own words, she says, “I remember being scared....Smith put his right hand up my skirt and moved my underwear [sic] and touched my vagina. I froze....I remember ...being very nervous and hoping another student would get up and come to the desk....I remember feeling sick to my stomach and froze until the school bell rang....then remember going into the school bathroom and crying.”(R.2245). All of these statements, made personally by the Petitioner, in her own words, demonstrate that she had these feelings at the time of the incident. Her use of the words “remember” and a description of how she felt at the time, are evidence of knowledge of harm in her own words. It was only when her deposition came up, that she then claimed that these were feelings she was having in 2007, not back in 1988 and 1989 during the alleged encounters. The evidence here does not require the court to weigh or construe it. The evidence is Petitioner’s own words about how she was feeling at the time of these encounters that allegedly occurred when she was fifteen years old and old enough to understand that it was not appropriate for a teacher to touch her vagina in class, or for her to touch his penis in class. While counsel claims that the “‘freezing’ up illustrates the acts were so shocking to her young psyche that she did not know how to process them...”, her own statements show that she remembers how she felt, and remembers going to the bathroom afterward to cry. She did know

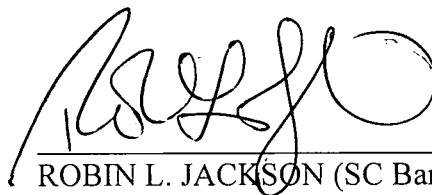
it was wrong. She did know she was being harmed. The evidence is clear in Petitioner's own words.

The evidence of this case directly contradicts the Petitioner's claim that she had no knowledge of harm until 2007. The court properly issued summary judgment to Charles Smith in this matter.

CONCLUSION

The basis for the Petitioner's petition as to Mr. Smith are 1) that she did not fail to meet the statute of limitations; and 2) that the factual allegations were not construed in her favor. Respondent Smith asserts that the evidence is clear that the Petitioner did not meet her burden of proof, did not show objective verifiability, and failed to file her claim within the applicable statute of limitations. Additionally, the court did properly consider the facts and view them in the light most favorable to her. For the above set forth reasons, and for any additional arguments on the statute of limitations that are contained in the brief of the James Island High School and Charleston County School District, which Respondent Smith hereby joins in, pursuant to SCAP Rule 208(b)(6), Smith asks this court to deny the Petitioner's petition.

Respectfully Submitted,



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November 5, 2014

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **RESPONDENT SMITH'S RETURN TO THE PETITION** has been served upon all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 5th day of November, 2014, to the following:

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November 5, 2014

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S.C. SUPREME COURT

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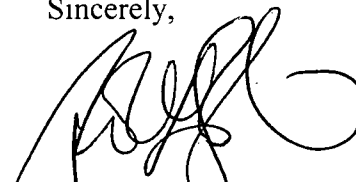
RE: Doe v. Charles Smith, et al
Circuit Court Case No.: 2010-CP-10-7699
Appellate Case No.: 2013-000084 (Court of Appeals)
Appellate Case No.: 2014-002057 (Supreme Court)
IRF Claim No.: 46138

Dear Clerk:

Please find enclosed the original and seven (7) copies of Respondent Charles Smith's Return to the Petition in the above referenced matter. Please file the original and all copies and return one file stamped copy to me in the enclosed self addressed stamped envelope. By copy of this letter, I am serving all counsel with a copy of this brief.

With kind regards, I am,

Sincerely,



Robin L. Jackson

RLJ/amh
Enclosures

cc: Aaron E. Edwards, Esquire
Brian Quisenberry, Esquire