THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHALND COUNTY
Richland County Circuit Court
Jocelyn Newman, Circuit Court Judge

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SC Court of Appeals

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

APPELLANT'S FINAL REPLY BRIEF

THE LAW OFFICES OF JASON E. TAYLOR, P.C.

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I. Respondent improperly restates the facts.

Respondent included a statement of the facts which clearly were not presented in the light most favorable to the non-moving party. This Court is required—like the trial court—to the view the evidence in the most favorable to K.S.. Ralph v. McLaughlin, 428 S.C. 320, 339, 834 S.E.2d 213, 223 (Ct. App. 2019); Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

II. Negligence is the appropriate cause of action.

Respondent cites no cases that state mental health damages can only be recovered by alleging outrage or negligent infliction of mental distress causes of action. Moody would the proper party to assert a claim of outrage. K.S. is pursuing the party that allowed Moody's conduct to continue. Respondent's negligent failure to follow South Carolina law and its own policies led to the damages suffered by K.S. Respondent itself was not the bully. Instead, the Respondent negligently allowed the bully—Moody—to continue after it is undisputed the principal first received notice of bad conduct. (R. p. 354, lines 7-20; p. 356, lines 6-16; R. p. 356, line 19-p. 357, line 3; R. p. 551-556, 581-582, 585-586). There was also testimony that Dr. Holzendorf was informed of a specific incident involving the K.S. and Moody prior to the cafeteria but failed to act. (R. p. pg. 188, line 110-pg. 189, line 15; pg. 210, line 18-pg. 211, line 12.) The failure to act is what caused K.S. to suffer damages. The appropriate cause of action in that instance is negligence.

The cases cited by Respondent instead supports K.S.'s contention that negligence is the appropriate cause of action. In the case which Respondent principally relies, the Supreme Court in Ford v. Hutson, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981) held:

> Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical injury suit.

The Supreme Court in Ford then cites Mack v. S.-Bound R. Co., 52 S.C. 323, 29 S.E. 905, 906 (1898) in which the plaintiff was allowed to recover for "fright" when a train going in excess of the speed limit killed plaintiff's mule while plaintiff managed to avoid with relatively minor physical injuries mainly consisting of bruises. However, the plaintiff suffered from physical manifestations of his fear including "nervous system was shocked," his mind was "partially destroyed," his reason was "unbalanced," and for a long time was "made ill and sick" from the terrible shock to his nervous system. Id. The Supreme Court in Mack affirmed that the jury were properly instructed that shock, fright and emotional upset which produces injury to a person's physical health is properly recoverable under a negligence cause of action. Id, 29 S.E. at 909 (1898). The Supreme Court concluded by holding:

> Here is a physical injury [referring to the plaintiff's nervous breakdown], as serious, certainly, as would be the breaking of an arm or leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie.

Id., 29 S.E. 910(clarification added.)

The Supreme Court in Ford, by citing Mack, did not overrule the "long accepted" concept of allowing a recovery for mental health injuries in personal injury suits. Ford, supra. The Supreme Court in Ford also cited Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 607–08, 103 S.E.2d 265, 272 (1958) which recognized that damages associated with shock, fright, and upset was actionable even in the absence of physical impact. The Supreme Court in a footnote in Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70, fn. 1 (2007), reaffirmed the concept that a mental health injury which produce a physical manifestation is actionable under

a negligence theory and did overrule that line of cases. The real question is whether there was a sufficient mental health injury, and the Supreme Court definitively ruled that such questions are for the jury. Padgett, supra.

The difference in the cases cited by Respondent, and the evidence in the light most favorable to the K.S. can be best be summarized in this quote:

> Respondent relies upon Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265, for support of his contention that under this testimony it was for the jury to say whether or not Mr. Huntley's death was proximately caused by the defendants' negligent act. But that case does not support such contention. There, recognizing the rule in Mack v. South Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898), we upheld recovery for physical injury sustained as a consequence of shock, fright, and emotional upset directly caused by the defendant's negligent act, though there was no physical impact. Here, the claimed emotional upset and consequent acceleration of physical deterioration resulted not from the defendants' negligent act, but from Mr. Huntley's concern, at first, over his wife's condition, and from his fretting over the delay in settlement of his claims. Distinction between the Padgett case and the one at bar is obvious. In the former, the plaintiff's fright was a natural, immediate, and foreseeable result of the negligent operation of the defendant's truck whereby it crashed into the plaintiff's home; the ensuing physical consequences were no less the direct result of the negligent act than were the shock and fright that attended it. In the instant case Mr. Hutley's injury was nothing more than a trivial bruise; of itself it entailed, so far as the record indicates, no shock, fright or emotional upset. His concern over his wife's possible injuries was apparently short-lived, and according to Dr. Perry it ended when 'he saw that she was going to be all right.' The worry that respondent would couple to appellant's negligent act so as to make that act the proximate cause of the death of his intestate concerned not the negligent act itself but the decedent's impatience or dissatisfaction with the progress of negotiations or litigation looking to settlement of his claims, which included a claim for damage to his automobile. To uphold his contention would be to extend the concept of proximate cause far beyond the scope contemplated in the Padgett case or any other precedent in this jurisdiction, and, we think, beyond reason.
>
> Roscoe v. Grubb, 237 S.C. 590, 594–95, 118 S.E.2d 337, 339 (1961)

There is certainly sufficient evidence in the record that K.S., like the plaintiff in Mack, suffered from a mental injury from which a jury could have reasonably ruled in his favor. K.S. testified he is still afraid of Moody. (R. p. 157, lines 5-8); (R. p. 164, line 2-p. 165, line 1); and often feels anxious, hopeless, and has trouble sleeping. (R. p. 165, line 5-pg. 167, line 17.) Mr.

Seeger testified K.S. still has anxiety and angry outbursts in the months and years since the incident. (R. p. 192, line 2-p. 193, line 16.) Mr. Seeger also described K.S. as being "fidgety," his "anxiety level was through the roof," and that he (K.S.) chewed all of his nails off continually." (R. p. 203, lines 14-20.) Mr. Seeger also testified that there are some period of time where K.S. is depressed, easily angered, and will not come out of his room and has trouble sleeping. (R. p. 209, lines 10-13; p. 209, lines 5-15.) K.S. has received in-office therapy from a series of psychologists after being removed from Moody's class (R. p. 193, line 19-p. 194, line 20; p. 126 lines 3-9; p. 200, line 9-p. 203, line 3; p. 205, line 5-p. 208, line 3); the assistance of a school counselor during the rest of his elementary school time. (R. p. 204, line 17-p. 205, line 4.) K.S. also sees a psychiatrist who prescribes him medication including Zoloft. (R. p. 208, lines 4-19.) K.S. has improved with medication, but K.S. struggles even with medication. (R. p. 208, line 21-p. 210, line 4.) The days K.S. does not take his medication are "rough." (R. p. 209, lines 7-9.) K.S. also presented expert testimony, Dr. David Englert, who testified as to his mental health treatment and diagnoses. Dr. Englert testified that K.S. has had several diagnoses over the years since the incident. These diagnoses included oppositional defiance and adjustment disorder. (R. p. 312, line 25-p. 312, line 4.) Dr. Englert also opined that it took time for K.S.'s depressive disorder to be diagnosed. (R. p. 293, line 1-pg. 297, line 4.)

Respondent has also attempted to distinguish Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 38–39, 448 S.E.2d 564, 567 (Ct. App. 1994) by relying upon the phrase "sexual assault." The facts of Doe show this assertion is specious. Doe was under the legal age of consent at the time she had sexual intercourse with an employee of the Defendant. This made the sexual intercourse illegal ddespite Doe's willing participation and constituted a sexual assault pursuant to S.C. Code Ann. § 16–3–655. This Court held fact that Doe did not suffer "an actual physical injury

at the time of the assault"—the illegal sexual intercourse—was not determinative of whether Doe had suffered damages. Id. This Court also held that the liability of the defendant was based on the failure to prevent a second instance after being informed of the first. Doe by Doe, 323 at 40–41, 448 S.E.2d at 568 (Ct. App. 1994). This is the exact scenario that was in evidence before the trial judge. In Doe, this Court held the denial of a directed verdict was appropriate. This Court should find the grant of a directed verdict was inappropriate in the instant action.

K.S. is advocating for a recovery which has been the law of the State of South Carolina for more than 120 years. A reversal would not—despite Respondent's histrionics— do damage to the unalleged causes of action.

CONCLUSION

For these reasons, K.S. respectfully requests this Court REVERSE the decision of the trial court to exclude the testimony of his expert witness, direct a verdict, and to declare that the Safe School Climate Act has repealed the South Carolina Tort Claims Act. K.S. respectfully requests this Court remand the instant action for a new trial.

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CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies Appellants' Final Brief and Final Reply Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

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