

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Wesco Insurance Company as subrogees  
of Villager Construction and its employees,  
Dock Cooper and Estate and Heirs of  
Nelson Gutierrez,

Plaintiffs

vs.

Albert R. Donahue, Sr., State Farm  
Insurance Company, and Alma Rosa  
Pasos as Personal Representative of the  
Estate of Nelson Enrique Guterrez Pasos,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL  
CIRCUIT

CASE NO.: 2016-CP-32-03772

**ORDER GRANTING DEFENDANT  
ALBERT R. DONAHUE SR.'S MOTION  
FOR SUMMARY JUDGMENT**

**RECEIVED**  
JUL 27 2020  
SC Court of Appeals

This matter comes before the Court pursuant to the Plaintiffs' and the Defendant Albert R. Donahue Sr.'s competing motions for summary judgment. Plaintiff Wesco Insurance Company filed this subrogation matter on November 3, 2016. Briefs were submitted by both parties and oral arguments heard before the Court on May 18, 2020 via Webex video conference. Jerry Reardon, Esquire appeared for the Plaintiffs, while J. Austin Hood, Esquire appeared for the Defendants.

**FACTUAL BACKGROUND AND FINDINGS**

This tragic case arises out of an automobile collision on November 15, 2013, near mile marker 111 on Interstate 26, near Lexington, South Carolina. As admitted by both parties in the pleadings, Plaintiffs Gutierrez and Cooper were operating a milling machine for Village Construction to grind out existing asphalt from the interstate around 10:00 o'clock that morning. Mr. Cooper was operating the machine while Mr. Gutierrez was on

the ground walking beside the machine. Mr. Cooper noticed a vehicle, which was driven by Defendant Donahue, coming toward them at a high rate of speed, and he yelled to Mr. Gutierrez to get out of the way. Mr. Gutierrez heard Mr. Cooper's yell and looked up at him, but he apparently could not understand his warning. Defendant Donahue's vehicle struck Mr. Gutierrez, causing his body to be thrown from the point of impact. Mr. Cooper has asserted that he saw the impact, immediately got out of the milling machine, and ran to help Mr. Gutierrez while calling 9-1-1. Ultimately, Mr. Gutierrez died at the scene. Mr. Cooper was not struck by Defendant Donahue's vehicle, nor did it make physical contact with Mr. Cooper or the milling machine he was operating at that moment. Subsequent to these event, Mr. Cooper filed a workers compensation claim for the emotional trauma he experienced from witnessing the fatal accident. It appears he did not file an independent claim against Defendant Donahue.

In the case at hand, Plaintiffs claim Mr. Cooper suffered from depression and other emotional distress caused by witnessing his coworker's death. They further allege Mr. Cooper was forced to quit his job and has undergone medical treatment for his psychological injuries. The Plaintiffs claim Wesco Insurance Company is entitled to recover damages from Defendant Donahue for the medical and indemnity payments it made to Mr. Cooper as his worker's compensation insurer for his injuries resulting from Mr. Donahue's alleged negligence. Conversely, Defendant argues that no recovery exists under South Carolina law for Mr. Cooper as a bystander to this tragic event.

### ANALYSIS

The primary issue presented to this Court is whether Mr. Cooper is entitled to recover damages for emotional distress conditions he allegedly experienced as a result

of Donahue's alleged negligence in striking Mr. Gutierrez. Mr. Cooper was not struck by the Donahue vehicle and the basis of Mr. Cooper's emotional distress claim is what he witnessed happen to Mr. Gutierrez at the scene of the accident when the Donahue vehicle made contact with Mr. Gutierrez's body.

Plaintiffs argue to the Court that Mr. Cooper sustained a physical injury to his nervous system and that South Carolina case law allows for such a recovery. As noted by both parties in oral argument, Mr. Cooper was treated by Dr. Nicholas Lind of Post Trauma resources following the accident that forms the basis of this case. Dr. Lind testified in his deposition in response to cross examination questions by counsel for the Defendant Donahue as follows:

Page 44 - Deposition of Dr. NICHOLAS A. LIND, PSY.D. 10/23/2019

14 Q. Okay. So there is -- I guess my original --  
15 going back to my original point, it's not -- it's not  
16 that there is an injury, a physical injury, to him as a  
17 result of this emotional impact that he has had from  
18 this event. It's more of a physical response that he  
19 has --

20 A. Uh-huh.

21 Q. -- as a result of this --

22 A. Right.

23 Q. -- incident.

24 A. So it's that there is just a change in  
25 the -- in its -- a change in the -- and a physical

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1 response.

2 Q. Okay. So it is a -- a change in his physical  
3 response how he -- from how he may have reacted prior  
4 to this event happening, but it's not that there's an  
5 injury to him physically from this event as a result of  
6 the psychological, the -- the anxiety or the depression  
7 or the PTSD. Am I saying that right?

8 A. Right.

9 Q. Okay.  
10 A. Right.  
11 Q. It's not -- it's not a situation where  
12 the -- the -- the emotional injury or the psychological  
13 injury that he may have experienced as a result of  
14 witnessing this event has caused him to have -- he may  
15 have had a physical reaction to it, but it's not a  
16 physical injury that he has had from it. Is that -- am  
17 I saying that correctly?  
18 A. Right.

Defendant Donahue argues to the Court that because Mr. Cooper was not struck by Mr. Donahue's vehicle and the basis of his claim, by and through Plaintiff Wesco, is from what Mr. Cooper witnessed happen at the scene, Mr. Cooper is limited to asserting a cause of action for negligent infliction of emotional distress as a bystander. Dr. Lind testified in his deposition as follows:

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25 Q. And psychological injury -- psychological

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1 injuries do not indicate a physical injury to the body;  
2 is that correct?  
3 A. Right.  
4 Q. This is an injury to the mind, is that right,  
5 or to the emotions?  
6 A. Right. Yeah. So it's kind of, you know --  
7 but, you know -- but it's -- there was no physical  
8 contact.  
9 Q. Right.  
10 A. Right.  
11 Q. He never had -- as you understand it, he  
12 never had any physical injury from this motor vehicle  
13 accident; is that --  
14 A. Right.  
15 Q. -- correct? There was no contact to his  
16 body.  
17 A. Right.

18           Q.    This -- his entire issue was what he  
19   witnessed with regard to his coworker and the events to  
20   the accident; is that right?  
21           A.    Right.

Defendant Donahue asserts in this action Mr. Cooper is unable to recover as a bystander because his claim does not satisfy the requirements for such a claim required by South Carolina case law.

Under Rule 56(b), SCRCP, a defendant may move for summary judgment in his favor against the claimant at any time. The motion may be made on all or any part of the case. SCRCP 56(b). A motion for summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. SCRCP 56(c); City of Columbia v. American Civil Liberties Union, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any triable issues of fact exist, 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. Id.

Generally, negligence claims are not susceptible to summary judgment because of the many questions normally present in such cases, such as the reasonableness of a party's conduct, foreseeability, and proximate cause. Folkens v. Hunt, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (1986) (citing 6-Pt. 2 Moore's Federal Practice § 56.17 at 56-946 (1985); 65A C.J.S. Negligence § 251(1) at 778 (1966)). However, exceptions are made in circumstances where the facts, even if proven, would not create a legal cause of action. See Newton v. S.C. Pub. Rys. Comm'n, 319 S.C. 430, 462 S.E.2d 266 (1995) (finding summary dismissal appropriate where the plaintiff's superseding negligence was not a natural and probable consequence of the defendant's actions); Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 407 S.E.2d 637 (1991) (finding summary judgment appropriate

where there was no evidence to support claims of negligence, fraud, or bad faith from which a jury could find in plaintiff's favor); Hammond v. Scott, 268 S.C. 137, 143, 232 S.E.2d 336, 338 (1977) (finding summary judgment properly granted where "the only reasonable inference" arising from the facts is that the defendant did not breach any duty of care and thus could not be negligent).

South Carolina case law holds that generally "negligent infliction of emotional distress is a bodily injury for which damages may be recovered under a standard insurance policy." State Farm Mut. Auto. Ins. Co. v. Ramsey, 297 S.C. 71, 72, 374 S.E.2d 896 (1988). However, there are only a few circumstances under South Carolina law for plaintiffs to recover for a damaging emotional response to physical injuries of another:

[I]n order to avoid the problem of disproportionate liability arising in cases where mental trauma results from witnessing an injury or from responding emotionally to a physical injury to a friend or relative, the courts generally deny recovery for such "indirect" emotional trauma except in very narrowly limited situations. In South Carolina, such indirect emotional distress is only recoverable: (1) under Kinard v. Augusta Sash and Door Co., which provides a limited right of "bystander recovery" for emotional distress from witnessing the death or serious bodily injury of a close relative; (2) for loss of consortium; (3) for wrongful death; and (4) in "special" situations.

The South Carolina Law of Torts § 2.A.1.b.(1).

In 1985, the South Carolina Supreme Court decided Kinard v. Augusta Sash and Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985), the seminal case creating a cause of action for negligent infliction of emotional distress on "bystanders" in South Carolina. "[T]he decision in Kinard created a new substantive right, not a new remedy to vindicate existing rights." McCaskey v. Shaw, 295 S.C. 372, 375, 368 S.E.2d 672, 673 (1988). Kinard also defined the limits of the bystander cause of action and laid out the five-part

test for a successful claim:

- (a) the negligence of the defendant must cause death or serious physical injury to another;
- (b) the plaintiff bystander must be in close proximity to the accident;
- (c) the plaintiff and the victim must be closely related;**
- (d) the plaintiff must contemporaneously perceive the accident; and
- (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Kinard, at 582-83, 336 S.E.2d at 467 (emphasis added).

The Kinard Court further noted that “Developing any cause of action necessarily includes setting limits. Such limits are required to control liability.” Id. at 581-82. In setting this limited test, the Court in Kinard indicated that it was following the “foreseeability” approach of a California case, Dillon v. Legg, 441 P.2d 912 (Cal. 1968). The Court in Kinard held that, in order for the plaintiff to be a foreseeable person to which a defendant owes a duty of care, they must be “closely related” to the victim. Specifically, Kinard allowed the plaintiff to recover damages for her emotional injuries because she was the mother of the injured victim. Since Kinard, the South Carolina Supreme Court has allowed recovery in other cases where parents were claiming emotional injury from watching their children suffer injury or death. See State Farm Mut. Auto. Ins. Co. v. Ramsey, 297 S.C. 71, 71, 374 S.E.2d 896, 896 (1988). The Court has been presented with no other South Carolina state cases that have allowed recovery for any relationships other than parent-child.

In the case at hand, Mr. Cooper was not “closely related” to the decedent, Mr.

Gutierrez. He obviously lacks the parent-child relationship that has been allowed recovery by South Carolina courts and presents no prior caselaw as to why his co-worker relationship should be considered to have met this prong of the Kinard test. While this court recognizes that witnessing such a tragic happening is not without emotional trauma, Mr. Cooper was a co-worker and not closely related to the decedent.

Counsel for the Plaintiffs has conceded in this action that Mr. Cooper was not closely related to Mr. Gutierrez. Plaintiff contends that the psychological effects resulting in physical manifestations as a direct result of watching the fatal accident are equivalent to a physical impact and injury caused by the Defendant Donahue. The cases on which Plaintiff relies involve emotional injuries where Plaintiffs were "direct victims" and thus distinguishable from the case at hand.<sup>1</sup> While the court acknowledges the tragic nature of the case, Plaintiff's argument does not appear to fit into the current holdings of South Carolina jurisprudence.

Based upon the facts of this specific case, I find that because Mr. Cooper was not closely related to the decedent, he cannot satisfy all elements of the Kinard test as required, and therefore cannot establish a bystander claim for negligent infliction of emotional distress. I further find that based on the testimony of Dr. Lind, Mr. Cooper's treating psychologist, that Mr. Cooper's claimed injuries are psychological / emotional injuries, the kind of injuries contemplated in a claim for negligent infliction of emotional distress and were solely the result of what he witnessed happen to Mr. Gutierrez on the

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<sup>1</sup> "Padgett was a direct victim. He was in his house when it was jarred by the truck and he suffered physical damage to his property. His shock and distress did not result from witnessing an injury to another person but, presumably, from fear of harm to himself." Bray v. Marathon Corp., 347 S.C. 189, 195, 553 S.E.2d 477, 480 (Ct. App. 2001), aff'd in part, rev'd in part, 356 S.C. 111, 588 S.E.2d 93 (2003)(citing Padgett v. Colonial Wholesale Distrib. Co. 232 S.C. 593, 103 S.E.2d 265 (1958)).

day of the accident in question in this case and not because of any physical injury to Mr. Cooper. This case centers around the facts, circumstances and claims contemplated by the Kinard case and its progeny. Because neither Mr. Cooper nor Wesco Insurance Company can establish they are entitled to relief on these grounds, even if the facts they allege are true, this Court finds that summary judgment in favor of the Defendant Donahue is proper in this action.

**CONCLUSION**

In light of all the facts and circumstances presented to this court, the arguments and legal memoranda provided by counsel this court finds that Defendant Albert R. Donahue, Sr.'s Motion for Summary Judgment is GRANTED and that the Plaintiffs' Motion for Summary Judgment is DENIED.

**IT IS SO ORDERED.**

[SIGNATURE PAGE TO FOLLOW]



Lexington Common Pleas

**Case Caption:** Wesco Insurance Company , plaintiff, et al VS Albert R Donahue Sr  
**Case Number:** 2016CP3203772  
**Type:** Order/Summary Judgment

It Is So Ordered

s/ Walton J. McLeod