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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No.: 2021-000596
Case No.: 2021-CP-06-00028

Ashley Whitehead, individually and as
Guardian ad Litem for Brantley W.,
a minor under the age of fourteen (14) years
and William B. Whitehead,

Appellants,

v.

Barnwell School District 45,

Respondent.

REPLY BRIEF OF APPELLANTS

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A. Respondent's reliance on Kinard is misplaced.

Appellants' claim is one for negligence which requires proof of the following: a duty; breach of that duty; causation; and damages. It is not a claim for negligent infliction of emotional distress as recognized by Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). This distinction, as subtle as it may be, is the crux of this appeal. In Kinard, the Court answered a fact specific certified question from the federal district court: "Whether a mother who is herself physically injured as a result of a delict may recover damages for severe shock, emotional trauma and resulting physical injuries caused by witnessing severe injury to her daughter in the same incident?" Id. Appreciating the limited nature of the certified question that arose from a specific and limited factual scenario, the Court decided to recognize a cause of action for what it coined negligent infliction of emotional distress in the bystander context.[1] Coincidentally, this cause of action is often referred to as "bystander liability." What makes this bystander liability/negligent infliction of emotional distress claim different from an ordinary negligence claim is the analysis of whether a defendant owes a duty to a plaintiff. Under the negligent infliction of emotional distress cause of action recognized in Kinard, the only way to prove a duty (and to qualify as a foreseeable plaintiff) is to meet the bystander analysis set forth in Kinard. However, if a defendant already owes a duty to the plaintiff, the bystander analysis never comes into play.

[1] Even though the Kinard Court limited its recognition of the negligent infliction of emotional distress claim to the bystander context, the Court was careful to remind us that it was answering a very limited certified question on the specific facts before the Court. For that reason, the Court, in footnote 2, recognized that the cause of action could apply in other factual situations, outside of the bystander context.

This distinction is clearly recognized in Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003). As much as Respondent wants to distinguish Bray on the basis that it is a products liability claim, that argument fails. In Bray, the Court properly recognized that Bray was already a foreseeable plaintiff as the user of the product and the manufacturer of that product already owed her a duty of care, just as the defendants in Mack, Spaugh, and Padgett already owed a duty of care to the direct victims of the negligence who were already foreseeable plaintiffs. Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898); Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930); Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265 (1958). Therefore, the bystander analysis did not apply in Bray; rather, the Bray Court properly analyzed Bray's claim as an ordinary negligence claim and looked all the way back to Mack, Spaugh, and Padgett for that reason.[2] Interestingly and quite significantly, the term "negligent infliction of emotional distress" does not appear in the Bray opinion. Rather, the Court recognized and appreciated the distinction and analyzed it as an ordinary negligence claim:

> Bray asserts a products liability claim for **negligence** under *Padgett v. Colonial Wholesale Distrib. Co., supra.* The *Padgett* court held that a plaintiff may recover for a physical or bodily injury that results from mental and emotional trauma **in the absence of physical impact**. *See also, Spaugh v. Atlantic Coast Line R. Co.,* 158 S.C. 25, 155 S.E. 145 (1930)(suffering from nervous breakdown, as result of defendant's negligence, would support verdict for plaintiff); *Mack v. South-Bound R. Co.*, 52 S.C. 323, 29 S.E. 905 (1898)(defendant liable for injuries sustained as result of mere fright and mental disturbance caused by its negligence). Because *Padgett* allows recovery for injuries sustained as a consequence of shock, fright, and emotional upset, Bray may be able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker.

[2] Unlike the circuit court below, the Court in Bray had no problem with the age of the case law; rather, the Court recognized the subtle distinction in the facts that made Mack, Spaugh, and Padgett apply instead of Kinard.

Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003)(emphasis added). Here, as in Bray, the Appellants' have properly asserted ordinary negligence claims as direct victims under Padgett and its predecessors. Although Respondent has been diligent in referring to Appellants' claim as one for negligent infliction of emotional distress as recognized by Kinard, that mischaracterization does not change the fact that Appellants have properly asserted ordinary negligence causes of action as the direct victims of Respondent's conduct; Respondent's attempt to pigeon-hole these claims as ones for negligent infliction of emotional distress under Kinard fails under the applicable law. As such, the circuit court erred.

B. Respondent's reliance on Doe is misplaced.

For the same reasons that Kinard is inapplicable, so is Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 305 (2007). In Doe, a student was sexually assaulted by a teacher. The parents, who were informed about the sexual assault after it occurred, brought a negligence claim against the school for the mental distress they suffered. Clearly, the parents' mental distress was based on a physical injury suffered by their daughter; the parents were not the direct victims of any negligence. Therefore, to qualify as foreseeable victims, they had to meet the bystander analysis of Kinard. They could not because they did not witness the physical injury to their daughter. To illustrate this point, a hypothetical is appropriate. If the Whitehead parents had received a call informing them that their son suffered a physical injury in a wreck or had been run over by the bus, Kinard would apply because the parents would be claiming damages for mental distress arising out of a physical injury suffered by their child. Because they were not direct victims, they would have to meet the bystander analysis. Because they did not witness the incident, they could not meet the elements of bystander liability. Therefore, their claims would fail. That is

not the situation here. The Whitehead parents actually lost their child for a period of time because of the negligence of the school district and they experienced the loss in real time as it was playing out. Unlike the parents in Doe, the Whitehead parents are direct victims to whom the school district owed a duty and the circuit erred in holding otherwise.

C. Respondent's reliance on Dooley is misplaced.

Respondent relies on Dooley v Richland Memorial Hosp., 283 S.C. 372, 322 S.E.2d 669 (1984), for the proposition that Appellants' claims fail because they have not shown evidence of any physical injury. In Dooley, the parents were advised by the hospital that their son had been tragically injured in a wreck. After sitting at the bedside of the patient whom the parents believed to be their son based on the information from the hospital, the parents discovered that the patient was not their son. They brought an action against the hospital for negligent infliction of emotional distress. The Court found that the parents had failed to show any negligence against the hospital in the first place because the hospital simply relied on information provided by law enforcement; the parents also failed to show objective evidence of physical symptoms of their emotional distress. The Court therefore declined to decide whether a cause of action existed under South Carolina law. Moreover, Dooley involved a jury verdict that was reviewed on appeal. In contrast, this case involves an appeal from a decision on a motion to dismiss. Here, Appellants alleged a manifestation of physical symptoms in their Complaint; in the context of this motion to dismiss, that allegation is sufficient **to defeat dismissal**. To the extent the circuit court held otherwise, it was in error.

CONCLUSION

For the reasons set forth in the Brief of Appellants as well as the arguments set forth above, the circuit court erred and its Order dismissing Appellants' individual negligence claims for emotional distress manifested by physical symptoms should be reversed.

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