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.

RECORD ON APPEAL

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INDEX

ORDERS

PLEADINGS, MOTIONS AND MEMORANDA OF LAW

TRANSCRIPTS

OTHER DOCUMENTS

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
Ashley Whitehead, individually and as Guardian ad Litem for Brantley W., a minor under the age of fourteen (14) years and William B. Whitehead, Plaintiffs, vs. Barnwell School District 45, Defendant.	)	C.A. No. 2021-CP-06-00028 **ORDER**

This case came before the Court on April 1, 2021 on a motion that the Defendant, Barnwell School District 45 ("District), filed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The District seeks to dismiss the Plaintiffs' complaint on the ground that South Carolina law does not permit a claim for an alleged negligence claim under the facts alleged in the Plaintiffs' complaint.

All parties were present and represented by counsel of record for the hearing on the District's motion. For the reasons set forth herein, the Court grants in part and denies in part the District's motion to dismiss.

Plaintiffs allege that, on or about September 11, 2020, the District's school bus driver negligently dropped the minor Plaintiff, B.W., off at the wrong location. For some period of time, B.W.'s whereabouts were unknown to the Defendant, and Plaintiffs Ashley and William Whitehead were informed that their son, B.W., was lost. B.W. was reunited with his parents later that afternoon. The complaint does not allege any physical impact to B.W. or his parents. Rather B.W. and his parents seek to recover for the emotional distress, allegedly manifested by physical symptoms, they experienced because B.W. was missing for a period of time, along with the lingering emotional effects of that traumatic event. Ashley Whitehead brings this case as the

guardian of B.W, and both William and Ashley Whitehead also allege claims individually seeking to recover for their own emotional distress as well as medical expenses incurred for treatment received by B.W.

The South Carolina Supreme Court's opinion in *Kinard v. Augusta Sash and Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) is instructive on the District's motion. In that case, the plaintiff, a mother, sought to recover for her own physical injuries, as well as her alleged emotional distress from witnessing a serious injury to her daughter as the result of a vehicle accident. The Court adopted a cause of action for negligent infliction of emotional distress, but strictly limited the claim to the "bystander" context. In other words, the Court established the elements of this cause of action to require that it only applies when a defendant's negligence causes a death or serious physical injury to another while the plaintiff bystander is in close proximity to the accident and is closely related to the victim. Plaintiffs have conceded that they are not alleging a bystander claim.

Additional South Carolina authorities are consistent with the narrow scope of this claim. For example, in *Doe v. Greenville County School District,* 375 S.C. 63, 651 S.E.2d 305 (2007), a student's parents brought an action against a school district alleging several causes of action arising from incidents of sexual activity between a female student and a substitute teacher. The parents alleged, among other things, a claim for negligent infliction of emotional distress. With regard to this claim, the Court stated as follows:

> In this case, Mr. and Mrs. Doe admit that they did not and cannot allege facts which would support a bystander liability cause of action. **Because South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which is cognizable under South Carolina law**.

Doe, 651 S.E.2d at 307 (emphasis added). *See also Pope v. Barnwell County School District No. 19*, 2017 WL 1148741 (D.S.C. 2017) (recognizing that South Carolina law only permits recovery

for negligent infliction of emotional distress in the very limited context of situations involving bystander trauma).

In *Dooley v. Richland Memorial Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), parents sued a hospital for alleged negligent infliction of emotional distress based on the misidentification of their son as an individual seriously injured in an automobile accident. The Court rejected the parents' cause of action in part because they "failed to make any showing of physical injury to support their claim." As in this case, the parents in *Dooley* alleged to have sustained emotional trauma because of fear and concern about the wellbeing of their child, who had been misidentified as an accident victim. The facts of *Dooley* are analogous to this case, in that the Plaintiffs here allege that for a period of time they were concerned about the wellbeing of their child.

In this case the Plaintiffs admit that they have not alleged a "bystander" liability claim. They instead argue that this is a negligence claim in which they suffered a "direct" injury. Plaintiffs' argument ignores the clear holding of the *Kinard* and *Doe* decisions. They cite to several cases to argue that they can pursue this negligence claim outside of the bystander context. The Court disagrees.

First, the Plaintiffs rely on three older court decisions—*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); and *Padgett v. Colonial Wholesale Distributing Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958). Plaintiffs' reliance on these decisions is misplaced. All of these cases were decided many years ago, prior to the *Kinard* decision. The *Kinard* decision controls, not the older cases relied upon by the Plaintiffs.

Finally, Plaintiffs also rely on *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003). The *Bray* decision is distinguishable from this case. The Supreme Court of South

Carolina in *Bray* held that a worker who was operating a trash compactor when a coworker was crushed to death could bring a products liability claim against the manufacturer and lessor of the compactor for strict liability and negligence. The Court's reasoning in that case was based on the fact that the Plaintiff was alleging a products liability claim under the strict liability statute for defective products. Because the Plaintiff's claim involved strict liability, the Court also allowed a negligence claim to proceed. However, *Bray* did not overrule the *Kinard* and *Doe* decisions, and is limited to the facts of that case, involving a strict liability case based on a defective product.

Therefore, the Court dismisses the claims of Ashley Whitehead and William Whitehead insofar as they seek to recover for their own emotional distress. The parents can proceed with their individual claims, but only with regard to any alleged medical or counseling bills incurred to provide care for B.W. [1]

IT IS THEREFORE ORDERED that the District's motion to dismiss is **GRANTED IN PART AND DENIED IN PART.**

AND IT IS SO ORDERED.

[1]The factual recitations above are based on the complaint in this action and the memoranda filed in support of this motion, and are not intended to and shall not be construed to make any finding of fact in this action. The factual statements in this Order are procedural and cannot be used to prejudice or bind any party who would seek to assert different facts during the pendency of this action.

Barnwell Common Pleas

Case Caption: Ashley Whitehead , plaintiff, et al VS Barnwell School District 45

Case Number: 2021CP0600028

Type: Order/Other

So Ordered

s/ Clifton B. Newman, 2127

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL ASHLEY WHITEHEAD, individually and as Guardian ad Litem for BRANTLEY W., a minor under the age of fourteen (14) years and WILLIAM B. WHITEHEAD, Plaintiffs, vs. BARNWELL SCHOOL DISTRICT 45, Defendant.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2021-CP-06-_____ **SUMMONS** **(JURY TRIAL DEMANDED)** **(PERSONAL INJURY)**

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office at 265 Barnwell Highway, Allendale, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

GOODING AND GOODING, P.A.

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February 2, 2021

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL ASHLEY WHITEHEAD, individually and as Guardian ad Litem for BRANTLEY W., a minor under the age of fourteen (14) years and WILLIAM B. WHITEHEAD, Plaintiffs, vs. BARNWELL SCHOOL DISTRICT 45, Defendant.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2021-CP-06-_____ **SUMMONS** **(JURY TRIAL DEMANDED)** **(PERSONAL INJURY)**

The Plaintiffs would respectfully show:

1. Plaintiff Ashley Whitehead is the mother of and duly appointed Guardian ad Litem for Brantley W. ("the minor"), a minor under the age of fourteen (14) years who resides with Ashely Whitehead in Barnwell County, South Carolina.

2. Plaintiff William B. Whitehead is a citizen and resident of Barnwell County, South Carolina, and was a citizen and resident of Barnwell County, South Carolina at the time of the incident described herein.

3. Defendant is an agency of the State of South Carolina; this action is brought pursuant to the S.C. Torts Claims Act § 15-78-10 et seq., South Carolina Code of Laws.

4. At all times relevant herein, the teachers, aides, bus drivers and other employees mentioned herein were employees, agents, or servants of Defendant and were acting within the scope and course of said agency, service and employment and within the scope of their official duties with the Defendant.

5. The most substantial part of the acts or omissions giving rise to the causes of action alleged herein occurred in Barnwell County, South Carolina.

6. On or about September 11, 2020, the minor was a student passenger on Defendant's school bus being operated by D.J. Washington; prior to September 11, 2020, Plaintiffs made Defendant aware that the minor would riding the school bus after school and should be delivered to Creation Station, a daycare center in Barnwell, South Carolina; instead of delivering the minor to Creation Station, Mr. Washington dropped the minor off at the Litchfield Apartments complex where he was left unattended and unsupervised in the parking lot.

7. Plaintiff Ashley Whitehead was at her place of employment when she received a telephone call from an employee of Creation Station who informed Plaintiff that her son was not delivered to the daycare center. Plaintiff Ashley Whitehead became frantic, left work, and began desperately searching for her missing four-year-old son; Plaintiff Ashley Whitehead notified her husband and minor's father, Plaintiff William Whitehead, that their son was missing, and he began frantically and desperately searching for his son. As such, Plaintiffs Ashley and William Whitehead were in close proximity to and contemporaneously perceived that their son was lost, missing, and afraid and were aware of the fear he had to endure. After a significant period of time, Plaintiffs were reunited with their son by another individual who happened to see him standing in the apartment complex parking lot and took the initiative to make sure she returned him to his mother.

8. Defendant owed a duty of care to both the minor and the minor's parents to provide proper supervision of its students, to place them on the proper school bus, to deliver them to the proper location and under proper supervision, and to provide a reasonably safe and secure environment for its students.

9. As a result of this incident, the minor has suffered significant injuries to his body, both mental and physical; these injuries have caused and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and impairment of health and bodily efficiency; have caused the Plaintiff to spend money for medical services; and have caused a permanent disability.

10. As a further result of this incident, the Plaintiffs Ashley and William Whitehead not only suffered as a result of the danger and fear experienced by their son but as a result of the fear they experienced themselves during the search. As a direct and proximate result of the Defendant's conduct, Plaintiffs have suffered and will in the future continue to suffer extreme emotional distress manifested by physical symptoms, medical expenses, and other damages.

11. Defendant, by and through the acts and/or omissions of its agents, servants, and/or employees, were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above-mentioned in the following particulars:

a) In failing to properly care for, monitor, observe and supervise students entrusted to its care, including the minor;

b) In delivering the minor to an incorrect location and leaving the minor unattended and unsupervised;

c) In placing the minor on the wrong bus;

d) In endangering the minor;

e) In failing to properly hire, train and supervise its employees;

f) In failing to properly instruct and monitor its bus drivers to insure that its students are taken to their proper destinations;

g) In failing to provide a reasonably safe and secure environment, including but not limited to proper supervision, to prohibit the improper handling of their students;

h) In failing to promptly discover that the minor had been left at the wrong location;

i) In failing to properly search for and locate the minor;

j) In failing to create proper policies and procedures to ensure that its students are delivered to the correct location with proper supervision, or in failing to follow its own policies and procedures;

k) In failing to exercise the degree of care that a reasonable school establishment would have exercised under the same or similar circumstances;

l) In such other and further particulars as the evidence in trial may show:

all of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by the minor and the Plaintiffs herein, said acts being in violation of the statutes and common laws of the State of South Carolina.

WHEREFORE, Plaintiffs pray for judgment against Defendant in a sum sufficient to adequately compensate for actual damages for a jury may reasonably award, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

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February 2, 2021

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
Ashley Whitehead, individually and as Guardian ad Litem for Brantley W., a minor under the age of fourteen (14) years and William B. Whitehead, Plaintiff, vs. Barnwell School District 45, Defendant.	)	C.A. No. 2021-CP-06-00028 **DEFENDANT'S MOTION TO DISMISS**

Defendant, Barnwell School District 45 ("District"), hereby moves this Court, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an order dismissing Plaintiffs' complaint because the Plaintiffs cannot establish the essential elements of their alleged claims, including the requirement of a physical injury. In addition, the minor Plaintiff's parents cannot establish a "bystander" claim. In support of this motion, the District will rely on the pleadings on file in this case, the applicable statutory and case law, the South Carolina Rules of Civil Procedure, and a memorandum of law to be filed with the Court prior to a hearing on this motion.

Respectfully submitted,

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March 1, 2021

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STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
Ashley Whitehead, individually and as Guardian ad Litem for Brantley W., a minor under the age of fourteen (14) years and William B. Whitehead, Plaintiffs, vs. Barnwell School District 45, Defendant.	)	C.A. No. 2021-CP-06-00028 **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

I. INTRODUCTION

Plaintiffs filed this tort action on February 2, 2021. In their complaint, Plaintiffs describe an incident in which the minor Plaintiff was a student passenger on a school bus and was allegedly dropped off at the wrong location. Plaintiffs filed this action against Barnwell School District 45 ("District") asserting a negligence cause of action. The District has moved for an order dismissing the complaint on the grounds that Plaintiffs have failed to state facts sufficient to support a claim against the District upon which relief can be granted. For the reasons set forth below, Plaintiffs' claims should be dismissed.

II. STANDARD OF REVIEW

In ruling on a motion to dismiss under Rule 12(b)(6), the court must examine the legal sufficiency of the facts alleged in the complaint, and the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*,

373 S.C. 390, 395 (2007)(citation omitted). A motion under Rule 12(b)(6) admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. *See Deberry v. McCain*, 275 S.C. 569, 274 S.E.2d 293 (1981). South Carolina courts apply a "fact pleading" standard, which is more rigorous than the lenient "notice pleading" standard established in federal court. *See* Rule 8(a)(2), SCRCP; *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (citation omitted) (distinguishing relevant standard under the SCRCP from "more lenient" standard under federal rules), *affd as modified,* 354 S.C. 416, 581 S.E.2d 169 (2003). While not intended to be an overly technical standard, the non-moving party may not simply make conclusory assertions of liability, but must set forth assertions of fact that give rise to relief. *See, e.g., Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364-65 (Ct. App. 2001) (finding the trial court properly disregarded the plaintiff's conclusory allegations because they were not supported by the asserted facts). It is well-established that a motion to dismiss should be granted where the complaint either fails to allege all of the elements for a cause of action or sufficient facts to support each element. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988). The motion must be granted if the facts alleged in the complaint and the inferences reasonably deducted therefrom do not entitle the Plaintiff to relief on any theory of the case. *Jarrell v. Petoseed Co.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

III. LEGAL ANALYSIS

A. Plaintiffs' Cause Of Action Alleging Negligence Should Be Dismissed As A Matter of Law

As a first cause of action, the Plaintiffs seemingly allege a claim for negligent infliction of emotional distress. This claim must fail as a matter of law for two separate reasons.

First, South Carolina courts have had several occasions to consider this precise cause of action and have concluded that this claim is not allowed under these circumstances. As the South

Carolina Supreme Court has confirmed in *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007), this claim is strictly limited to the bystander context. *See also Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985). Thus, as explained in *Doe*, the Plaintiffs must show the following elements to prevail on this claim:

(a) The negligence of the defendant caused death or serious physical injury to another;
(b) The plaintiff bystander was in close proximity to the accident;
(c) The plaintiff and the victim are closely related;
(d) The plaintiff contemporaneously perceived the accident; and
(e) The plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and can be established by expert testimony.

If a plaintiff fails to sufficiently allege any one of these elements, the complaint must be dismissed. *Kinard*, 286 S.C. at 582.

The allegations of the complaint in this case do not assert any type of bystander theory of liability. There are no facts in the complaint to state a claim to relief that is plausible on its face as required by law. Specifically, Plaintiffs do not allege that the District's alleged negligence caused death or serious physical injury. Further, the complaint fails to state any allegations of emotional distress manifested by physical symptoms capable of objective diagnosis and can be established by expert testimony. Moreover, Plaintiffs have failed to show that they were bystanders in close proximity to an accident and contemporaneously perceived the accident.

Plaintiffs allege the minor Plaintiff was dropped off at an apartment complex and left unattended and unsupervised. (Compl. ¶ 6). Plaintiff Ashley Whitehead was at her place of employment when she received a telephone call from a day care employee who informed her that her son was not dropped off at the daycare center, and Plaintiff William Whitehead was then notified by Ms. Whitehead that their son was allegedly missing. (Compl. ¶ 7). Therefore, based on this allegation, Plaintiffs were not and could not be bystanders in close proximately to an accident and who contemporaneously perceived the accident. Accordingly, this cause of action is

not actionable and should be dismissed because plaintiffs failed to sufficiently allege all of the required elements. *Id.*

Furthermore, as a separate basis for dismissal, the Plaintiffs' cause of action is merely an effort to circumvent the Tort Claims Act, which prohibits this claim from being brought against the government. Specifically, as noted above, the Tort Claims Act, in § 15-78-30(f), defines "loss" to exclude the intentional infliction of emotional harm. As stated in that section:

> (f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, **but does not include the intentional infliction of emotional harm**.

See also Ward v. City of North Myrtle Beach, 457 F. Supp. 2d 625 (D. S.C. 2006) (noting that the South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of "loss" for which a governmental entity may be liable under the Tort Claims Act). Importantly, the South Carolina Tort Claims Act provides the exclusive tort remedy in this case. S.C. Code Ann. § 15-78-20(b), -30(d), -30(h). As the South Carolina Supreme Court has noted in *Adkins v. Varne*, 312 S.C. 188, 439 S.E.2d 822 (1993), a court should look at the nature of a complaint, rather than an attempt by a plaintiff to argue a creative theory of recovery to get around a statutory prohibition. In this case, the Plaintiffs are seemingly attempting to creatively plead their way around this Tort Claims Act bar, but they should not be allowed to do so. As a result, for these two separate reasons, Plaintiffs' cause of action cannot survive and should be dismissed.

B. Plaintiffs Cannot Recover For Purely Emotional Injuries Based On The Claims Alleged As A Matter Of Law

In addition to the arguments set forth above, the South Carolina appellate courts have recognized only three ways that a plaintiff may recover damages for emotional distress in a tort case: (1) when it accompanies a physical injury, such as in a car accident; (2) in a claim for

intentional infliction of emotional distress or outrage where severe emotional distress occurs as a result of extreme and outrageous conduct by the defendant, and (3) negligent infliction of emotional distress in the bystander context, first recognized in *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582 336, S.E.2d 465 (1985). *See also, Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68, 70 (S.C. 2007); The development of South Carolina law regarding the recovery of damages for purely emotional distress is clearly outlined in Judge Roger Young's order in *Latham v. Latham*, 2014 WL 10417616 (Ct. Com. Pleas 2014), a copy of which is attached. (Exhibit A.) *See also*, *Pope v. Barnwell Cty. Sch. Dist. No. 19*, No. 1:16-CV-01627-JMC, 2017 WL 1148741, at *11 (D.S.C. Mar. 28, 2017) (no general negligence cause of action for alleged emotional distress only). It is well-settled under South Carolina law that emotional distress damages are not available under a negligence theory absent physical injury or manifestation. *Id.* (citing *Dooley v. Richland Mem'l Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984)) ("Damages for emotional or mental suffering are typically not recoverable, unless there is some physical manifestation of the emotional distress"); *see also Smith v. Blanton*, C/A No. 8:09-789-HFF-BH, 2009 WL 1107528, at *3 (D.S.C. Apr. 23, 2009) (explaining "[u]nder South Carolina law, in a negligence action, if [p]laintiff has not suffered physical injury, damages for emotional distress are generally not recoverable unless the emotional distress manifests itself physically"); *Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 604, 103 S.E.2d 265, 270 (1958) (stating that under the law of this State damages cannot be recovered for mental suffering in the absence of bodily injury).

Based on the Complaint, there are no specific factual allegations that Plaintiffs suffered physical injuries. Instead, Plaintiffs allege Ashley and William Whitehead suffered as a result of the danger and fear experienced. Plaintiffs Ashley and William Whitehead's alleged injuries are based on conduct they allege their son experienced and which they did not personally experience. If Mr. and Mrs. Whitehead could recover damages for emotional distress based on the facts and claims alleged in this case, it would render the intentional infliction of emotional

distress cause of action and forty years of precedent completely superfluous and impermissibly expand the limited cause of action for negligent infliction of emotional distress beyond the bystander context. Furthermore, the complaint is void of any specific allegations that the minor Plaintiff suffered physical injuries. Plaintiffs' claims are purely emotional based on the facts alleged in the Complaint and are therefore, unrecoverable.

IV. CONCLUSION

Plaintiffs' complaint fails to provide factual allegations sufficient to support their claim against the District. In light of the foregoing, the District respectfully request that Plaintiffs' Complaint be dismissed with prejudice pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

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March 23, 2021

Columbia, South Carolina

2014 WL 10417616 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Ninth Judicial Circuit
Charleston County

Nancy LATHAM,
v.
Christopher LATHAM, et al.

No. 2013CP1002189.
February 3, 2014.

Order Granting Defendant Bank of America's Motion to Dismiss and Granting in Part and Denying in Part Defendant Christopher Latham's Motion to Dismiss

Roger M. Young, Sr., Judge.

*1 This matter is before this Court pursuant to S.C. R. Civ. P. 12(b)(6) on Defendants Bank of America's (Bank) and Christopher Latham's Motion to Dismiss the Plaintiff's Second and Third Amended Complaints which attempt to state claims of negligence supervision and intentional infliction of emotional distress (outrage) against these Defendants.

PROCEDURAL BACKGROUND

On April 15, 2013, Plaintiff Nancy Latham filed this action against the Defendants Christopher Latham, Wendy Annette Moore, Aaron Wilkinson, Arthur Yenawine, and Jane and/or John Doe(s) in the Charleston County Court of Common Pleas. The Complaint was never served on Defendants. On June 3, 2013, Plaintiff Nancy Latham filed an Amended Complaint in this action against the Defendants Christopher Latham, Wendy Annette Moore, Aaron Wilkinson, Arthur Yenawine, Rachel Palmer, and Jane and/or John Does. The Amended Complaint was never served on Defendants. On August 14, 2013, Plaintiff Nancy Latham filed her Second Amended Complaint against Defendants Christopher Latham, Wendy Annette Moore, Bank of America Corporation, US Trust Corporation, and John and/or Jane Doe(s). Defendant Bank of America filed a Motion to Dismiss and Christopher Latham filed a Motion to Dismiss or for More Definite Statement of Plaintiff's Second Amended Complaint on several grounds, including that the Plaintiff failed to properly allege the elements of a negligence claim or in the alternative, the claim was so vague or ambiguous that a defendant could not frame a responsive pleading.

The parties submitted memoranda setting forth their arguments with regard to the motions, and the Court conducted oral arguments on December 4, 2013. Defendant Bank's and Defendant Latham's Motions to Dismiss were taken under advisement, and Plaintiff's Motion to Amend was granted. On December 11, 2013, Plaintiff filed a Third Amended Complaint, for which Defendants Bank of America and Christopher Latham renewed their Motions to Dismiss.

LEGAL ARGUMENT

Under S.C. R. Civ. P. 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 114, 628 S.E.2d 869, 873 (2006). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id S.C. R. Civ. P. 8(b) mandates that a pleading contain "ultimate

facts," which are facts that "fall somewhere between the verbosity of evidentiary facts and the sparsity of legal conclusions." *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004) (*quoting Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (S.C. Ct. App. 2001)).

NEGLIGENT SUPERVISION

Although it may surprise many because it sounds harsh at first glance, a person generally has no duty to act affirmatively to protect the interests of others or come to their aid or rescue. *Rayfield v. S. Carolina Dep't of Corr.*, 297 S.C. 95, 101, 374 S.E.2d 910, 913 (S.C. Ct. App. 1988) (*quoting Sharpe v. South Carolina Dept. of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (S.C. Ct. App. 1987) *writ dismissed*, 294 S.C. 469, 366 S.E.2d 12 (1988). Stated another way, a person usually incurs no liability when he fails to take steps to protect others from harm that he did not create. Id.

***2** Therefore, in a case like this, the question is not whether the Bank knew or had notice of the Defendants Latham's and Moore's actions, but rather did the Bank owe the Plaintiff any duty to protect her from the harm she suffered.

As with most general rules, there are exceptions. Within the context of duty - the building block of all of negligence law - there are five general, yet distinct exceptions which will be explored more fully below. In their authoritative treatise on South Carolina tort law, Professors Hubbard and Felix note these five exceptions have two things in common: they either involve situations where a particular defendant can fairly be said to be different from society in general, or it can fairly be said the defendant has, to some extent, waived his right to refuse to act. F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 105 (4th ed. 2011)(footnotes omitted). It should also be noted that even if a defendant falls within one of these categories or exceptions, the duty owed is still only that of due care, and general principles of proximate cause apply as well. These exceptions do not morph a negligence-based cause of action into an intentional tort or one based upon strict liability.

The five basic exceptions to the rule that one does not generally owe a duty to act affirmatively to come to the aid of another are: (1) special relationship to the victim (duty to aid or protect); (2) special relationship to the injurer (duty to control, supervise, or warn); (3) voluntary undertaking; (4) creation of risk; (5) statutory imposition of risk. Id.

Negligent supervision of employees falls under the category of the duty arising because of some special relationship to the injurer. The Third Amended Complaint does not label its causes of actions. For instance, at times it speaks in terms of the Defendant Bank failing to supervise its employees, Defendants Latham and Moore, and then shifts to intentional actions in the next paragraph.

However, a close reading reveals any intentional acts alleged are those of Defendants Latham and Moore only, and the Bank's liability would be for failing to discover it. Thus, this discussion will initially focus on the negligence-based cause of action of negligent supervision.[1]

In *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992), the South Carolina Supreme Court adopted the Restatement (Second) of Torts § 317 (1965), which states:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.[2]

***3** In this case, the Plaintiff has alleged Defendants Latham and Moore, both Bank employees, were on the Bank's premises using the Bank's telephones and computers to hire someone to murder her, thus satisfying the first two elements. However, in order to become liable for negligent supervision, there must be some duty owed by the Bank to the Plaintiff; to wit, the Bank

knew or had reason to know it had the ability to control Defendants Latham and Moore, and the Bank knew or should have known of the necessity and opportunity for exercising such control over them.

Normally, the Court's analysis would end there, because as a matter of law no court would impose a duty upon an employer, in the ordinary course of business, to monitor its employees to discover whether one or more of them were planning to kill a spouse, even if the employer had knowledge that an employee was going through a divorce, or that two of its employees were having an romantic affair. It might be against company policy for two employees to become romantically involved, but failure to fire them for doing so does not give the alienated spouse a cause of action against the employer. There must also be some additional facts to put the Bank on notice that it had a heightened duty to control its servants to prevent harm to a third party.

As the Court reads the Complaint, the Plaintiff alleges that after she and Defendant Latham separated, she subpoenaed records from the Bank concerning communications between Latham and Moore. In response to the Family Court subpoena, the Plaintiff alleges the Bank voluntarily undertook a duty to monitor the records and communications of Defendants Latham and Moore to protect the Bank's privileged information from disclosure, and that had the Bank done so, it would have discovered the murder-for-hire plot. Whether the Bank voluntarily undertook this duty in its responses to the Family Court proceedings remains to be seen; however, at this point in the proceedings, this Court must deem the allegation to be true and finds that allegation sufficient to create a duty to monitor Latham's and Moore's communications that it would not otherwise have in this case.

Assuming for purposes of this motion that the Bank did have such a duty it is clear that when one studies the development of the law in South Carolina governing recovery for emotional distress, the Plaintiff cannot recover for the psychological damages she has suffered under a negligent supervision cause of action. Fortunately, the alleged murder-for-hire plot was discovered before any attempt was made on the Plaintiff's life. As a result, she did not suffer a direct physical injury. The understandably severe psychological shock that she alleges has resulted are symptoms such as "violent physical illness, loss of hair, loss of appetite, physical pain throughout her body and other physical manifestations, emotional distress and severe pain and mental anguish, shock to her nervous system." In other words, because the alleged murder-for-hire plot never resulted in an actual or attempted physical attack on the Plaintiff, all of her alleged injuries have to be the physical manifestations of emotional distress. Many years ago, our courts did allow recovery for injuries similar to the physical manifestations of emotional distress that the Plaintiff claims in this *case. See Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 604, 103 S.E.2d 265, 270 (1958) (allowing shock with a physiological basis injury to be submitted to the jury because "nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism.").

***4** The Supreme Court of South Carolina has taken a different approach for nearly thirty years, prescribing objectively verifiable criteria for recovery of emotional distress rather than attempting to parse "nervous shock or paroxysm" from mental anguish. In 1977, the South Carolina Supreme Court recognized "that there is no liability for emotional distress without a showing that the distress inflicted is extreme or severe." *Rhodes v. Security Fin. Corp. of Landrum*, 268 S.C. 300, 302, 233 S.E.2d 105, 106 (1977). Concluding that there was no evidence to support a recovery, the Court observed that while there was testimony that the appellant was emotionally upset from the attempt to collect a forged note, there is no showing that the attempts by respondent's agents to collect were unreasonable or abusive, nor that appellant's emotional upset was other than transient and trivial." Id.

Two years later, in *Mason v. Zenith Engraving Co.*, the Court held that "[i]n order to prevail in a tortious action in which the sole damages alleged are those of mental anguish, plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature." 273 S.C. 766, 770, 259 S.E.2d 812, 813 (1979). In 1981, the Supreme Court formally recognized the tort of outrage (or intentional interference with emotional distress). *See Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981). Importantly, in *Dooley v. Richland Mem'l Hosp.*, the Supreme Court rejected an invitation to recognize a general tort of negligent infliction of emotional distress beyond intentional and reckless conduct because the plaintiffs had failed to make any showing of physical injury to support their claim. 283 S.C. 372, 374 322 S.E.2d 669, 670 (1984). The Court recognized that one criticism of permitting a tort for negligent infliction of emotional distress was "that it will allow for fraudulent claims" and that "[o]ne method of eliminating this danger has been to require some type of physical injury in addition to any claimed emotional injury." Id. at 671.

Later that year, the Court of Appeals refused to permit the recovery of emotional distress damages in a legal malpractice claim, despite a litany of physical manifestations of the distress (including crying spells, headaches, change of hair color, and an inability to sleep with her spouse for several years). *See Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (S.C. Ct. App. 1984), *cert. denied*, 286 S.C. 125, 333 S.E.2d 569 (1985).

In *Kinard v. Augusta Sash & Door Co.*, the Supreme Court finally recognized the tort of negligent infliction of emotional distress, but restricted it to circumstances where a bystander observes an accident that actually causes death or serious physical injury, holding (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. 286 S.C. 579, 582 336, S.E.2d 465 (1985).

This is clearly not a claim of bystander liability. Further, and fortunately, no death or serious physical injury to Plaintiff resulted from Defendants Latham's and Moore's alleged plot. In sum, as the law of South Carolina stands, the approach of the Supreme Court in recent years has been to recognize emotional distress damages only in three specific circumstances, none of which exist here: (1) when accompanied by a physical injury, such as in a car accident; (2) outrage or intentional infliction of emotional distress; and (3) negligent infliction of emotional distress in the "bystander" context. In the nearly thirty years since *Kinard*, the Supreme Court has refused to extend liability for emotional distress damages beyond these three limited circumstances. .

***5** Because the Plaintiffs claim for the damages she alleges she suffered as a result of the Bank's negligent supervision does not fall within the ambit of any cause of action for emotional distress recognized under South Carolina law, both the Bank's and Defendant Latham's Motion to Dismiss the Plaintiff's cause of action for negligent supervision is granted.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (OUTRAGE)

As noted above, the Plaintiff's Complaint seems to morph from alleging a cause of action for negligent supervision to alleging a cause of action for intentional infliction of emotional distress (a/k/a outrage). For instance, in her memo in opposition she states the Complaint alleges negligent conduct by the Bank allowed the murder-for-hire plot to unfold, and that the same conduct amount to a level of recklessness and intentional conduct that would support a factual basis for Plaintiff's claim of intentional infliction of emotional distress. Because the Plaintiff argues in her brief that the allegations support a claim for an intentional tort, the Court will therefore examine whether the allegations against the Defendants support such a claim.

To recover under an intentional infliction of emotional distress theory, a plaintiff must establish:
(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;

(2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"

(3) the actions of the defendant caused plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."

Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (*quoting Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)).

Viewing the allegations in the light most favorable to the Plaintiff, it is clear that when sorted out the actual intentional actions which form the basis of the Plaintiff's intentional infliction of emotional distress claim were those committed by the Defendants Latham and Moore. All of the averments contained in the Complaint which allege specific wrong-doing by the

Bank (other than those committed by Defendants Latham and Moore) pertain to the Bank's failure to properly supervise Latham and Moore. As such, the only basis for holding the Bank liable for intentionally inflicting emotional distress upon the Plaintiff would be through vicarious liability.

The doctrine *of respondeat superior* rests upon the relation of master and servant. *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. Id. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. Id. These general principles govern in determining whether an employer is liable for the acts of his servant. Id.

The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Id. Under those circumstances the servant alone is liable for the injuries inflicted. Id. If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, the master is not liable for his acts during such time. Id. *See also Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006).

***6** By the very nature of the claim - murder-for-hire of a spouse - those acts as a matter of law in no way served the interest of the Bank, regardless of whether the plot was hatched on Bank premises or using Bank chattel. As such, the Plaintiff's claim for intentional infliction of emotional distress fails to allege anything that any Bank employee, acting within the scope of his or her duties and in furtherance of the Bank's interests, did to injure the Plaintiff. Therefore, the Bank is entitled to have the Complaint dismissed as to the claim for intentional infliction of emotional distress. However, Defendant Latham is alleged to have actually participated in the planning of the murder-for-hire plot which would make him liable for intentional infliction of emotional distress, and his Motion to Dismiss is therefore denied.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:
1. That the Defendant Bank of America's and the Defendant Christopher Latham's Motion to Dismiss the Plaintiff's cause of action for Negligent Supervision is GRANTED; and

2. That the Defendant Bank of America's Motion to Dismiss the Plaintiff's cause of action for Intentional Infliction of Emotional Distress is GRANTED; and

3. That the Defendant Christopher Latham's Motion to Dismiss the Plaintiff's cause of action for Intentional Infliction of Emotional Distress is DENIED.

IT IS SO ORDERED!

<<signature>>

Roger M. Young, Sr.

Judge of the Ninth Judicial Circuit

February 3, 2014

Charleston, SC

Footnotes

[1] In her Brief in Opposition to the Bank's Motion to Dismiss, the Plaintiff asserts her Third Amended Complaint supports the causes of action of negligent supervision and of intentional infliction of emotional distress. Because she does not label her causes of action in her Complaint (see SCRCP 10(b) "Each cause of action and each defense shall be stated in a separate cause of action or

defense."), it is difficult for the Court to discern where she is asserting a cause of action for negligent supervision and where it is for intentional infliction of emotional distress, or both.

2 "The rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency." Restatement (Second) of Torts § 317 cmt. a (1965).

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STATE OF SOUTH CAROLINA COUNTY OF BARNWELL ASHLEY WHITEHEAD, individually and as Guardian ad Litem for BRANTLEY W., a minor under the age of fourteen (14) years and WILLIAM B. WHITEHEAD, Plaintiffs, vs. BARNWELL SCHOOL DISTRICT 45, Defendant.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2021-CP-06-00028 **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS**

If these were bystander claims, Defendant's argument might be correct. But they aren't. Rather, these are direct injury claims. The minor, his mother, and his father have each alleged old-fashioned negligence claims to recover for their individual injuries that resulted **directly** from the Defendant's negligence. Moreover, each Plaintiff experienced and have alleged not only emotional trauma but the manifestation of physical symptoms from that emotional trauma. Therefore, because South Carolina recognizes the cause of action alleged by the Plaintiffs and Plaintiffs have alleged facts sufficient to satisfy each element of the cause of action under South Carolina law, the Court should deny Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

This is a case about a school district whose bus driver dropped a four (4) year old boy off at the wrong location and left him in an unfamiliar parking lot alone and unsupervised for a significant period of time. He was terrified. When the minor was not timely delivered to the daycare center, a daycare worker called his mother. At that point, his mother, in a terror-stricken

state fearing that her young son was forever lost, called her husband and both began frantically searching for their son. They both suffered the direct injury of losing their child for a period of time. Fortunately, the minor was ultimately located and returned to his parents. However, the danger was done and the suffering, both mental and physical, continues. Because this is simply a negligence claim for direct injury to each Plaintiff, alleging both emotional trauma as well as physical manifestations of that emotional trauma, the Court should deny Defendant's Motion to Dismiss.

LEGAL STANDARD

In ruling on a motion to dismiss a cause of action under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to state a cause of action, the court must look only to the allegations of the Plaintiff's Complaint. State Board of Medical Examiners v. Fenwick Hall, Inc., 300 S.C. 274, 387 S.E.2d 458 (1990). The court must review the facts and all reasonable inferences therefrom in the light most favorable to the Plaintiff. Woodell v. Marion School District One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992). The court must deny the motion if the facts and inferences, when viewed in the light most favorable to Plaintiff, show that Plaintiff could prevail under any theory. Murrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 373 S.E.2d 701 (Ct. App. 1988). Moreover, because the legal sufficiency of the pleading is at issue in a Rule 12(b)(6) motion to dismiss, the Court must review the allegations of the pleading in the light of the general rules of pleading as set forth in Rule 8 of the South Carolina Rules of Civil Procedure. James F. Flanagan, South Carolina Civil Procedure (2d. ed.) P. 93. Rule 8(e)(2) allows alternative and inconsistent allegations and causes of action. Also, Rule 8(f) directs the Court to construe the pleadings in an effort "to do substantial justice to all parties." South Carolina Rules of Civil Procedure, Rule 8.

ARGUMENT

In an attempt to direct the Court's attention to the law surrounding bystander liability, the Defendant has completely ignored the relevant law that applies when a plaintiff's injuries result **directly** from the defendant's negligence. This long-standing body of law finds its genesis in the 1898 Supreme Court decision of Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898). In Mack, a young boy was almost struck by a train as he was attempting to move his mule off the railroad track. There was no physical impact between the train and the young boy. Suit was brought on behalf of the boy against the railroad company for negligence in causing injury to the boy. Specifically, the boy "was terribly frightened, his nervous system was shocked, his mind was affected and particularly destroyed, his reason unbalanced, and he for a long time was made ill and sick, and suffered great mental anguish and physical pain, arising from the terrible shock to his nervous system and the fright he received." Id. The question before the Court was whether the railroad company was "liable for injuries sustained in consequence of fright caused by its negligence." Id. The Court analyzed the issue in detail:

> Danger excites alarm. Few people are wholly insensible to the emotion caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or insensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be received for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering, when not accompanied by any perceptible physical effects.

Id. Ultimately, in holding that the boy could recover for the mental anguish he suffered, the Court further explained:

> The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

Id.

In 1930, the Court addressed the same issue in a different fact scenario in Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930). Mr. and Mrs. Spaugh resided in the town of Holly Hill with their infant children and Mrs. Spaugh's invalid mother. The Spaughs left their children and Mrs. Spaugh's invalid mother with a caregiver for the day and traveled to Florence. When Mr. Spaugh learned that he needed to stay overnight in Florence, he purchased a train ticket for his wife and was specifically told by an employee of the railroad company that the ticket he purchased would return Mrs. Spaugh to Holly Hill that very same evening. Mrs. Spaugh boarded the train but then learned that the connecting train that would deliver her to Holly Hill would not leave until the following morning. Therefore, Mrs. Spaugh was forced to disembark the train. After some time of being stranded alone in an unfamiliar place, a traveling man gave her a ride to another town in the direction of Holly Hill "where she remained for some time, sick and greatly distressed, fearing that her infant children and invalid mother would have to spend the night alone." Id. Finally, a farmer offered her a ride to Holly Hill, "where she arrived sick and almost a nervous wreck."

The defendant argued that Mrs. Spaugh could not recover because she did not sustain a bodily injury. However, the Court was unconvinced:

> According to our view of the evidence on the question of bodily injury, the proof was ample, and clearly establishes that the Plaintiff did receive bodily injury. In order to receive bodily injury, it was not necessary that the Plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body. Having her nervous system injured and being made sick constitutes bodily injury, and for which she should be entitled to receive damages in proportion to such injury, provided the proof establishes negligence on the part of Defendant's agent in misinforming the Plaintiff or the Plaintiff's husband, acting for her, as to the train schedules between the points in question, and such negligence caused the alleged injury complained of.

Id. (citing Shepherd v. Southern Ry. Co., 135 S.C. 75, 133 S.E. 231; Milhans v. Southern Ry., 72 S.C. 442, 52 S.E. 41; Taber v. Seaboard Air Line Ry., 81 S.C. 317, 62 S.E. 311; Taber v. Seaboard Air Line Ry., 84 S.C. 291, 66 S.E. 292; Murrell v. Charleston & W.C.R. Co., 115 S.C. 228, 105 S.E. 350; Entzminger v. Seaboard Air Line Ry., 79 S.C. 151, 60 S.E. 441; and Campbell v. Seaboard Air Line Ry., 83 S.C. 448, 65 S.E. 628). [1]

In 1958, the Court faced the same issue in Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265 (1958). When Mr. Padgett was sitting in his living room watching television, Defendant's liquor truck collided with Mr. Padgett's house. Although there was no physical impact with Mr. Padgett, the shock of the incident made him very nervous and he broke out in a rash. Relying on Mack, Spaugh and other similar cases, the Court held that the Plaintiff could recover for mental injury that manifested itself by physical symptoms. Id. ("If the respondent's bodily injury was proximately caused by the shock, fright and emotional upset as a result of the negligence and willfulness of the appellant, he was entitled to recover such damages

[1] The Spaugh case illustrates perfectly that both the minor and his parents have viable claims in the pending litigation. Ms. Spaugh is like Brantley, the four (4) year old in this case, because she was left alone in an unknown place without any funds to make her way home. As a result, she experienced fear for her own well-being just as the minor did here. In addition, Ms. Spaugh is like Mr. and Mrs. Whitehead, Brantley's parents, because Ms. Spaugh's minor children and invalid mother were in essence lost to her because she couldn't make it home. As a result, she experienced fear for their well-being. She experienced **direct injury** in two separate ways and was allowed to recover for both.

as would compensate him for the injury so sustained.")

This line of cases involved Plaintiffs whose injuries resulted **directly** from the defendant's negligence: Mack was almost hit by a train; Spaugh was delivered to the wrong location and was therefore prevented from getting home in a timely fashion to care for her children and mother; Padgett was inside his house when it was struck by a truck. These three cases do not involve bystanders who witnessed injury to another; rather, the plaintiffs were the **direct** victims of the negligence.

Here, Brantley, the 4 ½ year old minor, was delivered to the wrong location and left unattended to wonder if he would ever be found by his parents, just as Mrs. Spaugh was delivered to the wrong location to wonder how she would ever make it home to her children and ailing mother. The minor was not a bystander witnessing injury to someone else; rather, his injuries were the direct result of Defendant's negligence. Moreover, his mother and father were not bystanders witnessing injury to someone else; rather, they experienced a direct injury when they learned that their minor child was lost. They were not bystanders who witnessed their minor son experience physical injury. Rather, during the time that he was missing, they experienced the physical loss of their actual child. The Court should never reach a bystander analysis in this case because no one was a bystander who witnessed another person sustain injuries. Rather, each Plaintiff was a direct victim of the Defendant's negligence.

Moreover, just as in each of the relevant cases, the Plaintiffs here have alleged in their Complaint the manifestation of physical symptoms as a result of the mental injuries they sustained. In the context of this Motion to Dismiss, the allegations of the Complaint are sufficient and the Motion should be denied.

In its Memorandum of Law, Defendant completely ignores this line of South Carolina case law and urges this Court to dismiss the Complaint under the authority of Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985) and Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007), both of which are bystander claims and wholly inapplicable here. In Kinard, a mother and daughter were driving in their vehicle when a load of roof trusses fell from the Defendant's truck and crushed them. Both mom and daughter were severely physically injured and the daughter was left severely disabled. The mother claimed damages not only for her own personal injuries but also claimed damages for severe shock and emotional trauma in witnessing severe injury to her daughter. The issue before the Court was whether the Court should allow the mother's action for negligent infliction of emotional distress as a result of witnessing her daughter being crushed by roof trusses. The Court held that they would allow the cause of action for bystanders and the Court set out elements that must be met in order to limit the class of persons who can collect damages as a result of injuries actually sustained by another. In other words, in the context of her claim for emotional distress suffered in witnessing her daughter sustain the injuries, the mother was not a direct victim of the negligence but rather a bystander. The Court in Kinard did **not** hold that direct victims have no such claim. Rather, the Court recognized a claim for negligent infliction of emotional distress for certain bystanders. The reason for the strict elements is to limit the group of people who qualify as bystanders, not to strip a negligence cause of action from the direct victim of the negligence.

Perhaps mort significantly, a close review of Kinard reveals that the Court did not even mention Mack, Spaugh or Padgett. The Court did not need to mention them because they were **not** bystander claims. Kinard in **no way** overrules Mack, Spaugh or Padgett. In fact, in 2003, 18 years after Kinard, our Supreme Court relied on Mack, Spaugh and Padgett in the case of Bray v.

Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003). In Bray, a worker pushed a button on a machine. The equipment malfunctioned and as a result, her co-worker was crushed to death. Relying on Padgett and is progeny, the Court allowed the claim by the worker who pushed the button and witnessed the crushing even though she did not sustain any physical injury from a direct impact. Bray is proof that Mack, Spaugh, and Padgett are alive and well.

The same analysis applies to Doe v. Greenville Cnty. Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007). There, a minor was sexually assaulted by a school employee. The parents of the minor brought a claim against the school for negligent infliction of emotional distress for the emotional distress they experienced once they learned of the sexual relationship between their minor daughter and the school employee. In holding that the parents had no such claim, the Court explained:

> In Kinard, the Court recognized that a parent may bring a cause of action for negligent infliction of emotional distress as a result of injury to his or her child. The Court instructed that such an action is strictly limited to the "bystander liability' scenario. This Court has not otherwise defined the parameters of a cause of action for the negligent infliction of emotional distress arising out of an **injury to someone other than the Plaintiff.**

Id. In other words, when a direct injury is not involved, the only way to pursue a negligent infliction of emotional distress claim is to satisfy the bystander analysis. Otherwise, any parent whose child is injured could pursue an independent claim for negligent infliction of emotional distress even when the parent did not witness the injury. [2]

Defendant also relies on a Circuit Court Order signed by Judge Roger Young, Latham v.

[2] It is important to note that this is not a case where the parents learned of an injury to their child after the injury occurred as in the Doe case. Rather, these parents knew their child was missing and experienced the injury during the actual event. Here, the parents are not bringing an action as a result of an injury to their child; rather, they actually lost their child for a period of time and suffered injuries resulting directly from Defendant's negligence in losing their minor child. They are direct victims of Defendant's negligence unlike the parents in Doe who learned of an injury to their child after the fact.

Latham, 2014 WL 10417616 (The Honorable Roger M. Young, Feb. 3, 2014). In that case, the husband was employed by the Defendant bank. The husband and his co-employees hired someone to murder the husband's wife and apparently formulated the plan while at work. The murder-for-hire plot was discovered before any attempt was made on the wife's life. Even so, she brought an action for emotional distress she allegedly suffered once she learned of the plot. Judge Young quickly pointed out that she did not suffer any direct injury. Neither was she a bystander under a bystander analysis. Therefore, she could not recover. To the extent that the Judge Young's Order holds that Padgett v. Colonial Wholesale Distrib. Co. and its progeny of cases are no longer good law, the Order is obviously flawed and not binding on this Court in any event. In fact, in the case of Wilson v. Ray, Judge Mark Hayes issued an Order denying the Defendant's Motion for Summary Judgment in a claim by a mother who was talking on the phone with her son when he was involved in a car crash. In that case, Judge Hayes held that the mother could establish **both** a bystander liability claim as well as a claim for direct injury under the Mack, Spaugh, and Kinard line of cases as the direct victim of the defendant's negligence. Although neither of these Orders is binding on this court, Judge Hayes' Order illustrates that Mack, Spaugh and Kinard are good law and apply to cases involving direct injury to the Plaintiff. See, Exhibit A attached hereto.

CONCLUSION

Here, the minor has alleged injuries that directly resulted from the Defendant's negligence and has also alleged physical manifestations of the emotional trauma he sustained. Each parent has alleged injuries that directly resulted from the Defendant's negligence and have also alleged physical manifestations of the emotional trauma they sustained. All three plaintiffs are **direct** victims of the Defendant's negligence, not bystanders, and neither Kinard nor Doe mandates a

dismissal of any of the claims alleged. Accordingly, Defendant's Motion to Dismiss should be denied.

GOODING AND GOODING, P.A.

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March 31, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-06-242

Donna Wilson

PLAINTIFF(S)

J. Morgan Kearse, as special administrator of the estate of Mary Salisbury Ray

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED FOR RECORD
2015 JUL 17 PM 1:12

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment

This case came before the Court on Defendant's motion for summary judgment. After considering the arguments presented and reviewing the materials submitted, the Court denies the motion.

For purposes of this motion, the Court has examined the *Kinard* foreseeability test. As noted in *Kinard*, the foreseeability factors are applied on a case by case basis for claims of bystander liability where emotional trauma manifested by physical symptoms are sought by a party.

Defendant desires this Court to adopt a view of *Kinard* that allows bystander claims for emotional trauma manifested by physical symptoms only where the injured party "personally observes the accident." In *Kinard*, the court did reference this language when it referenced the *Dillion* case. However, the court, when it announced its approval of the "general approach" of Dillon, stated this element of bystander liability as "the plaintiff must contemporaneously perceive the accident." Thus, this Court does not find bystander liability claims barred simple because the Plaintiff did not actually "observe" the accident.

In reviewing Plaintiff's deposition, and applying the summary judgment standard of review to the deposition, this Court cannot grant the defendant's motion for summary judgment.

This Court is aware of Plaintiff's separate argument that this claim does not require a foreseeability/bystander analysis. This Court reviewed the cases offered for this proposition. This Court agrees that emotional trauma manifested by physical symptoms can be proven without establishing foreseeability through the bystander analysis.

The parties also offered arguments regarding medical aspects of Plaintiff's claim. The information presented to this Court establishes a dispute of fact at to the degree of physical/mental injury suffered by Plaintiff for purposes of a foreseeability/bystander analysis.

SCRCP Form 4C (10/2011)

PLAINTIFF'S EXHIBIT 'A'

Thank you all for the excellent presentations.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge 2132 **Judge Code** 7/15/15 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the 17th day of July 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 27th day of July, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Mat K B. Tinsley
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Allendale, SC 29810

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Alfred J. Cox
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ATTORNEY(S) FOR THE DEFENDANT(S)

Onatance B. Marshfield

CLERK OF COURT

Deputy

Court Reporter: Brenda Sigwald

State of South Carolina) Court of Common Pleas
County of Barnwell) Second Judicial Circuit

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

Plaintiffs,

vs.

Barnwell School District,

Defendant.

Transcript of Record

2021-CP-06-00028

April 1, 2021
Barnwell, South Carolina

B E F O R E:

The Honorable Clifton Newman, Judge

A P P E A R A N C E S:

Laine B. Gooding, Esquire
Mark B. Tinsley, Esquire
On behalf of the Plaintiffs

Allen D. Smith, Esquire
On behalf of the Defendant

Stacy S. Johnson
Circuit Court Reporter

I N D E X

E X H I B T S

NO EXHIBITS WERE INTRODUCED

(The following proceedings were held on April 1, 2021, beginning at 9:57 AM.)

THE COURT: Number one on the motions roster is where we're gonna start and that's Whitehead v. Barnwell School District?

MR. SMITH: That's correct. I'm Allen Smith here on behalf of the school district.

THE COURT: All right, Mr. Smith.

And?

MS. GOODING: Your Honor, I'm Laine Gooding here on behalf of the Plaintiff. I'm joined by Mr. Mark Tinsley today.

THE COURT: All right, Ms. Gooding.

Motion to dismiss.

MR. SMITH: Yes. Thank you, Your Honor.

On September the 11th, 2020, a substitute school bus driver was transporting students from school to their destinations. The minor plaintiff, who was about four years old at the time, was supposed to have been dropped off at a daycare center. The substitute bus driver mistakenly dropped the student off at a different location, the wrong location, and left the student there. For some period of time, the child's parents were alarmed because the child was missing. Fortunately, at some point somebody who recognized the child was able

to reunite the child with his parents.

This suit followed, essentially bringing -- it's a negligence case. They're alleging a claim for negligent infliction of emotional distress. I have filed a motion to dismiss the complaint because that's not a recognizable claim in South Carolina at this point in our law. The plaintiff cites some older cases from fifty years go and that may have been the law fifty years ago, but it's not the law now.

And I've provided to the Court with my memorandum of law a circuit court opinion from Judge Roger Young where he goes through the history of these cases and basically in order to recover for emotional distress damages, you can only do that in three circumstances. You can do it in a case involving a physical injury like a car wreck, you can also recover for your physical and your emotional damages, you can do it in a case alleging the tort of outrage, the intentional infliction of emotional distress. The third way you can do it is -- is the bystander context. You're in a zone of danger, somebody close to you is killed or seriously injured and you're a bystander, you can refer under that context.

In this -- in this case, none of those circumstances apply so based on the allegations of the

complaint I have moved to dismiss the complaint because there are no -- it's not a bystander case, it's not an intentional infliction of emotional distress case and there's no allegation that the child was injured other than the allegation of emotional distress or no injuries, and that's the basis for our motion.

THE COURT: Do you have a copy of that motion by chance?

MR. SMITH: I don't have the motion, but I've got the memorandum of law.

THE COURT: No, the memorandum is fine.

MR. SMITH: I've got my memorandum of law and the case I'm citing to.

Can I pass it up?

THE COURT: Okay.

MR. SMITH: Thank you.

THE COURT: Okay. All right, Ms. Gooding.

MS. GOODING: Thank you, Your Honor. May it please the Court?

THE COURT: Yes.

MS. GOODING: This is a case about a little four-year-old boy who was dropped in a bad part of town and -- and left for an extended period of time while his parents searched frantically for him. They both -- they both sustained an injury, the parents. They believed

they had actually lost their child, the little boy, worried to death that he would be lost forever. Since that time though the little four-year-old has been under -- undergoing counseling, so this is -- this has affected him quite significantly.

We've brought these claims as old-fashioned negligence claims, which is absolutely allowed under South Carolina law and the -- the case law goes back, as I've outlined in my brief, all the way to 1898 and maybe before that, but that's -- that's where I started.

And so in 1898 -- and it's fun to read those old cases. That was the Mack case. And as Your Honor is -- is aware, many of those cases involved railroads, trains and train situations, and so in that old Mack case a -- a young by was leading a -- a donkey or a mule and -- and it got caught on the tracks and he was trying to get it off. He almost got hit by a train, but there was no physical impact, he was scared to death, and the Court allowed him to recover for the fright that manifested itself in -- in physical symptoms like sleepless nights, that sort of thing.

After that, Your Honor, there -- there were other cases, but the next notable one was the Spaugh case, also involving a -- a train company as the defendant. In that case, Ms. Spaugh was trying to get back to her

home in Holly Hill. Her husband bought her a ticket and was told by the train company that the connecting train would get her to Holly Hill by that night. It was important for her to get home as she had small children at home, she had a disabled mother at home. Well, she -- the connecting train did not get her there, it would not get her there, and so she had to disembark the train and try to find a way home on her own. She was allowed to bring her claim for negligence for the mental suffering that manifested itself in physical symptoms for the -- the fear of what was going on with her children and her mother and also for her fear of -- of being stranded there.

Following that, a little more recently, I believe in 1958, was the Padgett case. That's the case where Mr. Padgett was sitting in his living room when all of a sudden a -- a panel truck collided into his home. He was not physically injured, there was no physical impact, but he was allowed to recover for negligence for the mental anxiety, again, manifested by physical symptoms, and so that is the -- the line of cases that is still the law in South Carolina.

THE COURT: Tell me again what happened in the last example you were giving.

MS. GOODING: The last -- with Mr. Padgett?

THE COURT: Yes.

MS. GOODING: Sitting in his house, a panel truck struck the house, he was not physically injured, there was no physical impact, but he was allowed to recover for the fear that he experienced with -- with that happening with -- with him in -- in close proximity.

THE COURT: And that was which year?

MS. GOODING: That was 1958, I believe, Your Honor.

THE COURT: Thank you.

MR. GOODING: And so after -- after 1958 -- and I have all these cases printed out for the Court in order just to see the progression if you need them, but after --

THE COURT: Yeah, well, I don't have any of them. That's why I asked for his brief. I -- I saw your memorandum that I think was sent to me this morning or last night or something.

MS. GOODING: We filed it yesterday.

THE COURT: Yesterday.

MS. GOODING: Yes, sir.

THE COURT: Well, I glanced through that --

MS. GOODING: Okay.

THE COURT: -- briefly last night, but do you have copies of whatever you --

MS. GOODING: I do.

THE COURT: Okay.

MS. GOODING: I have all of the case law and my -- and my memorandum.

May I approach, Your Honor?

THE COURT: Yes.

MS. GOODING: (Handing.)

THE COURT: Thank you.

MS. GOODING: You're welcome.

And so, Your Honor, after 1958 there -- there came about the -- the Kinard case, and that was a 1985 case, and that is a case where a mother and a daughter were in a car crash and a truck that was hauling some roof trusses, the -- the trusses came off the truck and collided into the car. And so both of them had terrible physical injuries and so the mother had her own claim for her physical and mental suffering as a result of her injuries, but she also presented a claim for the emotional distress that came about from watching her daughter be crushed, and so that's where this bystander analysis came from.

That is a wholly different thing than what we're claiming. There the Court said that we're gonna allow this mother to collect for the emotional damage she sustained by watching her daughter, you know, get physically injured, but we're gonna create this bystander

analysis where you have to be in close proximity, you have to have perceived it, you have to be a relative, you know, a close personal relation, those -- those elements.

The reason for that case is that that mother in her claim where she was claiming damages from watching her daughter get hurt, she was not claiming a direct injury, she was claiming injuries from -- emotional injuries from damage to another person, and so that's where the bystander analysis came from.

The reason for that analysis is to keep people who -- for instance, there's a bad wreck in front of me and I drive up on it and I see some mangled body, I -- if I didn't witness it, if that's not a close relative of mine, I would not be able to recover for that other -- for the injury to that other person that has an effect on me. That's a wholly different thing and our Supreme Court has made that clear by the Bray case.

So after that 1985 Kinard case where the trusses fell on the car comes the -- the Bray versus Marathon Corporation case. That's 2003. That's the case where two coworkers were working, there was a compactor that they were crushing things with, and so the one worker pressed the button and the compactor basically malfunctioned and another coworker was crushed in the

compactor. Well, Ms. Bray is the person who pushed the button and in that case the court allowed her to -- even though she was not injured they found that she could recover for her injuries aside from the bystander analysis and that court, our Supreme Court in 2003 after that Kinard case that set out the bystander analysis, they jumped back to the Mack case to the Spaugh case to the Kinard case and they said this person who -- who witnessed these injuries because she's -- she's the one who pressed the button, whatever, she's allowed to recover under this -- this old line of cases. That's our Supreme Court saying that in 2003.

There is no doubt under South Carolina law that the -- that the Kinard case and its progeny, the ones that I've outlined, those old cases, are still good law as -- as pronounced by our Supreme Court in 2003.

Subsequent to the Bray case, then comes the Doe case that defense counsel has cited. The Doe case is the case where a minor child was sexually molested by a state employee. The claim -- the parents attempted to pursue a claim for their emotional distress that came about once they found out about what had happened to their daughter or son, I think it was a daughter, and the court said no, bystander analysis applies here, you didn't actually have any direct injury, you're trying to

claim something that you found out about after the fact, and so that's when that bystander analysis is -- comes into play to determine the class of plaintiff and they did not meet it.

But, again, Your Honor, there's a difference between a bystander and a direct plaintiff and that's what is made clear in the line of cases that is made up of Mack, Spaugh, Kinard and then Bray.

My clients are direct victims. This little boy was directly impacted by the negligence of the defendant. His parents suffered a direct injury when they learned that he was missing and thought they had lost him for eternity. That was their loss, that was their direct injury.

As far as the -- as the argument goes about physical symptoms, we have alleged in our complaint the manifestation of physical symptoms. In the context of this motion to dismiss, we have all the elements in our complaint. If discovery goes on later on and we can't prove a physical manifestation, which I believe we can, but if we can't then -- then maybe a motion for summary judgment would be a proper way to accomplish that goal, but at this point in time our pleading pleads every element necessary for us to survive a motion to dismiss and I would ask the Court to deny the motion.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Well, do you -- do you distinguish -- you have in your lawsuit, the caption at least, Allison Whitehead, individually -- or Ashley Whitehead, individually, and as guardian ad litem of the minor, so the injured parties are not the child who was left off, dropped off, but the parents?

MS. GOODING: We have three plaintiffs. Three claims. So the -- the minor's claim brought by Ashley Whitehead as the guardian ad litem, we have Ashley Whitehead, the mother, in her individual capacity pursuing a claim for her direct injury, and the father pursuing a claim. There are three plaintiffs. All -- they're all pled within the same cause of action, but three plaintiffs.

THE COURT: All right. Yes, sir.

MR. SMITH: Very briefly. The -- the Kinard case in 1985 made it very clear that in South Carolina you can only bring a claim for negligent infliction of emotional distress in one context, and that's the bystander context. Kinard makes it very clear you can't bring a negligent infliction of emotional distress claim under any other context. There has to be something else, other -- like a negligence claim or a physical injury,

that sort of thing. Doe reaffirmed that the parents had no claim for negligent infliction of emotional distress because it was not a bystander context.

The Bray case, which the plaintiff cites to, used a different analysis. That was a products liability case and so the Court used a different analysis.

THE COURT: Yeah, strict liability.

MR. SMITH: Yes, a strict liability case. And then so they analyzed that under the products liability statute.

And -- and as a practical matter, if this cause of action for negligent infliction of emotional distress was allowed, we would have no need to have an intentional infliction of emotional distress claim. Nobody would ever plead it. It wouldn't exist as a claim if -- if we could bring negligent infliction of emotional distress claims without a physical injury.

Thank you.

THE COURT: Well, how about the -- the last case, the Doe v. Greenville? What's the -- how does that --

MR. SMITH: The Doe -- the Doe case actually supports our position. Doe versus Greenville involved a sexual assault of a -- of a child and the court said the parents cannot bring a negligent infliction of emotional distress claim there because as in Kinard this

was not a bystander claim so the parents had no claim.

MS. GOODING: May I briefly respond, Your Honor?

THE COURT: Yes.

MS. GOODING: As for Bray, Your Honor, that was a products case, but there were two causes of action. There was a negligence cause of action and a strict liability cause of action, and a reading of the case revealed that under the analysis for the negligence cause of action the court specifically relied on Mack, Spaugh, Kinard and held that those cases were still -- still good law, there is no doubt about that, and so to dismiss this case would be in direct contravention of our Supreme Court's recognition of those old cases as being good law.

THE COURT: All right. So you went back to 1900 and cited one or 1890's and then another one in 1930, 1940, 1950, 1960. I mean, we're having lawsuits filed every day for every thing and has any been filed under the direct scenario of my child was injured and so, therefore, I am injured or are you saying the child and the parents are the same? The child was dropped off, so it would appear that to the extent the child was injured from being wrongfully dropped off in the bad neighborhood that that seemingly would give the child a cause of action, but then the parents who were concerned

about the child then also has a cause of action based on what again?

MS. GOODING: Well, Your Honor, I think that the -- and I know it's an old case, but the Spaugh case of Ms. Spaugh, who was on the train, and so --

THE COURT: What year was that?

MS. GOODING: That was 1930, I believe.

THE COURT: Yeah, well, that's my point. You know, we're a hundred years -- almost a hundred years later and fifty thousand lawsuits later and why do we have to go back to 1930 to find authority when -- when the courts are -- even from Dillon v. Legg in law school to all of the many lawsuits, particularly the ones now being filed against school districts and -- and the like, and I see a lot of them with all kinds of causes of action.

MS. GOODING: I don't think we do have to go back that far, Your Honor, because in 2003 the Supreme Court relied on those cases and they're -- they're still good law. There are two different avenues to get to some specific fact pattern and to -- you know, and so the -- the parents here, they have a four-year-old child who is lost by the school district --

THE COURT: Right. We understand.

MS. GOODING: -- and so the analysis is whether or

not they sustained a direct injury and so what I would submit to the Court is that that Bray -- the Bray case in 2003, the court could have -- our Supreme Court could have just fallen back on Kinard and said no, Ms. Bray, you don't meet that -- that bystander analysis. And the dissent brought that up. I think it was Pleicones. He brought that up in his dissent and said, you know, we could have just -- you-all could have just relied on Kinard, but the majority of the Supreme Court decided not to. They decided to go back to 1898 and 1930 and to the Padgett case so that there is a way for these parents to get that cause of action and it's -- it's nonsensical to me to say that bystander -- that all we have is bystander liability. So, in other words, the person that it actually happened to has no claim, but a bystander, as long as you meet these elements, might. That's not the point. That was not the purpose of that bystander analysis. The purpose of the bystander analysis was to eliminate people who drive up on a wreck and see things after the fact. You can't recover for that. That's what the bystander analysis eliminates. It does not eliminate the old case law that recognized that old-fashioned negligence claims for people like Ms. Spaugh on that train who couldn't get home to her children.

THE COURT: Well, let's see. I issued an order most recently here in Barnwell county in a case, Jacobs versus -- individually and next of kin versus Barnwell Elementary School and Barnwell School District, and I wrote in there the defendants have moved to dismiss a second cause of action alleging negligent infliction of emotional distress. In 1985, the Supreme Court recognized negligent infliction of emotional distress as a cause of action, but limited recovery to bystanders in close proximity, and that was the Kinard case v. Augusta Sash and Door. In this case, plaintiff alleges that a teacher identified, threatened and physically attacked a minor child and used profanity against the child, and so here the parent is suing because the teacher threatened and physically attacked her child and used profanity against her child and there was also intentional infliction of emotional distress which -- and for punitive damages. Let's see what all I dismissed.

So I granted the motion dismissing negligent infliction of emotional distress based on the -- the defense's argument in this case, in essence, that to maintain a separate cause of action must be a bystander in close proximity.

MS. GOODING: May I distinguish that situation,

Your Honor?

THE COURT: Yes.

MS. GOODING: So the difference there is that those parents, and I'm not familiar with the facts, but based on what I just heard Your Honor --

THE COURT: Well, you're at home and you get a call that the teacher slapped your child and cursed your child and you sued them for doing it.

MS. GOODING: Right. That is just like the Doe case where the parents were not allowed to recover because the parents in Doe and the parents in the case Your Honor is referencing they learned of this after the fact. They -- the injury occurred and then they learn of it.

THE COURT: Right.

MS. GOODING: My clients experienced the actual loss while it was going on. They searched for forty-five minutes. Everybody did. The school had no --

THE COURT: So the distinction is your client went to the scene.

MS. GOODING: Well, they didn't go to the scene because they didn't know where the scene was. They're searching. They experienced the loss while it was going on. They lost their son. It's not like they found out later he was lost. They experienced it. They searched

frantically for, I think, about forty-five minutes until finally some -- luckily some nice person saw the child sobbing in the parking lot and took efforts to -- to reunite them. They experienced it while it was going on. This is very different than learning -- learning of something after the fact, which is what that bystander analysis is for. This is like Spaugh, which is still good law.

THE COURT: Which is like what?

MS. GOODING: Spaugh. The case of Spaugh where she experience it while it was going on.

THE COURT: 19 what?

MS. GOODING: 1930.

THE COURT: 1930. Okay.

MS. GOODING: But, Your Honor, our Supreme Court -- I sound like a broken record -- in 2003 recognized that Spaugh was still good law for people who experienced it while it was going on like my clients.

THE COURT: All right. What do you say about all that, Counselor?

MR. SMITH: I go back to what I've said earlier. This is a claim for negligent infliction of emotional distress and Kinard has said that's not allowed except during the bystander context.

THE COURT: All right. Well, I think I'll have

both of you submit proposed orders and I'll have an opportunity to think more clear -- more in depth because I hadn't received these papers before today.

MS. GOODING: Thank you, Your Honor.

MR. SMITH: Thank you. Would you prefer that we e-file them?

THE COURT: Yes, e-file serving the other party. The other party can comment on it, but e-file it so that I can more easily sign it.

MR. SMITH: Thank you.

THE COURT: What kind of timeline will you-all be on?

MR. SMITH: It's -- the case is just getting started, so we're not in a hurry.

MS. GOODING: Your Honor, I'm on vacation next week, so I would ask for maybe ten days once I return.

THE COURT: That's fine. I'm asking you-all, so.

MR. SMITH: That's fine.

THE COURT: What period of time do you want to file it? Thirty days?

MS. GOODING: That would be great.

MR. SMITH: Whatever -- I can do whatever she needs, yes.

THE COURT: Okay. Within thirty days.

MS. GOODING: Okay. Thank you.

THE COURT: Thank you-all.

(Whereupon, the proceedings were concluded at 10:24 AM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 1st day of April, 2021.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

June 25, 2021

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS
Ashley Whitehead, individually and as Guardian ad Litem for Brantley W., a minor under the age of fourteen (14) years and William B. Whitehead, Plaintiffs, vs. Barnwell School District 45, Defendant.	)	C.A. No. 2021-CP-06-00028 **ORDER GRANTING SCHOOL DISTRICT'S MOTION TO DISMISS**

This case came before the Court on April 1, 2021 on a motion that the Defendant, Barnwell School District 45 ("District), filed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The District seeks to dismiss the Plaintiffs' complaint on the ground that South Carolina law does not permit a claim for an alleged negligent infliction of emotional distress under the facts alleged in the Plaintiffs' complaint.

All parties were present and represented by counsel of record for the hearing on the District's motion. For the reasons set forth herein, the Court grants the District's motion to dismiss.

Plaintiffs allege that, on or about September 11, 2020, the District's school bus driver negligently dropped the minor Plaintiff, B.W., off at the wrong location. For some period of time, B.W.'s whereabouts were unknown. B.W. was reunited with his parents later that afternoon. The complaint does not allege any physical injury to B.W. or his parents. Rather B.W. and his parents seek to recover for the emotional distress they experienced because B.W. was missing for a period of time.

The South Carolina Supreme Court's opinion in *Kinard v. Augusta Sash and Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) is instructive on the Defendant's motion. In that case, the

plaintiff, a mother, sought to recover for her own physical injuries, as well as her alleged emotional distress from witnessing a serious injury to her daughter as the result of a vehicle accident. The Court adopted a cause of action for negligent affliction of emotional distress, but strictly limited the claim to the "bystander" context. In other words, the Court established the elements of this cause of action to require that it only applies when a defendant's negligence causes a death or serious physical injury to another while the plaintiff bystander is in close proximity to the accident and is closely related to the victim. Plaintiffs have conceded that they are not alleging a bystander claim.

Additional South Carolina authorities are consistent with the narrow scope of this claim. For example, in *Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E.2d 305 (2007), a student's parents brought an action against a school district alleging several causes of action arising from incidents of sexual activity between a female student and a substitute teacher. The parents alleged, among other things, a claim for negligent infliction of emotional distress. With regard to this claim, the Court stated as follows:

> In this case, Mr. and Mrs. Doe admit that they did not and cannot allege facts which would support a bystander liability cause of action. **Because South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which is cognizable under South Carolina law**.

Doe, 651 S.E.2d at 307 (emphasis added). *See also Pope v. Barnwell County School District No. 19*, 2017 WL 1148741 (D.S.C. 2017) (recognizing that South Carolina law only permits recovery for negligent infliction of emotional distress in the very limited context of situations involving bystander trauma).

In *Dooley v. Richland Memorial Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), parents sued a hospital for alleged negligent infliction of emotional distress based on the

misidentification of their son as an individual seriously injured in an automobile accident. The Court rejected the parents' cause of action in part because they "failed to make any showing of physical injury to support their claim." As in this case, the parents in *Dooley* alleged to have sustained emotional trauma because of fear and concern about the wellbeing of their child, who had been misidentified as an accident victim. The facts of *Dooley* are analogous to this case, in that the Plaintiffs here allege that for a period of time they were concerned about the wellbeing of their child.

In this case the Plaintiffs admit that they have not alleged a "bystander" liability claim. They instead argue that this is a negligence claim in which they suffered a "direct" injury. Plaintiffs' argument ignores the clear holding of the *Kinard* and *Doe* decisions. They cite to several cases to argue that they can pursue this negligent infliction of emotional distress claim outside of the bystander context. The Court disagrees.

First, the Plaintiffs rely on three older court decisions—*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); and *Padgett v. Colonial Wholesale Distributing Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958). Plaintiffs' reliance on these decisions is misplaced. All of these cases were decided many years ago, prior to the *Kinard* decision. The *Kinard* decision controls, not the older cases relied upon by the Plaintiffs.

Finally, Plaintiffs also rely on *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003). The *Bray* decision is distinguishable from this case. The Supreme Court of South Carolina in *Bray* held that a worker who was operating a trash compactor when a coworker was crushed to death could bring a products liability claim against the manufacturer and lessor of the compactor for strict liability and negligence. The Court's reasoning in that case was based on the fact that the Plaintiff was alleging a products liability claim under the strict liability statute for defective products. Because the Plaintiff's claim involved strict liability, the Court also

allowed a negligence claim to proceed. However, *Bray* did not overrule the *Kinard* and *Doe* decisions, and is limited to the facts of that case, involving a strict liability case based on a defective product.

IT IS THEREFORE ORDERED that the District's motion to dismiss is **GRANTED**.

AND IT IS SO ORDERED.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BARNWELL	)	CIVIL ACTION 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,	)	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**
Plaintiffs,	)	
vs.	)	
BARNWELL SCHOOL DISTRICT 45,	)	
Defendant.	)	

This case came before the Court on April 1, 2021, upon Defendant's Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), SCRCP. Laine B. Gooding appeared and argued on behalf of Plaintiffs while Allen Smith appeared and argued on behalf of Defendant. For the reasons that follow, the Court denies the Defendant's Motion to Dismiss.

In their Complaint, Plaintiffs allege that Defendant's school bus driver dropped the four year old minor off at the wrong location where he was left unattended and unsupervised for a period of time. When the minor's mother was notified that her son was not delivered to the daycare facility, she in turn called her husband (the minor's father) and they both began frantically searching for their son who was lost to them for a period of time. In the Complaint, the minor's mother, Ashley Whitehead, in her capacity as his Guardian ad Litem, has asserted a negligence claim under the S.C. Tort Claims Act on behalf of her minor son alleging that he sustained "injuries to his body, both mental and physical." Moreover, Ashley Whitehead, in her individual capacity, as well as William B. Whitehead (the minor's father), in his individual capacity, have asserted

their own negligence claims against Defendant for medical expenses they have incurred on behalf of their minor son, as well as "emotional distress, manifested by physical symptoms" as a result of the fear they experienced during their search for their son. Significantly, Plaintiffs have alleged that "Defendant owed a duty of care to **both** the minor and the minor's parents to properly supervise the minor."

South Carolina law clearly recognizes a negligence cause of action which allows recovery for shock, fright and emotional upset, even when there is **no** physical impact, provided that there is some physical manifestation of the emotional trauma. Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958). In Padgett, Mr. Padgett was sitting in his living room watching television when Defendant's liquor truck collided with his house. Mr. Padgett was not struck by the truck nor did he suffer any physical injury as a direct result of the collision with his house. Rather, he suffered shock and fear that he claimed manifested in the physical symptom of a rash. Mr. Padgett sued for negligence. Obviously, the driver of the truck owed Mr. Padgett a duty of care in operating his vehicle, and he breached that duty by failing to exercise due care. The question before the Court was whether Mr. Padgett could recover for emotional damage when he suffered no physical impact that resulted in an actual physical injury. The Court, relying on 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), and other similar cases, clearly held that Mr. Padgett could recover for injuries sustained as a consequence of shock, fright and emotional upset even in the absence of a physical impact, provided the emotional trauma results in physical manifestation. [1]

[1] As recently as 2003, our Supreme Court relied on the Padgett case in holding that a Plaintiff, to whom the Defendant already owes a duty, can recover for emotional trauma, manifested by physical symptoms even in the absence of a physical impact. See, Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003). Therefore, contrary to Defendant's argument, Kinard v. Augusta Sash & Door Co. did not overrule the Padgett line of cases.

Here, the minor, through his Guardian ad Litem, has properly alleged all elements of a negligence cause of action: 1) that the Defendant owed the minor a duty of care; 2) that Defendant breached that duty of care by leaving him at the wrong location unattended and unsupervised; and 3) that the Defendant's negligence caused the minor bodily injuries, both mental and physical. Moreover, under South Carolina law, the minor's parents have properly asserted a claim for any medical expenses they have incurred for treatment received by their minor son.

Likewise, Mr. and Mrs. Whitehead have properly alleged all elements of a negligence claim in their individual capacities: 1) that Defendant owed them a duty of care in supervising their minor child; 2) that Defendant breached that duty of care by losing their minor child; and 3) that Defendant's negligence caused them emotional trauma, manifested by physical symptoms, as a result of the fear they experienced when they could not physically locate their minor child.

Defendant argues that all claims asserted in the Complaint must be dismissed based on Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). Defendant argues that in adopting a negligent infliction of emotional distress cause of action in bystander liability cases, the Kinard Court eliminated direct victims of negligence from the recovery of emotional distress without physical impact. Defendant's argument is flawed. In Kinard, the Court addressed only situations in which a Plaintiff attempts to recover damages for emotional trauma as a result of witnessing physical injury to another party. The Court chose to allow a small class of bystanders to pursue a claim for negligent infliction of emotional distress suffered as a result of witnessing injury to another person provided the Plaintiff meets the elements of the bystander analysis. In other words, the Court recognized that a defendant's duty of care should extend to certain bystanders to whom a duty of care would not otherwise be owed. Here, the minor child is obviously not a bystander; rather, he was a direct victim to whom the Defendant most definitely

owed a duty of care. Likewise, the parents of the minor were obviously not bystanders; rather, during the time they searched for their lost child, they were direct victims of Defendant's breaches of the duty it owed directly to the minor's parents. The critical factor is that the parents entrusted their minor child to Defendant, and Defendant therefore owed them a duty of care to properly supervise the minor. The parents are not claiming injury as a result of witnessing injury to their child. Instead, they actually lost physical custody of their child while his whereabouts were unknown.[2] The bystander analysis is not necessary because the Defendant owed the parents a duty of care separate and apart from any bystander analysis. Contrary to Defendant's argument, the bystander liability recognized by Kinard expands the class of Plaintiffs from the direct victims of a Defendant's negligence to include certain bystanders who are not direct victims of negligence and to whom a defendant would not owe a duty of care without bystander liability. [3]

For these reasons, the Court denies Defendant's Motion to Dismiss.

IT IS SO ORDERED!

April ___, 2021

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[2] Defendant's reliance on Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 305 (2007) is likewise misplaced. In Doe, the parents asserted a bystander claim for negligent infliction of emotional distress that they experienced after learning that their daughter had been sexually assaulted. They were not direct victims to whom a duty was owed because they did not witness the assault.

[3] To the extent Defendant argues that there would be no need for the tort of outrage/intentional infliction of emotional distress if Padgett and its progeny are still good law, Defendant's argument is flawed. The tort of outrage/intentional infliction of emotional distress is an intentional tort that does **not** require the existence of a duty of care. Rather, when a Defendant intentionally acts so outrageously, even to someone to **whom he owes no duty of care**, he can be held responsible for severe emotional distress **even without** the manifestation of physical symptoms. Therefore, the Court's adoption of the outrage cause of action in Ford v. Hutson does not affect the Padgett line of cases in any way, just as the Court's adoption of a negligent infliction of emotional distress cause of action for certain bystanders does not affect the Padgett line of cases in any way.

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CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all material proposed to be included by the parties and not any other material.

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