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.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGES

CASES:

RULES:

I. STATEMENT OF ISSUE ON APPEAL

Whether the Circuit Court properly dismissed Ashley and William Whitehead's individual negligence claims for their own emotional distress when they did not sustain any physical injuries and do not allege a "bystander" claim?

II. STATEMENT OF THE CASE

This tort action, filed by Ashley and William Whitehead on February 2, 2021, arises out of an incident in which their minor son, B.W., was a student passenger on a school bus operated by Barnwell School District 45 ("District") and dropped off at the wrong location. (R. p. 9.) 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. (R. pp. 8-11.)

As part of this action, the Whiteheads allege that, on or about September 11, 2020, the District's school bus driver negligently dropped B.W. off at the wrong location. (R. p. 9.) According to the complaint, for some period of time, Mr. and Mrs. Whitehead believed their son was missing, they began searching for him, and they were reunited with B.W. later that afternoon. (R. p. 9.) The complaint does not allege any physical impact to B.W. or his parents, but asserts B.W. suffered, among other things, significant injuries to his body, both mental and physical. (R. pp. 9-10.) In addition, the Whiteheads allege that as a result of the incident, they have suffered extreme emotional distress, manifested by physical symptoms, medical expenses, and other damages. (R. p. 10.)

On March 1, 2021, the District moved the Circuit Court, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an order dismissing the Whiteheads' complaint on the grounds that the Whiteheads could not establish the essential elements of their alleged claims, including the requirement of a physical injury, and B.W.'s parents could not establish a

"bystander" claim. (R. pp. 12-13, Def's Mot. to Dismiss.) Following briefing by both parties, a hearing was held on the District's Motion to Dismiss on April 1, 2021. (R. pp. 14-60.) By order dated May 10, 2021, the Circuit Court granted in part, and denied in part, the District's Motion to Dismiss. (R. pp. 2-6.) Specifically, the Circuit Court dismissed the claims of Ashley Whitehead and William Whitehead insofar as they sought to recover for their own emotional distress. (R. p. 5.) The Circuit Court held the parents could proceed with their individual claims, but only with regard to any alleged medical or counseling bills incurred to provide care for B.W. (*Id.*) The Whiteheads filed a Notice of Appeal on June 4, 2021.

Appellants assert that the Circuit Court erred in dismissing Ashley and William Whitehead's individual claims for emotional distress. Appellants' arguments misconstrue or misapply the law applicable to the claims. Respondent contends that, under reasonable construction of the law and in viewing the facts alleged in this complaint in the light most favorable to Appellants, the Circuit Court correctly concluded Ashley and William Whitehead could not recover for emotional distress under applicable South Carolina law and properly dismissed their claims to the extent they sought such recovery. Accordingly, Respondent prays this Court to affirm the order entered below.

III. STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 573 S.E. 2d 805 (Ct. App. 2002). A trial judge may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the

complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001); *see also Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. *Williams*, 347 S.C. at 233, 553 S.E.2d at 500.

IV. ARGUMENTS

A. The Circuit Court Correctly Concluded Ashley and William Whitehead's Individual Claims For Emotional Distress Are Not Recognized Under Applicable South Carolina Law.

The Circuit Court correctly concluded the Appellants' claims for an alleged negligent infliction of emotional distress claims are not recognized under applicable South Carolina law. With the exception of certain products liability claims, South Carolina 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, 582-583, 336 S.E.2d 465, 467 (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). *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).

In this case, the complaint does not allege Ashley and William Whitehead suffered a physical injury, rather only non-specific allegations of emotional distress manifested by physical symptoms. (R. 10.) Further, the complaint does not state a claim for outrage or intentional infliction of emotional distress against the District. (R. pp. 8-11.) Additionally, the Appellants cannot establish a claim for negligent infliction of emotional distress because South Carolina courts have expressly limited that claim to "bystander recovery," and Appellants concede they are not proceeding under that theory. (R. pp. 26, 34.) *See Kinard*, 286 S.C. at 582-83, 336 S.E. 2d at 467 (recognizing negligent infliction of emotional distress as a cause of action **only** for bystanders witnessing accidents involving close relatives). *See also, Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007), *Stewart v. State Farm Mutual Insurance Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 603 (Ct. App. 2000), *Doe v. North Greenville Hosp.*, 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995). Accordingly, because the Appellants' claims for negligent infliction of emotional distress are not recognized under the current applicable and controlling law on this issue, the Circuit Court's dismissal of Appellants' individual claims for emotional distress was proper.

1. The Circuit Court Applied *Kinard* Correctly When Dismissing the Parents' Claims for Emotional Distress.

The South Carolina Supreme Court's opinion in *Kinard* is dispositive of this issue. *See Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985). In that case, the Plaintiff and her daughter were injured when a load of roof trusses fell from defendant's truck and struck the car in which they were driving. *Kinard*, 286 S.C. at 580, 336 S.E.2d at 466. The mother sought to recover for her own physical injuries, as well as her alleged severe shock and emotional distress from witnessing a serious injury to her daughter as the result of a vehicle accident. 286 S.C. at 580-581, 336 S.E.2d at 466. The question before the Court was "whether a mother who is herself physically injured as a result of a delict may recover damages for severe shock, emotional trauma and resulting physical injuries caused by witnessing severe injury to her daughter in the same incident." *Id.*

In answering the question, the *Kinard* Court adopted a cause of action for negligent infliction of emotional distress, but strictly limited the claim to only the "bystander" context, requiring the Plaintiffs to show the following elements to prevail on such 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 Whiteheads' complaint admittedly does not allege a bystander claim for relief. Therefore, the Circuit Court's dismissal of Ashley and William Whitehead's individual claims for emotional distress was proper.

Other South Carolina authorities are consistent with the narrow scope of this claim. 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. 375 S.C. at 66, 651 S.E.2d at 306. 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, 375 S.C. at 68, 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).

Another example of the narrow scope of emotional distress claims is found in *Dooley v. Richland Memorial Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984). In *Dooley*, the 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. 283 S.C. at 373-374, 322 S.E.2d at 670-671. The *Dooley* Court rejected the parents' cause of action in part because they "failed to make any showing of physical injury to support their claim." 283 S.C. at 375, 322 S.E.2d at 671. 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. In this case the Whiteheads have alleged that for a period of time they were distraught about the wellbeing of their child until his whereabouts were known. (R. pp. 7,10.)

Appellants contend *Kinard*, *Doe* and *Dooley* are inapplicable. However, these cases have not been overruled, and Appellants have failed to establish any clear departure from this governing authority. Rather, Appellants contend these cases do not apply because they did not address claims

in which the Plaintiffs were also "direct victims" of the negligence or wrongdoing. While the *Kinard* decision did not seek to categorize the victims, the fact that no distinction was made does not render the requisite elements inapplicable to all claims of negligent infliction of emotional distress.

Appellants also seek to distinguish these cases by emphasizing the timing of the alleged emotional distress in comparison to the actual tortious event. Particularly, Appellants argue that *Doe* and *Dooley* involved scenarios in which the parents received information about their children, *after* the event occurred, while Ashley and William Whitehead experienced injury *during* the actual event giving rise to the action. However, in *Doe* and *Dooley* the Court did not find the time in which the parents received information of a loss concerning their child to be dispositive on the key issue. Further, in *Kinard*, the Court noted the mother could not recover for the emotional upset arising from her voluntary vigil at her daughter's bedside following the accident. 286 S.C. at 583, 336 S.E.2d at 467 n.3. Therefore, in essence, *Kinard* did in fact account for the timing of emotional distress suffered, including directly and simultaneously at the time of and after the alleged incident, and still restricted recovery to the bystander standard, rendering Appellants' "direct victim" argument and timing distinction misplaced. There is simply no basis to wholly and completely disregard *Kinard* in disposing of this issue, and the Circuit Court did not err in relying or giving weight to this authority.

2. Appellants' Reliance on *Mack, Spaugh, Padgett,* and *Bray* Is Misplaced and Does Not Support A Reversal Of The Trial Court's Decision.

Appellants seek to rely on several decisions to support their position that they can recover for an alleged negligent infliction of emotional distress. That reliance, however, is misplaced because *Kinard* controls. (R. p.4.) *Kinard* has impliedly overruled those older decisions by clearly establishing that a claim for negligent infliction of emotional distress is only allowed in one narrow context – the bystander claim.

Further, the pre-*Kinard* cases are distinguishable. In *Mack*, a minor sought recovery for emotional trauma resulting from an incident in which he was nearly hit by a locomotive when trying to remove his mule from the track before it was ultimately struck and killed. *Mack v. South Bound R. Co.*, 29 S.E. 905, 906 (1898). In *Spaugh*, the Plaintiff, a mother, sought recovery for mental distress without limitation after being given misinformation about her train schedule and being unnecessary delayed from returning home to care for her family. *Spaugh v. Atlantic Coast Line R. Co.*, 155 S.E. 145 (1930). In *Padgett*, the Plaintiff was permitted to recover for emotional distress that manifested itself with physical symptoms, after a truck struck his home but did not make impact with Plaintiff. *Padgett v. Colonial Wholesale Distribution Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958). Besides no longer being good law after *Kinard*, none of these cases involved a parent's ability to recover for negligent infliction of emotional distress as a result of receiving misinformation about a child or close relative, a parent suffering a simultaneous loss with the child, or a parent witnessing loss sustained by a child or close relative. Therefore, Appellants' reliance on these cases is misplaced.

Likewise, *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E. 2d 93 (2003) does not support the Appellant's position. In *Bray,* the Plaintiff, a worker at a manufacturing plant, witnessed a coworkers' death resulting from a defective compactor. 356 S.C. at 114, 588 S.E. 2d at 94. The Plaintiff filed a products liability action against the manufacturer for beach of implied and express warranty, strict liability, and negligence, seeking recovery for serious and permanent physical injuries caused by the emotional trauma of witnessing her co-workers' death. 356 S.C. at 115, 588 S.E. 2d at 95. *Bray* involved the Court's analysis for recovery of emotional distress for strict liability and other theories of products liability, and did not overturn *Kinard*. Particularly, as noted by the Circuit Court, the *Bray* Court held the Plaintiff could bring a products liability claim against the manufacturer and lessor of the compactor for strict liability and negligence. (R. p. 5.) The *Bray* analysis is limited to the strict liability setting. Therefore, Appellants' reliance on *Bray* is

misplaced because it is not controlling or dispositive on the issue before this Court, and the Circuit Court properly found it distinguishable and not persuasive. Accordingly, the Circuit Court's ruling should be affirmed.

V. CONCLUSION

The Circuit Court properly dismissed Ashley and William Whitehead's individual claims for their own emotional distress based a review of the complaint in the light most favorable to Appellants and in accordance with applicable law. Accordingly, the Court should affirm the Circuit Court's ruling.

Respectfully submitted,

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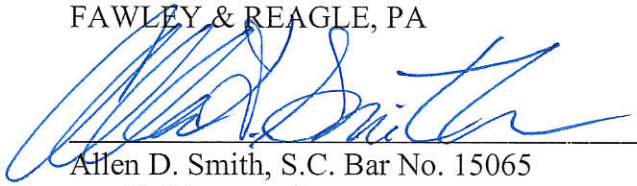

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CERTIFICATE OF COUNSEL

I certify that the Final Brief of Respondent complies with Rule 21(b), SCACR.

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