IN THE SUPREME COURT OF MISSISSIPPI

CIVIL APPEAL NO. 2010-CA-02103

ZACHARY CLEIN, a minor, individually and by and through Debra Clein, Natural Mother and Next Friend — **APPELLANT**

VS.

RANKIN COUNTY SCHOOL DISTRICT — **APPELLEE**

COURT APPEALED FROM: Circuit Court
COUNTY: Rankin
TRIAL JUDGE: William E. Chapman, III

APPELLANT'S REPLY BRIEF

Oral Argument not Requested

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APPELLANT'S REPLY BRIEF

REPLY TO APPELLEE'S STATEMENT OF THE CASE

I. Procedural History

Appellee RCSD's procedural history is in concert with that presented by appellant.

II. Statement of Facts Relevant to Issues for Review

Appellee's statement of facts is *not* in concert with those presented by appellant. Appellee's statement of facts introduces extraneous facts which are clearly *not* favorable to appellant. Also, appellee RCSD's facts are expressly contradicted by the sworn testimony of appellant Zack Clein. Three examples will suffice to demonstrate.

1. Appellee's statement of facts includes a reference to unsworn written comments from two (2) students who describe how they remembered Zack falling; these descriptions are not only contradictory with each other but also contradict the descriptions of the accident recounted numerous times by Zack Clein in appellant's brief. (Cf., Appellee's

brief, p. 3; Appellant's brief p. 8, R.-41, 42, 45, 46, 49, 61, 67, 68, 73) In particular, one student's recollection that Zack "tried to jump over two stairs at once . . ." simply presents a version of facts RCSD finds attractive to its defense of contributory negligence. This gratuitous use of contested fact in a reply brief is both self-serving and inappropriate to a summary judgment analysis.

2. More significantly, appellee RCSD states that "The undisputed material facts, however, reveal this physical exercise [running the bleachers] was not dangerous, so long as students followed Coach Walker's instructions to run to the top of the bleachers, stop, and then walk down. (Appellee's brief, p. 4).

Once again, appellee's statement of "undisputed material facts" expressly contradicts appellant's presentation of facts as set forth in his appeal brief, where appellant amply demonstrated using excerpts from the record that Coach Walker 1) admittedly *knew* the correct way to "run the bleachers"; 2) not only failed to instruct the students in the correct way to run the bleachers; but 3) instead *ordered* the students to run the bleachers in a manner that he knew or should have known was inherently dangerous. (Appellant's brief, pp. 7-10)

3. Appellee finally states that "Neither Coach Walker nor Coach Patterson were (sic) found at fault for what they did." (Appellee brief, p. 4) This statement elicited from school personnel during depositions is nothing more than a self-serving comment from a school administrator defending his employee's actions in a lawsuit. It is not a statement of fact that proves anything material to the issues at hand. Neither is it a fact presented in a light favorable to Appellant.

Simply put, the material facts presented in appellant's brief are so persuasive of Coach Walker's irresponsible and reckless behavior that RCSD feels the need to bring in contradictory facts in an attempt at damage control, which is of course not the purpose of a summary judgment analysis.

APPELLANT'S REPLY TO APPELLEE'S ARGUMENT

I. Discretionary Argument

None of the cases cited in appellee's brief address the actual facts presently before the court, i.e.,

1. RCSD implemented rules that required Coach Walker to use "appropriate warm up exercises" for eighth grade students in his gym class;
2. Coach Walker considered "running the bleachers" a warm up exercise;
3. Coach Walker was fully aware of the appropriate method for running the bleachers;
4. Coach Walker knew that improper methods for running the concrete bleachers was inherently dangerous for students;
5. Coach Walker intentionally, willfully and with full knowledge of the inherent dangers of improper running of the bleachers nevertheless required his students to run the bleachers in an inappropriate, improper manner that proximately resulted in appellant's serious injuries.

Once again the appellant would direct the court to *Pritchard v. Von Houten,* 960 So.2d 568 (Miss. 2007). In *Pritchard,* the Mississippi Court of Appeals reversed a circuit court that, relying on the discretionary exception to immunity, had rendered a verdict against the

plaintiff. The appellate court refused to permit the immunity exception to "swallow" the statutory waiver of immunity by an over-broad application of policy claims that would "eviscerate" the social, economic or political prong test. Id., at 583.

In light of *Pritchard v. Von Houten,* it is difficult to fathom how appellee RCSD can successfully argue that Coach Walker's willful and intentional decision to conduct an inappropriate warm-up exercise in direct contravention to 2006 MPEF guidelines *and his own understanding of proper warm-up methods* somehow involve application of some social, economic or political policy required to trigger the discretionary immunity afforded by Miss. Code Ann. 11-46-9(1)(d).

II. Premises Liability

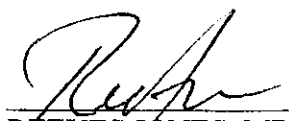
Appellee's argument that RCSD enjoys the "open and obvious dangers defense" is inapplicable where Zack had no option but to obey Coach Walker and run the bleachers as he had been instructed.

Likewise, to suggest that the steep concrete bleachers were not inherently dangerous for a warm up exercise like running the bleachers, and that Coach Walker had never seen an accident "similar to this one" before seems nonsensical when Coach Walker previously testified that the proper method for running concrete bleachers was "to prevent possible injuries." (R-119, note 6) Unfortunately, according to Zack, Coach Walker did not follow his own knowledge and training when making the students "run the bleachers," and because of that fact, Zack lost all his front teeth and permanently injured his knee.

CONCLUSION

Appellant believes Zack Clein has a remedy for the injuries he suffered because of Coach Walker's actions. Hopefully, if the reasoning behind the *Pritchard v. Von Houten* decision is still good law, Zack Clein will prevail in his appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Reeves Jones, hereby certify that I have sent via U. S. Mail, Postage Prepaid, a true copy of the above and foregoing Appellant's Reply Brief to:

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DATED, this the 16 day of May, 2011.

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