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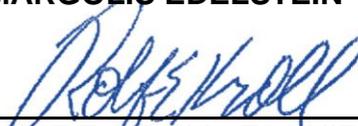
UNITED STATES DISTRICT COURT for the MIDDLE DISTRICT OF PENNSYLVANIA	
HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, <p style="text-align: center;">Plaintiffs</p> <p style="text-align: center;">v.</p> RED LION AREA SCHOOL DISTRICT; JASON M. HOFFMAN, M.A.; OFFICER MARC GREENLY; L.D., a minor; D.M., a minor, T.F., a minor; C.H., a minor; W.G., a minor; and C.W., a minor, <p style="text-align: center;">Defendants</p>	No. 1:23-cv-00286-CCC  CIVIL ACTION  JURY TRIAL DEMANDED
<b>REPLY BRIEF IN SUPPORT OF DEFENDANT, T.F., A MINOR'S          MOTION TO DISMISS</b>	

Respectfully submitted,

**MARGOLIS EDELSTEIN**

Date: July 14, 2023

By:



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**I. FACTUAL AND PROCEDURAL HISTORY**

The loss of human life by suicide is a tragedy, even more so when the life lost is that of a child. However, this kind of tragic loss, and the societal reactions thereto, do not create a *legal* duty, as between children, to refrain from making hurtful, insensitive comments. There is certainly no recognized legal basis upon which to assert a civil action against the purportedly offending children for the suicide of one of their classmates based upon the spoken word. In place of a viable legal basis for their claims, Plaintiffs direct this Court's attention to social data decrying bullying. While this data is important, it does not take the place of applicable precedent. In the same vein, Plaintiffs direct the Court to general causation principles in settings crucially distinct from those in the instant case in a vain attempt to create a cause of action when none exists.

Perhaps in recognition of the absence of actionable facts against any individual minor Defendant, Plaintiffs assert their claims against the group of all Student Defendants together without any factual or legal basis to contend that the conduct of any one minor Defendant was made in connection or in concert with the alleged conduct of any other. Plaintiffs press this baseless approach to the minor Defendants both substantively in their arguments against T.F., and procedurally, by filing an omnibus brief. This "group" approach to pleading against the minor Defendants is an inappropriate attempt to circumvent Plaintiffs' duty to plead facts applicable to each individual Defendant to "show" how each Defendant owed Plaintiff a duty, how they breached that duty, and how that breach caused Plaintiffs' harm. Plaintiffs contend that any additional facts would go beyond the pleading requirements established under the

Federal Rules of Civil Procedure. However, Plaintiffs fail to recognize that they have chosen to sue six **individuals** who happen to share a common demographic. Plaintiffs' unsupported attempt to lump all six minors together as one collective does not relieve them of their obligation to plead facts sufficient to state a cause of action against each **individual**. Under the law there is no such justification. The Federal Rules of Civil Procedure require that *each* defendant be given fair notice of what the claim is and what they are being called upon to defend. See *Cupp v. Cty. Of Lycoming*, No. 3:20-cv-001784, 2021 U.S. Dist. LEXIS 188866 at \*13 (M.D. Pa. Sept. 30, 2021) ("Group pleading, such as...lumping sixteen defendants together without setting forth what each defendant is alleged to have done, is impermissibly vague."). For T.F., the only conduct which has been specifically attributed to him is an unidentified text message on an unidentified date allegedly instructing the Decedent to kill himself. Plaintiffs have failed to plead facts alleging a special relationship between T.F. and the Decedent or establishing the requisite causal link between T.F.'s alleged conduct and Plaintiffs' harm.

As will be more thoroughly discussed *infra*, Plaintiffs' arguments fail as a matter of law because (1) suicide is not a basis for recovery under tort absent certain exceptions; (2) they have failed to identify any legal duty associated with verbal abuse or bullying between minors; and (3) Plaintiffs' IIED claims fail as a matter of law for failure to meet the elements of an IIED claim.

**II. STATEMENT OF QUESTIONS PRESENTED**

- A. WHETHER PLAINTIFFS HAVE FAILED TO IDENTIFY A DUTY OR A CAUSE OF ACTION ASSOCIATED WITH VERBAL ABUSE FROM ONE MINOR STUDENT TO ANOTHER WARRANTING DISMISSAL OF COUNT V OF THEIR AMENDED COMPLAINT?**

*(Suggested Answer in the Affirmative.)*

- B. WHETHER PLAINTIFFS HAVE FAILED TO PLEAD AN IIED CLAIM AS A MATTER OF LAW?**

*(Suggested Answer in the Affirmative.)*

**III. ARGUMENT**

- A. PLAINTIFFS HAVE FAILED TO IDENTIFY A DUTY OR A CAUSE OF ACTION ARISING FROM INSENSITIVE COMMENTS FROM ONE MINOR STUDENT TO ANOTHER.**

- 1. Plaintiffs have failed to identify a legal duty between minors involving insensitive comments.**

In a Brief spanning 45 pages, Plaintiffs fail to identify a single case which establishes a duty for *minors* to abstain from the behavior at issue in this case. Instead, Plaintiffs rely upon precedent discussing the existence of a general duty to not expose others to reasonably foreseeable risks of injury. See *Roche v. Ugly Duckling Car Sales, Inc.*, 879 A.2d 785 (Pa. Super. 2005). Plaintiffs' reliance upon such generalized caselaw in the context of the facts of this case is misplaced.

Contrary to Plaintiffs' theory of the case, the general rule in Pennsylvania is that absent a special custodial relationship, there is no cause of action against a third party arising from suicide. That is the precise holding of this Honorable Court in *Ferris v. Cleveland*, No. 3:10-1302, 2012 U.S. Dist. LEXIS 91259 \*3 (M.D. Pa. July 2, 2012). See also, *McPeake v. Cannon*, 553 A.2d 439, 440-41 (Pa. Super. 1989); *State Farm Fire & Cas. Co. v. Motta*, 356 F. Supp. 3d 457, 470-71 (E.D. Pa. Dec. 20180; *Federal*

*Rice Drug Company v. Queen Insurance Company of America*, 463 F.2d 626, 631 (3d Cir. 1972) (“complaint of decedent’s estate alleges no more than that by purely verbal harassment in the course of decedent’s employment, his employer caused stress which resulted in an emotional condition resulting in an insane suicide. We do not believe that the Pennsylvania courts would hold the resulting death to be compensable under that State’s Workmen’s Compensation Statute, for although it arose out of employment it did not result from an accident.”).

In *Ferris*, this Honorable Court was confronted with a motor vehicle accident with injuries. The plaintiff contended that the injuries sustained in the accident rendered him unable to work, made him depressed, and ultimately led to a suicide attempt. *Ferris* 2012 U.S. Dist. LEXIS at \* 2. In addressing the viability of the claim that the attempted suicide was a viable part of plaintiff’s damages, this Honorable Court observed that “it is a general rule in Pennsylvania that suicide - or attempted suicide - is not a recognized basis for recovery in a tort claim.” *Id.* (citing *McPeake v. Cannon*, 381 Pa. Super. 227, 553 A.2d 439, 440-41 (Pa. Super. Ct. 1989)). Following *McPeake*, this Court observed that

In *McPeake*, the Superior Court stated quite plainly that suicide is generally not recognized as a basis for recovery “because suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor.” The court did acknowledge circumstances, generally related to mental health professionals and workers compensation statutes, in which liability may attach when an additional duty exists.

*Ferris* at \* 3 (citations omitted).

In the instant case, as in *Ferris*, no facts are alleged that could support the proposition that a special, much less custodial, relationship exists with Plaintiffs’

Decedent. Thus, while there may be exceptions to the general rule in Pennsylvania precluding claims arising from suicide, none of those circumstances are present here.

The cases upon which Plaintiffs rely in an effort to establish liability against T.F. are inapposite. For example, as noted above, Plaintiffs rely upon *Roche, supra*. *Roche* involved the question of whether a car lot owner and sales company were liable for a plaintiff's injuries when the plaintiff was struck by a car stolen from the defendant's lot. The case did not involve the duties of one minor to another, much less, whether verbal interaction among minors can be the basis for a claim arising from the suicide of one of the minors. Instead, the discussion in *Roche* is limited to the duties imposed upon the **adults** arising from the duties imposed upon the possessor of property in Pennsylvania. Under these distinctly different facts, the Pennsylvania Superior Court decided that there were no facts established to demonstrate that the Defendants should have known the car would have been stolen by the juveniles and therefore there was no duty because the injury was not foreseeable. *Id.* at 794-95.

While foreseeability plays a role in the duty analysis, Plaintiffs fail to adequately address the arguments raised not only by T.F., but also by the other student Defendants that there is a lack of case law identifying a special relationship between school-age classmates imposing any duty upon these juveniles. In fact, the law cited by Plaintiffs expressly states that the scope of a duty not to place others at an unreasonable risk of harm requires the consideration of the "risks that are reasonably foreseeable **by the actor in circumstances of the case.**" *Id.* at 790. The crucial distinction between the cases relied upon by Plaintiffs and those relied upon by T.F. and the other minor Plaintiffs is that the cases relied upon by T.F. involve the law pertaining to third party

liability for suicide and third-party liability of minors. Indeed, given the fact that *Roche* expressly notes that the circumstances must be assessed in ascertaining the duties owed in a given case, even *Roche* supports T.F.'s contention that there is no legal precedent for a claim against him.

Finally, Plaintiffs rely upon *Commonwealth v. Carter*, 115 N.3.3d 559, 481 Mass. 352 (2019) to attempt to establish that encouraging another to commit suicide can carry criminal liability, and by Plaintiffs' extension, civil liability. At the outset it must be noted that this is a criminal case based upon a Massachusetts statute and thus is both procedurally and substantively distinct from the facts of the instant case. Notwithstanding the foregoing, Plaintiffs' reliance on *Carter* is factually distinct.

Michelle Carter and Conrad Roy were in a romantic relationship. They were also just under the age of majority. Ms. Carter, age 17, was no longer interested in Mr. Roy. In the days leading to Mr. Roy's suicide, knowing of his suicidal ideation, she texted him goading him into committing suicide. Crucially, on the day of his suicide, Ms. Carter knew that ***Mr. Roy was in the midst of a suicide attempt at the very moment*** she leveraged her relationship with Mr. Roy to tell him, on the phone to "get back in the car" that was filling with carbon monoxide. Mr. Roy followed Ms. Carter's urging, and his suicide took place moments later.

Unlike the instant case, Ms. Carter and Mr. Roy undisputedly had a special relationship that allowed Ms. Carter a level of influence and control distinct from that of a mere juvenile classmate. This relationship allowed Ms. Carter to, as Plaintiffs concede in their brief, "overpower" Mr. Roy's will. The jurisdictional and substantive distinctions between *Carter* and the instant case aside, these two factual distinctions

were essential to the outcome in *Carter*, and neither are present in the instant case. There was no special relationship between the Decedent and the Student Defendants. Plaintiffs have not pled any facts to establish that T.F. had any contact with Plaintiffs' Decedent as he was in the act of committing suicide. Instead, all that is pled is that T.F. was a classmate in the same school and that generally, he made insensitive suggestions of self-harm to Plaintiffs' Decedent. As noted above, Plaintiffs have not identified any controlling precedent establishing a duty based on such a relationship, because as has been argued and briefed at length, there is none to be found. Indeed, the applicable precedent is to the contrary. See *Ferris v. Cleaveland*, No. 3:10-1302, 2012 U.S. Dist. LEXIS 91259 \*3 (M.D. Pa. July 2, 2012).

The creation of the duty Plaintiffs propose would be unworkable in practice. To impose a duty upon juveniles, whose brains are not fully developed until at least age 25, to refrain from bullying would create an impossible situation for the courts. At what point does a comment go from a school yard taunt to a legally cognizable act? Recognizing that juveniles are already protected under the Tender Year's Doctrine, how early does the duty attach; should second graders be held liable for jokes, insensitive, or immature comments? If Plaintiffs' arguments are accepted, then does it become the duty of a classmate to be aware of the mental health of each of their classmates? Is a child legally responsible for foreseeing the possible outcome of their words when they do not yet have a fully formed brain? Despite Plaintiffs' misplaced arguments, there simply is no duty for minors to refrain from verbal insults, perhaps in part for the reasons set forth above.

Despite their reliance on Massachusetts criminal law and a case involving duties imposed upon adults, Plaintiffs fail to identify a single precedential case establishing a duty for minors to refrain from this conduct. As discussed above, both *Carter* and *Roche* are factually and legally inapplicable. Plaintiffs have failed to cite any precedent establishing a duty specific to *minors* and have done so because no such precedent exists. Plaintiffs similarly rely upon the definition of recklessness found in the Restatement (Second) of Torts. The undersigned conducted an analysis of the Restatement (Second) of Torts § 500 and found that not a single Pennsylvania case applies this section to hold a minor liable for actions such as these. Once more, Plaintiffs' authority is misplaced. Accordingly, even viewing the allegations of Plaintiffs' Amended Complaint in a light most favorable to the Plaintiffs, they have failed to state a claim for gross negligence/recklessness upon which relief can be granted against T.F.

**B. PLAINTIFFS HAVE FAILED TO PLEAD AN IIED CLAIM AS A MATTER OF LAW.**

Plaintiffs' IIED claims both asserted on behalf of the Decedent and Mr. Kirchner fail as a matter of law as well. First for the Decedent, even taking all allegations in the Amended Complaint as true, there are insufficient allegations against T.F. to hold him individually liable for IIED. Plaintiffs even concede in their brief that "insults, indignities, [and] threats" do not satisfy the IIED standard. Doc. 41, p. 29. Reliance on the social data does not create a legal duty or satisfy the elements of IIED as Plaintiffs suggest. Furthermore, Plaintiffs' IIED claims on behalf of both the Decedent and Mr. Kirchner fail for the reasons set forth in *Price ex rel. O.P. v. Scranton Sch. Dist.*, No. 11-0095 2012 U.S. Dist. LEXIS 1651, 2012 WL 37090, (M.D. Pa. Jan. 6, 2012).

Plaintiffs argue *Price* is inapplicable because the plaintiff in *Price* was “not disabled, a member of the LGBTQIA+ community, nor had O.P. attempted suicide in the past.” Doc. 41, p. 29. However, Plaintiffs’ attempt to distinguish *Price* fail to recognize that the conduct pled against the fellow students in *Price* was much more detailed than that in this case and the court *still* did not find that the elements of IIED were met. *Price*, U.S. Dist. LEXIS 1651 \* 10. The students in *Price* called O.P. a myriad of insults and derogatory names *every day and multiple times a day* as well as making mocking asides. *Id.* \*10-14. This Honorable Court recognized that verbal abuse alone is insufficient to state an IIED claim and that there is a distinction between the standards for which adults and minors are held to. Because the student’s conduct was not found to be outrageous, the IIED claims were dismissed against the student Defendants. *Id.* \*42. Plaintiffs rely upon social data to attempt to argue that this conduct is outrageous, but Plaintiffs have not pled conduct with the same particularity as *Price*. As for Mr. Kirchner, Plaintiffs state in their Brief in Opposition that the bullying by the student Defendants extended to Mr. Kirchner after the Decedent’s death. Doc. 41, p. 17. However, all that is pled in the Amended Complaint is one instance of a Snapchat photo, which certainly does not rise to the level of “outrageous” to be actionable under an IIED theory and is not attributed to T.F. Accordingly, even viewing the allegations of Plaintiffs’ Amended Complaint in a light most favorable to the Plaintiffs, they have failed to state a claim for IIED upon which relief can be granted against T.F.

**IV. CONCLUSION**

In light of the arguments and authorities cited herein, T.F. respectfully requests that this Honorable Court enter judgment in his favor and against Plaintiffs with cost of suit assessed to Plaintiffs.

Respectfully submitted,

**MARGOLIS EDELSTEIN**

Date: July 14, 2023

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**PROOF OF SERVICE**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of July, 2023, a copy of the foregoing document was served upon the following via ECF Notification:

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