

**The State of South Carolina
In The Supreme Court**

Appeal from Spartanburg County Court of Common Pleas
Hon. J. Derham Cole, Circuit Judge, Case No. 2010-CP-42-2349

Appeal 2012-213521

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MAY 20 2015

S.C. Supreme Court

Jane Doe, as guardian for John Doe,

Petitioner,

v.

Boy Scout Troop 292, Spartanburg SC; Palmetto Council of the Boy Scouts of America; St. Margaret's Episcopal Church; Shelby Culbreth; Jackie LaFontaine; Brandon Smith; Rob Green; Roy Cole; Bob Faulks; and Scott O'Neill,

Respondents.

Petition for Writ of *Certiorari* to the Court of Appeals

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Certification by Counsel

Counsel certifies pursuant to SCACR 242(d) that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 21, 2015.

Questions Presented For Review

1. Did the Court of Appeals err in holding that no claim for outrage could be stated where adults who operated a Boy Scout Troop for special needs children retaliated against a 14-year old troop member by excluding him from the Troop for having reported the Scoutmaster's criminal sexual abuse of troop members?
2. Did the Court of Appeals err in requiring a Rule 59(e) motion for an argument necessarily denied by the trial court?

Grounds for the Petition

On April 21, 2015, the Court of Appeals denied rehearing after having affirmed the trial court's grant of summary judgment. Court of Appeals Order at 2, R. App. 339. The rationale of the Court of Appeals panel was (a) that no Rule 59(e) motion had been filed in the trial court about its having failed to consider the Plaintiff's special needs, and (b) the Court of Appeals adopted what we contend was the error of the trial court as to the applicable standard, concluding without any application of the Plaintiff's pre-existing condition that the Plaintiff had shown "no evidence that Doe's distress was severe." Court of Appeals Order at 2, R. App. 333.

The trial court explicitly found that the Plaintiff was a member of a Scout Troop "which was formed to allow special needs children to participate in scouting," Trial Court Order at 1, R. App. 12. The trial court necessarily rejected the contention that the Plaintiff's condition should be evaluated based on his various undisputed pre-existing conditions, obviating the need for a Rule 59 motion. E.g., *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009). The Court of

Appeals erred in holding the issue was not preserved for appellate review. *Staubes v. City of Folly Beach*, 529 S.E.2d 543 (S.C. 2000) (parties not required to engage in futile acts to preserve issues for appellate review); *I'on, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716 (S.C. 2000) (only when trial court fails to rule on issue is Rule 59 motion required).

Certain things are undisputed.

- (a) The Plaintiff reported the Scoutmaster's sexual abuse of himself and another Troop member on October 7, 2005, R. App. 13.
- (b) On October 7 or 8, 2005, the Defendants hand-delivered a letter expelling the Plaintiff from the Troop, effective October 10, 2005 (R. App. 167),
- (c) The Plaintiff was expelled from the Troop effective October 10, 2005, R. App. 159,
- (d) By October 20, 2005, the Scoutmaster had admitted sexual abuse, R. App. 245, and
- (e) The Troop at no point reconsidered its decision to exclude the Plaintiff after the Scoutmaster admitted sexual abuse, despite their own requirements that the child who reports is not to be criticized. R. App. 242.

Other matters are disputed, but in the light most favorable to the Plaintiff the circumstantial evidence must be accepted as true that the Defendants retaliated against the Plaintiff, and did so using a pretext for the expulsion, R. App. 169, did so despite the BSA rules to not criticize a child who reports sexual abuse, R. App. 242, did so after failing to use the progressive discipline required before expelling a Scout from a Troop, R. App. 243, and the Defendants have no accounting records or meeting minutes to support their supposedly non-

retaliatory motivation that a dispute existed over money from popcorn sales or behavior issues. R. App. 79, 169.

The trial court presumed that the adult Defendants indeed retaliated against the Plaintiff because he witnessed and reported sexual abuse, Trial Court Order at 6, R. App. 17, but concluded that “no jury could reasonably find such conduct to be sufficiently extreme or outrageous,” Trial Court Order at 6, R. App. 17, unless the Plaintiff was explicitly told “that he was being punished for reporting abuse.” Trial Court Order at 7, R. App. 18. The Court of Appeals concluded that the evidence that the Plaintiff was “really upset about being excluded from Troop 292,” Court of Appeals Order at 2, R. App. 333, was insufficiently “severe” to support a claim for outrage. Court of Appeals Order at 2, R. App. 333.

The record reflects that the Plaintiff had been physically threatened by the Scoutmaster to not report the sexual abuse, R. App. 198, the Plaintiff has the pre-existing conditions noted above, and the Plaintiff’s stepmother testified about his expulsion that he “was really upset about it. He just sit around [sic] looking at the letter [expelling him].”). R. App. 218.

On independent grounds the petition should be granted.

(1) The issues in the case are novel. SCACR 242(b)(1). The Court has previously held that (a) “great embarrassment” can form the basis of a claim for intentional infliction of emotional distress, *McSwain v. Shei*, 402 S.E.2d 890 (S.C. 1991) (overruled in part on other grounds, *Sabb v South Carolina State University*, 567 S.E.2d 231, 234 [S.C. 2002]), and (b) that sexual abuse is, as a matter of law, “inherently injurious,” *Manufacturer’s Mutual Insurance Co. v. Harvey*, 330 S.C. 152, 159, 498 S.E.2d 222, 226 (Ct. App. 1998). The Court has never directly confronted the proper standard to apply to a special needs

14-year-old sexual abuse victim who was threatened not to report, made a report despite the threat, and who was retaliated against by adults for having reported a crime.

- (2) The decision of the Court of Appeals to require a Rule 59(e) motion when the only ground argued below was necessarily denied by the trial court conflicts with this court's decision in *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009), *Staubes v. City of Folly Beach*, 529 S.E.2d 543 (S.C. 2000); and *I'on, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716 (S.C. 2000). SCACR 242(b)(3).

Statement of The Case

This claim for intentional infliction of emotional distress presents two issues of first impression:

- (1) Is it "extreme and outrageous" conduct for adults in a Boy Scout Troop to retaliate against a 14-year-old Troop Member because he reported his Scoutmaster's sexual abuse of Troop members? and,
- (2) Should the proper standard to apply to the emotional distress claim of a 14-year-old consider (a) that he is "incapacitated" and requires a permanent guardian, (b) has an IQ of 60, (c) has behavioral problems, (d) had been sexually abused by his Scoutmaster, (e) had witnessed sexual abuse of another Troop Member by the Scoutmaster, (f) had been physically threatened by the Scoutmaster to not report the abuse, and (g) had reported the sexual abuse?

The trial court granted summary judgment, necessarily rejecting that the Plaintiff's claims should be considered in light of his acknowledged pre-existing conditions and guardianship. E.g., Order at 1, R. App. 12. The trial court also concluded that retaliatory conduct against the Plaintiff for his having reported the Scoutmaster's crimes could be "extreme and outrageous" only if Defendants "told John Doe that he was being punished for reporting abuse." Order at 7, R. App. 18.

The Plaintiff is "incapacitated," R. App. 9, and his grandmother is his permanent guardian, R. App. 8 - 10 (order of the Probate Court). The grandmother brought the case on behalf of the Plaintiff. The Defendants are individuals associated with Boy Scout Troop 292, the Troop's Sponsor (St. Margaret's Episcopal Church), and the Troop's chartering organization (Palmetto Council of the Boy Scouts of America).

The Troop was created for boys with developmental disadvantages. Order at 1, R. App. 12. Medical records reflect that the Plaintiff was born in 1991 (R. App. 160) has an IQ of 60 (R. App. 163), has behavioral problems (R. App. 162, police report notes Plaintiff "has some mental handicaps," and R. App. 163).

Argument in Support of the Petition

Defendants take the Plaintiff as he is found, and the Plaintiff is entitled to both aggravation of his pre-existing conditions, *Watson v. Wilkinson Trucking Co.*, 136 S.E.2d 286 (S.C. 1964), and to be evaluated using a standard adjusted to a 14 year old "of like age, intelligence, and experience under like circumstances." E.g., *Jones v. Castor*, 336 S.C. 110, 117, 518 S.E.2d 619, 622 (1999). In determining that the Defendants were at liberty to retaliate

against the Plaintiff, unless they told him explicitly they were doing so, the courts below erred in two ways.

First, the court erred in concluding that adults can retaliate against a child for reporting a crime without acting in an “extreme and outrageous” manner as long as the adults do not inform him that “he was being punished for reporting abuse.” Order at 7, R. App. 18. The behavior should matter, not whether the behavior is explicitly acknowledged. Dismissing the Plaintiff’s emotional distress claim as insufficiently “severe” in light of the Plaintiff’s disadvantages, and permitting the Defendants to retaliate against a developmentally disadvantaged child for reporting criminal conduct are unprecedented holdings which appear to directly contradict, for example, *McSwain v. Shei*, 402 S.E.2d 890 (S.C. 1991) (employee’s medical condition and “great embarrassment” sufficient conduct to be evaluated by a jury).

Second, the courts below erred by deciding that the impact of the Defendant’s conduct on the Plaintiff was not “severe” without factoring in the Plaintiff’s incapacities of his developmental disadvantages (e.g., R. App. 163), that he had witnessed sexual abuse of another Troop member (R. App. 162), had himself been sexually abused (R. App. 160 to 162), had been threatened against reporting abuse (R. App. 198), had reported the abuse despite the threats (R. App. 13, 160 to 162, 166, 175, 194 and 219); and that after his report of abuse had been immediately expelled from the Troop (R. App. 167).

The Plaintiff is entitled to be evaluated using a standard adjusted to a 14 year old “of like age, intelligence, and experience under like circumstances.” E.g., *Jones v. Castor*, 336 S.C. 110, 117, 518 S.E.2d 619, 622 (1999). The courts below have erred.

Conclusion

The Petition for *Certiorari* to the Court of Appeals should be granted to address the novel issues presented and to overturn the errors of the courts below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregg Meyers", written in a cursive style.

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Proof of Service

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S.C. Supreme Court

I hereby certify that I have served the enclosed

**Petition for Writ of *Certiorari*
and Appendix**

by causing a copy of the document to be placed in the United States mails, first-class
postage pre-paid, addressed to:

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Done May 19, 2015


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