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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG County
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2015-001088
Civil Action No. 2010-CP-42-2349

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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.

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# RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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## INTRODUCTION

The Petition for Writ of Certiorari in this matter should be denied. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no Court of Appeals dissent, no constitutional issue, no federal question, no novel question of law, and no other "special and important" reason warranting certiorari. The opinion of the Court of Appeals regarding issue preservation is consistent with this Court's precedent. Further, even if the issue had been preserved for appellate review, and even if a subjective standard should have applied to Doe's outrage claim, the Court of Appeals nevertheless correctly held that Doe had failed to prove his emotional distress was severe.

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly affirm the trial court's ruling that Doe failed to establish the mandatory elements required to support a claim of intentional infliction of emotional distress—elements that this Court has required in *every* suit asserting that cause of action, including suits brought by minors alleging sexual abuse and exploitation?
2. Did the Court of Appeals correctly hold that Petitioner failed to preserve the issue on appeal for appellate review?

## COUNTER-STATEMENT OF THE CASE

Jane Doe, the grandmother and guardian of John Doe, filed the Complaint giving rise to this appeal on April 29, 2010, alleging that John Doe suffered emotional distress as a result of being excluded from Boy Scout Troop 292 ("the Troop"). (*See* Compl. at ¶ 7; App. 23.) Until early October 2005, John Doe was a member of the Troop, which was formed to allow special needs children to participate in scouting. (Order at 1; App. 12.) Following a regular Troop meeting on either September 27 or October 4, 2005, the Troop's managing committee decided to suspend John Doe from the Troop based on his

prior misconduct. (Culbreth Aff. at ¶¶ 3-4; App. 227-28.) Pursuant to established procedure, the Troop wrote a letter to John Doe's father informing him of John Doe's suspension effective October 10, 2005. (Green Aff. at ¶ 4; App. 225-26.)

On October 7, 2005, John Doe reported to a school official that James Rhinehart, the Troop's Scoutmaster, had sexually abused both John Doe and Rhinehart's stepson, who also was a member of the Troop. (*See* Oct. 7, 2005 Incident Report; App. 160.) Rhinehart pled guilty to a single charge related to his stepson, and currently is serving a prison sentence. (Order at 2; App. 13.) Rhinehart never admitted to abusing John Doe, and the charge related to John Doe was dismissed. (*Id.*) Several weeks after John Doe's accusation of abuse, when word of Rhinehart's abuse became public, the Troop permanently dissolved, and it remains disbanded to this day. (Sum. J. Hearing Tr. at 25:6-14, 28:12-15; App. 153, 156.)

The Complaint alleged that John Doe's exclusion from the Troop was in retaliation for the accusation against Rhinehart. (Compl. at ¶¶ 2, 12; App. 22, 24.) The Complaint, however, asserted no claim against the abuser and sought no recovery from the defendants for the harm caused by the abuse. Rather, Doe asserted claims of intentional infliction of emotional distress and negligent supervision—based solely on the decision to exclude Doe from the Troop—against the Troop, the state council of the Boy Scouts of America, the Episcopal Church that sponsors the troop and provides a location for some of its activities, and seven individuals who volunteered to assist or supervise various activities of the troop. (*Id.* at ¶¶ 6-8, 16-23, 24-33; App. 23, 25-27.)

After extensive discovery, the defendants moved for summary judgment. (Def.'s Mot. for SJ; App. 34-35.) Their supporting memorandum argued that the uncontroverted

evidence showed that the decision to exclude John Doe from the troop was made in good faith and was based on his misconduct as a troop member (Def.'s Memo. in Supp. of S.J. at 3, 6-8; App. 40, 43-45.) The trial court conducted a hearing on the summary judgment motion on May 16, 2012. After hearing from each party, the court took the motion under advisement.

The trial court granted the motion for summary judgment in an order filed on November 1, 2012. (Order; App. 12-20.) The court held that, even viewing the facts in the light most favorable to Doe, the defendants' alleged conduct was not sufficiently extreme or outrageous to satisfy the legal requirements of intentional infliction of emotional distress. (Order at 4; App. 15.) The court also held that because the negligent supervision claim was derivative of the claim for intentional infliction of emotional distress, where the latter claim failed as a matter of law, the former claim must likewise fail. (Order at 9; App. 20.)

Doe appealed this order to the Court of Appeals. (Notice of Appeal; App. 96.) After hearing oral arguments, the Court of Appeals issued its opinion on March 11, 2015, affirming the trial court's grant of summary judgment on two bases: (1) because the trial court never ruled on Doe's argument that he should be excused from satisfying the well-established standard for a claim of outrage, and because Doe failed to file a Rule 59(e) motion seeking a ruling on that issue, Doe's argument on appeal was not preserved for appellate review, and (2) in any event, Doe failed to make a prima facie showing of severe emotional distress. (*See* Opinion of the Court of Appeals; App. 329.) On March 26, 2015, Doe sought rehearing, arguing that despite Doe's failure to file a Rule 59(e) motion Doe's argument on appeal was nevertheless preserved because the trial court

"implicitly" ruled on that issue, and that in any event a disadvantaged minor should not be required to satisfy the well-established and universally applied requirements for a claim of intentional infliction of emotional distress. (*See* Pet. for Rehearing; App. 332.) The Court of Appeals denied the petition for rehearing on April 21, 2015. (*See* Order Denying Rehearing; App. 339.) On May 19, 2015, Doe petitioned this Court for a writ of certiorari.

## ARGUMENT

The South Carolina Appellate Court Rules provide that a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR; *see also State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009) ("The Court has held it will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power.") (citations omitted). Typically, the granting of certiorari is limited to cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision by the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the Court of Appeals conflicts with a decision of the Supreme Court of the United States. *See* Rule 242(b), SCACR; *see also Lyles*, 381 S.C. at 444 n.2, 673 S.E.2d at 812 n.2.

The Court of Appeals' ruling presents none of these factors and is consistent with longstanding precedent regarding issue preservation and the mandatory elements of the cause of action for intentional infliction of emotional distress. In his petition for certiorari, however, Doe asserts that two "independent grounds" purportedly justify a writ

of certiorari. (*See* Doe's Pet. for Writ of Cert. at 4-5.) As explained below, each of these grounds is meritless.

## I. This case does not present a novel issue of law because it is well-settled that every plaintiff—including minors who were victims of sexual abuse—who asserts a claim for intentional infliction of emotional distress must satisfy the normal, objective standard for proving the severity of the distress.

Contrary to Doe's assertions, this case raises no novel issue of law warranting a grant of certiorari. Doe is simply incorrect when he states that "[t]he issues in this case are novel" in that the Court has (supposedly) not previously discussed whether an "adjusted" or subjective standard applies when evaluating a plaintiff's claim for outrage. (*See* Doe's Pet. for Writ of Cert. at 4, 6-7.) As explained below, however, this issue is neither novel nor uncertain. In *every* opinion analyzing the cause of action for intentional infliction of emotional distress—including suits, like this one, that were brought by minors and victims of sexual abuse—this Court has consistently and without exception applied the standard, objective requirement that the emotional distress must be so severe that no reasonable man could endure it.

Under the well-established law of this State, to recover for intentional infliction of emotional distress, a plaintiff must show:

> (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."

*Bass v. S.C. Dept. of Social Servs.*, 403 S.C. 184, 193, 742 S.E.2d 667, 672 (Ct. App. 2013) (quoting *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011)).

This test employs an *objective* standard,[1] and neither the trial court nor the appellate courts may inject a subjective element into the objective legal test for intentional infliction of emotional distress. *See Todd v. S.C. Farm Bureau Ins. Co.*, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984), rev'd in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985) ("Neither the trial court nor this court is at liberty to substitute its subjective and provincial sensibilities regarding what is reprehensible and socially intolerable conduct for the guidelines which our Supreme Court has established with its adoption of the Restatement formulation of the tort.").[2]

The objective standard set out in the Restatement and adopted by South Carolina is no "mere happenstance." *Id.* Rather, it is intended to "'set some boundaries to the liability' for intentional infliction of emotional distress." *Id.* (quoting Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40 (1956)). Accordingly, "it is [the trial] court's responsibility to determine whether defendant's conduct in a given instance may 'reasonably constitute outrageous conduct,'" and, where it does not, the trial court should grant summary

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[1] Legal encyclopedias agree that "[w]hether conduct is extreme and outrageous is judged on an *objective* standard based on all the facts and circumstances of the particular case." 38 Am. Jur. Fright, Shock, & Mental Disturbances § 8 (citing *Roth v. Wiese*, 716 N.W.2d 419 (Neb. 2006)) (emphasis added). "Further, it is the conduct of the offender *rather than the subject* of the conduct that determines whether the conduct is outrageous." *Id.*

[2] In her briefing to the Court of Appeals, Doe cited *Todd* in support of her argument for the subjective standard, *see* Appellant's Brief at 16, App. 286, apparently unaware that *Todd* forecloses the very argument she seeks to make.

judgment. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359, 1369 (D.S.C. 1985).

This normal, objective standard applies regardless of the age of the plaintiff and the fact that he was the victim of criminal acts of a third party—acts that are only indirectly and tangentially related to the acts giving rise to the claim. *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004). In *Bergstrom*, the plaintiff alleged that the hospital in which she was born intentionally inflicted emotional distress on her by failing to follow its policies and procedures, which resulted in the plaintiff being placed with an adoptive family where she was subject to criminal sexual acts. *Id.* The Supreme Court held that her cause of action accrued at the time of her birth, *i.e.*, when she was a minor, *id.* at 398, 596 S.E.2d at 47, but the Court nevertheless applied the normal, objective, four-part test that it applies in *every* claim for intentional infliction of emotional distress, *id.* at 401, 596 S.E.2d at 48. *See also Snakenberg v. Hartford Cas. Ins. Co., Inc.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989) (reiterating the normal, "adult" test when discussing a claim for wrongful intrusion into private affairs brought by minor females against an adult who had made voyeuristic videos of them).

The courts of other jurisdictions considering similar facts and claims have applied the standard, objective test for intentional infliction of emotional distress regardless of whether the claim is brought by a minor against a scoutmaster or troop leaders. *See, e.g., Boy 7 v. Boy Scouts of America*, No. CV-10-449, 2011 U.S. Dist. Lexis 63212 (E.D. Wash. June 13, 2011) (applying the normal, objective standard and dismissing claim for intentional infliction of emotional distress). In short, Doe is simply incorrect that it is a

novel question of whether some different, lower, easier, or subjective legal test should apply to his claim for intentional infliction of emotional distress.

In the case at bar, the Court of Appeals held that the only evidence of Doe's distress—namely testimony that he was "really upset" about being excluded from the Troop—was insufficient to establish the requisite severity. (*See* Court of Appeals Opinion; App. 329.) Doe's Petition for Certiorari raises a number of sympathetic factors about John Doe, but fails to point to any additional evidence showing the severity of the distress inflicted by the decision to exclude him from the Troop.[3]

In sum, this suit does not present a novel issue warranting a grant of certiorari and, under the well-established law of this State, Doe failed to satisfy the requirement of proving that his distress was sufficiently severe to warrant recovery.

## II. The Court of Appeals correctly held that Doe's arguments were not preserved for review by this Court.

The law is well-settled that issues not raised and ruled upon in the trial court will not be considered on appeal. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004). When an issue is not explicitly ruled on in the final order, it must be raised by an appropriate post-trial motion to be preserved for appeal. *Shealy v. Aiken County*, 341 S.C. 448, 459-60, 535 S.E.2d 438, 444 (2000) (explaining that where the trial judge does not explicitly rule on argument and no Rule 59 motion is filed, the appellate court may not address the issue); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (same). Here, Doe failed to file a motion to

[3] The facts that "Plaintiff had been physically threatened by the Scoutmaster to not report the sexual abuse," that Plaintiff is intellectually disadvantaged, or that Plaintiff was a victim of sexual abuse do and cannot establish that his distress over being excluded from the Troop was severe.

reconsider or otherwise challenge the trial court's opinion, and thus her arguments on appeal are not preserved.

Doe's petition for certiorari argues that a Rule 59(e) motion was not required because the trial court "implicitly" rejected the argument that a subjective or "adjusted" standard should be applied to the outrage claim. The trial court did not implicitly reject that argument, however, because that was never raised to the trial court prior to its ruling granting summary judgment. There is no reference to or request for an adjusted legal standard in Doe's Rule 56(f) affidavit opposing the motion for summary judgment, Doe's Opposition to Motions for Summary Judgment, and Doe's oral arguments at the May 16, 2012.[4] (*See* App. 231-36, 76-83, and 129-58.) In the pending Petition for Certiorari, Doe fails to point to any place where this issue was raised to the trial court—because it never was.

A trial court does not and cannot rule—implicitly or otherwise—on an issue that has not been raised. Had Doe wished to assign error to the trial court's failure to apply or even mention the "adjusted" standard, she had every opportunity to do so in a Rule 59 motion. She failed to do so and it is improper for her to ask this Court to pass judgment on the trial court's opinion based on arguments never presented below. To do so would ignore this Court's long-standing issue preservation jurisprudence.

## Conclusion

For the foregoing reasons, Respondents submit that the Court of Appeals' decision in this suit is consistent with precedent and presents none of the characteristics

[4] The fact that Doe raised the issue of John Doe's developmental disadvantages to the trial court is an entirely different matter from the question of whether John Doe was entitled to a different or adjusted legal standard on his claim of intentional infliction of emotional distress. The latter issue was never raised or argued to the trial court.

that justify a grant of certiorari. Even if the issue Doe raised on appeal were preserved for appellate review, and even if some lesser standard applied to Doe's outrage claim, Doe nevertheless failed to prove the distress was severe, and thus the Court of Appeals properly affirmed the trial court's grant of summary judgment. Accordingly, this Court should deny Doe's Petition for a Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Return to the Petition for a Writ of Certiorari

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