

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

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MAY 20 2015

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

S.C. Supreme Court

Appeal 2012-213521 (S.C. App. Unpublished Opinion Filed March 1, 2015)

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

**Appendix to Petition for Writ of *Certiorari*
To the Court of Appeals – Volume Two**

Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson Suite 100
Saint Paul, MN 55101
Attorney for Petitioner

Other Counsel of Record:

Nelson Mullins Riley & Scarborough, LLP	
Mark G. Phillips	A. Mattison Bogan
William H. Foster	Miles E. Coleman
P.O. Box 10084	P.O. Box 11070
Greenville, SC 29601	Columbia, SC 29201

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The State of South Carolina
In The Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge

Appeal 2012
Case No. 10-CP-42-2349

RECEIVED

SEP 28 2015

S.C. Supreme Court

Jane Doe, as guardian for John Doe, ... Appellant

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

Record On Appeal

Volume Two

Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street Suite 100
St. Paul, MN 55101
651-227-9990

Attorney for Appellant

William H. Foster
Miles Coleman
Nelson, Mullins, Riley & Scarborough
Poinsett Plaza, Suite 900
104 South Main Street
Greenville SC 29601
864-250-2222

Attorneys for Respondents

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
JANE DOE, as guardian for JOHN DOE,	)	Civil Action No. 10-CP-42-2349
	)	
	)	
Plaintiff,	)	
	)	<u>DEFENDANTS' ANSWERS TO</u>
vs.	)	<u>PLAINTIFF'S INTERROGATORIES</u>
	)	
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,	)	
	)	
	)	
Defendants.	)	
	)	

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Defendants 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 ("Defendants"), by and through their undersigned counsel, hereby submit the following answers to Plaintiff's Interrogatories, subject to the objections set forth herein.

GENERAL OBJECTIONS

Defendants assert the following General Objections to Plaintiff's Interrogatories. Each objection shall be deemed asserted with respect to each interrogatory propounded. On occasion, Defendants have asserted specific objections to certain interrogatories. That other specific objections were not also stated shall not be construed as a waiver of any applicable objections, either as to that interrogatory or as to others.

Defendants also reserve the right to supplement, revise, correct, or clarify these responses as their investigation continues.

Defendants assert the following General Objections:

1. Defendants object to the extent that any interrogatory seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege. Should Defendants inadvertently disclose any privileged material, the Plaintiff must hold that information in the strictest confidence and shall return or destroy such information upon demand.

2. Defendants object to the extent that the Plaintiff has provided any instruction regarding the definition, interpretation, or characterization of the language set forth in Plaintiff's Interrogatories. Defendants have interpreted such language in a manner consistent with the plain and ordinary meaning of such language.

3. Defendants object to the extent that any interrogatory seeks the disclosure of confidential business information, trade secrets, or competitive information.

4. Defendants object to the extent that any interrogatory may be ambiguous, confusing, vague, overly broad, or misleading, or that it calls for Defendants to engage in speculation. Should this objection be stated, Defendants will respond in a manner consistent with a reasonable interpretation of the interrogatory.

5. Defendants object to the extent that any interrogatory seeks the disclosure of information without also providing an operative date or time period.

6. Defendants object to the extent that any interrogatory seeks information that is not within their knowledge, or to the extent that any request seeks documents or other tangible things that are not within Defendants' possession, custody, or control.

7. Defendants affirm that it has respectively conducted a thorough investigation into the circumstances surrounding the litigation and that each interrogatory has been answered as fully, fairly, and accurately as is reasonably practicable based upon the Defendants' personal knowledge of the facts and circumstances. However, these responses are subject to change as their investigation continues. Consistent with the South Carolina Rules of Civil Procedure, Defendants will supplement these responses as necessary.

ANSWERS TO INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witness and indicate who has possession of such statements.

ANSWER:

a) John Doe:
Address Unknown

John Doe is the Plaintiff in this action and is expected to testify in support of his claims.

b) Lucy B. Taylor:
Address Unknown

Upon information and belief, Ms. Taylor is Plaintiff John Doe's putative legal guardian. Ms. Taylor is expected to testify regarding her knowledge of and response to Plaintiff's allegation that he was molested by James Brian Rhinehart, prior incidents of molestation involving Plaintiff and any medical or psychiatric treatment before and since the events in question. Ms. Taylor is also expected to testify regarding events surrounding Plaintiff's exclusion from participation in Troop 292. Ms. Taylor may also testify regarding other relevant incidents of Plaintiff's conduct and reporting of complaints of abuse against family members and third parties.

- c) [REDACTED]:
Address Unknown

Mr. [REDACTED] is Plaintiff John Doe's father and expected to testify about his receipt of the letter excluding Plaintiff from participation in Troop 292 and the events which led to same. Mr. [REDACTED] is also expected to testify regarding his knowledge of and response to Plaintiff's allegation that he was molested by James Brian Rhinehart, prior incidents of molestation involving Plaintiff and any medical or psychiatric treatment before and since the events in question. Mr. [REDACTED] is also expected to testify regarding his abandoned pursuit of a monetary settlement on behalf of Plaintiff in 2005. Mr. [REDACTED] may also testify regarding other relevant incidents of Plaintiff's conduct and reporting of complaints of abuse against family members and third parties.

- d) James Brian Rhinehart:
SCDC
Tyger River Correctional Institution
100-200 Prison Road
Enoree, SC 29355

Mr. Rhinehart is expected to testify regarding Plaintiff's allegations of molestation. Mr. Rhinehart may also testify regarding the basis for the decision to exclude Plaintiff John Doe from participation in Troop 292.

- e) [REDACTED]:
Address Unknown

[REDACTED] is the stepson of James Brian Rhinehart and is expected to testify regarding the events which led to Mr. Rhinehart's conviction. [REDACTED] may also testify regarding his participation in Troop 292 and his interaction with Plaintiff.

- f) [REDACTED] ([REDACTED])

[REDACTED] is the ex-wife of James Brian Rhinehart and testified via videotape prior to her death. Plaintiff has possession of this deposition.

g) **Shelby Hughes Culbreth:**

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Ms. Culbreth was a volunteer and Chairman of the Troop 292 Committee. Ms. Culbreth is expected to testify regarding the decision to exclude Plaintiff from participation Troop 292 and the related letter. Ms. Culbreth may also testify regarding Plaintiff's relevant behavior and conduct as a member of Troop 292.

h) **Jackie LaFontaine:**

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Ms. LaFontaine was a Troop 292 volunteer and a member of the Troop 292 Committee. Ms. LaFontaine is expected to testify regarding the decision to exclude Plaintiff from participation in Troop 292 and the related letter. Ms. LaFontaine may also testify regarding Plaintiff's relevant behavior and conduct as a member of Troop 292.

i) **Brandon Smith:**

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Mr. Smith is a District Executive for Palmetto BSA and Troop 292 was, at the time, located in his territory. Mr. Smith is expected to testify regarding his knowledge of the decision to exclude Plaintiff from participation in Troop 292.

j) **Rob Green:**

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Mr. Green is Scout Director for Palmetto BSA and is expected to testify regarding his knowledge of the decision to exclude Plaintiff from participation in Troop 292.

k) Reverend Roy Cole:

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Mr. Cole was the interim minister at St. Margaret's Episcopal Church, the chartered organization that sponsored Troop 292. Mr. Cole is expected to testify regarding his knowledge of the decision to exclude Plaintiff from participation in Troop 292.

l) Bob Faulks:

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Mr. Faulks is the parent of a Troop 292 member and volunteered on occasion in that capacity. Mr. Faulks is expected to testify that he had no involvement in the decision to exclude Plaintiff from participation in Troop 292. Mr. Faulks may also testify regarding Plaintiff's relevant behavior and conduct as a member of Troop 292, to the extent he observed same.

m) Scott O'Neill:

C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

Co-Defendant. Mr. O'Neill was a Troop 292 volunteer. Mr. O'Neill is expected to testify that he had no involvement in the decision to exclude Plaintiff from participation in Troop 292. Mr. O'Neill may also testify regarding Plaintiff's relevant behavior and conduct as a member of Troop 292, to the extent he observed same.

n) Martha Tetosky:

Address Unknown

Ms. Tetosky is a school psychologist for Spartanburg County School District Two. Ms. Tetosky was Plaintiff's school counselor and, upon information and belief, first reported his allegations against James Brian Rhinehart to the authorities. Ms. Tetosky is expected to testify regarding these events and her treatment/counseling of Plaintiff.

- o) Susan Ellis:
Spartanburg County School District Two
4606 Parris Bridge Road
Boiling Springs, SC 29316

Ms. Ellis is a Psycho-Educational Specialist for Spartanburg County School District Two and performed a psychological assessment of Plaintiff following the reported abuse by James Brian Rhinehart. Ms. Ellis is expected to testify to the matters contained in her report(s), any additional medical or clinical records and regarding her treatment/counseling of Plaintiff.

- p) Dr. Princewell Onwere:
1800 Colonial Drive
Columbia, SC 29203

Dr. Onwere is an attending psychiatrist for William S. Hall Psychiatric Institute who treated Plaintiff following the reported abuse by James Brian Rhinehart. Dr. Onwere is expected to testify to the matters contained in his report(s), any additional medical or clinical records and regarding his treatment/counseling of Plaintiff.

- q) Dr. Laurie Barwick:
250 Dewey Ave
Spartanburg, SC 29303

Dr. Barwick was on staff at Spartanburg Mental Health Center and treated Plaintiff for ADHD, conduct disorder, mild mental retardation and severe problems with aggression. Dr. Barwick is expected to testify regarding her treatment/evaluation of Plaintiff and to the matters contained in her report(s) and any additional medical or clinical records.

- r) Wiley H. Garrett, MSW, LISW-CP:
100 Washington Place
Spartanburg, SC 29302

Mr. Garrett is a Counselor with the Children's Advocacy Center and conducted an extended forensics assessment of Plaintiff on behalf of the Spartanburg County Sheriff's Department during the criminal investigation. Mr. Garrett is expected to testify to the matters contained in his report(s), any additional medical or clinical records and regarding his treatment/evaluation of Plaintiff.

- s) Detective Nikki Cantrell:
8045 Howard St.,
Spartanburg, SC 29303

Detective Cantrell was the lead detective for the Spartanburg County Sheriff's Office during the criminal investigation of James Brian Rhinehart and is expected to testify regarding that investigation.

- t) [REDACTED]:
Address Unknown

Ms. [REDACTED] is Plaintiff John Doe's stepmother and is expected regarding her knowledge of and response to Plaintiff's allegation that he was molested by James Brian Rhinehart, prior incidents of molestation involving Plaintiff and any medical or psychiatric treatment before and since the events in question. Ms. [REDACTED] is also expected to testify regarding events surrounding Plaintiff's exclusion from participation in Troop 292. Ms. [REDACTED] may also testify regarding other relevant incidents of Plaintiff's misconduct and reporting of complaints of abuse against family members and third parties.

Defendants have not taken a written statement of any of the above witnesses.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: Objection. Defendants object to this interrogatory to the extent it seeks the production of information and/or documents protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege, and to the extent it seeks to discover the thoughts and mental impressions of Defendants' counsel. Subject to and without waiving any objection, see documents produced in response to Plaintiff's Request for Production.

3. In cases involving personal injury, set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been committed in connection with said injuries and also set forth a statement of all medical costs involved.

ANSWER: Defendants do not seek damages in this case.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: Defendants continue to investigate the existence and amounts of possible insurance coverage with respect to the allegations and claims set forth in the Complaint. When the investigation is complete, Defendants will supplement this response upon entry of an appropriate confidentiality or protective order.

5. List the names and addresses of each expert witness you propose to use as a witness at the trial of this case.

ANSWER: Defendants have yet to identify any expert, but reserve the right to supplement this response as discovery in this case develops, and further reserve the right to call upon any expert identified by Plaintiff. Defendants note that some of the witnesses identified in response to Interrogatory No. 1 may be called upon to provide expert testimony within their appropriate area of expertise.

6. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory No. 1.

7. State the name and last known address of each member of Troop 292 as of October 1, 2005.

ANSWER: Objection. Defendants object to this interrogatory on the grounds that the term "member" is undefined. Subject to and without waiving any objection, Defendants state that Troop 292's adult and youth members on or about October 1, 2005, were as follows:

Adults:

- a) Shelby Hughes Culbreth
C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601

- b) Jackie LaFontaine
C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601
- c) Scott O'Neil
C/O Nelson Mullins Riley & Scarborough, LLP
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, South Carolina 29601
- d) Hayley Kosmat
352 Amhurst Drive
Boiling Springs, SC 29316
- e) Doni Rhinehart (deceased)
- f) James Brian Rhinehart
SCDC
Tyger River Correctional Institution
100-200 Prison Road
Enoree, SC 29355

Youth:

- a) [REDACTED]
551 Houston St.
Spartanburg, SC 29303
- b) [REDACTED]
551 Houston St.
Spartanburg, SC 29303
- c) [REDACTED]
823 Bryant Rd.
Inman, SC 29349
- d) [REDACTED]
21 Royal Troon
Campobello, SC 29322
- e) [REDACTED]
420 Waterford Point Dr.
Boiling Springs, SC 29316

8. State the name and last known address of each member of the Palmetto Council of the Boy Scouts of America, as of October 1, 2005.

ANSWER: Objection. Defendants object to this interrogatory on the grounds that the term "member" is undefined.

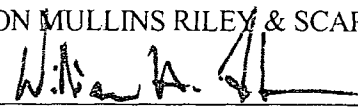
9. Identify each award or other recognition given to the John Doe plaintiff for his report of sexual abuse having ended the abuse for the child Brian Rhinehart admitted abusing, and the date the award or recognition was given.

ANSWER: Objection. Plaintiff did not report an allegation of sexual abuse to Defendants. Upon information and belief, Spartanburg County School District 2 employee Martha Tetosky reported Plaintiff's claim to local authorities.

10. Identify each member of Troop 292 responsible for the funds that are contended to have been missing as described by Doni Rhinehart in her deposition.

ANSWER: Objection. Defendants object to this interrogatory to the extent it calls for speculation. Subject to and without waiving any objection, Defendants state that, upon information and belief, Plaintiff was the only Troop 292 member responsible for the alleged missing funds.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

William H. Foster
SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
Steven E. Buckingham
SC Bar No. 75089
E-Mail: steven.buckingham@nelsonmullins.com
A. M. Quattlebaum, Jr.
SC Bar No. 013048
E-Mail: marvin.quattlebaum@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Defendants

Greenville, South Carolina
February 28, 2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
JANE DOE, as guardian for JOHN DOE,	)	Civil Action No. 10-CP-42-2349
	)	
Plaintiff,	)	
	)	<u>DEFENDANTS' RESPONSES TO</u>
vs.	)	<u>PLAINTIFF'S REQUEST FOR</u>
	)	<u>PRODUCTION</u>
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,	)	
	)	
Defendants.	)	

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, Defendants 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 ("Defendants"), incorporating the General Objections contained within Defendants' Answers to Plaintiff's Interrogatories served contemporaneously herewith as if restated verbatim, hereby respond to Plaintiff's Request for Production of Documents as follows:

GENERAL OBJECTIONS

Defendants assert the following General Objections to the Plaintiff's Requests. Each objection shall be deemed asserted with respect to each request propounded. On occasion, Defendants have asserted specific objections to certain requests. That other specific objections

were not also stated shall not be construed as a waiver of any applicable objections, either as to that request or as to others.

Defendants also reserve the right to supplement, revise, correct, or clarify these responses as their investigation continues.

Defendants assert the following General Objections:

1. Defendants object to the extent that any request seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege. Should Defendants inadvertently disclose any privileged material, Plaintiff must hold that information in the strictest confidence and shall return or destroy such information upon demand.

2. Defendants object to the extent that the Plaintiff has provided any instruction regarding the definition, interpretation, or characterization of the language set forth in Plaintiff's Requests. Defendants have interpreted such language in a manner consistent with the plain and ordinary meaning of such language.

3. Defendants object to the extent that any request seeks the disclosure of confidential business information, trade secrets, or competitive information.

4. Defendants object to the extent that any request may be ambiguous, confusing, vague, overly broad, or misleading, or that it calls for Defendants to engage in speculation. Should this objection be stated, Defendants will respond in a manner consistent with a reasonable interpretation of the request.

5. Defendants object to the extent that any request seeks the disclosure of information without also providing an operative date or time period.

6. Defendants object to the extent that any request seeks information that is not within its knowledge, or to the extent that any request seeks documents or other tangible things that are not within Defendants' possession, custody, or control.

7. Defendants affirm that it has respectively conducted a thorough search of the locations where responsive documents or other tangible things are reasonably likely to be kept, and that each request has been answered as fully, fairly, and accurately as is reasonably practicable based upon Defendants' personal knowledge of the facts and circumstances. However, these responses are subject to change as their investigation continues. Consistent with the South Carolina Rules of Civil Procedure, Defendants will supplement these requests as necessary.

RESPONSES TO REQUESTS FOR PRODUCTION

1. All documents which relate in any way to your contentions about damages.

RESPONSE: Objection. Defendants do not seek damages in this case.

2. All documents identified in response to interrogatories.

RESPONSE: See enclosed documents.

3. All documents obtained in response to any subpoena.

RESPONSE: See enclosed documents.

4. All exhibits which you intend to offer at trial.

RESPONSE: Objection. Defendants object to this request to the extent it seeks to discover the thoughts and mental impressions of Defendants' counsel. Defendants further object on the grounds that no determination has been made to date regarding what documents may be used as exhibits at any trial of this matter and, as such, Plaintiff's request is premature. Subject to and without waiving any objection, Defendants will timely supplement this response as required by the South Carolina Rules of Civil Procedure.

5. All correspondence between the plaintiff, anyone on behalf of the plaintiff, and any defendant.

RESPONSE: Upon information and belief, Defendants have no such documents. Defendants will supplement this response in the event further investigation leads to the discovery of non-privileged documents responsive to this request.

6. All correspondence between the plaintiff and any other person which relates to this litigation or which you contend relates to this litigation.

RESPONSE: Upon information and belief, Defendants have no such documents. Defendants will supplement this response in the event further investigation leads to the discovery of non-privileged documents responsive to this request.

7. Documents which reflect the membership of Troop 292 as of October 1, 2005, or as close as possible to October 1, 2005.

RESPONSE: Objection. Defendants object to this request on the grounds that the term "membership" is undefined. Subject to and without waiving any objection, see Defendants' Answer to Interrogatory No. 7. Defendants will supplement this response in the event further investigation leads to the discovery of non-privileged documents responsive to this request.

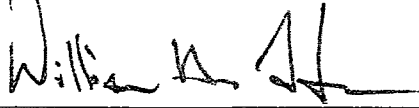
8. All documents, including accounting records, which you contend relate to the money missing as described by [REDACTED] in her deposition.

RESPONSE: Objection. Defendants object to this request to the extent it calls for speculation. Subject to and without waiving any objection, Defendants state that the events in question occurred in 2005 and Defendants are aware of no such documents at present. Defendants will supplement this response in the event further investigation leads to the discovery of non-privileged documents responsive to this request.

9. All awards or other recognition given to the plaintiff for having stopped the admitted abuse of one child with his report.

RESPONSE: Objection. Defendants have no knowledge to support the contention that Plaintiff "stopped the admitted abuse of one child with his report." Subject to and without waiving any objection, Defendants state no such documents exist to Defendants' knowledge.

NELSON-MULLINS RILEY & SCARBOROUGH, LLP

By: 

William H. Foster

SC Bar No. 66221

E-Mail: bill.foster@nelsonmullins.com

Steven E. Buckingham

SC Bar No. 75089

E-Mail: steven.buckingham@nelsonmullins.com

A. M. Quattlebaum, Jr.

SC Bar No. 013048

E-Mail: marvin.quattlebaum@nelsonmullins.com

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

Attorneys for Defendants

Greenville, South Carolina

February 28, 2011

Certificate of Counsel

I hereby certify that the enclosed Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

A handwritten signature in black ink, appearing to read "Gregg Meyers", with a stylized, cursive script.

Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street Suite 100
St. Paul MN 55101
651-227-9990

Attorney for Appellant

The State of South Carolina
In The Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge

Appeal 2012-213521
Case No. 10-CP-42-2349

Jane Doe, as guardian for John Doe, ... Appellant

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

Final Brief of Appellants

Jeff Anderson & Associates, P.A.
Gregg Meyers
366 Jackson Street
St. Paul MN 55101
651-227-9990

Attorney for Appellants

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Statement of Issues on Appeal

1. Did the trial court err in applying an adult standard to a case involving a 14 year old developmentally disadvantaged Boy Scout who had witnessed sexual abuse of one Troop member and had himself been sexually abused?
2. Did the trial court err in failing to construe the record in the light most favorable to the Appellant, and by applying two heightened legal standards?
3. Did the trial court err in granting summary judgment on a novel question of law before discovery was complete, while a motion to amend was pending, and in failing to apply the “as is just” standard of SCRCP 56(f)?

Standard of Review

On appeal from a grant of summary judgment, the record is reviewed under the same standard applied by the circuit court: there must be no genuine issue of material fact; judgment must be appropriate as a matter of law; and the record, including all inferences which can be reasonably drawn from the record, must be viewed in the light most favorable to the nonmoving party. E.g., Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (S.C. 2002); Shelton v. LS&K, Inc., 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007). Where the proof standard is a preponderance of evidence, as it should be in this case even though the trial court applied a higher standard, “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery,” Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment is “not appropriate where a

further inquiry into the facts of the case is desirable to clarify the application of the law.”

Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003). *See also*, Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989) (party opposing motion should have opportunity to present all materials, and summary judgment not appropriate when further development of the facts is desirable).

“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (citations omitted).

An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

Statement of the Case

This is a novel claim for intentional infliction of emotional distress and negligent supervision for a developmentally disadvantaged minor Boy Scout who was sexually abused by his Scoutmaster. Despite an affidavit of counsel under SCRCF 56(f), R. App. Vol. 1 p. 231 et seq., which detailed problems the Plaintiff had responding to the motion for summary judgment because discovery had not been produced by the Defendants, and despite a pending motion to amend the complaint, the trial court heard, and then granted, summary judgment to all Defendants. The trial court applied a standard applicable to retaliatory conduct among adults, and heightened evidentiary standards, to deny the emotional distress claims for the 14-year-old who was (a) developmentally disadvantaged, (b) had witnessed sexual abuse of another Troop

member by the Scoutmaster, (c) had himself been sexually abused by his Scoutmaster, (d) had reported the abuse of both he and the other boy to a school psychologist, (e) had been immediately excluded from his Troop after his report, and (f) was neither apologized to nor readmitted to the Troop after his abuse became widely known and the Scoutmaster had pleaded guilty to sexual abuse the Victim reported.

The Plaintiff in this case is an appointed guardian, the grandmother of the child victim who reported the Scoutmaster's sexual abuse in 2005. For ease of reference, the Plaintiff's grandchild, John Doe, will be referred to in this brief as the Victim. The Defendants are various individuals and entities associated with Spartanburg County 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).

Troop 292 was dedicated to boys with developmental disadvantages, R. App. Vol. 1 p. Order at 1. For example, according to medical records, the Victim was born in 1991 (R. App. Vol. 1 p. 160) and has the pre-existing developmental disadvantage of having an IQ of 60 (R. App. Vol. 1 p. 268, second entry), as well as a host of other problems that include behavioral problems (E.g., R. App. Vol. 1 p. 268). Rule 56(f) affidavit at ¶ 15 (R. App. Vol. 1 p. 235) and ¶ 19 (Id.); Defense Ex. 23 (R. App. Vol. 1 p. 162, police report notes Plaintiff "has some mental handicaps.") Hence the need for the Plaintiff's guardianship (R. App. Vol. 1 pp. 7 – 11), even though the Victim is no longer a minor, and hence the importance of Scouting to a minor child with few social outlets.

The Defendants, of course, take the Victim as he is found, and the Victim is entitled to any aggravation of his pre-existing conditions, Watson v. Wilkinson Trucking Co., 244 S.C. 217,

136 S.E.2d 286 (1964). He is also entitled to have his interactions with Defendants evaluated using a legal 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 this case, those circumstances include that the Victim’s developmental disadvantages (e.g., R. App. Vol. 1 p. 163), that the Victim had witnessed sexual abuse of another Troop member (R. App. Vol. 1 p. 162), had himself been sexually abused (Id.), and had reported the abuse (R. App. Vol. 1 pp. 13 and 160), each of which should inform the applicable standard for a child of like age and intelligence, and experience.

The Scoutmaster, James Brian Reinhart, the Scoutmaster the Defendants arranged to be in charge of Troop 262, had a sexual interest in children. (E.g., R. App. Vol. 1 pp. 13, 239 and 245). He now serves a prison sentence stemming from the events which gave rise to this case. Order at 2 (R. App. Vol. 1 p. 13); Reinhart statement of October 20, 2005 (R. App. Vol. 1 pp. 234 at ¶ 13 and p. 245).

The case arose from events in 2005, when the Victim was 14 years old. (R. App. Vol. 1 p. 160). Some of the factual issues are disputed. In the light most favorable to the Plaintiff, the record reflects:

- (1) Starting in July, 2005, Scoutmaster Rhinehart began sexually abusing the Victim and another member of Troop 262. Def. Ex. D, police report of October 7, 2005 (R. App. Vol. 1 pp. 160 to 162).
- (2) On the evening of Thursday, October 6, 2005, just before bedtime, the Victim related to his father that his scoutmaster had been sexually abusing him. Defense Exhibit G, Father Doe’s deposition at pp. 194 and 219 (R. App. Vol. 1 pp. 166

lines 6 - 17 and p. 175 lines 20 – 25).

- (3) The father did not automatically accept his son's information as true, Father Doe dep. at p. 203 (R. App. Vol. 1 p. 168 lines 6 - 10), but considered the magnitude of the allegation in light of his son's developmental problems and past occasions of sometimes reporting things that were not true. Defense Ex. 22, at p. 2 (R. App. Vol. 1 p. 161). On reflection, the father thought "that possibly his son is being honest about the incident." (Id.)
- (4) The Victim's stepmother called Rhinehart's wife, not later than October 7, and told her that the Victim had reported sexual abuse of both the Victim and the second troop member. Father Doe dep. at 202 (R. App. Vol. 1 p. 167 lines 1 – 6). Rhinehart was informed of the allegation as soon as the Victim related it (Id.), and it is fair to infer that the Rhineharts began planning how he would respond.
- (5) With his father's encouragement, on Friday, October 7, 2005, the Victim reported to a school psychologist that he and another Troop member had been sexually abused "by his boy scout leader, James 'Brian' Rhinehart over the past 3 months." October 7, 2005 Police Report, Attachment C to the 56(f) affidavit and Defense Ex. 22 (R. App. Vol. 1 pp. 160 to 162).
- (6) The school psychologist called law enforcement. October 7, 2005 Police Report, Attachment C to the 56(f) affidavit (R. App. Vol. 1 pp. 160 to 162), and a police investigation ensued. Order at p. 2, (R. App. Vol. 1 at p. 13); Defense Ex. 22 at p. 2 (R. App. Vol. 1 p. 161) ("further investigation is needed...").
- (7) As noted above, Reinhart was told of the allegation not later than the same day

Father Doe dep. at 202 (R. App. Vol. 1 p. 167 lines 1 – 6).

- (8) On Monday, October 10, 2005, Reinhart denied that he had sexually abused either boy (R. App. Vol. 1 p. 162 ¶ 1), and Reinhart tried, first with the father (Id.), and later with law enforcement (Id.), to infer that the Victim's allegation was fabricated by claiming that the Victim was angry for an ultimatum Reinhart had given him: "He [Reinhart] told the [V]ictim that if he did not turn in the money for a popcorn drive they had, he would be kicked out of the club." (R. App. Vol. 1 p. 162 ¶ 1, Defendants' Ex. 23, emphasis added). This is the "missing popcorn money" theory from Rhinehart. Rhinehart elected to try to argue that the boy with the IQ of 60 had created a plan to ensnare his Scoutmaster. The Defendants have adopted the same approach.

But the Defense account has a significant discrepancy. The Defendants now claim that by October 10 they had already decided to exclude the Victim from the Troop (in a meeting at which Reinhart and his wife were supposedly present, R. App. Vol. 1 p. 228, Culbreth affidavit at ¶ 4; R. App. Vol. 1 p. 225, Green affidavit at ¶ 3), not that there had been only discussion about doing so, as Reinhart claimed R. App. Vol. 1 p. 162 ¶ 1). The father testified that some discussion about popcorn money was being had before the abuse allegation, Father Doe dep. at pp. 207 to 208 (R. App. Vol. 1 p. 169 line 16 to p. 170 line 3), but the Victim said he hadn't taken any money and the Father had asked (as had counsel in discovery), but had not received any confirmation of it at the time the abuse was reported. Father Doe Dep. at pp. 207 and 208 (R. App. Vol. 1 p. 169

line 16 to p. 170 line 3).

- (9) The abuse was reported before the Defendants had given the Father any confirmation about the popcorn money, and before a decision had been made about what to do with the contention about the money. Father Doe Dep. at 208, (R. App. Vol. 1 p. 170).
- (10) The Defendants provided to neither the father (nor to counsel in discovery) either minutes of meetings or financial records to show any “missing popcorn money.” (R. App. Vol. 1 p. 232 ¶ 6).
- (11) After the abuse was reported, the Victim was expelled. Father Doe dep. at 208 (R. App. Vol. 1 p. 170).
- (12) 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), but the Father testified both that the exclusion made his son angry and he did not comprehend that he had been permanently excluded. Father Dep. pp. 203, 208, 215. (R. App. Vol. 1 p. 168 line 12; p. 170; p. 172 lines 5 – 25).
- (13) As set forth below, the significance of this October 10 explanation by Reinhart, which says not that the Victim had already been excluded over the popcorn money but only might be excluded, contradicted the Defendant’s later position, that by the 10th the Victim had already been excluded (*compare*, R. App. Vol. 1 p. 228, Culbreth affidavit at ¶ 4; *and* R. App. Vol. 1 p. 225, Green affidavit at ¶ 3 *with* Reinhart claim at R. App. Vol. 1 p. 162 ¶ 1), but neither the contradiction nor its inferences was construed by the trial court favorably to the Plaintiff.

- (14) Nor did the trial court credit the Victim's account to police, R. App. Vol. 1 p. 162, which in the light most favorable to the Plaintiff the court must, that "the reason he told about the incidents was that he did not want the suspect [Reinhart] to touch two other scouts." R. App. Vol. 1 p. 162 ¶ 2, Defense Ex. 23.
- (15) The Victim's exclusion from Troop 292 was effective Monday, October 10, 2005, by an undated letter. Attachment D to the 56(f) affidavit, R. App. Vol. 1 p. 159.
- (16) The letter excluding the Victim was not mailed, but was hand-delivered to the Victim's home. 56(f) affidavit at ¶ 17 (R. App. 235 ¶ 17); Father Doe Dep. at p. 194, R. App. Vol. 1 p. 166 lines 3 - 5.
- (17) The Father recalled delivery being made on either the 7th or 8th of October. Father Doe. Dep. at p. 202 (R. App. Vol. 1 p. 167 lines 7 – 12). It is reasonable to infer that the letter was written the day of delivery, since hand-delivery is used for urgent communications. It is not likely the letter had been drafted 4 or 11 days before, as contended by Defendants (e.g., R. App. Vol. 1 p. 228, Culbreth affidavit at ¶ 4), sat for days, then was hand-delivered. Viewing the record in the light most favorable to the Plaintiff, and without the documents requested in discovery, the letter was written only after the abuse report had been made, the abuse report made in the morning, Reinhart informed about it, then the letter was written and delivered after the report, with full knowledge of the reported abuse. Both the Scoutmaster and the Assistant Scoutmaster knew of the abuse report not later than October 7. R. App. Vol. 1 p. 167, Father Dep. at p. 202.
- (18) On Wednesday, October 12, 2005, at 4 p.m., the Victim was interviewed by law

enforcement and the Victim gave specifics about the acts of sexual abuse by Reinhart, including that the Victim witnessed Reinhart abusing the other Troop member. R. App. Vol. 1 p. 162, Defendant Ex. 23, police report.

- (19) On Thursday, October 20, 2005, that other Troop member identified by the Victim, a boy then 15 years old, was interviewed at the Sheriff's office. It is reasonable to infer he would not have been interviewed without the Victim's initial report. That child confirmed that Rhinehart had sexually abused him, reporting that Rhinehart had "fondled his penis on numerous occasions" and "made him touch [Rhinehart's] penis." R. App. Vol. 1 p. 248.
- (20) On October 20, 2005, a judge issued two warrants against Rhinehart, charging him as to both Troop members. R. App. Vol. 1 p. 248, Attachment C to the 56(f) affidavit.
- (21) On October 20, 2005, Rhinehart was told by law enforcement that the second boy had confirmed the Victim's allegation. The confirmation by this scout put enormous pressure on Rhinehart, since that child's mother was Assistant Scoutmaster and the child was a family member to Rhinehart. The mother could be expected to support her child, giving Rhinehart an adult adversary as well as a second child accuser.
- (22) Although he had actively denied it since the first report on October 7, on October 20, 2005 Rhinehart admitted to sexually abusing the second scout, his family member, claimed he did so on only on one occasion (despite the boy's report of "numerous" instances), and was arrested. R. App. Vol. 1 p. 245, October 20,

2005 Voluntary Statement of James Brian Rhinehart, Attachment B to the 56(f) affidavit (the faint text of which is reproduced at R. App. p. 234 ¶ 13).

- (23) Defendants claim they had no knowledge of the abuse report, even though the Scoutmaster and Assistant Scoutmaster had been informed on October 7. Father Dep. at 202, (R. App. Vol. 1 p. 167 lines 1 – 6). Rhinehart's arrest was immediately reported in local news media, where Defendants undisputedly learned of the arrest and his charges. R. App. Vol. 1 p. 228, Affidavit of Shelby Culbreth at ¶ 6.
- (24) After learning that the Victim's report about Reinhart abusing the other Troop member was accurate, and Reinhart was arrested on charges of abusing two Troop members, none of the Defendants reconsidered the decision to exclude the Victim from Troop 292 or to personally apologize to him or his family.

Had the Defendants' decision been motivated by other factors, as the Defendants claim, the Defendants, knowing the Victim had various developmental problems, knowing that he had witnessed sexual abuse of another Troop member, knowing the Victim reported being himself abused, and knowing that Rhinehart had now admitted that the Victim's report of sexual abuse was true, Defendants would have considered this new information that reflected on their initial decision. The fair inference is that Rhinehart's confirmation on October 20 was not new information to the Defendants, and that the Victim's exclusion was both intentionally (or recklessly) initiated, and intentionally (or recklessly) maintained.

(25) Given Reinhart's confession to the scout the Victim identified, R. App. Vol. 1 p.

245, Reinhart was not prosecuted on the charge of also abusing the Victim.

The disputed events relate to the timing and motivation for the letter excluding the Victim from the Troop. The trial court ignored that the decision to exclude the Victim was not reconsidered, or apologized for, even after it was known the Victim was telling the truth. The trial court also ignored the discrepancy in the Defendants' claim that the expulsion letter was written 4 – 11 days before hand-delivery, a contention that fails to view the record in the light most favorable to the Plaintiff. As noted above, it is unlikely that a hand-delivered letter was written and then waited for days for hand-delivery, and in the light most favorable to the Plaintiff, the Plaintiff is entitled to the inference that the hand-delivered letter was created shortly before its hand-delivery.

As set forth in the 56(f) affidavit, ¶ 6 (R. App. Vol. 1 p. 232), the Defendants had agreed to provide, but had not provided, documents requested which would undermine their contentions. The Defendants had not produced minutes of their meetings, to establish the meeting at which the Victim's conduct was supposedly considered. 56(f) affidavit at ¶¶ 4 and 6 (R. App. Vol. 1 p. 232). Nor had the Defendants produced the financial records requested to document the supposed contention over popcorn sales funds. Id. Nor had Defendants produced the pertinent Scout Handbook,¹ which sets out certain standards of conduct for the Troop as well as for scouts,

¹ The Plaintiff sought in discovery, but had not received, the 2005 printing of the 1998 Guide to Safe Scouting. Pages from the 2009 printing of the 1998 Guide (R. App. Vol. 1 pp. 237 to 244) presumably contain the same standards as the 2005 printing, each of which were violated by the Defendants: (1) To prevent abuse, "two deep leadership" on p. 1 (meaning two adults present at all times, which was unarguably violated) (R. App. Vol. 1 p. 241 and p. 243); (2) to prevent abuse, "no one-on-one contact" (meaning no scout should ever be alone with an adult,

and required of the Troop progressive discipline and parental consultation for issues of claimed scout misconduct. (See, R. App. Vol. 1 p. 233 ¶ 10).

It is not proper Scout procedure to simply exclude a student for behavior without having engaged the parents in a series of interactions to correct the claimed misbehavior, R. App. Vol. 1 p. 243, and it is explicitly not acceptable Scout practice to criticize a child who reports abuse because of the “pressure” that the Scouts agree a victim of sexual abuse is under. Guide at p. 2, R. App. Vol. 1 p. 242. The Defendants offer no evidence whatever that the claimed misbehavior by the Victim, of being inside Shelby Culbreth’s car, created any harm or had ever been broached with the Victim’s parents or grandparents. E.g., R. App. Vol. 1 p. 170 line 3. The Defendants can make no showing that any of them complied with pertinent BSA disciplinary rules, so the Defendants simply promised to provide in discovery the pertinent 2005 rules, while failing to do so.

The Court permitted the Defendants’ discovery refusals by not continuing the motion until the promised discovery was provided.

Despite the lack of discovery responses, the timing issues about the Letter, and the Defendants’ lack of reconsideration after Reinhart’s arrest on charges of assaulting the Victim, the Court determined that the Plaintiff had “failed to offer *sufficient* evidence to rebut Defendants’ contention that the decision to send the Letter was made in good faith,” Order at 5, emphasis added. R. App. Vol. 1 p. 16. The trial court concluded, contrary to the record, that

which was unarguably violated) (Id. at p. 241), (3) not criticizing the child who reports abuse, which is on p. 2 (R. App. Vol. 1 p. 242), and which was unarguably violated; and (4) to consult with parents “to determine a course of corrective action” for behavior issues, which is on p. 3 (R. App. Vol. 1 p. 243), which viewed in the light most favorable to the Plaintiff, was also violated.

Defendants lacked knowledge of the Victim having reported sexual abuse. Order at 5, R. App. Vol. 1 p. 16. By their own account, and when viewed in the light most favorable to the Plaintiff, (a) the entire “popcorn money” theory was a fabrication by the Scoutmaster and Defendants to try to account for the Victim’s allegations, and (b) the Defendants became aware of Reinhart’s arrest and charges either before excluding the Victim or, unarguably, shortly after excluding the Victim, and did nothing to alter the decision to exclude the Victim or to apologize for it. The trial court ignored the proper standard for summary judgment and the proper evidentiary standard for proving intent, and determined that no reasonable jury could conclude that the Defendants had retaliated against the Victim, Order at 5, R. App. Vol. 1 p. 16.

Viewed in the light most favorable to the Plaintiff, the Defendants took no action after the allegation and charges were unarguably known because they had cooperated with the Scoutmaster initially to exclude the Victim to attack the Victim’s credibility for having made the abuse report. Defendants refused to reconsider their actions after Reinhart’s arrest because their original objective — to attack the Victim — had not changed. Both the original intention to exclude the Victim and the refusal to reconsider even after Reinhart’s admission of guilt were each outrageous actions directed against the child Victim who had reported the crime. The Court’s conclusion rests on the premise, contrary to the record viewed in the light most favorable to the Plaintiff, that the Defendants “acted in good faith and for a proper purpose.” Order at 6, R. App. Vol. 1 p. 17.

The Court then went on to conclude, remarkably, Order at 6, R. App. Vol. 1 p. 17, that even if the Defendants had acted to retaliate against the developmentally disadvantaged 14 year old abuse Victim for having reported the crime, “no jury could reasonably find such conduct to

be sufficiently extreme or outrageous to give rise to a claim for intentional infliction of emotional distress,” because it was merely “extremely insensitive,” or “callous.” Order at 6 – 7, R. App. Vol. 1 pp. 17 to 18. Citing cases in which the conflicts were entirely among adults, Order at pp. 6 and 7 (R. App. Vol. 1 pp. 17 to 18), the trial court projected that adults were at liberty to retaliate against a mentally and emotionally disadvantaged child for reporting his own and another child’s sexual abuse unless the Defendants were clumsy enough to tell the Victim (through his family) explicitly “that he was being punished for reporting abuse.” R. App. Vol. 1 p. 18. On that basis, which ignores the proper proof standard for matters of intent, the trial court dismissed both the intentional infliction and negligent supervision claims.

The Defendants take the Victim as they find him. The trial court cited to no case — because apparently such poor behavior has never before been on display in any prior case — in which a special needs child who had been sexually abused by his Scoutmaster was retaliated against by adults for having reported the abuse.

This appeal followed. R. App. Vol. 1 p. 96.

Argument

- 1. The trial court err in applying adult standards to a case involving a 14 year old developmentally disadvantaged Boy Scout who had witnessed sexual abuse of one Troop member and had himself been sexually abused.**

The trial court erred in analyzing the case under standards articulated for conflicts arising among adults, and in excluding circumstantial evidence of intent. This case is novel in that there does not appear to be any prior case where adults retaliated against a child — developmentally disadvantaged or otherwise — for having reported a crime, let alone a developmentally

disadvantaged child who had witnessed sexual abuse of one child and who was himself being sexually abused. Nor has any standard been articulated to establish whether South Carolina will treat children, or a child who has reported a crime, or a child who is himself a crime victim, by any standard different from when adults retaliate against adults.

Any citizen has a right to report a crime without retaliation. In re Quarles, 158 U.S. 532, 15 S.Ct. 939, 39 L.Ed. 1080 (1895). In South Carolina, crime victims are especially protected. E.g., S.C. Code § 16-3-1510 (recognizing psychological injury to crime victims). Accord, S.C. Const. Art. I § 24 (same). In theory, the State has a policy “to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented.” S.C. Code § 63-1-20(C). The practice, of course, ranks children’s problems as something less than “the most important strategy.”

In choosing the standard to apply to this summary judgment motion, the trial court made no concession for the Victim in this case being a developmentally disadvantaged 14 year old, or for the 14 year old Victim having been a witness to an adult sexually abusing another child, or for the 14 year old Victim having reported that he too had been sexually abused, or for the setting being one in which the Defendants solicited the Victim’s participation in their Troop and chose the Scoutmaster whose supervision enabled him to breach Scout rules to abuse Troop members. The trial court, Order at 6 and 7 (R. App. Vol. 1 pp. 17 to 18), applied the same standards applicable to conflicts among fully functioning adults, arising from work or school settings. The concept voiced by the trial court — that retaliation against a child for reporting sexual abuse is acceptable as long as it is not overtly stated to be retaliation (Order at 7, R. App. Vol. 1 p. 18) — is novel, is the wrong public policy choice for South Carolina and, among other things, both fails

to view the record in the light most favorable to the Plaintiff (which requires the Victim's exclusion to be viewed as the response by Defendants to his abuse report) and, as argued more fully below, applies two incorrect legal standards.

The Victim in this case was 14 years old when he came forward to report his Scoutmaster. R. App. Vol. 1 p. 160. He is also developmentally disadvantaged, as were all boys in the Scout Troop. R. App. Vol. 1 p. 12. In evaluating the interaction between the Defendants and the Victim, a child ought to be entitled to a standard that invokes a standard of 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 (S.C. 1999) (standard should be adjusted for age, intelligence, and experience). In this instance, that ought to include both his developmental disadvantages, his having witnessed abuse of the other Troop member, and his own sexual abuse by the Scoutmaster.

Intentional infliction has been affirmed even for adults who sustained emotional injuries. E.g., McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (employee compelled to engage in exercises despite embarrassment from preexisting medical condition), *overruled on other grounds*, Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (S.C. 2002); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) (2 year pattern of rude behavior to adult real estate agent); Mims v. Florence Co. Ambulance Service Comn., 296 S.C. 4, 370 S.E.2d 96 (Ct. App. 1988) (ambulance driver refused to transport patient because she was smoking).

As discussed in Todd v. South Carolina Mutual Farm Bureau Mutual Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984), emotional distress claims are appropriate where there are three elements (1) a pre-existing relationship (satisfied by the Victim's participation in the

Troop), (2) the Defendants conduct arises from an aspect of that relationship (satisfied by the act to exclude him after the report of abuse, and, viewed favorably to the Plaintiff, motivated by the crime report), and (3) the Defendants who are “heedless” of the emotional suffering (displayed by the exclusion and the refusal to reconsider or apologize when all facts are unarguably known).

The law of South Carolina should explicitly recognize that adults may not, recklessly or intentionally, retaliate against a developmentally disadvantaged 14 year old boy for reporting the crime against himself and another victim. The trial court erred in not applying a standard for emotional abuse that is adjusted for the age, intelligence, and developmental disadvantages of the Victim in this case.

2. The trial court erred in failing to construe the Record in the light most favorable to the Appellant and by applying two heightened legal standards.

As set forth above, the trial court erred in failing to view the factual record in the light most favorable to the Plaintiff. At pages 4 and 5 of the order (R. App. Vol. 1 pp. 15 and 16), the trial court compounded that error by applying the wrong legal standard of proof. The trial court applied the standard of proof for emotional distress claims unaccompanied by physical injury, e.g., Hansson v. Scalise Builders of South Carolina, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (S.C. 2007) (“heightened burden of proof” for some elements in a situation of “purely mental anguish”), rather than the standard for emotional distress claims where there has also been a physical injury. The order states, at p. 5 (R. App. Vol. 1 p. 16), emphasis added, that the Plaintiff had “failed to offer *sufficient* evidence,” implicitly acknowledging the ordinary standard was satisfied, even without the promised discovery, but finding that the Plaintiff had failed to satisfy

the court's erroneous, heightened standard.

Viewed favorably to the Plaintiff, the record shows that the Victim was sexually abused by Scoutmaster Rhinehart. R. App. Vol. 1 p. 162. Knowledge of the Defendants about the abuse at the time of the report is disputed, but in the light most favorable to the Plaintiff, must be accepted as true. But unarguably, after Reinhart pleaded guilty the Defendants were aware that the Victim's report was true, and yet made no change of position, or apology. The trial court erred in its analysis because it excluded these circumstantial indications of the Defendants' intent, even though circumstantial evidence is properly available to demonstrate intent. E.g., Anderson v. The Augusta Chronicle, 355 SC 461, 478, 585 S.E.2d 506, 515 (Ct App. 2003) (libel case, recognizing that intent "may be very difficult to prove" and "any direct or indirect evidence relevant to the defendant's state of mind is admissible," direct or circumstantial, to rebut a claim of good faith). The trial court excluded all circumstantial evidence in concluding that only a direct statement of retaliatory intent was sufficient.

This emotional distress claim is made in the context of the Victim's own sexual abuse, and the sexual abuse should both bear on the standard applicable to the Victim's pre-existing conditions,² as set forth in part 1 of this brief, and should also inform the standard applicable to the view taken of the factual record on the intentional infliction claim. The heightened proof

² Once the Victim was deposed, and demonstrated he was intellectually competent to relate the circumstances of the sexual abuse, evidence existed of the supervision violations that enabled the Scoutmaster to isolate himself with the Victim in violation of BSA policies. Accordingly, a motion was made to amend the complaint to claim damages from the abuse as well, not only for the retaliation. The trial court elected to ignore that motion, but the context of this emotional distress claim is unarguably a setting with a related physical injury. The legal standard used by the trial court, for exclusively emotional injury, is not applicable, and is an error of law applied to this Victim.

standard was erroneously applied by the trial court, an error of law that should be reversed. The plaintiff need offer only a scintilla of evidence, Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009), and more than a scintilla has been offered on each element of emotional distress.

3. The trial court erred in granting summary judgment on a novel question of law before discovery was complete, while a motion to amend was pending, and in failing to apply the “as is just” standard of SCRCP 56(f).

This is a novel claim, yet the trial court gave no consideration to the 56(f) affidavit and incomplete discovery responses from the Defendants. R. App. Vol. 1 pp. 231 to 236. Doing so was an abuse of discretion. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002) (trial court erred in not considering counsel’s request for more discovery and pending motions before granting summary judgment). As is set forth in detail above, the trial court erred in failing to construe the record in the light most favorable to the Plaintiff, in failing to continue the motion to enable the discovery responses that had not been provided, and in failing to review the proposed amended complaint. Those discovery responses and the motion to amend were probative of the summary judgment issues, as the Rule 56(f) affidavit set forth. R. App. Vol. 1 pp. 231 to 236.

Defendants contend the meeting at which the decision to exclude the Victim was made occurred 4 or 11 days before the letter was hand-delivered, Def. Ex. A at ¶ 4 (R. App. Vol. 1 p. 228 ¶ 4. As noted above, letters are hand-delivered because they are important as well as time-sensitive. Defendants contend that a letter which was so urgent as to have been hand-delivered

was permitted to lay unattended for 4 – 11 days when, in the light most favorable to the Plaintiff, the record suggests that the letter was hand-delivered after the abuse was reported because it was motivated by the report of abuse and had to be delivered promptly to further the plan to attack the Victim's credibility.

Prompted by notice that the Victim claimed abuse, Reinhart went immediately into action to attack the credibility of the Victim, and the Defendants went with him, to protect their Scoutmaster, directly contrary to duties each Defendant assumed in the Scout Guide. R. App. Vol. 1 pp. 237 to 244.

Viewing the record in the light most favorable to the Plaintiff, the Defendants did nothing even after they became aware that Reinhart had admitted guilt and was arrested, because the Defendants' original intention was to attack the Victim's credibility for having reported Reinhart. Any person motivated by any other reasons would realize that a serious mistake had been made, would realize that they had wrongly punished a child who had reported being sexually abused by a Scoutmaster who had admitted abusing a Troop member, and would realize that the child had been under enormous pressure, as the Guide puts it, before his disclosure. Guide at p. 2, R. App. Vol. 1 p. 242. The Guide is based on the BSA's "90-plus years of experience." Guide at iii, R. App. Vol. 1 p. 238. Any person making an honest mistake about his conclusion before the abuse was admitted would have realized after the abuse was admitted that a mistake had been made, and would have communicated that acknowledgment. That the Defendants did no such thing is because they had made no mistake in excluding the Victim. It is exactly what they intended to do, and they continue to argue the Victim's conduct in this case because it is the course they set for themselves starting on October 7, 2005, when they learned of the abuse report and sought

cover from it.

The supplemental police report of October 10, R. App. Vol. 1 p. 162 ¶ 1 (Def. Ex. 23), records Reinhart getting the story wrong (compared to the Defendants) as to the popcorn money, as he relates not that the Victim had been excluded but that he might be excluded if the money was not paid. The Father testified that no one had made a demand for return of any funds, the issue was still being discussed. R. App. Vol. 1 p. 170 line 3, Father Doe dep. at p. 208 (“We hadn’t gotten to that point yet.”). Only the Defendants contend that the exclusion had already occurred before the abuse was reported.

There are no records of the Troop which show it had complied in any way with the standards of the BSA Guide for progressive discipline that involves the parents (56[f] affidavit Attachment A, R. App. Vol. 1 p. 243), and Defendant Green’s affidavit (R. App. Vol. 1 pp. 225 to 226) demonstrates that he gave advice inconsistent with those standards. It is not surprising that the Defendants moved for summary judgment before producing the applicable disciplinary standards. It is only surprising that they had promised to produce them.

Those details are properly admissible on the Defendants’ intent and their good faith, and the trial court erred as a matter of law in excluding them by applying the wrong legal standard.

Conclusion

The trial court's order should be reversed, the applicable standards clarified for both the child victim and the emotional distress accompanied by physical injury, and the case remanded.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregg Meyers", with a stylized flourish at the end.

Gregg Meyers

Jeff Anderson & Associates, P.A.

366 Jackson Street

St. Paul MN 55101

651-227-9990; 651-297-6543 facsimile

Gregg@andersonsadvocates.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Deham Cole, Circuit Court Judge

Appellate Case No. 2012-213521
Case No. 2010-CP-42-2349

Jane Doe, as guardian for John Doe

Appellant

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

Respondents

RESPONDENTS' FINAL BRIEF

NELSON MULLINS RILEY & SCARBOROUGH LLP

G. Mark Phillips
William H. Foster, III
Post Office Box 40084
Greenville, SC 29601
(803) 250-2300

A. Madison Bogan
Miles F. Coleman
Post Office Box 11070
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondents

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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; R. 23.) The Complaint alleged that around the time John Doe was excluded, he accused his Scoutmaster of sexual abuse. (*Id.* at ¶¶ 2, 12; R. 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.¹ Rather, Doe asserted claims of intentional infliction of emotional distress and negligent supervision—based solely on the decision to exclude Doe from the Troop following his report of abuse—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; R. 23, 25-27.)

The court filed a consent scheduling order in which each party agreed to be prepared for a trial as early as November of 2011. (Consent Sched. Ord. at ¶ 5; R. 2.) The parties subsequently engaged in thorough discovery. Over the course of 2011 and 2012, Doe’s counsel deposed or participated in the deposition of numerous persons including the alleged abuser, the alleged abuser’s wife, John Doe, John Doe’s father, John Doe’s

¹ Jane Doe later testified that she had deliberately chosen not to bring a claim based on the alleged sexual abuse and that her Complaint did not seek any damages based on the alleged abuse. (*See* Jane Doe Dep., May 20, 2011, at 179:3-12; R. 185.) Indeed, on the same day Jane Doe commenced this suit, she also filed suit against Doni Rhinehart, the accused abuser’s ex-wife, claiming that she was negligent in allowing John Doe to be sexually abused in her home and seeking damages for the alleged abuse. (*See* Rhinehart Compl. ¶¶ 8, 20; R. 30, 32.)

step-mother, Jane Doe, and Jane Doe's husband. In addition, Doe served defendants with Requests for Production and Interrogatories; and on February 28, 2011, the defendants responded with the requested information. (Def.'s Resp. to Pl.'s RFP; R. 261-65; Def.'s Resp. to Pl.'s Interogs.; R. 250-60.) The defendants subpoenaed various hospitals, medical facilities, mental health centers, schools, local law enforcement agencies, and the South Carolina Departments of Juvenile Justice and Social Services. On February 10, 2012, Doe served another round of Interrogatories and Requests for Production.

On February 21, 2012, the defendants moved for summary judgment. (Def.'s Mot. for SJ; R. 34-35.) They filed their supporting memorandum of law on May 14, 2012, arguing 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; R. 40, 43-45.) In response, Doe's counsel completed a Rule 56(f) affidavit alleging that further discovery was needed to enable Doe to oppose the motion for summary judgment. (*See* Meyer's R56(f) Aff.; R. 231-36.) In addition, Doe provided to the trial judge, but did not file, an undated document titled "Opposition to Motions for Summary Judgment." (*See* Pl.'s Opp. to Mot. for SJ; R. 76-83.)

The trial court conducted a hearing on the summary judgment motion on May 16, 2012. At that hearing, Doe's counsel expressly withdrew his earlier objection to the supposed lack of discovery. (Sum. J. Hearing Tr. at 3:12-25; R. 131.) After hearing from each party, the court took the motion under advisement.

On the same day as the summary judgment hearing—more than two years after initiating the suit—Doe filed a motion to amend her Complaint. (Pl.'s Mot. to Amend.; R.

62-63.) The proposed Amended Complaint differs from the operative Complaint in one significant way: it included a claim based on the sexual abuse.² (*See* Prop. Amend. Compl. at ¶¶ 7, 46-57; R. 65, 73-74.) Defendants filed a memorandum in opposition, explaining the extreme prejudice that would be caused by the amendment as well as the amendment's futility. (*See* Def.'s Mem. in Opp. at 4-7; R. 87-90.) The trial court conducted a hearing on July 18, 2012, and defendants subsequently submitted a supplemental memorandum in opposition to the motion to amend. (Def.'s Supp. Mem. in Opp.; R. 93-94.)

The trial court granted the motion for summary judgment in an order filed on November 1, 2012. (Order; R. 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; R. 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; R. 20.)

Doe timely appealed this order to this Court. (Notice of Appeal; R. 96.) On March 26, 2013, the Respondent's filed a motion to dismiss Doe's appeal, explaining that Doe's arguments on appeal were not preserved for review by this Court. (Resp.'s Mot. to Dismiss; R. 98-110.) After Doe filed a belated Return and a motion to accept the Return

² Whereas the original Complaint asserted claims alleging that the defendants acted wrongly by excluding John Doe from the troop, the Proposed Amended Complaint alleges negligence in failing to prevent the abuse. (Prop. Amend. Compl. at ¶¶ 46-57; R. 73-74.) Jane Doe had been aware of this claim at the time she initiated this suit, as evidenced by the fact that she simultaneously initiated suit against the abuser's ex-wife for her negligence in allowing the abuse to occur. *See* note 1, *supra*.

out of time, this Court denied the motion to dismiss the appeal, but noted that Respondents could argue the preservation issues in their subsequent brief. (July 3, 2013 Order; R. 21.)

Statement of the Facts

This case concerns John Doe, currently a 22-year-old resident of the State of New York. (Order at 1; R. 12.) Until early October 2005, John Doe was a member of the Troop, which was formed to allow special needs children to participate in scouting. (*Id.*) 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. (Culbreth Aff. at ¶¶ 3-4; R. 227-28.) This decision was based on John Doe's prior misconduct, including his refusal to reimburse the Troop for the cost of popcorn that he was supposed to sell during a Troop fundraising drive but which he instead ate, and his entering the vehicle of Troop volunteer Culbreth without permission. (*Id.* at ¶ 3; R. 227.)

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; R. 225-26.) The entire substance of the undated Letter provides as follows:

This is a letter to inform you that as of 10/10/05, your son [John Doe] will not longer be able to participate in any functions that Troop 292 may hold now or in the future. That is to include meetings and other outside functions.

(Order at 2; R. 13.) The Letter was prepared for signature by Culbreth, who was the Troop committee chairperson, and was signed on her behalf by Jackie LaFontaine. (*Id.*) There is no evidence that the other Defendants were involved in the decision to suspend John Doe from participation in the Troop or in preparing and sending the Letter. (*Id.*)

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; R. 160.) A police investigation resulted in charges against Rhinehart for the abuse of both boys. (Order at 2; R. 13.) Rhinehart pled guilty to a single charge related to his stepson, and currently is serving a prison sentence. (*Id.*) 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; R. 153, 156.)

Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRPC." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). Rule 56 provides that summary judgment is proper there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. See Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC*, 387 S.C. at 235, 692 S.E.2d at 505. (citation omitted).

Although the nonmoving party is entitled to a favorable view of the evidence and reasonable inferences therefrom, "more is required than mere speculation to withstand [a] motion for summary judgment." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C.

528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012) (citing *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004)); *see also* *McNight v. S.C. Dept. of Corr.*, 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) (“South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury.”) (citations omitted).

In addition, this Court has recognized that “a cause of action for intentional infliction of emotional distress carries a ‘heightened burden of proof’” and that “the ‘mere scintilla’ rule . . . does not apply to this cause of action.” *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 170, 708 S.E.2d 218, 224 (Ct. App. 2011) (quoting *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007)). Accordingly, this Court will affirm a trial court’s grant of summary judgment where a plaintiff failed to establish a *prima facie* case for intentional infliction of emotional distress. *Id.* at 171, 708 S.C. at 224.

Argument

Respondents respectfully request this Court affirm the trial court’s grant of summary judgment for several reasons. First, the arguments Doe raises on appeal are not preserved for review by this Court, either because she failed to raise them before the trial court or because she expressly abandoned them below. Second, Doe is simply incorrect when she argues that the trial court applied the wrong legal standard to her claim of intentional infliction of emotional distress. The trial court applied the well-established standard that South Carolina’s appellate courts have reiterated and applied in every case discussing this cause of action, including situations similar to this one.

Third, Doe is incorrect that the legal standard employed by the trial court applies only to claims for emotional distress unaccompanied by a physical injury. The test applied by the trial court applies to every claim for intentional infliction of emotional distress, regardless of whether the emotional injury is or is not accompanied by physical injury. Doe is similarly incorrect in her argument that the trial court wrongly “excluded” certain “evidence.” The trial court did not exclude the *post hoc* “evidence.” It simply found it irrelevant or insufficient to establish the required elements to state a claim.

Finally, the trial court did not err by granting summary judgment because nothing in the procedural posture of the case prevented it. The claims Doe asserted in her suit are not “novel,” the additional discovery she sought (and, in fact, received) involved a merely speculative possibility of uncovering any helpful information, and her eleventh-hour request to amend the Complaint would have caused extreme prejudice to the defendants.

I. Doe’s arguments are not preserved for review by this Court.

Doe’s appeal is premised entirely upon arguments either raised for the first time to this Court or expressly abandoned before the trial court. 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). As explained below, Doe’s arguments thus present no basis upon which this Court can review the trial court’s ruling.

Even if Doe had raised the issues below, the trial court did not address them in his order. 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 reconsider or otherwise challenge the trial court's opinion, and thus her arguments on appeal are not preserved.

In addition, it is well-established that an issue conceded in the trial court cannot be argued on appeal. *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998). Similarly, where an objection is expressly withdrawn, it cannot be raised on appeal. *Rosamond Enters., Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983); *Pinckney v. Pettijohn Builders*, 289 S.C. 405, 408, 346 S.E.2d 533, 534 (Ct. App. 1986). Applying these well-established principles to the appeal at hand leaves no doubt that Appellant has failed to present any cognizable issues on appeal.

A. *Doe never argued below that an "adjusted" or subjective standard should apply to the claim for intentional infliction of emotional distress.*

In her first argument on appeal, Doe asserts that the trial court erred by applying an "adult standard"—*i.e.* the normal, objective test— rather than a standard accounting for the plaintiff's personal characteristics when evaluating the claim for intentional infliction of emotional distress. *See* App. Brief at 14 (arguing that the trial court should have made a "concession" for John Doe's age, mental disability, and the fact that he had been a witness to and victim of a crime perpetrated by a non-party); *id.* at 14-15 (arguing that John Doe was "entitled to" a standard accounting for his age, intelligence, experience, and circumstances); *id.* at 15 (arguing the normal standard should be "adjusted" to account for a plaintiff's individual characteristics).

Apart from the obvious legal flaws in Doe's argument, *see* Part II.A, *infra*, it is clear she never raised this issue below. Indeed, the Rule 56(f) affidavit, the unfiled Opposition to Motions for Summary Judgment, and Doe's oral arguments at the May 16,

2012 hearing before the trial court show no reference to or request for any adjusted legal standard.³ Further, had Doe wished to assign error to the trial court's failure to apply or even mention this "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 and the South Carolina Supreme Court's long-standing issue preservation jurisprudence.

B. Doe never argued to the trial court that circumstantial evidence should be permitted to demonstrate intent.

In both her first and second arguments on appeal, Doe argues that the trial court erred because it "excluded . . . circumstantial indications of Defendants' intent" to inflict emotional distress. App. Brief at 16 (arguing that defendants' intent was shown by their failure to invite John Doe back to the Troop or to apologize for excluding him); *id.* at 13. Setting aside the legal and factual flaws in Doe's argument, *see* Part III, *infra*, it is clear she never raised this issue below. The record contains no ruling by the trial court excluding the circumstantial evidence now cited by Doe and no motion to alter or amend challenging the purported exclusion of such evidence by the trial court. Thus, to the extent Appellant intends to base her appeal on this "evidentiary" issue, she is barred from doing so. *See Pope v. Heritage Comms., Inc.*, 395 S.C. 404, 425 n.7, 717 S.E.2d 765, 776

³ Respondents anticipate that Doe's Reply Brief will raise the same arguments that she raised in her Opposition to Respondent's Motion to Dismiss the appeal. These arguments, however, are unavailing. In her Opposition, for example, Doe insisted that she raised the issue of John Doe's developmental disadvantages to the trial court. *See* App.'s Opp. to Mot. to Dismiss at 2. This 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. This latter issue was never raised or argued to the trial court.

n.7 (Ct. App. 2011) (“To the extent Appellants argue the trial court failed to specifically state it found the evidence reliable, we find the issue is not preserved because it was not raised to or ruled upon by the trial court.”); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 348, 450 S.E.2d 66, 76 (Ct. App. 1994) (holding that the appellant’s argument was not preserved where, after the trial court heard argument and “much discussion” of the issue, it took the issue under advisement and never made a ruling).

Furthermore, Doe’s argument is actually rebutted by the trial court’s Order, which expressly assumes the very facts that Doe now says it ignored. *See* Order at 6; R. 17 (“assuming” that the letter excluding John Doe was, “in fact, retaliation for John Doe’s reports of alleged abuse”). Accordingly, Appellant’s argument that the lower court erred in excluding circumstantial evidence of intent is both procedurally barred and incorrect.

C. *Doe never argued to the trial court that it should apply the standard of proof for emotional distress accompanied by physical injury.*

In her second argument on appeal, Doe asserts that the trial court erred by applying a supposedly heightened standard of proof for emotional distress unaccompanied by physical injury. App. Brief. at 16. Doe apparently contends that some lesser burden of proof should apply because John Doe was a victim of sexual abuse. *Id.*

The record below, however, is devoid of (a) any argument by Doe that the trial court improperly applied some heightened standard to her claim, (b) any argument by Doe that a lesser or different standard should be applied, or (c) any Rule 59 motion disputing the standard applied by the trial court in its Order. Indeed, Doe’s argument on appeal *contradicts* her own admission that she deliberately chose *not* to bring a claim based on the alleged sexual abuse and that her Complaint did not seek any damages based on the alleged abuse. (Jane Doe Dep., May 20, 2011, at 179:3-12; R. 185.) Appellant

should not be allowed to change course on appeal and take a second bite from the apple. *See Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601, 612 n.11 (2013) (“Appellant may not argue a different position on appeal.”); *McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012) (“A party may not argue one ground at trial and an alternate ground on appeal.”).

D. *Doe expressly abandoned her argument that additional discovery was needed to oppose the motion for summary judgment.*

Doe’s third argument on appeal is that the trial court erred by granting summary judgment without considering her Rule 56(f) affidavit’s claim that more discovery was needed. *See* App. Brief at 17. This argument, however, was expressly abandoned before the trial court.

Doe’s response to the motion for summary judgment was largely in the form of a Rule 56(f) affidavit from her counsel, Greg Meyers. Among other things, the affidavit claimed Doe needed additional discovery to respond to Respondents’ motion and a similar motion filed in the *Rhinehart* case. (*See* Meyer’s R56(f) Aff.; R. 232.) But Doe expressly *withdrew* this argument at the summary judgment hearing before the trial court:

MR. FOSTER: I wanted to address before we get into the substance of our motion some concerns that were expressed by my colleague, Mr. Meyers, that somehow there was discovery he needed to respond to our motion for summary judgment. . . .

MR. MEYERS: Bill, if I might, I think this has just kinda gone by the wayside.

MR. FOSTER: Okay.

MR. MEYERS: I got responses from him, you know, about a day ago, and I was able last night to try to use them. So I think I’m good to go.

MR. FOSTER: Fair enough.

(Summ. J. Hearing Tr. at 3:12-25; R. 131.; *see also id.* at 17:22-18:8; R. 145-46 (Doe's counsel conceding that the "critical document" he sought was a Boy Scout rulebook, which he had received, and that Respondents' counsel had replied to Doe's request for a later edition of the rulebook).)

Having assured the trial court that her alleged discovery concerns had been addressed (and cutting off Respondents' arguments on the issue), Doe cannot revive this argument now. To do so would be the very sort of gamesmanship that the rule of issue preservation is intended to foreclose. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.").

E. Doe failed to preserve her argument that summary judgment was precluded by her pending motion to amend the Complaint.

Doe's final argument on appeal is that the trial court erred by granting summary judgment while her motion to amend the Complaint was pending. *See* App. Brief at 17, 18. Her motion to amend was filed on the same day as, but *after*, the trial court's May 16, 2012, hearing on the motion for summary judgment. (Pl.'s Mot. to Amend.; R. 62.) Thus, Appellant's motion to amend was not before the trial court when it undertook consideration of the summary judgment motion. Moreover, had Doe wished to argue that the trial court's opinion was flawed for an alleged failure to consider her proposed Amended Complaint, she was required to preserve this issue by filing a timely Rule 59 motion to reconsider. She failed to do so, and is barred from raising this issue now. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue not preserved for appellate review where lower court did not rule on the issue, and the party

failed to make a Rule 59 motion asking the lower court to rule on the issue); *Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990) (same).

II. The trial court applied the correct standard to evaluate a claim of intentional infliction of emotional distress.

In her first argument on appeal, Doe argues that the trial court applied the wrong legal standard to her claim of intentional infliction of emotional distress. App. Brief. at 13. Doe is incorrect. The trial court granted summary judgment on this claim because “no juror could reasonably find the Troop or Culbreth’s conduct to be sufficiently extreme or outrageous to permit recovery.” *See* Order at 4. This is the exact test adopted by the Supreme Court and reiterated by this Court. *See Dunn*, 392 S.C. at 171, 708 S.E.2d at 224 (affirming trial court’s grant of summary judgment for defendant and noting that “[t]he court must determine whether ‘reasonable minds could differ as to whether [the] conduct was sufficiently “outrageous”’) (quoting *Hansson*, 374 S.C. at 358, 650 S.E.2d at 71-72). As explained below, Doe is simply wrong when she contends that this standard was incorrect and that no prior cases involve the intentional infliction of emotional distress on a child by adults. *See* App. Brief at 13.

A. The trial court correctly applied the well-established, objective test.

Contrary to this Court’s established precedent, Doe argues that the legal test for intentional infliction of emotional distress should rely on a subjective standard. *See* App. Brief at 13 (“The Defendants take the Victim as they find him.”); *id.* at 14 (arguing that the trial court should have taken into account John Doe’s age, mental disability, and the fact that he had witnessed and been victim to a crime); *id.* at 14-15 (arguing he was “entitled to” a standard accounting for his age, intelligence, experience, and circumstances).

This argument is precisely contrary to the 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.⁴ Indeed, this Court has previously stated that neither the trial court nor the Court of Appeals 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

⁴ 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.*

reprehensible and socially intolerable conduct for the guidelines which our Supreme Court has established with its adoption of the Restatement formulation of the tort.”⁵

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 judgment. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359, 1369 (D.S.C. 1985). Here, the trial court did so, and this was no error.

B. South Carolina courts have applied the normal, objective test regardless of the age of the plaintiff.

In addition, Doe argues that a different standard should apply when a child brings a claim for intentional infliction of emotional distress against adults. *See* App. Brief at 13. Yet again, this argument runs directly contrary to the precedent of South Carolina’s courts. The South Carolina Supreme Court has previously considered a suit involving similar facts and claims. *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

⁵ Doe cites *Todd* in support of her argument for the subjective standard, *see* App. Brief at 15, apparently unaware that *Todd* forecloses the very argument she seeks to make.

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 the trial court could or should have applied some different, lower, or easier legal test.

III. The trial court applied the correct standard of proof and considered the appropriate evidence.

In her second argument on appeal, Doe argues that she “need offer only a scintilla of evidence” to survive summary judgment on the claim of intentional infliction of emotional distress. *See* App. Brief at 17 (citing *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).⁶ This assertion is unquestionably wrong as a matter of law. “[A] cause of action for intentional infliction of emotional distress carries a ‘heightened burden of proof’” and “the ‘mere scintilla’ rule . . . does *not* apply to this cause of action.” *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 170, 708 S.E.2d

⁶ *Hancock* did not involve a claim for intentional infliction of emotional distress or for any other sort of emotional or psychological injury.

218, 224 (Ct. App. 2011) (quoting *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007)) (emphasis added).

In addition, Doe argues that the trial court erred when (1) it “applied the standard of proof for emotional distress claims unaccompanied by physical injury” and (2) when “it excluded . . . circumstantial indications of the Defendants’ intent.” App. Brief at 16.⁷ As explained in greater detail below, both of these contentions are incorrect.

A. The trial court applied the correct standard of proof.

Doe argues that the trial court wrongly applied the standard of proof for emotional distress *unaccompanied* by physical injury rather than the standard for emotional distress *accompanied* by physical injury. App. Brief at 16. As an initial matter, Doe’s argument is factually flawed because there is no physical injury alleged here. Doe’s claim for intentional infliction of emotional distress is premised on the Respondents’ decision to exclude John Doe from the Troop and the letter informing him of that decision. The claim is *not* premised on the sexual abuse. *See* note 1, *supra* and accompanying text. Neither in the Complaint nor at any other time has Doe alleged that the decision and letter caused a physical injury or was manifested through any physical harm. The alleged emotional distress caused by the Respondents was purely mental and was unaccompanied by any physical injury.

In addition, Doe apparently misunderstands the legal requirements applicable to the causes of action she asserted in her Complaint. Even if John Doe’s emotional injury was accompanied by physical injury, the test applied by the trial court was still the proper test. The trial court applied the four-part test that this State’s courts apply to *every* claim

⁷ Doe’s argument regarding the allegedly erroneous exclusion of circumstantial evidence also appears briefly in her first argument heading. *See* App. Brief at 13.

for intentional infliction of emotional distress. *See* Order at 4; R. 15 (citing *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004)). While each of the test's four elements apply to every claim, some of them carry greater weight in some situations. Specifically, where there is no physical manifestation of the emotional distress—*i.e.*, where there is no empirical evidence that the plaintiff has more than hurt feelings—two of the test's elements apply with additional force:

In *Ford*, the Court emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was “extreme and outrageous,” and that the conduct caused distress of an “extreme or severe nature.” [] Chief Justice Littlejohn, writing for the Court, further reasoned that “where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious.” [] In this vein, our courts have since noted “the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct.”

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356-57, 650 S.E.2d 68, 71 (2007) (citations omitted).

However, the fact that two elements of the four-part test are especially critical in the absence of physical injury does not mean that those elements are ignored where the alleged emotional injury is accompanied by physical injury. In both situations—whether the emotional injury is *or is not* accompanied by physical injury—the plaintiff must prove that the defendant acted in an extreme and outrageous manner. *See id.* (“[W]here physical harm is lacking, the courts should look initially for *more* in the way of extreme outrage.”) (citation omitted; emphasis added); *Ford v. Hutson*, 276 S.C. 157, 162, 276

S.E.2d 776, 778 (1981) (adopting the Restatement rule that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”) (citation omitted).

The trial court properly applied this four-part test, which has been applied in every South Carolina case discussing intentional infliction of emotional distress. The determination of whether a defendant’s conduct may be reasonably regarded as so extreme and outrageous to permit recovery is one for the trial court. *Hawkins v. Greene*, 311 S.C. 88, 91, 427 S.E.2d 692, 693 (1993); *see also Cosby v. Legal Servs. Corp.*, 2006 U.S. Dist. Lexis 96837 at *18-19 (D.S.C. 2007) (“Based on the numerous decisions which have been decided on this cause of action, only an extraordinary set of facts will rise to the level of a tort of outrage claim, and summary judgment is proper if the alleged conduct does not rise to that level.”).

Here, the trial court correctly found that uncontroverted evidence establishes that the Letter suspending John Doe from Troop activities was prompted solely by his misconduct. (*See* Order at 5; R. 16; *see also* Culbreth Aff. at ¶¶ 3-6; R. 227-28.) Doe did not and cannot present any evidence or testimony contrary to Culbreth’s testimony that the decision to exclude John Doe was made prior to his accusation against Rhinehart and was premised solely on his prior misconduct. Rather, all Doe can muster in response to this undisputed evidence is speculation. *See, e.g.,* App. Brief at 7 (stating “[i]t is *reasonable to infer* that the letter was written the day of delivery,” *i.e.*, after John Doe’s accusation against Rhinehart) (emphasis added); *id.* at 10 (arguing it is “unlikely” that the decision to exclude John Doe was made prior to the accusation against Rhinehart).

Surmise and speculation are insufficient to withstand a motion for summary judgment. *D.R. Horton*, 398 S.C. at 556, 730 S.E.2d at 355 (“[M]ore is required than mere speculation to withstand [a] motion for summary judgment.”) (citation omitted); *McNight*, 385 S.C. at 389, 684 S.E.2d at 570 (“South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury.”) (citations omitted). Because the uncontroverted evidence shows that the Troop and Culbreth acted in good faith and in a reasonable manner in sending the Letter, Doe’s claim for intentional infliction of emotional distress fails as a matter of law.

Even assuming John Doe’s exclusion was in response to his allegation against the Scoutmaster, the trial court correctly held that his claim still failed as a matter of law because the Troop’s conduct was not sufficiently extreme or outrageous. (*See* Order at 6; R. 17.) As already discussed, the threshold for establishing a claim for intentional infliction of emotional distress in South Carolina is very high. Even extraordinarily callous or offensive conduct or “extreme insensitivity” is insufficient to establish the tort. *Doe v. Erskine College*, 2006 U.S. Dist Lexis 35780 (D.S.C. 2006); *Melton v. Medtronic, Inc.*, 389 S.C. 641, 651, 698 S.E.2d 886, 891 (Ct. App. 2010) ; *Shipman v. Glenn*, 314 S.C. 327, 329, 443 S.E.2d 921, 922 (Ct. App. 1994); *Roberts v. Dunbar Funeral Home*, 288 S.C. 48, 52, 339 S.E.2d 517, 518 (Ct. App. 1986).

In a situation analogous to Doe’s claim here, South Carolina courts have held that allegations of retaliatory discharge are insufficient to state a claim for intentional infliction of emotional distress, regardless of the extent of mental anguish caused by the alleged retaliation. *See, e.g., Corder v. Champion Rd. Mach. Int. Corp.*, 283 S.C. 520,

324 S.E.2d 79 (Ct. App. 1984),⁸ *Hudson v. Zenith Engraving Co. Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979).⁹

In short, even if Doe could prove that the letter was sent as a result of John Doe's reports of alleged abuse, her claim would fail. The suspension of John Doe from the Troop—regardless of the reason for the suspension and despite the mental anguish alleged to have resulted—is not sufficient to state a claim for outrage. To prove the type of extreme conduct supporting a claim for outrage, Doe must present evidence of extreme and outrageous verbal assaults or hostile or abusive encounters. Because she failed to do so, the trial court correctly held that her claim for intentional infliction of emotional distress failed as a matter of law.

B. The trial court considered the appropriate evidence.

Doe also argues that the trial court erred by excluding circumstantial evidence of Defendants' intent in deciding to exclude Doe from the Troop. *See* App. Brief at 16. The evidence supposedly "excluded" by the trial court consists of the Respondents' failure to reverse its decision to exclude John Doe or apologize to him after Reinhart pled guilty to abusing his stepson. *Id.* Because the trial court never ruled on or otherwise "excluded"

⁸ In *Corder*, this Court held that, "While wrongful discharge for any reason is reprehensible conduct and may cause mental anguish to the discharged employee, it is not in itself the kind of extreme conduct which gives rise to a legal claim for outrage." *Corder*, 283 S.C. at 523, 324 S.E.2d at 81.

⁹ The *Hudson* court held it "has not been enough that the defendant has acted with an intent which is tortious or even criminal or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Hudson*, 273 S.C. at 770, 259 S.E.2d at 814 (quoting Restatement (Second) of Torts § 46, comment (d)).

this evidence, Doe's argument is not preserved. However, even if Doe's argument were properly before this Court, it nevertheless fails as a matter of law.

As an initial matter, the Respondents' failure to invite John Doe back to the Troop is easily explained by the fact that shortly after John Doe received the letter excluding him from the Troop, the Troop was permanently disbanded and dissolved. (Sum. J. Hearing Tr. at 25:6-14, 28:12-15; R. 153, 156.) There was no Troop to which John Doe could be invited to return.

In addition, Respondents' acts weeks after the alleged wrongdoing are irrelevant to proving Doe's cause of action. As explained above, one factor necessary to establish intentional infliction of emotional distress is that the "defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct." *Bass*, 403 S.C. at 193, 742 S.E.2d at 672 (quoting *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011)). The focus of this requirement is on the defendant's intent or mindset at the time of the allegedly wrongful acts. Doe cites no cases—because there are none—in support of her proposition that *post hoc* acts occurring after the alleged emotional distress may be used to determine whether the defendant's long-past acts were intentional.¹⁰

Even if this "evidence" were relevant to the legal issue of intent, the failure to invite John Doe back to the non-existent Troop and the failure of Troop leaders to apologize for their decision to exclude him—a justifiable decision made on the basis of his past misconduct—are simply insufficient to satisfy the legal requirement that the

¹⁰ The only case Doe cites does nothing to support her argument. Specifically, she cites to a libel case stating that both direct and indirect evidence is admissible to prove state of mind. *See* App. Brief at 16 (citing *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 478, 585 S.E.2d 506, 515 (Ct. App. 2003)).

defendants' conduct be extreme, outrageous, beyond all possible bounds of decency, atrocious, utterly intolerable in a civilized community, and so severe that no reasonable man could be expected to endure it. *See Bass*, 403 S.C. at 193, 742 S.E.2d at 672 (citing *Argoe*, 392 S.C. at 475, 710 S.E.2d at 74). No South Carolina court has ever held that the presence or absence of an apology by a defendant is in any way indicative of the defendant's intent or is sufficient to establish or defeat a claim of intentional infliction of emotional distress. Indeed, in the many cases in which our appellate courts have affirmed a grant of summary judgment on a claim of intentional infliction of emotional distress, there is no mention of whether the defendant apologized. *See, e.g., Argoe*, 392 S.C. 462, 710 S.E.2d 67; *AJG Holdings LLC*, 392 S.C. 160, 708 S.E.2d 218; *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010); *Hansson*, 374 S.C. 352, 650 S.E.2d 68; *Bergstrom*, 358 S.C. 388, 596 S.E.2d 42; *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004); *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994).

In sum, Doe is simply incorrect that the trial court "excluded" the facts upon which she now relies. The fact that John Doe was not invited back is easily explained by the fact that the Troop ceased to exist shortly after he was excluded from it, and Respondents' acts occurring weeks after the alleged infliction of emotional distress are irrelevant to and insufficient to prove whether the decision to exclude Doe from the group was intended to cause extreme and outrageous mental anguish.

IV. The trial court did not err by granting summary judgment because nothing in the procedural posture of the case prevented it.

In her final argument on appeal, Doe argues that the trial court erred by granting summary judgment on a "novel" question of law while discovery was incomplete and a

motion to amend the Complaint was pending, and by failing to apply the “as is just” standard of Rule 56(f), SCRPC. *See* App. Brief at 17. Each component of her argument is without merit.

First, Doe is simply incorrect when she argues that “[t]his is a novel claim.” *See id.*¹¹ As noted in the preceding sections of this brief, there is no novel aspect to Doe’s claim. The South Carolina Supreme Court has previously considered a suit in which plaintiff alleged that an organization intentionally inflicted emotional distress on her while she was a minor by failing to follow its policies and procedures, which resulted in her being subject to criminal sexual acts. *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004); *see also Snakenberg v. Hartford Cas. Ins. Co., Inc.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989) (analyzing a claim for wrongful intrusion into private affairs brought by minor females against an adult who made voyeuristic videos of them). In *Bergstrom*, the Supreme Court reiterated and applied the well-established law for claims of emotional distress and affirmed the trial courts grant of a directed verdict for the defendant. Accordingly, there is no novel issue of law here that would prevent the grant of summary judgment.

Second, Doe argues that the trial court erred by granting summary judgment when a discovery request was pending. As already noted, Doe’s counsel stated at the summary judgment hearing that the defendants *had* responded to his pending discovery request and that she was withdrawing her objection in this regard. (Sum. J. Hearing Tr. at 3:12-25, 17:22-18:8; R. 131, 145-46.). To now argue to the contrary is mistaken, at best.

¹¹ Doe’s brief does not indicate what she considers to be the “novel” aspect of this suit. Elsewhere in her brief, however, she indicates her mistaken belief that there is no prior case discussing a claim of intentional infliction of emotional distress where the plaintiff was a child who was victim to a crime. *See* App. Brief at 13.

Furthermore, this Court has previously affirmed a grant of summary judgment on an emotional distress claim in which a discovery request was pending. See *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004). The procedural facts in *Rozelle* are strikingly similar to those here. In *Rozelle*, an employer moved for summary judgment on the employee's emotional distress counterclaim 21 months after the employee asserted that claim. *Id.* at 131, 591 S.E.2d at 646. The employer responded to the employee's discovery requests prior to the summary judgment hearing. *Id.* at 128, 591 S.E.2d at 644. The employee nevertheless opposed the summary judgment motion by arguing that further discovery was needed. *Id.* at 131, 591 S.E.2d at 646. The trial court granted summary judgment, and this Court affirmed. The Court noted that the discovery sought had no bearing on the uncontested evidence offered by the party seeking summary judgment and that the discovery sought involved was "speculative" and involved a "mere possibility" of gaining any helpful information. *Id.*

Here, very much like in *Rozelle*, the Respondents moved for summary judgment 22 months after Doe filed her Complaint. They responded to Doe's discovery requests prior to the summary judgment hearing. Doe has offered no testimony or evidence—only speculation—to dispute the uncontested evidence that the decision to suspend John Doe from the Troop was made prior to his accusation against Rhinehart and was based on his prior misconduct. (Culbreth Aff. at ¶¶ 3-4; R. 227-28.) The discovery Doe sought would have no bearing on the basic legal question of whether the Respondents intentionally inflicted emotional distress on Doe or were negligent in their supervision of Troop activities. This procedural posture is nearly identical to that in *Rozelle*, and a grant of summary judgment was not precluded by the supposedly outstanding discovery requests.

Third, Doe argues that the trial court erred by granting summary judgment when her motion to amend the Complaint was pending. Rule 15(a) of the South Carolina Rules of Civil Procedure states in pertinent part that “a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires *and does not prejudice any other party.*” Rule 15(a), SCRCPP (emphasis added). Here, Doe’s motion to amend, filed more than two years after the case began, would have resulted in extreme prejudice to Defendants, as it sought to drastically and fundamentally change the litigation after the completion of discovery and shortly before trial.

When she filed this suit, Doe was aware of the possibility of bringing claims based directly on the sexual abuse but consciously chose not to assert them in this suit. (Jane Doe Dep. at 173:2-23, 178:20-180:13; R. 183-86.) After a year of discovery, she was aware of the potential for amending the Complaint to assert such claims. (*Id.* at 179:10-18; R. 185.) Nevertheless, she waited yet another year to move to amend. For two years, the defendants structured their defense around the existing claims. For Doe to transform the case into a sexual abuse case at the eleventh hour, after the completion of discovery, in a last ditch attempt to avoid summary judgment would have resulted in extreme prejudice to defendants. Furthermore, at the time Doe moved to amend her Complaint, there was no impediment to her simply filing a separate action raising the causes of action she had chosen not to include in this suit.

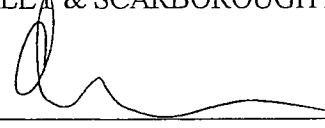
Finally, Doe argues that the trial court failed to apply the “as is just” standard of Rule 56(f), SCRCPP. That rule requires that if a party opposing summary judgment is unable to present facts to justify his opposition, the judge *may* deny the motion or order further discovery or “make such other order as is just.” Here, for all the reasons explained

above, it was no abuse of discretion for the trial court to determine that justice did not require additional, speculative discovery or a last-minute, prejudicial amendment to the Complaint. Rather, the trial court properly and correctly concluded that under the uncontested facts giving rise to this suit, Doe could not prove the elements of her claim and the Respondents were entitled to judgment as a matter of law.

Conclusion

For the foregoing reasons, Respondents respectfully request that this Court affirm the judgment and Order of the trial court.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  

G. Mark Phillips
SC Bar No. 7945
E-Mail: mark.phillips@nelsonmullins.com
William H. Foster III
SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondents

Columbia, South Carolina
December 16, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2012-213521
Case No. 2010-CP-42-2349

Jane Doe, as guardian for John Doe, ... Appellant,

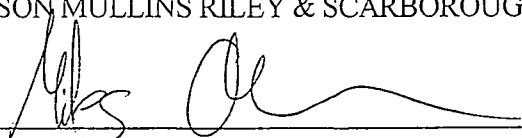
v.

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.

CERTIFICATE OF COUNSEL

Undersigned counsel certifies this Final Brief complies with Rule 211(b),
SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

G. Mark Phillips
SC Bar No. 7945
E-Mail: mark.phillips@nelsonmullins.com
William H. Foster III
SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondents

Columbia, South Carolina
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and Scott O'Neill, ... Respondents.

PROOF OF SERVICE

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 specified below by mailing
a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings:

Respondents' Final Brief

Counsel Served:

Gregg E. Meyers, Esquire
Jeff Anderson & Associates PA
366 Jackson Street
Suite 100
St. Paul, Minnesota 55101



Lisa P. Whitehurst
Administrative Assistant

December 16, 2013

Record on Appeal 000328

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jane Doe, as guardian for John Doe, Appellant,

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.

Appellate Case No. 2012-213521

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2015-UP-139
Heard February 11, 2015 – Filed March 11, 2015

AFFIRMED

Gregg E. Meyers, of Jeff Anderson & Associates, P.A.,
of Saint Paul, Minnesota, for Appellant.

Allen Mattison Bogan and Miles Edward Coleman, both
of Columbia, William Harrell Foster III, of Greenville,
and G. Mark Phillips, of Charleston, all of Nelson
Mullins Riley & Scarborough, LLP, for Respondents.

PER CURIAM: In this action for intentional infliction of emotional distress, Appellant Jane Doe, as guardian for John Doe, challenges the circuit court's order granting summary judgment to Respondents, Boy Scout Troop 292 (Troop 292), Palmetto Council of the Boy Scouts of America, St. Margaret's Episcopal Church, and various individuals. Appellant argues (1) the circuit court erred in applying an adult standard to a developmentally disabled fourteen-year-old boy who was excluded from Troop 292 after reporting he was sexually abused by his scoutmaster; (2) the circuit court failed to construe the record in the light most favorable to Appellant; (3) the circuit court erred in applying a heightened burden of proof to this case; and (4) summary judgment was inappropriate in light of the alleged novelty of the case, the alleged pendency of discovery, the pendency of Appellant's motion to amend the complaint, and the "as is just" standard of Rule 56(f), SCRCF. We affirm.

Appellant's argument that the circuit court erred in applying an adult standard to John Doe (Doe) is not preserved for our review. The circuit court did not address Doe's unique circumstances in evaluating Respondents' conduct, and Appellant did not file a Rule 59(e), SCRCF, motion seeking a ruling to correct this deficiency. *See Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) ("A party must file a Rule 59(e), SCRCF, motion to preserve an issue the trial court fails to rule on.").

In any event, this court may affirm for any reason appearing in the record. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Here, Appellant has not made a prima facie showing of severe emotional distress. While Doe's stepmother testified Doe was "really upset" about being excluded from Troop 292, Appellant presented no evidence that Doe's distress was severe. *See Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778-79 (1981) (holding to recover for the intentional infliction of emotional distress, the plaintiff must establish, among other elements, that the emotional distress suffered by the plaintiff was severe).

In light of the foregoing, we need not reach the merits of Appellant's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur:

The State of South Carolina
In The Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge

Appeal 2012-213521
Case No. 10-CP-42-2349

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SC Court of Appeals

Jane Doe, as guardian for John Doe Appellant

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 Rehearing

Plaintiff Jane Doe, as guardian for John Doe, hereby petitions for rehearing of the March 11, 2015 *per curiam* order affirming the trial court on the apparent conclusion that the trial court failed to rule upon the various arguments below in granting a motion for summary judgment.

The Court of Appeals panel has erred in concluding the trial court failed to rule on the four grounds of error claimed in the *per curiam* opinion. The trial court granted the Defendant's motion to dismiss on the grounds submitted by the Defendant. We agree the trial court's "order did not restate the ground on which petitioner opposed the motion," *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009). That the trial court's order did not do so is irrelevant. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009).

The trial court order granting the motion, R. App. 12 – 20, necessarily rejected the appellant's opposing arguments. R. App. 145 – 151. It is undisputable that the grounds were articulated for the trial court. The trial court order implicitly rejects those opposing arguments. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009); *Walsh v. Woods*, 638 S.E.2d 85, 88 (S.C. 2006) (implicitly denied arguments do not require Rule 59(e) motion).

The Court of Appeals panel's interpretation that a Rule 59(e) motion was required by *Johnson v. Lloyd*, 757 S.E.2d 705, 706 (S.C. 2014), was itself rejected in *Spence v. Wingate*, 674 S.E.2d at 170 (S.C. 2009). The panel should address the merits of the trial court's opinion because each of the contested grounds was implicitly rejected by the trial court.

The Court of Appeals panel has also erred in repeating the trial court's error of applying an adult standard to a developmentally disabled fourteen year old when it concluded, Order at 2, that "Appellants has not made a prima facie showing of severe emotional distress." As the record sets forth, the child on whose behalf the complaint was brought "has very significant health problems, mental." R. App. 224 (testimony of stepmother); R. App. 145, 163 (IQ of 60). It is undisputed that all the boys in the scout troop were special needs children. R. App. 212. The Court of Appeals has erred in contending that the Plaintiff offered "no evidence that Doe's distress was severe." Doe's stepmother testified not only that he was "really upset," as the panel opinion notes, but that "he just sit around looking at the letter." Doe himself testified that he "looked like to my parents that I was really shocked," R. App. 194, and that he stayed awake at night worrying that his scoutmaster would come after him to retaliate against him for reporting

the sexual abuse, R. App. 210, and that Doe "had a fear of him" because "he used to be in law enforcement" and "owned several firearms." R. App. 202. Doe also had been sexually abused by his scoutmaster, which was among his pre-existing conditions when the troop retaliated against him. R. App. 197.

The Court of Appeals is obligated to construe the factual record in the light most favorable to the Appellant, and is also obligated, since the Appellant is a developmentally disadvantaged child, to not view the record from the same, erroneous adult standard used by the trial court. The distress required is that of the developmentally disadvantaged fourteen year old with an IQ of 60 who was (a) sexually abused by his scoutmaster, and (b) retaliated against by the other adults for having reported the scoutmaster. This is "reprehensible conduct" by the Defendants, *Hansson v. Scalise Builders of S.C.*, 650 S.E.2d 68 (S.C. 2007), and "hostile and abusive encounters" by the Defendants. *Gattison v. S.C. State College*, 456 S.E.2d 414 (S.C App. 1995).

CONCLUSION

The Court of Appeals panel should grant this petition to rehear and address on the merits the trial court's failure to apply the proper standard for the Appellant's handicapping conditions.

Respectfully submitted,



Jeff Anderson & Associates, P.A.
Gregg Meyers
366 Jackson Street
St. Paul, MN 55101
651-227-9990, 297-6543 facsimile

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2012-213521
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Culbreth; Jackie LaFontaine; Brandon Smith; Rob Green; Roy
Cole; Bob Faulks; and Scott O'Neill, ... Respondents.

**RESPONDENT'S RETURN TO
THE PETITION FOR REHEARING**

Pursuant to Rule 240(d), SCACR, Respondents file this Return to Appellant's Petition for Rehearing. Rehearing is not warranted because, as this Court correctly held in its per curiam ruling filed March 11, 2015, Doe's argument on appeal is not preserved for appellate review and, in any event, Doe failed to make a prima facie showing of severe emotional distress—a requisite element of the only cause of action asserted in Doe's complaint. As explained below, this Court's ruling was correct, and Doe's arguments for rehearing are unavailing.

Doe's appeal was premised entirely upon arguments that were neither raised to nor ruled on by the trial court. *See* Resp. Brief at. 7-13. Accordingly, this Court correctly held that the issues were not preserved for appellate review. The law is clear that issues

not raised to and ruled upon by 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). Doe's Petition for Rehearing does not point to any Record evidence that this Court overlooked in making its issue preservation ruling. Rather, Doe argues that his failure to raise these issues (and the trial court's resulting failure to rule on them) is "irrelevant" because the trial court "implicitly rejected" these unraised arguments. *See* Doe's Pet. for Rehearing at 1-2. This contention is without merit. First, Doe did not even raise the issues to the trial court. An issue must be raised to the trial court to be preserved for appellate review. *Lucas*, 359 S.C. at 510-11, 598 S.E.2d at 715. Second, an issue is not ruled on where the "trial court's order is silent on the issue," *Foster v. Foster*, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). In short, the arguments in Doe's Petition for Rehearing are directly contrary to the well-established issue preservation rules and provide no basis for rehearing.

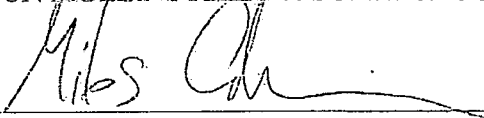
Doe's Petition for Rehearing also asserts that this Court's ruling erred by holding that Doe had failed to prove severe emotional distress, which is an essential element of a claim for intentional infliction of emotional distress. *See* Doe's Pet. for Rehearing at 2-3. As noted above, this argument is not preserved for appellate review and thus provides no basis upon which to grant rehearing. Even if it were preserved, however, both the trial court and this Court applied the oft-repeated and well-established requirement that a plaintiff must show severe emotional distress. *See, e.g., 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)). Our appellate courts have applied this requirement in previous suits asserting an intentional

infliction of emotional distress on behalf of minors who were sexually abused or exploited. *See, e.g., Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004); *Snakenberg v. Hartford Cas. Ins. Co., Inc.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989); *see also 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). This Court's holding in this suit likewise correctly applied this requirement here.

Doe's arguments on appeal were unpreserved and legally incorrect. Accordingly, this Court correctly affirmed the trial court's ruling. This Court's ruling did not overlook or misapprehend any points or issues and there is thus is no basis upon which to grant rehearing. Undersigned presents this Return, the briefing before the Court, the oral argument before the court, and the Record as additional support as to why rehearing should be denied.

[SIGNATURE PAGE ATTACHED]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

G. Mark Phillips

SC Bar No. 7945

E-Mail: mark.phillips@nelsonmullins.com

William H. Foster III

SC Bar No. 66221

E-Mail: bill.foster@nelsonmullins.com

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

Attorneys for Respondents

Columbia, South Carolina

April 6, 2015

The South Carolina Court of Appeals

Jane Doe, as guardian for John Doe, Appellant,

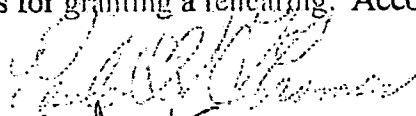
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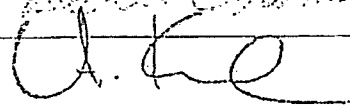
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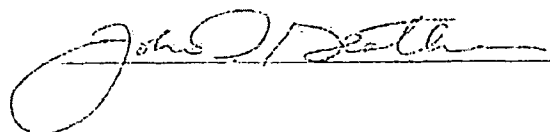
Appellate Case No. 2012-213521

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

Gregg E. Meyers, Esquire
William Harrell Foster, III, Esquire
Miles Edward Coleman, Esquire
Allen Mattison Bogan, Esquire
The Honorable J. Derham Cole

FILED

April 21, 2015