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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

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.

RESPONDENTS' PETITION FOR REHEARING OF THE COURT'S OCTOBER 14, 2015 OPINION

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INTRODUCTION

Pursuant to Rule 221(a), SCACR, Respondents respectfully submit this petition for rehearing of this Court's October 14, 2015 memorandum opinion No. 2015-MO-062 ("the Opinion"). As explained more fully below, the Opinion misapprehends or overlooks significant points of fact and law that, when properly considered, require affirmance of the Court of Appeals' ruling affirming the trial court's grant of summary judgment.

Argument

This Court's recent memorandum opinion relied on two bases to grant certiorari and summarily reverse and remand to the Court of Appeals for further consideration. First, in contrast to the Court of Appeals' ruling, this Court held that Petitioner's argument *was* preserved for appellate review. *See* Opinion at 1. Second, this Court held the Court of Appeals erred by ruling there was an additional sustaining ground to support summary judgment, namely Doe's failure to establish a requisite element of the tort of outrage. *Id.* As explained below, Respondents respectfully assert that in both of these aspects of its ruling, this Court misapprehended the law and/or the Record evidence.

I. This Court misidentified the issue actually raised on appeal, which was never raised to or ruled upon by the trial court.

This Court's Opinion was grounded in part on the Court's belief that Doe's issue on appeal was preserved. This Court, however, was mistaken in its identification of the issue being appealed. In the Opinion, this Court articulated the issue on appeal as whether "an adult's retaliation upon a mentally-disabled child for disclosing sexual abuse *prima facie* constitutes extreme and outrageous conduct." *See* Opinion at 1. Stated differently, this Court framed the issue as whether the allegedly retaliatory expulsion of a disadvantaged child from a club satisfies the well-settled test to prove the tort of outrage.

Respondents concede that if that were the issue Doe had raised on appeal, then it was preserved because that issue was raised to and ruled upon by the trial court. (*See* App. 17 and 150.[1])

Doe, however, raised a *different* issue on appeal, namely whether a subjective or otherwise lowered standard applies when a claim of outrage is brought by a disadvantaged minor rather than by an adult. (*See* App. 271.[2]) This issue—the one actually raised on appeal—was *not* preserved because it was never raised to the trial court. At no point, either in written filings or at the summary judgment hearing, did Doe argue that anything other than the normal, objective standard should apply when evaluating the claim of outrage asserted here. *See* Doe's Opposition to Motions for Summary Judgment at 6-7 (App. 81-82); Summary Judgment Hearing Transcript (App. 145–51).

Because the issue actually raised on appeal—whether the trial court erred "in applying an adult standard" rather than a subjective or otherwise lowered standard—was never raised to the trial court, that issue could not be (and was not) ruled upon in the trial court's order granting summary judgment. Accordingly, the Court of Appeals correctly

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[1] At the summary judgment hearing, Doe's counsel argued, "this is an event that qualifies for the label of outrage, because if you retaliate against a child for reporting sexual abuse you've done something that is—you ought to be—if it's not regarded as outrage already, it certainly ought to be." (App. 150.) In its ruling granting summary judgment, the trial court ruled in part that "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." (App. 17.)

[2] In Doe's brief submitted to the Court of Appeals, the first issue presented was: "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?" (App. 271 (emphasis added).)

concluded the issue was unpreserved because it had never been raised to (or ruled upon) by the trial court. (*See* App. 330.[3])

Accordingly, the case at bar is easily distinguishable from the precedent upon which this Court's recent opinion relied: *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). In *Spence*, the plaintiff had sued an attorney and his law firm, alleging they committed malpractice. *Spence*, 381 S.C. at 488, 674 S.E.2d at 170. The lawyer and firm moved for summary judgment, arguing the plaintiff was not their client and thus they owed her no duty. *Id.* at 489, 674 S.E.2d at 170. The plaintiff countered that she was a former client of the lawyer and firm, and they owed her a fiduciary duty based on that relationship. In the trial court's order granting summary judgment, the court "did not restate the ground on which petitioner opposed the motion," but did "*explicitly address*[] *that argument* by ruling respondents 'owed no duty or obligation' to petitioner." *Id.* (emphasis added). Here, unlike in *Spence*, the Petitioner never raised the argument now raised on appeal, nor did the trial court ever explicitly ruled on that argument. Accordingly, in contrast to *Spence*, the issue raised in this appeal was not preserved.

II. This Court overlooked the fact that Doe failed to bear the burden of establishing a requisite element of a claim of outrage.

In the Opinion, this Court held "the Court of Appeals erred in *sua sponte* finding summary judgment was appropriate on the ground that petitioner failed to establish Doe's emotional distress was 'severe.'" Opinion at 1. The Opinion does not state how or in what way the Court of Appeals' ruling was erroneous; however, Respondents deduce from the Opinion's citations to case law that this Court believed the lower court erred by

[3] The Court of Appeals' phrasing of the unpreserved issue precisely mirrors Doe's own phrasing of that issue. (*Compare* App. 271 (Doe's statement of issues on appeal) *with* App. 330 (Court of Appeals' ruling).)

relying on an additional sustaining ground that was not supported by adequate Record evidence. *See id.* at 1–2. As explained below, however, this holding is incorrect.

A. Doe failed to bear the burden of establishing the required showing that John Doe's emotional distress was extreme and severe.

There is no question it was Doe's burden at the summary judgment stage to establish *each* element of the claim for intentional infliction of emotional distress, including the severity and actuality of the emotional distress. *See Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) ("[W]e hold that when ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress."); *see also AJG Holdings LLC v. Dunn*, 392 S.C. 160, 170, 708 S.E.2d 218, 224 (Ct. App. 2011) (noting that this cause of action carries a "heightened burden of proof" and the "mere scintilla rule . . . does not apply tot his cause of action"). To carry the burden of showing actual and severe emotional distress, a claimant cannot rely on "mere bald assertions." *Hansson*, 374 S.C. at 358, 650 S.E.2d at 72. Rather, "the court must look for something 'more'—in the form of third party witness testimony ***and*** other corroborating evidence—in order to make a prima facie showing of 'severe' emotional distress." *Id.* at 358–59, 650 S.E.2d at 72.[4] Indeed, the *Hansson* Court stated that a plaintiff's "grief, shame, humiliation, embarrassment, [or] anger" is insufficient to

[4] Such corroborating evidence could include the physical or professional manifestations of emotional distress that are causally linked to the emotional distress such as dramatic weight loss, a medically documented increase in blood pressure, a new and diagnosable anxiety disorder, or a marked decrease in occupational or academic performance. Even these indicia, however, may be insufficient to sustain the claim. *See, e.g., AJG Holdings LLC v. Dunn*, 392 S.C. 160, 169, 708 S.E.2d 218, 224 (Ct. App. 2011) (affirming the trial court's grant of summary judgment on claim for intentional infliction of emotional distress despite the fact that the one claimant had "lost twenty pounds" and the other had been forced to take "medication for his high blood pressure and nervousness").

support a claim of outrage absent evidence that the distress was "extreme." *Id.* at 359 n.3, 650 S.E.2d at 72 n.3 (quoting Restatement (Second) of Torts § 46 cmt. j).

Doe failed to carry this burden. In contrast to this Court's clear demand in *Hansson*, the Record in the case at bar contains no third-party evidence indicating Doe's alleged emotional distress was "extreme," and even if there were, there is no additional corroborating evidence as required by *Hansson*.[5] As noted by the Court of Appeals, the only third-party evidence was the testimony of John Doe's step-mother that he was "real upset." (*See* App. 218.[6]) Even assuming *arguendo* that this testimony was sufficient to establish "extreme" and severe distress, *Hansson* requires more, namely "other corroborating evidence." Here, there was none. As explained in Respondents' brief filed with the Court of Appeals, Doe had ample opportunity to conduct thorough discovery prior to the summary judgment hearing. (*See* App. 299–300.) Accordingly, just as in

[5] Nor would such evidence have been forthcoming if only Doe had been given more time. Doe's counsel never argued to the trial court—either orally at the hearing or in his Rule 56(f) affidavit—that summary judgment was premature because more time was needed to assemble evidence of the severity of Doe's emotional distress.

[6] John Doe's own testimony indicated he was *not* excessively upset about the expulsion from the Troop. Rather, he testified that his distress stemmed from the sexual abuse itself: a wrong not asserted in this suit and committed by one who is not a party to this suit.

> Q. You said earlier that you were really upset when you found out you had been kicked out of Boy Scouts.
>
> * * *
>
> A. I was upset before that.
>
> Q. With everything that your scoutmaster did to you, you also mentioned that there were nights when you would stay awake and you would worry about Brian Rhinehart coming after you.
>
> * * *
>
> A. Yeah.

(App. 210 (objections to form omitted).)

Hansson, summary judgment is appropriate because Doe failed to establish the requisite elements of the claim.

Our appellate courts have often affirmed summary judgment rulings on the additional sustaining ground that a claimant failed to establish the requisite elements of his cause of action. *See, e.g.*, *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 583, 735 S.E.2d 528, 536 (Ct. App. 2012) (affirming grant of summary judgment because the plaintiff's failure to present evidence creating a genuine issue of material fact as to a requisite element of the claim provided an additional sustaining ground); *Williams v. Smalls*, 390 S.C. 375, 381, 701 S.E.2d 772, 775–76 (Ct. App. 2010) ("[B]ecause we can affirm for any reason appearing in the record, the trial court's grant of summary judgment for failure to provide evidence of negligence is affirmed as modified."); *Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 465, 702 S.E.2d 372, 375 (Ct. App. 2010) (affirming directed verdict where the plaintiff's failure to prove "the elements of duty and breach" served as additional sustaining grounds).

In the case at bar, Doe failed to bear the burden placed upon a claimant at the summary judgment stage to present facts sufficient to establish all of the mandatory elements of the cause of action. In the absence of both (a) third-party testimony that John Doe's emotional distress was, in fact, so extreme and severe that no reasonable man could bear it *and* (b) other corroborating evidence to support this testimony, Doe failed to prove a requisite element of the claim for intentional infliction of emotional distress. Accordingly, it was not error for the Court of Appeals to rely on this additional sustaining ground to affirm the order granting summary judgment.

B. **The additional sustaining ground was a proper basis upon which to affirm the trial court.**

Contrary to this Court's statement in the Opinion, the Court of Appeals did not raise the additional sustaining ground *sua sponte*. Although Respondents' appellate brief did not use the term "additional sustaining ground," the brief repeatedly raised the issue of Doe's failure to prove the elements of the claim, including the severity of Doe's emotional distress. (*See, e.g.*, App. 312 (reiterating the elements of a claim of outrage, including proving extreme and severe mental distress, and arguing the trial court properly applied these elements and granted summary judgment); App. 316 (arguing the requirement that a plaintiff "must show . . . that the conduct caused distress of an 'extreme or severe nature'" applied with additional force here because there was no physical manifestation of the emotional distress);[7] App. 325 ("[T]he trial court properly and correctly concluded that under the unconstested facts giving rise to this suit, Doe could not prove the elements of her claim.").)

Furthermore, Respondents raised this issue to the Court of Appeals by arguing that Doe's claim "failed as a matter of law . . . to establish the tort" of outrage, relying on case law in which summary judgment was upheld precisely because the claimant's emotional distress fell "far short of that needed for an action of this kind." (App. 318 (citing *Shipman v. Glenn*, 314 S.C. 327, 329, 443 S.E.2d 921, 922 (Ct. App. 1994)). This one argument and supporting citation are sufficient to bring the issue to the Court of Appeals' attention as an additional sustaining ground. *See State v. Byers*, 392 S.C. 438,

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[7] Respondents raised this argument for the express purpose of rebutting the assertion in Doe's appellate brief that the trial court "erroneously applied" the test for an outrage claim and that "more than a scintilla of evidence has been offered *on each element* of emotional distress." *See* Doe's Brief at 19 (App. 289) (emphasis added).

446 n.1, 710 S.E.2d 55, 59 n.1 (2011) (holding that despite the fact that the issue of the timeliness "was not raised to the court of appeals," the court of appeals was nevertheless "at liberty to rule . . . on the basis of timeliness" because "[a]n appellate court may affirm a judgment upon any ground appearing in the record on appeal" and because the issue of timeliness was "reasonably clear" from the State's reliance on a case in which the timeliness of an objection was an issue).

Finally, even if the Court of Appeals had independently arrived at this additional sustaining ground, its ruling was still appropriate. Although as a general inclination, our appellate courts "are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief," *Alexander v. Houston*, 403 S.C. 615, 620 n.4, 744 S.E.2d 517, 520 n.4 (2013), that inclination may be overcome in appropriate circumstances. *See S.C. Dept. of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 660, 667 S.E.2d 7, 16 (Ct. App. 2008) (affirming on the basis of a ground not argued on appeal and noting that "we nonetheless would affirm since we may do so for any reason in the record, whether or not raised and preserved."). Such circumstances are present here where the record is clear that, for many reasons, Doe cannot prevail in this suit and the interests of judicial economy support a swift disposition of the case.

Conclusion

For the foregoing reasons, Respondents respectfully submit that rehearing is warranted and that this Court should withdraw its grant of certiorari as improvidently granted or, alternatively, should affirm the Court of Appeals' ruling.

[*SIGNATURE PAGE ATTACHED*]

Respectfully submitted,

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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(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondents' Petition for Rehearing of the Court's October 14, 2015 Opinion

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