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.

RESPONDENTS' FINAL BRIEF

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Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

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

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[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, SCRCP.'" *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), SCRCP. "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 our 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"

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[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), SCRCP. *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.

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[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), SCRCP (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), SCRCP. 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.

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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.

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

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