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

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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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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 SCRCP 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

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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

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[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.

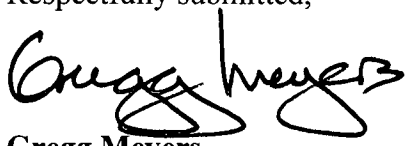
There are no records of the Troop which show it had complied in any way with the standards of the BSA Guide for progressive discipline that involves the parents (56[f] affidavit Attachment A, R. App. Vol. 1 p. 243), and Defendant Green's affidavit (R. App. Vol. 1 pp. 225 to 226) demonstrates that he 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,



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
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, ... Respondent

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Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of the enclosed:

Final Brief of Appellants

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

William H. Foster, bill.foster@nelsonmullins.com
Miles Coleman, miles.coleman@nelsonmullins.com
Nelson, Mullins, Riley @ Scarborough
Poinsett Plaza, Suite 900
104 South Main Street
Greenville, SC 29601

Date: December 20, 2013

Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 29601
651-227-9990