ORIGINAL

The State of South Carolina
In The Court of Appeals

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

Trial Court Case No. 10-CP-42-2350
Appellate Case No. 2013-000807

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

v.

Doni Rhinehart, ... Respondent

Final Reply Brief of Appellants

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Reply Argument

In Reply, Appellant makes only these few points.

1. Respondent's Statement of The Case contains incorrect information. At pp. 2, 11 and 12 the Respondent's brief states, incorrectly:

(a) that Appellant counsel's 56(f) affidavit does not address the claim against Respondent (p. 2),

(b) that the trial court was not asked to postpone the motion hearing (p. 11), and

(c) that Brian Rhinehart was "never charged" with abusing the Appellant's minor ward (p. 12).

Each of these factual assertions is incorrect, and under SCRCP 56, each must be presumed in the light most favorable to the Appellant.

A. The 56(f) affidavit addresses the claim against Respondent. The affidavit itself states, in the caption and in ¶ 2 (R. App. 66), that it is submitted in both cases. Paragraph 4 (R. App. 67) states explicitly that the refusal by the Boy Scouts to provide the promised discovery affected the motions for summary judgment in both cases, meaning this case as well as the case against the Boy Scouts. Paragraphs 4, 6, 9, and 11 (R. App. 67 – 69) explain why the information promised but not provided affects the claim against the Respondent.

B. The trial court was asked to postpone the hearing. Paragraph 21 of the Rule 56(f) affidavit (R. App. 70) explicitly asks the court to "defer the motions for summary judgment" until the discovery is provided.

Respondents perhaps mean to say that Appellants didn't ask the court *more than once* for the requested relief. When the court proceeded with the hearing, denying the request, Appellant did not argue with that ruling but accepted it, as SCRCP 46 requires. S.C.R. Civ. P. 46. Respondent's contention is directly contrary to the conduct required by the Rules, and is no basis for denying the requested relief on appeal.

C. Brian Rhinehart was charged with abusing both minor boys, including Appellant's ward. At page 5 n.2, Respondent's brief states, incorrectly, that Brian Rhinehart was not charged with abusing both minors. As the police report reflects, at pages 1 and 4 of Attachment C to the Rule 56(f) affidavit (R. App. 81 and 84), "two warrants" were issued on Brian Rhinehart, each for Lewd Act on A minor, once victim 2 (referred to on page 4 of Attachment C, R. App. 84) confirmed the abuse reported by victim 1 (referred to one page 1 of Attachment C, R. App. 81).

After Mr. Rhinehart admitted molesting Victim 2, and entered a plea to the first charge (R. App. 80), he was not prosecuted on the other charge, as to victim 1.

2. Respondent assumed a duty to the Appellant's minor ward by holding BSA Troop meetings in her home. As set forth in the Initial Brief, and as must be presumed on this Record (and as documents not produced in discovery would show), Respondent was one of the adult volunteers for the Troop.

The Complaint alleges (in paragraph 14, R. App. 16), and the proposed Amended Complaint more fully sets forth (R. App. 59 – 65), that Doni Rhinehart had a "duty to prevent James Rhinehart from injuring the Plaintiff while he was in her residence." (R. App. 63). The Complaint also alleges that she breached that duty (¶ 15, R. App. 61), was negligent in doing so (¶ 16, R. App. 62), and that the breach was a proximate cause of the sexual molestation (¶ 16, R. App. 62).

The evidence submitted to the trial court supported a negligence claim. The Complaint alleges facts from which two sources of the Respondent's duty to the Appellant's ward arise. First, her prior knowledge, which she denies, that Brian Rhinehart had a sexual interest in children. The trial court considered and dismissed that source of duty, a ruling not disputed in this appeal. Second, the Complaint alleges and the evidence submitted supported, that the Respondent was negligent in breaching the duty to the minor child arising from the undisputed facts (noted in Respondent's brief at p. 3, citing Doe Dep. at Vol. 1 p. 169, R. App. 496), of the minor having been abused at the Respondent's home during a Scout meeting held there.

Contrary to the requirements of the BSA, the Appellant's ward testified that Respondent left the children in the Troop in the sole supervision of Brian Rhinehart while she went grocery shopping. Doe Dep. Vol. 1pp. 168 – 169 (R. App. 495 – 496). Appellant's minor ward was himself unaware that Respondent had any duty to him, as the Respondent's observe at p. 4 of their brief (Respondent testified Ms. Rhinehart "had nothing to do with this.") The minor child's inability to understand the "two deep" rule or the concept of Respondent's negligence does not relieve Respondent of her duty to comply with BSA rules.

When Respondent left her pedophile husband alone in charge during a BSA event at her home she violated the "two deep" rule of the Boy Scouts of America that require two adults at all

times with Scouts. The rule was created by the BSA from what it calls its "years of experience" (R. App. R. App. 73), exactly so as to reduce the chances of sexual abuse facilitated whenever an adult isolates himself with a troop.

In discovery the BSA information pertinent to the "two deep" rule applicable during the time period involved had been repeatedly promised, but not produced, by the BSA at the time of the hearing. (BSA produced some discovery right before the hearing, but not those documents).

For the motion, Appellant proffered, through the Rule 56(f) affidavit (R. App. 66), evidence of the BSA's "two deep" rule from BSA handbooks, even though the BSA had not produced the pertinent information. When the pertinent Boy Scout Handbook is produced (it remains promised but not produced), it is expected to include the "Two Deep" provision, as that provision is in every other known Handbook. The trial court erred in denying that Respondent had a duty under the BSA rules, and in rejecting that contention that Respondent had an obligation to the Appellant's minor ward under those BSA rules when Respondent held a BSA event in her home.

As an adult BSA Troop volunteer, by hosting the BSA meeting in her home, Respondent assumed the duty to comply with BSA rules. *Hubbard v. Taylor*, 529 S.E.2d 549, 552 (S.C. App. 2000) ("affirmative legal duty to act may be created by . . . contract, relationship, status, property interest, or some other special circumstance," *citing*, *Carson v. Adgar*, 486 S.E.2d 3 (S.C. 1997); *Wyatt v. Fowler*, 484 S.E.2d 590 (S.C. 1997). Respondent's assumed duty to supervise, which on a motion for summary judgment must be presumed, arises from her voluntarily having undertaken to comply with BSA Rules. The BSA having withheld the pertinent documents which reflect the "two deep" rule during the pertinent time period, the trial court erred in not denying summary judgment based on that assumed duty.

Respondent argues, Brief at 5, that she was unaware of her husband's sexual interest in children. Had she known of that sexual interest, the abuse of the Appellant's minor ward abuse would unquestionably have been foreseeable, e.g., *Manufacturers and Merchants Mutual Ins. Co. v. Harvey*, 498 S.E.2d 222 (S.C. App. 1998), and her conduct in leaving the minor with Brian Rhinehart could be either intentional (if she intended the minor to be abused) 498 S.E.2d at 228, or negligent (if she did not intend the minor to be abused) 498 S.E.2d at 229. Respondent claims she lacked the intent to harm through her conduct, so, as in *Manufacturers Mutual Ins. Co. v. Harvey*, that she left the Appellant's minor ward alone with Brian Rhinehart would properly state a claim for negligence, and one within homeowner's coverage. 498 S.E.2d at 228 – 229.

That Respondent claims she did not know her husband had a sexual interest in children is not the only basis of foreseeability, hence duty, to the Appellant's minor ward. Once Respondent elected to volunteer as an adult leader of the Troop, and to hold a Scout meeting in her home, she was obligated to comply with what on this record must be presumed are the Scout rules requiring two adults at all times during Troop meetings. In that manner, her conduct assumes a duty to the Appellant's minor ward, *Hubbard v. Taylor*, 529 S.E.2d 549, 552 (S.C. App. 2000), which the Respondent breached. *Manufacturers and Merchants Mutual Ins. Co. v. Harvey*, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998).

The proposed amended complaint (R. App. 59 – 65) included more detailed and explicit allegations over this aspect of Respondent's supervisory liability (which is why the discovery was withheld and the proposed amended complaint was opposed). As the issue became more clearly available through the discovery in the case, the amended complaint should have been permitted,

particularly since the minor is not yet 27, and under S.C. Code § 15-3-555 can bring his claims related to sexual abuse until he turns 27 in 2018 (R. App. 81).

The trial court made an error of law in granting summary judgment and abused its discretion in not permitting the amended complaint and in not postponing the hearing until the promised discovery was produced.

Conclusion

The trial court's order should be reversed, and the action reinstated to permit discovery to conclude and the record in response to the motions to be supplemented, as requested in the 56(f) affidavit (R. App. 70). The Respondent assumed a duty to provide two adults at all times for Troop meetings, which she then breached in volunteering to be an adult leader for Troop 292, holding a BSA meeting in her home, but leaving to go grocery shopping during the meeting; which resulted in pedophile Brian Rhinehart being able to isolate himself with, and sexually abuse, the Appellant's minor ward.

Respectfully submitted,

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