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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 26 2013

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appeal 2012
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

MOTION TO DISMISS

Pursuant to Rules 240 and 260 of the South Carolina Appellate Court Rules, Respondents Boy Scout Troop 292 (the "Troop"), 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 (hereinafter "Respondents") hereby move to dismiss the above-captioned appeal filed by Appellant Jane Doe, as guardian for John Doe ("Appellant").

Appellant has premised her appeal wholly upon arguments either raised for the first time to this Court or expressly abandoned before the trial court. Appellants' arguments are thus not preserved for appeal as a matter of law, and this Court should dismiss her appeal in its entirety. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-

11, 598 S.E.2d 712, 715 (2004); *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 625, 503 S.E.2d 471, 478-79 (1998).

Procedural Background

Appellant filed this action on April 29, 2010, asserting a claim against Respondents Troop and Culbreth for intentional infliction of emotional distress (“outrage”) based upon their sending a letter to John Doe’s father suspending John Doe from the Troop. (Compl. ¶¶ 18-23, attached as Exhibit A.)¹ Specifically, Appellant claimed the letter was purportedly sent in retaliation for John Doe reporting alleged sexual abuse by a Scoutmaster for the Troop, Brian Rhinehart. (*Id.*) Plaintiff also asserted a claim against the remaining Respondents for negligent supervision based upon their allowing the letter to be sent. (*Id.* ¶¶ 25-30.)

Critically, however, Appellant testified that she had deliberately chosen *not* to bring a claim based on the alleged sexual abuse against the above listed Respondents and that her Complaint did not seek any damages based on the alleged abuse. (Jane Doe Dep. 179:3-12, May 20, 2011, cited excerpts attached as Exhibit B.) On or about the same date Appellant commenced this civil action, Appellant filed a Complaint against Doni Rhinehart, Brian Rhinehart’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 sexual abuse. (Rhinehart Compl. ¶¶ 8, 20, attached as Exhibit C.)

¹ The letter states:

This is a letter to inform you that as of 10/10/05, your son [John Doe] will no 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.

(Letter from Troop to John Doe’s father, attached as Ex. D.)

On February 21, 2012, Respondents filed a motion for summary judgment seeking the dismissal of Plaintiff's Complaint. (Resp't Mot. Summ. J. 1, attached as Exhibit E.) On May 14, 2012, Respondents filed their supporting memorandum of law, arguing that the uncontroverted evidence showed the decision to send the letter to John Doe's father was made in good faith and based solely on John Doe's misconduct as a Troop member. (Resp't Mem. Supp. Summ. J. 3, 6-8, attached as Exhibit F.) Respondents further noted that there was no evidence that the named Defendants [Respondents in this matter] were even aware of John Doe's alleged complaint when the letter was sent. (*Id.* at 7-8.) In the alternative, Respondents argued that even if the letter had been sent in retaliation for John Doe's report of sexual abuse—which was not the case—the act of sending the letter is wholly insufficient to state a claim for intentional infliction of emotional distress under South Carolina law. (*Id.* at 9-13.)

Respondents also argued that in sending the letter, the Troop Committee intended only to inform John Doe's father of the decision to suspend John Doe, and thus did not intend nor expect to cause emotional harm to John Doe. (*Id.* at 14.) Finally, Respondents argued that Appellant's failure to establish the underlying negligence claim rendered her derivative claim for negligent supervision deficient as a matter of law. (*Id.* at 15-16.)

The same day Respondents filed their memorandum in support of summary judgment, Appellant's counsel filed a Rule 56(f) affidavit opposing both Respondents' Motion and a Motion filed by Ms. Rhinehart's estate, and claimed Appellant needed additional discovery to oppose these motions. (Meyers Aff. ¶¶ 4, 6, attached as Exhibit G.) Specifically, Appellant sought production of minutes of Troop committee meetings and accounting records she believed would bolster her contention that the "real"

motivation for Respondents in sending the letter was retaliation. (*Id.* ¶ 6.) Appellant also sought to introduce “evidence” of various Boy Scout policies and noted an intent to file a motion to amend her Complaint. (*Id.* ¶¶ 9, 10-11.)

At the hearing on May 16, however, Appellant expressly *withdrew* her objection to the alleged lack of discovery on the record:

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. Your Honor, we – we think that’s inaccurate. He referenced in correspondence to – to me.

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. Hr’g Tr. 3, May 16, 2012, attached as Exhibit H.) Appellant also apparently provided the Court a document entitled “Opposition to Motions for Summary Judgment,” but it does not appear that this pleading was ever filed with the Court. (Appellant’s Opposition, p. 1, attached as Exhibit I.) After hearing from each party, the trial court took Respondents’ Motion under advisement.

On October 29, 2012, the trial court issued an order granting Respondents’ Motion in its entirety. (Opinion, p. 1, attached as Exhibit J.) In so doing, the court found as an initial matter that Appellant had failed to offer substantial evidence to rebut Respondents’ contention that the decision to send the letter was made in good faith and based solely upon John Doe’s misconduct. (*Id.* at 5-6.) The court also found:

Assuming for purposes of providing Plaintiff all deference at this stage, this Court finds that his claim for outrage *still* fails as a matter of law.

Even if Plaintiff were able to show that the decisions to suspend John Doe from the Troop and to send the Letter were, in fact, retaliation for John Doe's reports of alleged abuse by Rhinehart, 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.

(*Id.* at 6.) Citing the extensive precedent from this Court and the South Carolina Supreme Court establishing the very high threshold for establishing the tort of outrage, the trial court noted the lack of any allegation of extreme or outrageous conduct by Respondents apart from or accompanying the letter and held that Appellant's claim failed as a matter of law. (*Id.* at 6-9.) The trial court also dismissed Appellant's derivative claim of negligent supervision, finding that the lack of any underlying tort rendered that claim moot. (*Id.* at 10.)

Appellant failed to file a motion for reconsideration pursuant to Rule 59 or otherwise challenge the trial court's opinion below. Instead, Appellant filed the instant appeal, arguing for the *first* time as follows:

- (1) the trial court err [sic] in applying adult standards to a case involving a fourteen (14) year old developmentally disadvantaged Boy Scout who had witnessed sexual abuse of one Troop member and had himself been sexually abused;
- (2) the trial court erred in failing to construe the Record in the light most favorable to the Appellant and by applying two incorrect legal standards; and
- (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 SCRCF 56(f).

(Appellant's Br. 13-17.) Unfortunately for Appellant, *none* of these arguments were raised to the trial court and, therefore, the issues are not properly preserved for review by this Court. The summary judgment ruling of the trial court is the law of the case and the

Appellant cannot maintain this appeal due to his failure to raise the issues and arguments to the trial court that he now seeks to bring to this Court.

ARGUMENT

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. 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) (stating that it is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court). As the Supreme Court has reasoned:

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. 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.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also Ellie, Inc. v. Micchichi*, 358 S.C. 78, 102-03, 594 S.E.2d 485, 498 (Ct. App. 2004).

Even had Appellant raised the issues, the trial court did not address them in his order. Thus, similarly, an issue not ruled upon by the trial judge is not preserved for appeal. *Harkins v. Greenville County*, 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000); *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasizing the "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). When an issue is not explicitly ruled on in the final order, the issue 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 a trial judge’s general ruling is insufficient to preserve specific issue for appellate review; where trial judge does not explicitly rule on argument raised, and no Rule 59 motion filed, 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) (holding that constitutional issue was not preserved for appellate review because the lower court failed to rule on the issue and appellant did not raise the omission in its Rule 59 motion). Rulings not challenged below or in a proper appeal are the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Further, 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) (dismissing appeal because the sole issue presented was based upon an objection that was expressly withdrawn during the proceedings below); *see also Pinckney v. Pettijohn Builders*, 289 S.C. 405, 408, 346 S.E.2d 533, 534 (Ct. App. 1986) (explaining that where counsel states at trial that he has no objection to a specific aspect of a charge, he may not argue on appeal that the charge was erroneous).

Applying these well-established principles to the appeal at hand leaves no doubt but that Appellant has failed to present any cognizable issues on appeal.

1. Appellant’s first argument was never raised below.

In her first issue on appeal, Appellant claims the trial court erred by applying an “adult” standard to her outrage claim. (Appellant’s Br. 13.) Appellant contends her case

presents a novel issue in that she is unaware of any prior case in which adults allegedly retaliated against a child. (*Id.*) Given John Doe’s age at the time in question (14) and his developmental disadvantages, Appellant claims the trial court erred in not adjusting the standard for outrage based on his age, intelligence and developmental disadvantages. (*Id.* at 15.)

Setting aside the obvious legal flaws inherent in Appellant’s argument, Respondent submits it is crystal clear that she never raised this “novel” legal theory below. Indeed, a review of the Rule 56(f) affidavit (including attachments), the unfiled Opposition to Motions for Summary Judgment, and the Appellant’s arguments at the May 16, 2012 hearing before the trial court shows no reference to any adjusted legal standard. Further, had Appellant wished to assign error to the trial court’s failure to apply, rule upon, or mention this “adjusted” standard, she had every opportunity to do so in a Rule 59 motion. Appellant failed to do so because she did not raise it at all, 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.

2. Appellant’s argument that the trial court excluded circumstantial evidence of intent is both incorrect and not preserved.

Appellant also claims that the trial court erred in “excluding circumstantial evidence of intent” with regard to Respondent’s alleged knowledge of John Doe’s complaint of abuse and corresponding intent to retaliate against John Doe by sending the subject letter. (Appellant’s Br. 13, 16.) The trial court, however, construed all evidence in favor of Appellant. Furthermore, before the trial court, Appellant failed to specifically

identify the alleged circumstantial evidence at issue, and the record is utterly devoid of either (a) a ruling by the trial court excluding the evidence now cited by Appellant or (b) any motion to alter or amend by the Appellant to challenge 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 Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 762 (Ct. App. 2007) (“The failure to make a proffer of excluded evidence will preclude review on appeal.”); *see also State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (explaining that a reviewing court may not consider error claimed in the exclusion of testimony unless the record fairly shows what the rejected testimony would have been).

Respondent further notes that Appellant’s argument is actually contradicted on the face of the Order, as the trial court clearly based its decision on the *assumption* that Respondents sent the letter in retaliation for having reported Rhinehart’s alleged sexual abuse. (Exhibit J. - Opinion, p. 6.) Accordingly, Appellant’s argument that the lower court erred in excluding some unspecified circumstantial evidence of intent is both procedurally barred and simply, plainly false.

3. Appellant’s argument that the trial court erred by applying the standard of proof for claims unaccompanied by physical injury was never raised below and actually contradicts Appellant’s representations to the trial court.

In her second argument, Appellant claims the lower court erred by applying an allegedly heightened standard of proof for outrage claims unaccompanied by physical

injury. (Appellant’s Br. 16.)² Plaintiff apparently contends some lesser burden of proof should apply because John Doe was also a victim of sexual abuse by Rhinehart. (*Id.*)

The record below, however, is devoid of (a) any argument by Appellant that the trial court improperly applied some heightened standard to her claim, (b) any argument by Appellant that a lesser or different standard should be applied, or (c) any argument by way of a Rule 59 motion by Appellant regarding the standard applied by the lower court in its order. Indeed, Appellant’s argument *contradicts* her own admission in the record below 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. (Exhibit B. - Jane Doe Dep. 179:3-12, May 20, 2011.) Appellant should not be allowed to fashion issues from whole cloth for the first time on appeal, and the above arguments must be dismissed. *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.”); *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) (“Issue preservation requires that the question presented to the appellate court ‘must first have been fairly and properly raised in the lower court and passed upon by that court.’”).

4. Appellant cannot base her appeal on an alleged lack of discovery as she waived this argument on the record below.

Appellant’s final argument is that the trial court erred in ruling on her “novel” claim without regard to her Rule 56(f) affidavit and claim of incomplete discovery

² Respondent is compelled to note that Appellant’s argument contradicts her position in the record below 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.

responses. (Appellant's Br. 17.) Appellant also apparently contends that the trial court erred in failing to continue Respondents' motion to allow for the additional discovery responses to be provided and in failing to review the proposed Amended Complaint. (*Id.* at 18.) Appellant's duplicitous arguments must be rejected.

As noted above, Appellant's response to Respondents' Motion was largely in the form of a Rule 56(f) affidavit from her counsel, Greg Meyers. Among other things, the affidavit claimed Appellant needed additional discovery to respond to both Respondent's motion for summary judgment as well as a motion for the same relief filed in the Rhinehart case. (Exhibit G. - Meyers Aff. ¶ 4.) However, Appellant expressly *withdrew* this very argument on the record before the trial court.

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.

(Exhibit H. - Summ. J. Hr'g Tr. 3.) Having assured the trial court that her alleged discovery concerns had been addressed (and cutting off Respondents' arguments on the issue as no longer necessary), Appellant cannot revive this argument now. Indeed, this would represent the very sort of gamesmanship the rule of issue preservation is intended to foreclose. *See I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("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.").

Finally, Plaintiff cannot ask this Court to consider the trial court's alleged "failure" to consider her proposed Amended Complaint as grounds for appeal. (Appellant's Br. 18.) Appellant's motion to amend was filed *after* the trial court's May 16, 2012, hearing on Respondents' motion for summary judgment. (See File-Stamped Appellant's Motion to Amend Compl. at 1, attached as Exhibit K.) Thus, Appellant's motion to amend was not before the trial court when it undertook consideration of the summary judgment motion. Moreover, had Appellant wished to argue that the trial court's opinion was flawed for an alleged lack of consideration of her proposed Amended Complaint, she was required to preserve this issue by filing a timely Rule 59 motion to reconsider. Appellant 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) (holding an issue not explicitly ruled on by lower court was waived for appellate review where omission was not brought to trial court's attention through the proper motion).

Conclusion

For the foregoing reasons, Respondents respectfully request that the Court dismiss this appeal in its entirety.

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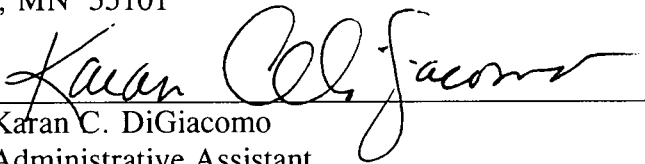
v.

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I
have served all counsel in this action with a copy of the pleading(s) hereinbelow
specified by mailing a copy of the same by United States Mail, postage prepaid, to the
following address(es):

Pleadings: MOTION TO DISMISS
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March 25, 2013

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March 25, 2013

Via Federal Express

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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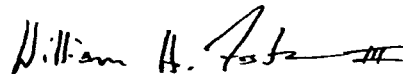
RE: Doe v. Boy Scout Troop 292, et al.
Appellate Case No. 2012-213521
(Spartanburg County Case No. 10-CP-42-2349, Hon. Derham Cole)
NMRS File No. 36489.01500

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the Respondents' Motion to Dismiss in the above referenced matter, along with our check for \$25.00 for the filing fee. We would ask that you return a file-stamped copy to us in the enclosed postage paid envelope, we would appreciate it.

By copy of this letter I am hereby serving opposing counsel, Gregg Meyers, Esq.

Very truly yours,



William H. Foster

WHF:kcd
Enclosure
cc: Gregg Meyers, Esquire

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