THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-001491

John Doe,……..……...Petitioner,

v.

Bishop of Charleston, a Corporation Sole, and
The Bishop of the Diocese of Charleston, in his
official capacity,……..……....Respondents.

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QUESTION PRESENTED

Did the Court of Appeals properly affirm the grant of summary judgment, where the Court's analysis correctly applied the common law doctrine of charitable immunity as it existed at the time of the alleged tort?

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly applied common law charitable immunity as it existed in 1970. The controlling law in South Carolina for most of the twentieth century was that charitable entities were exempt from liability for the torts of their officers, agents, and employees. South Carolina's common law charitable immunity was established as an exception to the doctrine of *respondeat superior* under which employers could be held liable for the negligence or intentional actions of employees when those acts were in the course of employment. Thus, until its abrogation in 1981, charitable immunity prevented injured parties from recovering money damages against a charity for the torts of a charity's employees. An injured party could seek recompense from the employee directly but not from the charitable organization itself. This Court determined that public policy was against bankrupting a charitable organization in order to compensate an injured party. This Court then reaffirmed that balancing of interests several times prior to the 1970s with only very narrow exceptions.

In the present case, Respondents established conclusively that they were charitable entities at the time Petitioner was allegedly molested, sometime in 1970. The lower courts correctly found that Respondents fell within the doctrine of charitable immunity and that there was no genuine issue of material fact in that regard. Having concluded that Respondents were, in fact charities and that charitable immunity was in full force at the time, the circuit court properly granted

summary judgment in favor of Respondents. The Court of Appeals correctly affirmed the circuit court's decision.

The record before the circuit court also supports alternative sustaining grounds for summary judgment. First, Petitioner commenced this action more than fifty years after his alleged abuse and more than thirty years after the statute of limitations ran. The record is bereft of admissible evidence supporting tolling the statute of limitations based upon repressed memories. Rather, the record before the circuit court reflected that Petitioner could not satisfy the heavy burden placed upon him to establish the fact that he had no access to those memories prior to three years before filing his action. There being no admissible evidence to meet the standards required under South Carolina law to toll the statute of limitations, the circuit court could have also determined that Petitioner's claims had lapsed many years ago and summary judgment on those grounds was likewise appropriate. The circuit court also could have found that Petitioner's claims are barred by the preclusive effect of the Respondent's 2007 class action settlement and judgment.

The Court of Appeals should be affirmed.

STATEMENT OF THE CASE

Petitioner filed this action against the Diocese of Charleston and "the Bishop of the Diocese of Charleston, in his official capacity"[1] in August, 2018. The Diocese timely answered the Amended Complaint on March 19, 2019, and filed a motion for partial summary judgment regarding "the Bishop of the Diocese of Charleston, in his official capacity" on March 29, 2019.[2]

[1] The only proper legal entity is Bishop of Charleston, a Corporation Sole, an entity established by the General Assembly in 1880.

[2] Both by statute and pursuant to the bylaws of the Corporation Sole, the ecclesiastical office of Bishop of Charleston operates in the secular world as the Corporation Sole. The Diocese maintains its position that the circuit court's refusal to give full effect to its decisions regarding how it is organized and operates in civil law violated the First Amendment's religion clauses.

Pursuant to the circuit court's scheduling order dated June 14, 2019, discovery closed on October 15, 2019, and the deadline for filing dispositive motions was October 30, 2019. Respondents filed individual motions for summary judgment based upon the absence of any genuine issue of material fact regarding: (1) the defense of common law charitable immunity; (2) the defense of the statute of limitations;[3] and (3) the defense of *res judicata*.[4] In support of the summary judgment motions, Respondent filed the affidavits of three people and filed supplemental affidavits of four expert witnesses. (R. 332, 379).

Approximately November 15, 2019, the circuit court called a hearing on all pending motions for December 12, 2019. Prior to that hearing, Petitioner filed nothing in opposition to Respondents' dispositive motions – he filed no deposition testimony, no discovery, no affidavits, and no briefing on the legal issues raised by Respondents' motions. Petitioner did nothing to satisfy his burden under Rule 56.[5] Thus, Respondents' memoranda of law and evidentiary submissions constituted the only record before the circuit court. The circuit court heard oral arguments on Respondents' dispositive motions based on charitable immunity, the statute of limitations, and the *res judicata* effect of the Respondents' 2007 class action settlement of claims related to sexual abuse of minors that occurred during the time period of the alleged abuse. (R. 93). On January 9, 2020, the court granted Respondents' summary judgment motion based on

[3] Respondents also pointed to the lack of admissible evidence required to satisfy *Moriarty v. Garden Sanctuary Church of God* regarding claimed repressed memory syndrome. (R. 379; Affidavits of expert witnesses Dr. Elizabeth Loftus, Dr. James Hudson, Dr. Janine Shelby, and Dr. Monica Applewhite).

[4] Simultaneously, the Diocese filed summary judgment motions regarding each cause of action asserting there was no genuine issue of material fact regarding the elements of each claim asserted by Petitioner – (1) negligence, negligent retention, negligent supervision, and outrage; (2) conspiracy; (3) fraud-based and contract claims; and (4) breach of fiduciary duty.

[5] *See Kitchen Planners v. LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023)

charitable immunity. (R. 1) After the court denied Petitioner's Rule 59 motion, this appeal followed.

STATEMENT OF THE FACTS

Sacred Heart School operated as a ministry of Sacred Heart Parish and of the Roman Catholic Diocese of Charleston. The Diocese of Charleston, and its ministries and operations listed in the *Official Catholic Directory* are, and have been, recognized as charitable entities by the Internal Revenue Service. There was no evidence in the record before the Circuit Court calling into question the Diocese's charitable status in 1970.

Petitioner was a student at the Sacred Heart. Petitioner alleged he was molested by two of his teachers while he was in 7th grade, in the 1970-1971 school year. One teacher died many years ago. The other testified by affidavit that he only taught at Sacred Heart for the fall semester, 1970, before quitting to return to his father's business in Winnsboro. Thus, the only evidence before the circuit court established that the alleged abuse could only have taken place during the fall of 1970.

Both teachers had just graduated college and teaching at Sacred Heart was the first full-time job for both men. While the one teacher returned to his family business in late-1970, the other became employed as a teacher at a middle school in Summerville, South Carolina, where he taught for much of the next 30 years. There is no record nor any admissible evidence in the record that either teacher was ever accused of sexual abuse of a minor or of any inappropriate behavior with a child before or after the alleged incidents. (R. 333).

ARGUMENT

I. THE CIRCUIT COURT AND COURT OF APPEALS PROPERLY CONCLUDED THAT THE DIOCESE OF CHARLESTON WAS A CHARITABLE ORGANIZATION IN 1970 AND, THEREFORE, WAS ENTITLED TO IMMUNITY FROM TORT LIABILITY PURSUANT TO SOUTH CAROLINA LAW.

a. South Carolina's common law doctrine of charitable immunity exempted *charitable* organizations like Respondents from liability for the tortious actions of their employees.

Both lower courts correctly analyzed South Carolina's law of charitable immunity and should be affirmed.[6] In order to demonstrate the nature and scope of charitable immunity as it existed at the time of the alleged abuse in this case, an overview of this Court's decisions in which this Court developed South Carolina's common law doctrine of charitable immunity is necessary.

This Court first adopted the common law doctrine of charitable immunity in *Lindler v. Columbia Hosp.*, holding that "[a] charitable corporation is not liable for injuries resulting from the *negligent or tortious* acts of a servant, in the course of his employment, where the corporation has exercised due care in his selection."[7] Two years later, in *Vermillion v. Women's College of Due West*, the Court unanimously expanded the doctrine of charitable immunity, concluding that charitable immunity rendered charitable entities exempt from liability "for the torts of their superior officers and agents as well as for those of their servants or employees, whether these be selected with or without due care."[8] The *Vermillion* Court held that, "the exemption of public charities from

[6] Additionally, in 2023, the Court of Appeals for the Fourth Circuit affirmed District Judge Gergel's judgment in favor of the Diocese based upon common law charitable immunity for alleged sexual abuse that took place in the 1960s. *Roe v. Bishop of Charleston*, No. 2:21-CV-20-RMG, 2022 WL 1570810, at *2 (D.S.C. May 18, 2022), *aff'd*, No. 22-1754, 2023 WL 3496326 (4th Cir. May 17, 2023)(discussed by Ct. App. in its decision below).

[7] *Lindler v. Columbia Hospital*, 98 S.C. 25, 27, 81 S.E. 512 (1914) (emphasis added) (internal citation omitted).

[8] *Vermillion v. Women's College of Due* West, 104 S.C. 197, 202, 88 S.E. 649, 650 (1916).

liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbid the crippling or destruction of charities . . . to compensate one or more individual members of the public. . . ." The Court continued: "[t]he principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good." The Court determined it was better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity.[9]

The *Vermillion* decision makes clear that the doctrine of charitable immunity stood as an exception to *respondeat superior* based upon public policy. At the time *Lindler* and *Vermillion* issued, the law in South Carolina was clear – a non-charitable employer could be held liable for both the negligent and willful or intentional acts of an employee done in the course of his or her employment but charities could not.[10] The *Vermillion* Court held that charitable entities were exempt "for the *torts* of their superior officers and agents as well as for those of their servants or employees, whether these be selected with our without due care."[11] *Vermillion* went on to say "this rule does not put such charities above the law, for their conduct is subject to the supervision of the court of equity."[12] Clearly, the Court was instructing that injured parties could not recover money damages from charities for torts their employees committed. The language used in both *Lindler* and *Vermillion* plainly shielded charities entirely from liability in tort, and an injured person could not recover money damages in a tort action from a charity for the wrongful acts of any of its officers, agents, or employees.

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[9] *Id.*
[10] *Jones v. Atl. C. L. R. Co.*, 108 S.C. 217, 94 S.E. 490 (1916); *Taber v. Seaboard A. L. Ry.*, 81 S.C. 317, 62 S.E. 311 (1908).
[11] *Vermillion*, 104 S.C. at 202, 88 S.E. at 650.
[12] *Id*., 104 S.C. at 201; 88 S.E. at 649.

Next, in *Caughman v. Columbia Y.M.C.A.*, a unanimous Supreme Court held that a charitable organization or institution was not liable under the workers compensation act.[13] In determining whether the immunity doctrine applied, the court stated "the question has been settled in this jurisdiction by adoption of the rule of *full immunity of such institutions from the torts of their agents and servants*."[14] The *Caughman* Court followed precedent and confirmed this Court's broad rulings in *Vermillion* and *Lindler*.

The Court again recognized this "*full immunity* from tort liability" in *Bush v. Aiken Elec. Coop., Inc.*[15] There, the Court stated: "[u]nder our decisions institutions of this kind, on grounds of public policy, enjoy full immunity from tort liability, citing *Lindler*, *Vermillion*, and *Caughman*.[16] The Court commented that any change to the public policy of full immunity from tort liability had to come from the General Assembly.

Four years later, the Court once again unanimously affirmed the defense of charitable immunity in *Eiserhardt v. State Agricultural and Mechanical Society of South Carolina*, though it refused to extend immunity to charitable entities for any commercial activities that were clearly outside the scope of the organization's charitable mission.[17] *Eiserhardt* involved a fall in a public parking lot owned and operated by the defendant-charity and on which they allowed the public to park from time to time for a fee. Plaintiff paid the fee to park in the lot for a football game.[18] As the plaintiff stepped out of the car, she tripped in a hole in the parking lot and was injured.[19] Plaintiff

[13] *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 343–44, 47 S.E.2d 788, 790 (1948)
[14] *Id.* at 343, 47 S.E.2d at 790 (emphasis added).
[15] *Bush v. Aiken Elec. Coop. Inc.*, 226 S.C. 442, 448, 85 S.E.2d 716, 719 (1955) (emphasis added).
[16] *Id.* at 448, 85 S.E.2d at 719.
[17] *Eiserhardt v. State Ag. and Mech. Soc. of S.C.*, 235 S.C. 305, 111 S.E. 2d 568 (1959).
[18] *Id.*, 235 S.C. at 307, 111 S.E.2d at 569.
[19] *Id.*

sued, asserting negligent maintenance of the parking lot.[20] The Court concluded a charitable organization could be liable for injuries on its property – but only where the "activity out of which the alleged liability arose is primarily commercial in character and wholly unconnected with the charitable purpose for which the corporation was organized."[21]

In 1966, the Court again affirmed total charitable immunity from tort liability in *Decker v. Bishop of Charleston*.[22] The *Decker* Court applied charitable immunity to a tort claim against the Diocese and declared the Church to be a true charity entitled to immunity from suit altogether.[23] The Court further held that a charity's immunity from suit was unaffected by the fact that the charity procured liability insurance that would cover the loss.[24] Rather, the Diocese was immune from suit for torts committed by its employees. The Court affirmed the dismissal of a tort suit on the Diocese's demurrer. Importantly, the plaintiff in *Decker* directly asked the Court to overrule the doctrine of charitable immunity. The Court declined that invitation, holding:

> For us to withdraw immunity from charitable institutions at this time, against the existing background of decisions of the court would, in effect, be an act of judicial legislation in the field of public policy. Whether some change in our rule is advisable is a question to be considered and resolved by the law making body.[25]

Prior to 1973, the law of charitable immunity was controlled by *Lindler*, *Vermillion*, and *Decker*, all of which clearly held that charitable organizations could not be held liable for the torts or negligence of their officers, agents, or employees. Charitable organizations could be liable if they

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[20] *Id.*
[21] *Id.*, 235 S.C. at 312, 111 S.E.2d at 572.
[22] *Decker v. Bishop of Charleston*, 247 S.C. 317, 324-25, 147 S.E.2d 264, 268 (1966). It is important to note that the site of the incident, the Cathedral of St. John the Baptist in Charleston, South Carolina, is a ministry of the Diocese of Charleston, whose civil law presence is through the Corporation Sole. There is no separate and distinct corporate entity.
[23] *Id.*
[24] *Id.*, 247 S.C. at 326, 146 S.E.2d at 269.
[25] *Id.*

created a nuisance on their property that deprived neighboring property owners of the use of their property without just compensation,[26] and charitable organizations could be liable in tort if a person suffered an injury in commercial ventures like paid parking lots.[27] Otherwise, the rule itself held firm – charities were immune from suit for the torts committed by individuals affiliated with the organization.

In 1973, years after the alleged abuse claimed in this case, *Jeffcoat v. Caine*[28] addressed an allegation that South Carolina Baptist Hospital could be liable for false imprisonment when its employees were acting within the course and scope of their job duties. The Court refused to overturn its precedents in *Lindler Vermillion* and *Decker,* and charitable immunity remained good law in South Carolina. The *Jeffcoat* Court's discussion and apparent criticism of *Lindler* and *Vermillion* noted by Petitioner are nothing more than *dicta*, as the Court steadfastly refused to overturn charitable immunity that had existed for more than fifty years.[29] The Fourth Circuit noted in *Roe v. Bishop of Charleston* that the *Jeffcoat* court narrowed the broad doctrine of charitable

[26] *Peden v. Furman University*, 155 S.C. 1, 151 S.E. 907 (1930) (discussed in greater length below).
[27] *Eiserhardt, supra.*
[28] *Jeffcoat v. Caine*, 261 S.C. 75, 198 S.E.2d 258 (1973).
[29] At best, *Jeffcoat* may be considered a change in prior precedent regarding charitable immunity and, as such, its effect is solely prospective. It must be noted that under the doctrine of *respondeat superior* a master can only liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment. *Froneberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013). "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so no matter how short the time, and the master is not liable for his acts during such time." *Kase v. Ebert*, 392 S.C. 57, 61–62, 707 S.E.2d 456, 458 (Ct.App.2011). "[S]exual harassment by a government employee is not within the employee's 'scope of employment.'" *Frazier v. Badger*, 361 S.C. 94, 103, 603 S.E.2d 587, 591 (2004). An employee is acting in his individual capacity and not as an agent for the defendants when he commits sexual assault, even when that occurs in his own office. *Brockington v. Pee Dee Mental Health Ctr.*, 315 S.C. 214, 218, 433 S.E.2d 16, 18 (Ct.App.1993).

immunity to exclude intentional torts but that the *Jeffcoat* Court "did not . . . hold that the doctrine always excluded intentional torts."[30]

Four years later, in *Crowley v. Bob Jones Univ.*,[31] the Court clarified its holding in *Jeffcoat* regarding charitable entities *Crowley* involved allegations that Bob Jones was grossly negligent, reckless, and willful in failing to provide appropriate medical treatment to a minor who sustained a severe eye injury while performing duties required of students at an elementary school operated by the university. The Court held that, under the *Jeffcoat* decision, if the plaintiff could prove the defendant-organization itself committed an intentional tort, then the plaintiff could recover damages, even though the defendant was a charitable organization. The Court further confirmed that charitable immunity was an affirmative defense under which the charitable organization bore the burden of proof.

Jeffcoat and *Crowley* were issued several years after Petitioner's alleged abuse. At the time of the events complained of, the doctrine of charitable immunity as stated in *Lindler* and *Vermillion* controlled, and a charitable organization was immune from suit for the torts of individuals affiliated with the organization. As *Vermillion* made clear, "the injured person has his remedy against the actual wrongdoer," as opposed to the charitable organization itself. But the Court also recognized that though the wrongdoer may be "financially irresponsible, . . . [t]he law does not undertake to provide a solvent defendant for every wrong done."[32] The Court then provided several examples where an injury cannot be compensated under the law because of complete immunity, noting that

[30] *Roe v. Bishop of Charleston*, 2023 WL 3496326 at *3 (4th Cir. 2023).
[31] *Crowley v. Bob Jones Univ.*, 268 S.C. 492, 234 S.E.2d 879 (1977).
[32] *Vermillion*, 104 S.C. at 201, 88 S.E. at 650.

the State is "most deeply interested in the preservation of public charities."[33] Thus, the Court's strong affirmations of charitable immunity held firm at the time Petitioner alleges he was molested.[34]

On the same day in 1977 the Supreme Court issued its decision in *Crowley*, it also issued *Brown v. Anderson Cnty. Hosp. Assoc.*[35] The defendant hospital was a charitable entity, and the plaintiff's decedent was a patient at the time of his death, which resulted from a fire in his hospital room. The plaintiff alleged the fire and the hospital's failure to protect the patient were due to the negligent and reckless acts of the hospital's employees.

The *Brown* Court then engaged in a lengthy discussion of the public policy underpinning the doctrine of charitable immunity and the gradual erosion of the doctrine in other jurisdictions. Ultimately, the Court rejected the argument that charitable immunity should be abrogated.[36] Instead, the Court adopted an intermediate ground and abolished charitable immunity *only* "for a hospital's heedless or reckless disregard for the plaintiff's rights."[37] The Court then added that "[w]e do not extend it so as to abrogate or modify the defense of charitable immunity as to churches, rescue missions, orphanages, colleges, and other institutions which are charitable in nature, purpose and operation."[38]

Not until 1981 did this Court abrogate the doctrine of charitable immunity.[39] However, the Court only did away with charitable immunity prospectively. The abrogation, like any other

[33] *Id.*, 104 S.C. at 102, 88 S.E. at 650.
[34] *Vermillion*, 104 S.C. at 201-2; 88 S.E. at 650.
[35] *Brown v. Anderson Cnty. Hosp. Assoc.*, 268 S.C. 479, 234 S.E.2d 873 (1977) (superseded by statute as stated in *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004)).
[36] *Id.*, 68 S.C. at 487, 234 S.E.2d at 876-77.
[37] *Id.*
[38] *Id.*
[39] *Fitzer v. Greater Greenville South Carolina YMCA*, 277 S.C. 1, 282 S.E.2d 230 (1981).

modification to charitable immunity, could not be applied retroactively.[40] Thus, a court applying South Carolina law must apply charitable immunity as it existed at the time of the allegedly tortious activity.[41] For that reason, *Jeffcoat* and *Crowley* are simply inapplicable to Petitioner's claims since they were decided after Petitioner's alleged abuse.

As late as 1979, in *Douglass v. Florence Gen'l. Hosp.*, this Court reaffirmed the doctrine of charitable immunity for torts that occurred while the doctrine remained effective.[42] The plaintiff initiated that case prior to the Court's decision in *Brown v. Anderson Cty. Hosp.*, though the case was pending when *Brown* was decided. The trial court dismissed plaintiff's complaint based upon charitable immunity and determined that *Brown* applied only prospectively and could not give life to plaintiff's claims. This Court affirmed that decision because *Brown* created liability where there had been none previously. Thus, in that case, Florence General Hospital was immune from suit for its employees' acts, even if heedless or reckless.[43] Clearly, therefore, changes to *Lindler*, like those in *Eiserhardt* or *Jeffcoat*, can only be applied prospectively.

In the present case, Petitioner's own allegations and testimony establish that his alleged abuse could only have taken place sometime in the fall of 1970. Therefore, the alleged abuse would have taken place when common law charitable immunity applied most broadly. As a result, Respondents are not to be held liable for the torts of its employees that occurred in 1970. Accordingly, summary judgment was appropriate.

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[40] *See Hupman v. Erskine College*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984), *Hasell v. Medical Society of S.C.*, 288 S.C. 318, 342 S.E. 594, 595 (1986); *see also Brown v. Anderson Cty. Hosp.*, 268 S.C. 479, 234 S.E.2d 873 (1977) (modifying charitable immunity as to hospitals only to render them liable for heedless and reckless acts and prospectively only).

[41] *See Laughridge v. Parkinson*, 304 S.C. 51, 403 S.E.2d 120, 120 (1991) (holding that charitable immunity law in existence at the time of tortious conduct in 1979 must be applied).

[42] *Douglass v. Florence-Gen'l Hosp.,* 273 S.C. 716, 259 S.E.2d 117 (1979).

[43] *Douglass,* 273 S.C. at 720, 259 S.E.2d at 118.

As previously noted, what matters for purposes of the present appeal is the law of charitable immunity as it existed in 1970. At that time, *Jeffcoat* had not been decided, and prior to *Jeffcoat*, this Court had never held that charitable organizations could be liable for false imprisonment or any other intentional tort committed by its employees. To the contrary, South Carolina had always granted sweeping tort immunity to charities as a complete exception to the doctrine of *respondeat superior*. Thus, Petitioner's argument that *Jeffcoat* represents the state of the law when his alleged abuse occurred is misplaced and incorrect. *Jeffcoat* was not the law of South Carolina in the years relevant here. *Jeffcoat* altered the common law in a manner that created liability where none had previously existed. Accordingly, *Jeffcoat* only affected future claims, and it is irrelevant to this appeal.

Even if Petitioner's assertion that *Jeffcoat*'s exception to the doctrine of charitable immunity for intentional torts applied, summary judgment remains correct because, similar to *Roe v. Bishop of Charleston*, there is no evidence in the record of any intentional acts of Respondents' intended to harm Petitioner. [44]

b. *Peden v. Furman University* was limited to its facts and provides no basis for manufacturing *respondeat superior* liability for charitable entities.

Peden v. Furman, relied on by Petitioner, lends no support to his argument.[45] In *Peden*, this Court held that public charities could be liable for trespass and private nuisance arising out of their activities as lessors where it is proven that the affected landowner was deprived of the use of his land without just compensation.[46] Importantly, the Court noted that the dispute did not involve alleged

[44] *Roe v. Bishop of Charleston* 2023 WL 3496326 at *3. Respondent moved for summary judgment on Petitioner's claim of outrage/intentional infliction of emotional distress, pointing out there was no evidence to support the essential elements of the claim. The record contains nothing to the contrary.
[45] 155 S.C. 1, 151 S.E. 907 (S.C. 1930)
[46] *Peden*, 155 S.C. at 1, 151 S.E. at 907.

tortious conduct by an employee of the charity and did not implicate *respondeat superior* in any respect.[47] Rather, the case involved Furman's lessee, Municipal Athletic Corporation, which constructed a baseball stadium on Furman's property. Peden owned neighboring property and suffered trespassers coming onto his property to retrieve baseballs, broken windows, his fences being torn down, shingles being torn from his roof, and a number of other issues. Because of the disruption caused by the baseball games, Peden had to move to another house and could not rent the property to anyone. The Court held that the trespass and private nuisance amounted to an unconstitutional taking of Peden's property without just compensation. The Court further determined there was no public policy that exempted charitable organizations, or a county, or the State, from claims that the entity engaged in unconstitutionally taking of property without compensation.[48] The evidence in the case showed that Furman had engaged in an unreasonable use of its property that interfered with the comfort and enjoyment of Peden's house and that the unreasonable use of the property drove Peden from his house and prevented him from enjoying the use of his property.[49] The Court determined it would be entirely unfair to permit that interference to go uncompensated.

c. *Picher v. Roman Catholic Bishop* is wholly inapplicable.

Petitioner relies on a case from another jurisdiction that he neither discussed in his previous appellate briefs nor referenced during oral arguments in the Court of Appeals. The Maine Supreme Court's decision in *Picher v. Roman Catholic Bishop* has no bearing on the law in South Carolina – even less so the law as it existed in 1970.[50] In *Picher*, the Maine Supreme Court affirmed the dismissal of claims against the Diocese for negligent supervision, breach of fiduciary duty, and

[47] *Id.*, 155 S.C. at 13-14, 151 S.E. at 911.
[48] *Id.*
[49] *Id.*
[50] *Picher v. Roman Catholic Bishop*, 974 A.2d 286, 295 (Me. 2009)

canonical agency, and reversed only as to the claim that the Diocese fraudulently concealed its priest's known history of abusing minors. On remand, that claim was also dismissed on summary judgment based on a failure of proof.[51]

Although, the *Picher* Court discussed the evolution of charitable immunity in South Carolina, it did not state, or even imply, that the doctrine could not apply to intentional torts in South Carolina prior to our Supreme Court's decision in *Jeffcoat v. Caine* in 1973.[52] To the contrary, the *Picher* Court referenced *Jeffcoat* as an example of the historical trend in other jurisdictions to chip away at the doctrine of charitable immunity over time. In that sense, the discussion in *Picher* supports the Court of Appeals' decision, as it agrees that *Jeffcoat* announced a new limitation on charitable immunity.

Petitioner also implies that *Picher*'s survey of other states' laws is an indication that no other jurisdictions have ever applied charitable immunity to intentional torts.[53] That is simply not the case. The *Picher* Court did not attempt an exhaustive review of the entire history of charitable immunity. Rather, the purpose of its survey was to determine the nationwide state and scope of that doctrine as it existed in 2009 when *Picher* was decided. Thus, it is reasonable and accurate to cite *Picher* as

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[51] *Picher v. Roman Catholic Bishop*, 82 A.3d 101 (Me. 2013)

[52] 261 S.C. 75, 198 S.E.2d 258 (1973).

[53] Contrariwise, in *St. Clair v. Trustees of Boston University*, 25 Mass. App. Ct. 662, 665-666 (1988), the Massachusetts Appeals Court interpreted the Massachusetts charitable immunity statute imposing limits on tort claims against charities to include intentional torts such as slander and intentional interference with advantageous relations. In *Allison v. Mennonite Publications Board*, 123 F. Supp. 23, 26, 29 (W.D. Pa. 1954) the court held charitable immunity would have applied when a church engaged in libel but did not apply under the given facts because the church "invade[d] the commercial field and engage[d] in business."("It is a doctrine too well established to be shaken, and as unequivocally declared in Pennsylvania as in any other state, that a public charity cannot be made liable for the tort of its servants.") In *Boardman v. Burlingame*, 123 Conn. 646, 647, 653 (1938) the Supreme Court of Errors of Connecticut held charitable immunity applied when a plaintiff was wrongfully detained at a mental institution.

support for the proposition that as of 2009 no other jurisdictions appeared to apply charitable immunity to intentional torts. But it is neither reasonable nor accurate to cite *Picher* for that same proposition as of 1970. The *Picher* Court never engaged in an analysis of the latter. Therefore, *Picher* has no bearing on this Court's decision.

II. AS AN ALTERNATE SUSTAINING GROUND, PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND MUST BE DISMISSED.

In addition to the reasons addressed in the preceding sections, Petitioner's claims are barred by the statute of limitations. His allegations that "his memory was repressed"[54] are unsupported by any admissible evidence. Plaintiff was born in 1957. He turned 18 in 1975. Thus, his claims lapsed no later than 1978. This action was not filed until August 29, 2018, more than forty years after the statute of limitations had run.

It is indisputable that South Carolina's three-year statute of limitations applies to this case.[55] Pursuant to the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. This standard as to when the limitations period begins to run is objective rather than subjective. Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains

[54] Compl. ¶ 16, R. 21.

[55] *See* S.C. Code Ann. § 15-3-530(1) and (5) (2005) (providing a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied" and "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law"); *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371-72, 597 S.E.2d 27, 29 (Ct. App. 2004) (holding the three-year statute of limitations began to run on homeowner's negligence claim when he discovered his newly purchased modular home was damaged during delivery).

actual knowledge of either the potential claim or of the facts giving rise thereto.[56] This Court has interpreted the "exercise of reasonable diligence" to mean that "the injured party must act with some promptness" when on notice of a potential claim.[57] "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial."[58] It takes very little to start the clock.

Both this Court and the Court of Appeals expressed deep concerns regarding so-called "repressed memory syndrome" in their decisions in *Moriarty v. Garden Sanctuary Church of God*. As the Court of Appeals noted, under the theory of repressed memory syndrome, when an event occurs that is horrifically traumatic, the victim will attempt to cope by *completely* shutting the memory out.[59] In theory, repressed memory is not at all like the ordinary process of forgetting bad experiences or a person choosing not to think about them. Rather, when a memory is repressed, the theory is that, the person's conscious mind will have no access to the circumstances and specific incidents that were traumatic.[60]

As both Courts acknowledged, the theory of repressed memory syndrome was highly controversial among psychiatrists and psychologists. As this Court noted, there is no consensus among the psychological, medical, or legal communities regarding the validity of the theory of repressed memory.[61] Critically, both Courts likewise recognized "the horrific possibility of false

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[56] *Id.* at 525-26, 787 S.E.2d at 489-90 (citations and quotations omitted); *see also* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.").
[57] *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).
[58] *Id.*
[59] *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 157-58, 511 S.E.2d 699, 703 (Ct. App. 1999).
[60] *Id.*, 344 S.C. at 158, 511 S.E.2d at 703.
[61] *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 330, 534 S.E.2d 672, 677 (2000).

accusations" and that corroborating evidence is required because of "the disagreement among the psychological and medical communities about the validity of repressed memory syndrome, the danger a plaintiff's memories could be faked or implanted during therapy, and the desire that a plaintiff not have the ability to control the running of the statute of limitations solely by allegations whose only support is contained within the plaintiff's mind."[62] Because of these concerns, this Court requires that a plaintiff claiming repression must present both at the summary judgment stage and at trial: (1) objectively verifiable corroborating evidence of the fact of the abuse and (2) expert testimony to establish the both the abuse and the fact of the repressed memories.

Petitioner failed to present expert testimony to establish the abuse, the fact of the repressed memories, and that those memories were repressed between his 18th birthday – May 28, 1975[63] - until sometime after August 29, 2015 (three years prior to filing the Complaint). There was no expert testimony regarding repressed memory syndrome at all.[64] The medical records provided to Respondents do not contain any diagnosis of the condition. There is no evidence of when Petitioner lost all access to any memory of abuse or if that occurred. There is also no evidence of the accuracy of his present recollection. Nor is there is any admissible expert testimony that would satisfy the requirements set forth in *Moriarty*.

[62] *Moriarty*, 534 S.E.2d at 680, citing *Roe v. Doe*, 28 F.3d 404, 408-09 (4th Cir. 1994) (suggesting that corroborative evidence of abuse and repressed memory should be required) (Hall, J., concurring); *Olsen v. Hooley*, 865 P.2d 1345, 1349-50 (Utah 1993) (requiring corroborating evidence because of concerns about the reliability of memory in general and revived memories in particular, and the difficulty of defending against claims of revived memories of sexual abuse long past); *S.V. v. R.V.*, 933 S.W.2d 1, 7-15 (Tex. 1996) (discovery rule applies in repressed memory case only when claim is "inherently undiscoverable" and "objectively verifiable" through corroborating evidence; court assumed plaintiff's injury was inherently undiscoverable, but rejected application of discovery rule because she offered no corroborating evidence).

[63] S.C. Code Ann. § 15-1-320 changed the age of majority to 18 effective February 6, 1975.

In short, Petitioner failed to present admissible evidence that satisfied the heavy burden placed upon him by *Moriarty v. Garden Sanctuary Church of God*. His inability to satisfy that burden placed him in exactly the position that gave both this Court and the Court of Appeals such grave concern – the only evidence of "repressed memory" is self-reported by Petitioner. Such is precisely what the *Moriarty* Courts cautioned against. Having failed to satisfy his burden of establishing repressed memory syndrome, summary judgment is warranted even if Petitioner's arguments about charitable immunity were accepted as correct. Therefore, the statute of limitations provides an alternative sustaining ground for the lower courts' decisions.

III. AS AN ADDITIONAL ALTERNATE SUSTAINING GROUND, PETITIONER'S CLAIMS ARE BARRED BY THE PRECLUSIVE EFFECT OF RESPONDENTS' 2007 CLASS ACTION SETTLEMENT AND MUST BE DISMISSED.

The record reflects the Diocese of Charleston entered into a Class Action Settlement of all potential claims that employees or priests of the Diocese sexually abused minors. On January 12, 2007 the Defendants entered into a Class Settlement Agreement to settle the claims of a class of people who alleged that they were sexually abused as minors by personnel of the Diocese Defendants.[65] The Settlement Agreement addressed the claims of two classes of individuals:

- All individuals born on or before August 30, 1980 who claim to have been sexually abused as minors by the Diocese of Charleston personnel ("primary class") and-
- Those individuals' spouses and parents ("consortium class").

A Fairness Hearing was held before the Honorable Diane S. Goodstein, on March 9, 2007, and the Court finally approved the Settlement Agreement by Orders dated July 30, 2007 and August 31, 2007.[66] The Court determined that the proposed Class Settlement was fair to both the named

[65] R. 296.

[66] R. 376

class representatives and to the absent class members and that both the named plaintiffs and Class Counsel were adequate representatives of the class. The Court entered its judgment approving the settlement classes and ordered Class Counsel to notify the class of the settlement. The classes were "opt-out" classes, that is, if an individual satisfied the criteria of either class, he is automatically a class member, bound to the law of the case and the terms of the Settlement Agreement. An individual must have affirmatively "opted-out" by filing a Notice of Opt Out to preserve his rights to pursue an independent claim against the Defendants.

Under the doctrine of *res judicata* "a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action."[67] Because the class action judgment is binding upon all those for whom the notice program was reasonably calculated to reach, Petitioner's claims are barred by *res judicata*. All three elements of *res judicata* are present – Petitioner's claims of sexual abuse are identical to the claims asserted in the court-approved class action settlement; Petitioner alleges he was a minor who suffered sexual abuse by an employee, agent, or priest of the Diocese of Charleston; the allegations of abuse are the same as the conduct defined in the Class Action settlement. Petitioner fell squarely within the classes of claimants whose causes of action were resolved and released by the Class Action Settlement and Judgment. Furthermore, Petitioner failed to opt out of the Class Action Settlement.

As such, the record supports a finding that Petitioner's claims are barred by the preclusive effect of the 2007 class action settlement and judgment

CONCLUSION

[67] *Treadaway v. Smith*, 479 S.E.2d 849, 855 (S.C. Ct. App. 1996).

The Court of Appeals properly determined that Respondents are entitled to the charitable immunity afforded to charities at the time Petitioner claims to have suffered abuse. In 1970, the time of the alleged abuse, South Carolina law fully exempted charities from liability in tort, including intentional torts. As this Court held in *Vermillion v. Woman's College of Due West*, charitable immunity was an exception to the doctrine of *respondeat superior*, and charitable organizations could not be liable for the negligence or torts of their agents, officers or employees. The Court of Appeals should be affirmed in every respect.

As alternate grounds for affirmance, Petitioner failed to satisfy his heavy burden to establish the elements required to toll the statute of limitations for nearly forty years. Failing that, his claims are barred by South Carolina's statute of limitations, and the circuit court could have properly granted summary judgment on that ground alone. Finally, Petitioner's claims the records supports affirmance based upon the preclusive effect of the class action settlement and judgment from 2007.

Respectfully submitted,

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