THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No.: 2010-CP-10-7699

Jane Doe, ...Appellant

v.

Charles Smith, Charleston County School
District and James Island High School,. . . . . .Respondents

RESPONDENT SMITH'S FINAL BRIEF

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STATEMENT OF THE CASE

This matter is based on a claim of sexual battery against a student by a teacher, brought against the teacher, Mr. Charles Smith, the school, and the Charleston County School District, dating back to 1988-89, when these instances are alleged to have occurred.

This action was filed by appellant Jane Doe on November 20, 2007. Thereafter, the appellant amended her complaint to include James Island High School as a defendant and further amended it to change the causes of action. The amended complaint alleges causes of action for breach of fiduciary duty, gross negligence and outrage against all defendants. Appellant alleged in her complaint that during the 1988-1989 school year, she was sexually assaulted on several occasions by Mr. Smith, both on and off the school's campus. Smith was a teacher during this school year, and also the school's softball coach. Appellant claims that though the alleged abuse occurred over a period of time, she repressed the memories of the abuse until 2007. Respondent Smith denies all allegations of abuse and asserts that the same never occurred. Additionally, Respondent Smith asserts that the statute of limitations has expired on this claim. The School and School District face additional allegations and have additional defenses. This brief only addresses the appeal as to Mr. Smith.

On July 23, 2012, the court heard Respondent Smith's motion for summary judgment and considered all evidence submitted by both sides, including affidavits, deposition transcripts, and documents dating back to the 1988-1989 school year. (R. 1417-22, 1427). On September 24, 2012,the court signed the Order granting summary judgment to the Respondent Smith. (R. 18-29). The order was based on Doe's failure to file the case within

the applicable statute of limitations. The court clearly found that Doe failed to satisfy the objective verifiability requirements set forth in *Moriarty v. Garden Sanctuary Church of God,* 334 S.C. 150 (Ct. App. 1999); *aff'd by Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320 (2000). The court also found that the claims for intentional infliction of emotional distress and punitive damages are not recoverable under the South Carolina Tort Claims Act.

The Appellant filed a motion for reconsideration, which was denied by the court on December 13, 2012. (R. 30). The appellant appeals the Order granting summary judgment and denying the motion to reconsider. Respondent Smith asks this court to affirm the grant of summary judgment.

STATEMENT OF FACTS

The Appellant alleges that while she was a second year freshman at James Island High School, more than twenty (20) years ago, during the 1988-1989 school year, she was sexually assaulted by then teacher and coach, Charles Smith. (R. 2248-9). During that school year, Mr. Smith was Appellant's geography teacher, and was also the high school softball coach. The Appellant was in one of his Geography classes, and was practicing with the softball team. The Appellant alleges that she does not know the dates of the assaults, but claims they occurred at some unknown point between September 1988, when the school year began and February 13, 1989. February 13, 1989 is an important date, because this is when the Appellant allegedly attempted to commit suicide by taking an unknown amount of Vivarin caffeine pills. (R. 2562-66).

The Appellant has alleged five (5) separate assault incidents occurring at an unknown points and in unknown order during this time period. These assaults are alleged to have occurred in the classroom, at a local horse stable and in Smith's vehicle as he drove her home from softball practice. Appellant asserts that three incidents occurred in the classroom, while the entire class of students were present. First, Mr. Smith brushed his hand across her breast while leaning over to answer a question. (R.193, Cond. Transcript P. 88 lines 10-20). She has also admitted that this touch may have been inadvertent, and not performed in a sexual manner. (R. 193, Cond. Transcript P. 89, lines 10-11). Second, that when the Appellant went to the front of the classroom to ask him a question, Mr. Smith put his hand under her skirt and rubbed the outside of her vagina. When he removed his hand, he sniffed his fingers. (R. 195, Cond. Transcript P. 97, lines 6-19). The third instance was again when she says she went to his desk, and claims he took her hand and put it on his penis through his pants. (R. 198, Cond. Transcript P. 99 line 25 through P. 100, line 7). All of these acts are alleged to have occurred in front of the class of 9th grade students. The appellant further alleges that Smith touched her breast and kissed her inside a horse stable, where he was boarding his horse. (R. 194, Cond. Transcript P. 91, lines 4-6). The final allegation of sexual assault is alleged to have taken place in Mr. Smith's vehicle after softball practice. Appellant claims that Smith stopped the vehicle on the way home, pulled out his penis and she performed oral sex on him. (R. 198-9, Cond. Transcript, P. 101 line 11 through P. 102, line 9). The last incident, appellant claims, was the oral sex incident in the vehicle. She further asserts that the there were no further incidents after her suicide attempt on February 12, 1989. Appellant admitted in her deposition that during the times of these alleged assaults, and after, she

"froze", she was "uncomfortable" and after the oral sex incident, "[a]ll I remember is going home, going into my room, closing my door and holding onto my cat crying." (R. 198, Cond. Transcript P. 98, lines 4-8; P. 100, lines 1-5; R. 197, Cond. Transcript P. 105, lines 2-4).

On February 13, 1989, the appellant claims she attempted suicide by taking a handful of Vivarin caffeine pills after school. (R. 2562-66). After taking the pills at the drinking fountain, she went to Mr. Smith's classroom, and stumbled inside. When she told him she had taken an overdose of pills, he called for the nurse to contact 911 and he walked her around with the nurse until the ambulance arrived and took her to the hospital. (R.199, Cond. Transcript P. 113, lines 20-22; R. 792, Cond. Transcript P. 131, lines 3-24). The appellant claims she has no recollection of anything that occurred between taking the pills and throwing them up at the hospital. (R. 199, Cond. Transcript P. 113, lines 11-16, 23-25; R. 200, Cond. Transcript P. 114, lines 1-4).

Appellant returned to school and the softball team after the alleged suicide attempt and finished out the 1988-1989 school year both in Mr. Smith's class and on his softball team until she became ineligible due to bad grades. (R. 2248-9). The following year, she returned to the school, as a third year ninth grader. (R. 2248). At the end of the 1989-1990 school year, she dropped out and later earned her GED. (R. 2249). Mr. Smith continued as both a teacher and coach at James Island High School until his retirement in 2008.

After getting her GED, the Appellant proceeded through a series of jobs from which she was fired for having sexual relationships with her supervisors. (R.175, Cond. Transcript P. 17, line 16 through P.18, line 5; R. 211, Cond. Transcript P. 160, lines 20-25). Eventually, she became a corrections officer with the South Carolina Department of Corrections. While

employed there, she witnessed several violent acts between inmates. She was disciplined on several occasions, reduced in rank and eventually terminated for refusing to comply with orders. (R. 1447). She then worked as a detention officer for the Charleston County Sheriff's Office, but was terminated for inappropriate conduct. (R. 1449). It was during her time as a detention officer in 2007, that she claims she suddenly remembered being sexually assaulted by Mr. Smith approximately 19 years prior. She claims that until her epiphany in 2007, she had no recollection of anything that had occurred in her life between sometime after the alleged assault and/or suicide attempt, through age 18.

This is the second allegation the Appellant has made that she was sexually abused by being forced to perform oral sex, followed by an allegation of memory repression. She also asserts that she has memory lapses in her life from birth to age 10, ages 15-18, and spotty recall through adulthood. (R.179, Cond. Transcript, P. 33, lines 18-20; R. 197, Cond. Transcript P. 105, lines 9-14). The first allegation of abuse stems from the Appellant's assertion that she was sexually abused by a babysitter sometime between the ages of 4 and 6. (R. 178, Cond. Transcript P. 29, lines 23-25). She claims she was forced to perform oral sex on the babysitter. (R. 179, Cond. Transcript P. 30, lines 3-4). She also claims that she repressed the memories of such abuse until 1995-96 (R. 179, Cond. Transcript P. 33, lines 16-20). She has no explanation for why those allegedly repressed memories of the same kind of alleged abuse surfaced in 1995 or 1996, but the second alleged abuse allegations did not, and did not come forward until 2007.

Mr. Smith asserts that he acted properly and had no relationship with the Appellant other than that of a teacher-student and coach-player. He asserts that there was no sexual

contact of any kind. (R. 802, Cond. Transcript P.171, lines 6-14). While he admits that he occasionally gave her and other members of the softball team a ride home after practice or games, he asserted that this was common place in the 1980's and that many coaches did the same. (R. 782, Cond. Transcript P. 82, line 16 through P. 83, line 20). Smith denies sexually assaulting anyone and further asserts that no inappropriate behavior took place. (R. 767, Cond. Transcript P. 31, lines 14-24).

ARGUMENT

I. THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANT SMITH ON ALL CAUSES OF ACTION, BECAUSE THE APPELLANT FAILED TO FILE WITHIN THE STATUTE OF LIMITATIONS AND DOES NOT QUALIFY FOR ANY EXTENSIONS.

Doe did not timely filed her complaint within the three-year statute of limitations set forth in the SC Code Ann. §15-3-530 (5). The statute of limitations applicable to actions "for assault, battery, or any injury to the person or rights of another... is three years for actions arising on or after April 5, 1988." Although a statute of limitations specifically concerning sexual-abuse actions, S.C. Code Ann. § 15-3-555, became effective on August 31, 2001 and would normally apply retroactively, that statute is not applicable here for reasons that are discussed in more detail below.

According to the discovery rule, the three-year statute of limitations found in section 15-3-530 (5) begins to run when the underlying cause of action reasonably ought to have

been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E. 2d 645, 647 (1996). Thus, the three-year clock starts ticking on the "day the injured party either knows or should have known by the exercise of reasonable diligence to cause of action arises from the wrongful conduct." *Bayle v. S. C. Dep't. Of Transp.*, 340 4 S. C. 115, 123, 540 2 S.E.2d 376, 740 (Ct.App. 2001). This determination is objective, rather than subjective. *Id.* As such, the question is not whether the particular plaintiff in this case actually knew she had a claim. *Martin v. Companion Healthcare Corp.*, 357 S. C. 570, 576, 593 S.E. 2d 624, 627 (Ct. App. 2004). Instead, the proper inquiry is "whether the circumstances of the case with a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Young v. S.C. Dep't. of Corr.*, 330 3S. C. 714, 719, 511 S.E.2d 413, 416 (Ct.App. 1999).

In *Doe v. Crooks*, 364 SC 349, 613 S.E.2d 536 (2005), the plaintiff sued his former physician for sexual abuse allegedly committed when the plaintiff was 14 or 15 years old in 1983. *Id.* At 351, 613 S.E.2d at 537. The action was commenced in 2002, when the plaintiff was 34 years old. *Id.* The plaintiff acknowledged that he was aware of the abuse while it was occurring but alleged that he did not realize the full extent of his injuries until 2001. *Id.* Thus, the court concluded that discovery occurred in 1983 when the plaintiff was 15. *Id.* at 352, 613 S.E.2d at 538. Under § 15-3-40 (1), the limitation period was tolled until the plaintiff reached the age of maturity, eighteen. *Id.* Therefore, pursuant to §15-3-535, the plaintiff had six years from the date that he reached the age of eighteen to file his action.[1] *Id.* Because he

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[1] For actions accruing prior to April 5, 1988, the limitations period of 6 years in duration. The three-year limitations period now found in the Code applies to actions accruing on or

failed to do so, has cause of action lapsed in 1992. *Id.* at 353, 613 S.E.2d at 538. On appeal, the *Doe* plaintiff argued that the recently enacted statute of limitations for sexual abuse claims applied:

> An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes 21 years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and sexual abuse or incest whichever occurs later.

S.C. Code Ann. §15-3-555 (A). The court acknowledged that statutes of limitations are generally applied retroactively and that the general assembly did not express any intent to limit the application of §15-3-555 prospectively. *Id.* At 352, 613 S.E.2d at 538. However, a new statute of limitations cannot operate to revive an action for which the limitations period has already expired. *Id.* At 351-52, 613 S.E.2d at 538. Therefore, because of the plaintiff's cause of action lapsed in 1992, nine years before §15-3-555 was adopted, the same did not apply. *Id.* at 353, 613 S.E.2d at 538. The South Carolina Supreme Court affirmed that trial court's dismissal of the action on the grounds that, when §15-3-555 became effective, the plaintiff's cause of action had already lapsed under §§15-3-530 (5) and 15-3-535. *Id.*

In this case, the appellant alleges defendant injured her during the 1988-1989 school year while she was a minor. In accordance with the allegations of the amended complaint, the alleged circumstances would have put a person of common knowledge and experience on notice some right of hers had been invaded or that she had a claim against another person. Under *Doe*, the appellant did not have to fully understand the extent of the injury, she only

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after April 5, 1988.

had to understand that she was harmed. When asked about two alleged incidents at the teachers desk, she testified that she was "very uncomfortable" and that she "froze". This testimony shows that she knew at the time the situation was allegedly going on, that she was being harmed. (R. 196, Cond. Transcript P. 98, lines 2-8; P. 99, line 25 through P. 100, line 5). Additionally, she testified that after the alleged oral sex incident:

> Q. When you got home was there anybody at your house?
>
> A. All I remember is going into my room and closing my door. I don't -- I don't recall if anybody was home or not.
>
> Q. What was the next time you saw anybody?
>
> A. I don't recall. All I remember is going home and going into my room and laying on my bed with my cat.
>
> Q. Your mom never came in to say, hey, welcome home or --
>
> A. I don't recall. All I remember is going home, going into my room, closing my door and holding onto my cat crying.
>
> (R. 197, Cond. Transcript P. 104, line 16 through P. 105, line 4).

Her emotional reaction to the act she alleges took place right before she went to her room and cried, again is evidence of knowledge of harm. Finally, after the caffeine pill overdose, Doe told hospital staff she was having problems at school, but although offered, she and her mother declined counseling. This behavior clearly indicates knowledge of harm during and after the events. Additionally, Doe was fifteen years old. She was in high school and was old enough to know right from wrong, and to know that a teacher should not be fondling her vagina in the classroom or forcing her to perform oral sex on him in his car.

Though Doe has refused to answer any questions about her actual feelings at the time, it is illogical for her to say that she was uncomfortable and "froze" while he was touching her in the classroom, and that she went home and cried after the oral sex incident, but that she didn't think it was wrong, or that he was harming her.

However, because Doe was a minor when the alleged injuries occurred, the statute of limitations was tolled until she reached the age of majority. *See* S.C. Code Ann. §15-3-40. Based on her date of birth, May 4, 1973 she would have reached the age of 18 in 1991. She then had three years, or until 1994 to file her action. *See* S.C. Code Ann. §15-3-530 (5). She failed to do so and, therefore, her right to bring an action lapsed in 1994, seven years before §15-3-555 was adopted. For that reason, even if Doe were to allege that §15-3-555 saves her action, it clearly is not applicable. Because she failed to file her action before it lapsed in 1994, the action must be dismissed.

A. THERE IS NO INDEPENDENTLY VERIFIABLE EVIDENCE OF ABUSE TO SUPPORT APPELLANT'S REPRESSED MEMORY ASSERTION.

As her claim is untimely under the statute of limitations, the only way the appellant can get around it is with a claim of repressed memory. Doe claims that at some point after the last alleged abuse incident in 1988 or1989, she involuntarily repressed all memories relating to her life between the ages 15 and 18. At age 18, she picks up recollection, but had no memories from the period of time between ages 15 and 18, until 2007. In 2007, she claims she suddenly started having dreams of Mr. Smith standing over her laughing, and that

those dreams have turned into memories. (R. 206, Cond. Transcript P. 138, lines 10-20). Therefore, she asserts that she is entitled to use 2007 as the date she was first aware of the abuse, and the applicable date for the running of the statute of limitations. This is not supported by the evidence, and the appellant does not meet the required criteria.

In order to prevent cases like this being a battle of the experts, the court added the requirement of objective verifiability. *Moriarty v. Garden Sanctuary Church of God,* 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999), *aff'd by Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000), This places a very high burden on the appellant. The requirements set forth in *Moriarty* include a "proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred." 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). The *Moriarty* court decided that "objective verifiability" is required for the application of the discovery rule. It set forth eight ways to objectively verify the abuse:

> (1) admission by the abuser; or
> (2) a criminal conviction; or
> (3) documented medical history of childhood sexual abuse; or
> (4) contemporaneous records or written statements of the abuser, such as diaries or letters; or
> (5) photographs or recordings of the abuse; or
> (6) an objective eyewitness's account; or
> (7) evidence the abuser had sexually abused others; or
> (8) proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.
>
> *Id.*

Appellant's counsel attempts to argue that this list contains "mere examples," only because the appellant has none of these requirements. At the beginning of this case, the appellant only pointed to the attempted suicide as their "proof of a chain of facts or circumstances."(R. 115, lines 15-20). Now, however, she has removed this allegation, because she knows that by making the suicide attempt the event that points to the abuse, she inevitably loses her argument that she did not have knowledge of harm at the time. (R. 106, line 18 through R. 107, line 4). Now, that argument has disappeared and the appellant has set forth several new attempts: (1) a documented medical history of childhood sexual abuse, (2) contemporaneous statements of the abuser, (3) an unknown chain of facts and circumstances, including classic grooming, (4) Smith's concealment of suicide attempt, and (5) other incidents involving inappropriate conduct by Smith. None of these meets the threshold.

First, there is no documented history of childhood sexual abuse, other than the mentions by the appellant later in life, that it happened. She claims her babysitter forced her to perform oral sex. There have been no documents from doctors or others, *during her childhood*, that have been produced to show abuse, even after her mother was told about it at the time. Additionally, there have been no documents from age fifteen that show or indicate a history of abuse. Second, the appellant has submitted a yearbook entry from Coach Smith. This entry makes no mention of any sexual relationship or abuse by him. He tells her to practice more in order to make the softball team, and to quit arguing so much. He was both her teacher and her coach during that school year. There is nothing unusual about a teacher signing a yearbook. Additionally, there are probably several students from that time frame who were students or athletes on one of his teams, who have similar entries

in their yearbooks. The appellant has not shown any evidence that anything in that entry is sexually related.

Third, the appellant sets forth, generically, "a chain of facts and circumstances, including classic grooming". There is no evidence that in doing things such as giving the appellant a ride home, Smith treated Doe any differently than he treated any other student. He testified that he gave rides to a number of his students and players as did other coaches.(R. 767, Cond. Transcript P. 31, lines 14-24). Fourth, the statement that Smith concealed Doe's suicide attempt is ridiculous. When Doe entered his room and told him she had taken pills, he testified that he yelled down the hallway for someone to get the nurse.(R. 792, Cond. Transcript P. 131, lines 3-12). But for the fact that this occurred over 20 years ago, there would probably be quite a few people who heard that and would remember it. The school nurse came and EMS came to the school, into the classroom and put her on a stretcher and took her to the hospital. (R. 792, Cond. Transcript P. 131, lines 18-20). Mr. Smith did not conceal anything. He reported it to the nurse. Anything the nurse may or may not have done after that is not on Mr. Smith. The appellant has produced no policies or procedures showing that Smith, in February 1989, was required to do anything beyond notifying the nurse.

Finally, the appellant claims "other inappropriate conduct". Only two incidents have arisen in Mr. Smith's career where he was "accused" of inappropriate conduct, and both occurred years after Doe dropped out and left the school. Years after Doe left James Island High School, Mr. Smith caught two students making out in the hallway. When he tried to corral them to the office, they ran in two different directions and he was unable to catch

them. He was reprimanded for not physically holding on to them as he escorted them and told he handled the situation "inappropriately." (R. 773, Cond. Transcript P. 56, line 9 through R. 774, Cond. Transcript P. 58, line 9). Additionally, again, years after Doe left the school, Mr. Smith was teaching a swimming class. During class, a female student lost her top. As Mr. Smith was helping clear the pool so she could find it, she thought he might have looked at her. Mr. Smith was cleared. (R. 812, Cond. Transcript P. 210, line 18 through R. 813, Cond. Transcript P. 213, line 22). Neither of these instances has any bearing on this case.

Even in the light most favorable to the appellant, there is no objectively verifiable evidence to support the application of the discovery rule in 2007.

B. THE APPELLANT HAS NOT MET HER BURDEN OF PROOF WITH REGARD TO EXPERT TESTIMONY.

Though the appellant has managed to find expert witnesses who will testify that she appears to meet the qualifications for repressed memory, neither of her experts can say to a reasonable degree of medical certainty when the memories were repressed or when she recovered them. When asked about the earlier alleged episode of abuse, they could not tell when those memories were allegedly repressed or recovered either. The prior episode of similar abuse (forced oral sex), which Doe also claims was repressed at some unknown point, was recovered, according to her, in the mid 1990's. The experts could not explain why some previously repressed memories of abuse would be recovered in the 1990's and memories of these incidents would not. They can only say that they believe that at some point she

repressed the memories and at some later point, she recovered them. This is not enough to bypass the statute of limitations. The appellant knew at the time of the events what was going on, and that she was being harmed. She was fifteen (15) years old, was getting her drivers license, and going out for a sporting team. She knew right from wrong. Her own testimony, statements to doctors and other written statements show that she claims that at the time he was abusing her, she was fearful, "frozen" and crying. This is evidence of knowledge of harm. Under *Doe v. Crooks,* the appellant does not need to understand the extent of the harm, just the fact of it. 364 SC 349, 613 S.E.2d 536 (2005). Like Doe, the appellant "was aware of the abuse while it was occurring." *Id.* at 537. Because she knew at the time, the statute is only tolled due to her being a juvenile. She is not entitled to any additional tolling, because there is no objectifiable evidence of when she repressed the memories, and no expert testimony regarding the same.

II. THE COURT PROPERLY CONSTRUED THE FACTS IN THE LIGHT MOST FAVORABLE TO THE APPELLANT.

"A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *George v. Fabri*, 345 S.C. 440, 452, 548 S.E. 2d 868, 874 (2001)(quoting Rule 56(c), SCRCP) *accord Trivelas v. South Carolina Dep't. of Transportation,* 348 S.C. 125, 130, 558 S.E. 2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); *see also Tupper v.*

Dorchester County, 326 S.C. 318, 325, 487 S.E. 2d 187, 191 (1997). Summary judgment is appropriate when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986), and "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986).

Appellant argues that the court failed to construe a number of "factual inferences" in the light most favorable to her when considering summary judgment and that if the court had in fact construed such facts in the most favorable light to her, she would have overcome summary judgment. Appellant fails to acknowledge that many of the facts delineated by the court are not "construed" but are in fact, statements from the appellant's own mouth.

The facts the appellant claims were not properly construed are: (1) that her "freezing" and being "uncomfortable" while she was being fondled was evidence of knowledge of harm, but that her "freezing" should instead be construed as showing an act "so shocking" that she could not process it; (2) that the yearbook entry from Smith shows nothing unusual, when Doe claims it shows an "unusual relationship" that included sexual contact; and (3) that the silence with regard to the suicide attempt demonstrates that he did not want any inquiry into their relationship.

With regard to number 3, the appellant has presented absolutely not one shred of evidence that Mr. Smith was "silent" about the suicide attempt of the Appellant. To the contrary, all evidence is that he yelled out from his classroom, and summoned the nurse and

an ambulance who transported the appellant from his classroom to the hospital. (R. 792, Cond. Transcript P. 131, lines 3-24). The court is being asked to disregard the only evidence in the case about this situation. The appellant's testimony was that she didn't remember. Therefore, the only evidence in this case about the suicide attempt at the school, is based on the records, and the records show that Smith contacted someone who called 911. An ambulance came to the school and transported Doe to the hospital.

The second claim, regarding the statement in the yearbook, was not improperly weighed by the trial court. The statement in the yearbook is what it is. On its face, it makes absolutely no mention of any inappropriate relationship between Smith and Doe, and it would be improper for the court to read such into the entry. The court merely ruled that on its face, there is no reference to an inappropriate sexual relationship between the two.

With regard to number 1, while the burden of summary judgment is on the defendants to show that there are no questions of fact for a jury, the appellant has the burden of overcoming the statute of limitations by showing objective verifiability. Therefore, it is the Appellant's burden to show that she had absolutely no knowledge of harm until 2007. The facts stand, as the appellant wrote them in her own statement. Though she did not put them out there until 2007, they are clearly statements of how she felt at the time of the incidents.

In her September 11, 2007, statement to the Sheriff's Office, she wrote, "I remember wanting to die after that happened." (R. 2240, line 18). She also wrote that she was too embarrassed to tell anyone and "I remember thinking that I wanted him to pay for what he had done to me." (R. 2240, line 18). Though in her deposition, she attempts to claim that the feelings she put in her 2007 statements, were how she felt about it in 2007, she clearly writes,

that she is "remembering" things. This indicates that she had the feelings while the incidents were happening, or she would not have them to "remember".

In her December 7, 2007 statement to police, she wrote, "I remember anxiety feeling from being at the stables." (R. 2244, line7-8). She stated that "I remember the anxiety....I remember being scared because of what he did." (R. 2244). As to another incident, she stated, "I remember feeling scared..... I was very scared and did not know what to do." (R. 2244). Finally, in her own words, she says, "I remember being scared....Smith put his right hand up my skirt and moved my underware [sic] and touched my vagina. I froze....I remember ...being very nervous and hoping another student would get up and come to the desk....I remember feeling sick to my stomach and froze until the school bell rang....then remember going into the school bathroom and crying." (R.2245). All of these statements, made personally by the appellant, in her own words, show that she had these feelings at the time of the incident. Her use of the words "remember" and a description of how she felt at the time, are evidence of knowledge of harm in her own words. It was only when her deposition came up, that she then claimed that these were feelings she was having in 2007, not back in 1988 and 1989 during the encounters. The evidence here does not require the court to weigh or construe it. The evidence is the appellant's own words. Her own statements about how she was feeling at the time of these encounters. Encounters that allegedly occurred when she was fifteen years old. Old enough to understand that it was not appropriate for a teacher to touch her vagina in class, or for her to touch his penis in class. While counsel claims that the "'freezing' up illustrates the acts were so shocking to her young psyche that she did not know how to process them...", her own statements show that

she remembers how she felt, and remembers going to the bathroom afterward to cry. She did know they were wrong. She did know she was being harmed. The evidence is clear in the appellant's own words.

The evidence of this case directly contradicts the Appellant's claim that she had no knowledge of harm until 2007. The court properly issued summary judgment to Charles Smith in this matter.

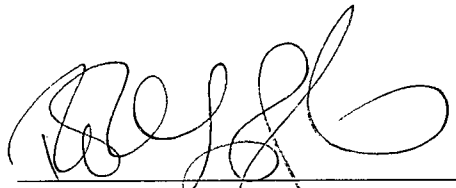
CONCLUSION

For the above set forth reasons, and for any additional arguments on the statute of limitations that are contained in the brief of the James Island High School and Charleston County School District, which Respondent Smith hereby joins in, pursuant to SCAP Rule 208(b)(6), Smith asks this court to affirm the trial court's ruling.

The basis for the appellant's brief are two arguments 1) that she did not fail to meet the statute of limitations; and 2) that the factual allegations were not construed in her favor. Respondent Smith asserts that the evidence is clear that the appellant did not meet her burden of proof, did not show objective verifiability, and failed to file her claim within the applicable statute of limitations. Additionally, the court did properly consider the facts. Therefore, there is no "genuine issue for trial." Respondent Smith respectfully requests this honorable court affirm the decision of the trial court granting summary judgment to him.

{Signature Page Follows}

Respectfully Submitted,



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July 16, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No.: 2010-CP-10-7699

Jane Doe, ...Appellant

v.

Charles Smith, Charleston County School District and James Island High School,. . . . . .Respondents

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **RESPONDENT SMITH'S FINAL BRIEF** has been served upon all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 22nd day of July, 2013, to the following:

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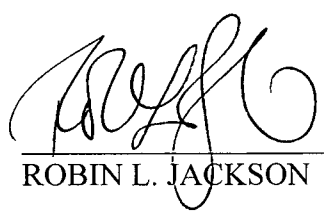

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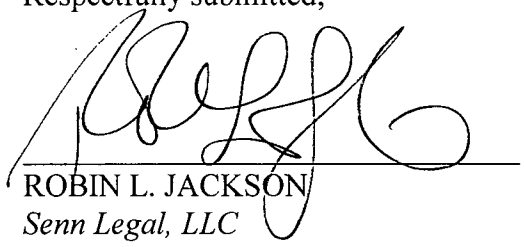
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with the August 13, 2007 Order of the South Carolina Supreme Court.

Respectfully submitted,

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