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. 2013-000084

Jane Doe — Appellant,

v.

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

FINAL BRIEF OF APPELLANT

September 16, 2013

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STATEMENT OF THE CASE

Appellant Jane Doe ("Doe") filed her initial complaint on against Respondents Charles Smith ("Smith"), Charleston County School District ("CCSD") and James Island High School ("JIHS") on November 20, 2007.

The complaint arose out of alleged sexual abuse and other misconduct by Smith during the 1988-89 school year. Smith was Doe's teacher and coach and was employed by CCSD and JIHS at this time. Doe further alleged that she had repressed the memories of the abuse and did not recover them until early 2007.

Doe asserted claims against Smith, CCSD, and JIHS for breach of fiduciary duty and outrage. She further asserted a claim of gross negligence against CCSD and JIHS.

In response to the allegations made by Doe, the Respondents denied the allegations of abuse and put forth the defense that the statute of limitations had run on all of Doe's claims. CCSD and JIHS further defended by asserting the limitations of liability set forth in the South Carolina Tort Claims Act and that no duty was owed to Doe.

Respondents filed motions for summary judgment which were heard on July 23, 2012. On September 10, 2012, the court filed an order granting summary judgment in favor of CCSD and JIHS. The court found that, as a matter of law, CCSD and JIHS do not have a fiduciary relationship with its students and that no duty was owed to its student Doe. The order also incorporated the rationale and analysis regarding the statute of limitations as articulated in the order granting Smith's motion for summary judgment that would be filed two weeks later.

On September 24, 2012, the court filed an order granting Defendant Smith's motion for summary judgment. The basis of the order was that the statute of limitations had run pursuant to S.C. Code Ann §15-3-555 and Doe v. Crooks, 364 SC 349, 613 S.E.2d 536 (2005). The court further found that Doe did not satisfy the requirements of objective verifiability as espoused 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), that intentional infliction of emotional harm and punitive damages are not recoverable under the South Carolina Tort Claims Act.

The court denied the Doe's motions to alter or amend the judgments without a hearing.

FACTUAL BACKGROUND

Respondent Charles Smith ("Smith") was a teacher at James Island High School during the 1988-1989 school year. In the 1988-1989 school year, Jane Doe was a freshman student at James Island High School. Respondent Smith was Jane Doe's teacher and coach at James Island High School.

During the 1988-1989 academic year, Respondent Smith began giving Jane Doe rides home from school and practice. Smith routinely gave students, including Doe rides to their homes in his own personal car from school grounds and from practice. [1] He gave students rides to overnight sports camps and even out of state. Id. He also bought students gifts, interacted socially with students, including Doe, outside of school hours. Id.

[1] *See* Respondent Smith depo tr.. (R. p. 767, pp. 31:14 – R. p. 770, pp. 43:8; R. p. 780, pp. 82-83; R. p. 782, pp. 90 – R. p. 784, pp. 98; R. p. 786, pp. 105-106)

All of this conduct is inappropriate conduct for teachers of James Island High School and Charleston County School District as testified to by the 30(b)(6) representative of James Island High School. *See* James Island High School 30(b)(6) depo pp. (R. p. 907, pp. 49:1-18; pp. 50:1-5, 16-19; R. p. 913, pp. 74:23 - pp. 75:2, 12-14, 25 – pp. 76:13, 24 - R. p. 914, pp. 77:12; *see also James Island Policy Manual R. p. 1348; and whole James Island Policy Manual R. p. 1115-1406*) Moreover, JIHS acknowledges that it is responsible for the supervision of its students during transportation to and from school activities such as softball practice:

> Q. All right. Do you agree with the statement...Students who travel to and from the school on school buses or any trips in connection with school sponsored activities are under school supervision?
>
> A. Yes, I agree.
>
> Q. Okay. You are in charge of the teachers, are you not?
>
> A. Right.
>
> Q. Okay. And if the use of private vehicles was used by a teacher, coach, other staff member, that would be a violation without proper consent of the superintendent or the principal, that would be a violation of the policy, wouldn't it?
>
> A. It would be a violation of this policy right here, yes.

During the 1988-1989 academic year, Respondent Smith began touching Jane Doe in inappropriate and sexual ways in his classroom at James Island High School during school hours and utilized the rides he gave her in his vehicle to begin a series of sexual assaults on the minor child Jane Doe. All of these assaults occurred either on school grounds or resulting from rides given by Smith to Doe from school grounds. He further

travelled with Doe from school grounds to a local horse stable and engaged in sexual contact with Doe.

The assaults caused the minor child Jane Doe such distress that she attempted to commit suicide in Smith's classroom shortly after the end of the school day in February 1989. Emergency Medical Services was called, arrived at James Island High School and paramedics rushed Doe out of the school, into the ambulance, and off to the hospital where her stomach was pumped and her life saved.

School and District policy requires that a student who receives such medical attention would result in an investigation by the school, records created and maintained in the student's file, accommodations provided to the student upon their return, and potentially a referral to the Department of Mental Health with a copy of such a referral kept in the student's file.[2]

However, nobody at the school or the school district investigated the matter, no accommodations were provided to Doe upon her return, no contact was made by the school or the district with Doe's family, no referral made for mental health treatment, and Respondent Smith admittedly did nothing to accommodate Doe, to inform the proper authorities of the incident, or otherwise demonstrate any care for Doe's mental or emotional well being.[3] Moreover, according to Smith, a nurse assisted him in providing emergency medical care for Doe, yet no nurse has been identified by the school, no report made of the incident in Doe's student records, no report of the incident made in Smith's

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[2] *See, e.g.* the deposition testimony of the 30(b)(6) representative of James Island High School and School District policies regarding emergency care.(R. p. 912, pp. 69:10 – pp. 70:7; R. p. 922, pp.109:5 – pp. 111:21; R. p. 1109; *see also* R. p. 1312-1313; R. p. 1329)

[3] *See, e.g.* the deposition testimony of Smith and the 30(b)(6) representative of James Island High School.(R. p. 794, pp. 137:3-24; pp. 139:7 – pp. 140:24; R. p. 796, pp. 147:14-21; R. p. 799, pp.160:15 – R. p. 802, pp. 171:5)

personnel file, and no investigation performed by the School or the District in response to Doe's suicide attempt.

As testified to by the 30(b)(6) representative of James Island High School, the school should have provided accommodations for Doe upon her return to school following her suicide attempt and discouraged her from dropping out of school, neither of which occurred in this case:

> Q. What would you expect the -- what actions would be taken by the school in response to a suicide attempt?
>
> A. Well, certainly if it is happening on campus, school personnel have to first act with the safety of the student in mind, notify medical authorities on the campus, notify law enforcement also for assistance, and notify the parents. And then at the same time, call for emergency help and get -- make sure the student is transported to the closest medical facility as quickly as possible.
>
> Q. Okay. And you would expect to be notified as well, wouldn't you?
>
> A. The principal would be notified right away.
>
> Q. When the student -- let's assume that the suicide attempt was unsuccessful and they lived and that student comes back, what accommodations would you make for that student?
>
> A. ...I can tell you that what we would do would be similar to any student who has had a serious medical situation and is returning to school after either a short or an extended stay from a medical situation.
>
> Q. What types of things are those?
>
> A. The student may qualify for an accommodation plan, a 504 accommodation plan.
>
> Q. What do you mean when you say that?

> A. A 504 is part of 94-142 concerning students with disabilities. You have to assemble and should assemble a team of educators on campus and support personnel, the parents also, the school psychologist to examine if there are any special accommodations that that student will need so that one of the basic life functions -- and education is one of them, are not impacted negatively...So it may be some accommodations in the classroom. A student may require special seating, they may require regular visits to the guidance counselor for school related items.

James Island High School 30(b)(6) depo (R. p. 922, pp. 109:5-20; pp. 110:18 - pp. 111:20; *See Also pp. 112:5 - R. p. 923, pp. 113:13*)

Doe dropped out of high school without any discouragement from Smith, the school, or the school district, without any accommodations provided, and without any questions or concern exhibited for her well-being. Thereafter, Doe, like many sexual abuse victims, struggled in her adult life with sexual dysfunction, mistrust of authority figures resulting in conflict at work and in her personal life, desolation, shame, loneliness, low self esteem, and other physical and psychological manifestations of the trauma suffered at the hands of Respondent Smith and under the watch of James Island High School and the Charleston County School District.[4]

As a result of the unbearable physical and emotional distress, Doe repressed the memories of the abuse at some point prior to her 18th birthday and did not recall any of these memories until her recollection in or around early 2007.

Doe has a documented medical history of childhood sexual abuse,[5] contemporaneous written statements of the abuser (Smith),[6] and a chain of facts and

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[4] *See* Deposition testimony, statement to police, and affidavit of Doe.(R. p. 211, pp.159:13 – pp.160:3; pp. 161:16 - R. p. 212, pp. 162:2; R. p. 241, pp. 7:24 – pp. 8:5; R. p. 242:4-13; R. p. 244, pp. 18:21 – pp. 19:5; R. p. 1407-1413; R. p. 2238-2247;)

[5] *See, e.g.* affidavit of Heidi Zinzow, medical records of Tanya Bolton, MUSC, and others. (R. p. 1414-1416; R. p. 2553-2561; R. p. 2543-2552; R. p. 2562-2566)

[6] *See* a handwritten note from Respondent Smith to Doe from her 1989 James Island High School yearbook. (R. p. 2542)

circumstances, including classic grooming activities from Smith,[7] Smith's concealment of Doe's suicide attempt in his classroom,[8] and other incidents involving inappropriate conduct on Smith's behalf[9] which have sufficient probative force to produce a reasonable inference, in the light most favorable to Doe, that the sexual abuse occurred.[10]

Additionally, the testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia supports the conclusion that Doe was in fact abused, suffered from dissociative amnesia, and did not recall the abuse until 2007, despite recalling abuse by another that had been repressed. One of Doe's expert witnesses, Dr. Timothy Brewerton, testified regarding Doe's suffering and the phenomenon of dissociative amnesia as follows (due to significance of the required expert testimony in cases involving dissociative amnesia, a lengthy excerpt is appropriate for proper understanding of the phenomenon):

> Q. Can you state to a reasonable degree of medical certainty that the symptoms that [Doe] is having now as an adult are solely related to her allegation that Charlie Smith [abused her] when she was 15?
>
> A. Yes.
>
> Q. How?
>
> A. It all -- ... you know, it's something that I've been studying for literally 25 years and I've seen a number of patients with dissociative disorders who have had longer gaps in their periods of life that they don't remember. So it -- you know, the fact that she had earlier traumas actually

[7] *See, e.g.* affidavit of Heidi Zinzow, deposition testimony of the 30(b)(6) representative of James Island High school and the deposition testimony of Respondent Smith. (R. p. 1414-1416; R. p. 905, pp. 43:5 – R. p. 906, pp. 47:22; R. p. 782, pp. 92:11 – R. p. 783, pp. 93:25)

[8] *See* Smith's deposition testimony. (R. p.793, pp. 135:23 – R. p. 794, pp. 137:24; R. p.795, pp. 142:6-17; R. p. 796, pp. 147:14-21)

[9] *See* Smith's deposition testimony and the deposition testimony of the 30(b)(6) representative of James Island High School. (R. p. 905, pp. 43:5 – R. p. 906, pp. 47:22; R. p. 782, pp. 92:11 – R. p. 783, pp. 93:25)

[10] *See* deposition testimony of Rita Avila. (R. p. 376, pp. 76:19 – R. p. 378, pp.81:2; R. p. 384, pp. 107:2 – R. p. 385, pp.112:6)

primed her to have a later period of time of severe amnesia. I mean, she had an earlier --she had dissociation beginning as a child...

Q. How could that earlier abuse affect her state of mind when she didn't have any memory of it at that time?

A. Because it's imprinted in the brain. Dissociation is a survival mechanism. It's a defense mechanism. Its part of how the brain reacts to overwhelming stress and it alters the course of brain development. And it's a protective mechanism. So that ability to dissociate was triggered and once it's triggered, it kind of sticks around, that propensity continues on into adulthood

The propensity to dissociate is a genetically determined quality. It's part of our personality and it's also much -- we know this from twin studies, there's kind of a bi-mobile distribution, there are high dissociators and low dissociators that run in families and then when you add overwhelming abuse or stress earlier in childhood when there is a propensity toward dissociation, that person maintains that propensity up into and through adulthood.

So the fact that she had these earlier experiences that caused her to block out these memories, which had a protective affect, which allowed her to feel okay at times, it's not gone, it's just hidden. But that propensity is still there when another serious trauma comes along. She -- you know, it worked before in terms of a protective mechanism, it's going to be relied on again as a protective mechanism...

Q. Okay. So the sexual abuse and the physical abuse and the violent home all contributed to her having a 10 to 13 years amnesic period?

A. Yes. Yes.

Q. That she didn't recover until 1996?

A. That is certainly possible, yes.

Q. Okay. And then that made her more prone to develop dissociation after the abuse she alleges at age 15? [by Smith]

A. Exactly.

Q. And that period of amnesia ended at age 18, approximately –

A. In part....She still had partial amnesia, yes, she did, for that event [Smith's abuse]...And that's the way memory recovery happens. It's just not all in one big fell swoop, it's piecemeal. It's fragmented. That's the nature of dissociation. It's the failure to integrate the experience and when it comes back, it comes back in a fragmentary way. That's very typical.

Q. At what point after the event does the person have to dissociate from that memory in order to qualify for dissociative amnesia?

A. There's no -- there's no definitive point. It -- in some ways it a judgment call, but when you're talking about years of someone's life, big huge chunks, that's obviously abnormal. You know, people without this may not -- nobody remembers everything. Very, very few people remember everything in their lives, but they can generally know what schools they went to, who their teachers were. They can have a kind of stream, you know, a sequence of events that they can have certain -- they can point out certain facts in their life in that sequence. But with people with dissociative amnesia, they're unable to recall even some of the most neutral factual information. And so it's all kind of relative, you know. The bigger the gap, the more obvious it is.

Q. Okay. So if she had a recall of the events with Charlie Smith and we've got several of them, at least five -- up until her suicide attempt and then after the suicide attempt when she survived, is it possible that she disassociated at that point from those memories?

A. Yeah. You know, you're thinking of it as a one point in time and it's more like a process, rather than one distinct event in time.

Q. Okay.

A. You know, this was an extremely stressful overwhelming time for Michelle. You know, she -- it's not clear what exactly caused her to take the pills, you know, at the school. Something triggered her, chances are at school.

Q. And Charlie Smith was at school, correct?

A. Yes. Yes. Absolutely.

Q. Okay.

A. And then to -- and it's the whole thing, and not to disclose and have the shame of doing this in front of all of her classmates and then coming back and just being so mortified. I mean, it's the whole context –

Q. Okay.

A. -- of the situation that led to the need to disclaim it, to forget about, you know, let me out of here. And that led to her dropping out of school and it's that whole process. So no one can say, oh, it was this time, this minute on this day that dissociation began. It doesn't work that way...

You know and she didn't realize cognitively what happened to her. You have to take her psychology into consideration, her experiences before, the context. You know, she'd already had -- you know, she had very negative experiences with authority figures, father figures. She said in her testimony and told me, as well, that she really looked up to this guy. She needed a father figure. She needed someone to be a positive role model for her. She looked up to him. He betrayed her. He betrayed her trust. She was -- she thought that he was someone that she could trust and it wasn't going to be a repetition of her father experiences, but he wasn't. And you know, one of the things that happens in kids is that they freeze. They just kind of freeze. They're so frightened. She'd already had -- she'd already been primed to be scared to death of authority, particularly male authority by her family experiences. All right. And this guy comes along and he's nice to her, he gives her attention, you know, he pretends to care about her. There's an attraction, perhaps an attraction at multiple levels, okay. Just getting that attention. It's something that she wasn't used to. That, of course, you're going to like, you know. And he fooled her like a good perpetrator would. He groomed her. He led her to believe that he really cared about her, okay.

Q. Okay.

A. And then sex, she didn't know what sex was. It's completely new experience. Is this love, is this abuse. Kids at her age, particularly her age, she was an immature fifteen-year-old. Never had sex in her life except abusive sex by a female. So it's confusing, completely, you don't know what to think. You know, you're not thinking clearly, someone in that situation.

Q. Okay. So there's no way to say exactly when it started --

A. Correct...

Brewerton depo (R. p. 614, pp. 42:13 – pp. 43:7; R. p. 615, pp. 46:14 – pp. 47:20; pp. 48:18 – pp. 49:5, 18-19, 24 – R. p. 616, pp. 50:4; *Also see pp. 52:16 – pp. 53:4*; R. p 624, pp. 84:4 – R. p. 625, pp. 86:7; *Also see pp. 88:17-23*; pp. 88:24 – R. p. 626, pp. 90:13; pp. 92:23-25; *Also see R. p. 627, pp. 96:1 – pp. 97:14.*)

Respondent's expert witness on the phenomenon of dissociative amnesia, Dr. Layton McCurdy, confirmed the existence of the disorder and that he could not state that Doe had recovered the memories of the abuse prior to 2007, testifying as follows:

Q Okay. But you are aware of some cases of sexual trauma in childhood being repressed...?

A I think -- it's my opinion that there are some childhood sexual abuses that are repressed for a time until that child grows and matures a bit more.

Q Okay. And that period of time is not a fixed period of time. It can be short for one, longer for another person?

A That's right...

Q Okay. Now, if I understand your earlier testimony, you are of the opinion that dissociative amnesia exists, that it is a diagnosable illness in certain circumstances?

A I'm almost certain of that...

Q Okay. Do you agree that disassociation is more common in childhood trauma victims than adult trauma victims?

A Yes.

Q And is that because their mental process is not as fully developed as an adult?

A I think that's it. But again, I'm not completely sure.

Q And the ability to cope with traumatic events at a younger age is not -- a person is not as fully equipped to deal with a traumatic event at age 4 as age 40?

A I would agree with that.

Q Okay. So then that -- would you agree that it's more likely for a child victim of trauma to disassociate those memories than it would be as an adult victim of trauma?

A Yes.

Q It's a stretch to say that a child who's had her -- had the trust violated by those with authority and control over her, it's a stretch for 19 you to say that that child going into her adolescence and adult years would have conflict with people in similar positions of authority and trust?

A I can see that, and I can also see, as I read her life history, also see that she had -- she witnessed a physical abuse by two stepfathers.

Q Right.

A She witnessed her mother being raped by one of these people.

Q. Right.

A She was abused by a child -- a baby-sitter as a younger child. Hers was not a smooth life, and those events happened to her well before she was age 15.

Q And is it your -- it's your opinion that those events did not contribute to her susceptibility to abuse?

A ..Did they contribute to her -- to her incidents of abuse is the question. Did that make her more vulnerable to someone she trusted like Charles Smith? I think that could

be argued that -- that having a trusting adult might make you more vulnerable to that person.

Q All right. And then –

A Especially when you have had this background of adults that didn't seem very trustworthy, at least in reading the record.

Q Sure. And then to have that -- to get to that point and to have that person who's in a trust and authoritative position, to violate that trust in a sexual way, would then also contribute to the subsequent issues in her life?

A I would say.

Q -- are you aware or do you have an opinion on whether or not a person is predisposed to disassociate traumatic memories?

A ...I can see how that person -- one person might be more vulnerable than another, yeah.

Q And if a person is susceptible or predisposed to disassociation of traumatic events, could it then also be possible that that same person is susceptible or has a propensity -- well, is susceptible to subsequent disassociation of traumatic events? What I mean is if the person is predisposed to disassociate –

A Right.

Q -- assuming that that's the case, and the person is predisposed to disassociate --

A Yeah.

Q -- then they also would be more likely to disassociate on more than one occasion?

A Uh-huh. Yes.

Q Okay. And in reviewing the records, did you find any evidence of hypnosis or suggested memory, false memories that have been implanted in any kind of way?

A I did not.

Q. Okay. And this is just for clarification on what we have been talking about. Is there anything in her, [Doe's] records, or any of the testimony that you can point to that says she recalled these memories prior to 2007?

A No.

Q Okay. That's what I wanted to ask you about. Knowing that it happens, okay? Some people can't -- they just can't function, and they -- in order to cope, the brain on an automatic subconscious level, just kind of pushes it down somewhere in the memory bank to such a degree that it's not in their conscious awareness. Okay? You agree that that happens, and it can happen?

A I will agree that it can happen.

Q Okay. Now, assuming that that can happen, how do we know that there are not incidents of people who go their entire lives without recovering that memory?

A There just has been no case history of that.

Q But there wouldn't be one, would there?

A If they went their entire life, perhaps they would -- it would never -- they would die with that secret.

Q And nobody would –

A There are people who die with secrets. That's a fact.

Q Sure.

A And those secrets could be abuse secrets. Are they gone from -- are they amnestic for those abuse secrets? We don't know the answer to that.

Q Possibly, possibly not.

A Possibly so.

Q But my point is that it -- a person could go their entire life without other people knowing what happened, correct?

A Yeah.

Q And, in fact, assuming that the dissociative amnesia is real and happens so that it's not in that individual's conscious awareness, that person could actually go their entire life without knowing?

A Okay. Yes. I would agree.

McCurdy depo (R. p. 852, pp. 50:4-14; R. p. 853, pp. 55:21-25; R. p. 855, pp. 63:10-22; pp. 64: 11-15; R. p. 857, pp. 71:16 – pp. 72:13, 16 – R. p. 858, pp. 73:6; pp. 74:25 – pp. 75:2, 7 – pp. 76:1; R. p. 859, pp. 80:8-12; R. p. 860, pp. 83:15-20; R. p. 873, pp. 136:23 – R. p. 874, pp. 138:14.)

ARGUMENT

I. THE COURT DID NOT CONSTRUE THE FACTS IN THE LIGHT MOST FAVORABLE TO DOE.

Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law. Bates v. City of Columbia, 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990). In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in the nonmoving party's favor and the nonmoving party must be accorded the benefit of all favorable inferences that might reasonably be drawn from the record. Id; Grooms v. Marlboro County Sch. Dist., 307 S.C. 310, 312 (Ct. App. 1992). It is a matter for the jury to consider the weight to be given the testimony. Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 36 (Ct. App. 1994).

In its order granting summary judgment to the Respondents on the issue of the statute of limitations, the court based its analysis on many factual inferences drawn in favor of the Respondents rather than Doe.

For example, in the Order granting summary judgment for Smith, the court states that the alleged circumstances would have put a person of common knowledge and experience on notice some right of Doe's had been invaded. In support of this conclusion, the court cites deposition testimony of Doe and concludes that "this testimony is *evidence* that [Doe] knew at the time the situation was allegedly going on, that she was being harmed." Smith Summary Judgment Order, (R. p. 23-24) (emphasis added). Even if this were evidence of such knowledge, this testimony is taken out of context as Doe was testifying as to what she had remembered about the abuse since her recollection first began in 2007, not what she remembered as a child. In fact, the court acknowledges that Doe could not answer any questions about her feelings at the time of the abuse because she still could not remember them. Smith Summary Judgment Order, (R. p. 24).

The court further states that it was not reasonable for Doe to testify that she was uncomfortable and "froze" while Smith was touching her in the classroom but that she did not think it was wrong or that Smith was harming her. Smith Summary Judgment Order, (R. p. 24-25). Again, this testimony is taken out of context as Doe was testifying as to what she had remembered about the abuse since her recollection first began in 2007, not what she remembered as a child. She has steadfastly asserted that she had absolutely no recollection of the abuse until early 2007. In any event, the reasonableness of the reaction of a child victim to sexual abuse by a trusted adult like Smith is clearly a question to be determined by a jury. The factual inference to be drawn at the summary judgment stage is that Doe's "freezing" up illustrates that the acts were so shocking to her

young psyche that she did not know how to process them, leading to the repression of the memories of the abuse.

The court goes on and concludes that a yearbook entry from Smith in Doe's yearbook shows nothing unusual and that Smith's handling of Doe's attempted suicide was proper. Smith Summary Judgment Order, (R. p. 26 -27). These are conclusions to be made by a fact finder, not to be summarily decided by the court. A jury could reasonably conclude that the yearbook entry confirms an unusual relationship existed between Doe and Smith that included inappropriate sexual contact and that his silence with respect to the suicide attempt demonstrates that he did not want any inquiry into their relationship.

II. THE STATUTE OF LIMITATIONS WAS TOLLED DURING DOE'S PERIOD OF REPRESSION.

Generally, a cause of action accrues at the time of the injury. Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998). However, the statue of limitations is tolled during until a minor reaches the age of maturity, eighteen. S.C. Code Ann § 15-3-40. Moreover, the discovery rule tolls the statute of limitations during the period a victim psychologically represses her memory of sexual abuse. Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999); S.C. Code Ann. § 15-3-535.

Does such as Doe in this case do not suffer from statutory limitations on filing and action where circumstances prevent them from knowing they have been harmed. Moriarty, 334 S.C. 162 (Ct. App. 1999). Survivors of sexual abuse who repress their memories of sexual abuse and then recover them many years later -- when they are finally able to confront them – would otherwise be effectively blocked from seeking legal redress for their injuries by traditional statutes of limitations, which typically commence

when the wrong is committed. These statutes, such as those relied upon by the Respondents in their motions for summary judgment, traditionally provide no legal action can be maintained unless brought within a specified period of time. However, in cases such as this one involving repressed memory, the victim is unaware of the wrongful event until well after the statute of limitations has expired.

In response to such cases, South Carolina has applied the discovery rule to prevent the injustice which would result from the strict application of the statute of limitations. *See* Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999). The Respondents acknowledge this is a case of alleged repressed memory of childhood sexual abuse and that Doe does not claim merely that she did not realize the full extent of her injuries and, as such, this case is distinguishable from Doe v. Crooks, 364 S.C. 349, 613 S.E.2d 536 (2005), which is relied upon heavily by the court in its in order granting summary judgment on the issue of the statute of limitations.

In Doe, the plaintiff was aware that as a child he had been sexually abused by his father for a number of years, however, it was not until many years later that he learned the extent of his injuries. The Supreme Court held that S.C. Code Ann. Section 15-3-40(1) (Supp. 1991) tolls the statute until Doe reaches majority; however, because Doe did not involve allegations of repressed memory, the Court held the action was barred.

Here, Doe claims that she was abused and otherwise harmed by the Respondents while she was a minor, repressed those memories before she reached the age of majority, and did not recover them until early 2007. When viewing the facts in the light most favorable to Doe, this case was filed within 1 year of recollection of the abuse from Smith - the trigger of the statute of limitations in repressed memory cases, well within the

3 year statute of limitations provided by the discovery rule. *See* S.C. Code Ann. § 15-3-535; Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999). Accordingly, the Respondents motions should be denied.

a. THERE IS SUFFICIENT INDEPENDENTLY VERFIABLE EVIDENCE OF ABUSE.

"Objective verifiability" is required for the application of the discovery rule in cases of repressed memory. Moriarty, 334 S.C. 150, 171 (Ct. App. 1999).

The element of "objective verifiability" may be satisfied by corroborating evidence, for example:

> (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.

It is important to note that these are merely examples of corroborating evidence that would satisfy the objective verifiability standard. They are not elements of objective verifiability. Here, Doe has a documented medical history of childhood sexual abuse,[11]

[11] *See, e.g.* affidavit of Heidi Zinzow, medical records of Tanya Bolton, MUSC, and others. (R. p. 1414-1416; R. p. 2553-2561; R. p. 2543-2552; R.. p. 2562-2566)

contemporaneous written statements of the abuser (Smith),[12] and a chain of facts and circumstances - including classic grooming activities from Smith,[13] Smith's concealment of Doe's suicide attempt in his classroom,[14] and other incidents involving inappropriate conduct on Smith's behalf[15] which have sufficient probative force to produce a reasonable inference, in the light most favorable to Doe, that the sexual abuse occurred.[16]

The court however, held that Doe was required to present medical records from the time she was abused to show a documented medical history of abuse. Smith Summary Judgment Order, (R. p. 26). Doe presented no such records because she did not recall the events of abuse until 2007. She therefore did not seek treatment until that time. All of the post 2007 medical records from her providers indicate that she was abused sexually by her teacher, Smith. Moreover, the chain of facts and circumstances regarding the grooming behavior of Smith with Doe can reasonably be inferred that the abuse did occur.

Additionally, the testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia, discussed more fully above, supports the conclusion that Doe was in fact abused and in fact suffered from dissociative amnesia. Ultimately the issue of whether and when Doe repressed her memories and when she recovered them are

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[12] *See, e.g.* a handwritten note from Respondent Smith to Doe from her 1989 James Island High School yearbook. (R .p. 2542)

[13] *See, e.g.* affidavit of Heidi Zinzow, deposition testimony of the 30(b)(6) representative of James Island High school, and the deposition testimony of Respondent Smith. (R. p. 1414-1416; R. p. 905, pp. 43:5 – R. p. 907, pp. 50:22; R. p. 782, pp. 92:11 – R. p. 783, pp. 93:25; R. p. 786, pp. 105-108)

[14] *See* Smith's deposition testimony. (R. p.793, pp. 135:23 – p.795, pp.143:25; R. p. 796, pp. 147:14-21)

[15] *See* Smith's deposition testimony and the deposition testimony of the 30(b)(6) representative of James Island High School. (R. 767, pp.31 – R. p. 770, pp.43; R. p. 780, pp. 82-83; R. 782, pp. 90 – R. 784, pp.98; R. p. 810, pp. 202:21 – pp. 203:17; R. p. 811, pp. 208: - R. 813, pp. 213:13, R. p. 903, pp. 36:21 – R. p. 904, pp.38:19; R. p. 905, pp.43:5 – R. p.906, pp.47:22)

[16] *See* deposition testimony of Rita Avila. (R. p. 376, pp. 76:19 – R. p. 378, pp.81:2; R. p. 384, pp. 107:2 – R. p. 385, pp.112:6)

questions of fact to be determined by the jury. Moriarty, 334 S.C. 150 (Ct. App. 1999). Accordingly, the Respondents' motions should be denied.

III. THE RESPONDENTS OWED A DUTY OF CARE TO DOE.

a. Gross Negligence.

The Respondents in this case would be liable to Doe for her loss when their responsibility to supervise or control Smith or otherwise protect its student, Doe, is exercised in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25); Grooms v. Marlboro County Sch. Dist., 307 S.C. 310, 313 (Ct. App. 1992). Whether in fact the loss resulted from the Respondent's alleged grossly negligent conduct is for the jury to determine. Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (S.C. Ct. App. 1992); Duncan v. Hampton County Sch. Dist. 2, 335 S.C. 535, 545-546 (Ct. App. 1999).

The South Carolina Supreme Court has defined gross negligence as "the failure to exercise slight care" and "the absence of care that is necessary under the circumstances." Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490 (1993). South Carolina law is clear that the Respondents are liable to its students for a loss when their responsibility to supervise, protect, or otherwise control one of its teachers was exercised in a grossly negligent manner under S.C. Code Ann. § 15-78-60(25); Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (Ct. App. 1992). Whether in fact the loss resulted from the Respondent's alleged grossly negligent conduct is for the jury to determine. Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (S.C. Ct. App. 1992); Duncan v. Hampton County Sch. Dist. 2, 335 S.C. 535, 545-546 (Ct. App. 1999).

Moreover, "the burden of establishing this limitation upon liability is upon the governmental entity asserting it as an affirmative defense." Doe by Roe v. Orangeburg

County Sch. Dist. No. 2, 329 S.C. 221, 223-224 (Ct. App. 1997) *citing* Rakestraw v. South Carolina Dep't of Hwys. & Pub. Trans., 323 S.C. 227, 230-31, 473 S.E.2d 890, 892 (Ct. App. 1996); Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430 (S.C. 1994)("The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.").

Respondent CCDS and JIHS assert, and the trial court found, that no duty existed between the school and its student, Doe, because the school was not aware of Smith's activities with Redden. CCSD/JIHS Order (pp. 8-15).

Here, the reasonable inference drawn from the testimony and evidence at this stage is that Respondent Smith routinely and repeatedly violated school policy in the discharge of his duties as a teacher and that both James Island High School and the Charleston County School District did absolutely nothing to enforce these policies, nothing to ensure that they were being followed, and nothing to document Smith's violations of policy in his personnel file so that appropriate action could be taken. Doe claims focus on the Respondent's alleged gross negligence in supervising its teacher, Smith, and protecting its student, Doe.

Under these factual circumstances, whether School District exercised "slight care" in never once noticing that Smith was giving student's rides in his car and utilizing that vehicle to sexually abuse Doe, never once making no effort to offer guidance, accommodation, or other support to Doe when she attempted suicide on school grounds, and otherwise completely failing to ensure its teacher, Smith, adhered to policies designed to protect the students, including Doe, is a question for the jury. Furthermore, it

is for the jury to determine whether these failures constituted gross negligence and whether Doe's injuries were proximately caused by such gross negligence. Accordingly, the Respondents' motions should be denied.

b. Scope of Employment.

Respondent CCDS and JIHS also assert, and the trial court found, that no duty existed between the school and its student, Doe, because acts of abuse are outside the scope of employment as a matter of law. CCSD/JIHS Order (R. p. 15-16).

"The terms 'course of employment' and 'scope of authority' are not susceptible of accurate definition. What acts are within the scope of employment can be determined by no fixed rule. The authority from the master is generally to be gathered from all the surrounding and attendant circumstances." Adams v. South Carolina Power Co., 200 S.C. 438, 441 (S.C. 1942).

Under South Carolina law, it is not necessary to find the particular act creating liability was within the servant's authority. Nor is it necessary that the assault should have been made as a means or for the purpose of performing the work the servant was employed to do. Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986); Carr v. William C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946); Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947).

The proper inquiry is "if the servant is doing ***some*** act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115-116 (S.C. Ct. App. 1986) (emphasis added); Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d at 798-799, (S.C. 1945) *quoting* Cantrell v. Claussen's Bakery, 172 S.C. 490,

494, 174 S.E. 438, 440 (1934). 288 S.C. at 115-116, 341 S.E.2d at 387 (citations omitted); *accord* S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 246 (S.C. 1991).

"The reason which has supported the principle of respondeat superior, based upon the judicial interpretation and declaration of public policy, is that the principal, selecting his agent and directing the manner in which he shall execute the agency, should in justice to third persons with whom the agent may deal, and who are not responsible either for his selection or conduct, be held liable for his torts." Jones v. Elbert, 211 S.C. 553, 558 (S.C. 1945) *citing* Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 208.

Under South Carolina law - which takes a decidedly broad view of acts in furtherance of the master's business[17] - it is irrelevant if Smith may have taken actions that were outside of the technical scope of his authority as a teacher. If Smith is doing ***some*** act in furtherance of James Island High School or the Charleston County School District with Doe, he must be regarded as acting within the scope of his employment, even if he exceeds his technical authority in doing so. *See* Crittenden, Jones *supra.*

The Respondents claim that Smith was not acting within the scope of his employment while assaulting Doe. However, Smith clearly was acting within the scope of his employment when he taught and coached Doe, both on school grounds and during extracurricular activities. Smith routinely would take Doe in his car from school to

[17] South Carolina routinely holds that employers can properly be found vicariously liable for the intentional torts of their employees. *See* Berkeley - Dorchester Counties Econ. Dev. Corp. v. United States HHS, 395 F. Supp. 2d 317, 323 (D.S.C. 2005) (civil conspiracy and slander within scope of employment); Polatty v. Char, 67 S.C. 391, 395 (S.C. 1903) (assault and battery within scope despite lack of express authorization by principal); Jamison v. Howard, 271 S.C. 385, 388 (S.C. 1978) (assault within the scope of employment even when the employee exceeded his authority and acted contrary to the express orders of the employer); Crittenden v. Thompson-Walker Co., 288 S.C. 112, 116 (S.C. Ct. App. 1986) (assault and battery); Murphy v. Jefferson Pilot Communs. Co., 364 S.C. 453, 462 (S.C. Ct. App. 2005) (defamation); Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001) (defamation); S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 247 (S.C. 1991) (defamation).

practice and to her home. According to the Respondents, this conduct was not only within the scope of his employment but common place at the time. The Respondents' knew or should have known of Smith's trips with Doe and others, yet did not to prevent this from happening, did nothing to warn Smith or Doe that this was inappropriate conduct, and did nothing to otherwise take any reasonable measure to protect Doe. While the assaults themselves may or may not have been technically outside the scope of his employment, the conduct of transporting Doe to and from school to practice and to her home apparently fell squarely within his employment duties. Accordingly, Smith was performing at least *some* act in furtherance of the school and the district's business, and whether or not the Respondent's are responsible for the resulting harm is a proximate causation question to be determined by the jury.

Moreover, Smith's conduct with respect to Doe's attempted suicide was clearly within the scope of his duties as a teacher. The emergency medical care of a student and the following actions to be undertaken by the teacher, the school, and the school district are all actions, independent of any acts sexual abuse, which are within Smith's scope of employment.[18] The question of whether or not Doe's resulting drop out was a proximate

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[18] For these reasons, the analysis set forth in Degenhart v. Knights of Columbus, 309 S.C. 114 (1992), Moore v. Berkeley County School District, 326 S.C. 584 (1997), and Brockington v. Pee Dee Mental Health Center, 315 S.C. 214 (1993), all of which apply to an employer's duty with respect to employee conduct that is outside the scope of employment, is not applicable. To the extent Smith was taking any action in furtherance of the school's business by giving rides and tending to Doe after her suicide attempt, the question becomes one for the jury.

To the extent Smith was acting outside the scope of his employment by taking Doe for rides in his car and tending to Doe after her suicide attempt, the ruling by the trial court barring the claims of outrage and for punitive damages against Smith are in error because those limitations on liability apply only to employees acting within the scope of their employment.

The record and evidence supports the inference be drawn in Doe's favor insofar as genuine issues of material fact exist as to what the actual scope of Smith's employment, how exactly Smith exceeded the scope of his employment, and whether Smith's conduct within the scope of his employment contributed in whole or in part to her injuries.

cause of the failure of Smith, the school, and/or the district failure to exercise even slight care owed to Doe arising out of her suicide attempt is a question for the jury to determine. At this stage of the proceedings, all reasonable inferences must be drawn in the light most favorable to Doe.

Clearly, Smith was doing at least *some* act in furtherance of the school and the districts business during his travels with Doe. Even if Smith was acting without the express authorization of the school or the district, which is most properly reserved for determination by a jury, his activities with Doe were not so wholly disconnected from the business of the school and the district such that he was acting outside the scope of his employment as a matter of law. This question remains a fact question to be determined by the jury. Accordingly, the Respondents' motions must be denied.

CONCLUSION

For the foregoing reasons, the orders granting summary judgment in favor of the Respondents should be reversed and the case set for a jury trial.

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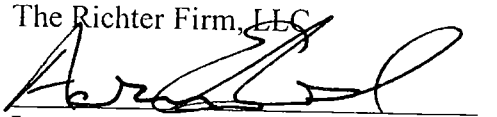

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9/16, 2013
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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RESPONDENT SMITH'S FINAL BRIEF

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2. WHETHER THE COURT PROPERLY EVALUATED THE FACTS SET FORTH IN THIS MATTER.

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

---

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.

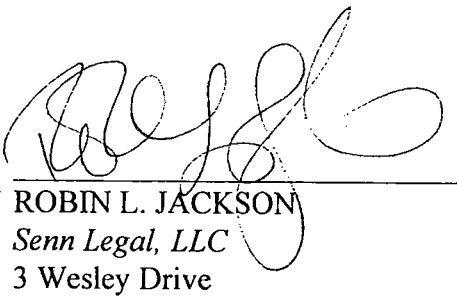
CONCLUSION

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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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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July 16, 2013
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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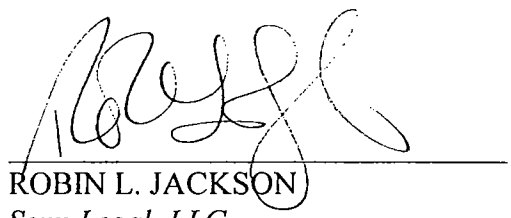
District and James Island High School,. . . . . .Respondents

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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THE STATE OF SOUTH CAROLINA
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v.

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Respondents.

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INTRODUCTION

In this lawsuit, the Appellant, Jane Doe ("Doe"), is suing the Respondents, Charles Smith ("Smith"), Charleston County School District (the "School District"), and James Island High School (the "High School") (collectively, the School District and the High School will be referred to herein as the "Respondents"[1]), for causes of action arising out of Smith's alleged sexual assault of Doe on a number of occasions during the 1988-1989 school year while Doe was a freshman at the High School and Smith was Doe's teacher and softball coach. Specifically, the causes of action Doe has pleaded against the Respondents are breach of fiduciary duty, intentional infliction of emotional distress (outrage), and gross negligence. Doe commenced this action in November of 2007, claiming that she had repressed any memory of the alleged assaults until earlier that year, and therefore her suit was not barred by the applicable statute of limitations.

After sufficient discovery, and upon due notice and opportunity for Doe to be heard in opposition, the Respondents successfully moved for summary judgment, with the circuit court setting forth its decision in two extensive orders.

As an initial matter, in evaluating Doe's appellate challenge to the

[1] Smith is represented by separate counsel.

circuit court's grant of summary judgment in favor of the Respondents, it is important to note that, to upset the presumptive validity of the circuit court's ruling, as to each cause of action upon which the circuit court has granted summary judgment in favor of the Respondents, Doe has the affirmative obligation to present argument/analysis sufficient to show reversible error as to all of the independent grounds supporting the circuit court's decision. *See* McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error). Respectfully, Doe has not met this burden, and has not presented argument/analysis in her principal brief sufficient to upset the circuit court's summary judgment on appeal.

Moreover, the circuit court's summary judgment should stand on its merits. The circuit court properly exercised its discretion to find that all of Doe's claims against the Respondents—both entities covered under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -220 ("SCTCA")—fail substantively and because they are barred by the applicable statute of limitations.

Respectfully, the circuit court's grant of summary judgment in favor of the Respondents should be affirmed. Doe's appellate challenge is

insufficient to undermine it, and the record amply supports it.

RESPONDENTS' STATEMENT OF THE ISSUES ON APPEAL

I. **Did the circuit court properly grant summary judgment in favor of the High School as to all of the Appellant's causes of action against it because it did not exist as a separate legal entity during the relevant time period (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?**

II. **Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for breach of fiduciary duty (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?**

III. **Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for intentional infliction of emotional distress/outrage (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?**

IV. **Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for gross negligence (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?**

V. **Did the circuit court properly granted summary judgment in favor of the Respondents as to all of the Appellant's causes of action because they are barred by the applicable statute of limitations (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?**

RESPONDENTS' STATEMENT OF THE CASE

Doe commenced this action against Smith and the School District on

November 20, 2007, filing a summons and complaint in Charleston County Circuit Court alleging causes of action arising out of (her former teacher and softball coach) Smith's alleged sexual assault of Doe on a number of occasions during the 1988-1989 school year while she was a student at the High School. By amendment, Doe later added the High School as a defendant.

After the case was struck from the docket and thereafter restored pursuant to Rule 40(j), SCRCP, it was given the (2010) case number reflected in the above caption. Upon restoration of the case, Doe filed a second amended complaint—her operative complaint—alleging the following causes of action: breach of fiduciary duty (against all defendants), gross negligence (against the Respondents), and intentional infliction of emotional distress/outrage (against all defendants). (R. pp. 64-72.)

At all appropriate times, the Respondents pleaded or otherwise responded to Doe's complaints, denying their material allegations, and setting up a number of affirmative defenses.

After a period of discovery, the Respondents (as well as Smith) moved for summary judgment. (R. pp. 1423-1426.) The motions for summary judgment were heard by the Honorable W. Jeffrey Young on July 23, 2012.

On September 10, 2012, Judge Young entered an order granting summary judgment in favor of the Respondents. (R. pp. 1-17.) On September 24, 2012, Judge Young entered an order granting summary judgment in favor of Smith. (R. pp. 18-29.) Judge Young expressly incorporated the reasoning and authority in his (September 24, 2012) order granting summary judgment in favor of Smith on the basis of the statute of limitations into and in support of his (September 10, 2012) order granting summary judgment to the Respondents. (R. pp. 5-6.)

By orders entered on December 13 and 27, 2012, Judge Young denied Doe's motions to reconsider with respect to the summary judgments granted Smith and the Respondents, respectively. (R. pp. 30-31.) This appeal followed.

STATEMENT OF FACTS[2]

Doe's lawsuit is based on events that allegedly occurred nearly two decades before she filed suit in 2007.[3] She alleges that her former teacher and softball coach, Smith, sexually assaulted her on a number of occasions during the 1988-1989 school year when she was a freshman at the School District's high school on James Island, i.e., the High School. (R. pp. 64-72.)

[2] Additional facts will be included, where pertinent, in the argument below.

[3] Both the superintendent of the School District and the principal of the High School at the time that the abuse allegedly occurred are now deceased.

In the 1988-1989 school year, the High School was part of the School District's system and did not exist as a separate legal entity. (R. p. 908 (Depo. p. 53, line 1 – p. 55, line 2).) The High School was created in 2003 as an entity separate from the School District. (R. p. 919 (Depo. p. 100, lines 11-24).)

Doe identifies a total of five instances of sexual assault by Smith: three instances where Smith allegedly brushed or touched her inappropriately in his classroom, and two instances occurring off school grounds when Smith took her home from softball practice. (R. p. 193 (Depo. p. 88, lines 10-23); R. p. 194 (Depo. p. 91, lines 4-6); R. p. 195 (Depo. p. 95, lines 1 – p. 97, line 22); R. p. 196 (Depo. p. 100, line 1 – p. 101, line 20).) Doe cannot specifically identify when each of the alleged instances occurred, or in what order they occurred. She alleges that the assaults took place at some point between the beginning of the school year in September of 1988 and February 12, 1989, when she alleges that she attempted to commit suicide by taking Vivarin caffeine pills. (R. p. 195 (Depo. p. 95, line 19 – p. 96, line 25); R. p. 199 (Depo p. 110, lines 4-25).) According to Doe, her suicide attempt was motivated by distress caused by Smith's sexual assaults. (App's Br. p. 4.) Doe has identified no other incidents of sexual assault after February 12, 1989.

Doe admits that she did not tell anyone about the alleged sexual assaults until 2007. (R. p. 248 (Depo. p. 35, lines 2-17).) She admits that she did not report the alleged instances to anyone at the High School and did not tell any friends or parents. (R. p. 248 (Depo. p. 35, lines 2-17).) Her mother admits that she knew that Smith gave Doe rides home from softball practice and did not complain to anyone at the High School about Smith or otherwise have a problem with it and had no suspicions of Smith prior to 2007. (R. p. 1681, lines 1-23; R. p. 1698, lines 1-16.)

At the time, it was not uncommon for coaches to give rides to students if they had no way home after practice. (R. p. 1685, lines 1-24 (Mr. Shaddrix was a football coach at the High School during the 1988-1989 school year); R. p. 1688, lines 7-25 (Dr. Dilligard served as the Deputy Superintendent for the District during the 1988-89 school year); (R. p. 1691, lines 3-24 (Dr. Shealy was the assistant principal at the High School during the 1988-89 school year).)

There are no former students, teachers, employees, or any other witnesses that testified that they suspected Smith of sexual misconduct. Indeed, no witness testified that they suspected Smith had acted inappropriate toward students.

Doe concedes that she has no evidence to show that the Respondents

should have known about the alleged danger presented by Smith prior to the alleged sexual assaults. The School District hired Smith as a teacher in 1975. (R. pp. 1693-1906.) At all times in issue, Smith held full certification credentials from the South Carolina Department of Education. (R. pp. 1693-1906.) Smith received a score of satisfactory or higher on all of his teacher evaluations, and Smith received no reports of misconduct or reprimands whatsoever prior to the alleged sexual assaults. (R. pp. 1693-1906.)

According to Doe, "[a]s a result of the unbearable physical and emotional distress, [she] repressed the memories of the abuse at some point prior to her 18th birthday and did not recall any of these memories until her recollection in or around early 2007." (App's Br. p. 6.)

STANDARD OF REVIEW

"Summary judgment is a useful tool for ending costly and time-consuming litigation and should be granted where appropriate . . . ." State ex rel. McLeod v. Brown, 278 S.C. 281, 287, 294 S.E.2d 781, 784 (1982) (Ness, J., concurring and dissenting). "When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pye v. Estate of

Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

In ruling on a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Rife v. Hitachi Constr. Mach. Co. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge this initial responsibility by pointing out to the Court the absence of evidence to support the nonmoving party's case. Id. The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. Id.

After the moving party has met this initial burden, the opposing party must, under Rule 56(e), SCRCP, "'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward

with 'specific facts showing that there is a genuine issue for trial.'"" Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original)). In response to a properly supported motion for summary judgment, "the non-moving party may not rest on the mere allegations or denial of the pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact. Thus the existence of a mere scintilla of evidence in support of the non-moving party's position is not sufficient to overcome a motion for summary judgment." Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994) (citing Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)).

ARGUMENT[4]

I. The circuit court properly granted summary judgment in favor of the High School as to all of Doe's causes of action against it because it did not exist as a separate legal entity during the relevant time period (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

[4] Though separately set forth, the analysis/argument presented herein may contain some overlap among the issues before the Court. To the extent that the argument/analysis contained in any particular portion of this brief is relevant to any other portion, the same is hereby incorporated therein by reference.

The circuit court granted summary judgment in favor of the High School as to the entirety of Doe's claims "for the additional reason that during the 1988-1989 school year [(i.e., the school year during which Doe was allegedly abused by Smith)], the High School was part of the Charleston County School District system and did not exist as a separate legal entity." (R. pp. 15-16.)

Nowhere in Doe's brief is any challenge to this ruling. The failure to present a challenge to this ruling in Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Cont'l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief). Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary judgment in favor of the High School as to the entirety of Doe's claims. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Moreover, because this (unchallenged) ruling is itself a sufficient

ground to find that all of Doe's causes of action against the High School must fail, and it is the law of the case, affirmance of the circuit court's summary judgment in favor of the High School is also called for under the two-issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). As our Supreme Court has explained, the two-issue rule is applicable to affirm circuit court orders:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996).

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that, factually, the High School's lack of separate existence during the 1988-1989 school year is clear

from the record,[5] and, legally, the correctness of the circuit court's ruling that no cause of action is available against an entity that had no legal existence at the time of the allegedly tortious conduct is axiomatic.

II. The circuit court properly granted summary judgment in favor of the Respondents as to Doe's cause of action for breach of fiduciary duty (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

The circuit court found that Doe's cause of action for breach of fiduciary duty fails as a matter of law because the Respondents do not have a fiduciary relationship with their students. (R. p. 6) ("Under South Carolina law, the [Respondents] do not have a fiduciary relationship with their students.")

Nowhere in Doe's brief is any challenge to this ruling. The failure to present a challenge to this ruling Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary judgment in favor of the Respondents as to Doe's cause of action for breach of fiduciary duty. Soden, 333 S.C. at 566, 511 S.E.2d at 378.

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[5] (R. p. 908 (Depo. p. 53, line 1 – p. 55, line 22); R. p. 919 (Depo. p. 100, lines 11-24).)

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that the correctness of the circuit court's ruling that, as a matter of law, Doe has no viable cause of action against the Respondents for breach of fiduciary duty is amply supported by the authority cited by the circuit court: Doe v. Greenville County Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007) and Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003). (R. pp. 6-7.)

III. The circuit court properly granted summary judgment in favor of the Respondents as to Doe's cause of action for intentional infliction of emotional distress/outrage (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

The circuit court found that Doe's cause of action for intentional infliction of emotional distress (outrage) fails as a matter of law because the SCTCA "does not waive sovereign immunity for claims of intentional infliction of emotional distress." (R. p. 7.)

Nowhere in Doe's brief, however, is any challenge to this ruling. The failure to present a challenge to this ruling in Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary

judgment in favor of the Respondents as to Doe's cause of action for intentional infliction of emotional distress (outrage). Soden, 333 S.C. at 566, 511 S.E.2d at 378; Jones, 387 S.C. at 346, 692 S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that the correctness of the circuit court's ruling that, as a matter of law, Doe has no viable cause of action against the Respondents for intentional infliction of emotional distress (outrage) is amply supported by the authority cited by the circuit court: § 15-78-30(f) (defining "loss" as "bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish and any other element of actual damages recoverable in actions for negligence, **but does not include the intentional infliction of emotional harm.**") (emphasis added);[6] *see also* Newman v. S.C. Dep't of Empl. & Workforce, 2010 WL 4791932 (D.S.C. 2010) (holding that "the [South Carolina Department of Employment and Workforce], as a state agency, has sovereign immunity with regard to this tort claim [(i.e., intentional infliction

[6] Section 15-78-50(a) provides: "Any person who may suffer a **loss** proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter

of emotional distress)]"); Harkness v. City of Anderson, 2005 WL 2777574 (D.S.C. 2005) (holding that "the SCTCA does not waive sovereign immunity for [an outrage] claim"). (R. p. 7.)

Further still, the circuit court found that this cause of action fails as a matter of law because "the SCTCA excludes liability for 'employee conduct outside the scope of his official duties **or** which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.'" (R. p. 7) (emphasis added) (quoting § 15-78-60(17).)

Although Doe does devote some argument in her brief to the issue of whether Smith was acting within the scope of his employment, nowhere in Doe's brief is any argument directed to the issue of whether Smith's alleged conduct "constitutes actual fraud, malice, intent to harm, or a crime of moral turpitude." Consequently, Doe has not effectively challenged this independent aspect to the circuit court's ruling, which ruling is the law of the case, and alone sufficient to require affirmance of the circuit court's grant of summary judgment in favor of the Respondents on Doe's claim for intentional infliction of emotional distress (outrage). Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378; Jones, 387 S.C. at 346, 692

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provided.") (emphasis added).

S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

To the extent that the Court may be inclined to address the merits of the ruling regarding the application of § 15-78-60(17) nonetheless, the Respondents contend that the circuit court's ruling is correct.

Again, § 15-78-60(17) excludes liability against a government entity for "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." The tortious conduct alleged here is sexual assault; such conduct cannot be within the scope of Smith's "official duties" or employment.

As an initial matter, the SCTCA expressly defines "'scope of official duty' or 'scope of employment' [to] mean[] (1) acting in and about the official business of a government entity and (2) performing official duties." Section 15-78-30(i). Doe does not address the more-restrictive nature of these defined terms under the SCTCA in her brief. S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 245, 403 S.E.2d 643, 646 (1991) (holding that the term "scope of employment" as used in an insurance policy is broader than the term "scope of official duties" as used in the SCTCA).

In any event, however, there is no question that Smith's alleged sexual

assaults of Doe were not within the scope of his employment. Our Supreme Court has explained as follows:

> The doctrine of respondeat superior rests upon the relation of master and servant. A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. These general principles govern in determining whether an employer is liable for the acts of his servant.
>
> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. **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; this is so no matter how short the time, and the master is not liable for his acts during such time.**

Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52-53 (2006) (emphasis added) (internal citations omitted). Smith's alleged sexual assaults can only reasonably be viewed as being for his own independent purpose, wholly disconnected with his employment.

Doe notes that "South Carolina routinely holds that employers can properly be found vicariously liable for the intentional torts of their employees." (App's Br. p. 24, n. 17). Respectfully, this general notion, i.e., that it is possible for an employer to be found vicariously liable for an employee's intentional tort, is unavailing to Doe here. Indeed, the cases Doe cites are readily distinguishable from the present case, helping to illustrate the difference between those instances wherein an intentional tort, assault/battery, could be found to be within the scope of employment so as to trigger vicarious liability.[7] For instance, in Crittendon v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986), a case Doe relies upon, the employer was held vicariously liable for an employee's assault and battery, but the assault and battery was committed in connection with the employee's efforts to force the plaintiff to pay a business debt owed to the employer. In stark contrast, the alleged employee conduct in the instant case is the alleged sexual assault of a minor, which simply cannot reasonably be viewed as anything else than being for the independent purpose of the alleged abuser, wholly disconnected from his employment.[8] *Cf.*

[7] To be clear, Doe cites no authority where sexual assault has been found to be within the scope of an employee's employment.

[8] Doe argues that Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) and its progeny are not applicable here because Smith was acting within the scope of his employment with respect to the alleged sexual abuse. (App's Br. p. 25, n. 18.) Respectfully, Doe is mistaken, because, as explained herein, it is beyond reasonable

Brockington v. Pee Dee Mental Health Center, 315 S.C. 214, 218, 433 S.E.2d 16, 18 (Ct. App. 1993) ("Clearly, Davis was acting in his individual capacity and not as an agent for the defendants when he sexually assaulted Brockington."); Whittle v. S. Bell Tel. & Tel. Co., 306 S.C. 163, 410 S.E.2d 575 (Ct. App. 1991) (implying that sexual abuse is not within the scope of an employee's employment).

Also, Smith's alleged conduct, i.e., sexual assault of a minor, is a sexual battery,[9] which is a crime of moral turpitude,[10] and therefore excluded from liability under § 15-78-60(17).

IV. The circuit court properly granted summary judgment in favor the Respondents as to Doe's cause of action for gross negligence (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

As explained above, Doe is incorrect in asserting that her gross negligence claim is not controlled by Degenhart, 309 S.C. 114, 420 S.E.2d 495, and its progeny. There is no question that Smith's alleged sexual assaults of Doe were outside the scope of his employment.

In Degenhart, our Supreme Court held that an employer is under a

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dispute that Smith's alleged sexual abuse of Doe was outside the scope of his employment.

[9] Doe v. Greenville Hosp. System, 323 S.C. 33, 37, 448 S.E.2d 564, 566 (Ct. App. 1994) ("As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person. S.C.Code Ann. § 16-3-655(3) (1985).").

[10] *Cf.* State v. Lee, 269 S.C. 421, 237 S.E.2d 768 (1977) (indicating that rape is a crime of

duty in some circumstances to exercise reasonable care to control an employee acting outside the scope of employment. The Court stated that an employer may be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control the employee, **and** (3) **the employer knows or should know of the necessity and opportunity for exercising such control**. 309 S.C. at 116-17, 420 S.E.2d at 496.

Here, the circuit court correctly focused on the final element, i.e., whether the Respondents knew or should have known of the necessity and opportunity for exercising control over Smith, and concluded that, viewing the evidence and reasonable inferences to be drawn therefrom in the light most favorable to Doe, it is still not possible to reasonably conclude that the Respondents knew or should have known of the alleged danger presented by Smith. (R. p. 10.)[11] Accordingly, the Respondents had no duty under Degenhart, 309 S.C. 114, 420 S.E.2d 495 and its progeny. As explained

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moral turpitude).

[11] With regard to the "light most favorable" to Doe, the Respondents note that it is only with respect to the circuit court's summary judgment on the basis of the statute of limitations that Doe argues the circuit court did not construe facts in the light most favorable to her. (App's Br. pp. 15-17.) Doe does not argue that any aspect of the circuit court's September 10, 2012 order granting summary judgment to the Respondents is tainted by this alleged error. Of course, in any event, the Respondents contend that Doe is mistaken in asserting any error with respect to the circuit court's view of the evidence

therein, the circuit court's ruling is amply supported by cases following Degenhart in the context of alleged sexual assault: Brockington, 315 S.C. 214, 433 S.E.2d 16 (reversing the trial court's denial of the defendants' motions for JNOV where, when viewing the evidence in the light most favorable to the nonmoving party, the evidence and its reasonable inferences did not support a finding that the defendants knew or should have known of the necessity of controlling the subject employee) and Moore v. Berkeley County School District, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997) (affirming the trial court's grant of the defendant's motion for summary judgment where there was no evidence that the defendant knew or should have known of subject employee's inappropriate sexual proclivities). (R. pp. 7 - 13.)[12]

The circuit court's application of the Degenhart analysis to the indisputable facts of this case is also above reproach. Doe herself testified that she has no evidence to show that the Respondents should have known about the alleged danger presented by Smith prior to the alleged sexual

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underlying the grant of summary judgment on the basis of the statue of limitations.

[12] The circuit court also noted, for the sake of comparison, Greenville Hospital System, 323 S.C. 33, 448 S.E.2d 564. (R. p. 9, n. 20.) Although, in that case, a judgment in favor of the plaintiff was affirmed, the analytical framework, which examined whether the evidence would permit a reasonable inference that the defendant hospital knew or should have known of the necessity of controlling the subject employee, is the same as applies to determine this case. Unlike the Greenville Hospital case, here there is simply no evidence allowing for such an inference to be reasonably made.

assaults. (R. pp. 251-52 (Depo. p. 49, line 14 – p. 50, line 4).) As noted in the above factual recitation, the School District hired Smith as a teacher in 1975. (R. pp. 1693-1906.) At all times in issue, Smith held full certification credentials from the South Carolina Department of Education. (R. pp. 1693-1906.) Prior to the alleged instances sexual abuse at issue, Smith received a score of satisfactory or higher on all of his teacher evaluations, and Smith received no reports of misconduct or reprimands. (R. pp. 1693-1906.)

There is no question that Doe did not report or otherwise tell anyone about the alleged sexual assaults until 2007. (R. p. 248 (Depo. p. 35, lines 1-17).) There are no former students, teachers, employees, or any other witnesses that testified they suspected Smith of sexual misconduct or any inappropriate actions towards students. And the mere allegation that Smith gave Doe rides home after softball practice could not reasonably put the Respondents on notice of any danger presented by Smith. Indeed, during the relevant school year (i.e., 1988-1989), it was not uncommon for coaches to give rides to students after practice, and it did not violate any school policy. (R. p. 1685, lines 1-24; R. p. 1688, lines 7-25; R. p. 1691, lines 3-24.)

Doe's mother knew that Smith gave Doe rides home from softball practice and did not have a problem with it. Doe's mother did not complain to anyone at the High School about Smith. (R. p. 1681, lines 6-24; R. p.

1682, lines 1 - 16.)[13]

Moreover, besides being correct on the merits, the circuit court's ruling with respect to the Degenhart analysis is also the law of the case. Nowhere in Doe's brief does she cite to any evidence from which a reasonable inference can be drawn that the Respondents knew or should have known that Smith had any inappropriate sexual proclivities. *See* Moore, 326 S.C. at 591-92, 486 S.E.2d at 13. In her brief, Doe acknowledges the circuit court's ruling that "no duty existed" on behalf of the Respondents under Degenhart, 309 S.C. 114, 420 S.E.2d 495, and its progeny. (App's Br. p. 22) ("Respondent CCDS and JIHS assert, and the trial court found, that no duty existed between the school and its student, Doe, because the school was not aware of Smith's activities with [Doe].") But Doe does not thereafter actually argue against the ruling (again, the

[13] Any argument by Doe that Smith giving her rides home provides evidence in and of itself from which the Respondents knew or should have known of any of Smith's alleged inappropriate sexual proclivities is patently specious. The gap between the evidence of Smith giving Doe rides and any contention that the Respondents knew or should have known of any danger presented by Smith cannot be bridged without resort to impermissible speculation. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) ("[V]erdicts may not be permitted to rest upon surmise, conjecture or speculation."); *see also* Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602, 613 (Ct. App. 1984), *rev'd on other ground by* 287 S.C. 190, 336 S.E.2d 472 (1985) ("Although we are required at this point to view the evidence in the light most favorable to Todd, we are not allowed to embellish it by frequent flights into the fanciful."). Also, any argument by Doe regarding the Respondents' response to her alleged suicide attempt is patently irrelevant with respect to the critical question of whether the Respondents knew or should have known about any of Smith's alleged inappropriate sexual proclivities, because the record is clear that no alleged acts of sexual

ruling being that no duty existed); rather, Doe argues that the record contains evidence creating a jury question as to whether a duty (which Doe seems to simply presume exists) was breached. In other words, Doe puts the cart before the horse, arguing about the alleged breach of a duty before (indeed, without) arguing that the duty exists in the first place. Respectfully, a plain reading of Doe's argument reveals that the she has not, in fact, challenged the circuit court's actual ruling regarding the threshold question of the existence of a duty based upon the Degenhart analysis. (App's Br. p. 22.) Having failed to challenge this ruling, it is the law of the case and requires affirmance of the circuit court's grant of summary judgment in favor of the Respondents as to Doe's gross negligence cause of action. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378.

Further still, with regard to policies that Doe claims to have been violated/not enforced, the circuit court expressly ruled as follows: "Doe submits current 2012 policies and attempts to apply those to the allegations from the 1988-89 school year. The policies Doe cites are irrelevant to the present case because none were issued earlier than 2005." (R. p. 4, n. 13.) Doe has not challenged this ruling in her principal brief, and it is therefore

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assault occurred after Doe's alleged suicide attempt.

the law of the case. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378. Consequently, Doe's argument regarding the violation/failure to enforce policy is—in addition to being misplaced, as explained in the preceding paragraph—necessarily unavailing because it pertains to policies that the circuit court has ruled to be irrelevant, which ruling is conclusive because Doe has not properly challenged it on appeal.

Even further, with regard to policies, the circuit court ruled as follows:

> In *Brockington v. Pee Dee Mental Health Center*, 315 S.C. at 218, the Court of Appeals held there was no duty to adopt or enforce certain rules against employees acting outside the scope of their employment. The plaintiff in *Brockington* alleged his negligence claim should survive because the employer owed him a duty to supervise its employees under the employer's internal rules and directives. *Id.* The Court rejected the plaintiff's claim and held an employer can only be held liable for failing to enforce its rules and policies with respect to actions within the scope of employment. *Id.* The Court held "we conclude the defendants possessed no duty arising out of the internal directives to protect [the plaintiff] from unreasonable risks resulting from his relationship with [the employee] in [his] individual capacity." *Id.* (emphasis added). *See also, Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47 (1996) ("Whether the law recognizes a particular duty is an issue of law to be determined by the court. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict.").

> Even if there was such a duty to adopt or enforce rules or polices, the District and High School are immune from such a claim in this case under the Tort Claims Act. The SCTCA states in relevant part "The governmental entity is not liable for a loss resulting from. . . ***adoption, enforcement, or compliance*** with any law ***or failure to adopt or enforce*** any law, whether valid or invalid, ***including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.***" S.C. Code Ann. § 15-78-60(4) (emphasis added).

(R. pp. 13-14) (emphasis in original.) Here, again, the Respondents are unable to discern that where Doe has presented an argument challenging the circuit court's ruling in this regard, and it is therefore the law of the case. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511.[14]

V. The circuit court properly granted summary judgment in favor of the Respondents as to all of Doe's causes of action because they are barred by the applicable statute of limitations (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

In its order granting summary judgment in favor of the Respondents,

[14] In fairness, Doe does argue that the evidence presents a jury question as to whether Smith was acting in the scope of his employment with respect to the alleged sexual abuse. (App's Br. pp. 22-26.) As explained, *supra*, this argument is without merit; the evidence simply does not allow for a reasonable conclusion that Smith's alleged sexual abuse of Doe was within the scope of his employment. Armstrong, 371 S.C. at 276, 639 S.E.2d at 52-53; Brockington, 315 S.C. at 218, 433 S.E.2d at 18; Whittle, 306 S.C. 163, 410 S.E.2d 575. That said, Doe's brief does not at all address the circuit court's above-quoted analysis of Brockington, 315 S.C. 214, 433 S.E.2d 16 (regarding enforcement of policies within the scope as opposed to outside the scope of employment) or of § 15-78-60(4) of

the circuit court expressly found that the reasoning and authorities cited in its order granting summary judgment in favor of Smith on the basis of the statute of limitations applied equally to Doe's claims against the Respondents and incorporated that reasoning and authority into its order granting summary judgment in favor of the Respondents. (R. pp. 5-6; R. pp. 18-29.) Pursuant to Rule 208(b)(6), SCACR, to the extent not inconsistent herewith, the Respondents hereby adopt by reference all of the argument/analysis in Smith's brief in support of affirmance of the circuit court's summary judgment in favor of the Respondents on the basis of the statute of limitations.

Additionally, the Respondents contend that Doe has not properly presented a challenge to the circuit court's ruling that all of her claims are barred by the statute of limitations. The only way that Doe's 2007 lawsuit arising out of alleged assaults upon her as a 15-year-old in 1988-1989 is not time barred is if she can carry her burden of showing repressed memory under South Carolina law. One of the independent bases for the circuit court's rejection of Doe's repressed-memory theory was that Doe had not presented sufficient expert testimony: "Though [Doe's] expert witnesses have testified that she appears to meet the qualifications for repressed

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the SCTCA.

memory, **neither of her experts can say to a reasonable degree of medical certainty when the memories were repressed or when she recovered them.**" (R. p. 27) (emphasis added.)[15] Accordingly, the circuit court found that, to present a potentially meritorious claim of repressed memory, Doe had to present expert medical testimony establishing, to a reasonable degree of medical certainty, both (1) when the memories were repressed and (2) when she recovered them, and that Doe had not presented such evidence.

Nowhere in Doe's brief is any challenge to this ruling. Doe argues only as follows: "[T]he testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia . . . supports the conclusion that Doe was in fact abused and in fact suffered from dissociative amnesia. Ultimately the issue of whether and when Doe repressed her memories and when she recovered them are questions of fact to be determined by the jury." (App's Br. p. 20.) Doe never actually challenges the circuit court's clear ruling that, to present a case sufficient to get to a jury, she must first put forth an expert that "can say to a reasonable degree of medical certainty when the memories

[15] (*See also* R. pp. 5-6) ("Defendants further argue that [Doe's] allegation of repressed memory fails to save her claims because she presented no 'objectively verifiable' evidence of the alleged abuse, **and the expert testimony she submitted did not identify the specific date when [Doe] allegedly recovered her memories**. Based on the reasoning and authorities cited in this Court's Order granting Defendant Smith's Motion for Summary Judgment, **the Court agrees** and finds that the same reasoning and authorities, which are incorporated by reference herein, apply equally to [Doe's] claims asserted against the [Respondents].") (emphasis added.)

were repressed or when she recovered them." (R. p. 27.) The failure to present any challenge to this ruling in Doe's principal brief renders it abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case. Soden, 333 S.C. at 566, 511 S.E.2d at 378. Because this (unchallenged) ruling is itself a sufficient ground to find that all of Doe's causes of action against Respondents (and, for that matter, Smith) must fail, and it is the law of the case, affirmance of the circuit court's summary judgment in favor of the Respondents as to all of Doe's causes of action is called for under the two issue rule. Jones, 387 S.C. at 346, 692 S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

CONCLUSION

For the foregoing reasons, and any other reason that may be apparent from the record (to include especially the reasoning set forth in the circuit court's orders), the Respondents ask that this Honorable Court affirm the circuit court's summary judgment in their favor.

Respectfully submitted,

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July 29, 2013

VIA US MAIL
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Jane Doe v. Charles Smith, Charleston County School District and James Island High School*
Appellate Number: 2013-000084
Case No.: 2010-CP-10-7699
Claim No.: 46138
Date of Loss: 9/1/1988
YCR File: 2235-20080353

Dear Ms. Kitchings:

Enclosed for filing please find the following:

- The original and sixteen (16) copies of Respondents' Final Brief; and
- The original and two (2) copies of a Proof of Service and Rule 211, SCACR certification regarding same.

Kindly return one copy of each document to us in the self-addressed stamped envelope provided.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures
cc: Robin L. Jackson, Esquire
Aaron E. Edwards, Esquire
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Lawrence E. Richter, Jr., Esquire

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.

RESPONDENTS CHARLESTON COUNTY SCHOOL DISTRICT AND JAMES ISLAND HIGH SCHOOL'S RULE 211(b) CERTIFICATION OF FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of August 13, 2007.

Respectfully submitted,

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I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **Final Brief of Respondents Charleston County School District and James Island High School and Certification** in the above-captioned matter was served on all parties hereto by depositing a copy of the same in the United States Mail, postage prepaid, on 7/29/13, addressed as follows to their attorneys of record:

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