THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

John Doe 2 ..... Appellant,

v.

The Citadel ..... Respondent.

BRIEF OF APPELLANT

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   C. The Citadel's duty under Title IX to not conceal ReVille's sexual abuse after it received the April 2007 complaint of sexual abuse by ReVille.

II. Whether the Tort Claims Act bars Doe 2's claim of Outrage against The Citadel, and, if not, whether genuine issues of material fact exist as to whether The Citadel directed its conduct at Doe 2 so as to preclude summary judgment for The Citadel.

STATEMENT OF THE CASE

This is a case brought by a young man, Doe 2, who as a child was sexually abused by Louis "Skip" ReVille. On March 19, 2012, Doe 2 commenced a civil action against The Citadel, alleging claims of negligence/gross negligence and outrage for The Citadel's actions that caused him to suffer the child sexual abuse. (*Complaint*, R., pp. 84-105). On June 20, 2012, The Citadel Answered. (*Answer*, R. pp. 106-118). On March 6, 2014, The Citadel filed a *Notice of Motion and Motion for Summary Judgment* and on April 17, 2014, filed its *Memorandum in Support of Motion for Summary Judgment*. (R. pp. 171-477). The Citadel argued that it did not owe a duty to Doe 2 at any time; that even if a duty existed, Doe 2's claims were barred by the two-year statute of limitations of the South Carolina Tort Claims Act [TCA], S.C.Code Ann. 15-78-110 (1976), or the statute of limitations of S.C.Code Ann. 15-3-40 (1976); and that Doe 2's outrage claim was barred by the TCA, barred by the availability of other remedies, and that the evidence did not support outrage. (*Memo In Support of Motion for Summary Judgment*, R. pp.176-477).

On April 18, 2014, Doe 2 filed three briefs: his *Memorandum in Opposition to Motion for Summary Judgment*, a *Reply in Opposition to Motion for Summary Judgment*, and a *Supplemental Response in Opposition to Motion for Summary Judgment*. (R. pp. 478-1534). Doe 2 argued that The Citadel owed him a duty based on its own affirmative actions taken without due care and based on the five common law circumstances where the duty to control the conduct of another or to warn of the danger exists, *see Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); that The Citadel's conduct constituted the claim of outrage and is not barred by the TCA or availability of other remedy; and that Doe 2's claims are governed by the sexual abuse statute of limitations that extends the limitation period for actions arising out of child sexual

abuse to six years from the victim's twenty-first birthday, pursuant to S.C.Code Ann. 15-3-555 (1976).

On April 18, 2014, the Honorable R. Markley Dennis, Jr. heard oral argument on The Citadel's Motion for Summary Judgment. (*Transcript of Hearing, April 18, 2014*, R. pp. 119-143). On December 9, 2014, Judge Dennis issued a written order, denying summary judgment for The Citadel because The Citadel owed a duty to Doe 2, that neither the TCA or pleading another tort bars the claim of outrage and a genuine issue of material fact exists as to the claim, and that Doe 2's claims are governed by the statute of limitations in S.C. Code § 15-3-555. (*Order Denying Summary Judgment*, R. pp. 3-69).

On April 24, 2015, The Citadel filed a *Renewed Motion for Summary Judgment.* (R. pp. 1575-1824). On June 4, 2015, Doe 2 filed his *Memorandum in Opposition to the Renewed Motion for Summary Judgment.* (R. pp. 1825-1876). Also on June 4, 2015, The Citadel filed a *Supplemental Brief in Support of Motion for Summary Judgment.* (R. pp.1877-1904). On June 5, 2015, Judge Dennis heard oral argument on the renewed motion. (*Transcript of Hearing*, June 5, 2015, R. pp. 144-170). After the hearing, Judge Dennis issued a Form Order granting The Citadel summary judgment and indicating that a formal order would follow. (*Form Order, June 5, 2015*, R. p. 70). Thereafter, on July 6, 2015, Judge Dennis filed his formal order granting The Citadel's renewed motion for summary judgment, finding The Citadel did not owe Doe 2 a duty and that Doe 2's claim of outrage failed as a matter of law. (*Order Granting Renewed Motion for Summary Judgment*, R. pp. 71-83).

Doe 2 hereby appeals the lower court's grant of summary judgment to The Citadel on his claims of negligence/gross negligence and outrage. On July 7, 2015, Doe 2 served his Notice of Appeal.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). "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." *Grooms v. Marlboro County School Dist.*, 307 S.C. 310, 311, 414 S.E.2d 802, 803 (Ct.App.1992). Furthermore, to determine "whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party"— Doe 2 in this case. *Pye*, 369 S.C. at 563, 633 S.E.2d at 509.

STATEMENT OF FACTS

Louis "Skip" ReVille was a cadet at The Citadel from 1998-2002. In 1998, ReVille self-reported to The Citadel Counseling Center for treatment and received on-going mental health services through 2001, during which he revealed that at age 15 he was court ordered to counseling for his sexual misconduct with adolescent boys.[1] (R. pp. 1850, 1857-1858). On January 18, 2001, Citadel counselor Dr. Bradham and a MUSC psychiatrist discussed monitoring ReVille for bi-polar disease, and by February 2001, The Citadel knew that

[1] On December 2000, ReVille signed an authorization for the release of his mental health records to third parties because he sought to receive academic accommodations due to his mental health issues. (R. pp. 1854-1856).

ReVille was non-compliant with his prescription psychiatric medications. (R. pp. 1852-1854).

The Citadel operated a summer camp on its campus each summer from approximately 1957-2006. The Citadel's Office of The Commandant of Cadets operated the Camp and selected current and former Citadel cadets to serve as staff and senior camp counselors. The camp counselors were housed in barracks (dorm rooms) alongside the campers on various parts of The Citadel campus in order to supervise the children and ensure their safety. From at least 2001, the following policies, among others, were in effect at The Citadel: *The Counselor Code of Conduct*, prohibiting sexual activity at camp and requiring immediate dismissal if violated; *The Official Camp Policies Regarding Sexual Misconduct Issues*, prohibiting all sexual relations between counselors and campers, mandating immediate dismissal of counselors in violation and prosecution to the fullest extent of the law, prohibiting counselors from being behind closed doors with campers, and requiring any sexually inappropriate conduct reports to be thoroughly investigated by The Citadel's own Department of Public Safety regardless of when sexual misconduct occurred or whether or not the counselor is still affiliated with the camp; and *Barracks Guard Duties, Memo of Instruction*, requiring guards to conduct walk-through checks of barracks at night during camp sessions. (R. pp. 983, 1342, 1351).

The Citadel employed former Citadel cadet and Captain in the United States Marine Corps Michael Arpaio as the Senior Camp Counselor during the summers of 1995-2001. In the summer of 2001, The Citadel learned that Arpaio sexually abused several campers in his barracks room. Several victims of Arpaio's sexual abuse filed suit against The Citadel to redress the injuries they suffered as campers entrusted to the care of the Camp. In the

summer of 2001, The Citadel also employed ReVille as a camp counselor and continued to do so for the following summer camp sessions through 2003. Specifically, in the first summer of ReVille's employment as a counselor, he sexually abused up to eight male campers at the Camp. (R. pp. 1308-1311). In late summer 2001, after praying for over three hours at The Citadel's chapel, ReVille attempted to self-report his acts of sexual abuse of campers to The Citadel's Department of Public Safety. (R. pp. 1859-1860). At the end of the camp in August 2001, ReVille's camp employee evaluation noted him as "senior counselor material if learns to distance himself from campers..." (R. p. 1319).

Also in the summer of 2001, on August 6th, in the wake of discovering Arpaio's sexual abuse at the Camp, Sergeant Middleton of the Charleston Police Department, by letter, advised The Citadel of concerning and inappropriate practices taking place at the Camp by counselors, to include counselors allowing campers to spend the night in counselors' rooms and in the same bed as counselors, sexual conversation in front of campers, and counselors taking campers off campus for non-camp activities without parental consent. (R. p. 1304). Sgt. Middleton offered his assistance to The Citadel in addressing the practices. (*Id.*). However, The Citadel never sought any assistance and instead took no action to cease the inappropriate counselor practices. The Citadel did not interview counselors or campers or implement any safety practices in regards to counselors having campers in their rooms at night.

The following summer, in 2002, Camp Deputy Director Jennifer Garrott caught ReVille alone with a minor camper in his barracks room. Deputy Garrott and Director Bill Bates discussed with ReVille that his actions violated the rule against being behind closed doors with campers, but despite the rule also requiring immediate termination for a

violation, Garrott and Bates decided not to terminate ReVille or even to document his offense. (R. pp. 1308-1312). ReVille went on to sexually abuse multiple campers numerous times in his barracks room at night during the 2002 summer sessions. (R. p. 1352, lines 4-12; p. 1353, line 18 through 1354, line 19).

The next summer, in 2003, Garrott, now camp Director, caught Reville engaged in inappropriate physical contact with another camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room. Again Director Garrott decided not to terminate ReVille, despite the rule mandating his termination as a counselor. (R. pp. 983, 1308-1312). Director Garrott admits that she caught ReVille in direct violation of the rule and that she should have fired him. (R. pp. 968-969). Also, during the 2003 camp sessions, Director Garrott's assistant, Anna Brock, spoke to ReVille multiple times about his being alone with campers in his room, and counselor O.C. Evans made a report to Ms. Garrott's supervisor, Colonel Lackey, that ReVille had campers in his room at night, to include one of Evans's campers. In response, Colonel Lackey only told ReVille not to be alone with campers and informed Director Garrott of the complaint. Colonel Lackey and Garrott did not terminate ReVille or take any further action. (R. pp. 1308-1312).

Additionally, in the summer of 2003, The Citadel employed Camper Doe 6 as a junior counselor, and ReVille sexually abused Camper Doe 6 at the Camp in the barracks. (R. pp. 1861-1866). In the summer of 2004, The Citadel employed Camper Doe 6 as a counselor, and he visited ReVille's home and learned that ReVille was sexually abusing boys and applied to be a foster parent of a male child. (R. pp. 1862-1866, 1241-1243). In summer 2005, The Citadel again employed Camper Doe 6 as a counselor, during which time he received training on child sexual abuse and after the training asked to speak with

Director Garrott. Garrott agreed but once Camper Doe 6 told her he wanted to speak to her about ReVille in an attempt to disclose ReVille's pedophilia, she abruptly stopped the conversation and sent him to his barracks room. A short while later, Director Garrott ordered Camper Doe 6's immediate termination from employment at the Camp, under the guise that he had called a camper an inappropriate name.

In the summer of 2005, Doe 2 met ReVille through AAU basketball. ReVille began a grooming process of Doe 2 to gain his trust by befriending him and giving him special attention, which eventually led to ReVille exposing Doe 2 to pornography, masturbation, and various acts of physical sexual abuse that continued up until late August 2007, when Doe 2 moved to Georgia. (R. pp. 1374, lines 2-5; 1433-1437; 1530-1531).

On or about August 16, 2006, The Citadel hired ReVille to serve as a tutor in its writing center. On April 23, 2007, a former camper's father called the President of The Citadel, General John W. Rosa, in his office at the Citadel, because the father had just learned that his son had been sexually abused by an adult male counselor at The Citadel Camp. The Citadel's General Counsel, Mark Brandenburg, returned the phone call and spoke with the father who reported that his son had been sexually abused by camp counselor Skip while his son was a camper in the summer of 2002—that Skip showed pornography and masturbated with his son, showered with the campers, and had done this to another identified camper. (R. p. 672-675, 687). On that same day, Mr. Brandenburg had a telephone conversation with the former camper [hereinafter Camper Doe], where he told Mr. Brandenburg that the counselor who abused him was Skip; that Skip had campers watch pornography and masturbate and Skip joined in; that Skip did this with other

campers for more than one year; and other counselors were never involved. (R. p. 688-690).

Doe 2 asserts that the facts establish that The Citadel, thereafter, acted to conceal the complaint while The Citadel argues that it investigated the complaint. Regardless, it is undisputed that The Citadel took actions in regards to Camper Doe's complaint against ReVille once it received the disclosure.

On April 24, 2007, the day after Camper Doe's complaint came to The Citadel, Mr. Brandenburg apparently knew ReVille was working in the Citadel's writing center because he left a message for ReVille there to contact him. Later that day, ReVille met with Mr. Brandenburg and Colonel Trez, Executive Assistant to President Rosa, in The Citadel's Bond Hall where they disclosed details of Camper Doe's complaint to ReVille. Mr. Brandenburg and Colonel Trez conveyed The Citadel's requirement of a quid pro quo from ReVille for him to leave Citadel employment and "lay low" in exchange for The Citadel's silence as to his pedophilia. (R. pp. 692-697). ReVille left his employment with The Citadel.

That same day, Mr. Brandenburg also met with Ms. Garrott, where she relayed that in 2003, she had caught ReVille in his barracks room alone with a camper engaged in inappropriate physical contact. She also disclosed to Mr. Brandenburg that ReVille had been let go by his former employer prior to his current employment with The Citadel, suggesting that it was for sexual misconduct with children. (R. pp. 958-959, 963-967). By at least May 1, 2007, The Citadel knew that the other camper who was coerced to masturbate by and with ReVille currently was a cadet at the Citadel, and by May 6, 2007, Mr. Brandenburg had informed President Rosa of the sexual abuse complaint against

ReVille. (R. p. 918). By May 16, 2007, The Citadel— specifically at least Mr. Brandenburg and President Rosa— knew that multiple campers were coerced by ReVille into his room to watch pornographic movies and masturbate with him. (R. pp. 921-923). During the month of May 2007, Mr. Brandenburg memorialized The Citadel's intent to cover up ReVille's child sexual abuse, as well as the school's knowledge of it: "I am hopeful that by conducting an investigation on behalf of the school, no "formal" investigation—criminal or civil—will occur." (R. p. 555).

In May 2007, ReVille's sexual abuse of Doe 2 escalated, as ReVille was now unemployed and had increased time and access to Doe 2. ReVille sexually abused Doe 2 by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (R. pp. 1527-1529, 1846-1849).

Jennifer Shiel, Administrative Assistant in the President's Support Office in 2007, testified that based on her personal experience, President Rosa directed the concealment of the April 2007 complaint from the get-go. (R. pp. 930-933). Mr. Brandenburg and President Rosa concealed details of the April 2007 complaint against ReVille from The Citadel's Board of Visitors. In June and September 2007, Mr. Brandenburg made presentations to the Board of Visitors on the complaint, where Mr. Brandenburg concealed the details to such an extent that the Board members did not understand that he was briefing them on a child sexual abuse claim. President Rosa attended with Mr. Brandenburg and made no corrections or additions to the presentations in order to change the Board's misperceptions, despite his knowledge that the complaint was of a pedophile on their campus. (R. pp. 556-607, 1183-1192). The Citadel's Margolis Healy Report[2] concluded

[2] In 2012, The Citadel hired Margolis Healy to conduct an investigation into the school's

that the Board of Visitors "assumed, based on what they were told, that it was an insurance defense and civil claim matter, and believed from what they were told that this was the case of a father displeased with his son's unsuccessful application for admission to the College." (R. pp. 556-607). The Board of Visitor's uniform recollection that the complaint was not a sex based complaint contrasts with Mr. Brandenburg's testimony that he "gave them [Board] all that information." (R. pp. 1193-1194).

The Citadel also ensured that the General Counsel files did not indicate in any way a child sexual abuse claim against ReVille. In October 2007, the General Counsel file list did not contain Camper Doe's sexual abuse claim against ReVille anywhere, despite listing other "possible litigation" files. (R. pp. 703-716). However, in 2010, Camper Doe's name appears on the File List annotated with code 113, signifying that it is litigation involving the Citadel, and specifically described as "alleged sexual abuse at summer camp." (R. pp. 717-720). Yet, instead of annotating that the complaint was against ReVille, the entry's keyword is "Arpaio". (R. p. 718). The lack of including Camper Doe's complaint in October 2007 but then including it three years later disguised as an Arpaio complaint is evidence of The Citadel's concealment of its knowledge of child sexual abuse by ReVille.

On July 1, 2007, Mr. Brandenburg flew to Dallas, Texas and met with Camper Doe and his parents in person. A portion of the meeting was recorded and transcribed. (R. pp. 1015-1174). Camper Doe repeated his complaint of sexual abuse by ReVille at the Camp and relayed that ReVille did the same to "about 5 other" boys multiple times and acknowledged to Mr. Brandenburg that ReVille may have touched other boys at the camp. Camper Doe emphasized to Mr. Brandenburg that the reason he reported the abuse to

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handling of the April 2007 complaint of ReVille's pedophilia. (R. pp. 556-607).

President Rosa was to make sure that ReVille did not have the opportunity to sexually abuse any more boys. (R. pp. 995-997). Contrary to The Citadel's expressed goal of preventing any formal civil or criminal investigation into the ReVille allegations[3], Mr. Brandenburg led Camper Doe to believe that his transcribed interview meant that The Citadel would ensure that ReVille would not abuse any more children. (R. pp. 995-997). After the July 1, 2007 meeting, The Citadel continued to take actions to conceal ReVille's pedophilia and the school's knowledge of it.

For instance, in May 2007, ReVille applied for unemployment benefits after The Citadel required a quid pro quo for him to leave Citadel employment in exchange for The Citadel's silence as to his pedophilia. The S.C. Employment Security Commission found ReVille eligible for unemployment benefits, and initially, The Citadel appealed his eligibility. (R. p. 980). A hearing was noticed to determine whether ReVille "voluntarily quite (for good cause)" or was discharged "for disqualifying cause" and, thereby, ineligible for benefits. However, four days after Mr. Brandenburg met in person with Camper Doe, The Citadel withdrew its appeal and accepted ReVille's eligibility for unemployment benefits. ReVille believes the Citadel withdrew the appeal in order to avoid a confrontation over the circumstances of his departure from Citadel employment.

Governing Citadel Policies and Procedures

In 2007, the following policies and procedures were in effect and governed The Citadel's actions taken in response to the April 2007 complaint of sex abuse by ReVille. The *Employee Misconduct Policy* required that The Citadel not terminate any investigation in exchange for resignation by the employee; provide factual and candid responses to

[3] (R. p. 555).

inquiries by potential employers; fully cooperate with law enforcement; and not expunge molestation findings from the employee's record. (R. p. 1214).

The Citadel had in effect several policies that required the report of all incidents of sexual abuse or assault to law enforcement, along with the arrest of criminal suspects. *Serious Incidents, Memorandum No. 39*, dated April 2000, directed that "[s]erious incidents are unexpected occurrences directly or indirectly involving The Citadel, which require a response or action from the college administration; or which have the potential to generate positive or negative publicity regarding the college." (R. pp. 1198-1210). Among the non-exclusive list of examples of serious incidents is "criminal activity," and the policy directs that when criminal activity involving someone affiliated with the Citadel as a suspect or victim occurs, the "first member of the Citadel community learning of the occurrence" **will report it to the Public Safety Department**. (R. p. 1206).

Sexual Harassment, Memo. No. 51 established procedures for reporting and investigating sexual harassment complaints, specifying that: "[w]hen ever there is an incident of sexual assault or sexual abuse, the incident **will be reported to the police**." (R. p. 1228) (emphasis added). *The Citadel's Sexual Assault Crisis Intervention Policy, Memo. No. 4*, also mandated that, "THE CITADEL WILL PUNISH ANY INDIVUAL(S) WHO IS FOUND TO HAVE COMMITTED SEXUAL ASSAULT," and "THIS POLICY APPLIES TO ALL MEMBERS OF THE CITADEL COMMUNITY." (R. pp. 1215-1218). In addition, *The Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues* requires that "**[r]egardless of validity** of the violation, any sexually inappropriate conduct reports concerning any camper or employee of the camp **will be turned over to The Citadel Public Safety Department** and a thorough investigation will

be conducted," and **no time limit exists** for conducting such investigations **of current or former individuals associated with the camp**. (R. p. 983) (emphasis added).

In the "Message from the President," President Rosa himself publically called on The Citadel community to report immediately "any criminal offense, suspected criminal activity, or other emergency **directly to Citadel Public Safety**," stressing that Public Safety "has complete police authority to apprehend and arrest anyone involved in illegal acts on campus, and also in areas immediately adjacent to the campus." (R. p. 985) (emphasis added). The Citadel's head of Public Safety, Colonel Fletcher in 2007, was a State Constable, and his police powers went beyond the gates of the Citadel and applied to any type of foreseeable crime, just as any other law enforcement officer's jurisdiction would cover. (R. p. 1872). Yet, no one at The Citadel reported the April 2007 complaint to Public Safety or to any law enforcement entity, and The Citadel did not arrest ReVille or punish him in any way.

ARGUMENT

The Citadel owed a duty to Doe 2 to use reasonable care when it voluntarily undertook the duty to investigate, charge, and arrest ReVille for pedophilia, dating back to 2003 when The Citadel caught ReVille engaged in inappropriate conduct with a minor in his room alone, in 2004 when The Citadel had constructive knowledge of ReVille's sexual abuse of boys, in 2005 when The Citadel fired Camper Doe 6 for attempting to disclose ReVille as a pedophile, and again in 2007 when The Citadel acted to investigate ReVille's pedophilia and instead further concealed it. Additionally, The Citadel negligently created the risk of Doe 2's sexual abuse by its actions to conceal ReVille's pedophilia and the school's knowledge of ReVille's dangerous proclivities, as well as The Citadel had a duty

not to conceal ReVille's pedophilia pursuant to Title IX of the Education Amendments of 1972 [Title IX], codified at 20 U.S.C. §§ 1681 et seq. and Title 34 Code of Federal Regulations Part 106. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. Therefore, the trial court erred in granting summary judgment to The Citadel based on finding that The Citadel did not owe any duty to Doe 2. (*Order Granting Defendant's Renewed Motion for Summary Judgment*, July 6, 2015, R. pp. 71-83).

At the hearing on The Citadel's Renewed Motion for Summary Judgment, Judge Dennis specifically found that The Citadel owed a duty of due care to Doe 2 once it learned of the sexual abuse complaint against ReVille on April 23, 2007 and, thereafter, voluntarily took upon itself to investigate the complaint.[4] Judge Dennis also found that without doubt Plaintiff suffered damages after The Citadel's duty to Plaintiff arose, as he was sexually abused by ReVille through late August 2007. There are no questions, ifs, ands or buts that had The Citadel acted in accordance with their policies and procedures and arrested ReVille

[4] "I believe without the action taken by The Citadel once they received some notice that something had happened, then they--....I think The Citadel has to do something to get you over the hurdle that is created by this long line of cases." (*Transcript of Hearing, June 5, 2015*, R. p. 145, line17-19, 25 through p 146, line 2). "The question is, what happens when the pedophile acts consistent with that disorder. That's what I think triggers this. That is what I think is the egregious act that gets you over the hurdles of the present law. That is founded/encapsulated in what happened when the camper, or the father, came and said 'this is what happened.' Because you've got all the policies of what they were supposed to do, to report them. That's criminal conduct." (*Id.*, R. p. 152, line 25 through p. 153, line 10). "That's the problem that I have, that it is only from that date forward. I don't have to roll the clock back and say, 'yeah, what about all these other things that you knew and should have known?" (*Id.*, R. p. 153, lines 14-19). "The problem is that under the present law the exceptions are, and we went through them, and the only one that I can get you there is voluntarily putting themselves in the fray. They did that by investigating something and then didn't take any steps. That's the problem." (*Id.*, R. p. 157, lines 19-25). "You have a duty by virtue of what you said that you would do once you knew, and you didn't. By virtue of your not doing that, not following your own policy, that person was injured. Totally." (*Id.*, R. p. 163, lines 3-7).

that Plaintiff would not have been abused from late April 2007 onward. However, Judge Dennis explained that since he found a duty arose only after April 23, 2007, the issue of how to present Doe 2's damages existed— the jury could either consider only the sexual abuse suffered after April 23, 2007 or hear evidence of the earlier abuse and determine whether the subsequent abuse aggravated previous harm done by abuse occurring before April 23, 2007.[5]

Judge Dennis considered limiting damages or granting summary judgment for the determination on appeal of the scope of The Citadel's duty prior to April 2007: "my thought was, 'well, deny it and that cuts his damages in half' and maybe the best way to frame this issue--...--is to send this up. Even though there is damage after the notice." (*Transcript of Hearing, June 5, 2015*, R. p. 148, lines 14-19. In contrast to the rulings at the hearing, Judge Dennis's written order granting The Citadel's renewed motion for summary judgment finds that The Citadel did not owe Doe 2 a duty of care at any time, even after voluntarily undertaking a duty to investigate the April 2007 complaint and arrest ReVille accordingly. (*Order Granting Defendant's Renewed Motion for Summary Judgment*, July 6, 2015, R. pp. 73-80).

Whether ReVille sexually abused Doe 2 before or after certain acts of negligence by The Citadel is a question of fact for the jury, as he suffered sexual abuse by ReVille prior to and after April 23, 2007. Furthermore, the lower court erred in granting summary

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[5] "[A]t least from my standpoint the only point that I can allow a jury to consider would be the damage(s) that accrued after." (*Transcript of Hearing, June 5, 2015*, R. p. 147, lines 11-14). "Maybe you could give the charge of – the only thing that I could think of is the charge you give for preexisting conditions where you say that you are only entitled to the damage that occurred after—that you aggravated. The problem is, I agree with you, I don't know how you separate them. It's so intertwined and therefore it flows from the get-go." (*Id.*, R. p. 159, lines 22-25 through 160, line 5).

judgment for The Citadel on Doe 2's claim of outrage, as it is not barred by the TCA and the evidence at summary judgment supports more than a scintilla of evidence that The Citadel's conduct was outrageous and directed towards Doe 2. Accordingly, summary judgment for The Citadel should be reversed on all counts.

I. The Citadel Owed Doe 2 A Duty Of Due Care.

The duty The Citadel owed to Doe 2 is grounded in the legal proposition that one who assumes to act may become subject to the duty to act with due care. *See Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct.App.1985). The Citadel is liable to Plaintiff for its own failure to act with due care, as it was on notice of the danger ReVille posed from as early as 1998, when The Citadel treated ReVille for mental health issues and learned that ReVille previously had engaged in sexual misconduct with adolescent boys. Thereafter, in 2001, The Citadel learned of Arpaio's sex abuse at the camp and received notice from the Charleston Police Department of inappropriate sexual conduct by other counselors; caught ReVille with a camper behind closed doors in 2002 and again in 2003, where ReVille was engaged in inappropriate conduct with the minor; had constructive knowledge of ReVille's pedophilia in 2004; terminated Camper Doe 6 when he attempted to disclose ReVille's pedophilia to the camp director in 2005; and then acted to conceal ReVille's pedophilia, along with its knowledge of ReVille's pedophilia, in and after April 23, 2007.

The trial court at the hearing found that The Citadel owed Doe 2 a duty after it received the April 2007 sex abuse complaint against ReVille based on its voluntarily undertaking the duty to investigate the complaint. (*Transcript of Hearing, June 5, 2015*, R. pp. 144-170). However, the *Order Granting the Renewed Motion for Summary Judgment* does not reflect the court's holding. (R. pp. 71-83). Furthermore, the lower

court erred in holding that no duty existed prior to April 2007, as The Citadel voluntarily undertook the duty to investigate and charge acts of sexual abuse at the summer camp by its counselors, to included ReVille, and had notice of ReVille's dangerous proclivities as early as 1998. Moreover, The Citadel's duty to Doe 2 arises not only out of the school's voluntarily undertaking of the duty to investigate and arrest ReVille but also out of its negligent actions that created the risk of Doe 2's abuse, as well as based on Title IX's imposition of a duty on The Citadel not to conceal ReVille's sex abuse.

To establish a claim of negligence, a plaintiff must show: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; (3) damage actually and proximately resulting from that breach; and (4) injury or damages suffered by Plaintiff. *See, e.g., Madison ex rel Bryant v. Babcock Center, Inc.; S.C. Dep't of Disabilities and Special Needs; and Batchelor*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). "Due care" is defined as "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." *Berberich v. Jack,* 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Hart v. Doe,* 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)). It is well established that South Carolina recognizes the following five circumstances where the duty to control the conduct of another or to warn a potential victim of danger exists: (1) where the defendant has a special relationship with the victim; (2) where the defendant has a special relationship with the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; or (5) where a statute imposes a duty on the defendant. *Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

In opposition to the renewed motion for summary judgment, Doe 2 does not contend that The Citadel owed him a duty under the "special relationship" exceptions. (*Memo in Opposition to Renewed Motion for Summary Judgment*, R. pp. 1834-1835; *Transcript of Hearing, June 5, 2015*, R. pp. 150-152). A special relationship does not create a duty unless the defendant has knowledge of a specific threat of harm to a specific individual. *See, e.g., Roe v. Bibby*, 410 S.C. 287, 296, 763 S.E.2d 645, 650 (Ct.App.2014), *cert. granted*, (January 16, 2015). However, when a defendant's duty arises because the defendant voluntarily undertakes a duty, negligently or intentionally creates the risk of harm by the third party, or a statute imposes a duty on the defendant there is no requirement that the threat of harm be to a known, specific individual. *See, e.g., Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547-548 (1990) (where defendant created risk of injury committed by third party it is sufficient that defendant should have foreseen his negligence "would probably cause injury to **someone**"); *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (1991) (city voluntarily undertook maintenance of sidewalk, owing duty to **those injured** by sidewalk); *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 103, 374 S.E.2d 910, 914-915 (Ct.App.1988) (duty arises under statute where statute's essential purpose is to protect from the kind of harm plaintiff suffered and plaintiff is **member of class of persons** statute intends to protect).

In this case, The Citadel's duty to Doe 2 does not rest on the "special relationship" exceptions. Instead, The Citadel is liable for its own failure to act with due care in voluntarily undertaking the duties to investigate, arrest, and punish ReVille; for taking

actions that negligently created the risk that ReVille would sexually abuse Doe 2; and for action to conceal ReVille's pedophilia in violation of Title IX.

A. The Citadel owed a duty to Doe 2 to act with due care when it voluntarily undertook the duty to investigate and charge acts of sexual abuse by ReVille at the summer camp and after its receipt of the April 23, 2007 complaint of sexual abuse.

The Citadel's own conduct of voluntarily undertaking the duty to investigate claims of sexual abuse on its campus and/or by its employees, turn offenders over to it its own Public Safety Department or other law enforcement entity, and arrest offenders establish its duty to Doe 2. First, The Citadel's duty to Doe 2 arises out of its voluntarily undertaking the duty. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Madison ex rel Bryant*, 371 S.C. at 134, 638 S.E.2d at 655 (quoting Restatement (Second) of Torts § 323 (1965)).

Whether such a duty arises in a given case may depend on the existence of particular facts. *Miller v. City of Camden*, 329 S.C. 310, 313, 494 S.E.2d 813, 815-16 (1997) (internal citations omitted). Also, prior conduct or internal memoranda may serve as evidence of a voluntary undertaking. *See, e.g., Vaughan v. Town of Lyman*, 370 S.C. 436, 444, 635 S.E.2d 631, 637–38 (2006) (finding genuine issue of material fact as to whether there was a voluntary undertaking of the maintenance of town sidewalks where there were references to sidewalk maintenance in town minutes and town ordinances regulating sidewalks; town

was aware of complaints about sidewalks but did not report to any other authority; and town had previously handled complaints about sidewalks); *Fickling v. City of Charleston*, 372 S.C. 597, 606-607, 643 S.E.2d 110, 115-116 (Ct.App.2007) (fielding complaints, maintaining a log of calls, and having a policy and employees in place to repair sidewalks establishes triable issue as to whether City voluntarily undertook duty to maintain sidewalk).

Here, the *Order Granting The Citadel's Renewed Motion for Summary Judgment, July 6, 2015*, conflicts with *Fickling*, in holding that The Citadel did not voluntarily undertake a duty to investigate the 2007 complaint or to address, punish, and report sexual misconduct by ReVille at the camp. The lower court relies on *Underwood v. Coponen*, 367 S.C. 214, 217-18, 625 S.E.2d 236, 238 (Ct.App.2006) to hold that The Citadel did not assume a duty of care to Doe 2. (*Order Granting The Citadel's Renewed Motion for Summary Judgment, July 6, 2015*, R. p. 76). However, *Underwood* is not on point with this case. In *Underwood*, the plaintiff sued a land owner for negligence in allowing his tree to grow over a stop sign, which obscured her view of a parked car that she then hit. 367 S.C. at 215, 625 S.E.2d at 237. This Court granted summary judgment for the defendant, because South Carolina law imposes a duty on a landowner to protect others from "defective or unsound trees on his premises," and the evidence established that the tree at issue was not unsafe or defective. *Id.* at 217-18, 238. Thus, the determinative factor in finding that the defendant did not voluntarily undertake a duty to the plaintiff was the health of the tree, not that a duty could not exist as to that plaintiff. If the evidence had shown that the tree was unsafe or defective, the defendant would have owed a duty to protect roadway users from the unsafe tree. *See id.* Thus, *Underwood* is specific as to liability for

tree maintenance and is not controlling here in analyzing whether The Citadel owed a duty to Doe 2.

Guiding and controlling is the *Fickling* opinion, where a pedestrian filed a negligence action against the City, alleging the City failed to maintain the sidewalk that proximately caused her injuries when she stepped into a hole in the sidewalk and fell. 372 S.C. at 601, 643 S.E.2d at 113. This Honorable Court held that there was a genuine issue as to whether the City exercised some measure of control over the sidewalk, given that the City had repaired sidewalks within the municipality, and control over the premises is the determinative factor over whether a common law duty exists. *Id.* at 607, 116. Furthermore, evidence was presented that "the City fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks." This Court held that whether the City had voluntarily undertaken a duty of maintaining sidewalks, to include the sidewalk at issue, was a genuine issue of material fact for the jury. If the City had voluntarily undertaken the duty, the City's duty was to users of the sidewalk, to include the plaintiff. Therefore, the Court held the plaintiff stated a claim of negligence against the City, and genuine issues of material fact as to the City's duty existed to present to the jury. *Id.* at 608, 611; 116, 118.

"In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care." *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31 410 S.E.2d 21, 24 (Ct.App.1992) (internal citations omitted); *see also Madison ex rel Bryant*, 371 S.C. at 140, 638 S.E.2d at 659 (citing with favor the following in holding that a defendant's own policies establish standards of care: *Elledge v. Richland/Lexington*

School Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (holding evidence of industry safety standards relevant to establishing standard of care in negligence case); *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 95 S.E. 109 (1918) (holding relevant rules of defendant admissible in personal injury suit regardless of whether rules were intended for employee guidance, public safety, or both because violation of rules may constitute breach of duty of care and proximate cause of injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of case)).

The existence of factual issues regarding whether the defendant voluntarily assumed the duty renders the existence of a duty a mixed question of law and fact to be resolved by the fact-finder. *Vaughan*, 370 S.C. at 444, 635 S.E.2d at 637-38. Evidence in this case of The Citadel's deviation from its own policies and procedures can demonstrate its lack of due care under the relevant circumstances. *See Peterson v. National Railroad Passenger Corporation*, 365 S.C. 391, 396, 618 S.E.2d 903, 906 (2005) (holding company's deviation from internal maintenance policies admissible to show breach of duty owed).

Here, ReVille was a Citadel camp counselor in 2001 through 2003 and a Citadel employee in 2006-2007. The evidence presented at summary judgment establishes that The Citadel had notice of ReVille's pedophilia as far back as 1998, when ReVille received services at the school's counseling center. By 2001, The Citadel was on notice of sexual abuse of campers at the camp when it learned of Arpaio's abuse. Also in 2001, The Citadel received independent notice from Sergeant Middleton of the Charleston Police Department

that counselors were engaging in inappropriate conduct with campers, including allowing campers to sleep in their rooms and beds and engaging in sexual conversation in front of campers. Thereafter, Garrott caught ReVille alone in his barracks room with a camper at least twice, in 2002 and 2003, with the 2003 incident involving inappropriate physical contact with the boy. Garrott received complaints against ReVille of the same from a number of individuals in 2003. In place at the time was *The Official Camp Policies Regarding Sexual Misconduct* that required a counselor's immediate termination for sexual misconduct and required investigation by The Citadel's Public Safety. However, Garrott, Bates, and Lackey decided on multiple occasions not to terminate ReVille when he was caught in violation of the rule and to not turn the complaints over to Public Safety.

Furthermore, in 2004, The Citadel employed Camper Doe 6 as a camp counselor, and during his employment that summer, he visited ReVille's home and learned that ReVille was sexually abusing boys and had applied to be a foster parent in South Carolina. As a counselor that summer, Doe 6 was an agent/employee of The Citadel. It was within Camper Doe 6's authority and responsibility to maintain the safety of the campers, and Camper Doe 6's knowledge of ReVille's pedophilia related to maintaining campers' safety. Again, *The Official Camp Policies Regarding Sexual Misconduct* applied to ReVille as a former counselor and required investigation by The Citadel's Public Safety regardless of whether the counselor was currently affiliated with the camp. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice. Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). Accordingly, The Citadel had constructive knowledge of ReVille's pedophilia in 2004.

Thereafter, in 2005, Director Garrott terminated Camper Doe 6 from his employment as a counselor when he attempted to report ReVille's pedophilia to her. These actions by The Citadel from 1998 to 2005 raise a triable issue as to whether The Citadel voluntarily assumed the duty to investigate and arrest ReVille for sexual abuse of children. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

Moreover, a genuine issue of fact exists as to whether The Citadel voluntarily assumed the duty to investigate and arrest ReVille's pedophilia after it received the sexual abuse complaint against him on April 23, 2007. The Citadel's own policies and procedures in effect in April 2007 established required action by The Citadel in the face of the complaint of sexual abuse. *See Madison ex rel. Bryant*, 371 S.C. at 140, 638 S.E.2d at 659 (noting the standard of care in a given case may be established by a defendant's own policies and guidelines). First, the evidence shows The Citadel violated its *Employee Misconduct Policy* when it required a quid pro quo from ReVille for him to leave Citadel employment and lay low in exchange for The Citadel's concealment of his pedophilia. (R. p. 1214). The Citadel's policy required that it not terminate any investigation in exchange for resignation by the employee, that it provide factual and candid responses to inquiries by potential employers, that it fully cooperate with law enforcement, and that it not expunge molestation findings from the employee's record. (*Id.*). Here, The Citadel did not make any record of the complaint against ReVille in his employment file and instead concealed its knowledge of his pedophilia.

The Citadel also violated its own multiple policies in effect requiring the report of all incidents of sexual abuse or assault to law enforcement, along with the arrest of criminal suspects, to include the *Sexual Harassment, Memo. No. 51*; *Serious Incidents*

Memorandum; and *The Citadel's Sexual Assault Crisis Intervention Policy, Memo. No. 4.* (R. pp. 1198-1210, 1215-1234). Again, The Citadel also violated its *The Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues*, because the policy mandated that no time limit exists for turning complaints over to Public Safety and the policy applies even if the counselor is no longer affiliated with the camp. (R. pp. 983-984). The Citadel had the duty to arrest ReVille and had the power and jurisdiction to arrest ReVille on or off the campus. (R. p. 1872).

Instead, The Citadel violated its own policies requiring the arrest of ReVille. By adopting policies for the protection and well-being of prospective and foreseeable victims, the Citadel also acquired a duty under state common law to act with due care in the investigation and arrest of ReVille in 2007. The evidence establishes The Citadel acted to conceal ReVille's pedophilia, along with The Citadel's knowledge of his dangerous proclivities, and specifically concealed the 2007 complaint from the community, the Board of Visitors, and the S.C. Employment Security Commission, as well as within the school's own files. The Citadel's deviation from its own policies and procedures, along with evidence of its concealment of the complaint, demonstrate its lack of due care under the relevant circumstances. *Peterson*, 365 S.C. at 396, 618 S.E.2d at 906.

Therefore, whether The Citadel voluntarily undertook the duty to investigate and arrest ReVille for pedophilia in 2002, 2003, 2004, 2005, and in 2007 presents questions for the jury, and summary judgment should be reversed. *See Fickling*, 372 S.C. at 606-607, 643 S.E.2d at 115-116.

B. The Citadel is liable for negligently creating the risk that ReVille would sexually abuse Doe 2.

The Citadel also owed a duty to Doe 2 based on its own actions that negligently created the risk that ReVille would sexually abuse him. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. On point is our Supreme Court's decision in *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547 (1990), where the plaintiff claimed that the state auditorium was negligent in adequately securing and maintaining the premises during a concert where the plaintiff was injured by a bottle thrown by an unknown person from the balcony onto him. The plaintiff in that case did not allege that the auditorium was liable because of the third party's actions; rather, his complaint was that the auditorium was liable for its own negligence in creating a reasonably foreseeable risk of such third party conduct. The Supreme Court upheld the jury verdict for the plaintiff:

> [The auditorium] cannot successfully defend that [plaintiff's] injuries were caused by the wrongful criminal act of a third party, where the very basis upon which [the auditorium] is claimed to be negligent is that [it] created a reasonably foreseeable risk of such third party conduct.

Id. at 247, 549.

In this case, Doe 2 does not seek to hold The Citadel liable for creating ReVille's desire to sexually abuse Doe 2. Nor does Doe 2 seek to hold The Citadel liable merely based on its position as an employer of ReVille. Rather, the Citadel's duty to Doe 2 and liability is based on The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse Doe 2.[6] The Citadel should have foreseen that its negligent

[6] The Order granting The Citadel's Renewed Motion for Summary Judgment cites to a number of cases from foreign jurisdictions as support for holding that an employer is not liable for abuse by the employee occurring after the employment ends and outside of the employment context. (*Order Granting Renewed Motion for Summary Judgment*, R. p. 79). However, the cases do not involve conduct by a defendant that created the risk of

actions would probably cause injury to someone in the form of sexual abuse by ReVille. *See Greenville Memorial Auditorium*, 301 S.C. at 242, 391 S.E.2d at 547-548. Where a duty exists based on the negligent or intentional creation of the risk of injury, our Supreme Court explains:

> [I]n order to establish liability, it is not necessary the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen his negligence would probably cause injury to someone. He may be held liable for anything which appears to have been a natural and probable consequence of his negligence.

Id.

Continued sexual abuse of children by a pedophile is the natural and probable consequence of negligent actions taken to conceal a known pedophile and keep him out of police custody. The Citadel's own expert, Mr. Margolis, confirms that ReVille had a propensity to abuse victims within a discrete class of society, calling him a preferential child molester, and opined to the reasonable foreseeability that ReVille would continue molesting boys once he left Citadel campus. (R. p. 1195). Mr. Margolis also testified that he is not aware of any child sexual predator who stopped molesting children without being arrested or dying, and he is not aware of any peer-review studies that suggest a child molester will stop or decrease acts of molestation before being caught. (R. pp. 1196-1197). A person of ordinary reason and prudence would have known that the concealment of a child molester leads to the reasonable foreseeability that children will continue to be sexually abused. *See Crowley*, 285 S.C. at 406, 329 S.E.2d at 780.

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subsequent abuse or involve a defendant voluntarily undertaking any duty. Thus, these cases are not controlling, as The Citadel's duty is based on distinct actions it took to create the risk of Doe 2's abuse and a duty it voluntarily assumed by its actions and governing policies and procedures.

In sum, The Citadel is liable for its own negligent actions. The evidence at summary judgment includes that The Citadel violated its policies requiring investigation and arrest of ReVille and instead concealed ReVille's pedophilia in 2003, when Garrott caught ReVille engaged in inappropriate conduct with a minor behind closed doors; in 2004, when The Citadel had constructive notice of Reville's sexual abuse of boys; in 2005, when The Citadel terminated Camper Doe 6 for making a disclosure about ReVille's pedophilia; and then again when The Citadel received the April 23, 2007 complaint about ReVille's abuse at the camp. The Citadel violated its own policies by not arresting ReVille or even turning the complaints over to law enforcement, and The Citadel acted to maintain an apparent ignorance of ReVille's pedophilia, all the while knowing of his dangerous proclivities. The Citadel's actions maintained ReVille in the community undetected and supported his continuing sexual abuse of children.

The Citadel is liable for its own conduct of concealing a known child sexual predator. *See Madison ex rel Bryant*, 371 S.C. at 135, 638 S.E.2d at 656; *Faile*, 350 S.C. at 334, 566 S.E.2d at 546. The Citadel should have contemplated that its actions taken while ReVille was a cadet, was a camp counselor, and was an employee maintained and supported ReVille's continued sexual abuse of children, and The Citadel should have foreseen that its negligent actions would probably cause injury to someone in the form of sexual abuse by ReVille. *See Greenville Memorial Auditorium*, 301 S.C. at 242, 391 S.E.2d at 547-548.

C. Federal statute imposed a duty on The Citadel not to conceal ReVille's sexual abuse after it received the April 2007 complaint.

In South Carolina, the test for determining when a statute creates a duty of care and supports an action for negligence is (1) whether the statute's essential purpose is to protect

from the kind of harm the plaintiff has suffered and (2) whether the plaintiff is a member of the class of persons the statute is intended to protect. *Rayfield*, 297 S.C. at 102, 374 S.E.2d at 914 (deriving test from comparison of *Clifford v. Southern Railway*, 87 S.C. 324, 69 S.E. 513 (1910) and *Hutto v. Southern Railway*, 100 S.C. 181, 84 S.E. 719 (1915)). Therefore, a statute may create a duty of care of which the violation of constitutes breach and establishes negligence per se. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 915.

The Citadel's conduct in response to the 2007 report of child sexual abuse by ReVille violated Title IX of the Education Amendments of 1972. The essential purpose of Title IX is to eliminate, with certain exceptions, discrimination on the basis of sex in any education program or activity[7] receiving federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. § 106.1. Title IX bestows an affirmative action requirement on institutes of undergraduate higher education to take such remedial action as necessary to overcome the effects of such discrimination. 34 C.F.R. § 106.3(a). Therefore, Title IX's essential purpose to eliminate sex discrimination by definition seeks to protect other individuals from subsequent sex discrimination. For eliminating known sexual discrimination, whether it be in the form of harassment or abuse, prevents the future sexual harassment of other individuals. Accordingly, Doe 2 is a member of the class of persons Title IX intends to protect.

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[7] Under Title IX, an education program recipient of Federal financial assistance means "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(i). "Institutions" include those of higher education as defined by 34 C.F.R. § 106.2(l), (m), (n), and (o), which includes The Citadel as an institute of undergraduate higher education.

Furthermore, evidence of The Citadel's violations of Title IX is indicative of The Citadel's negligence in this case. Title IX imposed requirements on how The Citadel was to respond to the April 2007 complaint of sexual abuse by ReVille. The Citadel's actions taken counter, rather than in accordance with Title IX, are evidence of its failure to act with due care in handling the complaint, as well as evidence of The Citadel's negligent creation of the risk of Doe 2's abuse.

As far back as 2000, the Office of Civil Rights [OCR] provided guidance to schools on their obligations under Title IX in regards to complaints of sexual discrimination and harassment. (R. pp. 1257-1278; *see also* "Dear Colleague Letter," April 4, 2011, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html. OCR highlighted that the United States Supreme Court in *Gebser v. Lago Visa Indep. School Dist.*, 524 U.S. 274 (1998), expressly affirmed that the school must take remedial action to remedy the effects of the harassment on the victim. (R. p. 1260). Schools must "disseminate a policy against sex discrimination" and "adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment." (R. p. 1260).

The Citadel's expert, Mr. Margolis, highlights the definition of sexual harassment under Title IX:

> Sexual violence is a form of sexual harassment prohibited by Title IX.
> - Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol
> - An individual also may be unable to give consent due to an intellectual or other disability
> - May include rape, sexual assault, sexual battery, and sexual coercion.

(R. p. 1279).

As discussed, *see infra* pp. 13-14, in 2007, The Citadel disseminated policies against sex discrimination and harassment that governed its actions in regards to the complaint of ReVille's sexual abuse. Title IX also requires schools to designate at least one employee to coordinate compliance with the regulations implementing Title IX. (R. p. 1265). Despite President Rosa himself bringing in Janet Shealy as the Citadel's Sexual Assault Response Coordinator, neither he nor any other Citadel administrator referred the ReVille sexual abuse complaints to her, per the explanation that she was there "to handle current cases." (R. pp. 1280-1281). The Citadel did not refer the complaint to Ms. Shealy in order to keep ReVille's pedophilia concealed.

Title IX also requires that if the school knows, or even reasonably should know, of sexual harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. (R. p. 1267). Even if the school does not learn of the sexual harassment from the victim but from some other source, the school violates Title IX if it fails to take "immediate and effective corrective action." (R. p. 1267). Defendant's own expert stresses corrective action must be taken whether the complaint comes from the victim, a parent, or a third party. (R. p. 1282). The OCR also highlights, "if harassment has occurred, doing nothing is always the wrong response." (R. p. 1263).

Title IX makes clear:

> In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigation are different, police investigations or reports may not be determinative of whether harassment has occurred under Title IX and DO NOT relieve the school of ITS DUTY to respond promptly.

(R. p. 1271) (emphasis added). Title IX required The Citadel to assist the victim who came forward on April 23, 2007, as emphasized by OCR—"school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim." (R. pp. 1266, 1282).

The facts show that The Citadel did nothing to rehabilitate or assist Camper Doe, as is required by federal law, and instead acted to conceal his complaint of sexual abuse. The Citadel's motives were self-serving, and as a former member of President Rosa's staff who lived through this ordeal testified:

> Q. Looking back on the period of time when you were working within the President's office....do you believe that President Rosa was indifferent towards concerns that he should have been worried about; for example, other victims who may be abused?
>
> Mr. Kovach: Objection.
>
> A. Yeah, I do think he was indifferent to it.

(R. p. 1283, line 20 through p. 1284, line 4).

The Citadel's failure to abide by the duty of care established by Title IX further is evident in its decision to give responsibility for investigating the 2007 complaint to the Citadel's General Counsel. Title IX specifically requires an impartial investigation, and The Citadel's own expert agrees and stipulates that college attorneys are not an impartial party to investigate such claims. (R. pp. 1285-1286). In addition, The Citadel allowed the South Carolina Insurance Reserve Fund to be part of the process of investigating the complaint of child sexual abuse by a Citadel employee. (R. pp. 1288-1290). The Citadel's decision directly violates OCR's caution against using insurance company investigations to guide the school's response to complaints of sexual abuse or harassment, because "[t]he purpose of an insurance investigation is to assess liability under the insurance policy, and

the applicable standards may well be different than those under Title IX." (R. p. 1271). President Rosa's direction to the General Counsel to "investigate" the child sexual abuse and allowance of the Insurance Reserve Fund to be part of the process directly contradict the duty of care owed under Title IX.

Defendant's expert, Mr. Margolis, testified to the violation of Title IX by Defendant's actions in regards to the 2007 complaint:

> Q: when Doe made a third-party complaint as to eyewitness Doe and the six others who were abused the year before, The Citadel's duty under Title IX requiring it to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects applied to the many others, not just Doe, correct?
>
> A: Correct.

(R. p. 1291, lines 8-16).

> Q: You would agree with me that the Title IX coordinator at The Citadel didn't oversee those allegations and the investigation of them by Mark Brandenburg, correct?
>
> A: That is correct.
>
> Q: That would be a violation of Title IX, correct?
>
> A: It would be a violation of this, correct.

(R. p. 1292, lines 11-20).

In light of the foregoing, The Citadel's actions in response to the 2007 report of child sex abuse violated its duty of care established by Title IX to Doe 2, and its breach of the duty constitutes negligence per se. *See Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914.

II. The Citadel Is Not Entitled To Summary Judgment On Doe 2's Outrage Claim.

Doe 2 brought a claim of outrage, or intentional infliction of emotional distress, by

The Citadel for its conduct of deliberately concealing child sexual abuse by ReVille and facilitating ReVille's continued access to children in the Charleston community where it was reasonably foreseeable that he would sexually abuse Doe 2. The elements of the tort of outrage include: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the defendant's conduct was "so extreme and outrageous so as to exceed all possible bounds of decency" to be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the defendant's actions caused the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was "severe such that no reasonable man could be expected to endure it." *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (citing *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)).

A. <u>The TCA does not bar a claim of outrage against The Citadel.</u>

The lower court erred in holding that the TCA bars the claim of outrage against a state entity, because of the definition of the word "loss" within the TCA. The definition of "loss" qualifies the "actual damages recoverable in actions for negligence" by excluding intentional infliction of emotional harm as a damage of such negligence:

> "Loss" means 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.

S.C.Code Ann. 15-78-30(f) (1976).

The reference to intentional infliction of harm in the "loss" definition is not an exclusion of tort liability for outrage against a state entity. Rather, state entities "are liable

for their torts in the same manner and to same extent as a private individual under like circumstances," subject to the limitations and exemptions from liability and damages contained in the code. S.C.Code Ann. 15-78-40 (1976). The limitations and exemptions from liability and damages are delineated as specific circumstances where the state entity will not be liable for any loss, rather than a list of torts the state entity is exempt from. *See* S.C.Code Ann. 15-78-60 (1976). The TCA does not grant state entities blanket immunity from outrage liability.

This Honorable Court recently ruled on a complaint against a state entity where the jury entered verdicts for the plaintiff on claims of gross negligence and outrage under the TCA. *See Bass v. S.C. Dept. of Social Services*, 403 S.C. 184, 742 S.E.2d 667 (Ct.App.2013), *cert. granted*, (July 18, 2014). At trial, DSS had moved for a directed verdict on the outrage claim, making the same argument as The Citadel that the TCA definition of loss excluded the claim, and renewed its motion at the close of its case. *Id.* at 189, 670. On appeal, this Court reversed the trial court's denial of DSS's JNOV motions; however, the Court did not base its reversal on the TCA excluding outrage claims. Rather, the Court addressed the evidence in the case and whether the elements of outrage had been met. *Id.* at 189-193, 670-672 (holding since evidence did not establish gross negligence by DSS, claim of outrage based on reckless conduct must fail because conduct cannot be reckless where it is not at least grossly negligent). If the TCA exempted outrage liability against a state entity, the Court would not have had to go through the analysis of whether the elements of outrage were made by the plaintiff. Likewise, there is no basis to bar Doe 2's claim of outrage against The Citadel under the TCA's limitation on damages recoverable from state entity negligence.

B. <u>The evidence supports more than scintilla of evidence that The Citadel's conduct was outrageous and that The Citadel's conduct was directed toward Doe 2.</u>

In this case, more than a scintilla of evidence exists to establish the elements of outrage against The Citadel, and The Citadel's conduct may "reasonably be regarded as so extreme and outrageous as to permit recovery" and submission of the issue to the jury. *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74. First, the evidence establishes that The Citadel was certain or substantially certain that severe emotional distress would be inflicted on Doe 2 when it intentionally concealed ReVille's pedophilia in 2003, 2004, 2005 and again in 2007 with the report of child sexual abuse by ReVille at the camp. The Citadel's administrators actively required a quid pro quo from ReVille to "lay low" and leave The Citadel in exchange for The Citadel's silence as to his pedophilia, without any disclosure to any law enforcement or arrest, and, in essence, without any indication attached to ReVille that he was a child molester. Furthermore, The Citadel's actions maintained ReVille as an esteemed Citadel alumnus and former employee so that ReVille could continue to gain employment with children based on his Citadel credentials. The Citadel took these actions despite the reasonable foreseeability that ReVille would continue molesting children, to include Doe 2. It was certain or substantially certain that emotional distress of Doe 2 would result from The Citadel's conduct, as The Citadel's conduct led to Doe 2's sexual abuse by ReVille. *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74.

The lower court also erred in holding that there is no evidence that The Citadel targeted Doe 2 to be harmed by its intentional or reckless concealment of ReVille's pedophilia. *See Upchurch v. New York Times Co.*, 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993) (holding conduct for claim of outrage must be targeted at plaintiff to be harmed by

the allegedly tortious acts). The Citadel specifically acted despite the reasonable foreseeability that ReVille would continue molesting children, children that included Doe 2. As such, The Citadel targeted the Doe 2 for sexual abuse by ReVille in its conduct of concealing ReVille as a pedophile.

Second, concealing a child sexual predator and taking actions that allow the predator to continue to be around children and further victimize children is conduct "so extreme and outrageous so as to exceed all possible bounds of decency." *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74. Such conduct readily may be regarded as "atrocious, and utterly intolerable in a civilized community." *Id.* Third, it was The Citadel's actions of concealing the sexual abuse by ReVille and supporting him in the community that directly caused Doe 2's emotional distress by allowing ReVille access to abuse Doe 2. The emotional distress suffered by Doe 2 included years of suffering in silence out of fear that his parents would not love him anymore if he told them of his abuse by ReVille and would have been prevented had The Citadel not concealed its knowledge of ReVille as a pedophile. Fourth, Doe 2's emotional distress is so severe "that no reasonable man could be expected to endure it." *See Argoe*, 710 S.E.2d at 74. Therefore, the evidence supports Doe 2's claim of outrage against The Citadel, and The Citadel is not entitled to summary judgment on the claim of outrage.

CONCLUSION

The trial court erred in concluding that The Citadel did not owe a duty to Doe 2 as a matter of law at summary judgment. The evidence at summary judgment supports that The Citadel owed a duty to Doe 2 based on voluntarily undertaking the duty to investigate sexual misconduct by ReVille and arrest ReVille; based on The Citadel's negligent creation of the risk of Doe 2's sexual abuse by ReVille; and based on duties imposed on The Citadel

by Title IX. Whether The Citadel voluntarily undertook a duty to investigate ReVille's pedophilia and arrest him based on its actions in 2002, 2003, 2004, 2005, and again from April 2007 onward present genuine issues of material fact for a jury. *See Fickling* 372 S.C. at 610-11, 643 S.E.2d at 118. In addition, the lower court erred in granting summary judgment for The Citadel on Doe 2's claim of outrage, as a genuine issue of material fact exists as to whether The Citadel targeted Doe 2 for sexual abuse by ReVille in its conduct of concealing ReVille as a pedophile, and the TCA does not bar a claim of outrage against a state entity.

Accordingly, Doe 2 respectfully requests that the Court reverse the lower court's July 6, 2015 Order and deny summary judgment for The Citadel and remand the case in its entirety for trial.

Respectfully submitted this 26th day of October 2015,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

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v.

The Citadel.....Respondent.

CERTIFICATE OF COMPLIANCE

Appellant's counsel certifies that his final brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE OF FINAL BRIEF

I certify that I have served Appellant's Final Brief on the above-named Respondent via hand delivery and to the South Carolina Court of Appeals by depositing it in the United States Mail, Certified Mail – Return Receipt Delivery, postage prepaid, on October 27, 2015, addressed to the following:

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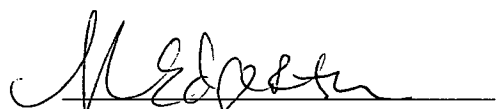

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