

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2015-001505

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**RECEIVED**

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SC Court of Appeals

John Doe 2, ..... Appellant,

v.

The Citadel ..... Respondent.

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FINAL BRIEF OF RESPONDENT

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### **STATEMENT OF ISSUES ON APPEAL**

1. Did the trial court properly conclude that The Citadel did not undertake a duty of care to Plaintiff where there is no evidence that it knew Plaintiff or ever intended to protect him from ReVille?
2. Did the trial court properly conclude that The Citadel did not "create" the danger to Plaintiff so as to require the imposition of a duty of care?
3. Did the trial court properly conclude that Title IX does not impose a negligence duty of care on The Citadel under the circumstances of this case?
4. Did the trial court properly conclude that Plaintiff may not base his claims on events occurring during the operation of the summer camp, years before his abuse?
5. Can Plaintiff show proximate causation under the facts of this case?
6. Did the trial court properly conclude that the South Carolina Tort Claims Act ("SCTCA") prohibits Plaintiff's outrage claim?
7. Did the trial court properly conclude that Plaintiff's outrage claims fail because no conduct of The Citadel was directed toward him?
8. Must Plaintiff's outrage claims fail where he presents no evidence that The Citadel acted in an outrageous manner?
9. Must Plaintiff's outrage claims fail where he had other remedies available to him?

## **STATEMENT OF THE CASE**

### **A. Procedural History**

John Doe 2 (“Doe”) sued The Citadel, The Military College of South Carolina (“The Citadel”) for failing to prevent Louis “Skip” ReVille, a former counselor at The Citadel’s former summer camp, from sexually abusing him. Doe concededly never attended the camp and had no affiliation with The Citadel. Doe alleges claims against The Citadel sounding in negligence/gross negligence and outrage. (*See* R. pp.84-105). On or about April 24, 2015, The Citadel filed a Renewed<sup>1</sup> Motion for Summary Judgment. (*See* R. pp. 1575-1824). On June 4, 2015, Plaintiff filed an opposition to that motion (R. pp. 1825-75) and The Citadel filed a Supplemental Memorandum in Support of Renewed Motion for Summary Judgment (R. pp. 1877-1904). On July 6, 2015, the Court granted The Citadel's Renewed Motion for Summary Judgment, which Plaintiff has appealed to this Court. (*See* R. pp. 71-83 (“Order”)). Although Plaintiff posits in his Brief, taking isolated portions of a hearing transcript out of context, that the trial judge somehow concluded that The Citadel owed him a duty, this is belied by the Order. The Order expressly holds that law does not impose a duty on The Citadel under where there was no specific threat to a specific victim. The trial court specifically rejected that The Citadel owed a duty to protect *everyone* from potential abuse by ReVille at some point in the future.

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<sup>1</sup> The Citadel had previously filed a Notice of Motion and Motion for Summary Judgment on March 6, 2014 in this and in other related cases. It filed a Memorandum in Support of Motion for Summary Judgment on April 14, 2014 (*See* R. pp. 171-477). Plaintiff filed memoranda in Memorandum in Opposition to Defendant's Motion for Summary Judgment on April 16, 2014 (*See* R. pp. 478-1334). On April 18, 2014, Plaintiff filed a Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment, supplementing the record with Doe's deposition (*See* R. pp. 1355-1534). The Citadel filed a Supplemental Memorandum in Support Concerning the Existence of a Duty of Care on April 28, 2014. On June 6, 2014, The Citadel filed another Supplemental Memorandum in Support of Motion for Summary Judgment. The trial court denied that Motion by order dated December 9, 2014. Subsequently, The Citadel renewed its Motion for Summary Judgment in this case.

**B. Factual Background**

**1. The 2007 Report**

On April 23, 2007, the father of a nineteen year-old former camper at The Citadel's summer camp ("Camper Doe") — who is *not* the Plaintiff in this lawsuit — informed The Citadel that ReVille had engaged in sexual misconduct with his son five years prior. Camper Doe's father spoke by telephone with Mark Brandenburg, The Citadel's General Counsel ("Brandenburg"), and told Brandenburg that once during Camper Doe's stay at the camp, a counselor named "Skip" invited his son into his room, where they watched pornography and masturbated. (*See* R. p. 232 ¶ 3). Brandenburg subsequently spoke on the phone with Camper Doe, who confirmed that "Skip" once invited him into his room, showed him pornography and convinced him to masturbate. (*See id.* ¶ 4). Brandenburg telephoned ReVille, who coincidentally submitted his resignation on March 22, 2007 to pursue other interests and had recently worked his final day. (*See* R. pp. 239-43). ReVille emphatically denied Camper Doe's allegations.

Brandenburg continued his investigation on July 1, 2007, when he met with Camper Doe and his parents in Texas. Camper Doe's father expressed a desire for privacy, stating, "I don't want to be another name in the Charleston papers" or to become "a part of Charleston gossip." (*See* R. p. 246-48). Camper Doe's father noted that Camper Doe had applied for admission to The Citadel but The Citadel had not accepted him and suggested that The Citadel "can be part of the root cause to fix him" by admitting him. (*See* R. p. 247 lines 16-17). Camper Doe's father opined that admitting his son as a cadet would be, "a very inexpensive way for The Citadel to say, do you know what – we'll fix our own." (*See* R. p. 247 lines 19-23).

In accordance with the wishes of Camper Doe and his family, Brandenburg worked with Citadel admissions staff in an effort to allow Camper Doe's admission as a cadet. (*See* R. p. 251 line 25 to p. 252 line 25). When The Citadel determined that Camper Doe lacked the requisite academic qualifications, Brandenburg proposed that the

South Carolina State Insurance Reserve Fund pay for courses to permit him to reapply to The Citadel. (See R. p. 253 line 1 to p. 254 line 16). After this meeting, Brandenburg never heard again from Camper Doe or his parents. There is no evidence that he ever received any independent corroboration of Camper Doe's claim of having been victimized at the summer camp, which was no longer in operation.

The following facts with regard to Camper Doe's report in 2007 and The Citadel's response thereto are undisputed (*see generally* R. pp. 244-48):

- The report concerned an incident that had occurred approximately five years prior.
- The summer camp closed the year prior to Camper Doe's report.
- ReVille had resigned from his employment at The Citadel (which involved working for the college, not the summer camp) prior to Camper Doe's report.
- Camper Doe's report did not identify any physical sexual contact between ReVille and any minor.
- Brandenburg was unable to obtain any independent verification that any other camper was present during the abuse.
- Camper Doe was an adult, with the autonomy to make his own decision about how to handle his claim of sexual misconduct.
- Camper Doe or his family never reported the incident to law enforcement prior to ReVille's arrest in 2011.
- Camper Doe did not follow up with Brandenburg after the July 1, 2007 interview.

In light of these accumulated factors and in compliance with applicable laws, The Citadel did not report the alleged incident to law enforcement

In October 2011, ReVille's sexual misconduct came to light, and various law enforcement agencies initiated investigations. ReVille was ultimately charged with crimes in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous charges of criminal sexual conduct with minors, solicitation

of minors, lewd acts upon a minor, and dissemination of obscene material. The Honorable R. Markley Dennis, Jr., sentenced ReVille to fifty years imprisonment.

## 2. Plaintiff's Abuse

The following timeline of key events underlying this action will help the Court place this appeal into context (*see generally* R. pp. 1575-1824):

| <u>DATE</u>            | <u>DESCRIPTION</u>                                                                                                                                                                                                                                                                                                    |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| June, 2001             | ReVille begins working at the summer camp as a CCQ (Counselor in Charge of Quarters)                                                                                                                                                                                                                                  |
| August, 2001           | "Evaluation" of ReVille recommends ReVille as senior counselor for 2002 camp but states "ReVille needs to learn to distance himself from campers"                                                                                                                                                                     |
| June 16-July 6, 2002   | ReVille is Senior Counselor at the camp.                                                                                                                                                                                                                                                                              |
| June, 2002             | ReVille allegedly views pornography with Camper Doe and encourages him to masturbate.                                                                                                                                                                                                                                 |
| July 14-August 3, 2002 | Camp supervisor Jenni Garrott ("Garrott") allegedly sees ReVille sitting on a couch next to a camper and admonishes him about being alone with campers.                                                                                                                                                               |
| April 15, 2003         | ReVille submits application to work at summer camp containing flippant information such as "likes to cook" and "enjoys walks on the beach" in an apparent attempt at humor.                                                                                                                                           |
| June, 2003             | Garrott allegedly observes ReVille applying Icy Hot to the leg of a 16 year old counselor during daytime hours in a room with the door open. She notes that neither of them stopped what they were doing when she came into the room.                                                                                 |
| August, 2003           | ReVille's employment at the camp ends.                                                                                                                                                                                                                                                                                |
| Early summer, 2005     | ReVille, then a teacher at Pinewood Prep, meets Doe through AAU basketball. ( <i>See</i> R. 1597 line 16 to p. 1600 line 3). During that summer, ReVille began "grooming" Doe, showing Doe pornography, and encouraging him to masturbate. ( <i>See</i> R. p. 1601 lines 4-17, R. p. 1602 line 16 to p. 1603 line 3). |
| Late summer, 2005      | ReVille started abusing Doe at ReVille's home, including masturbating him, performing oral sex on him and touching him. ( <i>See</i> R. p. 1604 line 4 to p. 1605 line 10).                                                                                                                                           |
| 2005-06 School Year    | During Doe's seventh grade year (2005-06), ReVille continued to abuse him at ReVille's home and created the group "The Killers" as a fraternity of victims who viewed pornography and masturbated. ( <i>See</i> R. p. 1609 line 23 to p. 1602 line 14).                                                               |
| August 22, 2006        | ReVille begins working as a part-time, temporary tutor in The Citadel's writing center working with college students. No evidence exists that ReVille was exposed to minors through this employment.                                                                                                                  |

| <u>DATE</u>                  | <u>DESCRIPTION</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Into fall of 2006            | ReVille continued to abuse Doe through 2005 and 2006, with ReVille moving into a bachelor suite at Doe's home as early as May of 2006, when Doe's father was working in Atlanta. (See R. p. 1605 line 19 to p. 1606 line 8; R. p. 1607 line 21 to p. 1608 line 6; R. p. 1625 lines 22-24). ReVille moved into the family home, in part to assist with family duties. (See R. p. 1612 line 13 to p. 1613 line 7). Plaintiff presents no evidence that The Citadel knew that ReVille lived with Doe or anything about their interactions. |
| 2006 and on ...              | Following ReVille's move into the guest house, ReVille's abuse continued essentially until the family moved out of state at the end of summer of 2007. (See R. p. 1615 line 25 to p. 1616 line 14).                                                                                                                                                                                                                                                                                                                                     |
| November, 2006               | ReVille listed Doe's mother as a reference in a November, 2006 job application. (See R. pp. 1635-36).                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| March 22, 2007               | ReVille resigns from The Citadel's writing center. (See R. p. 1816).                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b><u>April 23, 2007</u></b> | <b><u>Camper Doe first contacts The Citadel.</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| June 1, 2007                 | ReVille moves from Doe's 's home to Mount Pleasant.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| July 1, 2007                 | Brandenburg interviews Camper Doe.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Late Summer 2007             | Doe's family moved to Georgia. (See R. p. 1614 lines 8-15). ReVille testified that Doe moved to Georgia "well before school started." (See R. p. 1630 lines 20-23). ReVille stopped abusing Doe when he and his family moved to Georgia.                                                                                                                                                                                                                                                                                                |

When the actual incidents of abuse of Doe are charted, three key facts become apparent: (1) ReVille met and began abusing Doe two years *after* he stopped working at the summer camp and two years before Camper Doe's 2007 report; (2) the vast majority of ReVille's abuse of Doe occurred before Camper Doe's report or interview; and (3) ReVille's access to Doe had no connection to The Citadel.

| <u>DATE</u>                    | <u>DESCRIPTION</u>                                                                                                                                             |
|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2005                           | ReVille abused Doe at least 12 times at his home and in his car. (See R. p. 1622, line 2 to p. 1624, line 20).                                                 |
| 2006                           | ReVille abused Doe "three, four times a week" in 2006, approximately 200 times. (See R. p. 1626, line 17 to p. 1628, line 2).                                  |
| 2007 (prior to April 23, 2007) | From the beginning of 2007 through April 23, 2007, ReVille abused Doe approximately "two to three times a week." (See R. p. 1632, line 25 to p. 1633, line 4). |
| <b><u>April 23, 2007</u></b>   | <b><u>Date of Camper Doe's call to The Citadel.</u></b>                                                                                                        |
| May, 2007                      | ReVille only had two or three interactions with Doe in May, 2007. (See R. p. 1631, lines 12-20; R. p. 1632, lines 3-15).                                       |
| June, 2007                     | There were only six to eight interactions. (See <i>id.</i> ).                                                                                                  |

| <u>DATE</u>         | <u>DESCRIPTION</u>                                                                                                                                       |
|---------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>July 1, 2007</u> | <u>Brandenburg interviewed Camper Doe.</u>                                                                                                               |
| July, 2007          | ReVille only had four to six interactions with Doe in July of 2007. ( <i>See id.</i> ).                                                                  |
| August, 2007        | ReVille does not believe he abused Doe in August of 2007 (or any time after July, 2007). ( <i>See</i> R. p. 1631, lines 21-23; R. p. 1632, lines 16-24). |

ReVille confirmed that he abused Doe approximately twelve times between May, 2007 and the time Doe's family moved out of state. (*See* R. p. 1629, lines 15-25).

### **C. Plaintiff's Misstatements of Fact**

Plaintiff's Brief is replete with factual misstatements. Ordinarily, appeal – let alone appeal from summary judgment – is not the place to argue over interpretation of evidence. However, Plaintiff's misstatements are so pervasive, and some are so serious, that they cannot go unanswered.

First, Plaintiff's Brief states, on numerous occasions, that The Citadel's policies required that it fire ReVille as a camp counselor. This is simply not true. In fact, no policy *required* The Citadel to fire a camp counselor for merely being in a room with a camper; Plaintiff cites nothing in the record establishing this as a matter of policy, but instead relies on the *ipse dixit* of his counsel. While a document entitled "OFFICIAL SUMMER CAMP POLICIES REGARDING SEXUAL MISCONDUCT ISSUES" made "sexual relationships" between counselors and campers a ground for immediate termination, it did not make simply being alone in a room with a camper grounds for firing. (*See* R. pp. 983-84). Plaintiff presents no evidence that The Citadel ever knew that ReVille, while a counselor, engaged in a sexual relationship (or improper contact) with a camper. At most, The Citadel was aware that ReVille had been in a room with minors. He was appropriately admonished not to do that. Plaintiff cites no Citadel policy in the record that *required* that ReVille be fired for such an incident.

The following chart identifies some of Plaintiff's additional factual misstatements in his brief and seeks to correct them:

| <b><u>PLAINTIFF'S STATEMENT</u></b>                                                                                                                                                                                                                                                                      | <b><u>REALITY</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>p.4:</b> Plaintiff claims that 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 sexual misconduct with adolescent boys.</p> | <p>In 1998, ReVille sought counseling assistance for two months to improve his focus on the tennis team. He also sought guidance in 2000-2001. The records for that counseling that are properly part of the appellate record nowhere state or imply that ReVille disclosed anything about prior mental health services. Plaintiff certainly provides no evidence that ReVille revealed anything about being ordered into counseling for "sexual misconduct." Plaintiff also cites no authority for his implied contention that a mental health counselor would have been at liberty to disclose confidential counseling information to Citadel officials.<sup>2</sup></p>                                                                                                                                                                                  |
| <p><b>p.4:</b> Plaintiff claims that on January 18, 2001, Citadel counselor Dr. Bradham and a MUSC psychiatrist discussed monitoring ReVille for bipolar disease, and by February 2001, The Citadel knew that ReVille was non-compliant with his prescription psychiatric medications.</p>               | <p>The record does not support that The Citadel was involved in monitoring ReVille's alleged bipolar condition or medication compliance.</p> <p>Dr. Bradham's January 18, 2001 record makes clear that he communicated that MUSC was to monitor ReVille's potential bipolar condition: "The content of our last session was also relayed to Dr. Douglas as was this therapist's request <i>that she continue to monitor for the presence of bipolar symptoms when she meets with him again.</i>" (See R. p. 1852).</p> <p>Similarly, Dr. Bradham made clear in February of 2001 that ReVille needed to discuss compliance with medications with MUSC: "He was advised against non-compliance with his psychiatrist's directives and was advised to contact Dr. Douglas at MUSC to notify her of his decision to stop the medication." (See R. p. 1851).</p> |
| <p><b>p.5:</b> Plaintiff claims that in the summer of 2001 The Citadel learned that Arpaio abused numerous campers in his room.</p>                                                                                                                                                                      | <p>This is untrue. In the summer of 2001, the Citadel learned of an <i>allegation</i> of abuse involving one camper, in which the Charleston Police Department closed its investigation on August 1, 2001, stating that it "could not establish probable cause" to make an arrest upon. (See R. p. 1304).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

<sup>2</sup> In fact, statutes would have prohibited ReVille's counselors from disclosing any confidences about ReVille without his consent. See generally S.C. Code § 19-11-95.

| <b><u>PLAINTIFF'S STATEMENT</u></b>                                                                                                                                                                                                                                                                                                                                  | <b><u>REALITY</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>p.6:</u></b> Plaintiff claims that in 2001 ReVille "attempted to self report" his abuse to The Citadel's Department of Public Safety. ( <i>Citing R. pp. 1857-58</i> ).                                                                                                                                                                                        | The document that Plaintiff relies upon does not support his proposition, and it is not true. After his arrest, ReVille made a statement to the police, which he later recanted, that he had asked a Public Safety officer "how I could file a case of sexual misconduct at the summer camp." Even if this event occurred, Plaintiff presents <i>no</i> evidence that ReVille disclosed that this involved abuse of children, that he wished to make a criminal report, or that he was the perpetrator.                                                                                                  |
| <b><u>pp.6-7:</u></b> Plaintiff claims that in 2002, Camp Garrott "caught" ReVille alone with a minor camper in his room. Plaintiff claims that ReVille should have been fired because a "rule . . . require[ed] immediate termination" for that alleged "violation."                                                                                                | As set forth herein, there was no rule that required ReVille's termination for simply being in a room with a camper. Moreover, there is no evidence that ReVille was "caught" doing anything improper, suspicious or sexual with the camper.                                                                                                                                                                                                                                                                                                                                                             |
| <b><u>p.7:</u></b> Plaintiff claims that in 2003, Garrott witnessed 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, Plaintiff claims that ReVille should have been fired for that incident. ( <i>Citing R. pp. 983-84, 1308-12</i> ). | This is incorrect in several respects. First, Camper Doe 6 was not, at that time, a camper; he was a junior counselor. Second, the record does not support that the room door was closed (it was actually open, with only a screen door closed). Finally, there is no evidence that ReVille was engaging in "inappropriate physical contact" with Camper Doe 6 (he was, actually, applying Icy Hot to Camper Doe 6's leg after a run). In fact, ReVille's affidavit states that he "had not yet sexually abused him at the time Ms. Garrott caught the two of us alone." ( <i>See R. p. 1310 ¶ 10</i> ). |
| <b><u>p.7:</u></b> Plaintiff states that Garrott admitted that she caught ReVille in direct violation of a camp rule and should have fired him.                                                                                                                                                                                                                      | This is not in the record before the Court. Garrott testified that:<br><br>At the time I thought it was a lapse in judgment, and I did not think that it was a violation of that. I -- you know, in that position a lot of people go to him and I -- yes, sir, I was very mad.<br><br>( <i>See R. p. 969, lines 21-25</i> ). This is a far cry from admitting that she "should have fired" him.                                                                                                                                                                                                          |
| <b><u>p.7:</u></b> Plaintiff claims that Anna Bronk, Garrott's assistant, spoke to ReVille "multiple times about his being alone with campers in his room."                                                                                                                                                                                                          | This is not stated anywhere in the record, particularly in the documents Plaintiff cites. ( <i>See R. pp. 1308-12, 1857-58</i> ).                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

| <u>PLAINTIFF'S STATEMENT</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <u>REALITY</u>                                                                                                                                                                                                                                                                                                                                                                                                                                |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>p.7:</b> Plaintiff claims that counselor OC Evans reported to Garrott's supervisor, Colonel John Lackey ("Lackey"), that ReVille had campers in his room at night.                                                                                                                                                                                                                                                                                                             | This is not stated in the record, particularly in the documents Plaintiff cites. The record does not reflect that that Evans reported anything to Lackey about ReVille. ( <i>See</i> R. pp. 1308-12 and 1857-58).                                                                                                                                                                                                                             |
| <b>p.8:</b> Plaintiff claims that in 2005, Camper Doe 6 was employed as a counselor. Plaintiff claims that, following sexual abuse training, Camper Doe 6 asked to speak with Garrott. Plaintiff further claims that when Camper Doe 6 told her he wanted to report ReVille, she abruptly dismissed him from the room. Plaintiff finally claims that in retaliation The Citadel fired Camper Doe 6 later that day, on the pretense that he called a camper an inappropriate name. | The only record evidence that Plaintiff cites for this proposition does not support this factual claim, aside from mentioning that Camper Doe 6 was fired. ( <i>See</i> R. pp. 1861-67).                                                                                                                                                                                                                                                      |
| <b>p.9:</b> Plaintiff claims that in 2007 Re Ville met with Brandenburg and Trez, who disclosed details of Camper Doe's complaint to him. Plaintiff claims that Brandenburg and Trez conveyed The Citadel's requirement of a <i>quid pro quo</i> with Re Ville, under which he would leave his part-time employment in The Citadel's Writing Center and "lay low," in exchange for The Citadel's silence as to his pedophilia.                                                    | There is no evidence whatsoever of a <i>quid pro quo</i> for a cover up. Assuming, <i>arguendo</i> , that this meeting occurred, the only evidence is ReVille's allegation, in an affidavit that Plaintiff's counsel procured after ReVille had been incarcerated, that Brandenburg and/or Trez told him to "lay low" and stay off campus. There is <b>nothing</b> in the record of an exchange or <i>quid pro quo</i> for ReVille's silence. |
| <b>p.10:</b> Plaintiff claims that in May, 2007, Brandenburg memorialized The Citadel's intent to cover up ReVille's child sexual abuse, writing "I am hopeful that by conducting an investigation on behalf of the school, no 'formal' investigation — criminal or civil —will occur."                                                                                                                                                                                           | The cited email, directed to a potential witness of ReVille's conduct, does not, in any way suggest cover up. At most, Brandenburg's email expresses hope that Camper Doe's complaints would be unfounded and that no abuse occurred. Nothing in the email suggested that The Citadel intended to conceal anything. In fact, the email recognizes that Camper Doe could, at any time, file a report with police.                              |
| <b>p.11:</b> Plaintiff claims that The Citadel also ensured that certain General Counsel file lists did not refer to a child sexual abuse claim against ReVille as part of an effort to cover up ReVille's abuse.                                                                                                                                                                                                                                                                 | The record does not suggest that this was concealment." Plaintiff presents no evidence that these file lists are anything more than internal documents for the use of The Citadel's General Counsel.                                                                                                                                                                                                                                          |
| <b>p.12:</b> Plaintiff claims that The Citadel bought ReVille's silence by withdrawing an objection to his application for unemployment.                                                                                                                                                                                                                                                                                                                                          | Plaintiff has no evidence supporting this rank speculation. First, there is no evidence that The Citadel ever expressed that its withdrawal of objections had anything to do with the allegations against ReVille. Moreover, there is not even any evidence that ReVille received unemployment benefits after The Citadel withdrew its objection (because he did not).                                                                        |

## ARGUMENTS

### **I. Standard of Review**

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

*NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). “[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine [or material].

*Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (citations omitted). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted).

When the underlying action requires proof by a preponderance of the evidence, the non-movant must submit a "scintilla of evidence" to survive summary judgment. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court.” *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). This Court “may affirm the grant of summary judgment on any ground found in the record.” *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), S.C.A.C.R. (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”)); accord Rule 208(b)(2) (“Respondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).”).

## **II. The Trial Judge Properly Granted Summary Judgment Because The Citadel Did Not Owe Doe a Duty of Care Under South Carolina Law**

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The trial court first held that The Citadel did not owe Doe a duty of care. For the reasons that follow, this Court should affirm the trial court’s grant of summary judgment to The Citadel. In fact, the Court should go further than the trial court did and hold that The Citadel owed Doe and others similarly situated no duty regardless of when ReVille began molesting him. Unqualified affirmation of the state of the law will guide the trial court in dealing with claims by ReVille’s other victims who had no relationship with The Citadel, but whose molestation began after Camper Doe’s 2007 report about ReVille.

A plaintiff must prove three elements to recover on a claim for negligence:

(1) that the Defendant owed a duty of care to Doe; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting therefrom. *See Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). “If any of these elements is absent a negligence claim is not stated.” *See Summers v. Harrison Constr.*, 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct.App.1989). “If the plaintiff fails to prove [The Citadel] owed h[im] a legal duty of care, [h]e fails to prove actionable negligence.” *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) (affirming summary judgment).

"[T]he existence of a legal duty is a question of law for the court." *See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 506-07, 737 S.E.2d 512, 515 (Ct. App. 2012) (affirming grant of summary judgment). The Supreme Court "will not extend the concept of a legal duty of care in tort liability beyond reasonable limits." *See Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 190, 666 S.E.2d 247, 252 (2008) (citations omitted); *accord Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (citation omitted) ("The concept of duty in tort liability will not be extended beyond reasonable limits.").

"Generally, there is no common law duty to act. An affirmative legal duty, however, may be created by statute, contract relationship, status, property interest, or some other special circumstance." *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314-15, 743 S.E.2d 109, 122 (Ct. App. 2013); *accord Arthurs v. Aiken Cty.*, 338 S.C. 253, 264, 525 S.E.2d 542, 547 (Ct. App. 1999) (citations omitted), *aff'd*, 346 S.C. 97, 551 S.E.2d 579 (2001). "[F]oreseeability of injury, standing alone, does not give rise to a duty." *See Oblachinski v. Reynolds*, 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011) (refusing to find duty to third parties foreseeably injured by sexual abuse examination).

Except in limited circumstances, South Carolina courts have refused to impose a duty of care to prevent third persons from committing acts of violence:

Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. [Citations omitted.] We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.

*See Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (finding duty where defendant had *custody* of actor).

South Carolina law has never recognized a duty of care to protect others from the

criminal acts of a third party where, as here, the potential victim was not *specifically identified or a member of a defined group in a fixed location and time*. This is logical, since a duty flows from the relationship between the defendant and injured party:

“A tortfeasor's duty arises from his relationship to the injured party.” *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986). It is essential to liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care. 57A Am.Jur.2d Negligence § 89 (1989). Where this relationship is “too attenuated,” a duty will not arise.

*See Ravan v. Greenville Cnty.*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). Here, there was no relationship whatsoever between The Citadel and Doe. To impose a duty upon The Citadel in this case would be to impose a duty upon everyone, to everyone. Taken to its logical conclusion, any person who fails to catch a criminal would be liable to virtually all of the criminal’s future victims. There would be no logical reason not to extend this duty to all schools, churches, and law enforcement agencies.

Although Plaintiff focuses his argument on the foreseeability of injury to potential unknown victims, South Carolina has never recognized that as a basis for duty in facts such as those presented here. No South Carolina appellate court has imposed a duty to prevent acts of a third person without evidence of knowledge of a threat to *specific* persons:

- In its most recent case, this Court held that the spouse of a sexual abuser — despite knowing her husband's predilection — did not owe a duty to a minor that her husband abused *in her home*. The Court rejected the "special relationship" theory because "the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual." *See Doe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014), *cert. granted* (Jan. 16, 2015).
- In *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007), the plaintiff alleged sexual abuse by pediatrician Marion, who the defendant treated for a "predilection for child molestation." The Supreme Court rejected a duty of care, holding in part that:

Petitioner argues Dr. Graf had a duty to warn James Doe because he was a member of a readily identifiable group of future patients of Dr. Marion. In *Gilmer v. Martin*, 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct. App. 1996), the Court of Appeals rejected a similar

argument, holding "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim."

- In *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006), the Supreme Court held that a dialysis center might owe a duty to third-persons to warn patients of risks of driving home from treatment. The Court recognized a "very narrow" duty to third parties that was co-extensive to the medical provider's duty to a patient, "to warn of the dangers associated with medical treatment" when it knows a treatment "may have detrimental effects on a patient's capacities and abilities." *See id.*, 370 S.C. at 516, 636 S.E.2d at 631-32. Notably, the risk was immediate and of fixed duration and scope.
- In *Bishop v. South Carolina Dep't of Public Health*, 331 S.C. 79, 502 S.E.2d 78 (1998), the Supreme Court held that a duty to warn flowed from an institution discharging a mother who later harmed her child, where the mother had threatened to harm *that child*: "[T]he Department was aware mother had made specific threats to harm victim in the past. . . . This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person." *See id.*, 331 S.C. at 88, 502 S.E.2d at 82.
- In *Rogers v. South Carolina Dep't of Parole and Community Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995), the Court held that the defendants did not owe a duty to warn that they were releasing a prisoner on furlough, even though he was jailed for burglarizing *plaintiff's home*, because "there was no evidence presented that Vandroff ever made a specific threat to harm Doris." *See id.*, 320 S.C. at 256, 464 S.E.2d at 332.
- In *Gilmer v. Martin*, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), this Court held that a psychiatrist did not owe a duty though he knew that a patient with suicidal tendencies worked with vulnerable patients: "Gilmer concedes Martin 'did not know of a specific threat against Mallie S. Gilmer individually,' but claims there should be a duty to warn all 'foreseeable' victims, such as in this case, where an identifiable threat exists to a specific, small group of individuals. Gilmer in essence requests this Court to adopt a rule of liability for the same generalized threat of harm already rejected by our Supreme Court. This we cannot do."
- In *Rogers v. South Carolina Dep't of Mental Health*, 297 S.C. 363, 377 S.E.2d 125 (Ct. App. 1989), the court did not impose a duty on a doctor to warn family members of a risk of violence because "there is no evidence that Corley made specific threats against Harrison or any other family member while she was being treated by the two doctors." *See id.*, 297 S.C. at 366, 377 S.E.2d at 126.
- In *Sharpe v. South Carolina Dep't of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987), the court refused to impose a duty on a therapist to warn of a

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patient's violent propensity where there was no specific threat to a specific person. *See id.*, 292 S.C. at 14-15, 354 S.E.2d at 780 ("There was no identifiable threat to Bobby Sharpe on these facts. . . . Nothing in the record indicates Sevits and Sharpe knew each other prior to Sevits's discharge.").

These cases make clear that South Carolina has never recognized a duty to prevent violence by third-parties in the absence of evidence of knowledge of a specific threat to specific persons. Contrary to Plaintiff's request here, South Carolina has never imposed a duty to the general public or even a demographic subgroup.

Plaintiff's arguments would open a Pandora's Box of potential liability that would extend far beyond any reasonable bound. The South Carolina Supreme Court has never even suggested that this is the law. Focusing entirely on foreseeability, Plaintiff suggests that because ReVille was a "known pedophile," The Citadel owed a duty to all children he might encounter. (*See* Pl.'s Init. Br., at p.28). First, there is no evidence that The Citadel knew before Doe's abuse that ReVille was a pedophile or might abuse unknown victims at unknown times. In any event, this would be far too general a threat for the law to impose a duty. There are more than seventy-two thousand children in Charleston County and more than a million in South Carolina. (*See* U.S. Census Bureau - Census 2010 (Resident Population under Eighteen Years), [censtats.census.gov](http://censtats.census.gov)). Plaintiff cites no authority that The Citadel owed a duty to every minor in Charleston County or South Carolina to prevent ReVille from abusing them into perpetuity. Under Plaintiff's argument, one who fails to apprehend a rapist would breach a duty to all women. One who fails to apprehend a bank robber would breach a duty flowing to all banks. An identifiable (but large) "class" of potential victims simply is not a substitute for the specifically identified potential victim, to whom our courts have heretofore limited the duty of care.

Plaintiff argues that "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* Pl.'s Init. Br., at 19). However,

he fails to address the fact that South Carolina has *never* recognized a duty of care in the absence of a very specific and identifiable threat. Moreover, the cases Plaintiff cites do not support his argument:

- (a) *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), involved a rock concert attendee's claim that he was struck by a bottle thrown from a balcony. The Supreme Court affirmed the denial of the property owner's motion for a directed verdict, holding that the injury was "foreseeable." The *Martin* Court was not addressing whether a duty of care existed in the first place; rather, the Court only determined that there was sufficient evidence of *proximate cause* to submit the case to the jury. Additionally, the *Martin* plaintiff was part of a readily identifiable group of people at a specific place in a specific, limited time.
- (b) *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (1991), involved maintenance of a sidewalk, not the alleged failure to prevent the actions of a third person. Therefore, it is irrelevant to whether a duty of care exists here. In any event, even if the name of the potential victims were unknown in that case, it involved a risk confined to a very specific geographic location.
- (c) *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), involved claims that a prisoner killed decedents after his release. This Court held that no duty of care existed under state statutes because the purpose of those statutes was not "to guard members of the public against violent crimes by released prisoners." Notably, this Court did not conclude random members of the general public were within an identifiable "class" of victims the statutes were intended to protect. This case plainly does not support Plaintiff's argument.

As the trial court noted, Plaintiff's claims of a duty of care are particularly weak here, because Doe's abuse occurred almost entirely before Camper Doe's report to The Citadel and interview. Plaintiff has not cited to any authority that would permit him to succeed on a claim where ReVille had begun abusing him years before The Citadel was ever even notified of Camper Doe's allegations. As a matter of duty and causation, the trial judge properly held that this issue of the timing of Plaintiff's abuse forecloses his claims:

The vast majority of Re Ville 's abuse of Plaintiff occurred prior to

Camper Doe's report to The Citadel and The Citadel's investigation of that report. The undisputed evidence shows that Re Ville began abusing Plaintiff in 2005, approximately two years before Mark Brandenburg interviewed Camper Doe in July, 2007. ReVille's abuse of Plaintiff ended, at the very latest, at the end of August, 2007, when Plaintiffs family moved out of state. It is impossible to differentiate the injury that Plaintiff suffered after The Citadel arguably should have stopped ReVille from abusing him from the unquestionably devastating injury that he suffered from his longstanding, ongoing abuse by Re Ville. The Court must conclude that Plaintiffs injuries arose before - and thus were not a proximate result of - any possible breach of duty by The Citadel.

(See R. p. 73). Likewise, this reason justifies the affirmance of the entry of summary judgment for The Citadel. However, beyond that, it is clear that as a matter of law, The Citadel simply did not owe a duty of care to Plaintiff (or to any similarly situated future victim) to prevent future acts of abuse by ReVille, because there is no evidence of a specific threat to a particular victim.

Plaintiff argues that the trial court erred in granting summary judgment because The Citadel owed a duty of care on the following bases: (a) The Citadel voluntarily undertook a duty to Doe; (b) The Citadel negligently created the risk to Doe; and (c) federal statute imposed a duty on The Citadel. For the reasons that follow, this Court should affirm the grant of summary judgment to The Citadel.

**A. The Citadel Did Not Voluntarily Undertake a Duty of Care**

**1. Plaintiff Has Not Presented Evidence Supporting the Voluntary Undertaking of a Duty of Care**

South Carolina recognizes voluntary assumption of a duty of care in limited circumstances:

The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in the Restatement of Torts, which states:

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.

*See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 and refusing to extend duty beyond Section 323 formulation). The Supreme Court has declined to recognize an assumed duty of care to a third person under the broader Section 324A<sup>3</sup>:

We decline to adopt the expanded liability of Restatement 2d of Torts § 324A (1965). This section imposes a duty on “one who undertakes ... to render services to another which he should recognize as necessary for the protection of a third person” *and requires no actual volunteer relationship between the defendant and the third party.*

*Miller v. City of Camden*, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A “has not been adopted by our courts”). A voluntary undertaking of a duty requires that the duty be undertaken specifically *to plaintiff* and (in the absence of actual creation of the danger) that the plaintiff know of and rely on the undertaking:

Section 323(a) contemplates a party relying on the rendering of services to another for the other's protection. Even assuming Quigley acted voluntarily, he assisted the Bishopville Police Department in its investigation. He did not render a service to Johnson; he assisted authorities. Additionally, his conduct was not undertaken for Johnson's protection and any negligence in his performance did not result in her physical harm.

*See Johnson*, 401 S.C. at 506, 737 S.E.2d at 514. Plaintiff can cite to no South Carolina law recognizing undertaking of a duty to the general public, rather than a specific person.

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<sup>3</sup> The Restatement (Second) of Torts § 324A states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

In *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006),<sup>4</sup> this Court refused to find an undertaken duty where plaintiff did not know of the undertaking:

While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure to trim the tree might have increased the risk that the sign would be obstructed, *neither Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so.* Therefore, Taylor's occasional trimming of his tree did not create a duty for which he can be held liable.

*See id.*, 367 S.C. at 218-19, 625 S.E.2d at 239. Without a specific connection between *the undertaking and the plaintiff*, there could not be a voluntarily assumed duty of care.

On another occasion, this Court again recognized that undertaking of a duty requires either that the plaintiff rely on the undertaking or that the Defendant actually increase the danger (which is not present here):

[S]ection 323(a) mandates that Staples prove either that Duell's policy of searching for dead trees increased her risk of harm or that she detrimentally relied on Duell's policy. First, Staples presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. Duell's policy of inspecting for dead trees did not hasten the decay of trees or affect when and where dead trees might fall. Second, Staples made no allegation that she knew of the policy of searching for dead trees before the accident. Without previous knowledge of the policy, Staples could not have relied on the policy.

*See Staples v. Duell*, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997).

Plaintiff cannot show a voluntary undertaking because there is no evidence that The Citadel acted to protect Doe, a complete stranger. *See Thorson v. Mandell*, 402 Mass. 744, 525 N.E.2d 375, 378 (1988) ("The creation of a policy against gymnastics in the auditorium was not an undertaking to render services for the protection of its users."); *Charleston v. Larson*, 297 Ill. App. 3d 540, 231 Ill. Dec. 497, 696 N.E.2d 793, 801

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<sup>4</sup> Plaintiff tries to evade *Underwood* by arguing that "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." (*See* Pls' Init. Br., at pp.21-22). That is simply not true. While the Court considered the general common law duty to maintain trees, it *also* analyzed the separate question of voluntary undertaking of a duty and concluded that the defendant had not undertaken a duty. That analysis had nothing to do with the health of the tree.

(1998) (“[P]laintiff’s voluntary undertaking theory . . . fails at the outset because plaintiff never alleged that defendant undertook services for *plaintiff*. . . .”) (emphasis in original). Plaintiff presents no evidence that The Citadel engaged in any action undertaking a duty of care to *him* under Section 323. The Citadel did not know Doe or his circumstances and could not have undertaken to protect him. Although Plaintiff cites to numerous Citadel policies, he presents no evidence that any of these policies was intended to benefit him specifically. He presents no evidence that The Citadel actually *increased* the risk of abuse beyond what previously existed; that contention is particularly baseless as ReVille had been abusing Doe (even at Doe’s home for years before Camper Doe’s report). Further, there is no evidence that Doe acted in reliance on The Citadel.

Plaintiff argues, in essence, that the foreseeability that ReVille might abuse *someone* is the equivalent of a voluntary assumption to all minors to whom ReVille might ever be exposed. This flies in the face of South Carolina law, which requires an undertaking to a particular person, not merely foreseeability. At most, Plaintiff relies on general policies of The Citadel that he claims required that The Citadel act in a certain way.<sup>5</sup> However, none of these alleged policies are specifically directed to Plaintiff. Moreover, there has been no

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<sup>5</sup> Moreover, Plaintiff has not shown that The Citadel actually violated any of the policies. (See Pl.’s Br., at p.26).

- The "Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues" would not have applied because, at the time of Camper Doe’s report, that policy was no longer in effect as the summer camp was closed. (See R. pp. 983-84).
- The "Sexual Harassment" memorandum would not have been triggered because as it applies only to harassment in the context of "employment" and "student" and "academic" areas. This policy would not, by its definition of sexual harassment, apply to the abuse of summer campers. Moreover, if the policy could apply, Camper Doe’s report would have been an "informal" complaint, for which a report to law enforcement was not required. (See R. pp. 1219-34).
- The "Serious Incidents" memorandum would not apply because that policy relates to ongoing incidents or occurrences. It would not govern a report of an event from years prior. (See R. pp. 1198-1210).
- The "Sexual Assault Crisis Intervention" policy would not have applied because, by its terms, it only applies to circumstances involving *touching*. Moreover, that policy does not mandate a report, but rather requires respect for the wishes of the victim. (See R. pp. 1215-18).

showing that The Citadel ever knew that Plaintiff existed. Without evidence that The Citadel intended to undertake a duty to Doe, an unknown stranger, Plaintiff's argument fails.<sup>6</sup>

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

## **2. The Cases Plaintiff Cites Are Inapposite**

The cases that Plaintiff cites to support that The Citadel voluntarily undertook a duty to him are distinguishable and do not support his position. First, Plaintiff posits that *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), is "[g]uiding and controlling." In that case, this Court held that a city might have voluntarily undertaken a duty to ensure the safe condition of sidewalks in a state right-of-way (emphasis added):

Fickling presented evidence that the City had 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 within the municipal limits, including those that were City-owned and those that were non-owned. The trial court expressly found the City *admittedly* engaged in a voluntary undertaking in this instance, but noted in its order: 'Although the City in the instant case *admits that it undertakes an obligation to maintain and repair public sidewalks*, it only does so when it has notice of the dangerous condition or when the City creates the condition itself. In this case as in *Vaughan*, however, we believe there was a genuine issue of material fact as to whether the City had undertaken a duty of maintaining streets within the municipality, including Meeting Street.'

*See id.*, 372 S.C. at 609-10, 643 S.E.2d at 116-17; *accord Vaughan v. Town of Lyman*, 370

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<sup>6</sup> In furtherance of his misplaced argument, Plaintiff argues that The Citadel knew in 2004 that ReVile was abusing campers, through the knowledge of Camper Doe 6. This proposition is baseless for a number of reasons. First, in any event, this alleged knowledge would not constitute an undertaking of a duty of care to Plaintiff, a stranger to The Citadel. Mere knowledge or foreseeability is not equivalent to an undertaking of a duty. Second, there is no evidence that Camper Doe 6's alleged knowledge, as a junior camp counselor (and alleged victim) would be attributed to The Citadel. Specifically, Plaintiff makes no showing to support a claim that Camper Doe 6 was an agent whose knowledge could be attributed to The Citadel or that he learned information in the scope of his employment. Finally, there is no first-hand evidence as to what Camper Doe 6 knew and when.

S.C. 436, 444, 635 S.E.2d 631, 637-38 (2006). The City of Charleston *admitted* that it had undertaken a duty to deal with certain public sidewalks, and there was evidence that this duty might encompass the subject sidewalk. Importantly, the claimed duty concerned outwardly visible property conditions at specific geographic location within the jurisdiction of a municipality that was already charged with maintaining some sidewalks. Such a duty would be precisely the type of duty that the city had undertaken as to other sidewalks. One could scarcely imagine a more fundamental municipal undertaking than the maintenance of streets and sidewalks directed to those who use those sidewalks.

*Fickling* (and *Vaughan*) are inapposite, as this case does not involve maintenance of property within The Citadel's boundaries. Doe was not, in any way, within the custody or control of The Citadel at the time of his abuse. Moreover, there is no evidence that a condition of The Citadel's property caused Doe's abuse. Plaintiff applies a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* to the point of breaking. It does not support the imposition of a duty under the facts of this case.

Plaintiff also relies on *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), where a mentally challenged resident of a treatment center filed suit, alleging that the center failed to properly supervise her, permitting residents to abuse her. The Supreme Court held, *inter alia*, that defendants undertook a duty:

Babcock Center had a special relationship with Appellant because she was a client with special needs and disabilities admitted for care and treatment at the center. Babcock Center voluntarily undertook the duty of supervising and caring for Appellant as provided in its contractual relationship with Department. Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men. Furthermore, the center had a statutory duty to exercise reasonable care in supervising Appellant. [Citations omitted.] In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to

prevent others from harming her while staying at the center.

*See id.*, 371 S.C. at 137, 638 S.E.2d at 657. In *Madison*, the controlling fact was the contractual undertaking of a duty *for consideration* to protect and supervise custodial victims. Conversely, Plaintiff has not presented a scintilla of evidence that The Citadel agreed to protect Doe, took custody of Doe or was paid to monitor Doe. Rather, Doe proffers no evidence of any relationship between himself and The Citadel. He presents no evidence that anyone at The Citadel knew ReVille abused him — or even that the two knew each other — prior to this lawsuit. He presents no evidence that he was ever led to believe that The Citadel would protect him from ReVille. *Madison* is unavailing.

Plaintiff cites *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), to support his argument that The Citadel undertook a duty. In *Miller*, a plant operator constructed a dam adjacent to the plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for production. The City agreed to maintain the lake at the level of the spillway. If the water level got too high, the plant operator would contact the City to open sluice gates. An Army Corps of Engineers report deemed the dam unsafe, and plant employees and the City attended a meeting with the Land Resources Commission. Although the plant operator indicated that it did not own the dam, it attended the meeting and included its employees on the Land Resources Commission's emergency notification forms as personnel monitoring the dam. A heavy rainfall caused the lake to overtop the dam, injuring plaintiffs, who sued the City and plant operator. The plant operator obtained summary judgment, arguing that no duty of care existed. The Supreme Court held that issues of fact existed as to whether the plant operator voluntarily might have undertaken a duty, since its agent was listed on an emergency notification form and it had an employee present at the meeting at which an emergency plan was formulated. *See id.*, 329 S.C. at 315, 494 S.E.2d at 815. The Court made clear that it did not recognize a duty beyond the limits described above:

We decline to adopt the expanded liability of Restatement 2d of Torts § 324A (1965). This section imposes a duty on “one who undertakes ... to render services to another which he should recognize as necessary for the protection of a third person” *and requires no actual volunteer relationship between the defendant and the third party.*

*See id.*, 329 S.C. at 315, 494 S.E.2d at 815 (emphasis added). Unlike *Miller*, there is no evidence that The Citadel intended – through its operation of the summer camp or handling of Camper Doe's report – to benefit Doe, a complete stranger. The plant operator in *Miller* undertook duties that by their nature protected third-persons who might be impacted by a breach of the dam. There are no similar facts in this case. Instead, Plaintiff repeatedly tries to impose a duty to "the public" under the rubric of voluntary undertaking, an approach that no South Carolina court has ever taken.

**3. To the Extent Doe Claims The Citadel Voluntarily Undertook a Duty of Care Through Internal Policies, His Argument Fails**

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Plaintiff cites numerous cases for the proposition that The Citadel's internal policies constitute the voluntary undertaking of a duty of care. However, the cases Plaintiff cites do not support that internal policies might impose a duty of care. Rather, they *only* suggest that *after the law imposes a duty of care*, internal policies may be evidence of what might satisfy that duty, *i.e.*, the scope of the duty. *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1992) involved slander and false imprisonment, *not negligence*. This Court held only that internal policies could be evidence of whether the defendant acted "reasonably" as required for a statutory defense to false imprisonment; it did not use the policies to impose a duty, but only mentioned in *dicta* that internal policies are sometimes "relevant on the issue of failure to exercise due care," *i.e.*, whether a defendant satisfied an *existing* duty. Plaintiff cites no authority *imposing* a duty through internal policies unknown to Plaintiff.

In fact, the Supreme Court has expressly held that internal policies *cannot be used to impose a duty of care*:

It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this

internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.

*See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011). The Citadel's policies were not directed specifically at Doe and merely governed The Citadel's general operations in various respects. To the extent Doe argues that The Citadel undertook a duty through internal policies, his claims fail.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

**B. Plaintiff Has Not Presented Evidence That The Citadel Created the Danger So As to Impose a Duty of Care**

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Doe next argues that The Citadel owed him a duty of care because it "created the risk" that ultimately occurred or increased it. However, Doe has not presented any evidence that The Citadel "created" any danger. Instead, he focuses on the alleged general "foreseeability" that ReVille *might* abuse minors in the Charleston area. He suggests that The Citadel somehow "created" a risk by concealing ReVille's abuse. However, this is not equivalent to creating a risk in the first instance. Rather, Doe is merely repackaging allegations that The Citadel failed to protect him from an existing risk.

Doe presents no evidence that The Citadel was actively involved in ReVille's abuse of him. He concedes that he has no evidence that The Citadel did anything to cause ReVille to become an abuser. He further has no evidence that ReVille abused him at the summer camp. He has no evidence that The Citadel placed him in ReVille's custody or presence. He has no evidence that The Citadel provided a location for ReVille to abuse Doe. He has no evidence that The Citadel acted to encourage ReVille to abuse Doe. Doe has no evidence that The Citadel even did anything to make it *more likely* that ReVille would abuse him than it would have been had The Citadel not acted. At most, Doe's claim is that The Citadel failed to stop an existing risk that it did not create.

Doe posits that he does "not seek to hold The Citadel liable for creating ReVille's

desire" to abuse him, but rather seeks to base liability "on The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse" him. (See Pl.'s Init. Br., at pp. 27-28). However, Doe's own words make clear that he is not seeking to hold The Citadel liable for creating a risk. Rather, Doe merely tries to recast a "failure to protect" claim as one for creation of a risk by arguing that the risk was foreseeable. His argument focuses solely on a claim that ReVille's abuse of Doe, a stranger to The Citadel, was "foreseeable"; however, foreseeability alone is not enough to impose a duty for creation of a risk. Semantics aside, irrespective of how foreseeable ReVille's acts might have been, Doe presents no evidence that The Citadel *created* a dangerous situation; rather, Doe's claim boils down to an allegation that The Citadel failed to prevent ReVille from abusing him. If Plaintiff's position carries the day, the "creation of risk" exception to non-liability for the acts of a third-person would expand in a way no South Carolina court has ever permitted.

In a recent opinion, the United States Court of Appeals rejected this Plaintiff's argument that there was a "state-created danger" in the context of a claim against an administrator of The Citadel under 42 U.S.C. § 1983:

Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. . . . [A]llowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. . . . There was simply nothing new about ReVille's perverted abuse of the Does in the summer of 2007 that had not already been occurring for months. Rosa did not make the Does' danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse. . . . [T]he Does were in no different situation with ReVille after the Camper Doe complaint than they had been the previous two years.

*See Doe v. Rosa*, 2015 WL 4548009, at \*9-\*10 (4th Cir. July 28, 2015) (attached hereto as Ex. B). In addition, the Court held that Section 1983 liability did not exist because the defendant in that case did not engage in "affirmative" acts, but simply failed to act to prevent abuse. While this case is not controlling, confirms that The Citadel (and its agents) did not

undertake any acts to "create" the danger that ultimately befell Doe.

Plaintiff cites no authority imposing a duty for creation of a risk under similar circumstances, where the defendant did not specifically create the risk in the first instance by causing the actor to commit acts of violence. In a rare case in this state imposing a duty for "creation" of a risk, the Supreme Court imposed a duty where a defendant was *actively involved* in staging and creating the scenario in which violence occurred:

Respondents were well aware of Baker's unrelenting *violent tendencies toward Edwards*. Edwards had called the sheriff's office to report Baker's harassment on numerous occasions, and the sheriff's office arranged for Edwards to stay in a hotel after one of the incidents. The sheriff's office and the County, through its agent Howland, *arranged the bond revocation hearing at the magistrate's office with no security present*. Despite Respondents' awareness that Edwards feared Baker and was reluctant to attend the bond revocation, Respondents strongly *encouraged Edwards' presence*.

*See Edwards v. Lexington Cty. Sheriff's Dep't*, 386 S.C. 285, 293-94, 688 S.E.2d 125, 130 (2010) (emphasis added). Unlike *Edwards*, The Citadel did not *create* the scenario in which ReVille could abuse Doe and then fail to take reasonable security steps. Rather, notwithstanding this is a garden-variety failure-to-protect claim.

Application of the "creation of risk" exception here would cause the exception to swallow the rule, imposing potential liability in all "failure to-protect: cases, since anyone who fails to prevent an injury could be said to have enhanced a foreseeable danger. The Citadel did not create ReVille's desire to abuse children or actively assist ReVille to abuse children. It did not control ReVille or have custody of Doe. Under such circumstances, The Citadel cannot be said to have created the danger to Doe. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011) ("Wal-Mart did not negligently or intentionally create the risk of the father's sexual abuse.").

In *Staples v. Duell*, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997), this Court observed the difference between negligently patrolling for dead tree limbs and *creating* dead tree limbs: "First, Staples presents no evidence that Woddle's act of simply

patrolling the area looking for dead trees increased her risk of harm. Duell's policy of inspecting for dead trees *did not hasten the decay of trees or affect when and where dead trees might fall.*" See 329 S.C. at 510, 494 S.E.2d at 643 (emphasis added). On the other hand, in this case, there is no evidence that The Citadel did anything that caused ReVille to abuse when he otherwise would not. There is no evidence that The Citadel's conduct caused ReVille to select Doe as a victim or to abuse in that particular time frame. In the language of *Staples*, Doe's claim consistently reduces itself to a claim that The Citadel negligently patrolled for dead trees.

Plaintiff relies heavily on *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), where a bottle thrown from a balcony of the defendant auditorium struck a rock concert attendee. The auditorium only had 14 guards to control a crowd of 6,000 and had no reserved seating on the main floor. Multiple witnesses testified that patrons were openly drinking from liquor bottles and that there were liquor bottles and glass on the floor during the concert. In addition, the crowd was unruly. The court rejected the auditorium's argument that it was immune from liability under S.C. Code § 15-78-60(20), which provides, *inter alia*, that a governmental entity is not liable for criminal acts of third persons:

Appellant cannot successfully defend that respondent's injuries were caused by the wrongful criminal act of a third party, where the very basis upon which appellant is claimed to be negligent is that appellant created a reasonably foreseeable risk of such third party conduct. Consequently, the trial judge did not err in refusing to dismiss the action.

*See id.*, 301 S.C. at 247, 391 S.E.2d at 549. This case is inapposite for several reasons.

First, *Greenville Memorial Auditorium* does not address the imposition of a duty, but instead concerns the applicability of an exception to liability under the SCTCA. Second, *Greenville Memorial Auditorium* concerns actions on the defendants' property, under its supervision and in such circumstances that the law imposed a duty to provide for the safety of attendees. Here, (aside from Doe's one-time presence on campus,

unknown to The Citadel, with ReVille to attend a basketball game), ReVille did not abuse Doe at The Citadel or in the context of a formal Citadel activity.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

**C. Plaintiff Has Not Presented Evidence That Title IX Imposed a Duty of Care on The Citadel**

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Plaintiff next argues that federal statute, 20 U.S.C. §§ 1681, *et seq.* (also known as Title IX), imposes a duty of care on The Citadel. Importantly, Doe has not asserted a private cause of action under Title IX; instead, Doe posits that Title IX imposes and defines a duty of care on The Citadel for his benefit. For the reasons that follow, the trial court properly granted summary judgment to The Citadel, as Title IX does not create a duty of care.

**1. Title IX Cannot Impose a Duty of Care As a Matter of Law**

Initially, Doe's claim that Title IX imposed a duty of care on The Citadel fails because he does not even attempt to use the statute itself to impose civil liability. Instead, Plaintiff relies on certain non-statutory "administrative" standards in an effort to manufacture a duty of care. However, under the law of the United States Supreme Court and other jurisdictions, those standards cannot be misapplied in such a manner.

Plaintiff first cites to a regulation promulgated under the authority of Title IX: "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." *See* 34 C.F.R. § 106.3(a). This regulation does not apply on its face, insofar as the Assistant Secretary for Civil Rights of the Department of Education never made a finding that The Citadel discriminated against any persons relative to ReVille. As a result, The Citadel was not obligated to take any remedial action under this regulation. Moreover, the regulation does not impose a duty of care, because it seeks to *remedy past* discrimination, not to *prevent future* discrimination. The regulation also *permits* entities

to take certain affirmative actions if it so chooses in the absence of such a finding of discrimination: "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." *See* 34 C.F.R. § 106.3(b). However, Plaintiff does not identify anything in this permissive regulation that could impose a duty on The Citadel for Plaintiff's benefit.

Plaintiff also bases his argument heavily on the United States Office for Civil Rights, Department of Education's 2000 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("OCR Guidance"). Plaintiff devotes several pages of his Brief to detailing various "administrative" provisions of the OCR Guidance governing how certain entities should respond to complaints of sexual harassment, including:

- Disseminating a policy against sexual harassment (*See* 65 Fed. Reg. 66095).
- Adopting grievance procedures providing for prompt resolution of sexual discrimination complaints, including sexual harassment complaints. (*See id.*).
- Designating an employee to coordinate Title IX regulation compliance. (*See* 65 Fed. Reg. at 66100).
- Taking "immediate and corrective action" when learning of sexual harassment. (*See* 65 Fed. Reg. at 66100).
- Taking "effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effect on the victim." (*See* 65 Fed. Reg. at 66101).
- Not using "insurance" investigations because the "standards may well be different than those under Title IX." (*See* 65 Fed. Reg. at 66108).

(*See* Pl.'s Init. Br., at pp.31-34). Aside from the obvious point that a Guidance issued in 2000 could not have created a standard of care in 1997, there is nothing in the language of the OCR Guidance suggesting that these requirements should be imposed as a negligence standard of care actionable in tort. In fact, the OCR Guidance makes clear

that its revisions from its 1997 version solidify that it is *not* intended to create tort liability standards:

The 1997 guidance contained a section titled "Liability of a School for Sexual Harassment." To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; *it does not address standards applicable to private litigation for monetary damages.*

*See* 65 Fed. Reg. 66094 (emphasis added). The OCR Guidance further clarifies that the United States Supreme Court had foreclosed the use of its "administrative" standards to define liability for money damages: "The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by *Gebser* and *Davis*." *See* 65 Fed. Reg. 66095. *Gebser* confirms that the OCR Guidance administrative requirements may not form the basis for a civil claim:

[T]he failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. [Citation omitted.] We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

*See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

Applying *Gebser*, one court has held that it was error to use the OCR Guidance's "administrative" provisions to impose a civil standard of care:

Plaintiffs continue to assert negligence per se claims, arguing that "34 C.F.R. 106.8(b) ... requires a school receiving Title IX funds to establish 'procedures providing for the prompt and equitable resolution of student complaints' relating to all forms of sexual harassment, including sexual assault," and that this regulation incorporates an Office of Civil Rights of the Department of Education (OCR) Guidance requiring a school's procedures to "accord[] due process to both parties involved." . . . If the

Court were to allow a regulation used in administering a federally-created right to create a state negligence *per se* claim, it would effectively eviscerate the *Gebser* rule.

In fact, Defendant noted in its motion for summary judgment that Plaintiffs' strategy of "mak[ing] an end run around these principles by asserting state-law negligence-based claims and relying on Title IX regulations and OCR Guidance to establish the duty element of those claims ... [is] preempted by the Supreme Court's jurisprudence on the private right of action under Title IX"

*Doe v. University of the South*, 2011 WL 1258104, at \*14 (E.D. Tenn. March 31, 2011) (see R. pp. 301-16); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 n.13 (E.D. Pa. 2007) ("[The OCR] Guidance provides just that: guidance. It is not binding ...").

Plaintiff cites no authority permitting Title IX — in particular its "administrative" regulations and OCR Guidance provisions — to be used to *create* a state law negligence duty of care. To the contrary, those provisions — most of which are geared toward remedying *past* discrimination — are only intended to assist in guiding school actions and federal administrative governances of schools. There is no legal authority — particularly South Carolina authority — supporting Doe's contention.

If Doe believes that he possesses a Title IX claim, he should have asserted such a claim; he may not use the Title IX regulations and guidances to manufacture a duty of care where none exists under state law. See *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1457 (D. Colo. 1994) ("[S]ince both Title VII and Title IX provide a specific means of enforcing legal duties unknown at common law, the remedies under these statutes are exclusive. [Citation omitted.] The Houston's attempt to recover such damages under a negligence *per se* theory is therefore improper.").

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

## **2. Doe Is Not Member of a Class That Title IX Protects**

In addition to the foregoing, Doe cannot demonstrate that Title IX can support a

negligence *per se* claim. "In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988).

Under South Carolina law, the "public duty rule" rejects a statute-created duty to the general public. See *Trask v. Beaufort Cty.*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (Ct. App. 2011) ("[P]ublic officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually.") (quoting *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006)). Courts in South Carolina are especially reluctant to recognize a duty arising out of a statute governing the duties of a public official:

[W]hen the statute at issue creates or defines the duties of a public official, the public duty rule applies. [*Rayfield*, 297 S.C. at 105, 374 S.E.2d at 915.] "This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually." *Vaughan*, 370 S.C. at 441, 635 S.E.2d at 634 (quoting *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999)). The public duty rule represents a presumption that such a statute "has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public," and thus does not satisfy the elements of the two-part *Rayfield* test. 297 S.C. at 105, 374 S.E.2d at 915. The presumption may be overcome when the statute creates a "special duty" to the plaintiff. 297 S.C. at 106, 374 S.E.2d at 916. In *Rayfield*, this court stated:

"A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office."

*Trask v. Beaufort County*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (S.C. App. 2011) (no private right of action against county coroner for violating statute prohibiting destruction of human remains); accord *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010) (family court litigant assaulted in family court could not sue for violating statute requiring Sheriff to provide courthouse security).

Title IX cannot support a negligence *per se* claim because this is not the type of injury Title IX is designed to prevent and because Doe is not within the class of persons Title IX is intended to protect. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." See 20 U.S.C. § 1681(a). Courts have agreed that Title IX only applies to protect and benefit students and participants in educational programs. See e.g., *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs—and not the participants' parents—have standing to bring claims under Title IX."); *Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, applies only to students and participants in educational programs."); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) ("On its face, [Title IX] applies only to students and participants in educational programs. Mrs. Bosley is neither and, therefore, is an improper plaintiff.").

Doe can cite to no authority that he is within the class of persons Title IX is intended to protect. Title IX is geared to the protection of the civil rights of students. It is not a general statute for the prevention of violence where the Defendant happens to be an educational institution. There is no evidence or law supporting the claim that Title IX is intended to protect unknown future victims of sexual abuse who do not attend an institution within its scope. Rather, Title IX is intended to vindicate the civil rights of *participants* in educational programs to ensure that there is no discrimination in those

programs. Doe cites no authority using Title IX to impose a duty of care extending to a non-student who has no relationship with the defendant. Plaintiff's construction of Title IX would convert Title IX into a general statute for the protection of the public from sexual abuse. Title IX cannot be used to impose a duty of care flowing to an unknown person who was not a student at The Citadel and had no relationship with The Citadel.

The Citadel anticipates that Doe will argue that he is within the protections of Title IX under a "Dear Colleague" letter that was circulated in 2011 — almost four years after ReVille stopped abusing Doe:

Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall.

*See* Letter from Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. (April 4, 2011) (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>), at 4 n.11. However, this Dear Colleague letter only extends Title IX protection to persons who: (a) have a relationship with the school and (b) are physically present in connection with that relationship. Doe is not within the contemplation of the Dear Colleague letter. Unlike a visiting athlete or recruit, Doe was not on The Citadel's campus and did not have *any* relationship with The Citadel. Doe cites no authority suggesting that Title IX protect unknown, potential future victims with no tie to the school who might be abused under circumstances having no connection to the school.

Although no court has decided the specific question presented here, at least one court has recently suggested that distant connections to a school are likely insufficient to trigger Title IX. *See Kinsman v. Florida State Univ. Bd. of Trustees*, No. 4:15-cv-00235-MW-CAS (N.D. Fla. Aug. 12, 2015) (attached hereto as Ex. A) ("Ms. Kinsman has not offered any other authority for the proposition that Title IX extends to all persons coming into contact with students at off-campus establishments. This Court need not decide that

issue today. But if Ms. Kinsman means to rely on such a theory, she may need more convincing legal authority to support her position." ). Plaintiff can cite to no authority that would support expanding Title IX to impose a duty to persons who never attended The Citadel or had an actual relationship with it.

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

**D. Doe's Claims Fail to the Extent They Rely on Allegations Regarding the Operation of the Camp**

Doe argues that The Citadel owed a duty of care in the operation of the summer camp itself, even though those events occurred long before ReVille abused him. Specifically, Doe claims that The Citadel should have: (a) fired ReVille or noted in his personnel file several events — completely non-sexual in nature — that occurred in 2002 or 2003; and (b) known (or did know) that ReVille was abusing campers while a counselor. Plaintiff cannot proffer any evidence that The Citadel knew or suspected that ReVille committed sexual improprieties while he was still employed at the summer camp. These allegations involve conduct years before Camper Doe's report or Doe's abuse.

Doe cannot base his claim on alleged acts during the operation of the summer camp, two years before ReVille started abusing him, because there an employer cannot owe a duty to a victim of abuse by a *former* employee. Doe presents no evidence and cites no law that The Citadel owed a duty to foresee that a failure to properly monitor an employee might lead to that employee engaging in violence *years after the employment* terminates and in circumstances entirely unrelated to it. Doe's focus on what he believes The Citadel should have done while ReVille was a counselor would create catastrophic precedent that would make employers guarantors of all former employees into perpetuity. This is simply not consonant with any proper application of South Carolina law.

Authority from other jurisdictions demonstrates that Doe's claim cannot succeed. In *Roe No. 1 v. Children's Hosp. Med. Ctr.*, 16 N.E.3d 1044 (Mass. 2014), abuse victims of a pediatrician at a North Carolina hospital filed a negligence action against a Massachusetts hospital that had previously employed him. They alleged that that hospital failed to properly train, supervise, or discipline him during his employment, knew or should have known that he was conducting inappropriate genital examinations, and failed to report him to various licensing authorities and his future employer. The court concluded that the first hospital did not owe a duty of care:

***We have never recognized or imposed a duty on an employer to prevent the future behavior of a former employee, with respect to unknown customers and clients of unknown future employers.*** While the responsibilities of medical providers to vulnerable patients might extend beyond those of other service-providing employers, the geographic and temporal breadth of the duty the plaintiffs seek to impose reaches too far, and would potentially expose the employer to liability to an essentially limitless class of unknown parties for acts committed long after the employer had any ability to supervise, monitor, or discipline the former employee's conduct. We decline to create such uncertainties for medical providers in the Commonwealth by creating such a duty, and are not aware of any other jurisdiction that has done so.

*See id.*, 16 N.E.3d at 1048-49 (emphasis added).

In *Evans v. Ohio State Univ.*, 680 N.E.2d 161 (Ohio Ct. App. 10th Dist. 1996), a mother of an abuse victim sued Ohio State, alleging that it hired a state fair judge and speaker, despite knowledge of prior convictions for gross sexual imposition and corruption of minor. The Court refused to impose a duty of care:

[T]he attack on Stephanie was not a reasonably foreseeable consequence of defendant's decision to engage Waites as a goat judge or clinic speaker. The record indicates that Waites was hired by Ashtabula County 4-H to conduct four separate clinics and to judge two county fair shows. . . . The injured plaintiff was not a member of Ashtabula County 4-H at any time during which Waites judged a fair show or conducted a clinic; she became a 4-H member approximately six months after Waites last spoke at a clinic and the molestation took place, not at a 4-H activity, but at Waites's residence, over one year after the employment relationship between 4-H and Waites had ended.

*See id.*, 680 N.E.2d at 741; *Coleman & Co. Sec., Inc. v. Giaquinto Family Trust*, 236 F. Supp. 2d 288, 304 (S.D.N.Y. 2002) ("[Defendant] owed no such duty to supervise Jedrlinic — as an investment advisor or broker — when Jedrlinic was employed with J. Robbins, Inc. after that time.").

Similarly, in *Philips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864 (Cal. App. 4th Dist. 2009), the court held that a plumbing service did not owe a duty to a customer's daughter for negligent hiring and retention of a former employee who shot and killed the customer two years after his work was terminated:

The great weight of case authority from other jurisdictions that have applied the Restatement Second of Agency to posttermination torts by former employees supports our conclusion. Because the employer-employee relationship ends on termination of an employee's employment, we conclude an employer does not owe a plaintiff a duty of care in a negligent hiring and retention action for an injury or other harm inflicted by a former employee on the plaintiff even though that former employee, as in this case, initially met the plaintiff while employed by the employer.

*See id.*, 172 Cal. App. 4th at 1144-45, 91 Cal. Rptr. 3d at 872-73. That plaintiff had a much stronger argument than Doe here, insofar as she actually met the assailant through his employment with the defendant. Doe presents no evidence that ReVille met him through The Citadel's summer camp or directly through any act of The Citadel.

Consequently, no duty of care could flow to Doe in connection with the hiring, supervision or retention of ReVille as a counselor. Such a claim is too far removed to support a duty of care.

This result is logical, as South Carolina law would not recognize a claim even if ReVille had still been an employee at the time he abused Plaintiff. An employer only owes a duty to supervise employees who are acting outside the scope of their employment 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 it has the ability to control its employee; and (3) the employer knows or should know of the

necessity and opportunity for exercising such control. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992) (adopting *Restatement (Second) of Torts* § 317 (1965)); *Kase v. Elbert*, 392 S.C. 57, 64, 707 S.E.2d 456, 460 (Ct. App. 2011); *Hoskins v. King*, 676 F. Supp. 2d 441, 446-47 (D.S.C. 2009); *see also Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 644-45, 598 S.E.2d 717, 722-23 (Ct. App. 2004). Plaintiff could not show any of these requirements even if ReVille was still a camp employee when he abused Doe. If The Citadel would not be liable if ReVille abused Doe while an employee, it could not be liable for abuse years after ReVille's camp employment ended and the camp closed.

Even if a duty of care could exist, proximate cause requires that the ultimate harm be foreseeable ***at the time of the alleged negligence***:

It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Olson v. Faculty House*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001).

To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. *Id.* Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Id.* Legal cause turns on the issue of foreseeability. *Id.* An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Id.* ***Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach.*** *Id.*

*See Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001) (emphasis added). It would have been wholly unforeseeable to The Citadel in 2002 or 2003 (or earlier) that their alleged acts or omissions in running the summer camp would harm Doe years later. It is not reasonable to expect Garrott to have foreseen in 2002 that her failure to document an innocent looking event (such as ReVille being in a room with a camper in an entirely non-sexual manner) would cause a child, unrelated to the camp, to be sexually abused years later off of the premises of The Citadel.

To the extent he relies on events occurring while ReVille was employed at the camp, Doe's claims are too remote from ReVille's employment. Doe's claim that more

rigorous supervision of ReVille when he was a camp counselor would have altered his distant future child abuse is highly speculative. If the Court permits Doe to inject such hindsight into this case, it will open novel lines of liability that have never existed before.

Therefore, to the extent Doe's claims relate to the operation of the summer camp itself, the trial court properly granted The Citadel's motion for summary judgment.

**E. Plaintiff Cannot Show Proximate Causation**

In addition to the reasons set forth above, and as an alternative supporting ground, the trial court's grant of summary judgment was also proper because Plaintiff cannot show that any act of The Citadel — including the failure to report ReVille to law enforcement — was the cause of his abuse.

Proximate cause is the efficient or direct cause of the injury. *See Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988). Proof of proximate cause requires proof of both “causation in fact” and “legal cause.” *See Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Causation in fact is proved by establishing that the injury would not have occurred “but for” the defendant’s negligence; on the other hand, “legal cause” focuses on foreseeability. *See id.*, 477 S.E.2d at 715. “Negligence . . . may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.” *See Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 547, 694 S.E.2d 1, 5 (2010) (citation omitted).

“[P]roof of causation cannot rest on conjecture, and the mere possibility of such causation is not enough to sustain plaintiff’s burden of proof.” *See Todd v. United States*, 570 F. Supp. 670, 677-78 (D.S.C. 1983) (citation omitted). Speculation or conjecture is insufficient to show factual cause:

When asked if the case would have produced a different outcome had the Respondents not breached their standard of care, Scarminach hedged: “you never know because it's conjecture.” Instead of stating that the Respondents' conduct most probably caused the outcome, Scarminach said, “had [Respondents] done these things, the percentage of success

would have been greater.” Thus, Scarminach's deposition did not establish that the Respondents' actions were the “but for” cause of Harris Teeter's loss.

*See Harris Teeter, Inc. v. Moore & VanAllen, P.C.*, 390 S.C. 275, 289-90, 701 S.E.2d 742, 749 (2010).

Initially, as the trial court properly noted, under the specific facts of this case, there can be no legal or factual causation because ReVille's abuse of Plaintiff began long before Camper Doe's 2007 report. As set forth above, ReVille started abusing Plaintiff in 2005, two years before The Citadel was ever made aware of Camper Doe's accusations. The abuse ended in August, 2007, only days after Brandenburg interviewed Camper Doe. Therefore, as the trial court held, "Plaintiff's injuries arose before — and thus were not a proximate result of — any possible breach of duty by The Citadel." (*See Order*, at 3).

In any event, Plaintiff cannot carry his burden of showing causation because there is no evidence that, had The Citadel done any of the things Plaintiff claims it should have done, ReVille would not have abused him. For example, there is no evidence that, had The Citadel documented any of the alleged incidents of being alone with campers or reported ReVille to law enforcement, Doe would not have been abused. Instead, Plaintiff asks the Court to speculate about what might have happened under a hypothetical state of facts. This is plainly insufficient to support a finding of causation in fact. Moreover, Plaintiff cannot show legal cause because there is no evidence that it was foreseeable to The Citadel that its failure to engage in the acts complained of would cause the harm sustained by Plaintiff. *See Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001).

Therefore, the trial court properly granted The Citadel's motion for summary judgment.

### **III. The Trial Judge Properly Granted Summary Judgment as to Outrage**

#### **A. The SCTCA Prohibits Doe's Outrage Claim**

Doe's claims exist only to the extent the SCTCA permits them. The SCTCA's

provisions "establishing limitation[s] on an exemption to the liability of the state . . . *must be liberally construed in favor of limiting the liability of the state.*" S.C. Code Ann. § 15-78-20(f) (emphasis added). A "loss" under the SCTCA includes "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.*" See S.C. Code § 15-78-30(f) (emphasis added). Moreover, a governmental entity may not be held liable 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." See S.C. Code § 15-78-60(17) (emphasis added). The trial court properly held that these provisions bar Doe's outrage claim.

Construing the SCTCA "liberally in favor of limiting the liability of the state," numerous courts have concluded that the SCTCA bars outrage claims. See *Newman v. South Carolina Dep't of Employment and Workforce*, 2010 WL 4791932, at \*2 (D.S.C. Sept. 22, 2010) ("[A]mendment of the Complaint would not save this [outrage] cause of action, since the Department, as a state agency, has sovereign immunity with regard to this tort claim."), *report and rec. adopted*, 2010 WL 4666360 (D.S.C. Nov. 18, 2010) (see R. pp. 391-97); *Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Harkness v. City of Anderson*, 2005 WL 2777574, at 4 (D.S.C. Oct. 25, 2005) ("Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act . . . on the claim of outrage, otherwise known as intentional infliction of emotional distress. [Citation omitted.] The court agrees. The SCTCA does not waive sovereign immunity for this claim.") (see R. pp. 398-401); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the

Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'"); accord *Lindquist v. Tanner*, 2012 WL 3839237, at \*4 (D.S.C. April 12, 2012) ("Plaintiff concedes that her claim for 'intentional' infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act."), *report and rec. adopted in part*, 2012 WL 3839235 (D.S.C. Sept. 4, 2012) (*see* R. pp. 402-11); *Pruitt v. County of Charleston*, 2000 WL 35535239 (June 23, 2000 Comm. Pl. Charleston Cty.) ("Accordingly, based on the clear provisions of the Tort Claims Act, Doe's outrage claim is not actionable against this Defendant."). Likewise, in this case, the SCTCA bars Doe's outrage claim.

Doe argues that these provisions do not bar his claim, because he can succeed on an outrage claim if he can prove that The Citadel acted "recklessly" (rather than with intent to harm). However, bearing in mind that the SCTCA must be construed to minimize the state's liability, this Court should construe the SCTCA's prohibition of claims for "the intentional infliction of emotional harm" to include all claims for outrage. *See* S.C. Code § 15-78-30(f). The SCTCA's use of the phrase "intentional infliction of emotional harm" — rather than "intentional infliction of emotional *distress*" — does not suggest that the legislature intended to impose outrage liability where the defendant's acts are "reckless" rather than intentional.

In support of his contention that the SCTCA does not bar his outrage claim, Plaintiff only cites *Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 742 S.E.2d 667 (Ct. App. 2013), *cert. granted* (July 18, 2014). Specifically, Doe argues that, because this Court reversed the denial of a directed verdict on an outrage claim on *substantive grounds*, rather than the SCTCA, it impliedly rejected The Citadel's argument here. While the *Bass* defendant did make a similar argument, this Court *did not examine or rule upon that argument in its opinion*. To the contrary, this Court reversed on the separate ground that there was no evidence of conduct sufficient to support an outrage claim. As a result, *Bass* does not support Doe's contention that this Court should ignore the plain language of the SCTCA to permit liability for outrage.

For the reasons set forth above, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

**B. Doe's Outrage Claim Fails Because There Is No Evidence That The Citadel Directed Any Conduct Toward Him**

As the trial court correctly noted, Doe's outrage claim also fails because The Citadel did not direct conduct toward him. Doe's outrage claim will not succeed unless he proves that The Citadel knowingly *directed* its conduct at him *in particular*:

The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. [Citation omitted.] It is not enough that the conduct is intentional and outrageous. It must be conduct *directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware*.

*See Upchurch v. New York Times, Inc.*, 314 S.C. 531, 536-37, 431 S.E.2d 558, 561-62 (1993) (emphasis added); *Roberts v. Simmons*, 2014 WL 7005250, at \*6 (D.S.C. Dec. 11, 2014) ("[I]t is not clear that Defendant's alleged conduct was directed at the Plaintiff.") (see R. pp. 1805-09); *Fulghum v. Wise Seats, Inc.*, 2012 WL 1032594, at \*4 (D.S.C. Mar. 27, 2012) ("[T]he conduct upon which Plaintiff bases his claim . . . is not tortious conduct that was specifically directed towards Plaintiff."). In this vein, this Court has held that parents of a minor abuse victim could not sue for outrage where there was no evidence that the defendant directed actions at them. *See Doe v. Rojas*, 2007 WL 8327520, at \*4 (Ct. App. April 26, 2007) ("[T]he record contains no evidence that the School District, in failing to take any preemptive action to prevent the abuse, targeted or directed any of its conduct towards the Does.") (see R. pp. 1811-14).

Doe has not proffered any evidence that The Citadel knowingly directed any actions against him. There is no evidence that The Citadel knew Doe, knew that ReVille abused Doe or had any contact with Doe. There is no evidence that Doe was a camper at the summer camp or that he had any relationship with The Citadel. There is no evidence that The Citadel directed (or even could have directed) any conduct toward Doe, who

ReVille abused *after* his employment at the summer camp. At most, Doe argues that The Citadel should have known — or, more accurately, speculated — that ReVille might abuse some unknowable person at some uncertain time in the future. He does not argue that The Citadel had any way of knowing that Doe was specifically at risk of abuse or that ReVille was, in fact, abusing him. Therefore, this Court should affirm the entry of summary judgment as to Doe's outrage claim.

**C. This Claim Fails Because There Is No Evidence of Outrageous Conduct**

The trial court also properly granted summary judgment to The Citadel as to Doe's outrage claim because Doe has not proffered a scintilla of evidence that The Citadel engaged in the sort of egregious conduct required for him to succeed on that claim. Doe must prove the following elements for his outrage claim:

- (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 conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
- (3) the actions of the defendant caused plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."

*Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 193, 742 S.E.2d 667, 672

(2013) (citations omitted). "Facts which may show extreme insensitivity on the part of the defendant do not necessarily establish the tort of outrage." *Hawkins v. Greene*, 311 S.C. 88, 91, 427 S.E.2d 692, 694 (Ct. App. 1993).

South Carolina appellate courts rarely find conduct sufficient to support an outrage claim, even where defendants acted egregiously. *See e.g., Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) (supervisor threatened and ridiculed employee with cerebral palsy); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)

(homeowner's association president refused access to records); *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) (doctor mistakenly told patient's daughter that father had died); *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 411 S.E.2d 664 (1991) (newspaper published unflattering statements about plaintiff's murdered daughter); *Manley v. Manley*, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (plaintiff was involuntarily committed to state hospital); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) (verbally abusive accusations that plaintiff owed taxes and filed fraudulent returns); *Save Charleston Found'n v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985) (converting promissory note and maliciously bringing action).

One of the rare deviations from this trend was *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991), where an employer forced an employee to perform exercises that aggravated a known health condition and caused plaintiff to lose bladder control in front of others. The Court found that the jury could find this conduct "outrageous and intolerable in a civilized society." *Id.* at 29, 402 S.E.2d at 892; *accord Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (finding conduct sufficiently severe where home buyer subjected realtor to repeated public browbeatings, obscenities, and threats over two years and entered home without permission).

Bearing in mind that the Court must focus on The Citadel's conduct (not ReVille's), Plaintiff presents no evidence that The Citadel acted in an "extreme and outrageous" manner. There is no evidence that The Citadel acted to intentionally harm Doe or with reckless disregard for Doe's rights. Doe can point to no evidence that The Citadel intended for ReVille to abuse Doe (or anyone else) or cause emotional distress. There is no evidence that The Citadel took any act with conscious knowledge that Doe would suffer extreme emotional distress. There is no evidence that The Citadel took pleasure in ReVille's abuse or wished him to abuse any victims. There is no evidence that anyone at The Citadel acted in such a despicable manner. Despite Plaintiff's semantic gymnastics, his claim boils down to the allegation that The Citadel was failed to

prevent ReVille from abusing him. This is not the sort of conduct contemplated by the tort of outrage.

Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

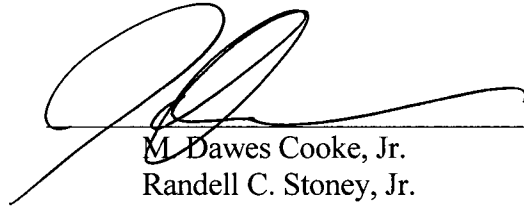
**D. Doe's Outrage Claim Fails Because He Possessed an Alternative Claim That He Could Have Pursued**

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Doe's outrage claim also fails because he had other potential causes of action that he could pursue for his injuries. The law is clear that Doe may only assert an outrage claim when *no other* claim is available: "The tort of outrage was designed *not as a replacement* for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct *where no remedy previously existed*." See *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985) (emphasis added); *Levine v. Walterboro City Police Dep't*, 2006 WL 2228993, at \*2 (D.S.C. Aug. 3, 2006) ("Intentional infliction of emotional distress is a claim of last resort. . . . Since that alternative remedy was available, *Todd* suggests that a claim for intentional infliction of emotional distress cannot lie."). Doe has already asserted negligence/gross negligence claims against The Citadel. His recovery, if any, is limited to those claims. Because Doe has alternative theories available, he should not be allowed to use the tort of outrage in addition to those claims. Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the judgment below granting summary judgment to The Citadel.



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Dated: October 23, 2015  
Charleston, South Carolina

# **Exhibit A**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

**ERICA KINSMAN,**

**Plaintiff,**

**v.**

**Case No. 4:15cv235-MW/CAS**

**FLORIDA STATE UNIVERSITY  
BOARD OF TRUSTEES,**

**Defendant.**

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**ORDER DENYING MOTION TO DISMISS**

This is an action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. Erica Kinsman is a former student at Florida State University (“FSU”). The Board of Trustees administers the university.<sup>1</sup> In her complaint, Ms. Kinsman alleges that another FSU student—the football player Jameis Winston—raped her at an off-campus apartment in Tallahassee, Florida. She claims that FSU failed to investigate properly or respond to the reported assault and that this denied her educational benefits. FSU moves to dismiss the

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<sup>1</sup> Florida law provides that the Board has capacity for suit. § 1001.72, Fla. Stat. For convenience, this order refers to Defendant as “FSU.”

complaint, arguing that under Federal Rule of Civil Procedure 12(b)(6) it fails to state a claim upon which relief can be granted. This order denies the motion to dismiss the complaint.

I

The relevant part of Title IX says that “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The Supreme Court has found an implied right of action for individuals to enforce that requirement. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979). A person may bring a claim for known student-on-student sexual harassment, which is “discrimination” under Title IX. *See Davis v. Monroe Count Bd. of Educ.*, 526 U.S. 629, 650 (1999).

A plaintiff seeking recovery for student-on-student sexual harassment must prove four things. First, the defendant must be a recipient of federal funds under Title IX. *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1293 (11th Cir. 2007). It is undisputed that FSU is a Title IX funding recipient. ECF No. 35, at 5. No further discussion of this requirement is necessary.

Second, “an ‘appropriate person,’ must have actual knowledge of the discrimination or harassment the plaintiff alleges occurred.” *Williams*, 477 F.3d at 1293 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

“[A]n appropriate person . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.” *Id.* (internal quotation marks omitted).

Third, “a funding recipient is liable for student-on-student harassment only if ‘the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.’ ” *Id.* (quoting *Davis*, 526 U.S. at 633). A funding recipient is deliberately indifferent “only where [its] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Id.* at 1296 (quoting *Davis*, 526 U.S. at 648). Put another way, it must amount to “an official decision by the recipient not to remedy the violation.” *Gebser*, 524 U.S. at 290. The deliberate indifference asserted must subject the plaintiff to further harassment; that is, it must cause the complaining student to undergo harassment or make the student liable or vulnerable to it. *Davis*, 526 U.S. at 644; *Williams*, 477 F.3d at 1296.

Fourth, “the discrimination must be ‘so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.’ ” *Williams*, 477 F.3d at 1293 (quoting *Davis*, 526 U.S. at 633).

## II

On January 7, 2015, Ms. Kinsman filed her Title IX complaint in this Court. She asserts that officials at FSU knew she reported that Mr. Winston raped her,

that its response to that information was clearly unreasonable, and that had FSU not been deliberately indifferent, she would not have been subjected to further discrimination. She seeks money damages, injunctive relief, and attorney's fees.

FSU seeks dismissal of that complaint. It identifies three forms of discrimination alleged in the complaint: (1) harassment caused by Ms. Kinsman having to be on campus with Mr. Winston; (2) harassment from third parties via social media; and (3) harassment in not being able to return to school. For each of these categories, FSU argues that the complaint fails to meet one or more of the four requirements for a Title IX claim. For that reason, FSU says the complaint does not state a Title IX claim.

When considering a motion to dismiss under Rule 12(b)(6), this Court must accept the allegations in a complaint as true and read them in the light most favorable to the plaintiff. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004). The sole issue before this Court is whether the complaint, considered through this lens, has sufficient factual matter to state a Title IX claim that is plausible on its face. In short, it does. For the following reasons, the motion to dismiss will be denied.

### III

In its first major point, FSU says it is not liable for any alleged harassment caused by Ms. Kinsman having to be on campus with Mr. Winston. First, FSU

argues that no “appropriate person” had knowledge of Ms. Kinsman’s allegation until November 2013. Second, even if one did, FSU says its response before then of providing a victim advocate to give assistance and explain the student-disciplinary process was not “clearly unreasonable.” Third, FSU says that merely being on campus with Mr. Winston for some months was not harassment under Title IX. This Court will address each argument in turn.

A

FSU’s first argument is that the complaint fails to allege that any “appropriate person” had actual knowledge of Ms. Kinsman’s report until November 2013. Basically, FSU says two officials did not have either enough authority or knowledge to take corrective action.

FSU asserts that neither its associate athletics director nor its head football coach is an “appropriate person” under Title IX. An appropriate person is one with “authority to take corrective action to end the discrimination.” *Williams*, 477 F.3d at 1293. But the “ultimate question of who is an appropriate person is ‘necessarily a fact-based inquiry’ because of the varying roles of educational officials.” *Doe v. Sch. Bd. of Broward Cnty.*, Fla., 604 F.3d 1248, 1256 (11th Cir. 2010) (quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999)). It is plausible that the facts will show that one or both of these officials had enough authority over a member of the football team to take corrective action. *See, e.g.*,

*Williams*, 477 F.3d at 1294–95. This Court cannot say now, as a matter of law, that these officials are not appropriate persons under Title IX.

Next, FSU argues that these persons did not know enough to have “actual knowledge” under Title IX. FSU says that Ms. Kinsman “does not—and cannot—allege that [the head football coach] and [the associate athletics director] knew that Winston’s alleged victim was an FSU student, much less that they knew the actual identity of Winston’s alleged victim.” ECF No. 35, at 9. This is not sufficient for a Title IX claim, FSU argues, because the law protects against *known* student-on-student harassment. At least for this type of claim, it follows that the school official must know that *both* the student *and* the alleged assailant are students, or at least connected to the funding recipient’s educational programs.<sup>2</sup>

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<sup>2</sup> To defeat FSU’s argument that those official had insufficient knowledge, Ms. Kinsman argues in part that “Title IX not only protects students; it also protects third parties from harassment by individuals under the school’s control such as Winston.” See ECF No. 44, at 8–9 n.4. The support for that proposition is a Dear Colleague Letter (“DCL”) issued by the U.S. Department of Education, Office of Civil Rights. Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter: Sexual Violence* 4 (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (included in this record at ECF No. 44-2). The DCL says that Title IX “protects third parties from sexual harassment or violence in a school’s educational programs and activities.” It gives examples of “a high school student participating in a college’s recruitment program, a visiting student athlete, . . . a visitor in a school’s on-campus residence hall,” and “employees of a recipient.” ECF No. 44-2, at 4, n.11. What those examples have in common is some connection to the to the school’s educational programs. Notably, Ms. Kinsman has not offered any other authority for the proposition that Title IX extends to all persons coming into contact with students at off-campus establishments. This Court need not decide that issue today. But if Ms. Kinsman means to rely on such a theory, she may need more convincing legal authority to support her position.

It is true that the complaint does not specifically allege that TPD disclosed Ms. Kinsman's name or student status to the FSU athletics department on January 22, 2013. But it does allege that "[s]enior FSU Athletics Department . . . officials had actual knowledge that Plaintiff reported being raped by Winston as of no later than January 22, 2013, six weeks after the rape." ECF No. 1 ¶ 78. Elsewhere in the complaint, Ms. Kinsman refers to herself at that time as "an FSU freshman." *Id.* ¶ 9.<sup>3</sup> For the purposes of this motion to dismiss, this Court assumes those allegations are true.

Taken together, the complaint plausibly alleges that an appropriate person had actual knowledge as of January 22, 2013.

## B

In its second argument, FSU insists that even if an appropriate person had actual knowledge of Ms. Kinsman's allegation before November 2013, its response up until then was not clearly unreasonable. Under Title IX, a funding recipient is liable for student-on-student harassment only when it acts with deliberate indifference; that is, where its "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

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<sup>3</sup> This Court notes that Ms. Kinsman initially filed her complaint anonymously as "Jane Doe" and referred to herself throughout the complaint only as "Plaintiff."

FSU says it immediately provided Ms. Kinsman with a victim advocate who explained how to change a class shared with Mr. Winston, that the victim advocate informed Ms. Kinsman of the student-disciplinary process, and that FSU honored what it describes as Ms. Kinsman's "informed decision not to initiate that process between January and November 2013, when she left campus." ECF No. 35, at 13. Should the facts bear this out, there is some support for the general proposition that such a response might not be clearly unreasonable. *See, e.g., Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) (holding deliberate indifference was not established where administrator offered resources and explained how to file rape complaint but alleged victim declined to do so). But the facts relevant now are those alleged in the complaint.

In the complaint, there is nothing about Ms. Kinsman affirmatively declining a student-disciplinary hearing. She alleges that no one at FSU offered any safety precautions. She further alleges that between January 22, 2013, and November 13, 2013, senior athletics officials took little if any action to investigate or respond to the alleged rape of a student by another student in their charge.

The complaint plausibly alleges deliberate indifference during this period.

C

In its third argument, FSU claims that Ms. Kinsman being on campus with Mr. Winston until November 2013 was not serious enough to constitute “further discrimination” under Title IX.

“[A] Title IX plaintiff at the motion to dismiss stage must allege that the Title IX recipient’s deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination.” *Williams*, 477 F.3d at 1297. That is, the deliberate indifference must cause the complaining student to undergo harassment or make the student liable or vulnerable to it. *Id.* at 1296.

As other courts have recognized, educational benefits are “not ‘equally available’ if the educational environment is ‘disparately hostile.’ ” *S.S. v. Alexander*, 177 P.3d 724, 744 (Wash. Ct. App. 2008) (quoting *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 (2d Cir. 2003)). Under Title IX, though, the discrimination complained of must be so “severe, pervasive, and objectively offensive” such that it effectively bars the victim’s access to an educational opportunity or benefit. *Davis*, 526 U.S. at 633. “Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and victim, and the number of individuals involved.” *Id.* at 651 (citations omitted).

When it comes to Title IX sexual harassment, such as rape, it is said that “[t]he effect of such abusive conduct on a victim does not necessarily end with a cessation of the abusive conduct, particularly if the victim and abuser retain the same or similar roles in an educational institution.” *See Wills v. Brown Univ.*, 184 F.3d 20, 36–37 (1st Cir. 1999). This Court agrees that the possibility of further encounters “between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.” *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at \*4 (D. Conn. Mar. 26, 2003); *see also Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (holding the “constant potential for interactions” between harasser and rape victim could support conclusion that harassment was “severe, pervasive, and objectively offensive”). It does not require mental gymnastics to reach this conclusion.

Among other things, Ms. Kinsman alleges that over a ten-month period (albeit with a summer break in between semesters) she was fearful of Mr. Winston (with whom she shared a class), she struggled with her coursework, she altered or avoided social activities at school, and she was frightened when she saw Mr. Winston during a midterm examination. She specifically asserts that the presence of her alleged attacker on campus and its impact on her educational opportunities forced her to leave school and prevented her from returning to

continue her education. ECF No. 44, at 18. In similar circumstances, the Eleventh Circuit has called such a decision “reasonable and expected.” *Williams*, 477 F.3d at 1298.

For Title IX purposes, it is certainly plausible that this alleged harassment was severe and pervasive enough to deprive her of educational benefits. *See Davis*, 526 U.S. at 650–51.

#### IV

In its second major point, FSU further asserts that it is not liable for third-party harassment via social media. FSU concedes that exposure to such comments can constitute harassment that is sufficiently severe for purposes of Title IX. ECF No. 35, at 15. FSU says it is not responsible for this harassment because it could not control the context in which it occurred. Cast in slightly different terms, FSU further asserts that any alleged deliberate indifference on its part could not have been the proximate cause of any harassment Ms. Kinsman suffered through social media or the internet.

Ms. Kinsman responds that if FSU had taken action back in January 2013 when officials allegedly learned of her report to TPD, Mr. Winston “ ‘would have been removed as a threat to [her] long before ever suiting up to play football in a Seminoles jersey,’ thereby reducing the likelihood that [she] would have been relentlessly vilified by the press and the Seminole football community.” ECF No.

44, at 19 (quoting ECF No. 1 ¶ 146). FSU says that theory relies on “rank speculation.” Ms. Kinsman says it does not.

Under *Davis*, a Title IX funding recipient’s liability for damages is limited to “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.” 526 U.S. at 645. At least one court, though, has found that while similar third-party harassment is not itself actionable, it may bear on the “severity and offensiveness of having to go to school” with one’s alleged attacker. *Derby*, 451 F. Supp. 2d at 445.

This Court has already found that the complaint states a claim on those grounds. *See* Part IV, above. It need not decide today the whole scope of the claim. This is especially true when, as here, the parties have only briefly addressed the issue of causation and third-party harassment in their respective submissions and the record is undeveloped.

## V

In its third major point, FSU argues that it is not liable for harassment in the form of Ms. Kinsman’s alleged exclusion from school. It says that Ms. Kinsman’s inability to return has not been caused by its alleged deliberate indifference.

The Eleventh Circuit confronted somewhat similar facts in *Williams*. 477 F.3d at 1296–97. In that case the plaintiff reported a rape and left school the next day. *Id.* at 1289. The police investigated but the university waited eleven months

from the incident and eight months after having a full report before conducting a disciplinary hearing. *Id.* at 1296–97. The plaintiff alleged that she may return if the university implemented more effective procedures to deal with student-on-student harassment. *Id.* at 1298. But the university took no precautions to prevent future attacks. *Id.* at 1297. The court said the university’s failure to take action was “inexplicably and discriminatory.” *Id.* The court concluded that, viewed in the light most favorable to the plaintiff, the university acted with deliberate indifference. *Id.* at 1296.<sup>4</sup> The deliberate indifference in *Williams* was “followed by further discrimination, this time in the form of effectively denying [the plaintiff] an opportunity to continue to attend” the school. *Id.* at 1297.

The result is the same in this case. According to the complaint, Ms. Kinsman left campus on November 14, 2013. Though there are some indications to the contrary,<sup>5</sup> the complaint fairly alleges that she wishes to remain an FSU student. ECF No. 1 ¶¶ 27, 122. Through her lawyers she repeatedly asserted a willingness to cooperate with a Title IX investigation and asked “what response the school believes would address the harassment and allow her to re-enroll in classes

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<sup>4</sup> To be sure, *Williams* involved two types of claims. One of the claims was as described above. The second was that the university recruited the student athlete with knowledge of past misconduct, failed to supervise him, and the plaintiff was raped as a result. 477 F.3d at 1294. Ms. Kinsman does not bring that sort of claim.

<sup>5</sup> See, e.g., ECF No. 1 ¶¶ 113, 145(j).

at Florida State.”<sup>6</sup> *Id.* ¶ 122. FSU had its own police officer’s report as well as TPD’s reports. Presumably, TPD’s reports contained the contents of the two interviews of Ms. Kinsman which TPD performed the day after the alleged rape. Yet the disciplinary hearing did not happen until December 2014. The complaint does not mention any precautions taken by FSU to prevent future harassment. According to the complaint, on November 12, 2013, the dean of students told the chief of police about a second student accusing Mr. Winston of sexual assault and assured the chief that a code of conduct proceeding against Mr. Winston *would not* move forward. *Id.* ¶ 101.

FSU says that after it learned of the allegation in November 2013, it waited for the state attorney to conclude the criminal investigation. After that, FSU says it reviewed the evidence, attempted unsuccessfully to interview Mr. Winston, and concluded it lacked sufficient evidence to bring charges. The remaining reason for

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<sup>6</sup> FSU has attached both the letters from Ms. Kinsman’s lawyers and FSU’s responses as exhibits to the motion to dismiss, and urges this Court to consider them. Although ordinarily a court will consider nothing beyond the complaint when deciding a motion to dismiss, there is an exception “in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.” *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). It may be that the letters are significant. But they are not central to Ms. Kinsman’s claim the way, for example, a written contract is in a breach-of-contract case. This Court declines to consider them in deciding this motion to dismiss.

the year-long delay in arriving at a disciplinary hearing, according to FSU, was its inability to interview Ms. Kinsman.

In sum, FSU offers a different take on some of the facts in the complaint and additional facts that are not in the complaint in an attempt to show its efforts to respond were diligent and genuine, or at least not “clearly unreasonable” under Title IX. This Court does not resolve such factual disputes on a motion to dismiss.

Viewed in the light most favorable to Ms. Kinsman, the complaint plausibly alleges deliberate indifference during this period that effectively denied her the ability to attend FSU. *See Williams*, 477 F.3d at 1297–97.

## VI

The complaint states a claim under Title IX upon which relief may be granted.

For these reasons,

**IT IS ORDERED:**

Defendant’s motion to dismiss, ECF No. 35, is **DENIED**.

**SO ORDERED on August 12, 2015.**

s/Mark E. Walker  
United States District Judge

# **Exhibit B**

2015 WL 4548009

Only the Westlaw citation is currently available.

United States Court of Appeals,  
Fourth Circuit.

John DOE 2, Plaintiff–Appellant,

v.

President John W. ROSA,  
individually, Defendant–Appellee.

Mother Doe, on behalf of John  
Doe 3, Plaintiff–Appellant,

v.

President John W. Rosa,  
individually, Defendant–Appellee.

Nos. 14–1748, 14–1749. | Argued:  
March 24, 2015. | Decided: July 28, 2015.

### Synopsis

**Background:** Older brother, and mother on behalf of younger brother, brought separate actions against president of public military college, alleging that president violated affirmative duty under Due Process Clause to protect brothers from being molested at summer camp held at college. The United States District Court for the District of South Carolina, Richard M. Gergel, J., granted president's motion for summary judgment in both actions. Mother and older brother appealed.

**[Holding:]** The Court of Appeals, Agee, Circuit Judge, held that president did not create danger of camp counselor's molesting brothers.

Affirmed.

West Headnotes (14)

[1] **Civil Rights**

↔ Rights Protected

Section 1983 imposes liability on state actors who cause the deprivation of any rights, privileges, or immunities secured by the Constitution. 42 U.S.C.A. § 1983.

[2] **Constitutional Law**

↔ Protection of Children; Child Abuse, Neglect, and Dependency

State actions that result in sexual abuse of children can be actionable under § 1983, based on Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] **Civil Rights**

↔ Failure to Act or Protect or to Enforce Law

When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive in determining whether a state actor can be liable under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4] **Civil Rights**

↔ Failure to Act or Protect or to Enforce Law

**Constitutional Law**

↔ Creation of Danger or Risk

The creation of a danger implicates the alternate framework of § 1983 liability, based on the Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity, wherein a plaintiff alleges that some conduct by an officer directly caused harm to the plaintiff. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[5] **Constitutional Law**

↔ Creation of Danger or Risk

To establish § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity based on a state-created danger theory, a plaintiff must show that the state actor

created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[6] **Constitutional Law**

⚡ Duty to Protect; Failure to Act

**Constitutional Law**

⚡ Creation of Danger or Risk

State actors may not disclaim § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity when they themselves throw others to the lions, but that does not entitle persons who rely on promises of aid to some greater degree of protection from lions at large. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[7] **Civil Rights**

⚡ Vicarious or Respondeat Superior Liability in General

Principles of respondeat superior do not apply in imposing liability under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[8] **Constitutional Law**

⚡ Protection of Children; Child Abuse, Neglect, and Dependency

**Infants**

⚡ School Authorities and Staff

President of public military college, at which summer camp was held, did not create danger of counselor at camp molesting two brothers, and thus president could not be liable under § 1983 for alleged violation of brothers' substantive due process rights against state actor conduct that deprived them of bodily integrity, where abuse of brothers occurred two years before president could have been aware of such abuse through complaint from other camper who was also molested, counselor's abuse of brothers

did not get any worse after date of complaint, and president did not take any affirmative acts, but instead allegedly failed to notify authorities of counselor's past conduct. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[9] **Civil Rights**

⚡ Failure to Act or Protect or to Enforce Law

There simply is no constitutional right to be protected by the state against criminals or madmen, and a state actor's failure to do so is not actionable under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[10] **Constitutional Law**

⚡ Creation of Danger or Risk

A key requirement for § 1983 liability, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, under the state-created danger doctrine is that the state actor increase or create the danger through affirmative conduct. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[11] **Constitutional Law**

⚡ Creation of Danger or Risk

In order for § 1983 liability, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, under the state-created danger doctrine to apply, the state, through its affirmative acts, must itself create the dangerous situation that resulted in a victim's injury, such that it becomes much more akin to an actor itself directly causing harm to the injured party. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[12] **Constitutional Law**

⚡ Creation of Danger or Risk

No constitutional liability under § 1983, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, pursuant to the state-created danger doctrine exists where the state actors had no hand in creating the danger but simply stood by and did nothing when suspicious circumstances dictated a more active role for them. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[13] **Constitutional Law**

↔ Creation of Danger or Risk

Affirmative acts, as required for § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity under the state-created danger doctrine to apply, are quite limited in scope; it cannot be that the state commits an affirmative act every time it does anything that makes injury at the hands of a third party more likely, and although inaction can often be artfully recharacterized as action, courts should resist the temptation to inject this alternate framework into omission cases. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[14] **Constitutional Law**

↔ Creation of Danger or Risk

The concept of affirmative acts, as required for § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity under the state-created danger doctrine to apply, should not extend beyond the context of immediate interactions between the state actor and the plaintiff. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

**Attorneys and Law Firms**

**ARGUED:**Jacqueline LaPan Edgerton, McLeod Law Group, LLC, Charleston, South Carolina, for Appellants. Morris Dawes Cooke, Jr., Barnwell Whaley Patterson & Helms, LLC, Charleston, South Carolina, for Appellee. **ON BRIEF:**W. Mullins McLeod, Jr., James B. Moore III, McLeod Law Group, LLC, Charleston, South Carolina, for Appellants. John W. Fletcher, Randell C. Stoney, Jr., Jeremy E. Bowers, Barnwell Whaley Patterson & Helms, LLC, Charleston, South Carolina, for Appellee.

Before SHEDD, DUNCAN, and AGEE, Circuit Judges.

**Opinion**

Affirmed by published opinion. Judge AGEE wrote the opinion, in which Judge SHEDD and Judge DUNCAN joined.

AGEE, Circuit Judge:

\*1 The appellants in this consolidated appeal were the plaintiffs below, John Doe 2 and Mother Doe, on behalf of John Doe 2's younger brother, Doe 3 (together, "the Does").<sup>1</sup> Beginning in 2005 and continuing through July or August 2007, Louis "Skip" ReVille provided childcare for the Doe family and sexually abused the two minor boys. ReVille, a graduate of The Citadel, The Military College of South Carolina ("The Citadel"), had previously worked as a counselor at The Citadel's youth summer camp.

Defendant John W. Rosa was the president of The Citadel during the time period relevant in this case. In April 2007, his office received a phone call from the father of a former camper, who reported that a counselor at the summer camp—later identified to be ReVille—had molested his son in 2002. Rosa did not report the complaint to law enforcement and instead, the Does contend, took steps to conceal the allegations. The Does argue that Rosa's actions allowed ReVille to continue his abuse of Doe 2 and Doe 3 during the summer of 2007.

The Does brought suit against Rosa under 42 U.S.C. § 1983, alleging that Rosa had violated an affirmative duty to protect them under the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment in favor of Rosa on the ground that Rosa had no duty to

protect the Does from a pre-existent danger. For the reasons explained below, we affirm the judgment of the district court.

### I. Background

The Citadel is a public military college in Charleston, South Carolina. From 1957 to 2006, it operated The Citadel Summer Camp for young children, employing current and former Citadel cadets to serve as staff and camp counselors. The Citadel housed the camp counselors on campus in rooms near the campers. In 2001, The Citadel learned that a former cadet named Michael Arpaio had sexually abused campers while working as a camp counselor from 1995 through 2001. Several victims sued the Citadel based on Arpaio's abuse and collected damages.<sup>2</sup>

#### A. Camper Doe Allegations

On April 23, 2007, Rosa's office received a phone call from the father of a former Citadel Summer Camp camper ("Camper Doe," unrelated to the plaintiffs and not a party in this case). Rosa was not present that day, and his administrative assistant referred the call to The Citadel's general counsel, Mark Brandenburg.

When Brandenburg returned the call, Camper Doe's father "asked whether [Brandenburg] was calling on behalf of President Rosa," because the family "did not want anything to fall through the cracks." J.A. 1753. The father told Brandenburg that Camper Doe had been sexually abused by a counselor known as "Skip" while attending the Citadel Summer Camp in 2002. Skip had allegedly shown Camper Doe pornography and masturbated with him and showered with the campers. The father also identified a second camper who was similarly victimized. Brandenburg then spoke on the phone with Camper Doe himself, who explained that Skip abused him and other campers in this way for over a year. J.A. 1830, 1862, 1865–1867.

\*2 Brandenburg reviewed camp records for the 2001 and 2002 years and found that Camper Doe's description matched a counselor named Louis "Skip" ReVile, who had been a Citadel cadet from 1998 to 2002. ReVile had worked as a camp counselor at the Citadel Summer Camp during the summers of 2000 to 2004 and as a tutor in The Citadel's Writing Center from August 2006 until sometime in April 2007.

Brandenburg called ReVile at the Writing Center on April 24, 2007, the day after talking with Camper Doe's father. According to ReVile, Brandenburg arranged to meet with him and Rosa's Executive Assistant, Colonel Trez. At the meeting, Brandenburg and Colonel Trez told ReVile about Camper Doe's accusations, all of which he denied. They explained to ReVile that "from the Citadel's standpoint their main concern was to protect the institution" and that during their investigation he should "lay low and stay off the campus." J.A. 2416–17, 4622.

The Does suggest that Brandenburg then terminated ReVile's employment at the Writing Center, but ReVile's time records as a Citadel tutor indicate that he last worked at the Writing Center on April 19, 2007, four days before Camper Doe's father called the Citadel. *See* J.A. 280. Similarly, a form that ReVile's supervisor at the Writing Center completed on March 22, 2007 lists the "Effective Date" of ReVile's "Resignation" as April 20, 2007. J.A. 279. The conflict between ReVile's testimony that he was at the Writing Center when he received Brandenburg's call on April 24, 2007 and the contradictory employment forms is not resolved in the record, but we must credit the Does' account for summary judgment purposes.

Brandenburg also met with the former director of The Citadel Summer Camp, Jennifer Garrott, on April 24, 2007, who disclosed that ReVile had been asked to leave his prior job at a prep school. In addition, Garrott told Brandenburg that in the summer of 2003, she caught ReVile in his barracks room alone with a camper rubbing Icy Hot on the camper's leg, which is against camp policy forbidding counselors from being alone in a room with campers—a terminable offense.

Brandenburg reported back to Rosa by May 6, 2007 about his investigation of the allegations against ReVile. The Does contend that Brandenburg "memorialized ... his and President Rosa's intentions" to conceal the Camper Doe complaint in a May 8, 2007 email, Appellant's Br. 9, and quote a portion of the email that states, "I am hopeful that by conducting an investigation on behalf of the school, no 'formal' investigation—criminal or civil—will occur." J.A. 1005. However, the Does appear to take the email out of context as it was written to provide a background explanation to a potential witness in advance of an interview by Brandenburg. Further, the Does offer no evidence that Rosa was aware of the contents of the email or ever saw it.

On July 1, 2007, Brandenburg went to Dallas, Texas to personally speak to Camper Doe and his parents. During the interview, which was recorded and transcribed, Camper Doe provided a detailed account of the abuse, including that it happened to “about five other” boys. J.A. 3591. Asked whether he reported the complaint to law enforcement, Camper Doe replied, “Well, I mean, I’ve talked to you,” and “Most of all, the thing I want the most is just to make sure that [ReVille] doesn’t have a chance to do this to anyone else.” J.A. 3659–61. Camper Doe later testified, “I would have absolutely reported it to police had I known that the Citadel didn’t.” J.A. 2399.

\*3 At the close of the July 1 interview, Camper Doe’s father mentioned that The Citadel had not accepted Camper Doe for admission as a cadet. He stated that The Citadel had been “part of the root cause” of Camper Doe’s problems and by admitting him could “be part of the root cause to fix him.” J.A. 288. The father considered this “a very inexpensive way for The Citadel to say, do you know what—we’ll fix our own.” J.A. 288.<sup>3</sup>

### B. The Alleged Cover-Up

The Does contend that Rosa “deliberately conspired to conceal” the allegations by Camper Doe against ReVille. J.A. 35, 61 (Compls. ¶ 25). Jennifer Shiel, an administrative assistant who worked in Rosa’s office, testified that “President Rosa [was] in charge” of a “conscious effort to cover up or conceal [the] report of sexual abuse.” J.A. 975. She testified that Rosa used the term “close hold,” which she interpreted to mean that “only people that needed to know about it were supposed to know about it.” J.A. 985. Further, Shiel testified that Brandenburg and Rosa had nearby offices and met on business at least three times a week. Brandenburg was deferential to Rosa and “there was no way that [Brandenburg] would have done something on his own without running it past [Rosa] first.” J.A. 970.

The Does posit that Rosa ignored policies of both The Citadel and its summer camp that required him to report the Camper Doe claim to the Citadel Public Safety Department. J.A. 35, 61 (Compls. ¶ 29); *see also Serious Incidents, Memorandum No. 39*, J.A. 1376–88 (directing 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” is responsible for reporting it to the Public Safety Department); *Summer Camp Official Camp*

*Policies Regarding Sexual Misconduct Issues*, J.A. 1389 (mandating 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”). Shiel testified that Rosa “made sure that did not happen.” J.A. 976.

The Does also assert that Rosa violated The Citadel’s Employee Misconduct Policy by allowing ReVille to resign his position at the Writing Center and to leave with a clean record. J.A. 37, 63 (Compls. ¶ 37). According to the Does, The Citadel policy forbids expunging molestation findings from an employee’s record or terminating an investigation in exchange for the employee’s resignation. J.A. 2418. The Does, however, offer no evidence that Rosa expunged findings from ReVille’s record.

The Does also point to multiple policies they contend required Rosa to report sexual assault or harassment to the college’s Title IX Coordinator. J.A. 37, 63 (Compls. ¶ 35); *see also Sexual Assault Crisis Intervention Policy*, J.A. 1415–20; *Sexual Harassment*, J.A. 1421–36; *General Procedures for Conducting Formal Investigations of Sexual Harassment*, J.A. 1437–38. In addition, the Does allege Rosa violated Title IX’s requirement for an impartial investigation of sexual abuse by leaving the investigation to The Citadel’s general counsel (Brandenburg) and its insurer, the South Carolina Insurance Reserve Fund. *See* 20 U.S.C. § 1681.

\*4 In addition to failing to report the Camper Doe allegations or initiate a proper investigation, the Does contend that Rosa actively concealed the allegations. For example, in October 2007, the Camper Doe complaint was omitted from a list of “possible litigation” files kept in The Citadel’s General Counsel’s office. J.A. 2421–34. In 2010, Camper Doe’s name appeared in the list with the description “alleged sexual abuse at summer camp,” but the entry was annotated as being against “Arpaio,” not ReVille. J.A. 2435–38. The Does argue that this “is evidence of President Rosa’s cover up” and that an accurate file, listing ReVille’s name, would have notified the South Carolina Budget and Control Board that potential liability extended beyond the Arpaio sex abuse complaints. Appellant’s Br. 17.<sup>4</sup>

As further evidence of a cover-up, the Does point out that The Citadel did not include the Camper Doe complaint in the 2007 crime statistics that it was required to keep under the Clery Act. *See* 20 U.S.C. § 1092(f). The Clery Act requires schools to report statistics of crimes “that are reported to local police

agencies or to a campus security authority” during “the three most recent calendar years.” 34 C.F.R. § 668.46. According to the **Dōēs**, **Rōsā** “effectively prevent[ed] the trigger of any duty to report pursuant to the Clery Act” by withholding Camper **Dōē**’s complaint from law enforcement. Appellant’s Br. 18; *see also* J.A. 36, 62 (Compls. ¶ 31).

The Does also assert that The Citadel further hid the Camper Doe allegations by withdrawing a challenge to ReVille’s application for unemployment benefits. On June 8, 2007, the South Carolina Employment Security Commission found ReVille eligible for unemployment benefits due to job loss from The Citadel, and on June 20, 2007, The Citadel filed a Notice of Appeal to challenge that decision. However, on July 5, 2007, four days after Brandenburg met with Camper Doe in Dallas, The Citadel withdrew its appeal of ReVille’s unemployment benefits. ReVille testified that he believed The Citadel withdrew the challenge because Brandenburg and Colonel Trez “did not want to have anything to do with [him] as far as any kind of confrontation or anything.” J.A. 4687.

Finally, in June and September 2007, Brandenburg appeared with **Rōsā** before The Citadel’s Board of Visitors to provide information on Camper Doe’s allegations against ReVille. The Does argue that Brandenburg gave such minimal detail on the issue that the Board could not understand the true nature of the complaint. According to a third-party investigative report commissioned by The Citadel, the Board “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.” J.A. 4043.

### C. ReVille’s Abuse of the Does

ReVille met Doe 2 in the summer of 2005, about two years before Camper Doe’s father called **Rōsā**’s office. Doe 2 had just finished 6th Grade, and ReVille was a volunteer coach for his youth basketball team, which held practice at the prep school where ReVille worked. At some point, ReVille invited Doe 2 to his home to help with yardwork and began sexually abusing him shortly thereafter. ReVille testified he abused Doe 2 at least 12 times in 2005 and “three, four times a week” in 2006. J.A. 4721–26.

\*5 ReVille became increasingly close with Doe 2 and his family, and during Doe 2’s 8th grade year, ReVille was

invited by the Doe family to move into their home as a part-time caregiver for Doe 2 and his younger brother, Doe 3. ReVille then increased his abuse of Doe 2 and also began to abuse Doe 3. The abuse—which consisted of sexual truth-or-dare games, oral sex, physical touching, and masturbation—occurred from three to four times a week to “nearly daily” between the summer of 2006 through early 2007. J.A. 4989, 5044, 5231–33. In April 2007, prior to learning about Camper Doe’s allegations, ReVille was abusing Doe 2 approximately “two to three times a week” and Doe 3 “three to four times a week.” J.A. 4730–31, 4736.

After meeting with Brandenburg and Colonel Trez on April 24, 2007, ReVille briefly curtailed his sexual abuse of the Does. However, he heard nothing further from The Citadel or law enforcement and, taking the silence as “news that [he] was not going to get in trouble,” ReVille resumed the abuse before the end of May 2007. J.A. 5043–44. By that time, ReVille was no longer working at the Writing Center and used his additional free time to abuse the Does more frequently. The abuse ended by August, when the Doe family moved to Atlanta.

After leaving his employment at the Writing Center, ReVille returned to The Citadel several times, to speak to the Honor Committee and incoming freshman, and in 2010 to attend the unveiling of the remodeled Honor Court. Finally, in October 2011, Mount Pleasant, South Carolina police arrested ReVille, apparently based on separate allegations of child sexual abuse. At that time, Camper Doe’s April 2007 allegations against ReVille came to light.

### D. Legal Proceedings

The Does filed two complaints against **Rosa** (one each for **Dōē** 2 and Doe 3) on March 19, 2012 in the District of South Carolina, which were later amended. The amended complaints assert a substantive due process violation under 42 U.S.C. § 1983, as well as two other claims that the district court dismissed. In effect, the **Dōēs** allege that **Rōsā** caused their abuse during the late spring and early summer of 2007 by covering up the Camper **Dōē** complaint and thereby allowing ReVille to remain a respected member of the community. J.A. 34, 62 (Compls. ¶ 34).

On June 27, 2014, the district court granted summary judgment in favor of **Rōsā** in both cases. The district court concluded that the Supreme Court’s holding in *DeShaney v.*

*Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), bars the **Dōēs'** § 1983 claim because **Rōsā** "cannot be said to have created a danger which already existed." J.A. 5244. By the time **Rōsā** learned of the Camper **Dōē** complaint, "ReVille had been abusing [the **Dōēs**] for nearly two years and this abuse had occurred wholly independent of any act or involvement of [**Rōsā**]." J.A. 5251. The **Dōēs** therefore "c[ould] not demonstrate that [**Rōsā**] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille." *Id.*

\*6 The Does timely appealed their respective orders, and we have jurisdiction over their consolidated appeal under 28 U.S.C. § 1291.

## II. Standard of Review

We review de novo the district court's grant of summary judgment. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.1994). Summary judgment is appropriate only when the evidence shows that "there is no genuine issue as to any material fact," Fed.R.Civ.P. 56(c), such that "a reasonable jury could [not] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In addition to construing the evidence in the light most favorable to [the Does], the non-movant, we also draw all reasonable inferences in [their] favor." *World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co., Ltd.*, 783 F.3d 507, 512 (4th Cir.2015).

## III. Discussion

On appeal, the **Does** argue that they have established a triable cause of action against **Rōsā** under 42 U.S.C. § 1983 for the abuse that occurred after the Camper **Dōē** allegation. They contend Rosa's alleged conduct constituted affirmative acts which created, or at least increased, the risk of their later abuse by ReVille. The **Does'** central argument is that the district court erred in applying the state-created danger doctrine when it concluded that **Rōsā** was not liable because ReVille had already been abusing the **Does** long before the Camper **Dōē** complaint.

### A. The State-Created Danger Doctrine

[1] [2] Section 1983 imposes liability on state actors who cause the "deprivation of any rights, privileges, or immunities secured by the Constitution."<sup>5</sup> Under established precedent, these constitutional rights include a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity. *See, e.g., Hall v. Tawney*, 621 F.2d 607, 612–13 (4th Cir.1980). Accordingly, state actions that result in sexual abuse of children can be actionable under § 1983. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.1994) (addressing a "student's constitutional right to bodily integrity in physical sexual abuse cases"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724–25 (3rd Cir.1989) (recognizing § 1983 liability for school administrators' "actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers").

State actor liability, however, is significantly limited as the Supreme Court explained in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In that case, a child's mother brought a § 1983 action against a social worker and other local officials on behalf of her child, who had been beaten and permanently brain damaged by his father. The mother alleged that the state officials failed to remove the child from his father's custody, despite repeated reports and evidence of the father's abuse, and that failure to act deprived the child of a liberty interest in violation of his due process rights. *Id.* at 191, 109 S.Ct. 998.

\*7 The Supreme Court rejected DeShaney's asserted federal constitutional cause of action because

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of

oppression[.]” Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

*Id.* at 195–96, 109 S.Ct. 998 (citations omitted). In establishing a brightline rule regarding due process causes of action involving the state-created danger doctrine, the Court concluded that because “the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.” *Id.* at 196–97, 109 S.Ct. 998.

The Supreme Court noted, nonetheless, that state actor liability might attach in two narrow circumstances. The first exception arises “when the State takes a person into its custody and holds him there against his will.” *Id.* at 199–200, 109 S.Ct. 998 (sometimes referred to as the state-custody or special-relationship exception). For example, individuals confined in a penal institution or mental hospital are due certain protections by the state during the time of confinement because

when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. .... The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf.

*Id.* at 199–200, 109 S.Ct. 998.

The Does do not contend that their asserted cause of action can be sustained under the state custody exception.

[3] [4] The second exception, implicit in *DeShaney*, gives rise to the state-created danger doctrine and is at issue here.<sup>6</sup> In *DeShaney*, the Supreme Court observed that “[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” *Id.* at 201, 109 S.Ct. 998 (emphasis added). Under “th[o]se circumstances,” the State had no constitutional duty

to protect the child. *Id.* Thus, “When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive.” *Pinder*, 54 F.3d at 1177.

\*8 The leading case in the Fourth Circuit on the state-created danger doctrine is *Pinder*, where Ms. Pinder, the mother of three children, brought a § 1983 action against a police officer who had responded to a report of domestic violence at her home. *Id.* at 1171–72. Her ex-boyfriend, Pittman, had broken into Pinder's home, assaulted her, and threatened to kill her and her three children. Pinder told the investigating officer that Pittman also had threatened her in the past and had just been released from jail for the attempted arson of her home. Fearing that Pittman could return to harm her or her children, she asked the officer whether she could safely return to work that evening. The officer assured her that Pittman would be incarcerated overnight on assault charges and could not be released until the county commissioner became available for a hearing in the morning. With that assurance, Pinder went to work that evening leaving her children at home.

Instead of the assault charge, the officer filed lesser charges against Pittman, and he was released from custody that night. Pittman then returned to Pinder's home after she had gone to work and set it on fire. Pinder's children were sleeping inside, and all three died of smoke inhalation.

Pinder then brought a § 1983 due process claim against the police officer. Lacking a custodial relationship with the state, she sought to invoke the state-created danger doctrine by alleging that the officer's assurances of Pittman's overnight detention were affirmative misconduct by a state actor that increased the danger to her children. *Id.* at 1175. We concluded, however, that Pinder could not sidestep the broad rule in *DeShaney* by “characterizing her claim as one of affirmative misconduct by the state in ‘creating or enhancing’ the danger, instead of an omission.” *Id.*

We reasoned that if Pinder's theory was correct, “every representation by the police and every failure to incarcerate would constitute ‘affirmative actions,’ giving rise to civil liability.” *Id.* Such a rule could not survive scrutiny under *DeShaney*:

No amount of semantics can disguise the fact that the real “affirmative act” here was committed by Pittman, not by Officer Johnson. As was true in *DeShaney*, the state did not “create” the danger, it simply failed to provide adequate protection from it. In both cases, “[t]he most that can be

said of the state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.” Thus, like *DeShaney*, Pinder's case is purely an omission claim.

*Id.* at 1175–76 (citation omitted). In light of *DeShaney*, the officer lacked a “clearly established” duty under the due process clause to protect Pinder or her children and was therefore entitled to qualified immunity. *Id.* at 1176.

[5] [6] Under the narrow limits set by *DeShaney* and *Pinder*, to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. Put another way, “state actors may not disclaim liability when they themselves throw others to the lions,” but that does not “entitle persons who rely on promises of aid to some greater degree of protection from lions at large.” *Pinder*, 54 F.3d at 1177.

#### B. Rosa's § 1983 Liability

\*9 [7] [8] Given the clear rule under *DeShaney* and *Pinder*, we conclude that the **Does** cannot make a § 1983 state-created danger claim against **Rosa**. As the district court found in granting summary judgment, the **Does'** claim fails because they “cannot demonstrate that [**Rosa**] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille.”<sup>7</sup> J.A. 5244. ReVille began abusing the **Does** in 2005 and 2006, two years before **Rosa** could have been aware through the Camper **Doe** complaint that he was a pedophile. Quite simply, Rosa “could not have created a danger that already existed.”<sup>8</sup> *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir.1998).

Nor did **Rosa** create or increase the risk of the **Does'** abuse specifically during the early summer months of 2007, as the **Does** posit. As horrific as the abuse of the **Does** by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by **Rosa**. As *DeShaney* makes clear, allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. The father's abuse in *DeShaney* was a pre-existent danger, and the fact that the state had taken temporary custody of the child and returned him to the father's care “d[id]

not alter the analysis.” 489 U.S. at 201, 109 S.Ct. 998; *see also Armijo*, 159 F.3d at 1263 (concluding that a state actor cannot be liable for a pre-existent danger, “even if the state put the plaintiff back in that same danger”). Here, Rosa is alleged to have done even less than the acts claimed in *DeShaney* and *Pinder*; at worst, he failed to take actions that might have removed them from an ongoing danger that had been present for a long time.

[9] The **Does** were thus placed in “no worse position than that in which [they] would have been had [**Rosa**] not acted at all.” *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. There was simply nothing new about ReVille's perverted abuse of the **Does** in the summer of 2007 that had not already been occurring for months. **Rosa** did not make the **Does'** danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse. “[T]here simply is ‘no constitutional right to be protected by the state against ... criminals or madmen,’ ” and a state actor's “ ‘failure to do so is not actionable under section 1983.’ ” *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir.1983) (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982)). To paraphrase *Pinder*, “[n]o amount of semantics can disguise the fact that the real ‘affirmative act’ here was committed by [ReVille], not by [Rosa]. As was true in *DeShaney*, the state did not ‘create’ the danger, it simply failed to provide adequate protection from it.” *Pinder*, 54 F.3d at 1175.

In arguing for the opposite conclusion, the **Does** rely almost exclusively on an unpublished case *Robinson v. Lioi*, 536 Fed.Appx. 340 (4th Cir.2013). However, the state actor in *Robinson* substantially changed a pre-existent danger—he did not simply fail to intervene to stop it. In *Robinson*, a woman was stabbed and killed after a police officer, Lioi, actively conspired with her husband and enabled him to evade an arrest warrant for domestic violence, thus creating the opportunity for him to murder his wife. Though the risk of domestic abuse already existed, the officer “directly enabled [the husband] to perpetrate the harm to [the wife]” and “affirmatively placed [the wife] in a position of danger.” *Id.* at 345 (citation and internal quotation marks omitted). Unlike here or in *DeShaney*, the police officer in *Lioi* put the victim in a far “worse position” by acting to thwart the arrest warrant. *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. By contrast, the **Does** were in no different situation with ReVille after the Camper **Doe** complaint than they had been the previous two years.

\*10 Even if the **Does** did face a new or increased risk of abuse, which they did not, their claim would still fail because the danger was not the result of **Rōsā's** "affirmative acts."

[10] [11] [12] A "key requirement" for liability under the state-created danger doctrine is that the state actor increase or create the danger through "affirmative conduct." *Butera v. District of Columbia*, 235 F.3d 637, 650 (D.C.Cir.2001); see also *DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 (observing that "it is the State's affirmative act" that "trigger[s] the protections of the Due Process Clause"); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir.1995) ("There is no evidence that the Board took any *affirmative* action that exposed decedent to any danger to which she was not already exposed."). The state, through its affirmative acts, must "itself create[ ] the dangerous situation that resulted in a victim's injury," such that "it becomes much more akin to an actor itself directly causing harm to the injured party." *Pinder*, 54 F.3d at 1177. "No constitutional liability exists where the State actors 'had no hand in creating the danger but [simply] stood by and did nothing when suspicious circumstances dictated a more active role for them.'" *Butera*, 235 F.3d at 650 (citation omitted).

[13] [14] "Affirmative acts," in the state-created danger context, are quite limited in scope. "It cannot be that the state 'commits an affirmative act' ... every time it does anything that makes injury at the hands of a third party more likely." *Pinder*, 54 F.3d at 1175 ("If so, the state would be liable for every crime committed by the prisoners it released."). And although "inaction can often be artfully recharacterized as 'action,' courts should resist the temptation to inject this alternate framework into omission cases." *Id.* at 1176 n. \*. The "concept of 'affirmative acts'" should not extend "beyond the context of immediate interactions between the [state actor] and the plaintiff." *Id.*

Here, Rosa's alleged "affirmative acts" boil down to a particular inaction: his failure to alert the authorities about ReVille's past conduct. He did not follow Citadel policies and report the ReVille allegations to campus police or file required notices under Title IX. But even what the **Dōēs** offered at oral argument as their strongest "affirmative act"—failing to fully explain the allegations against ReVille at the Board of Visitors meetings in June and September 2007—is something that **Rosa** *did not do*. As the **Does** argued, **Rosa** "sat idly by," Oral Arg. at 3:16, and "did not correct the misperception by the Board," Appellant's Br. 20. But that course of events clearly fails to establish state actor liability

under *DeShaney*. See 489 U.S. at 203, 109 S.Ct. 998 ("The most that can be said of the state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

The **Dōēs** cannot "sidestep" this problem by "artfully recharacteriz[ing]" **Rōsā's** conduct in terms of affirmative violations of Citadel policies and misrepresentations in Citadel records. *Pinder*, 54 F.3d at 1175–76 & n. \*. See Oral Arg. at 5:56 ("[Rosa] *acted* when he *didn't do* what his school policies told him to." (emphasis added)). Rosa's failure to report ReVille to the Citadel police or to a Title IX agency is an inaction on his part and not a cognizable affirmative act for liability under the state-created danger doctrine.

\*11 We rejected a similar in *Pinder*. Although the plaintiff "emphasize[d] the 'actions' that [the officer] took in making assurances, and in deciding not to charge Pittman with any serious offense," the failure to file more serious charges amounted to an inaction on the part of a state actor. *Pinder*, 54 F.3d at 1175 ("At some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused, but no such point is reached here."). Rosa's decision not to report ReVille is no different from the officer's decision not to file the more serious charges against Pittman. As in *Pinder* and *DeShaney*, the **Dōēs** claim against **Rōsā** is "purely an omission claim," and "[n]o amount of semantics can disguise the fact that the real 'affirmative act' here was committed by [ReVille], not by [Rōsā]." *Id.* at 1175–76.

In addition, the **Dōēs**' claim lacks the nexus necessary for any of **Rōsā's** alleged conduct to be "affirmative acts." We cannot "stretch[ ] the concept of 'affirmative acts' beyond the context of immediate interactions between the [state actor] and the plaintiff." *Id.* at 1176 n. \*. Here, **Rōsā** did not meet or speak with the **Dōēs**, and by all accounts, was not even aware the **Dōēs** existed. Further, he could only speculate that the Camper Doe allegations were true and that ReVille would pose future danger. If anything, the case at bar stands on weaker ground than in *DeShaney*, in which the state-actor defendants knew the child victim and were aware of the specific danger the father posed to him. The Supreme Court rejected liability there, and we must do the same here. The same distinction can be drawn to *Pinder*, where the officer was well aware of the potential danger to Pinder's children, but made his charging decision nonetheless. The downstream, but-for connection alleged here simply stretches the "affirmative acts" concept too far.

Here, again, the Does look only to *Robinson* for support, by arguing that case recognized that actions to keep a violent husband out of custody are “affirmative acts.” But (in addition to being unpublished) that case featured conduct of an entirely different nature than what the Does have alleged. Lioi had “conspired with [the husband] to help [him] avoid being arrested”; “actively interfered with the execution of the warrant by not only failing to turn the warrant over to the proper unit ..., but also by warning [the husband] and giving him advice about how to avoid service of the warrant”; and “lied to avoid service of the arrest warrant by falsely contending that it could not be found.” *Robinson*, 536 Fed.Appx. at 344. The conduct thus “was far more than a mere passive failure to act; the type of omission claim which the court rejected in *Pinder*.” *Id.* at 344. In contrast, Rosa did not collaborate with ReVille to assist him to avoid custody or detection; he merely failed to take actions that he was under no constitutional obligation to take.

## IV.

\*12 For the foregoing reasons, the state-created danger doctrine does not impose liability on Rosa for ReVille's ongoing abuse of the Does. While Rosa's undisputed failure to act brought dishonor to him and The Citadel, it did not create a constitutional cause of action.<sup>9</sup> Rosa's alleged conduct neither created nor increased the danger ReVille already posed to the Does, and in any event, did not constitute cognizable affirmative acts with respect to ReVille's abuse of the Does.<sup>10</sup> Accordingly, the district court's judgment is

*AFFIRMED.*

## All Citations

--- F.3d ----, 2015 WL 4548009

## Footnotes

- 1 Although both Doe 2 and Doe 3 were minors at the time of the events underlying this case, Doe 2 is now an adult and brings suit in his own right.
- 2 Consistent with the governing standard at the summary judgment stage, the facts are recounted in the light most favorable to the Does even where there are disputed events that the Does may not ultimately be able to prove. See *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 205 n. 1 (4th Cir.2014).
- 3 The Citadel considered Camper Doe for admission to its 2007 class, but could not admit him because he lacked several high school courses that the state of South Carolina required as prerequisites in order for him to matriculate. The Citadel offered to pay for Camper Doe to take those classes at a community college and consider him for admission to the 2008 freshman class but received no response from Camper Doe.
- 4 Rosa responds that this argument “defies logic” because the South Carolina Insurance Reserve Fund, to which Brandenburg did report Camper Doe's allegations, is a division of the Budget and Control Board. Appellee's Br. 15; see also *S.C. Dep't of Disabilities and Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 302 (4th Cir.2008).
- 5 There is no disagreement that Rosa could be a state actor for § 1983 purposes when acting in his capacity as the President of The Citadel, as The Citadel is a public university of the state of South Carolina.
- 6 Although commonly referred to as a second “exception” to *DeShaney's* general rule, we have noted that this terminology “is not strictly accurate.” *Pinder v. Johnson*, 54 F.3d 1169, 1176 n. \* (4th Cir.1995). “Rather, ‘creation’ of a danger implicates the alternate framework of § 1983 liability wherein a plaintiff alleges that some conduct by an officer directly caused harm to the plaintiff.” *Id.*
- 7 The Does' claim may suffer from an additional defect. Even if their theory were legally viable, it is not altogether clear that the evidence establishes Rosa's culpability. Because “principles of respondeat superior do not apply in imposing liability under § 1983,” *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1197 (4th Cir.1996), it is not enough that Rosa had general supervisory authority over Brandenburg and other Citadel employees. His “own individual actions” must violate the Does' rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Rosa did not receive the initial call from Camper Doe's father, and the Does provide at best speculative evidence that Rosa directed Brandenburg's subsequent actions. Nonetheless, because we find the claim fails as a matter of law, we need not delve further into the sufficiency of the Does' proof.
- 8 At oral argument, Rosa's counsel represented that this fact might not be dispositive if Rosa had specifically known that the Does would be victims of ongoing abuse. But see *Pinder*, 54 F.3d at 1175 (“*DeShaney* rejected the idea that [an

affirmative] duty can arise solely from an official's awareness of a specific risk or from promises of aid."). Because this case does not present that situation, we need not address the issue.

- 9 Rosa now agrees that The Citadel should have done more in response to Camper Doe's allegations and that the matter should have gone to the police. See J.A. 4030 ("When you read that transcript [of Camper Doe's interview], with my experience in the sexual assault world, there was much more going on than what we were led to believe (by Mark Brandenburg).").
- 10 Because we agree with the district court that Rosa lacked an affirmative duty to the Doe's and therefore did not violate their constitutional rights, we need not address Rosa's additional argument as to qualified immunity.

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SC Court of Appeals

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

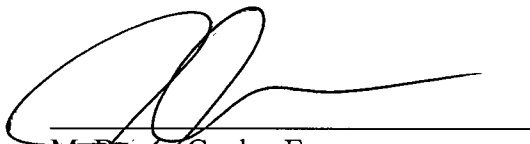
John Doe 2,..... Appellant,

v.

The Citadel ..... Respondent.

RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b), SCACR.

  
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THE STATE OF SOUTH CAROLINA  
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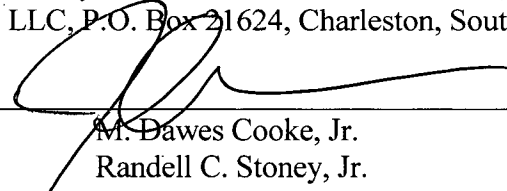
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The Citadel.....Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and Rule 211 Certificate on Appellant John Doe 2 by depositing a copy of it in the United States Mail, postage prepaid, on October 23, 2015, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413.

  
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