THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001920

Mother Doe A ..... Appellant,

v.

The Citadel ..... Respondent.

FINAL BRIEF OF RESPONDENT

M. Dawes Cooke, Esq.
Randell C. Stoney, Jr., Esq.
John W. Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite #200 (29401)
Post Office Drawer H
Charleston, South Carolina 29402-0197
(843) 577-7700
Attorneys for Respondent

Allan P. Sloan, III, Esq.
Joseph C. Wilson, IV, Esq.
Kristen B. Fehsenfeld, Esq.
Pierce, Herns, Sloan & Wilson, LLC
321 East Bay St.
Charleston, SC 29401
(843) 722-7733
and
Gregg Meyers, Esq.
Jeffrey R. Anderson, Esq., pro hac vice pending
Jeff Anderson & Associates, P.A.
366 Jackson Street Suite 100
Saint Paul, MN 55101
651-227-9990, 651-297-6543 facsimile
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHERS

STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court properly grant summary judgment here, where Plaintiff ("Mother") can show no damages other than emotional distress/loss of filial consortium and where the South Carolina Supreme Court has expressly held that a parent's damages for injury to a child are limited to medical expenses and loss of services?**

Suggested Answer: **Yes.**

2. **Did the trial court properly grant summary judgment where the South Carolina Tort Claims Act ("SCTCA") bars Mother's outrage claim?**

Suggested Answer: **Yes.**

3. **Did the trial court properly grant summary judgment on Mother's outrage claim where there is no evidence that The Citadel directed any conduct toward her?**

Suggested Answer: **Yes.**

4. **Did the trial court properly grant summary judgment as to Mother's outrage claim where there is no evidence of extreme or outrageous conduct?**

Suggested Answer: **Yes.**

5. **Did the trial court properly grant summary judgment as to Mother's outrage claim where she could have pursued alternate claims?**

Suggested Answer: **Yes.**

6. **Did the trial court properly grant summary judgment as to Mother's conspiracy claim on the ground that the SCTCA bars such a claim?**

Suggested Answer: **Yes.**

7. **Did the trial court properly grant summary judgment as to Mother's negligence-based claims (including Counts 1, 2, 3 and 5) where The Citadel did not ow even Mother's son -- let alone Mother -- a duty of care (either through voluntary assumption, creation of the danger or statutory imposition)?**

Suggested Answer: **Yes.**

8. **Did the trial court properly grant summary judgment as to Mother's negligence-based claims (including Counts 1, 2, 3 and 5) where there is no evidence that The Citadel's alleged conduct did not proximately cause Mother's injuries.**

Suggested Answer: **Yes.**

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Mother Doe A ("Mother")[1] 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 her son. Mother's son concededly never attended the camp and had no affiliation with The Citadel. Mother alleges claims against The Citadel sounding in:

(a) Count I — Gross Negligence/Failure to Warn

(b) Count II — Negligent Hiring, Retention and Supervision

(c) Count III — S.C. Code § 59-154-10 (Jessica Horton Act)

(d) Count IV — Civil Conspiracy

(e) Count V – S.C. Code § 63-7-310 (Mandatory Reporting Statute)

(f) Count VI — Intentional Infliction of Emotional Distress/Outrage

(g) Count VII — Loss of Services

(*See* R. pp. 1321-92).

On January 26, 2015, The Citadel filed its Notice of Motion and Renewed Motion for Summary Judgment, arguing that Mother's claims failed for several reasons. (*See* R. pp. 0326-430). On February 2, 2015, the Honorable R. Markley Dennis entered an order granting The Citadel's Renewed Motion for Summary Judgment. (*See* R. p. 0003). On May 29, 2015, the Court entered a more detailed Order Granting Defendant's Motion for Summary Judgment. (*See* R. pp. 0004-15). On June 15, 2015, Mother filed a Motion to

---

[1] Plaintiff's Brief includes *two* captions; one for this case and one for *John Doe 201 and Jane Doe 201 v. The Citadel*, Case No. 2013-CP-10-6330. The *John Doe 201* case, like this case, is brought by the parents of a ReVille abuse victim. The parties agreed that, given the similarities between *John Doe 201* and the instant case, that lawsuit should be held in abeyance pending the resolution of this appeal. However, the trial court has *not* entered judgment in the *John Doe 201* case. Plaintiffs have *not* filed an appeal in the *John Doe 201* case. Simply put, *John Doe 201* is not properly before this Court and John Doe 201 is not an appellant here. To the extent Mother's Brief seeks to make arguments on behalf of *John Doe 201*, such arguments are improper and the Court should disregard them.

Alter or Amend, which the trial court denied on August 6, 2015. Mother filed the instant Notice of Appeal on or about August 31, 2015.

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. 3607 ¶ 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. 0885-89). 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. pp. 0892-94). 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. 0893:16-17). 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. 0893:19-23).

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. pp. 0897:25-0898:25). 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. 0899:1-0900:16). 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. 0895-0900):

- The report concerned an incident that had occurred approximately five years prior.
- Camper Doe was an adult at the time of his report.
- The summer camp closed the year prior to Camper Doe's report.
- ReVille resigned from The Citadel (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.
- Brandenburg could not obtain 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 and his family did not report the incident to law enforcement.
- Camper Doe did not follow up with Brandenburg after the 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. The Abuse of Mother's Son

Plaintiff Mother Doe A alleges that ReVille abused her son on occasions in 2007 and 2008. (*See* R. p. 1352 ¶ 133). There is no evidence that ReVille abused Mother's son at the summer camp or on campus. To the contrary, Mother claims only that ReVille abused her son was abused while being coached by ReVille in Mount Pleasant after ReVille's involvement with the summer camp ended.

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. As to All Causes of Action, the Trial Judge Properly Held That Mother Did Not Sustain Any Actionable Damages

A. The Supreme Court Has Limited a Parent's Recoverable Damages to Medical Expenses and Pecuniary Harm From Loss of Services

1. Mother's Claimed Damages

Mother does not contend that ReVille abused her or that she suffered any direct injury as a result of The Citadel's conduct. Rather, Mother claims that The Citadel failed to prevent ReVille from abusing *her son*, and that she sustained harm as a result of the abuse of her son. ReVille did not abuse Mother in any way, and she sustained no direct harm from The Citadel's alleged negligence.

In her discovery responses, Mother has stated that she seeks to recover the following elements of damages:

> **ANSWER:** Expenses have been incurred for therapy for her child and herself, as indicated above. []In addition to out of pocket costs, there are intangible injuries. [H]er child has become less participatory with family activities. He is now more easily angered, especially with his siblings. His mother has observed his mood fluctuating between periods of solitude and exclusion, fits of rage, guilt, and deep-seated betrayal. She believes he now has anger management issues that he did not have before the abuse. For a number of years the sexual abuse resulted in "secret" keeping that puts the family in a no-win situation with regard to the other siblings in the family, as information about the abuse must either be spread more broadly

> among those family members or a certain level of ambiguity has to be maintained about the problems now posed for her son's interaction with family members.
>
> Mother Doe's brother, her child's uncle, has commented on her child's antisocial behavior which has led to very awkward, and heated conversations between Mother Doe A and her brother, who does not understand the impact of abuse on her child's psyche and how it has eroded his ability to trust people in positions of authority. Mother Doe A has observed that her son's abuse has changed the family's dynamic, and caused, among other things, Mother Doe A's brother to visit less frequently.

(*See* R. pp. 0908-09 ¶ 10 and R. pp. 0911-12 ¶ 16). However, Mother never identified any charges for medical treatment or counseling. She has never presented evidence of a single bill or payment of any medical bill.

In a correspondence with counsel for The Citadel, Mother's counsel elaborated on the damages she seeks to recover:

> Mother Doe A's damages are those permitted in various cases for loss of services. Past South Carolina cases have acknowledged claims for a parent's "shame, humiliation, and mental anguish," and "outrage and deprivation," and "the insult offered to [a parent's] feeling," and "the agony in the destruction of his hopes concerning his child," and the effect on the child's "companionship." These are intangibles, and jurors have been quite serious about the value of those intangibles.
>
> Mother Doe A knows her son was abused by Reville, and knows her child held that secret for a number of years. The Mother also has complications among her other children as a result of the abuse to this son, some of which was testified to by Chet Williams.
>
> Mother Doe A knows the probable emotional/psychological effects of child sexual abuse (see Margolis powerpoint slide - denial, anger, depression, social and family withdrawal, detachment, loss of caring, reduced ability to express emotions, loss of self-esteem, loss of trust in others including parents, guilt, shame, substance abuse and suicidal ideation). There are many instances where Mother Doe A's son refused to talk to her for long periods. He has been resisting therapy because he was angry that his intention to keep this secret was uncovered by the police investigation. His plan to keep silent about Reville reflects his shame and denial, burdens the Mother is keenly aware that her child was bearing alone. He has been withdrawn from her and other family members and has shown loss of caring about her and other family members.

> So we have a Mother who sees several of the known sexual abuse effects in her son and a son who is in denial and refuses therapy. The pre-Reville mother/son relationship is gone forever, and she will now forever carry the justifiable concern for the increased risk of future harms that her son will be more susceptible to in the long-term. She has an at many times angry son who withdraws from her and others, having had his caring relationships with his Mother and his family affected. She is also aware that he has an increased risk for complications for his own relationships and future problems to deal with as a result of the abuse. Mother Doe A desperately wants him to get help but he refuses and this causes more damage to the relationship, and burdens her. One only need look at Camper Doe 6 who made it to college on a scholarship and soon after his life went into a 8 year downward spiral of drugs, depression and suicide attempt – all related directly to the abuse of Skip Reville.
>
> Mother Doe A is left with the choice every time she sees her son - do I bring up getting help and further damage our relationship or just watch him slip away as other effects start to show up? How is a mother supposed to talk to her son about the disgusting acts detailed by Reville in the Burke records? How can a mother enjoy companionship with her son when he is angry, withdrawn, doesn't care about his family like he used to and refuses to get any help for the underlying problem which is the Reville abuse? Every parent will understand going from good relationship and companionship with their child to years of the opposite with no end in sight. Those would be among the damages. Essentially, because of The Citadel's assistance to Reville, the Mother now has a never-ending complication with this child, and her other children, as the time-bomb elements of sexual abuse can re-occur at any time later in life.

(*See* R. pp. 0922-23). In other words, Mother seeks to recover for the indirect emotional harm she sustained as a result of the abuse of her son and the resultant impact on the familial relationship. She seeks to recover damages for the emotional harm she suffered from the abuse of her son.

2. The South Carolina Supreme Court Has Limited Mother's Recoverable Damages, and She Does Not Seek Such Recoverable Damages

South Carolina law has consistently held that a parent may recover only two types of damages for an injury caused to a child: (a) medical expenses paid for the treatment of the child's injuries; and (b) the pecuniary value of the loss of the child's services caused by the injury. *See Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d

564 (1990) (holding that medical expenses and lost services may be recoverable under South Carolina Tort Claims Act). Importantly, no modern South Carolina court has construed "loss of services" to encompass a parent's intangible or emotional/psychic damages stemming from harm to a child. Mother's contentions in this appeal would rewrite tort damages law and dramatically expand the scope of potential liability for defendants.

In *Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E.2d 305 (2007), the Supreme Court defined the bounds of a parent's damages for injury to a child. There, parents sued a school district, alleging that a substitute teacher had engaged in a sexual relationship with their minor daughter. The Court concluded that South Carolina did *not* recognize a parent's claim for the loss of the consortium or companionship of a child:

> The dissent would find that parents have a common law right to sue for loss of filial consortium despite the clear distinctions between a parent's claim for loss of services and a spouse's claim for loss of consortium found in our previous jurisprudence. The cases which the dissent utilizes to support its conclusion that filial consortium claims existed at common law directly address parental claims for loss of services, not loss of filial consortium. *See Wright v. Colleton County*, 301 S.C. 282, 289, 391 S.E.2d 564, 569 (1990) (providing that a parent's claim for loss of services and medical expenses resulting from the injury of a minor child is within the tort claims act statutory definition of "loss"); *see also, e.g., Berger v. Charleston Consol. Ry. Gas & Elec. Co.*, 93 S.C. 372, 76 S.E. 1096 (1913) (addressing a father's action for medical expenses and loss of services of his injured child). As discussed above, our common law only allowed a parent to maintain an action for the loss of a child's *services and earning capacity. These common law claims [for loss of services] did not include the intangible losses of aid, companionship, and society which have traditionally defined loss of consortium claims.* Accordingly, in absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.

See id., 375 S.C. at 69-70, 651 S.E.2d at 308 (emphasis added).

This statement of the law governing recoverable parental damages is consistent with the Restatement's formulation. *See* Restatement (Second) of Torts § 703 ("One who by reason of his tortious conduct is liable to a minor child for illness or other bodily harm

is subject to liability to (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to (b) the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for the treatment during the child's minority.").

This should end the inquiry in this case (and it did in the trial court), as there is binding authority directly on point. Mother is simply not permitted to plead, prove or recover the damages she seeks here. Her claimed harm takes the form of injury to her emotional well-being and intangible harm to her relationship with her son. These damages, however Mother might characterize them, are for loss of filial consortium and prohibited by the Supreme Court.

a. ***Greenville County* Is Not *Dictum***

Mother would minimize relevant portions of *Greenville County* by calling them "historically inaccurate *dicta.*"[2] (*See* Pl.'s Init. Br., at 18).

This Court has been clear that "*dicta*" includes only those statements by a court that are not relevant to the issue decided:

> Judicial *dicta* is "not essential to the decision." Black's Law Dictionary 465 (7th ed.1999). *Dicta* or, as it is also known, *dictum* "is a statement on a matter not necessarily involved in the case, and is not binding as

---

[2] As former Chief Judge Sanders observed about *dicta*:

> We fully recognize that our opinion from this point on is no more than *dictum*. As everyone knows, *dictum* technically does not count because it is outside of what is necessary in resolving a matter. *See* 12 WORDS AND PHRASES, "Dictum," (1954). *But those who disregard dictum, either in law or in life, do so at their peril.* We are reminded of the apocryphal story of a duel which was about to take place in a saloon. One of the antagonists was an unimposing little man, thin as a rail — but a professional gunfighter. The other was a big bellicose fellow who tipped the scales at 300 pounds. "This ain't fair," said the big man, backing off. "He's shooting at a larger target." The little man quickly moved to resolve the matter. Turning to the saloon keeper, he said, "Chalk out a man of my size on him. Anything of mine that hits outside the line don't count." *See* P. Trachtman, The Gunfighters (1974).

Yaeger v. Murphy, 291 S.C. 485, 490 n. 2, 354 S.E.2d 393, 396 n. 2 (Ct. App. 1987) (emphasis added).

> authority. *Dictum* is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. Courts § 227 (2006).

See Nash v. Tindall Corp., 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007); *accord Dennis v. South Carolina Nat'l Bank*, 299 S.C. 34, 39, 382 S.E.2d 237, 240 (Ct. App. 1988) (construing case language as *dicta* because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

The relevant language from *Greenville County* is not *dicta,* as the Court there expressly stated that its holding was that a parent may not recover intangible losses from harm to a child: "[b]ecause Mr. and Mrs. Mother's loss of consortium claim is *based entirely upon their allegation of a change in their relationship with their child* and not a claim for loss of services, *we hold* that the trial court did not err in dismissing Mr. and Mrs. Doe's claim for loss of filial consortium." *See id.*, 375 S.C. at 70, 651 S.E.2d at 308-09 (emphasis added). In other words, the analysis upon which The Citadel relies forms the very basis for the Court's decision in *Greenville County*. While Mother might disagree with the Supreme Court, the cited language from *Greenville County* not *dicta*, it is binding authority upon this Court. Unless and until the South Carolina Supreme Court overrules *Greenville County*, it is the law of the state.

b. *Greenville County* Is Consistent with the Common Law

Mother argues that *Greenville County* does not foreclose her claims, as she seeks to recover permissible "loss of service" that have been recoverable under ancient common law:

> This case, by contrast, directly concerns the ancient common law cause of action known as loss of services, and thereby requires the court to address the historically inaccurate *dicta* in *Doe v. GCSD*, which states:
>
> > our common law only allowed a parent to maintain an action for the loss of a child's services and earning capacity. These common law claims did not include the intangible losses of aid, companionship, and society . . . ."

> 651 S.E.2d at 308. Based on this inaccurate *dicta*, the trial court dismissed the loss of services claim for Mother Doe A.

(*See* Pl.'s Init. Br., at 18).

Mother's argument boils down to the contention that her claim has been recognized under ancient South Carolina common law. Under the so-called Reception Statute, "[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." *See* S.C. Code § 14-1-50. "This [Reception S]tatute does not, however, preclude the Court from interpreting the Constitution and declaring the law of South Carolina." *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 112, 508 S.E.2d 575, 584 (1998). Even under the Reception Statute, "the English common law ordinarily is presumed to govern *if there is no South Carolina authority to the contrary.*" *See State ex rel. McLeod v. Sloan Const. Co.*, 284 S.C. 491, 496, 328 S.E.2d 84, 87 (Ct. App. 1985) (emphasis added); *accord State v. Nall,* 304 S.C. 332, 340, 404 S.E.2d 202, 207 (Ct. App. 1991) (same). For the reasons that follow, the authority that Mother cites is not applicable and is consistent with the Supreme Court's decision in *Greenville County.*

Mother argues that under ancient common law, a parent's right to recover for loss of services has roots that "trace to at least 1653, when the claim was adapted as an overt fiction transposing the claim for injury to a servant to enable a parent to recover for their injuries when his or her child was injured." (*See* Pl.'s Init. Br., at 18). In support of this contention, Mother first cites *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1947), wherein the United States Supreme Court noted a "parent's right to indemnity for loss of a child's services, *including his action for a daughter's seduction.*" (Emphasis added). Mother also relies upon *Tullidge v. Wade*, 3 Wils. K.B. 18 (Kings Bench 1769), the court addressed a trespass claim against a suitor of the plaintiff father's daughter (who was also his employee) who promised marriage to her. Instead, he impregnated the

daughter. The court confirmed the granting of damages to the father upon evidence that the father "was wholly deprived" of the daughter's "service and assistance in his business, and paid some money on account of her lying-in." *See id*, at 19. Notably, neither of these cases expressly permitted a parent to recover psychological damages for the sexual abuse of a child. To the contrary, these cases simply recognize — as the Supreme Court did in *Greenville County* — that certain relationships enable recovery for a loss of actual services.

Mother urges this Court to ignore the Supreme Court's decision in *Greenville County*, arguing that she asserts a common law "loss of services" claim stemming from the ancient rule permitting masters to recover damages for injuries to servants. She contends, despite *Greenville County*'s clear statement of the law, that her damages are different from loss of consortium damages. In doing so, she disregards *Greenville County*'s clear prohibition of damages for intangible injuries, such as insult to feelings and loss of the filial relationship, comfort and society. The South Carolina authority Mother cites arises in the context of the tort of abduction or seduction of a child, which has no bearing on the rule explained in *Greenville County.* In her brief, Mother cites two South Carolina cases that she claims support her position that she may recover, under the rubric of "loss of services," damages that are actually for "loss of consortium." Mother first cites *Webb v. Southern Railway*, 88 S.E. 297 (1916), for the proposition that for 100 years South Carolina has permitted parents to assert claims for their own tangible and intangible injuries from injury to a child. However, the parents in *Webb* did not state a claim for injury to their son, but for his *abduction* (emphasis added): "The action by Will Webb [son] was for damages on account of personal injuries. That of Ella Webb, as by her contended, *is for abduction of her minor son.*" Specifically, the plaintiff mother claimed that the defendants physically removed her son (whose labor and services belonged legally to her) to North Carolina to work on its railway. In other words, the *defendant physically removed a son from his mother.* Moreover, the *Webb* Court did not

analyze what damages were recoverable, much less create a broad rule that a parent could recover non-pecuniary intangible damages under the guise of "loss of services."

Mother also urges that the Supreme Court's decision in *Greenville County* is contrary to the 150-year-old case of *Villepigue v. Shular*, 1849 WL 2667 (Ct. App. 1849), which she cites for the proposition that she is entitled to recover "loss of services," meaning outraged feelings:

> [W]e see that here a *per quod servitium amisit* has been laid, and that the allegation, even if it is unnecessary, having been made must be sustained by some proof. Proof that the daughter was under 21 years of age, in absence of evidence that the paternal control had in some legal way ceased, would raise a presumption that she was the servant of the father, sufficient to sustain the action by him. When the daughter is above 21, some slight evidence of actual service rendered by her must be given; but very slight evidence will suffice, for the loss of service is well understood to be little more than a legal fiction, which has been introduced to secure compensation for outraged feelings. The same right of action which ordinarily a father has, devolves upon any one standing *loco parentis*.

See id., 1849 WL 2667, at *2. The plaintiff in *Villepigue* asserted a seduction cause of action *against the person who had debauched her child.*[3]

---

[3] This ancient cause of action is premised upon outdated presumptions that our society has since rejected in favor of recognizing direct rights of the victim of seduction:

> When a minor female child was seduced, old common law recognized a claim by the father both for medical expenses and for loss of his daughter's services resulting from the seduction. The seduction claim belonged to the father, not the child. The loss of services here became the fictional basis of the action which in reality was a reflection of judicial outrage coupled with the belief that the father had legal rights in his female children. Social change brought more independence to women and procedural reforms required suit to be brought by the real party in interest. After these changes and sometimes as a result of explicit statutes, courts began to permit the seduced woman to bring her own suit. The effect was to convert the relational injury claim into a kind of battery claim, or perhaps one for fraud, but either way to be pursued by the immediate victim. In a battery claim, the plaintiff's valid consent would bar the claim if she was past the age of statutory consent, and occasionally even if not, but not if the consent had been procured by fraud. So far as the relational injury claim remains distinct from the victim's personal claim, courts now recognize that its earlier formulation was discriminatory in allowing the claim only to women and in vesting the claim in the father. But in any event, the parental claim for anything more than obligatory medical expenses may be abolished along with the alienation and criminal conversation claims.

Mother's argument and reliance on this authority essentially mirrors the position taken by (now Chief) Justice Pleicones in his dissent in *Greenville County.* The majority of the *Greenville County* Court rejected this precise argument and refused to extend the law permitting recovery of consortium-type damages in seduction/abduction claims beyond the unique circumstances of those claims:

> Additionally, Mr. and Mrs. Doe's claim that South Carolina's recognition of a cause of action for seduction is a valid basis for recognizing a claim for loss of filial consortium is misleading. A claim for seduction requires the plaintiff to establish that the defendant, by promising to marry or through some other device, enticed the plaintiff, an unmarried chaste woman, to consent to unlawful sexual intercourse. *See* 18 S.C. Jur. Seduction § 2 (1993). The right to sue upon an action for seduction belongs to the victim of the seduction. *See* 18 S.C. Jur. Seduction § 9. However, traditionally, a claim for seduction was a father's (or mother's in the absence of the father) right of action for the loss of his daughter's services. *See* 18 S.C. Jur. Seduction § 8. In either case, the defendant to the action must be the perpetrator of the seduction. *See* 18 S.C. Jur. Seduction § 2. Clearly, the School District is not the perpetrator of the seduction in this case. Accordingly, *this Court's recognition of a claim for seduction would not lend support to Mr. and Mrs. Doe's argument that this Court should recognize a claim for loss of filial consortium.*

See Doe v. Greenville County School District, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (emphasis added). Thus, Mother's argument is in direct derogation of the Supreme Court's holding in *Greenville County*, and would require the Supreme Court to overrule that case.

Finally, Mother cites *Wright v. Colleton County School District,* 301 S.C. 282, 289, 391 S.E.2d 564, 569 (1990), for the proposition that she has suffered a cognizable injury under the South Carolina Tort Claims Act ("the Act"). However, as cited above, *Wright* recognizes only that — consistent with *Greenville County* — a parent has a claim for an injury to a child *for pecuniary loss of services and medical expenses. See id.* Nothing in *Wright* is contrary to the Court's determination in *Greenville County.* In fact, the *Greenville County* Court cited and relied upon *Wright*, noting that "[t]he cases which

---

See Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 603 (2d ed.).

the dissent utilizes to support its conclusion that filial consortium claims existed at common law directly address parental claims for loss of services, not loss of filial consortium." *See Greenville Cty.*, 375 S.C. at 69, 651 S.E.2d at 308. Discussing *Wright* and other cases, the Supreme Court in *Greenville County* stated: "As discussed above, our common law only allowed a parent to maintain an action for the loss of a child's services and earning capacity. These common law claims did not include the intangible losses of aid, companionship, and society which have traditionally defined loss of consortium claims." *See id.*, 375 S.C. at 69-70, 651 S.E.2d at 308. In other words, *Wright* is entirely consistent with the approach taken by the Supreme Court in *Greenville County* and the trial court in this action.

It is apparent that Mother is attempting to state a claim of loss of consortium by calling it a claim for "loss of services." Mother does not claim true lost services; she has presented no evidence that the abuse of her son caused her to suffer pecuniary loss from labor that her son would have provided. She presents no evidence that the abuse of her son prevented him from working in a family business or that she relied upon him for her support. Instead, Mother's claimed damages involve alleged harm to her relationship with her son, her loss of his companionship and impacts of the abuse on the familial relationship. The Supreme Court's *Greenville County* decision makes clear that such damages are not recoverable, because they represent loss of consortium damages prohibited under the law. Mother cannot convert "loss of services" into a substitute for loss of consortium by simply changing the label she gives to her alleged damages. That is in direct contravention of *Greenville County.*

In *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996), the Supreme Court rejected a child's claim for loss or parental consortium. The Court's rationale applies equally to Mother's claim for filial consortium: "By enacting S.C. Code Ann. § 15-75-20 (1977), the legislature provided for loss of consortium actions for spouses. The statute has not been amended to provide a similar cause of action for children. Whether South

Carolina should recognize a cause of action for loss of parental consortium is a matter best left to the discretion of the General Assembly." 479 S.E.2d at 47. The Court's holding in *Greenville County* is entirely consistent with this principle. *See Kirkland v. Sam's East, Inc.*, 411 F. Supp.2d 639 (D.S.C. 2005) (applying *Taylor* to a claim for loss of filial consortium).

The trial court's rejection of Mother's characterization of her damages as "loss of services" is consistent with the law from other jurisdictions. S*ee Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 801 (Ind. 2001) ("A claim for loss of services differs from loss of consortium because loss of services "d[oes] not expand to include intangible losses, . . . the parent [has] no claim for loss of the child's society and companionship.") (citation omitted); *Matter of Certification of Questions of Law from U.S. Court of Appeals for Eighth Circuit, Pursuant to Provisions of SDCL 15-24A-1*, 544 N.W.2d 183, 193 (N.D. 1996) ("[W]e do not recognize a parent's emotional distress or loss of consortium claim for injuries to a minor child. We do, however, recognize a parent's right to assert claims for loss of the child's services and for medical and other consequential damages incurred in caring for the child."); *Dralle v. Ruder*, 124 Ill. 2d 61, 71, 529 N.E.2d 209, 213-14 (1988) ("In light of the availability of a tort remedy to the injured child, the possible multiplication of claims, and the difficulty of determining damages, we decline to extend the reasoning of *Bullard* to encompass parental recovery for loss of a child's companionship and society."); *DeAngelis v. Lutheran Med. Ctr.*, 84 A.D.2d 17, 26, 445 N.Y.S.2d 188, 195 (1981), *aff'd sub nom. De Angelis v. Lutheran Med. Ctr.*, 58 N.Y.2d 1053, 449 N.E.2d 406 (1983) ("[T]he law will not compensate a parent for the loss of a child's affection and companionship when a child is injured; recovery is limited to the parents' loss of services and the medical expenses incurred by the parent. [Citation omitted.] Essentially, the parent's recovery is limited to a tangible, pecuniary loss; it has not been extended to the intangible, so-called sentimental losses of affection, love and companionship."); *Smith v. Richardson*, 277 Ala. 389, 394, 171 So. 2d

96, 100 (1965) ("[S]ervices means the labor and assistance of a child rendered for the father, and imply a loss measured by pecuniary standards of value. [Citation omitted.] The loss of the society of a child as distinguished from the loss of its services, cannot form the element of recoverable damages.").

For the foregoing reason, the trial court properly concluded that Mother had not presented evidence of recoverable damages in this case.

B. The Lower Court's Ruling Is in Accord with Decades of Damages Jurisprudence

Mother's attempts to recover damages for emotional and psychological harm constitute an end-run around the Supreme Court's unwavering refusal to recognize a general claim for negligently-caused emotional distress. The Supreme Court's ruling in *Greenville County* parallels decades of refusal to permit recovery of emotional distress damages beyond very tight constraints.

As discussed below, Mother's claim, of necessity, must be a claim for negligence inasmuch as it is brought pursuant to the South Carolina Tort Claims Act. In the past, South Carolina law did appear to allow recovery for negligently inflicted emotional distress. In *Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 604, 103 S.E.2d 265, 270 (1958), a negligently operated truck struck the plaintiff's home, allegedly causing fright, exposure to the cold, weight loss, fever and a skin condition. The Court considered whether damages might be "recoverable for shock, fright and emotional upset when there is no physical impact." Ultimately, the Court concluded that the question of whether the shock caused physical injury was properly submitted to the jury:

> We think that under the authorities above quoted, the trial Judge was correct in submitting to the jury the question of whether or not the respondent had sustained physical or bodily injury as a consequence of the shock, fright and emotional upset experienced by him. If the respondent's bodily injury was proximately caused by the shock, fright and emotional upset as a result of the negligence and willfulness of the appellant, he was entitled to recover such damages as would compensate him for the injury so sustained.

See id., 232 S.C. at 607-08, 103 S.E.2d at 272. In reaching that conclusion, the Supreme Court made a metaphysical connection between physical harm and some psychic harms:

> "The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism."

See id., 232 S.C. at 605, 103 S.E.2d at 271 (citations omitted).

Subsequently, the South Carolina Supreme Court cited *Padgett* in stating that "[w]e have recognized the rule that there is no liability for emotional distress without a showing that the distress inflicted is extreme or severe." *See Rhodes v. Security Fin. Corp. of Landrum*, 268 S.C. 300, 302, 233 S.E.2d 105, 106 (1977). Concluding that the evidence did not support recovery, the Court observed that "[w]hile there is testimony that appellant was emotionally upset from the attempt to collect the forged note, there is no showing that the attempts by respondent's agents to collect were unreasonable or abusive, nor that appellant's emotional upset was other than transient and trivial." *See id.* With *Rhodes,* the Court first began to limit recovery for negligent infliction of emotional distress.

The Supreme Court next stated, two years later, in *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 770, 259 S.E.2d 812, 813 (1979), that "[i]n order to prevail in a tortious action in which the sole damages alleged are those of mental anguish, plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature." Two years thereafter, the Supreme Court quoted the language referenced from *Hudson* and *Rhodes*, and formally recognized the tort of outrage (or *intentional* interference with emotional distress). *See Ford v. Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981).

Importantly, the Supreme Court next in *Dooley v. Richland Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), rejected an invitation to recognize a general tort of negligent

infliction of emotional distress — beyond intentional and reckless conduct — because the plaintiffs had failed to make any showing of physical injury to support their claim. The Court stated that one criticism of permitting a tort for negligent infliction of emotional distress is "that it will allow for fraudulent claims" and that "[o]ne method of eliminating this danger has been to require some type of physical injury in addition to any claimed emotional injury." *See id.*, 283 S.C. at 375, 322 S.E.2d at 671. Later that year, the Court refused to permit the recovery of emotional distress damages in a legal malpractice claim, despite a litany of claimed "physical" manifestations of the distress (including crying spells, headaches, change of hair color, and an inability to sleep with her spouse for several years). *See Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (1984).

In *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), the Supreme Court finally recognized the tort of negligent infliction of emotional distress, but restricted the very limited circumstances of a bystander who observes an accident causing death or serious physical injury:

> (a) the negligence of the defendant must cause death or serious physical injury to another;
>
> (b) the plaintiff bystander must be in close proximity to the accident;
>
> (c) the plaintiff and the victim must be closely related;
>
> (d) the plaintiff must contemporaneously perceive the accident; and
>
> (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

See id., 286 S.C. at 582, 336 S.E.2d at 465.

As the law of South Carolina stands, the modern rule of the Supreme Court has been to recognize emotional distress damages in three specific circumstances: (a) when it is the result of a negligently-caused physical injury; (b) outrage; and (c) negligent infliction in a "bystander" situation. In the nearly thirty years since *Kinard,* the Supreme Court has steadfastly refused to extend liability for emotional distress beyond those

limited circumstances:

- In *Hansson v. Scalise Bldrs. of S.C.*, 374 S.C. 352, 358-59, 650 S.E.2d 68, 72 (2007), the Court held in the context of an outrage claim: "Under the heightened standard of proof for emotional distress claims emphasized in *Ford*, a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"-in the form of third party witness testimony and other corroborating evidence-in order to make a prima facie showing of 'severe' emotional distress."

- In *Babb v. Lee Cty. Landfill SC, LLC,* 405 S.C. 129, 141, 747 S.E.2d 468, 474 (2013), the Court refused to allow a claim for emotional distress damages flowing from trespass and nuisance in the form of odors from a landfill: "In short, allowing recovery for personal annoyance and discomfort under the guise of trespass and nuisance would be the stealth recognition of an entirely new tort."

A case almost directly on point with the present case is another sexual abuse case arising under the Tort Claims Act, *Doe v. Greenville County School District,* 375 S.C. 63, 651 S.E.2d 305 (2007). The Court refused to extend the negligent infliction of emotional distress damages to encompass parents' claims stemming from sexual activity between their daughter and a school teacher: "[b]ecause South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which is cognizable under South Carolina law."

Mother's claims do not fall within any cause of action for emotional distress that the Supreme Court has recognized. She does not claim that The Citadel caused any physical impact to her or that she observed ReVille abuse her son. Instead, Mother seeks the "stealth recognition of an entirely new tort" for negligent infliction of emotional distress in the absence of any physical impact or the death or serious injury of a bystander, based solely on the *knowledge* that ReVille abused her son. No contemporary

South Carolina authority recognizes such a claim.

For this additional reason, the trial court properly granted summary judgment in this case.

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

For the reasons that follow, the trial court correctly granted summary judgment as to Mother's outrage claims.

A. The Act Prohibits Mother's Outrage Claim

1. The Plain Language of the Act Prohibits Outrage Claims

Mother's claims exist only to the extent the Act permits them. The Act'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 Act 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). A governmental entity is immune to liability for a loss resulting from "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 Mother's outrage claim.

The trial court's grant of summary judgment was consistent with numerous courts that have concluded that the Act bars outrage/intentional infliction of emotional distress claims. *See Poloschan v. Simon,* 2014 WL 1713562, at *13 (D.S.C. Apr. 29, 2014) ("Defendant correctly notes that claims for outrage or intentional infliction of emotional distress against a governmental entity (including an individual government employee in

their official capacity) are barred by the South Carolina Tort Claims Act."); *Ray v. Simon*, 2014 WL 1400812, at *14 (D.S.C. Apr. 10, 2014) (same); *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); *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 Act does not waive sovereign immunity for this claim."); *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); *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 Act bars Mother's outrage claim.

Bearing in mind that the Act must be construed to minimize the state's liability, this Court should construe the Act'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 Act'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.

This conclusion is consistent with case law recognizing that outrage is an intentional tort. *See State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 10, 530 S.E.2d 132, 137 (Ct. App. 2000) ("In her amended complaint, Barrett asserted causes of action against Kratzer for (1) outrage/intentional infliction of emotional distress, (2) false imprisonment, (3) assault, (4) battery, and (5) invasion of privacy. All five alleged causes of action are generally considered intentional torts and therefore the complaint does not allege an accidental occurrence."); *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 168, 383 S.E.2d 2, 4 (Ct. App. 1989) ("As the gist of outrage is the intentional infliction of emotional distress, he admits it falls within the intentional acts exclusion of the policy.").

Mother argues that the trial court erred in concluding that the Act bars her outrage claim, because she can succeed on an outrage claim if she can prove that The Citadel acted "recklessly" (rather than with intent to harm). (*See* Pl.'s Init. Br., at 21). Mother relies heavily on the Supreme Court's recent opinion in *Bass v. South Carolina Dep't of Social Services*, 414 S.C. 558, 780 S.E.2d 252 (2015). The Citadel does not dispute that *Bass* recites the first element of outrage as requiring that: "the defendant intentionally *or recklessly* inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct." *See id.*, 414 S.C. at 575, 780 S.E.2d at 260-61 (emphasis added). However, the *Bass* Court did not address the issue raised here: whether the Act prohibits an outrage claim, irrespective of its elements. In fact, Mother cites *no* authority expressly deciding that an outrage claim may proceed under the Act because it can be proven with evidence of reckless (as opposed to intentional) conduct. On the other hand, The Citadel has cited a number of cases prohibiting outrage claims under the Act.

Mother's argument violates basic canons of statutory construction, which require that a statute be construed to avoid making any provision superfluous:

> The Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).
>
> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). "**A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.**" *In re Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

See State v. Sweat, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575 (2010) (emphasis added).

The Act grants a governmental entity immunity for any loss resulting from "actual malice, intent to harm, or a crime involving moral turpitude." See S.C. Code § 15-78-60(17). This provision would preclude liability for any *intentionally caused harm,* whether emotional, physical or otherwise. In addition to that provision, Section 15-78-30(f) excludes "intentional infliction of emotional harm" from the definition of a potentially recoverable loss. Mother's construction would render Section 15-78-30(f) superfluous, as the state is already immune for any intentionally caused injury (including emotional ones). In other words, if the Court adopts Mother's construction, Section 15-78-30(f)'s exclusion of "intentional infliction of emotional harm" would be meaningless and unnecessary.

To read Sections 15-78-60(17) and 15-78-30(f) in harmony, "intentional infliction of emotional harm" *must* mean something more than Mother contends. It must mean, as the trial court properly concluded (and numerous other courts have agreed), that the Act precludes liability for all outrage claims (irrespective of the level of culpability ultimately proven). Thus, irrespective of whether Mother alleges intentional or reckless conduct by The

Citadel, the Act precludes liability.

Mother's argument relies upon the Act's wording excluding "the intentional infliction of emotional *harm*" from the definition of a "loss." See S.C. Code § 15-78-30(f) (emphasis added). From the legislature's use of the word "harm" (rather than "distress"), she concludes that it meant something other than the tort of outrage/intentional infliction of emotional distress. However, she cites to no authority suggesting that the legislature actually intended that. The General Assembly is well aware that intentional infliction of emotional distress and the tort of outrage are one and the same in South Carolina jurisprudence. It makes no sense that the General Assembly would differentiate between emotional distress and emotional harm without explaining the intended difference between essentially identical terms. Rather, as set forth above, the only reasonable construction of the Act — bearing in mind that this Court must construe the Act to limit the state's liability — is that it prohibits all outrage claims.

Mother's reading of the Act would create tremendous uncertainty in emotional distress claims. Under her construction, the state *could* be liable if it acted in a reckless, but not intentional, manner. This would require that a case be fully litigated and that a jury make a specific determination that the defendant acted recklessly, but not intentionally. This would require the state to defend a case to verdict in circumstances where the Act likely intended that it not be exposed to liability in the first instance. It is unreasonable to suggest that the legislature intended such an absurd result.

For these reasons, the trial court properly granted summary judgment as to Mother's outrage claim.

B. Mother's Outrage Claim Fails Because There Is No Evidence That The Citadel Directed Any Conduct Toward Her

In addition to the foregoing, Mother's outrage claim cannot succeed unless she proves that The Citadel knowingly *directed* conduct particularly at her:

> 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."); *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.").

This Court has held that parents of a minor abuse victim could not sue for outrage in the absence of 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."). Mother presents no evidence that The Citadel knowingly directed conduct toward her. There is no evidence that The Citadel knew Mother, knew that ReVille abused Mother's son or had any contact with Mother. There is no evidence that Mother (or her son) had any relationship whatsoever with The Citadel. There is no evidence that The Citadel directed (or even could have directed) any conduct toward Mother, whose son ReVille abused *after* his employment at the summer camp. At most, Mother 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 and that such abuse might harm the parent of such a person. Mother does not argue that The Citadel had any way of knowing that she was specifically at risk of injury or that ReVille was, in fact, abusing her son. Therefore, for this additional reason, this Court should affirm the entry of summary judgment as to Mother's outrage claim.

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

Mother's claims also fail because she has not proffered a scintilla of evidence that The Citadel engaged in the sort of egregious conduct required for such a claim. Mother must prove, *inter alia*, that The Citadel's "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.'" *See Bass*, 414 S.C. at 575, 780 S.E.2d at 260-61 (*quoting Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011)). "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*, 323S.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).

A rare deviation 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), Mother presents no evidence that The Citadel acted in an "extreme and outrageous" manner. There is no evidence that The Citadel acted to intentionally harm Mother. Mother can point to no evidence that The Citadel intended for ReVille to abuse Mother (or anyone else) or cause emotional distress. There is no evidence that The Citadel took any act with conscious knowledge that Mother would suffer extreme emotional distress. There is no evidence, or even a claim, that The Citadel promoted 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, and such a claim would defy reason. Despite Mother's semantic efforts, her claim boils down to the allegation that The Citadel botched its investigation of Camper Doe's complaint and thus failed to prevent ReVille from abusing her son. This is not the sort of conduct actionable under the tort of outrage.

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

D. Mother's Outrage Claim Fails Because She Could Have Pursued an Alternative Claim

Mother's outrage claim also fails because she had other potential causes of action that she could pursue. Mother 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."). Mother has already asserted negligence/gross negligence claims against The Citadel. Her recovery, if any, should be limited to what the law allows on those claims. Mother should not be allowed to supplement those claims with the tort of outrage. Therefore, this Court should affirm the trial court's entry of summary judgment on Mother's outrage claim.

IV. The Trial Judge Properly Granted Summary Judgment as to Conspiracy

A. The Act Prohibits Mother's Conspiracy Claim

As discussed above, the Act prohibits claims arising out of "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice,* [or] *intent to harm.*" *See* S.C. Code § 15-78-60(17) (emphasis added). Mother's conspiracy claim, by its very nature, requires that she prove an intention to harm Mother. *See Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) *for the purpose of injuring the plaintiff*, (3) which causes him special damage.") (emphasis added). As a result, Mother's conspiracy claim is plainly barred by the Act.

As a result, Mother's conspiracy claim fails because it is barred by the Act.

B. Mother's Conspiracy Claims Fails Because She Presents No Evidence of Special Damages

To succeed on civil conspiracy, Mother must prove special damages, damages *different* from those she seeks in her other claims:

> [C]ivil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely

> repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Accordingly, we conclude the circuit did not err in granting a directed verdict.

See Gordon v. Busbee, 397 S.C. 119, 136, 723 S.E.2d 822, 831-32 (Ct. App. 2011). Mother has not presented any evidence of special damages in support of her conspiracy cause of action. Instead, Mother seeks to recover the *same* damages as her other causes of action. For this reason, the trial court properly granted summary judgment to The Citadel as to the civil conspiracy claim.

V. The Trial Judge Properly Granted Summary Judgment on Mother's Negligence-Based Claims (Including Counts 1, 2, 3 and 5) Because The Citadel Did Not Owe Even Mother's Son -- Let Alone Mother -- a Duty of Care

Mother must prove, *inter alia*, that The Citadel owed her a duty of care (and breached such duty). *See Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). "If the plaintiff fails to prove [The Citadel] owed her a legal duty of care, she 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." *Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 506-07, 737 S.E.2d 512, 515 (Ct. App. 2012) (affirming 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).

"'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).

South Carolina courts typically refuse to impose a duty of care to prevent harmful actions by third-persons:

> 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 has never recognized a duty of care to prevent the criminal acts of a third party where, as here, the potential victim was not *specifically identified or a member of a well-defined group in a fixed location and time*:

> "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). The Citadel had no relationship with Mother (or her son).

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 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.").

South Carolina has never imposed a duty to the general public or a subgroup.

Recognition of a duty here would open a Pandora's Box of potential liability that would far exceed any reasonable bound. The South Carolina Supreme Court has never even suggested that this is the law. 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. No South Carolina authority imposes on The Citadel a duty to every minor in Charleston County or South Carolina to prevent ReVille from abusing them into perpetuity. Under Mother's anticipated 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 is not a substitute for a specifically-identified victim, to whom our courts have heretofore limited the duty of care.

A. <u>The Citadel Did Not Voluntarily Undertake a Duty of Care</u>

South Carolina recognizes voluntary assumption of a duty of care in the limited circumstances permitted by Section 323 of the Restatement:

> 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) (refusing to extend duty beyond Restatement (Second) of Torts § 323); *accord Miller v. City of Camden*, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997) (declining to recognize duty under broader Section 324A[4]); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A" has not been adopted"). Under that section, the defendant must undertake the duty specifically *to plaintiff,* who must 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. No South Carolina law recognizes an undertaking of a duty to the general public, as opposed to a specific person.

In *Underwood v. Coponen,* 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006),[5] this Court rejected a duty where plaintiff did not know of the undertaking:

---

[4] 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.

[5] 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.

> 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.

On another occasion, this Court recognized that undertaking of a duty requires either that the plaintiff rely on the undertaking or that the Defendant increase the danger:

> [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).

Mother cannot show a voluntary undertaking because there is no evidence that The Citadel acted to protect Mother, a complete stranger (and the *parent* of the abused victim). *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 (1998) ("[P]laintiff's voluntary undertaking theory . . . fails at the outset because plaintiff never alleged that defendant undertook services for *plaintiff*. . . .") (emphasis in original). Mother presents no evidence that The Citadel undertook a duty specifically to *her* under Section 323. The Citadel did not know Mother, her son or their specific circumstances.

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

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

Mother has presented no evidence that The Citadel "created" any danger to her. Mother presents no evidence that The Citadel was actively involved in ReVille's abuse of her son. She has no evidence that The Citadel did anything to cause ReVille to become an abuser. She has no evidence that ReVille abused her son at the camp. She has no evidence that The Citadel placed her or her son in ReVille's custody or presence. She has no evidence that The Citadel provided a location for ReVille to abuse her son. She has no evidence that The Citadel acted to encourage ReVille to abuse her son. Mother has no evidence that The Citadel even did anything to make it *more likely* that ReVille would abuse her son than it would have been had The Citadel not acted.

Mother 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 Mother's son and then fail to take reasonable security steps. Rather, 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 Mother or her son. Under such circumstances, The Citadel cannot be said to have created the danger to Mother or her son. *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). Similarly, 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 Mother or her son as a victim or to abuse in that particular time frame. In the language of *Staples*, Mother's claim consistently reduces itself to a claim that The Citadel negligently patrolled for dead trees.

In the trial court, Mother relied 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 Act. 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. ReVille did not abuse Mother or her son 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. Mother Has Not Presented Evidence That a Statute Imposed a Duty of Care on The Citadel

Finally, there is no evidence that would support a finding of a duty of care imposed by statute. Courts in South Carolina are especially reluctant to recognize a private right of action arising out of a statute governing the duties of a public official:

> However, when the statute at issue creates or defines the duties of a public official, the public duty rule applies. [*Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct. App. 1988).] "'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). In *Trask*, the Court of Appeals held that no private right of action exists against a county coroner for violating the statute prohibiting the destruction of human remains. In *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010), the Supreme Court applied the public duty rule to find that a family court litigant who was assaulted by her ex-boyfriend in family court could not sue the Sheriff's Department for violating a statute requiring the Sheriff to "provide any measures necessary to protect the victims and witnesses, including . . . physical protection in the courthouse." Applying these principles, this Court should conclude that there are no statutory duties of care imposed on The Citadel.

1. The Mandatory Reporting Statute Does Not Create a Duty

In *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011), the Supreme Court held that, even if the Defendant is a mandatory reporter under a state child abuse statute, this does not create a private right of action or a duty of care. *See id.*, 393 S.C. at 248, 711 S.E.2d at 912 ("Wal–Mart's duty to report under the Reporter's Statute cannot give rise to civil liability."); *accord Doe v. Marion,* 373 S.C. 390, 645 S.E.2d 245 (2007).

In any event, The Citadel was *not* a mandatory reporter under the version of the reporting statute in effect at the time of the Camper Doe investigation:

(A) A physician, nurse, dentist, optometrist, medical examiner, or coroner,

> or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, police or law enforcement officer, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, or a judge must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 20-7-490.

See S.C. Code § 20-7-510(A) (2007) (repealed). The Citadel did not fall under any of the provisions of the reporting statute in effect in 2007.

2. The Jessica Horton Act Does Not Create a Duty

Under the Jessica Horton Act, "[t]he chief of the campus police of an institution of higher learning, or his designee, immediately shall notify the State Law Enforcement Division . . . if the officer or another official of the institution is in receipt of a report alleging that an act of criminal sexual conduct has occurred on the property of the institution." *See* S.C. Code § 59-154-10(B).

First, this statute does not apply because it was not in effect at the time of Camper Doe's report in April, 2007. The Jessica Horton Act did not become effective until June 6, 2007. *See* 2007 Act No. 53, § 2, effective June 6, 2007. In the absence of express legislative intent, statutes normally apply prospectively:

> Where the legislative intent is not clear, we adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application. *See State v. Varner*, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992). The exception to the presumption of prospective operation arises when the statute is remedial or procedural in nature. *State v. Davis*, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). However, as indicated, legislative intent is paramount in determining whether a statute will have prospective or retroactive application. *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

See State v. Bolin, 381 S.C. 557, 561, 673 S.E.2d 885, 886-87 (Ct. App. 2009). This is

particularly so where the statute imposes affirmative obligations: "where a statute . . . creates new obligations [or] imposes a new duty . . . it will be construed as prospective only.'" *See Southeastern Site Prep, LLC v. Atlantic Coast Bldrs. and Contractors, LLC*, 394 S.C. 97, 106, 713 S.E.2d 650, 655 (Ct. App. 2011) (*quoting* 82 C.J.S. Statutes § 585 (2009)).

Second, Mother is not within a specific identifiable class to be protected under the Jessica Horton Act. The Jessica Horton Act concerns the reporting of claims of certain crimes of sexual violence. To the extent the statute protects anyone beyond the general public, it would extend only to *victims* of crimes. Mother is not part of a special class protected by the statute. As the Supreme Court stated with respect to the child abuse reporting statute described above, "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing civil liability." *Doe v. Marion, supra,* 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007)

Finally, it is clear that the information reported by Camper Doe would not have triggered the Jessica Horton Act. As set forth above, the statute is triggered by a report of "criminal sexual conduct." The crimes of "criminal sexual conduct" are defined in S.C. Code §§ 16-3-651 through 16-3-659.1. Nearly all of those statutes require "sexual battery," which is defined to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." See S.C. Code § 16-3-651(h). Camper Doe never reported a "sexual battery" to anyone at The Citadel.

The only exception to the requirement of a sexual battery is third-degree criminal sexual conduct with a minor: "A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or

gratifying the lust, passions, or sexual desires of the actor or the child." See S.C. Code § 16-3-655(C). Again, the report by Camper Doe, which expressly denied any physical contact, would not have triggered this statute. There is no evidence that Camper Doe reported any "act upon or with" his body.

For the foregoing reasons, this Court should reject the invitation to impose a duty of care arising from the Jessica Horton Act.

3. The Clery Act Does Not Impose a Duty of Care

It is further anticipated that Mother will argue that a duty of care was created by The Clery Act, 20 U.S.C. § 1092(f). That statute is explicit that it is not intended to "[e]stablish a standard of care." *See* 20 U.S.C. § 1092(f)(14)(A) (emphasis added). Numerous courts have held that there is no private right of action under the Clery Act. *See Moore v. Murray St. Univ.*, 2013 WL 960320, at *3 (W.D. Ky. March 12, 2013) (attached hereto as Ex. U); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 760 (E.D. Tenn. 2009); *King v. San Francisco Cmty. Coll. Dist., No. C 10–01979 RS*, 2010 WL 3930982, at *4–5 (N.D. Cal. Oct. 6, 2010) (attached hereto as Ex. V); *accord* Brett A. Sokolow, *et al., College and University Liability for Violent Campus Attacks,* 34 J.C. & U.L. 319, 344 (2008) ("[T]he Clery Act specifically notes that it cannot give rise to a private right of action to enforce its terms. . . . The enforcing authority for the Clery Act is the U.S. Department of Education."). As a consequence, Doe 2 and Doe 3 may not rely upon the Clery Act to impose a duty of care on The Citadel.

4. Title IX Does Not Impose a Duty of Care On The Citadel

It is also anticipated that Mother will argue that a duty of care was imposed by Title IX, 20 U.S.C. § 1681. Specifically, it is believed that she will posit that The Citadel was obligated under Title IX to engage in certain investigatory and remedial actions in response to Camper Doe's 2007 complaint.

Title IX itself does not impose such obligations. Instead, it is anticipated that

Mother will base her 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"). It is further anticipated that she will rely on "administrative" provisions of the OCR Guidance governing how certain entities should respond to sexual harassment complaints. However, the OCR Guidance makes clear that its revisions from the 1997 version of the guidance are intended to solidify that it is *not* intended to set standards applicable in damages claims:

> 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 id. (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 id. The *Gebser* case referenced in the OCR Guidance further cements that the administrative standards set forth in the OCR Guidance should not form, in any measure, the grounds for a civil damages 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*, a court has held that it was error to use the OCR Guidance's "administrative" provisions to define a standard of care in a civil lawsuit. *See Doe v. University of the South*, 2011 WL 1258104, at *14 (E.D. Tenn. March 31, 2011).

Moreover, Mother cannot posit that she is an intended beneficiary of a statute intended to protect the civil rights of students. Title IX is not a general statute for the prevention of violence. That statute is not designed to protect a specific class of persons from the specific abuse sustained by Mother's son. Title IX is not intended to protect unknown future victims of sexual abuse; rather, it is intended to vindicate the civil rights of students to ensure that there is no discrimination in educational programs. Mother can cite no authority extending Title IX to impose a duty of care flowing to a person who is not a student and who, in fact, has no relationship with the defendant and was not herself abused in any way. Mother's anticipated argument would convert Title IX into a statute for the protection of the general public (and improper to use as a basis for a duty of care), rather than for the protection of a specific class of persons.

VI. Mother Cannot Show Proximate Causation

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.

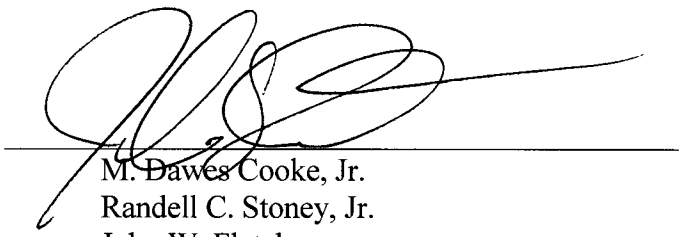
See Harris Teeter, Inc. v. Moore & VanAllen, P.C., 390 S.C. 275, 289-90, 701 S.E.2d 742, 749 (2010).

Mother cannot carry her burden of showing causation because there is no evidence that, had The Citadel done any of the things Mother claims it should have done, ReVille would not have abused her son. 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, Mother's son would not have been abused. Instead, Mother 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, Mother cannot show legal cause because there is no evidence that it was foreseeable to The Citadel that its alleged negligence would harm Mother. *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.

CONCLUSION

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



M. Dawes Cooke, Jr.
Randell C. Stoney, Jr.
John W. Fletcher
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite #200 (29401)
Post Office Drawer H
Charleston, South Carolina 29402-0197
(843) 577-7700
Attorneys for Respondent The Citadel

Dated: April 28, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001920

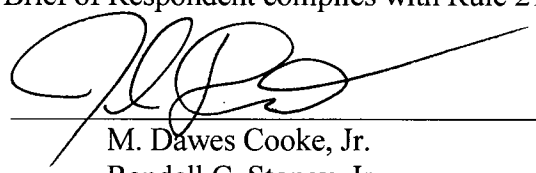
Mother Doe A, ... Appellant,

v.

The Citadel ..... Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Respondent complies with Rule 211(b), S.C.A.C.R.



M. Dawes Cooke, Jr.
Randell C. Stoney, Jr.
John W. Fletcher
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite #200 (29401)
Post Office Drawer H
Charleston, South Carolina 29402-0197
843-577-7700

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 26 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001920

Mother Doe A, ... Appellant,

v.

The Citadel ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and Certificate of Counsel on Appellant Mother Doe A by depositing the requisite number of copies of it in the United States Mail, postage prepaid, on April 26, 2016, addressed to their attorneys of record, Allan P. Sloan, III, Esq., Pierce, Herns, Sloan & Wilson, LLC, 321 East Bay St., Charleston, SC 29401 and Gregg Meyers, Esq., Jeff Anderson & Associates, P.A., 366 Jackson Street Suite 100, Saint Paul, MN 55101.

M. Dawes Cooke, Jr.
Randell C. Stoney, Jr.
John W. Fletcher
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite #200 (29401)
Post Office Drawer H
Charleston, South Carolina 29402-0197
843-577-7700