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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

John Doe 2Appellant,

v.

The Citadel.....Respondent.

PETITION FOR REHEARING

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COMES NOW John Doe 2, pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, and respectfully petitions this Honorable Court for rehearing of its Opinion filed August 2, 2017, affirming the lower court's grant of summary judgment for The Citadel by holding that The Citadel owed no duty to John Doe 2. John Doe 2 petitions for rehearing due to the errors of law and erroneous application of the standard of review of the evidence that form the basis of the Court's Opinion.

For the following reasons, Doe 2 respectfully requests that the Court of Appeals hold that whether The Citadel volunteered to investigate and respond to sexual abuse by its employee, Skip ReVille, for the protection of minor boys, to include Doe 2, is a mixed question of fact and law for the jury that was improperly decided on summary judgment. The Citadel itself admits that its actions to investigate and respond to child sexual abuse by its past and current employees was to protect children from subsequent abuse, as The Citadel's General Counsel Mark Brandenburg admits under oath:

Q. What were your goals for the investigation?

A. To find out what had happened.

Q. Would you agree with me that preventing harm to other young boys or victims was a goal of the investigation?

A. Sure.

Q. Would you agree with me that by undertaking the investigation, that The Citadel was aiming to prevent harm to potential victims?

A. I assume so.

(R. p. 1298).

The Opinion ignores the evidence of The Citadel's actions taken to investigate and respond to child sexual abuse by its past and current employees that date back to 2001 up through the arrest

of Skip ReVille in 2011. In voluntarily acting, The Citadel assumed the duty to carry out its acts with due care. *E.g., Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). However, rather than acting with due care to investigate and respond to ReVille’s sexual abuse of boys, The Citadel acted to conceal his abuse and conceal The Citadel’s knowledge of his abuse. The Citadel owed a duty to Doe 2 in this case, and the Opinion errs in affirming summary judgment for The Citadel.

I. The Opinion Misapprehends The Duty Owed To Doe 2 By The Citadel.

Since at least 2001, The Citadel, The Military College of South Carolina— a State institution—has voluntarily undertaken to investigate and respond to child sexual abusers in its employment (past and present). The Citadel’s voluntary actions, if carried forth with due care, seemingly align with our Legislature’s utmost priority to safeguard children through the establishment of a Children’s Policy for the State. The Legislature enacted the Children’s Policy in 2008, stating that “[i]t shall be the policy of this State to concentrate on the prevention of children’s problems as the most important strategy which can be planned and implemented on behalf of children and their families.” S.C.Code § 63-1-20(C). The law is clear that safeguarding children “shall be implemented through the cooperative efforts of state, county, and municipal legislative, judicial, and executive branches...” S.C.Code § 63-1-20(E).

However, when The Citadel, on its own accord, undertook to investigate and respond to child sexual abuse by its employees, the duty arose to then carry out those voluntary actions with due care. *E.g., Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (citing *Roundtree Villas Ass’n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46, 51 (1984) (citing Restatement [Second] of Torts, § 323); *Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922))). Accordingly, first

and foremost, the applicable duty in the present case is The Citadel's duty to Doe 2 to act with due care in what it undertook to do. *See Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (holding "that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care").

The Court's Opinion here fails to address The Citadel's duty of due care in the acts it chose to undertake, thereby mistakenly holding that The Citadel owed no duty to Doe 2. Instead, the Court's analysis goes straight to whether The Citadel owed a duty under any of the five exceptions to the general rule that one does not have a duty to warn a third party of danger or control the conduct of another.¹ *See Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002) (five recognized exceptions that will impose duty to warn or protect: (1) when defendant has a special relationship with the victim; (2) when defendant has a special relationship with the injurer, (3) when defendant voluntarily undertakes the duty; (4) when defendant intentionally or negligently creates the risk; and (5) when a statute imposes a duty on defendant). While The Citadel owed Doe 2 a duty under three of the *Faile* exceptions, The Court does not need to get to the *Faile* exceptions, because The Citadel's duty first is established by its own voluntary actions to investigate and respond to child sexual abuse.

Specifically, The Citadel's duty arose when it volunteered to investigate and respond to child sexual abuse by its past and current employees, and when it so volunteered, it assumed the duty to carry out its actions with reasonable care. Once The Citadel's performance began, the long established tenet of negligence law applied that "one who assumes to act, even though under no

¹ As argued at the trial court and in the appeal by Doe 2, while the *Faile* exceptions impose a duty on The Citadel as well, the analysis starts by assessing the direct duty owed by The Citadel for its own voluntary acts. The *Faile* exceptions are an alternative means of imposing a duty that need not be addressed, because the duty directly is established by The Citadel's volunteering to investigate and respond to sexual abuse by its past and current employees.

obligation to do so, may become subject to the duty to act with due care”, and the “common law duty to exercise reasonable care arose.” *Roundtree Villas Ass’n, Inc.*, 282 S.C. at 423, 321 S.E.2d at 51 (holding that “when the Lender, in effect, took over the project and undertook to market the units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose”); *Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (holding defendants were not obligated to provide supervision over the children’s visits with their daughter, but “once their performance [to so supervise] began, a common law duty to exercise reasonable care arose”).

The common law is unwavering that one who volunteers to act for the benefit of others assumes the duty to carry forth those acts with due care. *See, e.g., Roundtree Villas Ass’n, Inc.*, 282 S.C. at 423, 321 S.E.2d at 51; *Crowley*, 285 S.C. at 406, 329 S.E.2d at 78. Looking at case precedent is useful not only to illustrate how the duty arises but also to make clear that whether a defendant voluntarily undertakes an action is an issue for the fact finder, the jury in this case. *E.g., Vaughn v. Town of Lyman*, 370 S.C. 436, 446-448, 635 S.E.2d 631, 637-638 (2006); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Fickling v. City of Charleston*, 372 S.C. 597, 607-611, 643 S.E.2d 110 116-118 (Ct. App. 2007).

In *Miller v. City of Camden*, 329 S.C. at 314, 494 S.E.2d at 815, a dam was inspected and found unsafe by the Army Corps of Engineers. Defendant Kendall Company received a copy of the Corps of Engineers’ report and, thereafter, took the following two actions: (1) included one of its employees on an emergency notification form in the case of dam failure and (2) sent one of its employees to a meeting where an emergency plan was formulated for action to take if dam failure occurred. When the dam indeed did break and water from the overflow injured those in its path, our Supreme Court held that the evidence at summary judgment raised the issue of whether

Kendall voluntarily undertook to monitor the lake for the safety of others based on its two actions.

Id. at 815.

The Supreme Court reiterated, “[t]he common law ordinarily imposes no duty on a person to act. If an act is voluntarily undertaken, however, the actor assumes the duty to use due care.”

Id. at 314 (internal citation omitted). The Supreme Court also made clear:

Whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder.

Id. at 314-315 (internal citations omitted). Accordingly, where there is a fact issue as to whether the defendant voluntarily undertook to act, the jury must first answer whether the defendant did in fact volunteer to act, and, if yes, the second question for the jury is whether the Defendant failed to act with due care. *Id.*

Another illustrative case of a defendant volunteering to act and, thereby, assuming the duty to act with due care is *Vaughn v. Town of Lyman*, 370 S.C. at 446-448, 635 S.E.2d at 637-638. In *Vaughn*, our Supreme Court held that a fact issue existed for the jury as to whether the Town of Lyman volunteered to maintain the sidewalks for the safety of sidewalk users. *Id.* Reviewing the appropriateness of summary judgment for the Town, the Supreme Court considered the evidence presented by the plaintiff that the Town did volunteer to maintain the sidewalks, which included (1) references to sidewalk maintenance in town minutes, (2) town ordinances regulating sidewalks, (3) the Town’s awareness of a hazardous condition on a sidewalk without reporting it on to any other authority in the past, (4) the Town’s handling of prior sidewalk complaints, and (5) the Town’s earlier removal of hazardous tree roots. *Id.* Accordingly, based on this evidence, a genuine issue of fact existed for the jury as to whether the Town volunteered to act, and the Supreme Court held the duty issue “improperly decided on summary judgment”. *Id.* at 447-448.

Likewise, this Honorable Court in 2007 held in *Fickling v. City of Charleston*, 372 S.C. at 607-611, 643 S.E.2d at 116-118, that it was an issue of fact whether the City volunteered to maintain and repair sidewalks with due care. The Court specifically held that viewing the evidence in the light most favorable to the plaintiff, summary judgment was inappropriately decided for the City as to whether the City voluntarily undertook the duty to maintain/repair the sidewalk. *Id.* at 607. The Court pointed to the evidence for the jury to consider, which included that (1) the City had fielded complaints from residents about sidewalk hazards in the past, (2) maintained a call log that included repair calls, and (3) had a policy in place and employees to handle repairs. *Id.* at 608. The Court also found that an issue of fact existed as to the City's constructive notice of the defect based on the "numerous City personnel within the area of the defect who could have seen and reported the problem; the condition had existed for a while; and the City had an established policy in place to deal with defects...and problems with sidewalks were an expected and 'recurrent' or 'continual' condition of which it had notice." *Id.* at 609.

Fickling, *Vaughn*, and *Miller* clearly establish that whether a defendant volunteered to act for the benefit of others is a mixed question of fact and law for the fact finder, the jury in this case. These cases also provide the Court with context to examine the facts, and their reasonable inferences, that establish that a defendant voluntarily undertook to act for the benefit of others. Specifically, as highlighted above, acts of attending meetings, being an emergency contact, fielding complaints, having policies in place governing how to address an issue, and having constructive notice of a problem are facts sufficient to raise the triable issue of whether a defendant volunteered to act and, thereby, assumed the duty to act with due care in carrying out the actions.

In this case, at summary judgment the abundance of the evidence establishes that The Citadel volunteered to investigate and respond to child sexual abuse by its past and current

employees, to include Skip ReVille. Doe 2 incorporates in full as if fully stated herein the statement of the facts detailed in his *Petitioner's Brief*, pp. 4-14, to the Court. However to highlight, the evidence and its reasonable inferences includes:

- In 2001, The Citadel handled the report of camp counselor Michael Arpaio sexually abusing a camper at the Summer Camp and turned over the report to law enforcement;
- On August 6, 2001, in the wake of discovering Arpaio's sexual abuse at the Camp, Sergeant Middleton of the Charleston Police Department, by letter, advised The Citadel of concerning and inappropriate practices taking place at the Camp by counselors, to include counselors allowing campers to spend the night in counselors' rooms and in the same bed as counselors, sexual conversation in front of campers, and counselors taking campers off campus for non-camp activities without parental consent. (R. p. 1304; 1305-1307);
- Thereafter, The Citadel trained camp counselors to report suspected child sexual abuse or be fired;
- The Citadel required camp counselors to adhere to standard of conduct that provides zero tolerance for sexual misconduct with minors and implemented a process whereby The Citadel will respond by requiring any sexually inappropriate conduct reports to be turned over to and thoroughly investigated by The Citadel's own Department of Public Safety regardless of when sexual misconduct occurred (R. pp. 983-984);
- The Citadel required all its counselors to sign and agree to the standard of conduct and The Citadel's continuing control over them regardless of whether the counselor still works at the camp or not when a report of sexual misconduct is received by The Citadel with no time limitation (R. pp. 983-984);

- In summer 2002, Camp Deputy Director Jennifer Garrott caught ReVille alone with a minor camper in his barracks room, directly violating the rule against being behind closed doors with campers; despite the rule also requiring immediate termination for a violation, Garrott chose not to terminate ReVille or even to document his offense. (R. pp. 964-966; 1308-1312). ReVille went on to sexually abuse multiple campers numerous times in his barracks room at night during the 2002 summer sessions. (R. p. 1352, lines 4-12; p. 1353, line 18 through 1354, line 19).
- Director Garrott fired another counselor for being alone in his room with a camper in violation of the rule (R. p. 1349-1350);
- In summer 2003, Garrott, now camp Director, caught Reville engaged in inappropriate physical contact touching a camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room. Again Director Garrott chose not to terminate ReVille, despite the rule mandating his termination as a counselor. (R. pp. 983, 1308-1312). Director Garrott admits that she caught ReVille in direct violation of the rule and that she should have fired him. (R. pp. 968-969).
- Also, during the 2003 camp sessions, Director Garrott's assistant, Anna Brock, spoke to ReVille multiple times about his being alone with campers in his room, and counselor O.C. Evans made a report to Ms. Garrott's supervisor, Colonel Lackey, that ReVille had campers in his room at night, to include one of Evans's campers. In response, Colonel Lackey only told ReVille not to be alone with campers and informed Director Garrott of the complaint. Colonel Lackey and Garrott did not terminate ReVille or take any further action. (R. pp. 1308-1312).

- In 2004, The Citadel had constructive notice that ReVille was sexually abusing boys when Camper Doe 6, now The Citadel's Camp Counselor, had actual knowledge ReVille was abusing boys in the community (R. pp. 1862-1866, 1241-1243);
- In 2005, Garrott fired Camper Doe 6 when he attempted to report ReVille's sexual abuse to her;
- On April 23, 2007, The Citadel received a direct report from a former camper's (Camper Doe) father that Counselor Skip engaged in sexual abuse of boys, to include Camper Doe, while he was employed as camp counselor in the 2002 camp season (R. pp. 672-675, 687);
- On April 24, 2007, General Counsel Mark Brandenburg interviewed Camper Doe, Jennifer Garrott (who still worked at The Citadel), and ReVille (who was working for The Citadel since August 2006) (R. pp. 688-690, 958-959, 963-967);
- Specifically, Mr. Brandenburg called ReVille at his Citadel place of employment and requested ReVille come meet with him on campus; that day, Mr. Brandenburg and Executive Assistant to President Rosa, COL Trez, met with ReVille in person on campus and instructed him to "lay low" and required a quid pro quo from him to leave Citadel employment in exchange for The Citadel keeping the report close hold (R. pp. 692-697; 976-978; 980, 981);
- Mr. Brandenburg flew to Texas to meet in person with Camper Doe and his parents and take a transcribed interview, leading them to believe The Citadel was properly investigating and responding to the sexual abuse by ReVille so that no other boys would be abused (R. pp. 1015-1174); and

- Jennifer Shiel, Administrative Assistant in President Rosa's Support Office in 2007, testified that based on her personal experience, President Rosa directed the concealment of the April 2007 complaint from the get-go. (R. pp. 930-933).

Throughout the above time frames, The Citadel implemented its own policies and procedures that required The Citadel to report sex abuse of minors to its law enforcement entity, The Department of Public Safety, to fully investigate the reports and to prosecute to the fullest extent of the law. (*Petitioner's Brief*, p. 12-14 (internal citations to the Record omitted here)). The Citadel's duty to investigate and respond to child sexual abuse with due care is established by the actions it voluntarily undertook. Moreover, whether The Citadel's actions were reasonable may be assessed by looking at the standard of care The Citadel said it would adhere to, as memorialized in its own policies and procedures.

In sum, the evidence at summary judgment clearly indicates that a jury issue exists as to whether The Citadel volunteered to investigate and respond to sexual abuse by Skip ReVile, dating back to its actions taken at its Summer Camp starting in 2001 and continuing thereon until ReVile was arrested in 2011. The Court's Opinion here completely overlooks the facts establishing The Citadel volunteered to investigate and respond to sexual predators in its past and current employment and inappropriately takes the mixed question of fact and law from the jury. It is for the jury to decide whether The Citadel voluntarily undertook to investigate and respond to child sexual abuse by its past and current employees, to include ReVile. *See Miller*, 329 S.C. at 314, 494 S.E.2d at 815.

II. The Opinion Mistakenly Holds That The Citadel Owed No Duty to Doe 2 Because ReVile Began Sexually Abusing Him in 2005 and Misapprehends The Citadel's Proximate Causation Of Doe 2's Injuries (Before April 2007 And After).

The Opinion also misapprehends The Citadel's duty owed to Doe 2 by holding that no duty was owed because Doe 2 was abused before Camper Doe's report of sexual abuse was made to The Citadel on April 23, 2007. The Opinion is wrong for three reasons: (1) The Citadel acted to investigate and respond to child sexual abuse dating back to 2001, thereby assuming the duty to act with due care **before** any sexual abuse of Doe 2 occurred; (2) the facts and reasonable inferences in Doe 2's favor establish The Citadel knew Skip ReVille, its employee, was sexually abusing children in 2002, again in 2003, in 2004, and in 2005 **before** any sexual abuse of Doe 2 occurred; and (3) Doe 2's sexual abuse from April 23, 2007 through the end of August 2007 caused new injuries for which The Citadel is separately liable for causing. The sexual abuse prior to April 2007 neither negates the damage done by the subsequent abuse nor relieves The Citadel from liability for injury its negligence proximately caused. To hold otherwise tells sex abuse victims that if you are violated once, subsequent abuse causes no harm to you and, in essence, must be tolerated. This type of rhetoric constitutes victim blaming and shaming that our State's Children's Policy advocates against.

The record here includes the affidavit of David Lisak, Ph.D. and clinical psychologist, who has studied the impact of childhood physical and sexual abuse of males for the last three decades and has extensive experience evaluating and treating adult males who have been sexually abused as children. (R. pp. 1868-1871). Dr. Lisak confirms that each and every instance of child sexual abuse harms the child and repeated acts of abuse do not eradicate or lessen the injurious effect of the abuse:

Victims of sexual abuse who suffer repeated acts of assault and/or molestation are unequivocally harmed by each act. Repeated sexual abuse reinforces extremely damaging emotional states, extremely damaging feelings and ideas about the child's self-worth, and extremely damaging feelings and ideas about the adults in the child's life who are failing to stop the repeated abuse.

Id. The sooner the abuse is disclosed, the more likely the damage caused by the abuse may be mitigated, such that “[a]ny delay in disclosure therefore increases the risk of damage, as well as the actual damage caused to the child.” *Id.* Dr. Lisak explains that most children, and in particular boys, however, do not spontaneously disclose that they have been abused, and disclosure is more likely to occur because the abuse is discovered and stopped by an adult. *Id.*

The Opinion also errs in turning to federal law to support its holding that nothing The Citadel did specifically from April 23, 2007 onward harmed Doe 2 since ReVille began abusing Doe 2 in 2005. First, the Opinion incorrectly focuses only on April 23, 2007 forward. The Citadel’s duty starts in 2001, and all of Doe 2’s abuse was proximately caused by The Citadel’s conduct. Second, in The Court’s state law negligence analysis, the Court erroneously relies on *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989) and *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015), which are cases that assessed a state actor’s liability for constitutional violations actionable under Title 42 of the United States Code Section 1983. Specifically, the issue in these federal cases was whether a state actor created the danger of injury to a victim by a third party such that the state actor was liable for the violation of the victim’s federal constitutional rights under § 1983 in what is known as state created danger liability.

Importantly, to support a claim of federal state created danger liability under § 1983, the state actor must have acted with more than negligence. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 849 (1998) (holding to state a due process challenge to state action, the general rule is that the action must have been “intended to injure in some way unjustifiable by any government interest” and “negligently inflicted harm” is “categorically beneath the threshold of constitutional due process”); *see also Slaughter v. Mayor of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012) (holding state violates constitutional right when conduct is arbitrary “in a constitutional sense,

which encompasses ‘only the most egregious official conduct,’ namely that which ‘shocks the conscience’” and “refers, as a constitutional construct of substantive due process, to ‘conduct intended to injure in some way unjustifiable by any government interest.’”) (internal quotations omitted); *Waybright v. Frederick County*, 528 F.3d 199, 205 (4th Cir. 2008) (“With these principles in mind, the Supreme Court has, for half a century now, marked out executive conduct wrong enough to register on a due process scale as conduct that “shocks the conscience,” and nothing less”). Federal state created danger liability under 42 U.S.C. § 1983 has no application to assessing whether, under state common law of negligence, The Citadel voluntarily undertook to act and whether it carried out those actions with due care. The Court’s reliance on this federal body of law is misplaced.

Furthermore, under South Carolina negligence common law, The Citadel’s failure to act with due care proximately caused Doe 2’s injuries of sexual abuse by former Camp Counselor and employee, Skip ReVille. It was reasonably foreseeable and anticipated by The Citadel that ReVille would continue to sexually abuse minor boys when it failed to act with reasonable care in the actions it chose to take to investigate and respond to child sexual abuse. *See, e.g., Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968); *Green v. Atlanta & Charlotte Air line Railway Co.*, 131 S.C. 124, 133, 126 S.E. 441, 444 (1925). *Fickling, Vaughn, and Miller* make clear that when a defendant volunteers to take action, the duty to take that action with due care extends to those reasonably foreseeable individuals who would be injured by the defendant’s failure to carry out his actions with due care. The Town of Lyman and the City of Charleston’s voluntary actions to maintain sidewalks with due care extends to anyone who uses the sidewalk at any given time. *See Vaughn*, 370 S.C. at 439, 446-448, 635 S.E.2d at 633, 637 (duty to woman using sidewalk who tripped on broken part of sidewalk uprooted by trees); *Fickling v. City of Charleston*, 372

S.C. at 599, 607-611, 643 S.E.2d at 112 116-118 (duty to woman using sidewalk who stepped in hole in sidewalk and fell). The potential injured sidewalk users were not previously known to the defendants, and the defendants' duty to act with due care in what it volunteered to do extended to whomever happened to use the sidewalk and be injured by the defendants' lack of due care. Likewise, the defendant company in *Miller* who volunteered to monitor the dam for hazards did so for the benefit of those who would be injured if the company failed to act with due care to notify the appropriate officials in the event of imminent dam failure. 329 S.C. at 313-314, 494 S.E.2d at 814-815. The company's duty was owed to the reasonably foreseeable injured parties—those who happened to be in the path of water should the dam overflow because defendant failed to act with due care. *Id.* at 315. Again, these injured parties were not previously named and known but were reasonably foreseeable.

In regards to proximate causation, the Supreme Court relies continuously on “the controlling principles of law regarding intervening acts of a third party” that the Court established over the last century. *E.g., Stone*, 251 S.C. at 161, 161 S.E.2d at 173. The original tort-feasor's proximate causation of the injury remains even when an intervening act of a third party occurs if the original tort-feasor “should have reasonably foreseen and anticipated [the third party's acts] in the light of attendant circumstances. The law requires only reasonable foresight[.]” *Id.* Stated another way:

The proposition that the wrongful or illegal act of an independent third person may not be regarded as such a consequence of a tort-feasor's alleged wrong as should entail legal liability must rest, in the last analysis, upon the assumption that such a consequence is not one of which a person who assumes the discharge of the ordinary civil obligation has knowledge or the opportunity by the exercise of reasonable diligence to acquire knowledge; that it is an unnatural and abnormal intervention in the ordinary train of events and consequences not reasonably to be anticipated from the act or omission which is charged to the alleged tort-feasor as a breach of duty.

Green, 131 S.C. at 133, 126 S.E. at 444.

In sum, “[l]iability exists for the natural and probable consequences of negligent acts and omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care.” *Graham v. Whitaker*, 282 SC 393, 399, 321 S.E.2d 40, 44 (1984) (citing *Matthews v. Porter*, 239 S.C. 620, 124 S.E.2d 321 (1962)). Although foreseeability of some injury from an act or omission is a prerequisite to the plaintiff establishing proximate cause, it is not necessary for the defendant to have contemplated the particular event which occurred. *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547-548 (1990). Rather, it is sufficient that the defendant should have foreseen that his negligence would probably cause injury to someone. *Id.*

The Citadel’s duty to act with due care in volunteering to investigate and respond to sexual abuse extends to Doe 2 as a reasonably foreseeable party injured by The Citadel’s breach of the duty. The Citadel had the knowledge of the probable consequences of its failure to act with due care in investigating and responding to ReVille’s abuse—that being, of course, that ReVille would continue to sexually abuse boys, to include Doe 2. Child sexual abuse is an area where scientific, medical, social studies and research establish that the risk of a predator continuing to abuse children is substantially certain to happen. (R. pp. 1868-1871; 1196-1197). The Citadel’s own policies it put in place and its actions to investigate and respond to child sexual abuse explicitly recognizes the certainty that child sexual abuse will continue. Moreover, the probable consequence of The Citadel’s failure to act with due care to investigate and respond to ReVille’s sexual abuse of boys was Doe 2’s abuse, which is underscored by The Citadel’s own expert, Dr. Gary Margolis, who testified that the only way to stop child sex abusers is if the abuser dies or is

incarcerated. (R. pp. 1196-1197). The Citadel's expert confirms that ReVille had a distinct preferential class of victims— boys ages 10-14— the very ages of the boys The Citadel knew ReVille was abusing at its Camp and the age range of Doe 2, and Dr. Margolis opined to the reasonable foreseeability that ReVille would continue molesting boys. (R. p. 1195).

The Citadel volunteered to investigate and respond to child sexual abuse by its past and current employees, and it did so for the benefit of those children who foreseeably would be abused should The Citadel fail to carry out its actions with due care. Simply put, the continued sexual abuse of boys by ReVille is the natural and probable consequence of The Citadel's negligence in investigating and responding to ReVille as a sexual predator. Doe 2 clearly is a reasonably foreseeable party who would be injured by The Citadel's failure to act with due care in investigating and responding to ReVille as a sexual abuser as it volunteered to do, and the Opinion errs in holding that The Citadel owed no duty to Doe 2. Moreover, The Citadel not only failed to act with due care to carry out what it voluntarily undertook to do, but The Citadel acted to do the exact opposite. The Citadel instead acted to conceal ReVille's dangerous proclivities and to conceal any evidence of The Citadel's knowledge of ReVille's abuse. (R. pp. 480-499; 1831-1833).

As an aside, proving proximate causation sufficiently limits liability of one who volunteers to act and prevents the flood gates from opening up unlimited liability of volunteers. For example, the Town of Lyman in volunteering to maintain sidewalks may limit its liability by acting with due care to maintain the sidewalks. The Town controls its liability exposure. However, if the Town acts unreasonably and improperly maintains a sidewalk such that a hole is left unattended and someone falls and twists an ankle, the Town is liable for the lack of due care it exercised in the action in volunteered to do. Here, The Citadel volunteered to investigate and respond to child

sexual abuse by its past and current employees so children would not continue to be abused. If The Citadel acted with due care in carrying out what it volunteered to do, it would face no liability. However, liability attaches when The Citadel failed to act with due care in what it set out to do. Control of liability rests with The Citadel, and in this case, The Citadel failed to act with due care to carry out its investigation of and response to ReVille's child sexual abuse, thus subjecting it to liability for Doe 2's abuse. Doe 2's abuse by ReVille is "of such character that the author of the primary negligence [The Citadel] should have reasonably foreseen and anticipated [it] in the light of the attendant circumstances." *Stone*, 215 S.C. at 161, 161 S.E.2d at 173.

III. The Opinion Misapplies The Standard Of Review Of The Evidence At Summary Judgment By Misstating The Evidence And Erroneously Making Inferences In The Moving Party's Favor.

In addition, the Opinion misapplies the standard of review of the evidence by not viewing the evidence and all its reasonable inferences in the light most favorable to the nonmoving party, Doe 2. *See Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). Instead, the Opinion misstates the facts, completely ignores evidence, and makes inferences in The Citadel's favor from the misstated evidence. Properly viewing the evidence at summary judgment establishes that The Citadel voluntarily acted to investigate and respond to child sexual abuse by its past and current employees, dating back to its operation of the Summer Camp in 2001; that it knew of Skip ReVille's sexual abuse of boys in 2002, 2003, 2004, 2005, and again in 2007; and along the way, The Citadel acted to conceal ReVille's sexual abuse rather than investigate and respond to his abuse with due care.

The Opinion unfortunately makes numerous errors in its review of the evidence. The Opinion overlooks the notice The Citadel had of ReVille's sexual abuse of boys in 2002, 2003, 2004, and 2005. The Opinion also errs in stating that ReVille was not working at The Citadel on

April 23, 2007, when the direct report of sex abuse by ReVille came into President Rosa's office from Camper Doe's father. ReVille attests that he was working, and his testimony is corroborated by his presence in the workplace on campus when Mr. Brandenburg called him to meet in person on April 24, 2007, as well as his application for unemployment noting his last day worked as April 30, 2007. (R. pp. 692-697; 976-978; 980, 981). The Citadel contends that ReVille resigned prior to the date and was no longer working. The Opinion improperly decides this issue for The Citadel when evidence to the contrary exists and where clearly a genuine issue of fact exists for the jury to decide. *See Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

Further misstatements of fact include stating that Camper Doe, who came forward in 2007, met Mr. Brandenburg in Texas "to discuss a possible settlement of potential claims against The Citadel." There is no such evidence, and instead the evidence is that Camper Doe met with Mr. Brandenburg after he reported the abuse to President Rosa in order to make sure that ReVille did not have the opportunity to sexually abuse any more boys. (R. pp. 672-675, 990-992, 995-997). Camper Doe had not hired an attorney or made any indication he was bringing any claims against The Citadel when they met. (R. pp. 1015-1174). The Opinion also errs in finding that ReVille's abuse of Doe 2 in the summer of 2007 was scaled back "tremendously", when Doe 2 testified that it escalated. (R. pp. 1527-1531, 1846-1849).

The Opinion also entirely omits the evidence of The Citadel's actions to conceal ReVille's sexual abuse and to conceal its knowledge of ReVille's sexual abuse. *See Petitioner's Brief*, pp. 10-12: President Rosa and Mr. Brandenburg conceal details of the April 2007 report from the Board of Visitors to such an extent Board members did not understand Mr. Brandenburg briefing them on a report of child sexual abuse (R. pp. 556-607, 1183-1192); The Citadel ensured that the General Counsel files did not indicate in any way a child sexual abuse report against ReVille by

excluding it entirely in October 2007 and then including it three years later but disguised as an Arpaio report (R. pp. 703-720); in May 2007 after the direct report of sex abuse to President Rosa's office, The Citadel appealed ReVille's eligibility for unemployment benefits after The Citadel required a quid pro quo for him to leave Citadel employment in exchange for The Citadel's silence but after Mr. Brandenburg's meeting in Texas, Citadel withdrew its appeal and accepted ReVille's eligibility for unemployment benefits. ReVille believes the Citadel withdrew the appeal in order to avoid a confrontation over the circumstances of his departure from Citadel employment. (R. p. 980).

The Opinion also overlooks the evidence after ReVille's arrest in November 2011 of The Citadel's continued concealment of ReVille's sex abuse and what The Citadel knew about it before he was arrested. For example, the Mount Pleasant Police Department spoke directly with Mr. Brandenburg in November 2011, and Mr. Brandenburg told Det. Bacon that in April 2007, a family made a complaint to The Citadel of "inappropriate behavior" by ReVille with their son when he was a camper in 2002. (R. pp. 1873-1876). However, in 2007, Mr. Brandenburg unequivocally acknowledged in writing that the camper's complaint was of child sexual abuse- not "inappropriate behavior." (R. pp. 918-920; 921-922). Mr. Brandenburg further misled law enforcement by telling Det. Bacon that the "inappropriate behavior" was "ReVille show[ing] a pornographic movie to the camper and suggest[ing] he masturbate with him," (R. pp. 1873-1876), when in fact, in 2007, Mr. Brandenburg and President Rosa knew that the camper did not report that ReVille "suggested" he should masturbate but that ReVille coerced the camper to masturbate with him. (R. pp. 921-922).

In addition, Mr. Brandenburg misled law enforcement by telling Det. Bacon that The Citadel was unable to corroborate the camper's "story", when in fact in his interview of the camper

on July 1, 2007, Mr. Brandenburg acknowledged that ReVille was a child sexual abuser. (R. p. 1128; 990-992). Furthermore, on August 8, 2007, Mr. Brandenburg also memorialized his assessment that the camper's report of sexual abuse by ReVille was "believable." (R. pp. 993-994). Det. Bacon also asked Mr. Brandenburg if The Citadel had reported the incident to law enforcement, and he told her they had not "because there wasn't any touching involved." (R. pp. 1873-1876). Det. Bacon admonished Mr. Brandenburg "that law enforcement should have been notified even though there wasn't any touching involved....that what Mr. ReVille did was still criminal in nature, thus should have been investigated by law enforcement." *Id.* Det. Bacon also asked Mr. Brandenburg which law enforcement agency handles sexual assaults on campus, and he replied that Citadel Public Safety handles initial reports. *Id.* However, The Citadel acted to ensure that it did not make a report to Public Safety, and its actions maintained ReVille's anonymity as a child sexual abuser and supported ReVille's sexual abuse of Doe 2 instead.

In sum, the Opinion failed to apply the proper standard of review at summary judgment under Rule 56(c), SCRPC. The Opinion omits facts, misstates facts, and makes inferences erroneously in favor of the moving party, The Citadel. *See Pye*, 369 S.C. at 563, 633 S.E.2d at 509 (to determine "whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party"). Correcting the application of the standard of review of the evidence on summary judgment makes clear that genuine issues of material facts exist as to The Citadel's voluntary actions to investigate and respond to child sexual abuse and as to The Citadel's breach of its duty to undertake those actions with due care. Triable issues exist, and The Citadel is not entitled to summary judgment.

IV. The Opinion Errs In Holding That No Duty Exists Under *Faile's* Exceptions To The General Rule That One Does Not Have A Duty To Warn A Third Party Of Danger. The Citadel Owed Doe 2 A Duty Under Statutory Creation Of A Duty, The Negligent Creation Of The Risk, And Voluntary Undertaking Of A Duty.

The Court need not address The Citadel's duty to Doe 2 under the five exceptions to the general rule that one does not have a duty to warn a third party of danger or control the conduct of another under *Faile*, 350 S.C. at 334, 566 S.E.2d at 545, because the duty of due care directly is established by The Citadel's volunteering to investigate and respond to child sexual abuse by its past and current employees. However, the Court chose to address the *Faile* exceptions in its Opinion, and its application of the law of three of the exceptions was in error as applied to this case.

First, a duty to warn a third party or control the conduct of another is established when a statute imposes a duty on defendant. *Id.* In South Carolina, the test for determining when a statute creates a duty of care and supports an action for negligence is (1) whether the statute's essential purpose is to protect from the kind of harm the plaintiff has suffered and (2) whether the plaintiff is a member of the class of persons the statute is intended to protect. *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 102, 374 S.E.2d 910, 914 (Ct. App. 1988) (deriving test from comparison of *Clifford v. Southern Railway*, 87 S.C. 324, 69 S.E. 513 (1910) and *Hutto v. Southern Railway*, 100 S.C. 181, 84 S.E. 719 (1915)). Therefore, a statute may create a duty of care of which the violation of constitutes breach and establishes negligence per se. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 915.

Title IX of the Education Amendments of 1972 imposed a duty on The Citadel not to conceal ReVille's sexual abuse that occurred on its campus. The essential purpose of Title IX is to eliminate, with certain exceptions, discrimination on the basis of sex against any "person" in

any education program or activity² receiving federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. § 106.1. Title IX bestows an affirmative action requirement on institutes of undergraduate higher education to take such remedial action as necessary to overcome the effects of such discrimination. 34 C.F.R. § 106.3(a). Therefore, Title IX's essential purpose to eliminate sex discrimination by definition seeks to protect other "persons" from subsequent sex discrimination. For eliminating known sexual discrimination, whether it be in the form of harassment or abuse, prevents the future sexual harassment of other individuals.

The Opinion here mistakenly holds that Title IX only intends to protect participants and students of educational programs and that Doe 2 is not a member of the protected class. The Opinion is contrary to the plain language of Title IX that states:

No **person** in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal Financial assistance.

20 U.S.C.A. § 1681(a) (emphasis added). The plain language of the federal law applies to all persons, not specifically students or participants.

Second, other courts addressing the issue of who Title IX protects have applied "person" broadly and hold that Title IX protects persons injured if the federal funding recipient [i.e. the school] exercises substantial control over the abuser or over the context in which the abuse occurs. *E.g., Simpson v. Univ. of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (denying university's

² Under Title IX, an education program recipient of Federal financial assistance means "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(i). "Institutions" include those of higher education as defined by 34 C.F.R. § 106.2(l), (m), (n), and (o), which includes The Citadel as an institute of undergraduate higher education.

motion for summary judgment as to Title IX claim where plaintiff-student sexually assaulted on campus by nonstudent-football recruit); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304 (S.D.N.Y. 2000) (denying summary judgment for school where off-campus sexual harassment of medical student by hospital resident, who was not under the “direct control” of the school nonetheless fell within the ambit of Title IX). Whether the victim is a student or participant of the educational program is not dispositive of whether Title IX provides protection to the injured party.

Here, The Citadel had substantial control over its employee, ReVille, dating back to 2001 when he was employed as a Camp Counselor and subject to a policy that mandated that any report of sexual misconduct be turned over by The Citadel to The Citadel’s law enforcement agency, even if the counselor was no longer employed at The Citadel at the time of the report and with no limit of application. (R. p. 983). The Citadel’s control of ReVille continued unabated under this policy from 2001 forward. Moreover, The Citadel controlled ReVille through direct employment of him again in August 2006 through April 2007, when it received Camper Doe’s report and demanded a quid pro quo from ReVille to leave employment in exchange for The Citadel’s concealment of the report. At all times relevant, The Citadel had substantial control over ReVille. Second, at all times relevant The Citadel had substantial control over the circumstances of Doe 2’s abuse by ReVille, because The Citadel undertook to investigate and respond to child sexual abuse by its past and current employees thereby controlling whether the abuse would cease or not. Title IX creates a duty for The Citadel to not conceal ReVille’s sexual abuse following April 2007, which The Citadel breached. The Opinion errs in holding that Doe 2 is not a member of the class of persons Title IX intends to protect.

In addition, the Opinion errs in holding that The Citadel did not owe Doe 2 a duty of care under the *Faille* exceptions of negligently creating the risk of ReVille’s abuse and voluntarily

undertaking the duty to protect Doe 2 from ReVille's abuse, as fully briefed by Petitioner in his *Petitioner's Brief*. The Court need not address The Citadel's duty under these exceptions because The Citadel's own voluntary actions to investigate and respond to child sexual abuse created the duty for it to carry forth its exposure with due care. Therefore, the Opinion should apply and examine The Citadel's duty owed to Doe 2 in the actions it voluntarily undertook to do with due care as set forth herein.

V. Conclusion

In conclusion, Doe 2 respectfully requests that the Court rehear its Opinion issued August 2, 2017, due to the Opinion's misapprehensions of the duty owed by The Citadel to Doe 2 and The Citadel's proximate causation of Doe 2's injuries. Whether The Citadel volunteered to investigate and respond to Skip ReVille as a child sexual abuser for the protection of minor boys, to include Doe 2, is a mixed question of fact and law for the jury. If a jury answers yes, the subsequent jury issue is whether Doe 2's injuries were proximately caused by The Citadel's failure to carry out the actions it volunteered to do with due care. For the foregoing reasons, the court erred in affirming summary judgment for The Citadel and took these issues away from the jury. Doe 2 asks that the trial court's July 6, 2015 Order be reversed and the case remanded for trial in its entirety.

Respectfully submitted this 22 day of August 2017,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

John Doe 2Appellant,
v.
The Citadel.....Respondent.

PROOF OF SERVICE OF PETITION FOR REHEARING

I certify that I have served Appellant's Petition for Rehearing on the above-named Respondent via hand delivery and to the South Carolina Court of Appeals via Federal Express Overnight shipping on August 22, 2017, addressed to the following:

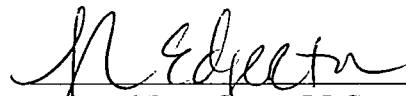
South Carolina Court of Appeals
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SC Court of Appeals



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August 22, 2017

Via Federal Express Overnight Mail

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211


Re.: John Doe 2 v. The Citadel
Appellate Case No. 2015-001505

Dear Ms. Kitchings:

Pursuant to your August 9, 2017 correspondence to the parties in the above-referenced Case, noting the updated timeline for filings, please find enclosed the original and one (7) copies of the Appellant's Petition for Rehearing. Also, enclosed, please find the Proof of Service of Appellant's Petition on Respondent and a check in the amount of \$25.00 for the filing fee. Please file the original and return a filed copy to me in the self-addressed stamped envelope.

With kind regards, I am

Sincerely,


Brooke A. DiMeo, paralegal to
Jacqueline LaPan Edgerton

/bad
Enclosures

cc: M. Dawes Cooke, Jr.
Randall C. Stoney, Jr.
John W. Fletcher

RECEIVED
AUG 23 2017
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