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. 2015-001505

John Doe 2, ... Appellant,

v.

The Citadel ..... Respondent.

RETURN TO PETITION FOR REHEARING

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AND NOW COMES Respondent The Citadel, The Military College of South Carolina ("The Citadel") and files the following Return to Petition for Rehearing:

For the reasons set forth below, this Court should deny Plaintiff John Doe 2'S ("Plaintiff") Petition for Rehearing and should retain in full force and effect its August 2, 2017 Opinion No. 5504, affirming the trial judge's entry of summary judgment in favor of The Citadel as to all of Plaintiff's claims. The Citadel incorporates by reference, as if set forth at length, its Final Respondent's Brief in this appeal.

ARGUMENTS

A. The Opinion Correctly Determined That The Citadel Did Not Voluntarily Undertake a Duty to Plaintiff

1. There Is No Evidence That The Citadel Voluntarily Undertook a Duty Pursuant to the Restatement (Second) of Torts § 323

Plaintiff first argues that the Court should reconsider its Opinion because The Citadel "has voluntarily undertaken to investigate and respond to child sexual abusers in its employment (past and present)." (*See* Pl.'s Pet. for Reh'g, at 2). However, Plaintiff's argument misses the mark, insofar as the Record on Appeal is devoid of any evidence supporting a voluntarily undertaken duty.

In accordance with the Restatement (Second) of Torts § 323, South Carolina does recognize that a party may voluntary undertake a duty of care in limited circumstances:

> "One who undertakes, gratuitously or for consideration, to render services *to another* which he should recognize as necessary for the protection *of the other's person* or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

See Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 and refusing to extend duty beyond that formulation). However, the Supreme Court has declined to expand the concept of

voluntary undertaking of a duty under the broader Section 324A[1]:

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

Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A "has not been adopted by our courts").

Plaintiff has not directed the Court to any evidence or testimony sufficient to create an issue of fact as to whether The Citadel undertook a duty to render services to Plaintiff for the protection of Plaintiff's person. The record evidence does not even suggest that The Citadel undertook to provide any services *to Plaintiff.*

In any event, in its Opinion, this Court correctly concluded that Plaintiff could not succeed on an action under the Restatement (Second) of Torts § 323. As the Opinion notes, (in addition to other requirements) for a voluntary undertaking of a duty of care to exist, Plaintiff must show that either: (a) The Citadel actually increased the risk of harm to him or (b) Plaintiff's injury was the result of his reliance on The Citadel's undertaking. This is consistent with this Court's prior precedent. *See Johnson*, 401 S.C. at 506, 737 S.E.2d at 514 ("Section 323(a) contemplates a party relying on the rendering of services to another for the other's protection."); *Underwood v. Coponen,* 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006) ("[N]either Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so."); *Staples v. Duell*, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997) ("First, Staples

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[1] 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.

presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. . . . 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."). Plaintiff's Petition for Rehearing does not demonstrate the existence of either prerequisite, and the Record on Appeal is devoid of any such evidence.

First, it is beyond cavil that Plaintiff could not have relied upon anything that The Citadel did, as there was no interaction between Plaintiff and The Citadel before or during the time of ReVille's abuse of the Plaintiff. In fact, The Citadel was completely unaware of Plaintiff until the filing of this lawsuit.

Second, there is no evidence that The Citadel did anything to increase the risk of harm to Plaintiff. There is no evidence that The Citadel provided ReVille with access to Plaintiff or gave him a location to abuse Plaintiff. There is no evidence that The Citadel made it more likely that ReVille would abuse Plaintiff. At most, Plaintiff claims that The Citadel failed to prevent ReVille from abusing him.

Therefore, for the foregoing reasons, this Court should deny Plaintiff's Petition for Rehearing.

2. Plaintiff's Arguments Are Not Bolstered by the Authority He Cites

Plaintiff cites numerous cases in support of his argument that the Opinion was in error because it failed to conclude that The Citadel voluntarily undertook a duty of care to Plaintiff. However, the cases that Plaintiff cites to support that The Citadel voluntarily undertook a duty to him are distinguishable and do not support his position.

For example, Plaintiff cites *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), to support his argument that The Citadel undertook a duty. In *Miller*, a plant operator constructed a dam adjacent to the plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for

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

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

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

Plaintiff additionally relies on *Fickling v. City of Charleston,* 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). In that case, this Court held that a city might have voluntarily undertaken a duty to ensure the safe condition of sidewalks in a state right-of-way (emphasis added):

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

See id., 372 S.C. at 609-10, 643 S.E.2d at 116-17; *accord Vaughan v. Town of Lyman*, 370 S.C. 436, 444, 635 S.E.2d 631, 637-38 (2006) (reversing grant of summary judgment where "Vaughan presented contrary evidence, including references to sidewalk maintenance in the town minutes and town ordinances regulating the sidewalks. Vaughan also presented deposition testimony showing that Lyman was aware of the hazardous condition of Lawrence Street for a substantial period of time without reporting the condition to any other authority, had previously handled complaints from town residents about the sidewalks, and removed hazardous tree roots disrupting the sidewalks.") (also cited by Plaintiff).

In *Fickling,* the City of Charleston *admitted* that it had undertaken an overarching duty to maintain certain public sidewalks, and there was evidence that this duty might encompass the subject sidewalk. Importantly, the claimed duty concerned outwardly visible property conditions at specific geographic location within the jurisdiction of a municipality that was already charged with maintaining some sidewalks. Such a duty would be precisely the type of duty that the city had undertaken as to other sidewalks. One could scarcely imagine a more fundamental municipal undertaking than the maintenance of streets and sidewalks directed to those who use those sidewalks.

Fickling (and *Vaughan*) are inapposite, as this case does not involve maintenance of property within The Citadel's boundaries. Doe was not, in any way, within the custody or control of The Citadel at the time of his abuse. Moreover, there is no evidence that a condition of The Citadel's property caused Doe's abuse. While a municipality may be liable for injury to a

previously-unknown person who was injured on a known, existing sidewalk, this does not extend the voluntary undertaking doctrine to the facts of this case. Plaintiff applies a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* to the point of breaking. It does not support the imposition of a duty under the facts of this case.

Plaintiff cites a number of additional cases in support of his contention that there is a genuine issue of material fact as to whether The Citadel voluntarily undertook a duty of care to Plaintiff. However, *none* of those cases support his argument:

- In Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), a duty could exist because the children's father specifically relied on representation that the defendant would supervise visitation. *See id.,* 285 S.C. at 406, 329 S.E.2d at 780 ("Timothy's testimony is unequivocal that *he allowed visitation to resume because the Spiveys undertook to provide supervision* over the children's visits with Lynette in Beaufort. The evidence also warrants the conclusion that *Timothy was swayed to permit visitation because the Spiveys undertook a search for the pistol* and were satisfied that Lynette no longer had it.") (emphasis added). There is no such reliance here, as the Plaintiff is a complete stranger to The Citadel.

- In *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984), the Court imposed a duty on a lender who undertook to repair roofs owned by regime as common elements and created a defective condition. *See id.*, 282 S.C. at 423, 321 S.E.2d at 51 ("We hold however 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."). There, the plaintiff was a known and intended beneficiary of the specific undertaking by the lender.

- In *Carolina Bank & Tr. Co. v. St. Paul Fire & Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983), the plaintiff relied upon the undertaking by the defendant. *See id.*, 279 S.C. at 580, 310 S.E.2d at 165 ("St. Paul, through its authorized agent, assumed an obligation to advise the Bank; St. Paul advised the Bank that coverage of the employee was suspended; the Bank indefinitely suspended the employee *in reliance on the advice*.") (emphasis added). On the other hand, there is no evidence that Plaintiff relied upon anything that The Citadel did in this case.

However, *none* of these cases support the imposition of a duty of care under the facts of this case, where there is no evidence that The Citadel and Plaintiff ever even knew each other, let alone that Plaintiff relied on The Citadel's alleged undertaking to him. Moreover, there is no

evidence here of anything that The Citadel did to increase the risk of danger to Plaintiff. The cases Plaintiff cites are inapposite.

B. Title IX Did Not Create a Duty of Care to Plaintiff

Plaintiff also challenges this Court's conclusion that Title IX of the Educational Amendments of 1972 did not create a duty of care flowing to Plaintiff, "because he is not a member of the class of persons the statute intends to protect." As the Opinion correctly notes, a statute may impose a duty of care if the Plaintiff can prove two elements: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *See Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914-15 (Ct. App. 1988). Plaintiff contends that the Court disregarded the following provision of Title IX: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal Financial assistance." *See* 20 U.S.C.A. § 1681(a). For the reasons that follow, the Opinion correctly concluded that Plaintiff — who had no prior relationship with The Citadel — was not within the class of persons that Title IX is intended to protect.

There is no evidence in the Record on Appeal that Plaintiff was denied the benefit of any education program or activity. Plaintiff has not cited to any authority undermining the Opinion's position that Title IX is intended to protect "participants and students of educational programs." The law is clear that Title IX is *not* intended to protect individuals in the position of Plaintiff, *i.e.*, non-students with no educational affiliation with The Citadel. *See Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, 20 U.S.C. § 1681 *et seq.*, applies only to students and participants in educational programs." (citations omitted)); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs . . . have standing to bring claims under Title IX."); *accord K. T. v. Culver-Stockton Coll.*, No. 4:16-CV-165 CAS, 2016 WL

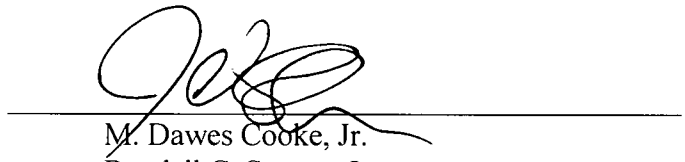
4243965, at *5 (E.D. Mo. Aug. 11, 2016) ("Title IX's protection against student-on-student harassment does not extend to permit a private action for damages by a non-student invited to visit the College for student-athlete recruiting purposes."), *aff'd*, No. 16-3617, 2017 WL 3254396 (8th Cir. Aug. 1, 2017); *Lopez v. San Luis Valley, Bd. of Co-op. Educ. Servs.*, 977 F. Supp. 1422, 1425 (D. Colo. 1997) ("No court has held that a plaintiff who is neither a potential beneficiary of a federally funded education program nor an employee of such a program can maintain a Title IX action for sex discrimination."). As a result, the Opinion correctly holds that Title IX is not a proper basis for the imposition of a duty of care on The Citadel.

In support of his contention that he is within the class of individuals protected by Title IX, Plaintiff cites *Simpson v. University of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007), and *Crandell v. New York Coll. of Osteopathic Med*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000). However, in both cases, the persons protected by Title IX were themselves students. *See Simpson*, 500 F.3d at 1175 ("Plaintiffs sought relief under Title IX, 20 U.S.C. § 1681(a), claiming that CU knew of the risk of sexual harassment *of female CU students* in connection with the CU football recruiting program.") (emphasis added); *Crandell*, 87 F. Supp. 2d at 306 ("[P]laintiff in this case alleges that she was subjected to sexual harassment *through much of her training* as an osteopathic physician at the New York College of Osteopathic Medicine.") (emphasis added). In fact, the *Simpson* court noted that there had been a prior sexual assault situation involving the college football team where "the victim was not a CU student protected by Title IX." *See Simpson*, 500 F.3d at 1181. In any event, these cases do *not* support Plaintiff's baseless contention that Title IX is intended to protect those who have no relationship with The Citadel and were not deprived of any "education program or activity" there.

Therefore, for the foregoing reasons, the Court should deny Plaintiff's Petition for Rehearing.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Petition for Rehearing and confirm its well-reasoned Opinion.



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Dated: September 1, 2017
Charleston, South Carolina

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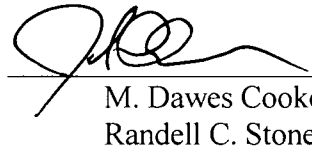
PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2017, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413.



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September 1, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: John Doe 2 v. The Citadel
Appellate Case No. 2015-001505
Our File No.: 1.537

Dear Ms. Kitchings,

Enclosed for filing please find the original and one (1) copy of Respondent The Citadel's Return to Petition for Rehearing in the above-referenced matter. We would appreciate if you would file the original and return the filed, stamped copy to us in the self-addressed, stamped envelope provided.

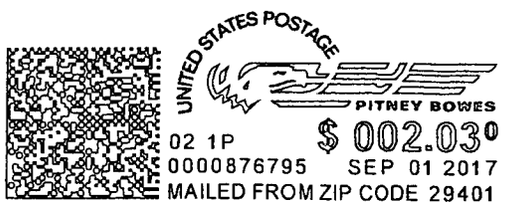
By copy of this letter, we are serving a copy of the return to Petition for Rehearing upon counsel of record.

Sincerely,

John W. Fletcher

JWF/jgc
Enclosures

cc: W. Mullins McLeod, Esquire
Jacqueline LaPan Edgerton, Esquire



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SC Court of Appeals

1.537

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