THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

John Doe 2 ..... ~~Appellant~~ Petitioner,

v.

The Citadel ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW Doe 2 and petitions this Honorable Court to issue a Writ of Certiorari to review the final decision of the Court of Appeals in this case due to the decision's conflict with the long standing common law of negligence in South Carolina 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., 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); *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984); *Fickling v. City of Charleston*, 372 S.C. 597, 607-611, 643 S.E.2d 110, 116-118 (Ct. App. 2007); *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). The Court of Appeals erroneously affirmed summary judgment for The Citadel by ignoring the duty owed by The Citadel to act with due care in carrying out its voluntary investigation and response to sexual abuse by its employee, Louis "Skip" ReVille, for the protection of minor boys, to include Doe 2. A proper application of South Carolina common law of negligence establishes that when The Citadel voluntarily undertook to act, it assumed the duty to do so with reasonable care. Summary judgment for The Citadel was improperly granted.

Counsel for Doe 2 certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on September 27, 2017. (Appendix pp. 2115-2144; 2167-2180).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals misapprehended the long standing common law of negligence that one who voluntarily undertakes to act assumes the duty to carry forth those actions with reasonable care.

2. Whether The Citadel's duty to act with due care in carrying forth its voluntary investigation and response to child sexual abuse by its employees, past and present, extends to Doe 2 as a reasonably foreseeable party injured by The Citadel's breach of the duty and whether The Citadel's failure to exercise reasonable care increased the risk of harm to Doe 2.

3. In addition to the duty to act with reasonable care in carrying out what The Citadel volunteered to do, whether The Citadel owed Doe 2 a duty to warn or protect him from ReVille's sexual abuse under the exceptions to the rule that generally one does not have a

duty to warn a third party of danger or control the conduct of another as set forth in *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 556 S.E.2d 536, 545 (2002), and, specifically, as to duties imposed on The Citadel (i.) by statute, (ii.) by The Citadel's negligent creation of the risk of ReVille's sexual abuse of Doe 2, and (iii.) The Citadel voluntarily undertaking the duty to protect Doe 2 from ReVille's abuse.

STATEMENT OF THE CASE

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).

This case was decided at summary judgment for The Citadel, where the standard of review of the evidence requires that the evidence and all its reasonable inferences be viewed in the light most favorable to the nonmoving party, which is Doe 2 here. *See Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). The evidence is clear that The Citadel volunteered to investigate and respond to child sexual abuse by its past and current employees for the protection of minor boys who would come into contact thereafter with the abuser(s). One such child sexual abuser was Louis "Skip" ReVille who was employed by The Citadel in 2001 to 2003 and again in 2006 to 2007. The Citadel's General Counsel, Mark Brandenburg, admits under oath that The

Citadel's actions to investigate and respond to child sexual abuse by ReVille was to protect children from subsequent abuse:

> 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.

(App. p. 1298).

In the summer of 2005, ReVille met Doe 2, who was an adolescent boy, and began a grooming process of Doe 2 to gain his trust by befriending him and giving him special attention. ReVille's grooming of Doe 2 led to ReVille exposing Doe 2 to pornography, masturbation, and physical sexual abuse of him that continued through late August 2007 until Doe 2 moved out of state. (App. pp. 1374, lines 2-5; 1433-1437; 1530-1531).

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 its Summer Camp in 2001 up through the arrest of Skip ReVille in 2011; that The Citadel knew of Skip ReVille's sexual abuse of boys in 2002, 2003, 2004, 2005, and again in April 2007; and throughout the years, The Citadel acted to conceal ReVille's sexual abuse, and the school's knowledge of his abuse, rather than to investigate and respond with reasonable care.

Specifically, dating back to 2001, The Citadel handled the report of its camp counselor Michael Arpaio sexually abusing a camper at The Citadel's 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. (App. pp. 1304; 1305-1307). Thereafter, The Citadel trained camp counselors to report suspected child sexual abuse or be fired.

The Citadel also required camp counselors to adhere to a standard of conduct that provided 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 the sexual misconduct occurred. (App. pp. 983-984). The Citadel also required all its counselors to sign and agree to a standard of conduct that included The Citadel's continuing control over them, regardless of whether the counselor still worked at the camp when a report of sexual misconduct was received by The Citadel. As such, The Citadel's employees were subject to absolutely no time limitation on The Citadel's response to reports of sexual misconduct by past and current employees. (App. pp. 983-984).

In summer 2002, Camp Deputy Director Jennifer Garrott caught its camp counselor ReVille alone with a minor camper in his barracks room, directly violating the rule against being behind closed doors with campers, and, despite the rule also requiring immediate termination for the violation, Garrott chose not to terminate ReVille or even to document his offense. (App. pp.

964-966; 983, 1308-1312, 1342, 1351). ReVille went on to sexually abuse multiple campers numerous times in his barracks room at night during the 2002 summer camp sessions. (App. p. 1352, lines 4-12; p. 1353, line 18 through 1354, line 19). In contrast, Director Garrott immediately fired another counselor for being alone in his room with a camper in violation of the rule. (App. p. 1349-1350).

In summer 2003, Garrott, now camp Director, caught Reville inappropriately touching a camper [hereinafter referred to as Camper Doe 6] alone in ReVille's barracks room behind closed doors. Again Director Garrott chose not to terminate ReVille, despite the rule mandating his termination as a counselor. (App. pp. 983, 1308-1312). Director Garrott admits that she caught ReVille in direct violation of the rule and that she should have fired him. (App. 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. (App. 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. (App. pp. 1862-1866, 1241-1243). In 2005, Garrott fired Camper Doe 6 when he attempted to report ReVille's sexual abuse to her. Thereafter, on April 23, 2007, The Citadel received a direct report from a former camper's [Camper Doe] father that camp counselor "Skip" engaged in sexual abuse of boys, to include Camper Doe, while he was employed as camp counselor in the 2002 camp season. (App.. 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 had been working for The Citadel again since August 2006). (App. 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, Colonel 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. (App. pp. 692-697; 976-978; 980, 981).

Thereafter, 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. (App. pp. 1015-1174). 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. (App. pp. 930-933).

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

Sexual Harassment, Memo. No. 51 established procedures for reporting and investigating sexual harassment complaints, specifying that: "[w]hen ever there is an incident of sexual assault or sexual abuse, the incident will be reported to the police." (App. p. 1228). *The Citadel's Sexual Assault Crisis Intervention Policy, Memo. No. 4*, also mandated that, "THE CITADEL WILL PUNISH ANY INDIVUAL(S) WHO IS FOUND TO HAVE COMMITTED SEXUAL ASSAULT," and "THIS POLICY APPLIES TO ALL MEMBERS OF THE CITADEL COMMUNITY." (App. pp. 1215-1218) (emphasis in original). In addition, as previously noted, *The Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues* requires that "[r]egardless of validity of the violation, any sexually inappropriate conduct reports concerning any camper or employee of the camp will be turned over to The Citadel Public Safety Department and a thorough investigation will be conducted," and no time limit exists for conducting such investigations of current or former individuals associated with the camp. (App. p. 983-984).

In the "Message from the President," President Rosa himself publically called on The Citadel community to report immediately "any criminal offense, suspected criminal activity, or other emergency directly to Citadel Public Safety," stressing that Public Safety "has complete police authority to apprehend and arrest anyone involved in illegal acts on campus, and also in areas immediately adjacent to the campus." (App. p. 985). The Citadel's head of Public Safety, Colonel Fletcher in 2007, was a State Constable, and his police powers went beyond the gates of the Citadel and applied to any type of foreseeable crime, just as any other law enforcement officer's jurisdiction would cover. (App. p. 1872).

Furthermore, the *Employee Misconduct Policy* required that The Citadel not terminate any investigation of sexual misconduct in exchange for resignation by the employee; provide factual

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

Yet despite The Citadel's policies and actions to investigate and respond to child sexual abuse by its employees, after April 2007, The Citadel acted to conceal ReVille's sexual abuse and to conceal The Citadel's knowledge of ReVille's sexual abuse. By way of example, President Rosa and Mr. Brandenburg concealed details of the April 2007 report from the Board of Visitors to such an extent that the Board members did not understand Mr. Brandenburg had briefed them on a report of child sexual abuse (App. 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 but then including the report three years later disguised as an "Arpaio" report (App. 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 he leave Citadel employment in exchange for The Citadel's silence as to the abuse, but after Mr. Brandenburg's meeting in Texas with Camper Doe, The Citadel withdrew its appeal and accepted ReVille's eligibility for unemployment benefits. ReVille believes the Citadel withdrew the appeal in order to avoid a confrontation over the circumstances of his departure from Citadel employment. (App. p. 980).

In sum, the evidence at summary judgment clearly indicates that a jury issue exists as to whether The Citadel volunteered to investigate and respond with reasonable care to sexual abuse by Skip ReVille, dating back to The Citadel's actions taken at its Summer Camp starting in 2001 and continuing thereon until ReVille was arrested in 2011.

ARGUMENT

When The Citadel, on its own accord, undertook to investigate and respond to child sexual abuse by its employees, past and present, the duty arose to then carry out those voluntary actions with reasonable 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))). Simply put, 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 of Appeals failed 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 rule that generally one does not have a duty to warn a third party of danger by another or control the conduct of another. *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). As argued before the trial court and in the appeal by Doe 2, while the *Faile* exceptions impose a duty on The Citadel as well, the duty first is established by The Citadel's own voluntary

acts, which it was required to carry out with reasonable care. The *Faile* exceptions are an additional means of imposing a duty in this case.

A. The Court of Appeals Misapprehended the Long Standing Common Law of Negligence That One Who Voluntarily Undertakes to Act Assumes the Duty to Carry Forth Those Actions With Reasonable Care.

Once The Citadel's performance began, the long established common law of negligence applied 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", 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 reasonable 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.

This Honorable Court is clear that while "[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." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (internal citation omitted). Moreover:

> [w]hether 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). In the case at hand, the Court of Appeals ignored this basic tenet of South Carolina's negligence common law. *E.g., Vaughn v. Town of Lyman*, 370 S.C. 436, 446-448, 635 S.E.2d 631, 637-638 (2006); *Miller*, 329 S.C. at 314, 494 S.E.2d at 815; *Fickling v. City of Charleston*, 372 S.C. 597, 607-611, 643 S.E.2d 110 116-118 (Ct. App. 2007).

For example, the Supreme Court in *Miller v. City of Camden*, 329 S.C. at 314, 494 S.E.2d at 815, was presented with factual issues over whether the defendant was a volunteer, and, accordingly, the Court held that summary judgment was inappropriate and the issue was for the jury. Specifically, 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 who happened to be in its path, this Court held that the evidence raised the issue for the jury of whether Kendell voluntarily undertook to monitor the lake for the safety of others based on its two actions. *Id.*

Also illustrative of a defendant volunteering to act and, thereby, assuming the duty to act with due care is the Court's decision in *Vaughn v. Town of Lyman*, 370 S.C. at 446-448, 635 S.E.2d at 637-638. In *Vaughn*, the 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 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.* Based on this evidence, a genuine issue of fact existed for the jury as to whether the Town volunteered to act. *Id.* at 447-448; *see also Fickling v. City of Charleston*, 372 S.C. at 607-611, 643 S.E.2d at 116-118 (holding jury issues existed as to whether the City voluntarily undertook the duty to maintain/repair the sidewalk and whether the City had constructive notice of sidewalk defect based on numerous City personnel within the area who could have seen and reported defect; defect existed for a while; 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 City had notice).

Fickling, *Vaughn*, and *Miller* provide 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 reasonable care in carrying out the actions. However in this case, the Court of Appeals completely overlooked the facts establishing that The Citadel voluntarily took on to investigate and respond to sexual abusers in its past and current employment, and the court inappropriately kept 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 ReVille. *See Miller*, 329 S.C. at 314, 494 S.E.2d at 815.

B. The Citadel's Duty to Act With Reasonable Care In Carrying Forth its Voluntary Investigation and Response to Child Sexual Abuse By ReVille Extends to Doe 2 As a Reasonably Foreseeable Party Injured by The Citadel's Breach of the Duty and Whose Risk of Injury was Increased by The Citadel's Breach.

The Court of Appeals also misapprehends The Citadel's duty owed to Doe 2 by holding that no duty was owed because ReVille started sexually abusing Doe 2 before The Citadel received Camper Doe's report of sexual abuse on April 23, 2007. The Court of Appeals' 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 at summary judgment includes the affidavit of David Lisak, Ph.D. and clinical psychologist, who has studied the impact of childhood 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. (App. 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.*

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 his sexual abuse of children. *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 carry out the acts 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—anyone 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, this Honorable Court continuously relies on "the controlling principles of law regarding intervening acts of a third party" 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.

Accordingly, 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.* "Liability 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)).

The Citadel's duty to act with due care in volunteering to investigate and respond to child sexual abuse by its past and current employees extends to Doe 2 as a reasonably foreseeable party injured by The Citadel's failure to exercise reasonable care in what it undertook to do. The Citadel absolutely had 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 with whom he came into contact, to include Doe 2. Child sexual abuse is an area where scientific, medical, social studies and research establish that the risk of a child abuser continuing to abuse children is substantially certain to happen. (App. 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 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. (App. 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 abusing boys with whom he came into contact. (App. p. 1195). Doe 2 was one such boy.

In summary, 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'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*, 251 S.C. at 161, 161 S.E.2d at 173. Going hand in hand, The Citadel's failure to act with reasonable care increased the risk of Doe 2's sexual abuse by ReVille. The Court of Appeals erred in holding that The Citadel owed no duty to Doe 2. Furthermore, The Citadel not only failed to act with due care to carry out what it volunteered to do, but instead The Citadel concealed ReVille's dangerous proclivities and concealed evidence of its knowledge of ReVille's abuse. (App. 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. 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 thereafter 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. Here, 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.

C. The Citadel Also Owed Doe 2 a Duty to Warn or Protect Him From ReVille's Sexual Abuse Under Three of the *Faile* Exceptions by Way of The Citadel's Negligent Creation of the Risk, Voluntarily Undertaking the Duty, and Creation of the Duty by Statute.

The Court of Appeals not only ignored the duty The Citadel owed Doe 2 by the actions it voluntarily undertook, the lower court incorrectly applied the law set forth in *Faile* to the facts in this case. There are five specified exceptions to the rule that generally one does not have a duty to warn a third party of danger or control the conduct of another *E.g., Faile*, 350 S.C. at 334, 566 S.E.2d at 545. The five recognized exceptions that impose a duty to warn or protect from an injurer are (1) when the defendant has a special relationship with the victim; (2) when the defendant has a special relationship with the injurer; (3) when the defendant voluntarily undertakes the duty to warn or protect; (4) when the defendant intentionally or negligently creates the risk; and (5) when a statute imposes a duty on defendant. Here, The Citadel had a duty to warn or protect Doe 2 from ReVille's sexual abuse based on The Citadel's negligent creation of the risk of the abuse, The Citadel's voluntarily undertaking the duty to warn or protect Doe 2, and Title IX of the Education Amendments of 1972.

The facts that establish The Citadel voluntarily undertook to investigate and respond to sexual abuse by its past and current employees for the protection of children with whom the abuser would come into contact with thereafter likewise establish The Citadel's duties to Doe 2 under the *Faile* exceptions of creation of the risk and voluntary undertaking. *Infra.* pp. 1-17. *See, e.g., Edwards v. Lexington Co. Sheriff's Dep't*, 386 S.C. 285, 688 S.E.2d 125, 129-130 (2010) (holding defendant created the foreseeable risk Baker would attack Edwards when defendant knew Baker

had violent tendencies but encouraged Edwards to attend Baker's bond hearing without arranging for any security); *Greenville Memorial Auditorium*, 301 S.C. at 254, 391 S.E.2d at 547 (holding auditorium created a reasonably foreseeable risk that concert attendee would throw bottle and harm another attendee when auditorium provided inadequate security staffing at concert).

In addition, 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. 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, 102-103, 374 S.E.2d 910, 914-915 (Ct. App. 1988). Therefore, a statute may create a duty of care of which the violation of constitutes breach and establishes negligence per se. *Id.*

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 activity[1] 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

[1] 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.

"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 Court of Appeals mistakenly held 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, and covers being subjected to discrimination under any education program or activity receiving the Federal Financial assistance.

Furthermore, 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 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, 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 mandates that any report of sexual misconduct be turned over by The Citadel to The Citadel's law enforcement agency, even if the counselor is no longer employed at The Citadel at the time of the report and with no limit of application. (App. 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. In addition, 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. Thus, the Court of Appeals also erred in holding that Doe 2 is not a member of the class of persons Title IX intends to protect.

CONCLUSION

Doe 2 respectfully petitions this Honorable Court for a Writ of Certiorari to review the final decision of the Court of Appeals that affirmed summary judgment for The Citadel by holding that The Citadel owed no duty to John Doe 2. The Court of Appeals made errors of the common law of negligence and erroneously applied the standard of review of the evidence at summary judgment. Whether The Citadel volunteered to investigate and respond to Skip ReVille as a child sexual abuser for the protection of minor boys with whom he would come into contact with

thereafter, to include Doe 2, is a mixed question of fact and law for the jury. For all of the foregoing reasons, summary judgment for The Citadel was improperly decided.

Respectfully submitted this 26th day of October 2017,

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

John Doe 2 ..... ~~Appellant,~~ Petitioner,

v.

The Citadel ..... Respondent.

PROOF OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

I certify that I have served Appellant's Petition for Writ of Certiorari on the above-named Respondent via hand delivery and to the South Carolina Court of Appeals and the South Carolina Supreme Court via US Mail October 26, 2017, addressed to the following:

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