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. 2017-002210

Mother Doe A ..... Appellant,

v.

The Citadel ..... Respondent.

RETURN TO PETITION FOR WRIT OF *CERTIORARI*

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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 Writ of *Certiorari*:

SUMMARY

A parent cannot recover for loss of consortium of an injured child. In this case, Petitioner-Plaintiff Mother Doe A ("Plaintiff") seeks to change long-standing South Carolina law to recognize such claims. While she says that she is seeking "loss of services," it is clear that she is attempting to recast her claim for loss of companionship and society – filial consortium -- under a different name. Additionally, Plaintiff's claims fail for other reasons that the Court of Appeals did not reach.

Plaintiff does not identify any important legal questions for this Court to consider. Moreover, she cannot show that this case is an appropriate vehicle for the Court to make new law. Indeed, the Court of Appeals' ruling is entirely consistent both with longstanding precedent and with modern trends in the law. Therefore, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

INTRODUCTION

Petitioner Mother Doe A ("Plaintiff" or "Mother") sued The Citadel for failing to prevent Louis "Skip" ReVille, a former counselor at The Citadel's former summer camp, from sexually abusing her son. Mother's son concededly never attended the camp, and neither Mother nor her son had any affiliation with The Citadel. Mother alleges claims against The Citadel sounding in:

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

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

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

(d) Count IV — Civil Conspiracy

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

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

(g) Count VII — Loss of Services

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

Plaintiff's Petition seeks this Court's review of the following questions:

Did the Court of appeals (sic) err in:

1. Confusing Loss of Services with a claim not stated in the pleadings and concluding that South Carolina "does not recognize a cause of action for loss of the child's consortium"?

2. Construing the evidentiary standard applicable to the mother's tangible and intangible damages was "unappealed" when it is argued in the brief?

3. Failing to consider the recklessness standard for an outrage claim? And

4. Failing to consider that the harm to the child of Mother Doe A was a "natural and foreseeable consequence" of the Citadel's deliberate conduct to conceal information it had gathered in its own investigation that the pedophile had a sexual interest in boys?

(*See* Pl.'s Pet. for Writ of *Cert.*, at 1). For the reasons that follow, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

DISCUSSION

A. Standard of Review[1]

The Appellate Court Rules set forth guidelines for the granting of certiorari. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

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[1] Plaintiff's Petition for Writ of *Certiorari* also references another action filed by a parent of a ReVille victim, styled *John Doe 201 and Jane Doe 201 v. The Citadel*, No. 2013-CP-10-10330 (Charleston Cty. Ct. Comm. Pl.). However, the *Doe 201* case is not presently before this Court (and was never before the Court of Appeals). While The Citadel agrees with Plaintiff that the *Doe 201* case fails for the same reason as this case, any reference to the *Doe 201* lawsuit in this appeal is entirely irrelevant and the Court should disregard it.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.A.C.R., Rule 226(b) (emphasis added). As set forth in detail below, Plaintiff has not shown that any such reasons exist that would warrant review of this Court's review of the instant case.

Plaintiff contends that her Petition for Writ of *Certiorari* presents three (though the Petition says four) independent grounds for review:

> (1) The Petition presents novel questions of law about the ancient common law cause of action known as Loss of Services.
>
> (2) The decision of the Court of Appeals purports to overrule a series of South Carolina cases which have recognized Loss of Services. *E.g., Doe v. Greenville Hospital System*, 448 S.E.2d 565, 565 (S,.C. App. 1994) (father's claim for "loss of custody, companionship, and service of his daughter"); *Stewart v. State Farm Mut. Auto Ins. Co.*, 533 S.E.2d 597 (S.C. App. 2000) (separate claim recognized for parent after injury to child). It also appears to conflict with the recent decision in *Patton v. Miller*, 804 S.E.2d 252 (S.C. 2017), allocating between parent and child the capacities of each to claim various expenses before and after majority).
>
> (3) The petition would enable to court to clarify the proper scope of *Doe v. Greenville County School District*, 651 S.E.2d 305 (S.C. 2007), which rejected a parent's claim for injury to a child because it was pled as a loss of consortium claim and not, as this claim was pled, a loss of services claim. 651 S.E.2d at 308-309 ("not a claim for loss of services").

(*See* Pl.'s Pet. for Writ of *Cert.*, at 2). For the reasons that follow, this Court should deny Plaintiff's Petition for Writ of *Certiorari*, because there are no issues appropriate for review in this Court.

B. Plaintiff's Claims Are Foreclosed by the Recent Court of Appeals Opinion in *Doe 2 v. The Citadel*

In addition to the reasons set forth below, this Court should deny Plaintiff's Petition for Writ of *Certiorari* because the recent published Court of Appeals opinion in *Doe 2 v. The Citadel*, ___ S.E.2d ___, App. Case No. 2015-001505, 2017 WL 4273968 (Ct. App. Sept. 27, 2017), *petition for writ of certiorari pending*, bars her claims. In *Doe 2*, the Court of Appeals affirmed the grant of summary judgment in a suit by another victim of abuse by ReVille. In that case, as in this case, The Citadel did not know the actual victim of the abuse, and the abuse did not occur on the campus of

The Citadel or during any Citadel activity. In fact, the victim had no connection to The Citadel. Therefore, the Court of Appeals held that The Citadel owed Doe 2 no duty of care that could support a negligence claim stemming from abuse by ReVille. *See id.*, 2017 WL 4273968, at *3-*6. Additionally, the Court of Appeals concluded that the plaintiff there could not succeed on an outrage claim because he presented no evidence that The Citadel specifically directed any conduct toward Doe 2 (or even know of Doe 2's existence). *See id.*, 207 WL 4273968, at *6 ("[W]hile The Citadel's failure to notify law enforcement of ReVille's alleged abuse in 2007 is highly lamentable, Doe did not present any evidence that The Citadel directed any tortious conduct specifically toward him. Indeed, The Citadel was unaware of Doe's very existence prior to the commencement of this lawsuit. Accordingly, we uphold the circuit court's finding on this issue.").

Doe 2 is controlling in the instant case and provides an alternative basis for the affirmance of the Court of Appeals' decision. In this case, it is beyond dispute that The Citadel did not know either Plaintiff or her son. There is no evidence that The Citadel undertook any duty to Plaintiff or her son. There is no evidence that The Citadel directed any conduct toward Plaintiff or her son. For the reasons the plaintiff could not do so in *Doe 2,* Plaintiff cannot present any evidence that The Citadel owed her a duty of care. Therefore, Plaintiff's claims fail for all of the same reasons that *Doe 2*'s claims failed. For this reason, the Court should deny Plaintiff's Petition for Writ of Certiorari.

C. The Court of Appeals Correctly Concluded That Plaintiff Did Not Present Any Evidence of Recoverable Damages

South Carolina law is clear that a parent may recover only two types of damages for a child's injury: (a) medical expenses for treatment of the child's injuries; and (b) the pecuniary value of the loss of the child's services. *See Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990) (holding that medical expenses and lost services may be recoverable under South Carolina Tort Claims Act). In *Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E.2d 305 (2007), this Court concluded that South Carolina does *not* recognize a parent's claim for the loss of a child's consortium or companionship:

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

See id., 375 S.C. at 69-70, 651 S.E.2d at 308 (emphasis added).[2] Plaintiff does not offer a genuine reason why this Court should revisit its opinion in *Greenville County* or why that decision should be overruled. To the contrary, *Greenville County* is well-reasoned and should remain the law of South Carolina. It is entirely consistent with modern South Carolina law, which strictly limits recovery of damages for emotional distress unaccompanied by physical harm.

Plaintiff does not contend that ReVille abused her or that the Citadel's conduct caused her any direct injury. Rather, Plaintiff seeks damages for The Citadel's alleged failure to prevent ReVille from abusing *her son*. In discovery responses, Plaintiff itemized her damages thusly:

> Expenses have been incurred for therapy for her child and herself, as indicated above.[3] []In addition to out of pocket costs, there are intangible injuries. [H]er

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[2] This is consistent with the Restatement. *See* Restatement (Second) of Torts § 703 ("One who by reason of his tortious conduct is liable to a minor child for illness or other bodily harm is subject to liability to (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to (b) the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for the treatment during the child's minority.").

[3] The Citadel addresses any potential claims for medical expenses below.

> child has become less participatory with family activities. He is now more easily angered, especially with his siblings. His mother has observed his mood fluctuating between periods of solitude and exclusion, fits of rage, guilt, and deep-seated betrayal. She believes he now has anger management issues that he did not have before the abuse. For a number of years the sexual abuse resulted in "secret" keeping that puts the family in a no-win situation with regard to the other siblings in the family, as information about the abuse must either be spread more broadly among those family members or a certain level of ambiguity has to be maintained about the problems now posed for her son's interaction with family members.
>
> Mother Doe's brother, her child's uncle, has commented on her child's antisocial behavior which has led to very awkward, and heated conversations between Mother Doe A and her brother, who does not understand the impact of abuse on her child's psyche and how it has eroded his ability to trust people in positions of authority. Mother Doe A has observed that her son's abuse has changed the family's dynamic, and caused, among other things, Mother Doe A's brother to visit less frequently.

(*See* R. pp. 0908-09 ¶ 10 and R. pp. 0911-12 ¶ 16). Plaintiff's counsel elaborated on her claimed damages, characterizing them as intangible harm to her relationships with her family members (particularly her children). (*See* R. pp. 0922-23). Plaintiff has made apparent that she seeks compensation for emotional harm she sustained as a result of the abuse of her son, including the impact on the familial relationship. These are precisely the "intangible losses of aid, companionship, and society" that this Court found unrecoverable in *Greenville County.*

Greenville County did not plow new legal ground; it was an unsurprising application of modern South Carolina law on loss of consortium. In *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996), this Court rejected a child's claim for loss of parental consortium. The Court's rationale applies equally to claims for filial consortium: "By enacting S.C. Code Ann. § 15-75-20 (1977), the legislature provided for loss of consortium actions for spouses. The statute has not been amended to provide a similar cause of action for children. Whether South Carolina should recognize a cause of action for loss of parental consortium is a matter best left to the discretion of the General Assembly." *See id.,* 479 S.E.2d at 47. *Greenville County* is entirely consistent with this principle, as is the Court of Appeals' decision in this case. *See Kirkland v. Sam's East, Inc.*, 411 F. Supp.2d 639 (D.S.C. 2005) (applying *Taylor* to a claim for loss of filial consortium).

For the reasons set forth above, because Plaintiff seeks damages for loss of the consortium of her minor child, this Court's unbroken precedent bars her claims. Therefore, the Court should deny Plaintiff's Petition for Writ of *Certiorari.*

1. ***Greenville County's Holding Is Not Dicta***

In her Petition for Writ of *Certiorari* (at page 4), Plaintiff attempts to minimize *Greenville County* as "historically inaccurate" *dicta.*[4] Plaintiff's assertions in this regard are without merit, as the cited portions of this Court's *Greenville County* are not *dicta.* "*Dicta*" includes only a court's statements that are irrelevant to the issue:

> Judicial *dicta* is "not essential to the decision." Black's Law Dictionary 465 (7th ed.1999). *Dicta* or, as it is also known, *dictum* "is a statement on a matter not necessarily involved in the case, and is not binding as authority. *Dictum* is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. Courts § 227 (2006).

See Nash v. Tindall Corp., 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007); *accord, Dennis v. South Carolina Nat'l Bank*, 299 S.C. 34, 39, 382 S.E.2d 237, 240 (Ct. App. 1988) (language was *dicta* because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof"). The relevant portion of the *Greenville County* opinion is not *dicta,* as this Court expressly stated that its *holding* was that a parent may not recover intangible losses from child's injury: "[b]ecause Mr. and Mrs. Mother's

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[4] This Court should not ignore its prior reasoning even if it was dicta. As former Chief Judge Sanders observed:

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

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

loss of consortium claim is *based entirely upon their allegation of a change in their relationship with their child* and not a claim for loss of services, *we hold* that the trial court did not err in dismissing Mr. and Mrs. Doe's claim for loss of filial consortium." *See id.*, 375 S.C. at 70, 651 S.E.2d at 308-09 (emphasis added). The holding that controls this case formed the basis for the Court's *Greenville County* ruling. While Plaintiff might disagree with the Court's holding in that regard, the cited parts of *Greenville County* are not *dicta* and they represent the law of South Carolina.

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

Plaintiff argues that *Greenville County* does not foreclose her claims, because she seeks to recover permissible "loss of service" damages that were recoverable under ancient common law. Plaintiff argues that "[a] parent's right to assert claims for their own injuries after their child is injured, including injuries from sexual assault, was recognized as early as 1653." (*See* Pl.'s Pet. for Writ of *Cert.*, at 4). However, as discussed above, Plaintiff is really seeking to recover damages for "loss of consortium," not "loss of services." Moreover, for the reasons that follow, the authority that Plaintiff cites — all of which predates this Court's decision in *Greenville County* — does not support her contention. The authority Plaintiff cites is inapposite because those cases either concern true "loss of services" or claims that arise in the unique context of the tort of abduction or seduction[5] of a child, which has no bearing on the rule explained in

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[5] This ancient cause of action is premised on outdated presumptions that our society has rejected:

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

Greenville County. For example, Plaintiff cites *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1947) (emphasis added), wherein the United States Supreme Court noted a "parent's right to indemnity for loss of a child's services, *including his action for a daughter's seduction.*"

Plaintiff also cites *Webb v. Southern Railway*, 88 S.E. 297 (1916), for the proposition that for 100 years South Carolina has permitted parents to assert claims for their own tangible and intangible injuries from injury to a child. However, the parents in *Webb* did not state a claim for injury to their son, but for his *abduction* (emphasis added): "The action by Will Webb [son]was for damages on account of personal injuries. That of Ella Webb, as by her contended, *is for abduction of her minor son.*" Specifically, the plaintiff mother claimed that the defendants physically removed her son (whose labor and services belonged legally to her) to North Carolina to work on its railway. In other words, the *defendant physically removed a son from his mother.* Moreover, the *Webb* Court did not analyze what damages were recoverable, much less create a broad rule that a parent could recover non-pecuniary intangible damages under the guise of "loss of services."

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

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

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> courts now recognize that its earlier formulation was discriminatory in allowing the claim only to women and in vesting the claim in the father. *But in any event, the parental claim for anything more than obligatory medical expenses may be abolished along with the alienation and criminal conversation claims.*

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

> to secure compensation for outraged feelings. The same right of action which ordinarily a father has, devolves upon any one standing *loco parentis*.

See id., 1849 WL 2667, at *2. The plaintiff in *Villepigue* asserted a seduction cause of action *against the person who had debauched her child.* The decision did not purport to create a claim for negligent infliction of emotional distress or outraged feelings. It is ironic that, while Plaintiff purports to advocate for a progressive approach to child protection, she relies upon ancient precedent that was premised on children being essentially the property of their parents.

Plaintiff also cites *Berry v. Myrick*, 194 S.E.2d 240, 242 (1973) for the proposition that her claim for her loss of her child's consortium is recoverable. Specifically, Plaintiff cites to a quotation from an ALR article to the effect that (emphasis added): "loss of services or consortium is an immediate rather than a delayed consequence of the defendant's negligence or wrongful act causing physical injury to plaintiff's spouse, *child*, or employee." However, *Berry* is of no aid to Plaintiff because it predates *Medenica* and *Greenville County* and does not control, to the extent it is inconsistent. Moreover, that case did not involve an injury to a child, but an injury to a spouse. The mere inclusion of the word "child" in a block quote in that case (in true *dicta*) did not rule on the availability of damages for loss of the consortium of a child.

Plaintiff also cites *Wright v. Colleton County School District,* 301 S.C. 282, 289, 391 S.E.2d 564, 569 (1990), for the proposition that she has suffered a cognizable injury under the South Carolina Tort Claims Act ("the Act"). However, as cited above, *Wright* recognizes only that — consistent with *Greenville County* — a parent has a claim for an injury to a child *for pecuniary loss of services and medical expenses. See id.* Nothing in *Wright* is contrary to the Court's determination in *Greenville County.* In fact, the *Greenville County* Court cited and relied upon *Wright*, noting that "[t]he cases which the dissent utilizes to support its conclusion that filial consortium claims existed at common law directly address parental claims for loss of services, not loss of filial consortium." *See Greenville Cty.*, 375 S.C. at 69, 651 S.E.2d at 308. Discussing *Wright* and other cases, this Court in *Greenville County* stated: "As discussed above, our common law only allowed a parent to maintain an action for the loss of a child's services and

earning capacity. These common law claims did not include the intangible losses of aid, companionship, and society which have traditionally defined loss of consortium claims." *See id.*, 375 S.C. at 69-70, 651 S.E.2d at 308. In other words, *Wright* is entirely consistent with the approach this Court took in *Greenville County* and the trial court took here.

Plaintiff's argument and reliance on the above-cited authority essentially mirrors the position taken in the *Greenville County* dissent. The majority of the *Greenville County* Court rejected this argument and refused to extend the law permitting recovery of consortium-type damages in seduction/abduction claims beyond the unique circumstances of those claims:

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

See Doe v. Greenville County School District, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (emphasis added). Plaintiff's argument is in direct derogation of this Court's well-reasoned majority holding in *Greenville County*.

For the reasons set forth above, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

D. <u>The Court of Appeals' Opinion Is in Accord with Modern Damages Jurisprudence</u>

Plaintiff's attempts to recover damages for emotional and psychological harm run counter to this Court's unwavering modern refusal to recognize a general claim for negligently-caused emotional distress. *Greenville County* parallels decades of refusal to permit recovery of

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

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

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

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

See id., 232 S.C. at 605, 103 S.E.2d at 271 (citations omitted). Subsequently, this Court cited *Padgett* in stating that "[w]e have recognized the rule that there is no liability for emotional distress without a showing that the distress inflicted is extreme or severe." *See Rhodes v. Security Fin. Corp. of Landrum*, 268 S.C. 300, 302, 233 S.E.2d 105, 106 (1977). Concluding that the evidence did not support recovery, the Court observed that "[w]hile there is testimony that appellant was emotionally upset from the attempt to collect the forged note, there is no showing that the attempts by respondent's agents to collect were unreasonable or abusive, nor that appellant's emotional upset was other than transient and trivial." *See id.* With *Rhodes,* the

Court first began to limit recovery for negligent infliction of emotional distress.

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

Importantly, this Court next in *Dooley v. Richland Hosp.*, 283 S.C. 372, 322 S.E.2d 669 (1984), rejected an invitation to recognize a general tort of negligent infliction of emotional distress — beyond intentional and reckless conduct — because the plaintiffs had failed to make any showing of physical injury to support their claim. The Court stated that one criticism of permitting a tort for negligent infliction of emotional distress is "that it will allow for fraudulent claims" and that "[o]ne method of eliminating this danger has been to require some type of physical injury in addition to any claimed emotional injury." *See id.*, 283 S.C. at 375, 322 S.E.2d at 671. Later that year, the Court refused to permit the recovery of emotional distress damages in a legal malpractice claim, despite a litany of claimed "physical" manifestations of the distress (including crying spells, headaches, change of hair color, and an inability to sleep with her spouse for several years). *See Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (1984).

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

> (a) the negligence of the defendant must cause death or serious physical injury to another;
>
> (b) the plaintiff bystander must be in close proximity to the accident;
>
> (c) the plaintiff and the victim must be closely related;

(d) the plaintiff must contemporaneously perceive the accident; and

(e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

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

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

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

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

Greenville County School District falls squarely within this unbroken line of modern authority. The Court refused to extend the negligent infliction of emotional distress damages to encompass parents' claims stemming from sexual activity between their daughter and a school teacher: "[b]ecause South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which is cognizable under South Carolina law."

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

E. Plaintiff Has Not Presented Evidence of Medical Expenses

Plaintiff suggests that the Court of Appeals erred in affirming the trial judge's grant of summary judgment to The Citadel with regard to any assertion of damages for medical expenses. Parents are unquestionably entitled to recover, in their own right, certain medical expenses paid on behalf of their child. *See Patton v. Miller*, 804 S.E.2d 252 (Ct. App. 2017). Plaintiff's suggestion that she has properly supported a claim for medical expenses is without merit. Initially, Plaintiff did not preserve this issue for appellate review. Plaintiff made reference in this appeal to medical expenses as an element of damages only in two sentences in a footnote in her 30-page brief in the Court of Appeals. (*See* Pl.'s Final Appellant's Br., at 27 n.7). That footnote contains no citation to legal authority and no reference to evidence supporting a claim for the recovery of medical expenses. *See State v. Crocker*, 366 S.C. 394, 399 n. 1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) (holding conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve issue for appellate review); *accord* 5 Am. Jur. 2d Appellate Review § 511 ("A passing reference to an issue in a brief is not enough to preserve it for appellate review, and the failure to make arguments and cite authorities in support of an issue waives it."). As a result, Plaintiff has not sufficiently preserved the question of whether she has presented evidence of medical expense damages.

Moreover, even if she preserved the issue, Plaintiff has not proffered evidence (before the trial court or Court of Appeals) of actual medical expenses incurred because of an injury to her son. Plaintiff's Final Brief in the Court of Appeals only vaguely refers to the line-designations

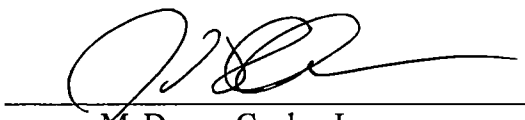
of the depositions of Plaintiff and Chet Williams, *which depositions are not themselves even part of the record.* Plaintiff does not identify any specific, actual testimony establishing recoverable medical expenses or the amount thereof. She does not cite to any record evidence showing that she has sustained medical expenses for which she may seek and obtain recovery. This record on appeal simply does not support this argument.

Even granting Plaintiff the benefit of every doubt, she has not presented evidence of her claimed medical expenses. She has not presented evidence of the amount claimed. She has not presented evidence detailing what treatment corresponds with any claimed medical expenses. She has not presented any evidence to causally tie any medical expenses to the abuse of her son. The Citadel requested details of Plaintiff's medical expenses, and Plaintiff detailed various aspects of damages that she was claiming. (*See* R. pp. 0908-09 ¶ 10; R. pp. 0911-12 ¶ 16; and R. pp. 0922-23). In all of those details, Plaintiff did not provide any specificity about any claimed medical expenses. To date, if Plaintiff wishes to recover medical expenses, she has not even told The Citadel the amount of damages claimed.

It is clear that Plaintiff did not bring this case to recover medical expenses, but rather to recover for the loss of companionship and society of her son. Moreover, there is no need for this Court to review the law on this issue; it is uncontested that a parent can recover medical expenses incurred due to the injury to her child, if she proves that she in fact incurred them. The Court of Appeals did not hold otherwise.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Petition for Writ of *Certiorari* and decline Plaintiff's invitation to review the Court of Appeals' well-reasoned opinion.



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Dated: November 20, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2017-002210

Mother Doe A, ... Appellant,

v.

The Citadel ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of *Certiorari* on Petitioner Mother Doe A by depositing the requisite number of copies of it in the United States Mail, postage prepaid, on November 20, 2017, addressed to their attorneys of record, Allan P. Sloan, III, Esq. and Gregg Meyers, Esq., Pierce, Herns, Sloan & Wilson, LLC, 321 East Bay St., Charleston, SC 29401.

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November 20, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Mother Doe A v. The Citadel
Appellate Case No.: 2017-002210

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent The Citadel, The Military College of South Carolina's Return to Petition for Writ of *Certiorari* in the above-referenced matter. Please file the original and six (6) copies and return a file-stamped copy to us in the envelope provided for your convenience. By copy of this letter to them, we are serving a copy of the Return upon counsel for Appellant.

Sincerely,

John W. Fletcher

JWF/jgc
Enclosures

cc: Allan P. Sloan, III, Esquire (*w/enclosure*)
Gregg E. Meyers, Esquire (*w/enclosure*)

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The Honorable Jenny Abbott Kitchings
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