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. 2017-002242

John Doe 2, ... 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*:

For the reasons set forth below, this Court should deny Plaintiff John Doe 2's ("Plaintiff") Petition for *Certiorari* and decline his invitation to review this matter.

SUMMARY

Many crimes are preceded by missed opportunities for intervention. Often, hindsight reveals that the perpetrator crossed paths with numerous people or institutions who, had they been more observant or more suspicious, might have taken action to prevent future acts. Such is the case with Skip ReVille. During his abuse, he escaped detection by multiple employers, his friends and colleagues, the parents of his victims, and even his own wife. In his Petition for Writ of *Certiorari,* Plaintiff attempts to impose liability upon The Citadel for having missed an opportunity to stop ReVille; that is, for failing to protect the public at large from ReVille's future criminal acts. This Court should deny Plaintiff's Petition because The Citadel owed no duty to Plaintiff or to other unknown potential victims and because creating such a duty would impose potentially ruinous exposure to liability upon anyone who ever voluntarily undertakes to investigate criminal activity.

Plaintiff ignores decades of well-reasoned case law and asks the Court to recognize, for the first time ever, an unprecedented and wide-ranging theory of liability. In doing so, Plaintiff also asks this Court — without any reasonable restrictions, limitations or guidelines — to punish people or institutions who engage in investigations and efforts to improve safety. Specifically, Plaintiff urges this Court to conclude that, in deciding to investigate a claim of past sexual abuse, The Citadel undertook a duty of care to all of the alleged perpetrator's potential future victims, even those who had no connection to The Citadel. Without proof of any reliance on The Citadel's alleged undertaking, Plaintiff seeks to open a Pandora's box of potential liability that would punish those who investigate and discourage efforts to maximize safety. The implications of such a rule would threaten potentially limitless liability for nearly any organized entity having contact with children or potential abusers.

Additionally, Plaintiff argues that The Citadel owed a duty of care because it "created" the danger posed by his abuser. Plaintiff ignores the fact that the record is devoid of evidence of any affirmative action taken by The Citadel to create the circumstances where Plaintiff was abused. At its heart (and free of Plaintiff's clever characterizations), Plaintiff's claims boil down to a simple contention that The Citadel failed to protect Plaintiff as part of the general public from a danger that it should have been aware of. South Carolina law has never recognized such a claim and should not begin doing so now.

Finally, Plaintiff argues that the Court of Appeals should have found a statutorily-created duty of care under Title IX. However, this case does not involve the denial of access to educational opportunities that is a necessary requirement to the invocation of Title IX. As a stranger to The Citadel, Plaintiff cannot claim entitlement to Title IX protection.

Consequently, it would be imprudent for the Court to grant *certiorari* in this case.

INTRODUCTION

A. Procedural History

Plaintiff sued The Citadel in the Court of Common Pleas for Charleston County for failing to prevent Louis "Skip" ReVille ("ReVille"), a former counselor at The Citadel's former summer camp ("Camp"), from sexually abusing him. Plaintiff never attended the Camp or The Citadel, and in fact had no affiliation with The Citadel.

Plaintiff' claims against The Citadel sound in negligence, gross negligence, and outrage. (*See* App. pp. 86-107). On or about April 24, 2015, The Citadel filed a Renewed Motion for Summary Judgment in the trial court. (*See* App. pp.1577-1826). On July 6, 2015, the Court granted The Citadel's Renewed Motion for Summary Judgment, which Plaintiff appealed to the South Carolina Court of Appeals. (*See* App. pp. 73-85).

By published opinion dated August 2, 2017 (withdrawn, refiled and substituted on September 27, 2017), the Court of Appeals affirmed the entry of summary judgment. (*See* App. pp. 2169-80). On August 23, 2017, Plaintiff filed a Petition for Rehearing. (*See* App. pp. 2115-44). On September 27, 2017, the Court of Appeals denied Plaintiff's Petition for Rehearing (and

withdrew, substituted and refiled its opinion). (*See* App. pp. 2167-68). Plaintiff then filed the instant Petition for Writ of *Certiorari*.

B. Factual Background

1. The 2007 Report

On April 23, 2007, the father of a nineteen-year-old former camper ("Camper") at the Camp (*not* the Plaintiff) informed The Citadel that ReVille had engaged in sexual misconduct with his son five years prior. Camper's father spoke by telephone with Mark Brandenburg, The Citadel's General Counsel ("Brandenburg"), and told Brandenburg that once during Camper's stay at the camp, a counselor named "Skip" invited his son into his room, where they watched pornography and masturbated. (*See* App. p. 234 ¶ 3). Brandenburg subsequently spoke on the telephone with Camper, who confirmed that "Skip" once invited him into his room, showed him pornography, and convinced him to masturbate. (*See* App. p. 234¶ 4). Brandenburg telephoned ReVille, then an employee at The Citadel's Writing Center, who coincidentally had submitted his resignation on March 22, 2007 to pursue other interests and had recently worked his final day. (*See* App. pp. 241-45). ReVille emphatically denied Camper's allegations.

Brandenburg continued his investigation on July 1, 2007, when he met with Camper and his parents in Texas. Camper's father expressed a desire for privacy, stating, "I don't want to be another name in the Charleston papers" or to become "a part of Charleston gossip." (*See* App. pp. 248-50). Camper's father noted that Camper had applied for admission to The Citadel — but The Citadel had not accepted him — and suggested that The Citadel "can be part of the root cause to fix him" by admitting him. (*See* App. p. 249 lines 16-17). Camper's father opined that admitting his son as a cadet would be, "a very inexpensive way for The Citadel to say, do you know what – we'll fix our own." (*See* App. p. 249 lines 19-23).

In accordance with the wishes of Camper and his family, Brandenburg worked with The Citadel's admissions staff in an effort gain admission as a cadet for Camper. (*See* App. pp. 253:25-254:25). When The Citadel determined that Camper lacked the requisite academic qualifications, Brandenburg proposed to Camper's family that The Citadel's insurer pay for

courses to permit Camper to reapply for admission. (*See* App. pp. 255:1-256:16). After the meeting, Brandenburg never heard again from Camper or his parents. There is no evidence that he ever received any independent corroboration of Camper's claim of having been victimized at the Camp, which was no longer in operation.

The following facts with regard to Camper's 2007 report are undisputed (*see generally* App. pp. 246-50):

- The report concerned an incident that occurred five years prior.
- The summer camp closed a year prior to Camper's report.
- ReVille resigned from his employment at The Citadel (which involved working for the college, not the Camp) prior to Camper's report.
- Camper's report did not identify any physical sexual contact.
- Brandenburg was unable to obtain independent verification that any other camper was present during the abuse.
- Camper was an adult with the autonomy to make his own decision about how to handle his accusations of misconduct.
- Camper and his family never reported the incident to law enforcement prior to ReVille's arrest in 2011.
- Camper did not follow up with Brandenburg after the July 1, 2007 interview.

In light of these factors and in compliance with the law, The Citadel did not report the alleged incident to law enforcement

In October 2011, ReVille's sexual misconduct with Camper and many other victims came to light, and various law enforcement agencies initiated investigations. ReVille was ultimately charged with crimes in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous charges of criminal sexual conduct with minors, solicitation of minors, lewd acts upon a minor, and dissemination of obscene material. The Honorable R. Markley Dennis, Jr., sentenced ReVille to fifty years imprisonment.

2. Plaintiff's Abuse

This is a suit by a young man whom ReVille abused over a course of years, beginning in 2005 (years before Camper approached The Citadel) until the summer of 2007, when Plaintiff's family moved to Atlanta. Plaintiff's exposure to ReVille had no connection to The Citadel. In fact, before Camper made his allegations about ReVille, ReVille was actually renting a guest apartment at Plaintiff's home, helping care for Plaintiff and his brother when their father was away. All the while, ReVille was abusing them.

When the actual incidents of abuse of Plaintiff are charted, three facts appear: (1) ReVille met and began abusing Plaintiff two years *after* he stopped working at the summer camp and two years before Camper's 2007 report; (2) most of ReVille's abuse occurred before Camper's report to The Citadel; and (3) ReVille's access to Plaintiff had no connection to The Citadel.

DATE	**DESCRIPTION**
2005	ReVille abused Plaintiff at least 12 times at his home and in his car. (*See* App. pp. 1624:2-1626:20).
2006	ReVille abused Plaintiff "three, four times a week" in 2006, approximately 200 times. (*See* App. pp. 1628:17-1630:2).
2007 (prior to April 23, 2007)	From the beginning of 2007 through April 23, 2007, ReVille abused Plaintiff approximately "two to three times a week." (*See* App. pp. 1634:25-1635:4).
April 23, 2007	**Date of Camper's call to The Citadel.**
May, 2007	ReVille only had two or three interactions with Plaintiff in May, 2007. (*See* App. pp. 1633:12-1634:15).
June, 2007	There were only six to eight interactions. (*See id.*).
July 1, 2007	**Brandenburg interviewed Camper.**
July, 2007	ReVille only had four to six interactions with Plaintiff in July of 2007. (*See id.*).
August, 2007	ReVille does not believe he abused Plaintiff in August of 2007 (or any time after July, 2007). (*See* App. pp. 1633:21-1634:24).

ReVille confirmed that he abused Plaintiff approximately twelve times between May, 2007 and the time Plaintiff's family moved out of state. (*See* App. p. 1631:15-25).

For the reasons set forth herein, this Court should decline Plaintiff's request for it to grant *certiorari*

ARGUMENTS

A. Standard of Review

The Appellate Court Rules set forth guidelines to govern this Court's analysis of a request for a writ 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 Supreme 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.
>
> (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 discussed below, Plaintiff's legal arguments are flawed and not well-supported. However, aside from those substantive legal reasons, the Court should deny Plaintiff's Petition for Writ of *Certiorari* because it does not present an opportunity for the Court to articulate law that is consonant with sound public policy. To the contrary, Plaintiff's primary argument in his Petition for Writ of *Certiorari* represents bad public policy that this Court should not entertain.

Plaintiff's main argument is that The Citadel voluntarily undertook a duty of care to him when it investigated allegations that *another, unrelated minor* made about ReVille, claiming improper conduct at the Camp occurring years prior. Virtually every institution and every business has a policy of investigating alleged crimes and incidents on their premises, which is beneficial and should be encouraged. Such investigations can often lead to increases in safety, positive changes, and honest self-evaluation. South Carolina law should encourage such investigations and efforts to improve safety. However, Plaintiff invites the Court to impose upon

anyone who investigates a possible crime a legal duty to all future victims. Plaintiff does not propose any boundaries to this duty or suggest any common-sense limitations. Plaintiff does not set forth legally-supported restrictions that would protect well-meaning institutions and businesses. Instead, Plaintiff proposes that *any* entity that conducts an investigation owes a duty flowing to *any* person who might be abused or assaulted by the perpetrator in the future. It is unimaginable that this could possibly be reasonable public policy.

To the contrary, Plaintiff's contentions in his Petition for Writ of *Certiorari* run directly counter to the basic law that one does not owe a duty to prevent criminal acts, to the point that the exception would swallow the rule. Therefore, this Court should deny Plaintiff's Petition for Writ of *Certiorari*.

B. The Court of Appeals Correctly Determined That The Citadel Did Not Owe Plaintiff a Duty of Care

Plaintiff must prove three elements to recover for negligence: (1) that The Citadel owed him a duty of care; (2) The Citadel breached that duty by a negligent act or omission; and (3) damage proximately resulting therefrom. *See Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). "If any of these elements is absent a negligence claim is not stated." *See Summers v. Harrison Constr.*, 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct.App.1989). "If the plaintiff fails to prove [The Citadel] owed h[im] a legal duty of care, []he fails to prove actionable negligence." *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) (affirming summary judgment).

"[T]he existence of a legal duty is a question of law for the court." *See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 506-07, 737 S.E.2d 512, 515 (Ct. App. 2012) (affirming grant of summary judgment). This Court "will not extend the concept of a legal duty of care in tort liability beyond reasonable limits." *See Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 190, 666 S.E.2d 247, 252 (2008) (citations omitted); *accord Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (citation omitted).

"'Generally, there is no common law duty to act. An affirmative legal duty, however, may be created by statute, contract relationship, status, property interest, or some other special circumstance.'" *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314-15, 743 S.E.2d 109, 122 (Ct. App. 2013); *accord Arthurs v. Aiken Cty.*, 338 S.C. 253, 264, 525 S.E.2d 542, 547 (Ct. App. 1999) (citations omitted), *aff'd*, 346 S.C. 97, 551 S.E.2d 579 (2001). "[F]oreseeability of injury, standing alone, does not give rise to a duty." *See Oblachinski v. Reynolds,* 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011) (refusing to find duty to third parties foreseeably injured by sexual abuse examination).

Importantly, South Carolina law has traditionally refused to recognize legal duties to protect plaintiffs from intentional third-party actions. In this regard, this Court has refused to impose a duty of care to prevent acts of violence by third persons:

> Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. [Citations omitted.] We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.

See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Respectfully, there is no evidence in this case to justify departure from the general rule declining to impose a duty to prevent third persons from committing acts of violence.

In his Petition for Writ of *Certiorari,* Plaintiff asserts that Court of Appeals erred in concluding that he had not demonstrated that The Citadel owed him a duty of care. Specifically, Plaintiff argues that: (a) The Citadel voluntarily undertook a duty; (b) The Citadel negligently or intentionally created the risk; and (c) a statute (Title IX) imposed a duty of care on The Citadel. For the reasons discussed below, Plaintiff's arguments all lack merit.

1. This Court Has Never Imposed a Duty of Care to Unknown (and Unknowable) Potential Future Victims

Under any theory Plaintiff proposes, his arguments fail because they would impose legal obligations in circumstances where none has ever previously existed. Specifically, this Court has never recognized a duty of care flowing to a plaintiff who was *neither specifically known to the defendant nor a member of a defined group in a fixed location.*

It is well-settled that a duty flows from the *relationship* between the defendant and injured party:

> "A tortfeasor's duty arises from his relationship to the injured party." *South Carolina State Ports Authority v. Booz–Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986). It is essential to liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care. 57A Am.Jur.2d Negligence § 89 (1989). Where this relationship is "too attenuated," a duty will not arise.

See Ravan v. Greenville Cnty., 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). As discussed below, all of the cases that Plaintiff cites involve one of two situations: (a) a victim who is specifically known to the defendant; and (b) an injury to an unknown person from the condition of real property open to the general public. Neither situation exists here, and Plaintiff cites no authority recognizing a duty of care outside of those limited circumstances. Moreover, Plaintiff presents no evidence whatsoever of any relationship between himself and The Citadel. There is no evidence that The Citadel had ever known of Plaintiff's existence (or that ReVille was abusing him) prior to the filing of this lawsuit. There is no evidence that The Citadel knew that ReVille had access to Plaintiff or was actually abusing him. There is no evidence that Plaintiff's claims relate to the condition of The Citadel's property open to the general public. Simply put, there is simply no evidence whatsoever of any circumstance that could give rise to a duty of care under existing South Carolina law (or any well-supported extension of existing law).

Therefore, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

2. There Is No Factual or Legal Basis for a Duty of Care to Be Imposed Upon The Citadel for an Alleged Voluntary Undertaking

a. South Carolina Law Supports the Decisions of the Lower Courts

Plaintiff first argues that the Court should grant *certiorari* 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 Writ of *Cert.*, at 2). Plaintiff's argument misses the mark, insofar as the Appendix is devoid of any evidence of a voluntarily undertaken duty.

Initially, The Citadel notes that Plaintiff contends that this analysis is outside of, or in addition to, the five exceptions to the absence of a duty to prevent third-party acts of violence under *Faile, supra*: "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." (*See* Pl.'s Pet. for Writ of *Cert.*, at 9-10). The Citadel observes that one *Faile* exception recognizes that a duty may exist "where the defendant voluntarily undertakes a duty." In any event, Plaintiff's argument lacks merit because, under any legal theory, this Court should not impose a duty of care on The Citadel.

In accordance with the Restatement (Second) of Torts § 323, South Carolina recognizes that a party may voluntarily undertake a legal duty only 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). Notably, Section 323 requires that the defendant act to render services to a particular person for *that person's* protection.

South Carolina's jurisprudence concerning voluntarily undertaken duties is limited to Section 323. Importantly, this Court has repeatedly declined to recognize a voluntary duty under

the broader Section 324A[1] (which recognizes a duty where a defendant undertakes to render services to "Person A" that is necessary for the protection of a third-party, "Person B":

> 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"). This Court has recognized an undertaken duty of care only in the specific circumstances enumerated in Section 323.

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 his protection. In fact, the record does not suggest that The Citadel ever undertook to render any services *to Plaintiff* or to act specifically for his benefit. There is no evidence that Plaintiff relied on the existence of any such undertaking. As set forth above, there is no evidence that The Citadel ever even knew who Plaintiff was before his filing of this lawsuit.

The Court of Appeals correctly concluded that Plaintiff could not succeed on an action under the Section 323. As its opinion notes, (in addition to other requirements) for a voluntary undertaking of a duty of care, Plaintiff must show either that: (a) The Citadel increased the risk of harm to him or (b) his injury was the result of reliance on The Citadel's undertaking. *See Johnson*, 401 S.C. at 506, 737 S.E.2d at 514 ("Section 323(a) contemplates a party relying on the

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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.

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 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 Writ of *Certiorari* does not demonstrate the existence of either prerequisite, and the record is devoid of any evidence supporting either requirement.

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. Plaintiff cannot conceivably show that he relied on any action of The Citadel.

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.

For these reasons, the Court of Appeals correctly held that summary judgment was proper in this case, as there is no evidence of a voluntary undertaking under Section 323.

The Court of Appeals also correctly noted that, even if The Citadel's internal policies required an investigation, these adoption of these policies could not have possibly been a voluntary undertaking of a duty. As this Court has held, the mere existence of a policy is not enough for a voluntary undertaking of a duty:

> We also hold Wal-Mart did not voluntarily undertake a duty. It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this internal policy cannot be said to constitute the voluntary

> undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.

See Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 248, 711 S.E.2d 908, 912 (2011). At most, The Citadel's policies — which Plaintiff devotes much of his Petition for Writ of *Certiorari* to discussing — *could* define the *scope* of a duty, if one existed from other sources.

Therefore, for the foregoing reasons, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

b. Plaintiff's Cited Cases Do Not Support His Misplaced Arguments

Plaintiff cites numerous cases for his argument that the Court of Appeals misapplied the law in refusing to impose a duty on The Citadel because of its perceived voluntary undertaking. In this regard, Plaintiff asserts that "*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." (*See* Pl.'s Petit. for Writ of *Cert.*, at 14). However, Plaintiff's authority is distinguishable and lends no support to his arguments. Contrary to Plaintiff's contentions, the cases he cites all involve two very specific circumstances: (a) cases where the negligence involves the condition of real property open to the public or impacting the public; and (b) cases where the plaintiff *relied on defendant's undertaking* or was a known beneficiary of an undertaking. Plaintiff's cases are unavailing because neither scenario is present here.

In *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), 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, harming the plaintiff landowners, 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.

Unlike *Miller*, there is no evidence that The Citadel intended – through its operation of the summer camp or handling of Camper's report – to benefit Plaintiff, a complete stranger who was abused in circumstances beyond The Citadel's control. The plant operator in *Miller* undertook duties that naturally protected third-persons who, by virtue of the physical location of their properties, would be harmed 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" to control a third person 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 injury caused by the maintenance of property within The Citadel's control. There is no evidence that a condition of The Citadel's property caused Plaintiff's abuse. While a municipality may be liable for injury to a previously-unknown person who was injured on a known, existing sidewalk open to the public, this does not extend the voluntary undertaking doctrine to the facts of this case. Plaintiff tries to apply a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* and *Vaughn* to the point of breaking. Those cases do not support the imposition of a duty in 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 there was specific reliance on a representation that 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). Plaintiff presents no evidence of such reliance here, as he was a stranger to The Citadel and had no interaction with 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."). Unlike Plaintiff, the plaintiff in *Roundtree* was a known, intended beneficiary of the lender's undertaking.

- 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). Conversely, there is no evidence that Plaintiff relied upon any undertaking by The Citadel.

None of these cases supports imposing a legal duty here, where Plaintiff presents no evidence that a relationship of any type between himself and The Citadel or that he relied on The Citadel's alleged undertaking. Plaintiff's authority is simply inapposite.

As a result, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

3. There Is No Factual or Legal Basis for a Duty of Care to Be Imposed Upon The Citadel for the Alleged Negligent or Intentional Creation of a Danger

Plaintiff next argues that The Citadel owed him a duty of care because it "created the risk" that ultimately occurred or increased the risk of such harm. However, Plaintiff presents no evidence that The Citadel actually "created" any danger at all. Instead, he tries to substitute an alleged general "foreseeability" that ReVille *might* abuse minors somewhere in the Charleston area. He suggests that The Citadel somehow "created" a risk by concealing ReVille's abuse. However, this is not equivalent to creating a risk in the first instance. Rather, Plaintiff merely repackages allegations that The Citadel failed to protect him from an existing risk.

Plaintiff presents no evidence that The Citadel was actively involved in ReVille's abuse of him. He concedes that he has no evidence that The Citadel did anything to cause ReVille to become an abuser. He further has no evidence that ReVille abused him at the summer camp. He has no evidence that The Citadel placed him in ReVille's custody or presence. He has no evidence that The Citadel provided a location for ReVille to abuse Plaintiff. He has no evidence that The Citadel acted to encourage ReVille to abuse Plaintiff. Plaintiff has no evidence that The Citadel even did anything to make it *more likely* that ReVille would abuse him than it would have been had The Citadel not acted. At most, Plaintiff's claim is that The Citadel failed to stop an existing risk that it did not create.

Plaintiff cites no authority imposing a duty for creation of a risk under similar circumstances, where the defendant did not specifically create the risk in the first instance by causing the actor to commit acts of violence. In a rare case in this state imposing a duty for "creation" of a risk, this Court imposed a duty where a defendant was *actively involved* in staging and creating the actual scenario in which violence occurred:

> Respondents were well aware of Baker's unrelenting *violent tendencies toward Edwards*. Edwards had called the sheriff's office to report Baker's harassment on numerous occasions, and the sheriff's office arranged for Edwards to stay in a hotel after one of the incidents. The sheriff's office and the County, through its agent Howland, *arranged the bond revocation hearing at the magistrate's office with no security present.* Despite Respondents' awareness that Edwards feared Baker and was reluctant to attend the bond revocation, Respondents strongly *encouraged Edwards' presence.*

See Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 293-94, 688 S.E.2d 125, 130 (2010) (emphasis added). Unlike *Edwards,* The Citadel did not actively take steps to create the scenario in which ReVille could abuse Plaintiff. At most, Plaintiff claims simply that The Citadel failed to protect him from a danger that ReVille alone created.

Plaintiff also cites *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), where a bottle thrown from a balcony at a rock concert hit an attendee. The auditorium had only 14 guards to control a large and unruly crowd. Witnesses testified that patrons were

openly drinking from liquor bottles and that bottles and glass were on the floor during the concert. This Court rejected the auditorium's argument that it was immune from suit under S.C. Code § 15-78-60(20), which insulates a governmental entity from liability for the criminal acts of third persons:

> Appellant cannot successfully defend that respondent's injuries were caused by the wrongful criminal act of a third party, where the very basis upon which appellant is claimed to be negligent is that appellant created a reasonably foreseeable risk of such third party conduct. Consequently, the trial judge did not err in refusing to dismiss the action.

See id., 301 S.C. at 247, 391 S.E.2d at 549. This case is inapposite for several reasons.

First, *Greenville Memorial Auditorium* does not address whether a duty existed, but instead whether governmental immunity applied. Additionally, *Greenville Memorial Auditorium* involved an incident on the defendants' property and under its supervision. In other words, the defendant there created the circumstance where the danger could occur. In this case, the record does not show any similar circumstances where The Citadel actively created a circumstance where ReVille could abuse Plaintiff. Instead, the abuse occurred off-campus and to an unknown victim in circumstances that were unknown to The Citadel.

Plaintiff offers no sound public policy justification to change South Carolina's well-established jurisprudence in this area. Plaintiff purports to champion enhanced protection for victims of child sexual abuse. However, his proposal, if adopted, would have the opposite effect. By imposing unlimited, potentially ruinous liability upon anyone who undertakes to investigate or prevent crime, the Court would discourage people, businesses, and institutions from ever doing anything that might be interpreted as voluntarily undertaking a duty of care. This is the opposite of the behavior that the law of South Carolina has long encouraged.

For all of the foregoing reasons, this Court should deny Plaintiff's Petition for Writ of *Certiorari.*

4. There Is No Factual or Legal Basis for a Duty of Care to Be Imposed Upon The Citadel Under Title IX

Plaintiff finally 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." Again, Plaintiff's argument misses the mark.

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. § 168l(a). The Court of Appeals correctly concluded that Plaintiff — who had no prior relationship with The Citadel — was not within the class of persons that Title IX protects.

Plaintiff primarily contends that Title IX applies because Plaintiff was a "person" under that statute. The Citadel does not dispute that Plaintiff is a natural "person" who could, *in appropriate circumstances,* fall within the scope of Title IX. However, Plaintiff's construction of Title IX is overly simplistic and ignores the rest of Section 1681(a). Specifically, Title IX applies only to "person[s]" who are "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 id.* There is no evidence in the Appendix that Plaintiff was denied the benefit of any education program or activity. Plaintiff has not cited to any authority disputing that Title IX is intended to protect only "participants and students of educational programs," but presents no evidence that he is such a participant or student.

To the contrary, Title IX does *not* protect individuals like Plaintiff, *i.e.,* non-students with no educational affiliation. *See Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("[T]he 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 Court of Appeals correctly concluded that Plaintiff may not rely on Title IX to impose a duty on The Citadel.

In his Petition for Writ of *Certiorari*, 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). Those cases do not help Plaintiff, since the persons that Title IX protected in those cases *were students*, unlike Plaintiff. *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. Consequently, *Simpson* and *Crandell* do not support Plaintiff's baseless contention

that Title IX protects those who have no relationship with The Citadel and who were not deprived of any "education program or activity."

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Petition for Writ of *Certiorari* and decline Plaintiff's ill-reasoned request for it to review this matter.

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Dated: November 27, 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. 2017-002242

John Doe 2, ... Appellant,

v.

The Citadel ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Writ of *Certiorari* by depositing a copy of it in the United States Mail, postage prepaid, on November 27, 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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