THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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John Doe 2 ..... Appellant,

v.

The Citadel ..... Respondent.

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# APPENDIX VOLUME I OF V

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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# RECORD ON APPEAL

## VOLUME I OF IV

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| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF CHARLESTON** | ) | **COURT OF COMMON PLEAS**<br>**NINTH JUDICIAL CIRCUIT**<br>**CASE NO: 2012-CP-10-1858** |
| JOHN DOE 2,<br><br>Plaintiff,<br><br>vs.<br><br>THE CITADEL,<br><br>Defendant. | ) | **PROPOSED ORDER** |

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Presently before the Court is Defendant's Motion for Summary Judgment. Plaintiff John Doe 2 has filed a Memorandum in Opposition to the Motion. On April 18, 2014, the Court heard oral arguments on the motion.

The Court considered the Defendant's Motion for Summary Judgment and the Plaintiff's Opposition Memorandum. After reviewing the various pleadings, exhibits, pertinent case law, and the arguments of counsel, the Court now DENIES Defendant's Motion for the reasons hereinafter stated.

**STANDARD OF REVIEW**

Summary judgment is appropriate only where there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law." Grooms v. Marlboro County School Dist., 414 S.E.2d 802, 803 (S.C. Ct. App. 1992). In evaluation of whether a genuine dispute as to material facts exists, the court must liberally construe all evidence, including all reasonable inferences flowing from that evidence, in the light most

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favorable to the non-moving party. See, e.g., David v. McLeod Regional Medical Center, 626 S.E.2d 1, 3 (S.C. 2006); Fleming v. Rose, 567 S.E.2d 857, 860 (S.C. 2002); Grooms, 414 S.E.2d at 803.

On a motion for summary judgment, the trial judge must take into consideration all documents and evidence contained within the case's record, to include pleadings and discovery documents such as depositions, answers to interrogatories, and admissions, as well as any affidavits submitted by the parties in conjunction with the motion. See Higgins v. Medical Univ. of South Carolina, 486 S.E.2d 269, 272 (S.C. Ct. App. 1997). Summary judgment is not appropriate where the parties disagree as to the conclusion to be drawn from facts pertinent to the case, and it "is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." Madison ex rel Bryant v. Babcock Center, Inc.; S.C. Dep't of Disabilities and Special Needs; and Batchelor, 638 S.E.2d 650, 655 (S.C. 2006); Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672, 675 (S.C. 2000).

**PROCEDURAL BACKGROUND AND STATEMENT OF RELEVANT FACTS**

On March 19, 2012, Plaintiff filed negligence/gross negligence and outrage causes of action against Defendant for its conduct in concealing a 2007 report of child sexual abuse by Louis "Skip" ReVille and allowing ReVille to leave Citadel employment as a decorated alumnus and former employee, instead of as a known child molester, where he was able to continue contact with children and sexually abuse Plaintiff. Defendant Answered on June 20, 2012. To date, the evidence in this complaint consists of deposition testimony, interrogatory and request for production responses, and voluminous documentation.

In reviewing the evidence in the light most favorable to the Plaintiff, as the Court must do, the evidence establishes the following. The Citadel had knowledge in 2001, during ReVille's first



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summer as a counselor at The Citadel's Summer Camp [hereinafter The Camp], that a well-respected volunteer counselor and Citadel graduate, Michael Arpaio, had sexually abused and molested a ten-year old male camper in his dorm room during the course of The Camp's first session. The Citadel was later informed that additional minor campers were sexually abused by Arpaio while attending The Camp between 1995 and 2000.

Thereafter, on August 6, 2001, The Citadel received a letter from Sergeant Middleton of the Charleston Police Department that highlighted several concerning practices occurring at The Camp, including that "[s]ome of the counselors are allowing certain campers to leave their rooms . . . to go into camp counselor's room[s], watch movies, and fall asleep in the same bed with counselors until the following morning." (Middleton Letter, August 6, 2001). The letter noted that "[s]ome of the counselors engage in sexual conversation in the presence of the campers." Notably, upon receipt of this letter, The Citadel took no action despite knowing that multiple counselors were engaging in such concerning practices. (Garrott Deposition, Vol III, p. 205-207). Indeed, ReVille has admitted to abusing nearly eight campers during the 2001 Summer Camp. To do so, he lured campers into his room at night with food and movies—the very practice highlighted in Middleton's letter. (ReVille Affidavit, Sept. 20, 2013). The Citadel did not interview counselors and campers or implement various safety practices such as random and frequent room checks. (Id.).

ReVille abused a camper, who notified The Citadel of the abuse in April 2007 [hereinafter identified as Camper Doe], at least five times the following summer in 2002 in ReVille's barracks room at night. Camper Doe has testified not only to his own abuse by ReVille but to the abuse of others at The Citadel camp in 2002:

> A. It wasn't just {John Doe BK} and I. Skip ReVille molested and abused multiple children at that camp. It wasn't just {John Doe BK] and I.



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Q. How do you know that?

A. Because I was there.

Q. Did any of those other kids – campers tell you that they were abused by Skip ReVille?

A. They didn't have to tell me. I was sitting right next to them masturbating.

*********

Q. But now you're telling me, in 2014, that there were more occasions than that one; is that correct?

A. Yes.

*********

Q. Tell me who was present when those other incidents took place.

A. I knew {John Doe BK}; he was my friend. The other—I remember there were—there was one other kid from my section that I didn't know that well, but Skip knew him somehow. And there were other kids from different sections that would come in at different times.

*********

A. We ended up staying in Skip's room after lights out – it had to have been more than five times.

Q. And during those five times, what happened?

A. It was always the same deal; it was the pattern. You know, we'd watch movies and do whatever during the day. But after lights out, the kids that didn't know about what was going on and the kids that who hadn't been introduced to it yet, they were allowed to leave the room.

Q. They were allowed to leave the room?

A. Yes.

Q. Could you have left the room?

A. I didn't feel that I could have, no.

(Camper Doe Deposition, March 25, 2014, p. 145:4-12; 146:18-25; 147:5-19).

During the summer of 2002, The Citadel operated The Camp as it had in the years leading up to Arpaio's abuse—turning a blind eye to inappropriate conduct, policy violations, and Citadel procedures requiring termination and reporting of sexual assault, sexual abuse, sexual harassment, sexual misconduct, and immoral and illegal conduct. Camp Director Major Bill Bates, Deputy Director Jennifer Garrott, Colonel John Lackey, Commandant General Emory Mace, and others were aware of ReVille's policy and code of conduct violations and knew, or should have known, that ReVille was sexually harassing, molesting and abusing The Camp's minor campers on The Citadel campus. These individuals, as well as other Citadel officials and staff, were aware of ReVille's deviant, pedophilic tendencies as early as 2001, wherein it was noted that ReVille was "senior counselor material if learns to distance himself from campers . . ." (2001 Employee Evaluation).

As well during the summer of 2002, The Camp's Deputy Director, Jennifer Garrott, caught ReVille alone with a minor camper in his dorm room. Both Garrott and Camp Director Major Bates had heard that ReVille had campers in his room after Taps and discussed the issue with ReVille, but they specifically declined to reprimand or terminate his employment despite established Citadel policies and procedures requiring immediate termination for such a violation. (ReVille Affidavit, Sept. 20, 2013). They also took no action against ReVille despite specifically emphasizing to counselors the year prior in 2001 that campers and counselors were not to be in the same barracks room alone. The Citadel completely disregarded the rule. (Id.).

Specifically, as early as 2001, The Citadel required the counselors to abide by a Counselor Code of Conduct that included the provision: "[s]exual activity, in any form, with any person, is prohibited while on campus. "Sexual activity" includes kissing, hand-holding, lying together,



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groping, fondling, and sexual intercourse." "Violation of any of the above policies will result in immediate dismissal." (Counselor Code of Conduct). Furthermore, the summer camp "Official Camp Policies Regarding Sexual Misconduct Issues," in part, bestowed the following requirements on counselors and imposed specific responses to violations on The Citadel:

- Any sexual relationship between any camp employee and a camper is prohibited. Any person not adhering to this rule will be immediately dismissed from his/her employment with the citadel and will be prosecuted to the fullest extent of the law.
- Camp employees will keep an open door when visiting camper rooms alone. When a camper visits a counselor's room alone, it is the responsibility of that camp employee to ensure that the door is fully open and that it stays open until another alert person is present in the room.
- Regardless 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.

Camp Director, Jennifer Garrott, terminated another counselor for being alone in his barracks room with a male camper in violation of the policy. (Garrott Deposition, Vol II, p. 39-40). However, when she caught ReVille with a camper alone in his room in 2002, she refused to terminate ReVille. (ReVille Affidavit, Sept. 20, 2013). Ms. Garrott took no action in response to ReVille's policy violation, neglecting to even document the offense in ReVille's employment file.

Then in 2003, Director Garrott again walked in on ReVille alone with a minor, Camper Doe 6, where ReVille was rubbing "Icy-Hot" on Doe 6's leg. Again, Garrott took no action on this terminable offense. Also in 2003, Garrott's assistant spoke to ReVille four to five times about having minors alone in his room; however, no further action was taken. Colonel Lackey similarly received a report from a counselor that ReVille was having minors in his room. Despite ReVille's repeated violations of the camp policy, The Citadel did not terminate him or document the infractions in ReVille's file. (ReVille Affidavit, Sept. 20, 2013). Instead, The Citadel permitted



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ReVille to continue serving as The Camp's Senior Counselor entrusted with the responsibility of the safety and well-being of the very boys he was abusing.

Ms. Garrott now admits she should have fired ReVille for his violations of the camp rule forbidding counselors from being alone in barrack's rooms with campers. (Garrott Deposition, Vol. II, p. 55-56). Defendant's expert witness, Ann Franke, states that policies regarding the safety of children should be strictly enforced, absent some exigent circumstance for the policy violation, and serious consequences imposed for violations in order to rightly protect children. (Franke Deposition, March 17, 2014, p. 49:13 through p. 51:19).

Additional Citadel policies controlling its camp counselors is found in the Barracks Guard Duties, Memorandum of Instruction, April 2001, where such duties included that "[d]uring evening hours, guards conduct walk-through checks of the barracks. A walking check is conducted on a random basis every hour between 0200 and 0600. Results of checks are to be logged." However, neither the camp directors, the Tactical Officer, nor the CCQ visited ReVille's room after taps, despite the frequency of campers coming to ReVille's room at night. (ReVille Affidavit, Sept. 20, 2013).

**CAMPER DOE'S 2007 DISCLOSURE TO THE CITADEL**

On April 23, 2007, Camper Doe's father called President Rosa in his office at the Citadel, because the father had just learned that his son had been sexually abused by an adult male counselor at the Citadel camp. (Affidavit of Father Doe, May 24, 2013, p. 1). The father had two priorities—taking care of his son and making sure that the counselor, Skip, did not abuse any other children—and he, his wife, and the victim decided "the most effective way to stop or prevent future abuse was to report [their] son's abuse to Lt. Gen. John W. Rosa." (Id.). President Rosa gave the complaint to the Citadel's General Counsel, Mark Brandenburg, who returned the father's call.

(Brandenburg Deposition, June 2013, p. 50, 104-105). The father asked Mr. Brandenburg whether he was calling on behalf of President Rosa, because the family "did not want anything to fall through the cracks" and believed President Rosa would see the evil in the sex-abuse and take appropriate care of the complaint. (Affidavit of Father Doe, p. 2 and Camper Doe Deposition, March 26, 2014, p. 226, 228). The father reported that his son had been sexually abused by camp counselor Skip while his son was a camper in the summer of 2002—that Skip showed pornography and masturbated with his son, showered with the campers, and had done this to another named camper. (Brandenburg Deposition, p. 109).

On that same day, Mr. Brandenburg had a telephone conversation with Camper Doe, where Camper Doe told him the counselor who abused him was Skip; that Skip had campers watch pornography and masturbate and Skip would join in; that Skip did this with other campers for more than one year; and other counselors were never involved. (Brandenburg Deposition, p. 75, 107, 111-112). On April 23, 2007, The Citadel had the name of a Citadel employee accused of child sexual abuse and the names of multiple victims. (Brandenburg Deposition, p. 112).

On April 24, 2007, Mr. Brandenburg called ReVille at the Citadel's writing center where he was working and asked ReVille to come meet him in Bond Hall. (ReVille Affidavit, May 21, 2013). Col. Trez, Executive Assistant to President Rosa, attended this meeting with Mr. Brandenburg, and rather than take any immediate and effective corrective action, they told ReVille of the child sexual abuse complaint and made it known that their main concern was to protect the Citadel. ReVille asked them what he needed to do, and "their reply was that, while they conduct their own investigation, I should lay low and stay off campus." (Id.). Mr. Brandenburg confirms that the meeting occurred on April 24, 2007; however, by June 2013, he states he cannot recall whether he told ReVille to "lay low" and to stay off campus. (Brandenburg Deposition, p. 98-99,

130-131). Defendant's expert agrees that allowing a sexual molester to leave campus means that he is a threat to minors wherever he goes off campus. (Margolis Deposition, Vol. I, p. 20:6-11).

Defendant's expert, Gary Margolis, opined to the foreseeability that a child sexual abuser will continue to abuse children where he works and spends his time:

Q. Do you agree with me, Dr. Margolis, that child sexual predators create risk of harm to children in their communities?

A. Yes, sir. I do.

Q. And why?

A. They pose a risk to the health and safety of children.

Q. If a child sexual predator is accused of abusing 11-to-15-year-old boys in the past, in your opinion, is it foreseeable that he will abuse 11-to-15-year- old boys near where he lives and works in the future?

A. Again, based on my law enforcement experience, not any psychological experience as such, I would agree with that, more likely than not, it would.

Q. Would you agree, based on your law enforcement experience and your academic background and education, that if you became aware in 2007 that a man has sexually abused children in 2002 and 2003 at a summer camp where he worked, would you agree that it would be foreseeable that any victims he was to have from 2004 through 2007 and 2007 through 2011 would occur where he worked and spent his time?

A. I would agree that it would predispose me to believe that he would be offending again and would have offended again.

Q. Would you agree with me that if you were notified that an individual had sexually abused a minor on campus five years previously, and that individual is currently on campus, and that there are minors on campus when that report comes in five years later, that that person poses a threat to the campus?

A. I would agree with you, yes.

Q. And when that individual leaves the campus, he's a threat to minors wherever he goes off campus, correct?

A. I would agree that that's a reasonable assumption.

(Margolis Deposition, Vol. I., p. 18-20).

Defendant claims that it conducted an "investigation" into the 2007 complaint of child sexual abuse by ReVille and that there is no evidence of a cover up. However, the evidence establishes otherwise. During the time period at issue in the cover up, Jennifer Shiel worked within the President's Office, and more particularly as an assistant to General Counsel, Mark Brandenburg. Ms. Shiel testified as follows:

> Q. And during the time period from when the report was made until the time that you left the Citadel, having lived through it, do you believe there was a conscious effort to cover up or conceal this report of sexual abuse?
>
> Mr. Kovach: Objection.
>
> A. Yes.
>
> Q. And was President Rosa in charge ultimately of making sure that this report was concealed and covered up?
>
> Mr. Kovach: Objection.
>
> A. In my opinion, yes.

(Jennifer Shiel Deposition, January 21, 2014, p. 36:9-20).

> Q. Having worked in the President's office during this time period, was there ever any doubt in your mind that President Rosa wanted this report of sexual abuse to be kept under wraps?
>
> Mr. Kovach: Objection.
>
> A. No. It was very clear that- the term that was used about it was "close hold." I mean only people that needed to know about it were supposed to know about it. That was it.

(Shiel Deposition, p. 46:12-20).

Defendant's expert, Mr. Margolis, hired by the Citadel to presumably conduct an independent and thorough investigation into the Citadel and its employees' actions in regards to

the 2007 ReVille complaint,[1] admits that another investigator looking at the facts presented could conclude that there was a cover up of ReVille's child sexual abuse, as well as admits that his investigation did not uncover any evidence that Defendant and others at the Citadel did not engage in a cover up:

> Q. can you point me to any evidence that The Citadel did not engage in a cover-up to make sure that Skip ReVille's name appeared nowhere with regard to any allegations that Doe had made?
>
> A. In terms of the civil defense sheets that were created?
>
> Q. In terms of anything.
>
> A. I cannot.

(Margolis Deposition, p. 109:7-13, 278:17-25, 279:2-3). Mr. Margolis did not interview Jennifer Shiel.

In order for Mr. Margolis's firm to have found a cover up, "[w]e would need to have found evidence that implied intent, intent to collusion, you know, intent to hide in some way, shape, or form was deliberate in that regard." (Margolis Deposition, p. 109:17-20). Defendant's expert ignored the articulation of Defendant's intent to cover up the child sexual abuse memorialized by Defendant's General Counsel: "I am hopeful that by conducting an investigation on behalf of the school, no "formal" investigation—criminal or civil—will occur." (Brandenburg Email, May 8, 2007). Yet, since 2011 when ReVille was arrested and The Citadel had to acknowledge that it knew of ReVille's child sexual abuse in 2007, The Citadel continues to cover up what it specifically knew, under the guise of an expressed opinion by the President that if university

[1] In late 2012, the Citadel Hired Margolis Healy and Associates to investigate the actions taken in regards to the 2007 disclosure of child sexual, which concluded with a written report. (Investigation Into The Citadel's Handling of Allegations Involving Louis N. "Skip" ReVille Findings, March 31, 2013).



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officials conceal a report of sexual abuse- "it would be a huge lack of integrity and lack of character...it would be unconscionable." (Rosa Deposition, January 2014, p. 187:7-16).

Prior to ultimately hiring Margolis Healy Associates, the Citadel hired and fired two other investigative firms to investigate the Citadel's knowledge and actions taken as to the 2007 sex abuse complaint. One was Guideposts Solutions, who the Citadel terminated due to a conflict of interest, and the other was Manuel, Daniels, Burke International, LLC (MDBI), which is headquartered in Alexandria, Virginia and comprised of former agents of the Federal Bureau of Investigations. Anthony Daniels, who enjoyed a 27 year career in the FBI that included positions as the Assistant Director of the FBI Academy and Deputy Assistant Director of the Criminal Division at FBI Headquarters, runs MDBI. See www.mdbinternational.com/anthony_daniels.php. MDBI wanted to conduct an "extensive" investigation and made it apparent from the get go that it would not ignore evidence of concealment in its review of the Citadel's actions in 2007. (Douglas Snyder Deposition, October 18, 2013, p. 44-45) (MDBI Preliminary Assessment of Issues- Issue Outline, September 8, 2012). MDBI stated in an email:

> If you look at the things the bishops promised to put in place, to include the accountability piece, you will see that both Penn State and The Citadel behaved in precisely the same fashion as the pre-Charter Catholic Church when allegations began to roll in. They did not aggressively investigate, they did not report to civil authorities, they made no attempt to reach out to victims...

(MDBI Email, August 17, 2012).

The Citadel was not forthright with MDBI, failing to disclose to MDBI that President Rosa had not only charged an Institutional Program Assessment Committee (IPAC) to evaluate all aspects of the Citadel's procedures and operations, define the most serious risks, and recommend corrective actions to eliminate these risks, but had recently received the final IPAC report. (Letter from John Palms to Defendant, August 23, 2012). This report concluded:

> Based on the results of the study, the case of Skip ReVille is but one of too many instances in which the institution's realities are at odds with its ideals and values. The report further concludes that the continuation of the status quo in these areas of the college's operations poses serious risks to The Citadel.

(IPAC Final Report, September 7, 2012, p. 21). The IPAC found that "[t]he Citadel is at high immediate risk for inappropriate sexual behavior to occur between its representatives and minors. The risk is ongoing through the year." The Panel "see[s] a need for change in order to prevent harm coming to children who are involved with The Citadel, as well as to mitigate and minimize risk. ACTION IN THIS AREA SHOULD BE CONSIDERED TO BE A HIGH PRIORITY." (IPAC Report, Appendix 6, p. 70).

Yet, The Citadel withheld the existence of the IPAC and its report from MDBI. (Email chain between Tony Daniels and Ann Franke[2], October 15, 2012). As MDBI member, John Harley, concluded "I don't think The Citadel has dealt with MDBI, or Ann forthrightly....The last thing they want is a truly clean, comprehensive and independent investigation that may make Citadel and its leaders look worse than they already look." (Id.). Thereafter, the Citadel terminated MDBI's services and engaged Margolis Healy and Associates.

**Untrue that Information Not Shared With The Citadel's President**

At issue are President Rosa's knowledge and actions taken, or not taken, in regards to the 2007 complaint of child sexual abuse by ReVille. (Rosa's Press Release). Despite currently acknowledging that all matters of sexual abuse should be handled the same, regardless of whether there is a civil lawsuit or criminal prosecution (Rosa Deposition, January 2014, p. 148), President

[2] In late 2012, the Citadel hired Ann Franke of Wise Results, LLC as well to conduct an independent review of the handling of a 2007 child sexual abuse report. On April 3, 2013, Ms. Franke provided the Citadel with her "Institutional Review Report to the Citadel Board of Visitors- Recommendations for Moving Forward." See http://www.citadel.edu/root/images/Public_Documents/Franke_IRT_report.pdf.

Rosa previously ensured that the 2007 complaint was characterized as some sort of settlement case against the school rather than as the disclosure of unlawful child sexual abuse that it was. (Rosa Deposition, July 2013, p. 194).

The General Counsel files did not indicate in any way the receipt of a child sexual abuse claim against ReVille. In October 2007, the General Counsel file list did not contain Camper Doe's sexual abuse claim against ReVille anywhere, despite listing other "possible litigation" files. (File List and File System attached to Email from Jennifer Shiel, October 24, 2007). However, in 2010, Camper Doe's name appears on the File List annotated with code 113, signifying that it is litigation involving the Citadel, and with the description-- "alleged sexual abuse at summer camp." (File List attached to Email from Susan Danko, June 15, 2010, p.1- camper's name redacted). Furthermore, instead of annotating that the complaint was against ReVille, the entry's keyword is "Arpaio". (Id.). The lack of including the camper's complaint in October 2007 but then including it three years later disguised as an Arpaio complaint is evidence of The Citadel's cover up of its knowledge of sex abuse by ReVille. If The Citadel had included the ReVille complaint in the General Counsel files for any year, the information would have been available to the South Carolina Budget and Control Board, notifying the board of potential liability that extended beyond the Arpaio sex abuse complaints.

The Citadel's expert witness agrees that it "raises questions and suspicions" that Mr. Margolis evidently overlooked in his review. (Margolis Deposition, p. 208-209). Mr. Margolis also agrees that a reasonable conclusion from Citadel administrators telling ReVille to lay low on April 24, 2007 and the suspicious annotation (and lack of annotation) of the ReVille complaint on the General Counsel file lists is that The Citadel was covering up the sex abuse report. (Margolis Deposition, 236-237). Plaintiff's experts agree. (Mary Jo McGrath Expert Witness Report, June

17, 2013; Initial Expert's Report of James D. Ginger, Ph.D.; and McGrath Deposition, February 3, 2014).

President Rosa knew of the April 2007 child sexual abuse complaint against Skip ReVille no later than graduation that year, May 6, 2007. (Brandenburg Deposition, p. 76:15-25, 212-213). Thereafter, on May 16, 2007, Mr. Brandenburg memorialized the information known by The Citadel at that time in a letter to the Insurance Reserve Fund, copying President Rosa, even though President Rosa already knew all of the information contained in the letter. (May 16, 2007 letter; and Brandenburg Deposition, p. 39:6-17). Defendant's expert Ann Franke notes that President Rosa knew all of the details of the General Counsel's investigation: "5/16/07- MB [Mark Brandenburg] wrote to IRF about potential claim, but no litigation hold in place. Jennifer cc'd Gen. Rosa, which perplexed MB, but he now appreciates it...because Gen'l already knew info." (Franke Notes, Bates Stamped 6702). Mr. Margolis's investigation likewise revealed that President Rosa knew what Mr. Brandenburg knew:

> Q: And do you see down towards the last part of the page in your notes, again, it states: "If president stands up and fires attorney," question, "makes him a scapegoat." And then in bold letters, it says: "Should I go? I knew what he knew." Those notes indicate President Rosa's response to your question or your firm's question regarding the extent of his knowledge as compared with Mr. Brandenburg; isn't that correct?
>
> A: I do recall him making that statement. I actually remember that quite clearly.

(Margolis Deposition, 195-196).

The May 16, 2007 letter specifies that The Citadel knew that the camper and another camper were "coerced into the counselor's room, where the counselor showed them pornographic movies and convinced them to masturbate;" "the counselor watched the movies and masturbated as well;" and "the counselor engaged in this activity frequently, though, and with many other campers." The Citadel also knew by May 1, 2007 that the other camper who was coerced to

masturbate by ReVille along with Camper Doe currently was a cadet at the Citadel. (Brandenburg Deposition, p. 135-136 and Brandenburg Email, May 1, 2007).

Jennifer Shiel has testified with personal knowledge of the April 23, 2007 phone call that, at the direction of President Rosa, from the beginning there was a concerted effort to keep the report of sex abuse within the President's office so that no other Citadel departments would know. (Shiel Deposition, p. 35-36). Ms. Shiel understood that President Rosa's and other administrators' priority was to protect The Citadel's interests in dealing with the sex abuse complaint and that President Rosa wanted the complaint kept "close hold" so that no one outside of the President's Office would know about it. (Shiel Deposition, p. 41; 46).

Ms. Shiel further testified that President Rosa and Mr. Brandenburg socialized outside of work, but that at work, Mr. Brandenburg absolutely was deferential to President Rosa and nervous about pleasing him. (Shiel Deposition, p. 31). She testified it was not possible that President Rosa would have left his subordinates to inquire into the 2007 ReVille sex abuse without being updated and consulted, further supported by Mr. Margolis's notes that Defendant and Mr. Brandenburg talked three times a week. (Shiel Deposition, p. 30; and MHA Interview Notes, 0078). In addition, on January 30, 2006, President Rosa previously provided his guidance for the "planning, preparation, and conduct of the 2006 Citadel Summer Camp session," showing his participation and leadership in such matters. (Course of Action/Decision Brief, 30 January 2006, Citadel 00278). In keeping with President Rosa's conduct of maintaining information close hold is his remark of "Amen" to Col. Trez's suggestion to keep another matter "off the net" in 2009. (Rosa and Trez Email chain, July 2009).

President Rosa and other Citadel employees kept the 2007 report of sexual abuse by ReVille "close hold" despite knowing that a child molester is a threat to the community at large:

Q: Is a child sexual predator an ongoing threat to the community at large?

A: It could—yes.

(Col Trez deposition, p. 54).

Q: ...Skip ReVille is on campus, the next day when he tries to find ReVille, he's on The Citadel Campus, wouldn't you agree that if that person who has been accused of being a pedophile is on The Citadel campus, that that's a current threat to not only The Citadel, but the public at large?

A: Possibly...

(Rosa Deposition, JULY 29, 2013, p. 168).

**Untrue that ReVille's Record Revealed No Other Complaints**

The Citadel has perpetuated that it looked into ReVille's record and no other complaints existed. (Press Release). However, Mr. Brandenburg's "investigation" unveiled information that ReVille had been fired from another school and had been caught in violation of a camp rule forbidding counselors to be alone in a room with a camper. Specifically, the day after the complaint came in, Mr. Brandenburg met with the former director of the camp, Jennifer Garrott, where she disclosed that ReVille had been asked to leave his prior job at Pinewood Prep and said this with a "knowing look," which Mr. Brandenburg testified means, "she looked at me like, Oh goodness, could this be another Arpaio case? Which, of course, is exactly what we were worried about." (Brandenburg Deposition, p. 114-115). Mr. Brandenburg had prior experience litigating child sexual abuse claims that had been filed against another former camp counselor and Citadel cadet, Michael Arpaio. (Brandenburg Deposition, p. 100). ReVille had worked at Pinewood Prep prior to his employment with the Citadel that started in August 2006. Any effort by the Citadel to screen ReVille prior to hiring him in 2006 would have revealed his termination from Pinewood Prep. (MDBI Preliminary Assessment of Issues- Open Questions, September 8, 20112). Apparently, no effort was made to check ReVille's employment history.

On April 24, 2007, Ms. Garrott also disclosed to Mr. Brandenburg that in the summer of 2003, she caught ReVille in his barracks room alone with a camper rubbing Icy Hot on the camper's leg, even though the camp had a policy forbidding counselors from being alone in a room with campers and making it a terminable offence. (Garrott Deposition, Aug 28, 2013, p. 56-57, 93). Ms. Garrott did not fire ReVille when she caught him in direct violation of the policy and has admitted that she should have. (Garrott Deposition, Vol. II, p. 55-56). Defendant's expert witness, Ann Franke, states that policies regarding the safety of children should be strictly enforced, absent some exigent circumstance for the policy violation, and serious consequences imposed for violations in order to rightly protect children. (Franke Deposition, March 17, 2014, p. 49:13 through P. 51:19). Ms. Franke opines that Ms. Garrott should have fired ReVille when he violated the policy against being alone with campers, because a sore muscle would not be the type of emergent situation that justifies departure from strict enforcement of the policy. (Frank Deposition, p. 50-51).

Moreover, ReVille's file contained his counselor performance evaluation stating, "senior counselor material if learns to distance himself, works well with younger kids," and his counselor application where he listed his qualifications as "5'11"; brown hair; brown eyes; athletic; can cook, recite poetry, dance; enjoys walks on the beach." (Counselor Reviews, p. 4; and Summer Camp Application). ReVille's record contained other complaints and red flags.

**Untrue that ReVille No longer Affiliated With Citadel at Time of Complaint**

The Citadel contends that ReVille was no longer affiliated with the school and had ended his employment on April 20, 2007. However, the evidence establishes otherwise. ReVille was working in The Citadel's writing lab on April 24, 2007 when Mr. Brandenburg tracked him down to meet with him, admitted to by Mr. Brandenburg. (Brandenburg Deposition, p. 131:10-12,



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132:4-8). Furthermore, The Citadel's expert witness, Ann Franke documented in her investigation that on April 24, 2007, "Skip was employed by C[itadel] at that point w/o contact w/ kids." (Franke Notes, Bates No. 6698). ReVille had a Citadel email address at that time as well. (Brandenburg Deposition, p. 45). Additional evidence of ReVille's employment at the Citadel includes ReVille's statements in his application to the South Carolina Employment Security Commission, Unemployment Insurance Division, where he notes his "last day worked for the school was 04/30/07." (ReVille Unemployment File, dated 6/7/07, p. 19). A year later, in April 2008, ReVille applied for a job at Velocity Sports in Mount Pleasant, noting that his prior employment with the Citadel lasted from August 2006 to May 2007. (Velocity Sports Application, p. 2).

The Citadel also has a policy that clearly states: (1) that there are no time period restrictions regarding sexual misconduct investigations; (2) that individuals currently or formerly with the camp will be investigated; and (3) that ReVille was subject to The Citadel's Standards of Review. (Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues). When confronted with the policy, President Rosa attempts to explain it away by citing the fact that the camp was closed in April 2007, as if this policy is an artifact of some sort. The Citadel Summer Camp closed in December 2006, only four months before the report of sexual abuse was made to The Citadel. President Rosa also knew that Citadel Public Safety had "complete police authority to apprehend and arrest anyone involved in illegal acts on campus." (Message from President Rosa).

**The Citadel's Excuse that Conduct Occurred 5 Years Earlier and Involved No Touching is Inexcusable**

In defense of The Citadel's actions, President Rosa offered that the child sexual abuse complaint was from five years prior. (Press Release). He now contends that this fact "was not significant to me." (Rosa Deposition, January 2014, p. 142:3-9). He also now agrees that the report from a nineteen year-old of abuse that occurred when he was fourteen years-old did not



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have any impact on whether the sexual abuse occurred or not. (Rosa Deposition, January 2014, p. 141:21-25). As stated, the Citadel's own policy places no time restriction on the investigation of sexual misconduct arising out of the camp and that the allegations, regardless of validity, will be turned over to the Public Safety Department. (Official Camp Policies Regarding Sexual Misconduct Issues).

By July 1, 2007, The Citadel acknowledged that ReVille was a pedophile when its General Counsel interviewed Camper Doe in person about his complaint. (Camper Doe Interview Transcript, July 1, 2007, p. 114; and Camper Doe Deposition, p. 233). On August 8, 2007, The Citadel's General Counsel memorialized that he found Camper Doe's complaint of child sexual abuse by ReVille "believable." (Brandenburg Email, August 8, 2007). Contrary to The Citadel's expressed goal of preventing any formal civil or criminal investigation into the ReVille allegations[3], Mr. Brandenburg led Camper Doe to believe that his transcribed interview meant that The Citadel would ensure that ReVille would not abuse any more children. (Camper Doe Deposition, p. 228-230).

Likewise, President Rosa defended The Citadel's actions by emphasizing that the April 2007 child sex abuse report did not involve touching. (Press Release). What the 2007 report of child sex abuse did reveal was a detailed account made by the camper on July 1, 2007, transcribed by a court reporter and explained to Mr. Brandenburg:

> A. And he at that time pulled out his penis and started masturbating and asked us to join him, and I got up, said I was tired, went to the bed and just said I was going to fall asleep and---
>
> Q. Okay.
>
> A. –just go to sleep.

[3] (Brandenburg Email, May 8, 2007).

Q. This was in his room?

A. That's right.

Q. Okay.

A. He—he kind of got a little aggressive and was asking me to come back to the computer and join them---

Q. All right.

A. –which I ended up doing.

Q. Was [other camper] over there with him?

A. That's right.

Q. Okay. And had he joined?

A. That's right.

Q. Okay.

A. And I did it. Immediately after, I felt completely violated.

(Camper Doe Interview Transcript, p. 74) (Brandenburg Deposition, p. 217-218).

Camper Doe also relayed that ReVille did the same to "about 5 other" boys multiple times and acknowledged to Mr. Brandenburg that ReVille may have touched other boys at the camp. (Camper Doe Interview Transcript, p. 75, 89). On July 30, 2007, President Rosa was briefed on the July 1, 2007 interview. (Brandenburg Deposition, p. 79-80). The May 16, 2007 letter from Mr. Brandenburg to the IRF emphasized that the camper had been "coerced" by ReVille, but Mr. Brandenburg described the camper's complaint as not having any "substance" despite the detailed in-person interview. (Brandenburg Deposition, p. 220, 240:22).

President Rosa acknowledges that in 2007, he understood that an adult masturbating and ejaculating in front of children was a form of abuse, was a criminal act, and violated the Citadel's policies and procedures regarding sexual harassment. (Rosa Deposition, January 2014, p. 54:1-



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16). He also understood in 2007 that an adult forcing a child to masturbate was sexual abuse. (Rosa Deposition, Jan. 2014, 53:20-25). However, The Citadel's actual response to the disclosure of child sexual abuse at the Citadel was "to put this file back in the cabinet" in August 2007. (Brandenburg Email, August 8, 2007).

**Untrue that Victim Did Not Want to Report to Law Enforcement**

The Citadel has falsely perpetuated that Camper Doe did not want to report the sexual abuse by ReVille to law enforcement as an excuse for its failure to disclose the abuse. (Press Release). From the beginning, The Citadel falsely proclaimed that the camper and his family did not want to go to the police with the complaint, even reiterating this falsity to the Citadel's expert, Ann Franke, during her investigation. (Shiel Deposition, p. 52); (Franke Deposition, p. 104:18 through p. 108:21). However, nowhere in the 157 page transcript of the July 1, 2007 interview with the camper do the camper or his parents state that they do not want to report the crime to the police. (Camper Doe Interview Transcript). In actuality, when asked whether he has reported the complaint to law enforcement, Camper Doe replied, "Well, I mean, I've talked to you," and emphasized "[m]ost of all, the thing I want the most is just to make sure that Skip doesn't have a chance to do this to anyone else." (Camper Interview Transcript, p. 109-110) (Affidavit Father Doe, May 24, 2013). Camper Doe testified, "I would have absolutely reported it to police had I known that the Citadel didn't." (Camper Doe Deposition, p. 241).

President Rosa, when asked "did you ever make a determination whether or not law enforcement should be called," responded "No. It was not really discussed." (Rosa Deposition, January 2014, p. 93). Ms. Shiel testified that she never heard considerations of going to law enforcement mentioned in her presence. (Shiel Deposition, p. 48- 49). Furthermore, after July 1, 2007, The Citadel did nothing else in regards to the camper's sexual abuse allegations except put

the file away. (Brandenburg Deposition, p. 183 and Brandenburg Email, August 8, 2007). President Rosa did not discuss turning the complaint over to law enforcement, because he did not want law enforcement involved period.

**Excuse of No Mandatory Reporting Requirement Inexcusable**

Despite The Citadel's own policies and procedures requiring disclosure of the complaint to Public Safety, discussed in detail hereinafter, The Citadel propounds that it was under no mandatory requirement to report the 2007 report of child sexual abuse. (Press Release). However, regardless of whether The Citadel and its administrators by definition were mandatory reporters under S.C. Code § 63-7-310(A), police and law enforcement unequivocally are mandatory reporters. Therefore, if The Citadel had reported the sexual abuse to any law enforcement, including the Citadel's Public Safety, those individuals in law enforcement would have been required by state law to report and would have been subject to criminal prosecution for the failure to do so. See S.C. Code § 63-7-410. The evidence leads to the reasonable inference that The Citadel deliberately chose not to turn over to law enforcement in order to prevent inevitable disclosure by law enforcement of child sex abuse by a Citadel employee on the Citadel campus.

The Citadel also failed to include the April 2007 complaint of child sexual abuse in The Citadel's report of crime statistics for the 2007 timeframe, pursuant to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092 (f). The General Counsel's own documents show that he was responsible for The Citadel's reporting obligations under the Clery Act and, accordingly, knew, or should have known, the law. (Email from Jennifer Shiel, October 24, 2007, including list of Mr. Brandenburg's files to include Clery Act Report-2007, p. 11). The regulations implementing the Clery Act require an annual security report that contains crime statistics "for the three most recent calendar years concerning the occurrence on

campus, in or on noncampus buildings or property, and on public property" of a list of crimes "that are reported to local police agencies or to a campus security authority." 34 C.F.R. § 668.46. Sex offenses, forcible and non-forcible are included. Id. Also, 34 C.F.R. § 668.46(c)(2) requires that "an institution must record a crime statistic in its annual security report for the calendar year in which the crime was reported to campus security"- rather than the year the crime occurred.

However, The Citadel did not include the child sex abuse complaint in the 2007 report. Nor did it report the 2007 child sex abuse complaint to any law enforcement entity, thereby also preventing the trigger of any duty to report pursuant to the Clery Act. However, Mr. Brandenburg has since opined that the school would get fined for the omission by the Department of Education. (Brandenburg Deposition, p. 387-388).

**Information Withheld from Board of Visitors**

President Rosa further attempts to excuse The Citadel's actions by contending that the Board of Visitors did not have all of the relevant information regarding the 2007 sex abuse complaint. (Press Release). The only reason the Board did not have all of the information was because President Rosa directed that the complaint be kept close hold and covered up. Specifically, Mr. Brandenburg, made two presentations to the Board of Visitors on the ReVille sexual abuse allegations, one in June and one in September 2007, where he concealed the details to the Board to such an extent that the Board members did not even understand that Mr. Brandenburg was briefing them on a child sexual abuse claim. (Deposition of Leonard Fulghum, Jr., November 20, 2013, p. 62; Deposition of Glenn Addison, July 26, 2013, p. 29; 34). President Rosa attended these Board of Visitor meetings and sat idly by while Mr. Brandenburg failed to inform the Board of the details of the child sex abuse, acquiescing in Mr. Brandenburg's concealment of the true allegations. (Addison Deposition, p. 34-35; Fulghum Deposition, p. 19).

The Margolis Healy Report concludes that the Board of Visitors "assumed, based on what they were told, that it was an insurance defense and civil claim matter, and believed from what they were told that this was the case of a father displeased with his son's unsuccessful application for admission to the College." (Investigation Into The Citadel's Handling of Allegations Involving Louis N. "Skip" ReVille Findings, p. 45). The Board of Visitor's uniform recollection that the complaint was not a sex based complaint contrasts with Mr. Brandenburg's testimony that he "gave them [Board] all that information." (Brandenburg Deposition, p. 303-304).

The Citadel's intentional actions to cover up the sex abuse created the risk that ReVille would continue to sexually abuse boys in the Charleston area, Plaintiff included. The Citadel's own expert testified to the foreseeable consequence of ReVille continuing to sexually abuse boys in the Charleston area;

> Q. So it's pretty clear to you that Mr. ReVille had a propensity to abuse victims within a discrete class within our society, is that right?
>
> A. Yes. I believe they're called preferential child molesters or preferential molesters.

(Margolis Deposition, p. 188).

## DISCUSSION

### I. Summary Judgment Not Appropriate as Evidence Supports That The Citadel Failed To Exercise Due Care That A Person Of Ordinary Prudence And Reason Would Have Under The Same Circumstances By Intentionally Concealing The 2007 Report Of Child Sexual Abuse.

To establish a claim of negligence, a plaintiff must show: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; (3) damage actually and proximately resulting from that breach; and (4) injury or damages suffered by Plaintiff. See, e.g., Madison ex rel Bryant, 638 S.E.2d at 660; Steinke v. S.C. Dep't of Labor,

Licensing and Regulation, 520 S.E.2d 142, 149 (S.C. 1999); and Rayfield v. S.C. Dep't of Corrections, 374 S.E.2d 910, 913 (S.C. Ct. App. 1988).

"[R]ecklessness or willfulness may be inferred from conduct so grossly negligent that a person of ordinary reason and prudence would then have been conscious of the probability of resulting injury." Yaun v. Baldridge, 134 S.E.2d 248, 251 (1964). "[R]ecklessness implies the doing of a negligent act knowingly ... [or] the conscious failure to exercise due care." Id. (quoting State v. Rachels, 61 S.E.2d 249, 252 (1950)). "Due care" is defined as "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." Berberich v. Jack, 709 S.E.2d 607, 612 (2011) (quoting Hart v. Doe, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)).

The evidence establishes that The Citadel consciously failed to exercise due care when it received the report of child sexual abuse in 2007. Instead of exercising due care, The Citadel intentionally concealed its knowledge of ReVille's abuse, as well as assisted ReVille in remaining in the community undetected and able to continue molesting children. A person of ordinary reason and prudence would have known that the intentional concealment of a child molester leads to the reasonable foreseeability that children will continue to be sexually abused. Defendant's own expert, Mr. Margolis, testified that he is not aware of any child sexual predator who stopped molesting children without being arrested or dying, and he is not aware of any peer-review studies that suggest a child molester will stop or decrease acts of molestation before being caught. (Gary Margolis Deposition, February 2014, p. 14:13- p. 15:4).

As such, The Citadel's intentional and reckless conduct, or gross negligence, may be inferred from the facts established in this case that show that The Citadel failed to exercise due

care that a person of ordinary prudence and reason would have in light of the probability of further child sexual abuse by ReVille. See Yaun, 134 S.E.2d at 251.

**A. The Citadel's Own Policies And Procedures Establish That It Violated The Standard Of Care Owed.**

The existence of a duty is not to be confused with the standards of care establishing the extent and nature of the duty in a particular case. See Madison ex rel Bryant, 638 S.E.2d at 656. The standards of care are grounded in common law, statutes, regulations, or a defendant's own policies and guidelines, which allow a fact finder to judge whether a duty was breached or not. Id. "The precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury." Id., 638 S.E.2d at 659.

To establish liability, it is sufficient to establish that a defendant "should have foreseen his negligence would probably cause injury to someone," and "[h]e may be held liable for anything which appears to have been a natural and probable consequence of his negligence." Greenville Memorial Auditorium, 391 S.E.2d at 548 (citing Childers v. Gas Lines, Inc., 149 S.E.2d 761 (S.C. 1966)). Stated another way: "[f]oreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable." Madison ex rel Bryant, 638 S.E.2d at 662 (internal citations omitted). In addition, "the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." Id. (citing Hughes v. Children's Clinic, P.A., 237 S.E.2d 753, 757 (S.C. 1977)). Proximate causation usually is one of fact for the jury, which may be resolved by either direct or circumstantial evidence. Id. (citing Childers, 149 S.E.2d at 765; McNair v. Rainsford, 499 S.E.2d 488, 497 (S.C. Ct. App. 1998)).

When The Citadel received the 2007 report of child sexual abuse, it failed to follow its own policies and procedures. The Citadel's deviation from its own policies and procedures



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demonstrates its lack of due care under the relevant circumstances. See Peterson v. National Railroad Passenger Corporation, CSX, and Southco Sweeping and Maintenance, Co., 618 S.E.2d 903, 906 (S.C. 2005) (holding company's deviation from internal maintenance policies admissible to show breach of duty owed).

"In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care." Caldwell v. K-Mart Corp., 410 S.E.2d 21, 24 (S.C. Ct. App. 1992) (citing Eastern Brick and Tile Co. V. U.S., 281 F. Supp. 216 (D.S.C. 1986)); see also Madison ex rel Bryant, 638 S.E.2d at 659 (citing with favor the following in holding that a defendant's own policies establish standards of care: Elledge v. Richland/Lexington School Dist. Five, 573 S.E.2d 789, 793 (S.C. 2002) (holding evidence of industry safety standards relevant to establishing standard of care in negligence case); Tidwell v. Columbia Ry., Gas & Elec. Co., 95 S.E. 109 (S.C. 1918) (holding relevant rules of defendant admissible in personal injury suit regardless of whether rules were intended for employee guidance, public safety, or both because violation of rules may constitute breach of duty of care and proximate cause of injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of case)).

The Citadel's own policies created the standard of care upon which to judge its actions of conccaling the report of child sexual abuse in 2007. First, if The Citadel had conducted an investigation and not a deliberate concealment of the 2007 sex abuse report, it would have taken action in accordance, rather than in contradiction of, its own policies and procedures and federal law. The school's "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." (Serious Incidents Memo, p. 1). Among the non-exclusive list of examples of serious incidents is "criminal activity." (Id.). 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.** (Id., p. 9-10) (emphasis added).

The Citadel's General Counsel has testified that if the Serious Incident Policy was in effect—and evidence establishes it was—it applied to him. (Brandenburg Deposition, p. 261:5-11). He also agrees that the Serious Incident Policy required the executive assistant, Col. Trez, to be notified of the 2007 report of child sexual abuse and that Col. Trez actually did have knowledge of the 2007 report. Mr. Brandenburg also stated that the policy required the President to be notified, which also occurred. (Brandenburg Deposition, p. 263). Furthermore, Mr. Brandenburg acknowledges that per the policy, Col. Trez was to report allegations of illegal or immoral activities to the Department of Public safety. (Brandenburg Deposition, p. 264:5-17). No report to the Department of Public Safety was ever made.

The Citadel also ignored its policy that no time limit exists to investigating sexual misconduct issues that arise out of the camp and 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 " (Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues) (emphasis added). Moreover, President Rosa's public proclamation for the Citadel community to report immediately "any criminal offense, suspected criminal activity, or other emergency directly

**to Citadel Public Safety,"** was completely ignored. (A Message from the President, p. 1) (emphasis added).

The Citadel's actions in telling ReVille to lay low and to leave Citadel employment with no record of the sex abuse report also were in direct violation of the school's policy that provided specific consequences in the event an employee is accused of sexual misconduct. (Employee Misconduct Policy). The consequences included not expunging molestation findings from the employee's record; not terminating any investigation in exchange for resignation by the employee; providing factual and candid responses to inquiries by potential employers; and fully cooperating with law enforcement. (Id.). The Citadel failed to impose any of these consequences.

Additionally in 2007, Memorandum Number 4, Memorandum Number 51, and General Procedures for Conducting Formal Investigations of Sexual Harassment Complaints governed The Citadel's actions in regards to the complaint of ReVille's sexual abuse. In accordance with the Citadel's own policies, it specifically should have reported the sex abuse complaint to the Citadel's Title IX Coordinator. (Memorandum Number 51, p. 13). The sexual assault policy also provides that **"The Citadel will punish any individual who is found to have committed a sexual assault,"** and Mr. Brandenburg admits that the 2007 complaint against ReVille constituted a sexual assault. (Brandenburg Deposition, p. 265-266). Mr. Brandenburg does not recall ever considering contacting The Citadel's sexual response coordinator. (Brandenburg Deposition, p. 267:5-8).

In sum, The Citadel failed to abide by the standard of care it itself created by its own policies. Despite the clear policies and protocols available when the camper made The Citadel aware of ReVille's sexual abuse, The Citadel ensured that none were followed and that the child sexual abuse instead was covered up. By its very own policies, The Citadel failed to exercise due care.

**B. Professional Standards for College And University Administrators Establish That The Citadel Violated The Standard Of Care Owed.**

Furthermore, professional standards for college and university administrators establish that The Citadel did not exercise due care in its response to the report of child sexual abuse. See Elledge v. Richland/Lexington School Dist. Five, 638 S.E.2d at 792-794 (holding evidence of industry standards related to playground equipment relevant and admissible to establish duty owed by school district in negligence claim for student's injury on playground equipment). In that regard, the "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to Child Sexual Abuse Committed by Gerald A. Sandusky" (2012), http://www.thefreehreportonpsu.com [hereinafter Freeh Report] is instructive to this case. As shown by the facts, The Citadel's actions taken in response to the 2007 ReVille child sexual abuse complaint mirror the "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims." (Freeh Report, p. 14).

The Citadel concealed ReVille's sexual abuse, thereby allowing and supporting a child sexual predator to continue harming children just as the leaders of Penn State did. The Citadel's administrators, to include President Rosa, have admitted to understanding that a sexual predator has the potential for further assaulting additional victims. (Rosa Deposition, Jan. 2014, p. 19:9-22). Like the Penn State leaders who concealed the details of sex abuse from the Board of Trustees, President Rosa concealed the details of ReVille's child sexual abuse from the Board of Visitors. Furthermore, like President Spanier, President Rosa discouraged discussion and dissent and specifically directed concealment of the 2007 complaint. (Freeh Report, p. 16). Like the Penn State leaders who allowed a pedophile to retire, "not as a suspected child predator, but as a valued member of the Penn State Football legacy, with future visibility at Penn State," The Citadel allowed ReVille to leave Citadel employment, not marked as a child predator, but rather with an



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unblemished record that allowed him continued employment with children in the Charleston area. (Freeh Report, p. 17).

ReVille had future visibility at The Citadel, returning to campus numerous times to speak to the Honor Committee, to incoming freshman, and in 2010 at the unveiling of the remodeled Honor Court. (ReVille Affidavit, May 21, 2013, p. 3). ReVille's ties to the Citadel included applying to be a foster parent with a photograph of himself wearing his Citadel jacket and noting his experience with children as a camp counselor. (ReVille Foster Home Application). The Citadel's leaders' concealment of the sexual abuse by ReVille from law enforcement, the Board of Visitors, the Citadel community, and the public at large also allowed the President and The Citadel to avoid negative publicity, very much the same as the Freeh Report concluded of Penn State leaders:

> it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University...repeatedly concealed critical facts relating to Sandusky's child abuse from authorities, the University's Board of Trustees, the Penn State Community, and the public at large...

(Freeh Report, p. 16).

In contrast, in investigating The Citadel's actions taken in regards to the 2007 report, Margolis Healy & Associates determined that seven factors excused The Citadel's failure to disclose the complaint of child sex abuse. (Investigation Into The Citadel's Handling of Allegations Involving Louis N. "Skip" ReVille Findings, p. 40). However, the evidence in this case renders the excuses inexcusable. First, the Citadel had numerous policies and protocols available that advised The Citadel leaders to report the sex abuse complaint to law enforcement; however, President Rosa ensured that none were followed and that the complaint was instead kept "close hold" in the President's Office. Second, The Citadel leaders, to include President Rosa, sufficiently understood their responsibilities for reporting pursuant to the Clery Act, had

knowledge of Title IX, had hired a Title IX coordinator, and had personal experience dealing with the Arpaio litigation.

Third, if anything, when the April 2007 complaint of child sexual abuse came into the President's Office, "key individuals" had a wealth of prior experience dealing with sexual abuse that highlights the inexcusable manner in which the complaint was handled and, also, establishes the intentional manner in which it was handled. The Citadel's leaders brought significant experience and understanding of the machinations of child sex abuse to the table. Moreover, President Rosa had led the Air Force Academy in a reform of a culture permeated with sexual assault and harassment, bringing to the table himself a high level of understanding of such criminal activity. (Rosa Deposition, Jan. 2014, p. 9-10; 12).

Fourth, it is inconceivable how The Citadel leaders could have held the opinion that ReVille could not possibly have sexually abused children due to ReVille's superior accomplishments at the Citadel. All knew that apparent upstanding individuals can be sexual predators, directly evidenced in former counselor and cadet Arpaio. (Trez Deposition, June 10, 2013, p. 106-107 and Lackey Deposition, April 10, 2013, p. 65:23-25 to 66:1-16). Mr. Brandenburg even told ReVille, when he confronted him with the 2007 report of abuse, "we thought we knew Arpaio." (Brandenburg Deposition, p. 98:20-25).

Fifth, Citadel policies and protocol made clear that all sexual misconduct allegations originating out of the camp were to be investigated by the Public Safety Department. The camper interview made clear that the victim most of all wanted to ensure that ReVille did not abuse any more children and that he came to the Citadel with the complaint so that The Citadel could take action. The current age of the camper made no difference, and the fact that the camp was closed did not negate that ReVille was a former Citadel counselor and the camper a participant in the

camp and the sexual abuse had occurred in the Citadel barracks. The context of the allegation in 2007 provides no excuse for The Citadel's intentional cover up.

Furthermore, the Margolis Healy investigation failed to include interviews of the former camper or his father who came forward in 2007 to The Citadel. (Margolis Deposition, p. 128:7-10). Mr. Margolis admits that it takes hearing from both sides "to gather the facts necessary to make a decision." (Id., p. 128-129). Nonetheless, Margolis Healy issued its conclusions despite omitting pertinent and relevant individuals from the investigation. Its investigation and conclusions do not excuse The Citadel's conduct or relieve it from liability for failing to exercise due care.

**C. The Citadel Also Owed Plaintiff A Common Law Duty To Control The Conduct of Another And *Doe v. Marion* Does Not Control.**

Defendant incorrectly propounds that Doe v. Marion, 645 S.E.2d 245 (S.C. 2007) is the controlling law in this case, where the Supreme Court held specifically that the child reporting statute did not create a private cause of action against an individual for *negligence per se* for the failure to report child abuse and that a doctor who treated a pedophile patient had no duty to warn future victims of the patient's predilection for child sexual abuse. The Citadel's argument ignores that (1) Plaintiff does not contend that The Citadel owed him a duty created under the child reporting statute and (2) that Doe v. Marion did not overturn the long established law in South Carolina that provides exceptions to the rule that there is no general common law duty to control the conduct of another or to warn a third person or potential victim of danger. Doe v. Marion, 645 S.E.2d at 249 (citing with favor the recognized exceptions set forth in Faile v. S.C. Dept. of Juvenile Justice, 566 S.E.2d 536, 546 (S.C. 2002)). None of the exceptions applied in Doe v. Marion; however, they do in this case.

Specifically, South Carolina recognizes the following five circumstances where the duty to control the conduct of another or to warn a potential victim of danger exists: (1) where the defendant has a special relationship with the victim; (2) where the defendant has a special relationship with the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; or (5) where a statute imposes a duty on the defendant. Madison ex rel Bryant, 638 S.E.2d at 656; Faile, 566 S.E.2d at 546. The Citadel owed a common law duty to Plaintiff because it negligently or intentionally created the risk of ReVille's sexual abuse of Plaintiff; because federal statute imposed a duty on The Citadel not to conceal the sexual abuse; because it had a special relationship with ReVille; and because it voluntarily undertook the duty to investigate the 2007 report of child sexual abuse and report to law enforcement.

**1. The Citadel Negligently or Intentionally Created the Risk of Sexual Abuse of Plaintiff.**

The fact that ReVille, as a third party, sexually abused Plaintiff does not affect the common law duty The Citadel owed to Plaintiff to not negligently or intentionally create the risk that ReVille would sexually abuse Plaintiff. See Madison ex rel Bryant, 638 S.E.2d at 660 (holding facts that independent contractor directly provided services to plaintiff or that third party committed criminal act against plaintiff did not affect the government's common law duty to plaintiff to exercise reasonable care in supervising and providing appropriate care to plaintiff).

In Greenville Memorial Auditorium v. Martin, 391 S.E.2d 546, 547 (S.C. 1990), the plaintiff claimed that the public auditorium was negligent in adequately securing and maintaining the premises during a concert where the plaintiff was injured by a bottle thrown by an unknown person from the balcony down onto him. The Supreme Court held that the exception to the waiver of immunity for a loss resulting from the act or omission of a person other than an employee did

not apply, because Martin did not allege the auditorium was liable because of the third party's actions. Id.; S.C. Code § 15-78-60(20). Rather, Martin's complaint was that the auditorium was liable for its own negligence in creating a reasonably foreseeable risk of such third party conduct, and the Supreme Court upheld the jury verdict for the plaintiff:

> [The auditorium] cannot successfully defend that [plaintiff's] injuries were caused by the wrongful criminal act of a third party, where the very basis upon which [the auditorium] is claimed to be negligent is that [it] created a reasonably foreseeable risk of such third party conduct.

Id. at 547-548; see also Woodell v. Marion School District One, 414 S.E.2d 794 (S.C. Ct. App. 1992) (holding school district may be liable for gross negligence in supervising plaintiff and another student where another student assaulted plaintiff; district's liability is not because of the conduct of the other student).

Likewise, The Citadel is liable for its own negligence in creating a reasonably foreseeable risk of ReVille sexually abusing Plaintiff. Specifically, The Citadel's deliberate concealment of its knowledge of ReVille as a child sexual abuser, which included directing ReVille to "lay low" and leave The Citadel with no record of the 2007 complaint and included the violation of its very own policies, created the reasonably foreseeable risk that ReVille would continue to sexually abuse boys. The evidence establishes that Citadel leaders, to include President Rosa, had a wealth of experience dealing with sexual harassment and abuse and knew that sexual predators continue to abuse. The Citadel's own expert confirms that ReVille had a propensity to abuse victims within a discrete class of society, calling him a preferential child molester, and opined to the reasonable foreseeability that ReVille would continue molesting boys once he left Citadel campus. (Margolis Deposition, p. 19-20; 188). Thus, The Citadel's own negligence allowed ReVille to stay in the Charleston community as a decorated Citadel alumnus and former employee and gain continued employment with children.

Furthermore, The Citadel could have stopped ReVille from further abusing children as far back as 2001, and had it done so, Plaintiff never would have been abused. The Citadel's conduct dating back to 2001 created the reasonably foreseeable risk of Plaintiff's abuse by ReVille, and The Citadel is liable for its own conduct of negligently and intentionally concealing a known child sexual predator. See Madison ex rel Bryant, 638 S.E.2d at 656; Faile, 566 S.E.2d at 546.

**2. Title IX Imposed A Duty On The Citadel To Not Conceal The 2007 Report of Abuse.**

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, 374 S.E.2d at 914 (deriving test from comparison of Clifford v. Southern Railway, 69 S.E. 513 (S.C. 1910) and Hutto v. Southern Railway, 84 S.E. 719 (S.C. 1915)). Accordingly, a statute may create a duty of care, which the violation of constitutes breach in a negligence action, and thereby establishes negligence per se. Rayfield, 374 S.E.2d at 915.

The Citadel's conduct in response to the 2007 report of child sexual abuse by ReVille violated Title IX of the Education Amendments of 1972 [Title IX], codified at 20 U.S.C. §§ 1681 et seq. and Title 34 Code of Federal Regulations Part 106. The essential purpose of Title IX is to eliminate, with certain exceptions, discrimination on the basis of sex in any education program or activity[4] receiving Federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. § 106.1. Title IX

[4] 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,

bestows a remedial and 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 individuals from the possibility of 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. Accordingly, Plaintiff is a member of the class of persons Title IX is intended to protect.

As far back as 2000, the Office of Civil Rights [OCR] provided guidance to schools on their obligations under Title IX in regards to complaints of sexual discrimination and harassment. (Ex. 41 to Rosa Deposition, "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties") (see also "Dear Colleague Letter," April 4, 2011, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html). OCR highlighted that the United States Supreme Court in Gebser v. Lago Visa Indep. School Dist., 524 U.S. 274 (1998), expressly affirmed that the school must take remedial action to remedy the effects of the harassment on the victim. (Ex. 41 to Rosa Deposition, p. 66095). Schools must "disseminate a policy against sex discrimination" and "adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment." (Id.).

The Citadel's own expert, Mr. Margolis, also put forth a presentation highlighting the requirements of Title IX, to include the definition of sexual harassment:

Sexual violence is a form of sexual harassment prohibited by Title IX.

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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.

- Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol
- An individual also may be unable to give consent due to an intellectual or other disability
- May include rape, sexual assault, sexual battery, and sexual coercion.

(Notebook 3 to Margolis Deposition, Margolis Healy PowerPoint, p. 7).

In 2007, The Citadel disseminated policies against sex discrimination and harassment that governed its actions in regards to the complaint of ReVille's sexual abuse. (Memorandum Number 4, Memorandum Number 51, and General Procedures for Conducting Formal Investigations of Sexual Harassment Complaints). Title IX requires schools to designate at least one employee to coordinate compliance with the regulations implementing Title IX. (Ex 41 to Rosa Deposition, p. 66100). Despite President Rosa himself bringing in Janet Shealy as the Citadel's Sexual Assault Response Coordinator, neither he nor any other Citadel administrator referred the ReVille sexual abuse claims to her, per the explanation that she was there "to handle current cases." (Rosa Deposition, July 29, 2013, p. 29, 83).

Title IX also requires that if the school knows, or even reasonably should know, of sexual harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. (Ex. 41 Rosa Deposition, p. 66101). Even if the school does not learn of the sexual harassment from the victim but from some other source, the school violates Title IX if it fails to take "immediate and effective corrective action." (Ex. 41 Rosa Deposition, p. 66102). Defendant's expert stresses the requirement applies whether the complaint comes from the victim, a parent, or a third party. (Notebook 3 to Margolis Deposition, Margolis Healy PowerPoint, p. 12). The OCR also highlights, "if harassment has occurred, doing nothing is always the wrong response." (Ex. 41 to Rosa Deposition, p. 66098).

The Citadel's attempt to shift blame to the 19 year-old former camper is troubling considering that it comes from a three Star General and President of the Military College of South Carolina. Title IX makes clear:

> In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigation are different, police investigations or reports may not be determinative of whether harassment has occurred under Title IX and DO NOT relieve the school of ITS DUTY to respond promptly.

(Ex 41 Rosa Deposition, January 2014, page 66106) (emphasis added). In addition, The Citadel's attempt to victim blame is baseless considering that Title IX required The Citadel to assist the victim, as emphasized by OCR—"school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim." (Ex 41 Rosa Deposition, page 66101 and Margolis Healy PowerPoint, p. 12).

The evidence supports that The Citadel did nothing to rehabilitate or assist Camper Doe, as is required by Federal law, and instead acted to conceal his complaint of sexual abuse. Such motives are self-serving, and as a former member of President Rosa's staff who lived through this ordeal testified:

> Q. Looking back on the period of time when you were working within the President's office....do you believe that President Rosa was indifferent towards concerns that he should have been worried about; for example, other victims who may be abused?
>
> Mr. Kovach: Objection.
>
> A. Yeah, I do think he was indifferent to it.

(Shiel Deposition, p. 49-50).

The Citadel's failure to abide by the duty of care established by Title IX further is evident in its decision to give responsibility for investigating the 2007 complaint to the Citadel's General Counsel. Title IX specifically requires an impartial investigation, and The Citadel's own expert

agrees and stipulates that college attorneys are not an impartial party to investigate such claims. (Margolis Deposition, p. 124-125 and Margolis Healy PowerPoint, p. 19). In addition, The Citadel allowed the South Carolina Insurance Reserve Fund to be part of the process of investigating the complaint of child sexual abuse by a Citadel employee. (Brandenburg Deposition, p. 169, 190-191). The Citadel's decision directly violates OCR's caution against using insurance company investigations to guide the school's response to complaints of sexual abuse or harassment, because, as OCR explains, "[t]he purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different than those under Title IX." (Ex 41 Rosa Deposition, p. 66106). President Rosa's direction to the General Counsel to "investigate" the child sexual abuse and allowance of the Insurance Reserve Fund to be part of the process directly contradict the duty of care owed under Title IX.

Defendant's expert, Mr. Margolis, testified to the violation of Title IX by Defendant's actions in regards to the 2007 complaint:

> Q: when Doe made a third-party complaint as to eyewitness Doe and the six others who were abused the year before, The Citadel's duty under Title IX requiring it to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects applied to the many others, not just Doe, correct?
>
> A: Correct.

(Margolis Deposition, Vol. I, 308:8-16).

> Q: You would agree with me that the Title IX coordinator at The Citadel didn't oversee those allegations and the investigation of them by Mark Brandenburg, correct?
>
> A: That is correct.
>
> Q: That would be a violation of Title IX, correct?
>
> A: It would be a violation of this, correct.

(Margolis Deposition, Vol. I, 309:11-20).

In light of the foregoing, The Citadel's actions in response to the 2007 report of child sex abuse violated the duty of care established by Title IX, and its breach of the duty constitutes negligence per se. See Rayfield, 374 S.E.2d at 914-915.

**3. Duty Established By The Citadel's Special Relationship With Injurer, ReVille.**

The common law duty to warn potential victims of an individual's dangerous conduct arises under the special relationship exception where, as here, the defendant "has the ability to monitor, supervise and control an individual's conduct," and the defendant is aware of a specific threat of harm to potential victims by the individual. Bishop v. S. C. Dept of Mental Health, 502 S.E.2d 78, 81 (S.C. 1998). A duty to warn does not require the threat to be made while under the control of or in the custody of the defendant; instead, all that is required is that the defendant was aware or should have been aware of the specific threat by the individual. Id. at 82. At all times relevant herein, The Citadel was aware of a specific threat by ReVille and had the ability to monitor, supervise and control ReVille.

Turning first to the existence of a special relationship, a material fact at issue is whether The Citadel employed ReVille on April 23, 2007, when the report of sexual abuse by ReVille first came into the President's office. The evidence shows that ReVille was on campus working in the writing center the next day when Mr. Brandenburg contacted ReVille to alert him of the allegations, and the call turned into a face to face meeting between ReVille, Mr. Brandenburg, and Col. Trez in Bond Hall. ReVille has attested that The Citadel officials told him to "lay low and stay off campus" while they conducted their own investigation into the sexual abuse report. (Brandenburg Deposition, Vol. I, p. 98:20-99:4, 101:4-102:14; 130:24-131:12; ReVille Affidavit, May 21, 2013). ReVille had a Citadel email address at this time and stated on his application to the South Carolina Employment Security Commission, Unemployment Insurance Division, that

his "last day worked for the school was 04/30/07." ReVille's employment with The Citadel and his presence on the campus at the time of the 2007 report not only confirm that ReVille had unfettered access to campus but further demonstrate The Citadel's ability to "supervise, monitor and control" his conduct.

Moreover, ReVille continued to have access to the campus after May 2007 by returning to campus numerous times to speak to the Honor Committee, to incoming freshman, and in 2010 at the unveiling of the remodeled Honor Court. Given ReVille's demonstrated access to and affiliation with the institution, President Rosa and Colonel Trez further admit that ReVille had a "different relationship" with The Citadel than the ordinary graduate. (Trez Deposition, Vol. I, p. 81:2-82:6; Rosa Deposition, Vol. II, p. 230:10-14). Thus, while The Citadel contends ReVille was no longer affiliated with the college after April 20, 2007, the evidence suggests otherwise.

The imposition of a duty on The Citadel based upon a special relationship is consistent with South Carolina jurisprudence. In Bishop, the South Carolina Supreme Court, quoting Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976), determined the Department of Mental Health had a special relationship with mother because the department had custody and control of mother. Thus, the court determined if the department knew or should have known a specific threat was made by mother, the department had a duty to warn the threatened third party of mother's release. Notably, the Court stated:

> Although the Department's discharge summary stated mother related to the examiners she had no intention of hurting herself or her family and **mother did not make a specific threat of harm to her child while in the Department's custody**, the Department was **aware mother had made specific threats to harm victim in the past.** These threats were noted on the documents admitting mother into the custody of the Department. This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person.



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Bishop, 502 S.E.2d at 82 (emphasis added). Therefore, to trigger the duty to warn, the Court found it sufficient that the department had knowledge that mother had made specific threats in the past. In fact, the opinion notes that "mother did not make a specific threat of harm to her child while in the Department's custody." Id. Consequently, the Court found the department breached its duty to warn of mother's release.

Likewise here, The Citadel demonstrated control over ReVille and awareness of specific acts of abuse by ReVille against multiple boys in the past. In fact, given the foreseeability of continued sexual abuse of children, as acknowledged by The Citadel's own witnesses and experts, the threat of harm was arguably even more apparent in the instant case. Here, as in Bishop, The Citadel's knowledge of the threat of harm posed by ReVille is sufficient to trigger The Citadel's duty to warn and/or report ReVille to law enforcement, which it breached. See Bishop, 502 S.E.2d at 81.

**4. Duty Established By The Citadel Voluntarily Undertaking Duties.**

The Citadel's own conduct of voluntarily undertaking the duty to investigate claims of child sexual abuse on its campus and/or by its employee, as well as its policies and procedures, establish its duty to warn or to control the conduct of ReVille. "[I]t has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." Madison ex rel. Bryant, 638 S.E.2d at 656-57 (citing Sherer v. James, 351 S.E.2d 148, 150 (S.C. 1986); Roundtree Villas Assn. v. 4701 Kings Corp., 321 S.E.2d 46, 50-51 (S.C. 1984); Miller v. City of Camden, 451 S.E.2d 401, 404 (S.C. Ct. App. 1994)). "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." Id. (quoting Restatement (Second) of Torts § 323 (1965)).

Whether such a duty arises in a given case may depend on the existence of particular facts. Miller v. City of Camden, 494 S.E.2d 813, 815-16 (S.C. 1997) (citing Carson v. Adgar, 486 S.E.2d 3 (S.C. 1997)). Prior conduct or internal memoranda may serve as evidence of a voluntary undertaking. See, e.g., Vaughan v. Town of Lyman, 635 S.E.2d 631, 637–38 (S.C. 2006) (finding genuine issue of material fact as to whether there was a voluntary undertaking of the maintenance of town sidewalks where there were references to sidewalk maintenance in town minutes and town ordinances regulating sidewalks; town was aware of complaints about sidewalks but did not report to any other authority; and town had previously handled complaints about sidewalks); Fickling v. City of Charleston, 643 S.E.2d 110, 116 (S.C. Ct. App. 2007) (fielding complaints, maintaining a log of calls, and having a policy and employees in place to repair sidewalks used by court as evidence to assess whether there was a voluntary undertaking). The existence of factual issues regarding whether the defendant voluntarily assumed the duty renders the existence of a duty a mixed question of law and fact to be resolved by the fact-finder. Vaughan v. Town of Lyman, 635 S.E.2d 631, 637–638 (S.C. 2006).

**i. Duty Voluntarily Undertaken by Adoption of Citadel Policies.**

As discussed previously, supra part I.A., The Citadel's own policies and procedures established certain steps it was to take in the face of complaints of sexual abuse. Citadel expert Ann Franke testified that an institution even can self-impose mandatory reporter duties by undertaking policies obligating certain officials to report. (Deposition of Ann Franke, Vol. I, p. 176:6-18). Thus, by adopting policies for the protection and well-being of prospective and

foreseeable victims, the Citadel acquired a duty under state common law to provide Plaintiff with adequate protection against that danger. See e.g. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (observing that by voluntarily undertaking to provide petitioner with protection against a danger it played no part in creating, the state may have acquired a duty under state tort law to provide petitioner with adequate protection against that danger).

Here, The Citadel acquired such a duty through its policies aimed at preventing harm and imposing reporter duties. By virtue of adopting policies and procedures, The Citadel undertook a duty to report ReVille to law enforcement and to warn plaintiffs, the community, and potential employers of ReVille's dangerous propensities and known acts of abuse. Despite its duties pursuant to the Citadel policies in effect, see supra part I.A., The Citadel ensured that none were followed, and that the child sexual abuse was instead concealed. In other words, by its very own policies and procedures, The Citadel failed to exercise due care. See Madison ex rel. Bryant, 638 S.E.2d at 659 (noting the standard of care in a given case may be established by a defendant's own policies and guidelines).

**ii. Duty Voluntarily Undertaken by Investigation.**

Citadel witness and expert testimony confirms there was a duty by The Citadel to protect foreseeable victims, such as the Plaintiff, by undertaking an investigation into the 2007 report of sexual abuse. Brandenburg admitted that "preventing harm to other young boys or victims" was a goal of the investigation. (Brandenburg Deposition, Vol. I, p. 31:4-7). He further agreed that "by undertaking the investigation . . . The Citadel was aiming to prevent harm to potential victims." (Brandenburg Deposition, Vol. I, p. 31:8-11). Similarly, Brandenburg testified that The Citadel's core values apply to him and that the moral sense of duty and obligation of responsibility for the welfare of others would apply to his investigation of an alleged sexual offense. (Vol. II, p. 259,

lines 11-19); (College Regulations) (defining "Duty" as "individual accountability and moral *obligation of responsibility for the welfare of others.*"). By voluntarily undertaking an investigation guided by the "moral obligation of responsibility for the welfare of others" and with the goal of "preventing harm to other young boys or victims," The Citadel owed a common law duty of care to Plaintiff.

Having undertaken the investigation- the only investigation conducted in 2007- The Citadel was obligated to act with due care, and it did not. In fact, by its own policies and procedures, The Citadel failed to exercise due care. Indeed, if The Citadel had conducted an impartial investigation, it would not have been led by its General Counsel, and it would have been in accordance with its own policies and procedures, state, and federal law. Instead, The Citadel neglected to follow these well-established policies and intentionally concealed the matter from law enforcement, the Citadel community, the Board of Visitors and the public at large. The Citadel's deviation from its own policies and procedures demonstrates its lack of due care under the relevant circumstances. See Peterson, 618 S.E.2d at 906.

Specifically, The Citadel undertook the duty to report ReVille to law enforcement; to report the 2007 sexual abuse complaint to the Citadel's Title IX Coordinator; to punish any individual found to have committed a sexual assault; not expunge molestation findings from the employee's record; to not terminate an investigation in exchange for resignation by the employee; to provide factual and candid responses to inquiries by potential employers; to fully cooperate with law enforcement; and to prevent harm to future victims by undertaking an investigation. See supra part I.A. By voluntarily undertaking these duties, The Citadel owed a duty to Plaintiff to use reasonable care to protect him from the risk of harm created thereby. Whether The Citadel exercised such care is a question of fact for the jury.

## II. Plaintiff's Outrage Claim Survives Summary Judgment.

Plaintiff pleads a claim of outrage, or intentional infliction of emotional distress, by The Citadel for its conduct of deliberately concealing the 2007 complaint of child sexual abuse by ReVille and facilitating ReVille's continued access to children in the Charleston community where it was reasonably foreseeable that he would sexually abuse Plaintiff. The elements of the tort of outrage include: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the defendant's conduct was "so extreme and outrageous so as to exceed all possible bounds of decency" to be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the defendant's actions caused the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was "severe such that no reasonable man could be expected to endure it." Argoe v. Three Rivers Behavioral Health, L.L.C., 710 S.E.2d 67, 74 (S.C. 2011) (citing Hansson v. Scalise Builders of S.C., 650 S.E.2d 68, 70 (S.C. 2007)).

### A. The TCA Does Not Bar A Claim Of Outrage Against The Citadel.

Defendant claims in its Motion for Summary Judgment that the TCA bars the claim of outrage against a state entity by citing to the definition of the word "loss" within the TCA:

> "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the intentional infliction of emotional harm.

S.C. Code § 15-78-30(f).

Thus, the definition of "loss" qualifies the "actual damages recoverable in actions for negligence" by excluding "intentional infliction of emotional harm" as a damage of such negligence. The reference to intentional infliction of harm in the "loss" definition is not an exclusion of tort liability for outrage against a state entity. Rather, state entities "are liable for

their torts in the same manner and to same extent as a private individual under like circumstances," subject to the limitations and exemptions from liability and damages contained in the code. S.C. Code § 15-78-40. The limitations and exemptions from liability and damages are delineated as specific circumstances where the state entity will not be liable for any loss, rather than a list of torts the state entity is exempt from. See S.C. Code § 15-78-60. The TCA does not grant state entities blanket immunity from outrage liability.

The South Carolina Court of Appeals recently ruled on a complaint against a state entity, the South Carolina Department of Social Services specifically, where the jury entered verdicts for the plaintiff on claims of gross negligence and outrage under the TCA. See Bass v. S.C. Dept. of Social Services, 742 S.C.2d 667 (S.C. Ct. App. 2013). At trial, DSS had moved for a directed verdict on the outrage claim, making the same argument as The Citadel that the TCA definition of loss excluded the claim, and renewed its motion at the close of its case. Id. at 670. On appeal, the Court reversed the trial court's denial of DSS's JNOV motions; however, the Court of Appeals did not base its reversal on the TCA excluding outrage claims. Rather, the Court of Appeals addressed the evidence in the case and whether the elements of outrage had been met. Id. at 670-672 (holding since evidence did not establish gross negligence by DSS, claim of outrage based on reckless conduct must fail because conduct cannot be reckless where it is not at least grossly negligent). If the TCA exempted outrage liability against a state entity, the Court of Appeals would not have had to go through the analysis of whether the elements of outrage were made by the plaintiff. There is no basis to bar Plaintiff's claim of outrage against The Citadel under the TCA's limitation on damages recoverable from state entity negligence.

**B. Plaintiff's Outrage Claim Is Not Barred Simply Because Other Tort Pled And Evidence Supports More Than Scintilla Of Evidence That The Citadel's Conduct Was Outrageous.**

The Citadel also incorrectly propounds that Plaintiff may not plead the tort of outrage where another tort with applicable remedies covers the conduct at issue. South Carolina jurisprudence has never made such a rule that a party may only plead outrage in the absence, and to the exclusion, of other torts. Such a rule would not make sense. Outrage has its own elements of proof that must be established, separate and distinct from other torts, and the relevant issue is whether the evidence in a specific case establishes those elements of outrage. See Argoe, 710 S.E.2d at 74 (reviewing whether material issue of fact existed to make out claims of false imprisonment, defamation, and outrage).

When South Carolina courts have reviewed whether the evidence makes out a cause of action of outrage, the courts have analyzed whether the specific elements of outrage are met and not whether another tort better captures the conduct at issue as the basis to allow a claim of outrage to proceed or not. See, e.g., Argoe, 710 S.E.2d at 74; Folkens v. J.W. Hunt, 348 S.E.2d 839 (S.C. Ct. App. 1986); Todd v. S.C. Farm Bureau Mutual Insurance Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), *portion of opinion quashed and verdict reinstated*, 336 S.C.2d 472 (S.C. 1985). The burden remains to prove the elements of the tort of outrage, even if another tort may remedy the conduct complained of. See Todd, 321 S.E.2d at 612-613 (reviewing evidence to determine if defendant's conduct may reasonably be regarded as outrageous even though another tort may cover the conduct). In this case, more than a scintilla of evidence exists to establish the elements of outrage against The Citadel, and The Citadel's conduct may "reasonably be regarded as so extreme and outrageous as to permit recovery" and submission of the issue to the jury. See Argoe, 710 S.E.2d at 74 (holding summary judgment for defendant appropriate on outrage claim where defendant's conduct was reasonable).

First, the evidence establishes that The Citadel was certain or substantially certain that severe emotional distress would be inflicted on Plaintiff when it intentionally concealed the 2007 report of child sexual abuse by ReVille. The Citadel's administrators actively told ReVille to "lay low" and leave The Citadel without any record of ReVille's child sexual abuse, without any disclosure to any law enforcement, and, in essence, without any indication attached to ReVille that he was a child molester. Furthermore, The Citadel allowed ReVille to leave as an esteemed Citadel alumnus and former employee so that ReVille could continue to gain employment with children based on his Citadel credentials. The Citadel took these actions despite the reasonable foreseeability that ReVille would continue molesting children, to include Plaintiff. It was certain or substantially certain that emotional distress of Plaintiff would result from The Citadel's conduct, as The Citadel's conduct led to Plaintiff's sexual abuse by ReVille. See Argoe, 710 S.E.2d at 74.

Second, concealing a child sexual predator and taking actions that allow the predator to continue to be around children and further victimize children is conduct "so extreme and outrageous so as to exceed all possible bounds of decency." See Argoe, 710 S.E.2d at 74. Such conduct readily may be regarded as "atrocious, and utterly intolerable in a civilized community." Id. Third, it was The Citadel's actions of concealing the sexual abuse by ReVille and supporting him in the community that directly caused Plaintiff's emotional distress by allowing ReVille access to Plaintiff. The emotional distress suffered by Plaintiff included years of suffering in silence out of fear that his parents would not love him anymore if he told them of his abuse by ReVille and would have been prevented had The Citadel not concealed its knowledge of ReVille as a sexual child abuser. Fourth, Plaintiff's emotional distress is so severe "that no reasonable man could be expected to endure it." See Argoe, 710 S.E.2d at 74. Accordingly, Defendant is not entitled to summary judgment on Plaintiff's claim of outrage.



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## III. Plaintiff's Claims Are Governed by The Statute of Limitations in S.C. Code § 15-3-555.

The governing statute of limitations for the causes of action in this complaint is S.C. Code § 15-3-555(A):

> An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes twenty-one years of age **or** within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later.

(emphasis added). Plaintiff's claims against The Citadel "to recover damages for injury to [his] person ar[ose] out of [ReVille's] act[s] of sexual abuse," and S.C. Code § 15-3-555(A) afforded him two alternative deadlines by which he "must [have] commenced" his suit against The Citadel: (1) "within six years after [he] bec[a]me[] twenty-one years of age"; or (2) "within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse." § 15-3-555(A) also gave him the option of choosing "whichever [deadline] occurs later."

The statute of limitations for actions to recover damages from sexual abuse focuses on one kind of claimant only, a person like Plaintiff whose lawsuit "aris[es] out of act of sexual abuse ...," a characterization that fits his experience and the allegations of his Complaint far more closely than any other South Carolina statute of limitation or tolling statute. Plaintiff's birthday is September 27, 1992, and he was nineteen when he filed this complaint on March 19, 2012. The Citadel never has disputed that Plaintiff commenced his lawsuit "within six years after [he] bec[a]me twenty-one years of age ...", and indeed, Plaintiff has not reached his twenty-seventh birthday yet. § 15-3-555(A).

What's more, Defendant has even conceded that § 15-3-555 applies to this litigation. Specifically, by email dated November 16, 2007, Mark Brandenburg, The Citadel's general

counsel, applied the sexual abuse statute of limitations in construing the limitations period for Camper Doe, stating:

> Fortunately, since we now have a transcript of my interview with [Doe], we have an unequivocal trigger of the statute of limitations. As you know, under S.C. Code Ann. 15-3-555, "An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later." At this point, we [k]now that [Doe] has "discover(ed)... the causal relationship" between the injuries described in the interview and the alleged abuse. Thus, at the very latest, the statute began to run on the date of the interview in June. Unfortunately, though, since the statute provides that the limitations period does not expire until three years after that discovery or six years after the person becomes twenty-one years of age, the period arguably does not expire until [Doe's 27th] birthday.

(Brandenburg's 11/16/2007 Email to IRF).

The Citadel argues for the application of the statute of limitations found in S.C. Code § 15-78-110, which applies to claims brought under the state's Tort Claims Act [TCA], and S.C. Code § 15-3-40, which is more general tolling exception for all minor tort victims, one that is notably shorter in length than the tolling exception the South Carolina legislature enacted in 2001 for the benefit of a small and special class of the most vulnerable, unfortunate, and unenlightened tort victims—minors whose injuries and claims arose from sexual abuse.

Nonetheless, The Citadel contends that the discovery tolling provision set out in S.C. Code § 15-3-40 should take priority over S.C. Code § 15-3-555(A)'s twin tolling provisions, because S.C. Code § 15-3-40 is an older statute and more generally applicable than §15-3-555.[5] Such an

[5] Section 15-78-110 was enacted by Act No. 463, §1, 1986 S.C. Acts (and re-stated by Act No. 352, §9, 1988 S.C. Acts), while §15-3-40 was enacted by 1962 Code (and last re-stated by Act No. 234, §1, 1996 S.C. Acts), which makes both statutes older than §15-5-555, which was enacted by

argument is without merit and without precedential support. A fundamental canon of statutory construction establishes:

> Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.

Denman v. City of Columbia, 691 S.E.2d 465, 468 (S.C. 2010) (quoting Spectre, LLC v. S.C. Dept. of Health and Envtl. Control, 688 S.E.2d 844, 851 (S.C. 2010)).

This principle is especially true when the older statute contains more general language while the newer statute—S.C. Code § 15-3-555 in this case—specifically is worded to cover a narrower class of persons or a unique set of factual circumstances like sexually abused minors. Simply put, "specific laws prevail over general laws, and later legislation takes precedence over earlier legislation." I'On, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716, 719 (S.C. 2000). Furthermore, "'according to the great weight of authority,'" it is axiomatic "in [South Carolina] that where there is any doubt as to which of two statutes of limitation applies, the doubt must be resolved in favor of the longer period." South Carolina v. Life Ins. Co., 175 S.E.2d 203, 209-10 (S.C. 1970) (emphasis added) (quoting Scovill v. Johnson, 3 S.E.2d 543, 545 (S.C. 1939)). There is no reason the same principle should not apply in this case.

Moreover, any argument by The Citadel that because the TCA constitutes the basis for any tort claim against The Citadel and because the TCA contains its own statute of limitations under S.C. Code § 15-78-110 such that Plaintiff's claims are governed by the general minority tolling statute in S.C. Code §15-3-40, must fail. The Citadel's logic fails for the same reasons discussed

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Act No. 102, §3, 2001 S.C. Acts. Both statutes also are indisputably broader and more "general" than §15-5-555.

at length above and, most especially, because S.C. Code § 15-78-110 was enacted by Act No. 463, § 1, 1986 S.C. Acts (and re-stated by Act No. 352, § 9, 1988 S.C. Acts), while S.C. Code § 15-3-40 was enacted by 1962 Code (and last re-stated by Act No. 234, § 1, 1996 S.C. Acts), rendering both statutes older than S.C. Code § 15-5-555—enacted by Act No. 102, § 3, 2001 S.C. Acts. Both statutes also are indisputably broader and more "general" than S.C. Code § 15-5-555.

Again these facts are dispositive of The Citadel's argument, because "specific laws prevail over general laws, and later legislation takes precedence over earlier legislation." I'On, L.L.C, 526 S.E.2d at 719. Given the "'basic presumption ... that the legislature has knowledge of previous legislation when later statutes are passed on a related subject,'" the S.C. General Assembly could have drafted S.C. Code § 15-5-555 as to exempt its application to TCA claims. South Carolina v. Baucom, 531 S.E.2d 922, 924 (S.C. 2000) (citation omitted). The legislature did not do so. Instead, S.C. Code § 15-5-555 states it covers "an[y] action to recover damages for injury to a person arising out of an act of sexual abuse" without any limitation whatsoever. Additionally, the General Assembly could have amended S.C. Code § 15-78-110 or § 15-3-40 to make clear that neither statute was affected nor restricted in any fashion by S.C. Code § 15-3-555. Again, the legislature did not take such defining and limiting action.

Moreover, the legislative intent underlying § 15-3-555 compels its application to this case. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 533 S.E.2d 578, 581 (S.C. 2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Id. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. Id. "The legislature's intent should be ascertained primarily from the plain language of



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the statute." Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken, 579 S.E.2d 334, 336 (S.C. Ct. App. 2003). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will; therefore, courts are bound to give effect to the expressed intent of the legislature. Hodges, 533 S.E.2d at 581. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. v. Leatherman, 420 S.E.2d 843 (S.C. 1992). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 382 S.E.2d 11, 14 (S.C. Ct. App. 1989).

With regard to the sexual abuse statute, there is no indication the legislature intended to limit the application of the statute simply because the defendant is a government entity. The legislative intent underlying § 15-3-555 suggests that the legislature intended the statute to apply to all claims arising out of sexual abuse. Specifically, § 15-3-555 was passed and made effective in 2001—after the TCA. In addition, the legislative history of § 15-3-555 suggests no intent to limit the applicability of the statute with regard to claims against a government entity. See South Carolina Bill Summary, 2001 Reg. Sess. H.B. 3131 (describing the purpose of the act as "to amend Chapter 3, Title 15 by adding section 15-3-555 so as to provide a statute of limitations for actions based on sexual abuse or incest of six years from the time a person becomes twenty-one or within three years of discovering the injury and the causal relationship between the injury and the abuse or incest."). Indeed, in ratifying § 15-3-555, the legislature implicitly highlighted the importance of providing a remedy to victims of sexual abuse.

Likewise, if the plain language of § 15-3-555 and the legislative history supporting the same is not enough it bears noting that § 15-3-555 is currently pending amendment to entirely

abolish the limitations period for an action based on childhood sexual abuse. Specifically, the proposed amendment revises § 15-3-555 to read as follows:

> [T]he provisions of this chapter which provide limitations on the commencement of civil actions do not apply to a civil action to recover damages for injury to a victim arising out of an act of sexual abuse or incest which occurred when the victim was under the age of eighteen.

2013 S.C. House Bill No. 3940, 120th Session, April 11, 2013. Certainly, such an expansive stance on broadening the rights of victims to seek remedies for childhood sexual abuse is instructive as to the legislature's intent to extend this right to victims regardless of the identity of the defendant as a government entity. Moreover, because §§ 15-3-555 and 15-3-40 are within the same chapter, the language of the new statute would modify that of § 15-3-40 so as to remove the limitations period for all child sexual abuse claims. See 2013 S.C. House Bill No. 3940.

Also instructive is Doe v. R.D., 417 S.E.2d 541 (1992). There, our Supreme Court, confined by the limitations period that pre-dated § 15-3-555, expressly recognized the unjust result of a narrow statute of limitations on victims of childhood sexual abuse. In so noting, the Court observed:

> We are aware of the damage that sexual abuse can cause in the lives of the victims. We also recognize that the application of a statute of limitations can appear unjust. In Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action,* 26 Wake Forest L.Rev. 1245 (1991), the author details the rationale for statute of limitations and the application of such statutes in sexual abuse cases. A number of states have amended their statute of limitations to protect the sexually abused. A few courts have allowed the plaintiff to avoid the statute of limitations because the plaintiff has successfully claimed a disability. Several other states have applied the discovery rule by allowing the plaintiff to maintain an action where, as in the case at bar, the plaintiff discovered the causal connection between the injury and abuse within the statutory period. **While the result may be appealing, we are without authority to amend our statute. An exception to the plain and unambiguous language of our statute of limitations must come from our legislature.**

Id., at 542-43 (emphasis added) (footnotes and internal citations omitted). While the court in Doe v. R.D. was confined by the statute of limitations existing at the time, it presented a compelling case for legislative action. Id. at 142, n. 4 (noting at least three state legislatures amended the statute of limitations to accommodate adult survivors of sexual abuse in the wake of decision such as Doe v. R.D.). Fortunately, we are not so confined today. Indeed, it was against this backdrop that § 15-3-555 was enacted to avoid the unjust result of the reluctant R.D. Court—the very result sought by Defendant in the instant case.

Accordingly, as expressed in the language of the statute, § 15-3-555 applies to all actions arising out of sexual abuse and is the relevant statute of limitations governing this case. As such, Plaintiff's claims, having been filed within the limitations period provided by § 15-3-555, are timely.

It is worth noting, however, that even if Plaintiff's claims were governed by the general two year statute of limitations found in the TCA, the statute of limitations would not accrue until the facts and circumstances put Plaintiff on notice that he had a claim against Defendant. Specifically, "[t]he statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party." Bishop, 754 S.E.2d at 500 (quoting Kreutner v. David, 465 S.E.2d 88, 90 (S.C. 1995)). Moreover, "[d]eliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." Id. (citing Strong v. Univ. of S.C. School of Medicine, 447 S.E.2d 850, 852 (S.C. 1994)).

Thus, even if S.C. Code § 15-78-110 provided the applicable statute of limitations for this cause of action, the statute of limitations on Plaintiff's claims would not have accrued until at the

very earliest November 2011, when The Citadel first acknowledged that it had prior knowledge that ReVille sexually abused children at The Citadel Summer Camp. (Press Release). It was only after November 2011 that the Citadel began revealing facts and circumstances as to its prior knowledge of ReVille's propensity as a child sexual predator. Accordingly, it was not until November 2011 that Plaintiff was even put on notice that he might have a claim against The Citadel. Plaintiff filed his complaint four months later on March 19, 2012, and his complaint is timely even if S.C. Code § 15-78-110 applies. Furthermore, The Citadel's conduct at issue in Plaintiff's claims occurred from at least 2001 up to November 2011. It was in this time period that The Citadel deliberately concealed its knowledge of ReVille's child sexual abuse from potential plaintiffs. Such "deliberate acts of deception" by The Citadel would have tolled the statute of limitations of S.C. Code § 15-78-110 if it applied. Id.

## IV. Whether Plaintiff's Claims involve Multiple Or A Single Occurrence Is Not At Issue At Summary Judgment.

In its motion for summary judgment, The Citadel asserts that Plaintiff's claims involve a single alleged "occurrence," and, as such, Plaintiff's potential recovery is limited to $300,000 under the TCA, S.C. Code § 15-78-120(a)(1), providing that "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivision involved." The TCA defines "Occurrence" as "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code § 15-78-30(g). Our Supreme Court has determined that the burden to prove more than one occurrence rests on the plaintiff to be submitted to the jury through appropriate jury charges and the verdict form, and, accordingly, whether Plaintiff's claims involve a single occurrence or multiple occurrences is a question for the jury and not an appropriate

determination to be made at summary judgment. See Chastain v. AnMed Health Foundation, 694 S.C.2d 541, 543 (S.C. 2010).

Specifically, in Chastain, the Court addressed an appeal from a plaintiff who had suffered injuries resulting from negligent care she received from six nurses at AnMed, a charitable organization under the South Carolina Solicitation of Charitable Funds Act [CFA], S.C. Code §§ 33-56-10 to 200. Id. at 542-543. The CFA provides that a plaintiff may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not to exceed the limitations on liability imposed in the TCA, which is limited to $300,000 per occurrence. S.C. Code § 33-56-180(A); § 15-78-120(a)(1). The trial judge found only one occurrence in that case and so reduced the plaintiff's recovery to $300,000, reasoning that the intent of the CFA was to limit the amount of damages recoverable from a charitable organization and refusing to define occurrence to include every instance of negligence by each nurse. Chastain, 694 S.C.2d at 543. However, the trial judge rendered an "alternative" holding as well that based on the jury charge and verdict form, it was impossible to determine how many negligent acts or negligent nurses the jury found and therefore impossible to conclude that the jury found more than one occurrence; thus, rendering only one recovery appropriate. Id.

On appeal, the Supreme Court declined to respond to the trial judge's ruling as to the definition of occurrence under the TCA and, instead, "[found] it necessary to uphold only one ground in order to affirm the trial judge's decision to reduce the verdict." Id. As such, the Supreme Court held that as a plaintiff bears the burden of proof, "[i]f she alleges multiple occurrences, that is that there was more than one single act of negligence from which proximately flowed an unfolding sequence of events, she bears the burden of proving each occurrence." Id. 543-544. The jury must be instructed on the definition of occurrence and asked to determine whether there were

more than one occurrence, either in the jury charges or in the verdict form. Id. at 544. Accordingly, our Supreme Court has set forth the procedure for determining whether a cause of action involves a single or multiple occurrence, and it is a decision that rests with the jury.

A year after the Chastain decision, the Supreme Court addressed another issue involving the definition of occurrence under S.C. Code § 15-78-120(a)(1) and acknowledged its previous holding that the burden to prove more than one occurrence rests on the plaintiff. See Boiter v. S.C. Dept. of Transportation, 712 S.E.2d 401, 406 (S.C. 2011). However, before the Court in Boiter was the specific issue of whether two separate occurrences gave rise to the plaintiffs' injuries where two separate state entities took two independent and separate acts of negligence. Id. In order to determine the number of "occurrences" for state liability, the Court had to decide whether to focus on the number of negligent acts by the governmental entities or to focus on the number of injuries caused by those acts. Id. The Supreme Court held that it was not adopting a "bright line test" but that "the circuit court erred in tying the number of occurrences to the number of injuries sustained" by plaintiffs. Id. Accordingly, the Supreme Court found that the two separate entities that took separate actions did not combine to form one act of negligence constituting an unfolding sequence of events (or one occurrence). Rather, the two entities' separate actions each stood alone as an occurrence, rendering the state liable for two occurrences under the TCA. Id. at 407. Therefore, Boiter held that an occurrence is defined by the negligent action and not by the resulting injury to the plaintiff. Id.

The Supreme Court has not addressed a cause of action, as in this case, where a single state entity has committed multiple acts of negligence by multiple state actors. However, other courts have found multiple occurrences in such circumstances. Furthermore, South Carolina's TCA specifically provides "the exclusive remedy for any tort committed by an employee of a

governmental entity" and requires the naming of the governmental agency or political subdivision, where the employee was acting, as the defendant. S.C. § 15-78-70(a)-(c). The courts that have held that a single entity is NOT limited to a single occurrence where more than one state employee has committed separate acts of negligence supports the TCA's protection of employees from individual liability. For the state entity bears responsibility for the negligence of its employees, and since multiple employees cannot be sued for separate and distinct acts of negligence, it makes sense that the state entity can be held liable for each of the separate and distinct acts of negligence by each of its employees. Case law supports such a position.

In Williamson v. S.C. Insurance Reserve Fund, 586 S.E.2d 115, 116 (S.C. 2003), the case involved occurrences of negligence by two separate physicians who each examined the plaintiff during childbirth and failed to take necessary steps at different times during the delivery to prevent harm to the child. While the Supreme Court did not have reason to address the issue of occurrences on appeal, the circuit court had found two occurrences established for purposes of the TCA, reasoning that the negligent acts of each doctor were separate and apart from the other doctor. Id. at 116 (Supreme Court holding TCA recovery caps under § 15-78-120(a)(3) & (4) not applicable because claims arose/accrued before reinstatement of caps; thus unnecessary for court to address number of occurrences issue). Likewise, the Tennessee Court of Appeals found multiple occurrences by a single governmental hospital under Tennessee's applicable tort claims act where one employee negligently failed to prevent the patient from falling off a stretcher and a second employee negligently provided an overdose of medication, resulting in the patient's death. See Brooks v. Memphis & Shelby County Hosp. Auth., 717 S.W.2d 292, 297 (Tenn. App. 1986).

In addition, the Court of Appeals decision of Johnson v. Hunter, 688 S.E.2d 593 (S.C. Ct. App. 2010) is instructive as to when a single governmental entity incurs liability for multiple

occurrences. While in Johnson, the Court of Appeals had the novel question in South Carolina before it of how to determine if a single motor vehicle accident or multiple accidents occurred for purposes of insurance liability limits, the court's process of analyzing the issue is applicable to determining when multiple occurrences by a single state entity have occurred. The court looked to other jurisdictions and concluded that most courts evaluate the circumstances under the causation theory: "[c]ourts applying the 'cause' theory uniformly find a single accident 'if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event." Id. at 595 (quoting Ill. Nat'l Ins. Co. V. Szczepkowicz, 542 N.E.2d 90, 92 (Ill. 1989)).

While under the cause theory an accident means a "single, sudden, unintentional occurrence and is used to describe the event, no matter how many persons or things are involved," the accident or occurrence is viewed from the perspective of cause and not effect. Id. (citing Olsen v. Moore, 202 N.W.2d 236, 241 (Wis. 1972)). Moreover, the cause theory requires consideration of the timing of actions, or space interval between actions, and whether or not one source of negligence set all the subsequent events in motion or not. Id. at 596. Thus, the particular facts of the case determine whether one or more accidents occurred and timing must be addressed in the analysis. Id. (holding motor vehicle collisions resulted from single act of negligence due to the extremely short time between each collision, the close distance of defendant's car to plaintiff that he could not stop, and plaintiff's assertion that he did not believe defendant could have done anything to avoid hitting him). The cause theory mirrors the Supreme Court's determination in Boiter that an occurrence is defined by the negligent actions of the defendant and not by the resulting injury to the plaintiff. 712 S.E.2d at 407.

Whether multiple occurrences are at issue for purposes of determining the scope of The Citadel's liability, pursuant to S.C. Code § 15-78-120(a)(1), under the cause theory will involve consideration of the timing of The Citadel's individual actions at issue and, specifically, the space interval between the actions, as well as the multiple Citadel employees who took separate and distinct intentional and grossly negligent actions towards Plaintiff.

The evidence reveals that in 2001, 2002, 2003, 2005 and 2007, The Citadel had numerous opportunities to put an end to ReVille's abuse by reporting him to law enforcement. As early as August 6, 2001, The Citadel received a letter from Sergeant Middleton of the Charleston Police Department that highlighted several concerning practices occurring at The Camp, including that "[s]ome of the counselors are allowing certain campers to leave their rooms . . . to go into camp counselor's room[s], watch movies, and fall asleep in the same bed with counselors until the following morning." (Middleton Letter, August 6, 2001). The letter noted that "[s]ome of the counselors engage in sexual conversation in the presence of the campers." Notably, upon receipt of this letter, The Citadel took no action whatsoever. (Garrott Deposition, Oct. 22, 2013, p. 205-207). Indeed, ReVille has admitted to abusing nearly eight campers during the 2001 Summer Camp. To do so, he lured campers into his room at night with food and movies—the very practice highlighted in Middleton's letter. (ReVille Affidavit, Sept. 20, 2013). Had The Citadel taken action in response to Sergeant Middleton's letter, whether by interviewing counselors and campers or by implementing various safety practices such as random and frequent room checks, ReVille's sexual abuse would have been discovered or, in the alternative, ReVille would have stopped having campers in his room for fear of being caught and fired. (ReVille Affidavit, Sept. 20, 2013).

The Citadel, through Camp directors Jennifer Garrott and Bill Bates, also failed to take any action in response to ReVille's 2001 "Counselor Evaluation," which notes that ReVille was "senior counselor material if learns to distance himself from campers." (2001 Counselor Evaluation).

The following year in 2002, Camp Director Jennifer Garrott walked in on ReVille with a camper alone in his room, a violation of Camp policy that warranted termination. (ReVille Affidavit, Sept. 20, 2013). However, Garrott took no action in response to ReVille's policy violation, neglecting to even document the offense in ReVille's employment file. Then in 2003, Director Garrott again walked in on ReVille alone with a minor, Camper Doe 6, where ReVille was rubbing "Icy-Hot" on Doe 6's leg. Again, Garrott took no action on this terminable offense. Also in 2003, Garrott's assistant spoke to ReVille four to five times about having minors alone in his room; however, no further action was taken. Colonel Lackey similarly received a report from a counselor that ReVille was having minors in his room. On none of these occasions that occurred with three different Citadel employees was ReVille terminated, nor were the infractions documented in ReVille's file, despite camp policies and procedures requiring such action. (ReVille Affidavit, Sept. 20, 2013). Instead, The Citadel permitted ReVille to continue serving as The Camp's Senior Counselor entrusted with the responsibility of the safety and well-being of the very boys he was abusing.

Four years later, when Camper Doe made the report of abuse on April 23, 2007, The Citadel again could have put an end to ReVille's abuse by simply adhering to its own policies and the requirements of state and federal law regarding reporting of sexual abuse to law enforcement. This simple act would have resulted in an investigation by trained professionals and a conviction. (ReVille Guilty Plea, Scarlett Wilson Testimony). ReVille even testified he would have confessed

to the multiple acts of sexual abuse if interviewed by law enforcement in 2007. (ReVille Affidavit, Sept. 20, 2013).

Thereafter, multiple Citadel employees grossly neglected their duty of care. The day after the report of sexual abuse by Camper Doe, Mr. Brandenburg and Colonel Trez met with ReVille on The Citadel campus and alerted him of the allegations. Notice of the allegations not only gave ReVille an opportunity to revise his tactics to remain undetected, it also allowed him to contact two of the victims referenced in Doe's report and urge them to pledge their silence if questioned by Brandenburg. These victims, who happened to be current cadets on The Citadel campus, were former campers abused by ReVille at the Citadel Summer Camp. Notably, Brandenburg neither spoke with nor interviewed these cadet victims. (Brandenburg Deposition, Vol. I, p. 139-140, 142, 144). Moreover, President Rosa intentionally acted to keep the report concealed and close hold. (Shiel Deposition, January 21, 2014, pp. 36:9-20; 46:12-20). President Rosa, Mark Brandenburg, and Colonel Trez each acted to effect the cover-up and failed to take the necessary action mandated by Citadel policies and by state and federal law.

Additional acts of negligence include The Citadel permitting ReVille to leave Citadel employment with no record of the sexual abuse; endorsing ReVille as an educator and coach in the Charleston community; allowing ReVille to continue trading on his reputation at the Citadel to secure continued employment with children; and allowing ReVille to remain at large preying on and sexually abusing the Plaintiff and other boys despite the foreseeability of continued child sexual abuse by ReVille.

Thus, the litany of negligent actions spanning from 2001 to 2007 by multiple Citadel employees readily constitute multiple occurrences as contemplated by S.C. Code §§ 15-78-30(g) and 15-78-120. The actions are not of such close proximity as to be construed as simultaneous,



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and the separate and distinct actions taken by individuals employed by The Citadel were independent acts of negligence, not dependent on each other. Furthermore, in addition to the independent acts of gross negligence above, each day The Citadel actively concealed the known allegations and other knowledge of ReVille's sexual abuse constitutes separate and distinct negligent acts and/or omissions giving rise to hundreds of occurrences as contemplated by S.C. Code § 15-78-120.

Therefore, Plaintiff alleges multiple occurrences of negligence, which he bears the burden of proving and whose determination is within the responsibility of the jury. The appropriate procedure will be for the jury to be instructed on the definition of occurrence and asked to determine whether there were more than one occurrence, either in the jury charges or in the verdict form. Chastain, 694 S.C.2d at 544.

**CONCLUSION**

For the above stated reasons, IT IS SO ORDERED that Defendant's Motion for Summary Judgment is DENIED.

The Honorable R. Markley Dennis, Jr.
Presiding Judge, Ninth Judicial Circuit

December 4, 2014
Charleston, SC

FORM 4

**STATE OF SOUTH CAROLINA**
**COUNTY OF** CHARLESTON
**IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE**

**CASE NO.** 2012 **CP-**10-1858

John Doe 2 — PLAINTIFF(S)

The Citadel — DEFENDANT(S)

| **Submitted by:** | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE. ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

JULIE J. ARMSTRONG CLERK OF COURT 2015 JUN -5 PM 4:16 FILED

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Renewed Motion for Summary Judgment, filed on 4/24/15, is GRANTED; Formal order to follow.

**ORDER INFORMATION**

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| N/A | | $ |
| | | $ |
| | | $ |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**Circuit Court Judge** — **Judge Code** 2060 — **Date** 6/5/15

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | C/N: 2012-CP-10-1858 |
| JOHN DOE 2, | ) | |
| | ) | |
| Plaintiff, | ) | **ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT** |
| v. | ) | |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendant. | ) | |

FILED
2015 JUL -6 PM 3:
CHARLIE J. ...
CLERK OF COURT

This matter came before the Court on June 5, 2015 on the Notice of Motion and Renewed Motion for Summary Judgment of Defendant The Citadel, The Military College of South Carolina ("Defendant" or "The Citadel") ("Renewed Motion for Summary Judgment") under Rule 56 of the South Carolina Rules of Civil Procedure. All parties were represented by counsel at that hearing. The Court fully considered all memoranda submitted in support of and in opposition to the Renewed Motion for Summary Judgment, evidence presented, and arguments of counsel. For the reasons that follow, the Court GRANTS The Citadel's Renewed Motion for Summary Judgment.

## INTRODUCTION

Plaintiff commenced this action on March 19, 2012, alleging that he sustained injuries resulting from sexual abuse by Louis ReVille ("ReVille"). Plaintiff asserts claims sounding in negligence/gross negligence and outrage. On about March 6, 2014, The Citadel filed its original Notice of Motion and Motion for Summary Judgment, ("Initial Motion for Summary Judgment") asserting that the Court should enter judgment against Plaintiff (and against plaintiffs in related cases) for various reasons. The parties submitted voluminous memoranda in support of and in opposition to The Citadel's Initial Motion for Summary Judgment (some of which incorporated and referenced memoranda filed in those related lawsuits). After oral argument, the Court formally denied The Citadel's Initial Motion for Summary Judgment on December 9, 2014. The Citadel filed the instant Renewed Motion for Summary Judgment on April 24, 2015. The parties

have submitted supplemental briefing stating their positions with respect to the Renewed Motion for Summary Judgment. After considering the parties' arguments, relevant case law, and the detailed record, this Court has concluded that it must GRANT Defendant's Renewed Motion for Summary Judgment.

## BACKGROUND

On April 23, 2007, the father of a camper at The Citadel's summer camp ("Camper Doe") reported to The Citadel that a counselor had engaged in sexual misconduct with his son at the camp five years prior. Camper Doe's father was referred to The Citadel's General Counsel, Mark Brandenburg, with whom he spoke by telephone. During that conversation, Camper Doe's father said that on one occasion during the camp, a counselor named "Skip" invited his son, then a minor, into his room, where the two of them watched pornography and masturbated. Attorney Brandenburg later spoke with Camper Doe by telephone. Camper Doe reported that "Skip" had invited him into his room and showed him pornography and convinced him to masturbate. By reviewing camp records, Brandenburg was able to identify "Skip" as Skip ReVille. Brandenburg contacted ReVille, who was then working as a part-time tutor at The Citadel's Writing Center. ReVille denied Camper Doe's allegations.

Brandenburg continued his investigation between April and July 1, 2007. On that date, he met with Camper Doe, then nineteen years old, and his parents in Texas. Following that interview, there ensued discussions among Brandenburg, Camper Doe, and the South Carolina State Insurance Reserve Fund about possible settlement of Camper Doe's potential claims against The Citadel. However, later that fall Mr. Brandenburg and Camper Doe fell out of touch with one another. Brandenburg attempted to contact potential witnesses who may have been present during the incident that Camper Doe reported; however, he did not contact any who corroborated Camper Doe's complaint. The Citadel's investigation ended without the incident being reported to law enforcement.

In October 2011, multiple incidents of ReVille's sexual misconduct came to light. ReVille was arrested and confessed to abusing many boys over a period of years. Charges were filed against ReVille in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous criminal charges involving sexual misconduct and was sentenced to fifty years in prison.

This is a suit by a young man whom ReVille abused over a course of years, beginning in 2005 and continuing until the summer of 2007, when Plaintiff's family moved to Atlanta. As will be explained in more detail below, it is undisputed that Camper Doe's injury – his abuse by ReVille – arose before The Citadel became aware of any complaint about ReVille and thus before The Citadel could arguably have had any legal duty to protect Plaintiff from ReVille.

## ANALYSIS

### A. Plaintiff's Negligence Claim Fails Because The Citadel Did Not Owe Plaintiff a Duty of Care

For the reasons discussed below, the Court concludes that The Citadel is entitled to summary judgment because, as a matter of law, it did not owe a duty of care to prevent ReVille from sexually abusing Plaintiff.

The vast majority of ReVille's abuse of Plaintiff occurred *prior to* Camper Doe's report to The Citadel and The Citadel's investigation of that report. The undisputed evidence shows that ReVille began abusing Plaintiff in 2005, approximately two years before Mark Brandenburg interviewed Camper Doe in July, 2007. ReVille's abuse of Plaintiff ended, at the very latest, at the end of August, 2007, when Plaintiff's family moved out of state. It is impossible to differentiate the injury that Plaintiff suffered after The Citadel arguably should have stopped ReVille from abusing him from the unquestionably devastating injury that he suffered from his longstanding, ongoing abuse by ReVille. The Court must conclude that Plaintiff's injuries arose before – and thus were not a proximate result of – any possible breach of duty by The Citadel. ..[1]

[1] This Order is limited to the specific facts of this case. The Court expresses no opinion herein as

For the reasons discussed below, the Court grants summary judgment to The Citadel as to Plaintiff's negligence/gross negligence claims.

**1. No Duty of Care Exists Under the *Faile* Exceptions**

Plaintiff's negligence claims fail because The Citadel did not owe him a duty of care to protect him from abuse by ReVille. There is no duty to control a third-party or warn a potential victim of a risk from a third-party, except: (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; or (5) where a statute imposes a duty on the defendant. *See Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002).

**a. Special Relationship with Plaintiff or ReVille**

Under the "special relationship" exceptions, a duty of care to protect from acts of violence will not extend to the general public as a whole. Instead, a duty of care only exists where there is some relationship between defendant and a specific plaintiff. *See Roe v. Bibby*, 410 S.C. 287, 296, 763 S.E.2d 645, 650 (Ct. App. 2014) ("[W]e find the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual."), *cert. granted* (Jan. 16, 2015); *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011) ("Wal-Mart had no special relationship with either the victim or his father because it did not have the ability to monitor, supervise, or control either."); *Doe v. Marion*, 373 S.C. 390, 400-01, 645 S.E.2d 245, 250-51 (2007) ("Petitioner's claim fails to allege a specific threat against James Doe necessary to create a duty to warn."); *Rogers v. South Carolina Dep't of Parole and Community Corrections*, 320 S.C. 253, 256, 464 S.E.2d 330, 332 (1995) (finding no duty where there was "no evidence presented that Vandroff ever made a specific threat to harm Doris."); *Sharpe v. South Carolina Dep't of Mental Health*, 292 S.C. 11,

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to whether a duty of care might exist to a victim who ReVille abused exclusively after July, 2007.

14-15, 354 S.E.2d 778, 780 (Ct. App. 1987) ("There was no identifiable threat to Bobby Sharpe on these facts."). *But see Bishop v. South Carolina Dep't of Public Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) (finding duty where "Department was aware mother had made specific threats to harm victim in the past. . . . This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person.").

Plaintiff was not a known potential victim of threatened violence or abuse by ReVille. There was no specific threat to this specific Plaintiff of which The Citadel was aware. Moreover, there is no evidence that The Citadel had the ability to control ReVille in his interactions with Plaintiff or was even aware of any such interactions. Plaintiff's contention that his parents' trust in ReVille was based in part on ReVille's stature as a Citadel graduate and Writing Center instructor is not enough to make The Citadel responsible for criminal acts that were wholly unrelated to his employment by or attendance at The Citadel. Under such circumstances, the Court concludes that The Citadel did not owe a duty of care to Plaintiff under a "special relationship" theory.

**b. Voluntary Undertaking**

As to the "voluntary undertaking" exception, South Carolina recognizes voluntary assumption of a duty in limited circumstances:

> The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in the Restatement of Torts, which states:
>
> > 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.

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Restatement (Second) of Torts § 323.

*See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (refusing to extend doctrine beyond Section 323 formulation). The Supreme Court has declined to recognize an assumed duty of care under the broader standards of Section 324A of the Restatement (Second) of Torts[2]:

> 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 (recognizing that Section 324A" has not been adopted by our courts"). *See Underwood v. Coponen*, 367 S.C. 214, 218-19, 625 S.E.2d 236, 239 (Ct. App. 2006) (finding defendant did not assume duty where "neither 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) ("Without previous knowledge of the policy, Staples could not have relied on the policy. Thus, Duell's policy of looking for dead trees did not create a duty for which he could be held liable.").

Whatever the precise contours of the current state of the law concerning voluntarily undertaken duties, it is clear that The Citadel could not have voluntarily undertaken a legal duty to

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[2] 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.

protect Plaintiff from ReVille before it had any information that ReVille posed a potential threat to him. Even under the most liberal interpretation of the law on voluntarily undertaken duties, The Citadel did not, by employing ReVille as a summer camp counselor in 2002 and 2003, voluntarily undertake a duty to prevent him from abusing the Plaintiff years in the future. ReVille's abuse of the Plaintiff began in 2005, years after ReVille's affiliation with the summer camp ended and years before anyone, including Camper Doe, reported to The Citadel that ReVille had engaged in sexual misconduct.

c. **Creation of the Danger**

The Court concludes that a duty of care does not exist under the created danger exception, because The Citadel did not create the risk that ReVille posed to Plaintiff. Plaintiff can proffer no evidence that The Citadel created ReVille's desire to abuse children or encouraged ReVille to abuse children. The Citadel did not "create" any dangerous condition that would not have existed otherwise. Instead, the only claim in this case is that The Citadel failed to stop ReVille from his own voluntary actions of abusing children. In other words, Plaintiff claims that The Citadel did not act to vitiate an already existing risk. This is insufficient to create a duty of care under this exception. *See Doe v. Wal-Mart,* 393 S.C. 240, 711 S.E.2d 908 (2011) ("Wal-Mart did not negligently or intentionally create the risk of the father's sexual abuse").

d. **Duty Imposed by Statute**

Finally, the Court concludes that no statute imposes a duty of care under the facts of this case. Under the "special duty" rule, a statute may only impose a duty of care in this case under limited circumstances:

> "A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to

act in the circumstances or he undertakes to act in the exercise of his office."

*See Trask v. Beaufort County*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (Ct. App. 2011) (citation omitted). There is no evidence that any statute imposed any legally-enforceable duty of care on The Citadel at the relevant time.

Plaintiff argues that Title IX, 20 U.S.C. § 1681, imposes a duty of care. For the following reasons, the Court concludes that this statute did not create a duty of care. First, Plaintiff was not within the scope of Title IX or within a class of intended protected persons. He never attended The Citadel or its summer camp and was never a beneficiary of that statute. Moreover, the United States Office for Civil Rights, Department of Education's 2000 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("OCR Guidance"), upon which Plaintiff relies, "does not address standards applicable to private litigation for monetary damages." *See also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (holding that "administrative" requirements of Title IX do not create legal claim).

In addition, none of the other statutes that Plaintiff has cited in the past support the imposition of a duty of care:

- **South Carolina "Mandatory Reporting Statute":** In *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011), the Supreme Court held that, even if the Defendant is a mandatory reporter under a state child abuse statute, this does not create a private right of action or a duty of care. *See id.*, 393 S.C. at 248, 711 S.E.2d at 912 ("Wal–Mart's duty to report under the Reporter's Statute cannot give rise to civil liability."); *accord Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007).

- **Jessica Horton Act (S.C. Code § 59-154-10(B)):** This statute does not apply in this case because it did not become effective until June 6, 2007. See 2007 Act No. 53, § 2, effective June 6, 2007. Moreover, there is no evidence that the statute could ever have been triggered. That statute is triggered by a report of "criminal sexual conduct," which is a term of art used in S.C. Code §§ 16-3-651 through 16-3-659.1. There is no evidence of a report of "criminal sexual conduct" at the relevant time period.

- **The Clery Act (Clery Act, 20 U.S.C. § 1092(f)):** This statute explicitly

provides that it is not intended to "[c]reate a cause of action" or "[e]stablish a standard of care." *See* 20 U.S.C. § 1092(f)(14)(A).

For the foregoing reasons, because The Citadel did not owe Plaintiff a duty of care to prevent ReVille from abusing him, the Court grants summary judgment to The Citadel as to Plaintiff's negligence/gross negligence claims.

**2. No Duty of Care Could Exist With Regard to the Former Operation of the Summer Camp**

The foregoing analysis of possible sources of a duty is reinforced by examination of the duty to prevent current or former employees from committing criminal acts outside the scope of their employment. The authorities make clear that The Citadel did not owe Plaintiff a duty to protect Plaintiff from the criminal acts of its former employee. There exists no South Carolina authority imposing a duty from an employer to a victim of abuse by an employee occurring after the employment relationship has ended and outside of the employment context. Such claims have been uniformly rejected in other jurisdictions. *See e.g., Roe No. 1 v. Children's Hosp. Med. Ctr.*, 16 N.E.3d 1044 (Mass. 2014) ("We have never recognized or imposed a duty on an employer to prevent the future behavior of a former employee, with respect to unknown customers and clients of unknown future employers."); *Evans v. Ohio State Univ.*, 680 N.E.2d 161 (Ohio Ct. App. 10th Dist. 1996) ("The injured plaintiff was not a member of Ashtabula County 4-H at any time during which Waites judged a fair show or conducted a clinic; she became a 4-H member approximately six months after Waites last spoke at a clinic and the molestation took place, not at a 4-H activity, but at Waites's residence, over one year after the employment relationship between 4-H and Waites had ended."); *Coleman & Co. Sec., Inc. v. Giaquinto Family Trust*, 236 F. Supp. 2d 288, 304 (S.D.N.Y. 2002) ("These undisputed facts also bar any claim of negligent supervision. While Coleman would be liable for failing to properly supervise Jedrlinic before September 1996, it owed no such duty to supervise Jedrlinic — as an investment advisor or broker — when Jedrlinic was employed with J. Robbins, Inc. after that time."); *Philips v. TLC Plumbing, Inc*, 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864

(Cal. App. 4th Dist. 2009) ("Because the employer-employee relationship ends on termination of an employee's employment, we conclude an employer does not owe a plaintiff a duty of care in a negligent hiring and retention action for an injury or other harm inflicted by a former employee on the plaintiff even though that former employee, as in this case, initially met the plaintiff while employed by the employer.").

South Carolina law would not recognize a claim for the abuse of Plaintiff relating to the operation of the summer camp, even if ReVille were a *present* camp employee, let alone a former one. An employer owes a duty to supervise employees who are acting outside the scope of their employment (as a child abuser certainly would be) only in narrow circumstances not present here. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992); *Kase v. Elbert*, 392 S.C. 57, 64, 707 S.E.2d 456, 460 (Ct. App. 2011); *Hoskins v. King*, 676 F. Supp. 2d 441, 446-47 (D.S.C. 2009). The *Degenhart* Court held that an employer could only be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is on the employer's premises or is using the employer's chattel; (2) the employer knows or has reason to know that it has the ability to control its employee; and (3) the employer knows or should know of the necessity and opportunity for exercising such control. *See Degenhart*, 309 S.C. at 116-17, 420 S.E.2d at 496; *accord Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 644-45, 598 S.E.2d 717, 722-23 (Ct. App. 2004). There is no evidence that ReVille's abuse of Plaintiff had any nexus to his employment at The Citadel or its property. Moreover, there is no evidence that The Citadel knew, at the time ReVille was a camp counselor, that it needed to control him to protect Plaintiff.

**B. <u>Plaintiff's Outrage Claim Fails for Several Reasons</u>**

**1. <u>The South Carolina Tort Claims Act Bars Plaintiff's Outrage Claim</u>**

The South Carolina Tort Claims Act ("Act") "establish[es] limitation[s] on an exemption to the liability of the state [and] . . . must be liberally construed in favor of limiting the liability

of the state." *See* S.C. Code Ann. § 15-78-20(f). Plaintiff does not dispute that the Act applies to The Citadel and governs his claims in this case. The Act states that a "loss" "does not include the intentional infliction of emotional harm." *See* S.C. Code § 15-78-30(f). The Act also provides that a governmental entity may not be held liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice,* [or] *intent to harm.*" *See* S.C. Code § 15-78-60(17) (emphasis added). These provisions bar claims for outrage/intentional infliction of emotional distress. *See Newman v. South Carolina Dep't of Employment and Workforce*, 2010 WL 4791932, at *2 (D.S.C. Sept. 22, 2010), *report and rec. adopted*, 2010 WL 4666360 (D.S.C. Nov. 18, 2010); *Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Harkness v. City of Anderson*, 2005 WL 2777574, at 4 (D.S.C. Oct. 25, 2005) ("Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act . . . on the claim of outrage, otherwise known as intentional infliction of emotional distress. [Citation omitted.] The court agrees."); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'"); *accord Lindquist v. Tanner*, 2012 WL 3839237, at *4 (D.S.C. April 12, 2012) ("Plaintiff concedes that her claim for 'intentional' infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act.'"), *report and rec. adopted in part*, 2012 WL 3839235 (D.S.C. Sept. 4, 2012). Plaintiff's outrage claim is barred by the Act.

Therefore, the Court grants summary judgment to The Citadel as to Plaintiff's outrage claims.

**2. Plaintiff's Outrage Claim is Barred Because No Conduct Was Directed Toward Plaintiff**

In the alternative, Plaintiff's outrage claim fails because The Citadel did not direct any

conduct toward the Plaintiff. The South Carolina Supreme Court has held that an outrage claim cannot succeed where Defendant's conduct was not specifically and knowingly directed at the particular Plaintiff:

> The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. *Christensen v. Superior Court*, 54 Cal.3d 868, 820 P.2d 181, 2 Cal.Rptr.2d 79 (1991). It is not enough that the conduct is intentional and outrageous. It must be conduct *directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. Id.* at 903, 820 P.2d at 202, 2 Cal.Rptr. at 100; see also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 12 (1984 & Supp. 1988) (hereinafter Prosser & Keeton ). There is no evidence that respondents targeted appellants to be harmed by their allegedly tortious acts.
>
> The harm suffered by appellants arose only indirectly from respondents' publishing allegedly false information about Bodie. There are situations when plaintiffs may recover for intentional infliction of emotional distress for harm they suffer as the result of acts which have injured another. The Restatement (Second) of Torts § 46(2) (1965) provides:
>
> > § 46. Outrageous Conduct Causing Severe Emotional Distress
> >
> > . . . . .
> >
> > (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> >
> > (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> >
> > (b) to any other person who is present at the time, if such distress results in bodily harm.
>
> As a matter of policy, courts have limited such recovery "to the most extreme cases of violent attack, where there is some especial likelihood of fright or shock." Prosser & Keeton § 8. See, e.g., Courtney v. Courtney, 186 W.Va. 597, 413 S.E.2d 418 (1991) (assault on mother in son's presence stated cause of action for intentional infliction of emotional distress by son).
>
> There being no evidence that respondents physically attacked Bodie *in the presence of appellants*, we must hold that appellants do not possess a cause of action for intentional infliction of emotional distress arising under section 46(2).

*See Upchurch v. New York Times, Inc.*, 314 S.C. 531, 536-37, 431 S.E.2d 558, 561-62 (1993)

(emphasis added); *Roberts v. Simmons*, 2014 WL 7005250, at *6 (D.S.C. Dec. 11, 2014) ("The undersigned recommends dismissal of this claim. As a preliminary matter, it is not clear that Defendant's alleged conduct was directed at the Plaintiff."); *Fulghum v. Wise Seats, Inc.*, 2012 WL 1032594, at *4 (D.S.C. Mar. 27, 2012) ("Here, the conduct upon which Plaintiff bases his claim . . . is not tortious conduct that was specifically directed towards Plaintiff.").

The South Carolina Court of Appeals held that parents of a minor sexual abuse victim could not sue a school for outrage because there was no evidence that the school's alleged conduct was directed at the particular plaintiff. *See Doe v. Rojas*, 2007 WL 8327520, at *4 (Ct. App. April 26, 2007) ("[T]he record contains no evidence that the School District, in failing to take any preemptive action to prevent the abuse, targeted or directed any of its conduct towards the Does. Further, no evidence suggests the School District's actions after discovering Rojas' misconduct was directed towards the Does.").

Plaintiff has not proffered any evidence that The Citadel directed any actions against him. There is no evidence that The Citadel knew ReVille abused Plaintiff or had any contact whatsoever with him. Under such circumstances, Plaintiff cannot succeed on an outrage claim.

Therefore, the Court grants summary judgment to The Citadel as to Plaintiff's outrage claims.

## CONCLUSION

For all of the reasons discussed above, the Court grants Defendant The Citadel's Renewed Motion for Summary Judgment and hereby enters summary judgment against Plaintiff on all of his claims in this lawsuit.

AND IT IS SO ORDERED!

BY THE COURT

Dated: ~~June~~ July 2, 2015
Charleston, South Carolina

R. Markley Dennis, Jr.
Circuit Court Judge

Rule 13

**STATE OF SOUTH CAROLINA** )
)
**COUNTY OF** CHARLESTON )
)
JOHN DOE 2 )
**Plaintiff(s)** )
)
**vs.** )
)
THE CITADEL )
**Defendant(s)** )

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION COVERSHEET**

12 -CP- 10 - 1858


**(Please Print)**
**Submitted By:** W. Mullins McLeod, Jr
**Address:** **Post Office Box 21624, Charleston, South Carolina 29413**

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**Fax #:** 843-277-6660
**Other:**
**E-mail:** mullins@mcleod-lawgroup.com


**NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.**

## DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete***

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (*Check One Box Below*)

**Contracts**
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

**Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

**Torts – Personal Injury**
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

**Real Property**
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

**Inmate Petitions**
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

**Judgments/Settlements**
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

**Administrative Law/Relief**
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

**Appeals**
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

**Special/Complex /Other**
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

**Submitting Party Signature:** _____ **Date: March 19, 2012**

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

## FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

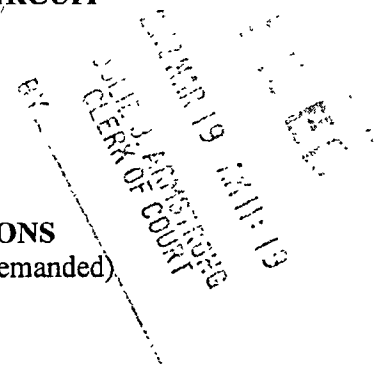
    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note:** **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

| | |
|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF CHARLESTON** | **COURT OF COMMON PLEAS**<br>**NINTH JUDICIAL CIRCUIT**<br>**CASE NO:** |
| JOHN DOE 2,<br><br>Plaintiff,<br><br>vs.<br><br>THE CITADEL,<br><br>Defendant. | **SUMMONS**<br>(Jury Trial Demanded) |



YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at their office at 134 Meeting Street, Suite 160, PO Box 21624, Charleston, South Carolina 29413 within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to appear and defend by filing an Answer to the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

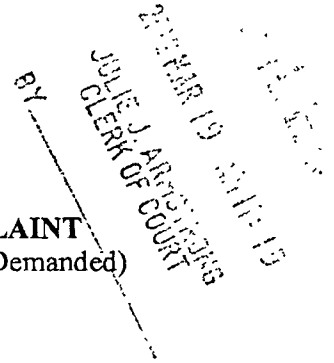
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Julie L. Moore

Attorneys for the Plaintiff

3/19, 2012
Charleston, South Carolina

| | | |
|---|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF CHARLESTON** | ) | **COURT OF COMMON PLEAS**<br>**NINTH JUDICIAL CIRCUIT**<br>**CASE NO:** |
| John Doe 2,<br><br>Plaintiff,<br><br>vs.<br><br>The Citadel,<br><br>Defendant. | ) | **COMPLAINT**<br>(Jury Trial Demanded) |



Plaintiff, John Doe 2, complaining of Defendant, The Citadel, alleges the following:

## JURISDICTION AND VENUE

1. Plaintiff is a citizen and resident of Florence County, South Carolina. Because Plaintiff is a victim of criminal sexual conduct, he is referred to only by pseudonym pursuant to section 16-3-730 of the South Carolina Code.

2. Defendant, The Citadel, the Military College of the State of South Carolina, is located in Charleston County, South Carolina.

3. The separate and distinct acts and occurrences which give rise to this case occurred in Charleston County, South Carolina. Venue is proper in Charleston County, South Carolina.

4. This Court has personal jurisdiction over the parties and subject matter jurisdiction over the claims set forth herein.

## FACTUAL BACKGROUND

5. In 1957, General Mark Clark founded The Citadel Summer Camp (The Camp) for the purpose of bringing aspects of The Citadel's college experience to young children and to

recruit future Citadel cadets. The Citadel operated The Camp on its campus each summer from approximately 1957-2006.

6. Upon information and belief, Louis "Skip" ReVille, a Citadel cadet from 1998-2002, was selected by The Citadel to serve as a camp counselor at The Camp during the summers of 2000-2004.

7. In 2002, upon information and belief, ReVille confessed to members of The Citadel Public Safety that he sexually abused young boys and requested the help of The Citadel.

8. According to President John Rosa, members of The Citadel Public Safety are state commissioned law enforcement officers operating under the authority and supervision of the State Law Enforcement Division (SLED). (See Exhibit A).

9. In addition and according to President Rosa, The Citadel's internal policies and procedures require these officers to report ALL criminal offenses to SLED. (See Exhibit A).

10. In 2002 and all times herein, the sexual abuse of a minor was a criminal offense pursuant to the laws of the State of South Carolina and The Citadel violated its own internal policies and procedures by failing to report ReVille to SLED following ReVille's 2002 confession and at all times thereafter.

11. Upon information and belief, because The Citadel Public Safety Officers were commissioned law enforcement officers, they were required to report suspected child sexual abuse because they were "police and law enforcement officers" under South Carolina's Mandatory Reporting Act.

12. In addition to violating its own internal policies and procedures, The Citadel violated statutory and common law duties to report ReVille to authorities and to warn the public in general and Plaintiff in particular of the threat that ReVille posed to young boys.

13. In April of 2007, a former camper and his family reported to President Rosa's office that the young boy had been sexually abused while attending The Citadel Summer camp in 2002. The camper's father called President Rosa's office because he researched who he needed to report the abuse to and because he was an alumnus of The Citadel.

14. Upon information and belief, at the time The Citadel received notice of the former camper's allegations in 2007, ReVille was employed by The Citadel as a faculty member and had signed an employment contract with The Citadel whereby ReVille agreed to teach at The Citadel from August 16, 2006 – June 30, 2007. (See Exhibit B).

15. Plaintiff is informed and believes that President Rosa was personally aware and had firsthand knowledge of the damage a child sexual abuse scandal could cause The Citadel because prior to joining The Citadel he served as Superintendent of the United States Air Force Academy in the wake of a sexual assault scandal.

16. Upon information and belief, The Citadel had in its possession on April 24, 2007, a handwritten note which stated: "Skip was asked to leave Pinewood Prep." (See Exhibit C).

17. The Citadel and its insurance carrier dispatched The Citadel's in-house attorney to Dallas, Texas to meet with the former camper and his family and to take a statement detailing the sexual abuse. The Citadel hired a court reporter to transcribe the statement and, as of July 1, 2007, The Citadel knew the following:

i. The former camper was sexually abused in ReVille's dorm room during the summer of 2002. ReVille insisted that the former camper and another camper spend the night with him in his dorm room. ReVille showed the boys pornographic videos on his computer and talked to the boys about the effect of masturbation on the size of a boy's penis.

ii. ReVille began masturbating in front of him and encouraged the young boy to do the same as they sat around ReVille's computer. When the victim tried to leave, ReVille coerced him into staying and masturbating in front of him.

iii. ReVille abused the camper who accompanied him to ReVille's dorm room multiple times during the summer of 2001 and 2002. The former camper also personally observed several other young boys going into ReVille's room late at night over the course of the summer.

18. The Citadel assured the former camper and his parents that The Citadel would investigate the allegations of ReVille's sexual abuse and report him to the proper authorities. The former camper was very clear: "Most of all, the thing I want the most is just to make sure that Skip doesn't have a chance to do this to anyone else."

19. However, The Citadel chose only to share the former camper's report with The Citadel's insurance carrier and attempted to offer the former camper and his parents money to keep the allegations from surfacing and to avoid a lawsuit.

20. After the former camper's father called President Rosa's office and after The Citadel obtained the former camper's statement, The Citadel had clear and unambiguous notice that a crime involving child sexual abuse had occurred at The Citadel.

21. At no point after the July 1, 2007, interview with the former camper did The Citadel report ReVille to law enforcement or take any action to prevent ReVille from sexually abusing other young boys, including this victim.

22. Upon information and belief, it is well established under South Carolina common law that a principal is affected with constructive knowledge of all material facts received by his agent when the agent is acting within the scope of his authority.

23. At all times relevant hereto, President Rosa, The Citadel's in-house attorney and The Citadel's insurance carrier acted within the scope of their authority and that once they were put on notice of the sexual abuse in 2007 everyone at The Citadel had notice including The Citadel Public Safety which was a mandatory reporter in 2007.

24. Following the 2007 complaint, The Citadel violated its internal policies and procedures, statutory laws and well-established common law of the State of South Carolina by failing to report ReVille and in failing to warn potential victims.

25. Plaintiff is informed and believes that President Rosa has personal knowledge of the duty to report criminal activity because, as Superintendent of the United States Air Force Academy, he instituted a reporting policy. While discussing this policy, President Rosa stated:

> "You report a crime. That way, you have a victim. The commander—it's in the chain of command. The commander knows that we have a victim. We can preserve evidence, take care of that victim, preserve evidence so that as the trauma passes, we can bring the appropriate action to the alleged perpetrator. So that's the program we have now."

(Online NewsHour with Jim Lehrer, October 14, 2003.)

26. Plaintiff is informed and believes that had President Rosa done for the Military College of South Carolina what he was quoted as doing for the United States Air Force Academy then the sexual abuse described herein would not have occurred.

27. Only when the media began reporting in October of 2011 that The Citadel concealed the 2007 allegations made against ReVille did The Citadel break its silence.

28. The Citadel broke its silence on or about November 14, 2011, when President Rosa held a press conference to address the media reports involving the former camper and his 2007 complaint.

29. Upon information and belief, President Rosa stated that one of the reasons The Citadel did not report the abuse was because "they did their own thing there."

30. Plaintiff is informed and believes that The Blue Book is issued by The Citadel's Office of The Commandants and contains regulations providing policy guidance to members of The Citadel Corp of Cadets. The Blue Book defines the abuse suffered by the Camper as "serious sexual activity" which warrants expulsion from The Corp of Cadets. (See Exhibit D).

31. Plaintiff is informed and believes that there is no form of acceptable childhood sexual abuse and that scientific research and studies indicate that sexual abuse becomes more pervasive and more severe the longer the perpetrator goes undetected.

32. The Citadel was in a unique position based upon its knowledge of the reported sexual abuse and its special relationship with ReVille to warn and or prevent ReVille from sexually abusing other young victims and, more particularly, Plaintiff.

33. ReVille began grooming this John Doe victim for what became an escalating pattern of sexual abuse when the child was twelve years old and after The Citadel was in a position to prevent the abuse.

34. ReVille first showed Plaintiff pornographic images, films and websites.

35. ReVille took the sexual abuse a step further when he explained and demonstrated to this victim how to masturbate and forced the victim to masturbate in his presence. ReVille began frequently performing oral sex on the victim.

36. Upon information and belief, ReVille created a fraternity for young boys that he named "The Killers." Each member, including this victim, was given a nickname by ReVille that was inspired by the size and shape of the boy's genitals.

37. As part of the initiation into "The Killers" fraternity, ReVille forced Plaintiff to suck peanut butter off of ReVille's penis.

38. Over the course of eighteen months, ReVille sexually abused this victim in excess of one hundred times.

39. For almost four years, Plaintiff suffered in silence and it was not until the media reports surfaced in late 2011 that he shared the abuse with his parents and with law enforcement.

40. This victim has suffered and continues to suffer irreparable emotional harm. During and after ReVille's sexual abuse, the victim's grades and scholastic performance declined drastically, he has struggled in all aspects of life and has contemplated suicide. He has lacked the ability to develop and maintain close personal relationships with his family and friends because of the shame and embarrassment he suffered. Currently, four years after ReVille's sexual abuse, this victim continues to resist affection from his family members, has trouble sleeping, suffers from deep depression and anger management.

41. As a direct and proximate result of the act and/or omissions of The Citadel, Plaintiff serious and permanent injuries which have caused and in the future will cause Plaintiff to suffer one or more of the following elements of damage:

i. physical pain;
ii. suffering;
iii. mental anguish;
iv. emotional distress;
v. loss of sleep and inability to concentrate;
vi. loss of the enjoyment of life;

vii. shock and injury to Plaintiff's nerves and nervous system;

viii. increased susceptibility to future injury;

ix. substantial expenses for medical services in the past and in the future;

x. as well as any and all other damages provable at the trial of this case.

**COUNT ONE**

**Negligence/Gross Negligence against the Citadel**

42. Plaintiff reincorporates and realleges all preceding paragraphs as if fully set forth herein.

43. When The Citadel established a residential summer camp for the community's youth, The Citadel undertook the duty to maintain the safety of those children and to accurately represent any inappropriate conduct between The Camp's counselors and campers.

44. The Citadel bestowed honors and accolades upon ReVille, and The Citadel knew ReVille relied on his status as a decorated alumnus to present to the public and future employers that he was trustworthy to work as a teacher, coach, and mentor to young boys. The Citadel knew or should have known that its silence about ReVille's danger to young boys negligently created the risk that ReVille would be placed in positions that would enable him to victimize additional young boys, like Plaintiff. This special relationship with ReVille created duties that were violated and proximately caused the damages set forth herein.

45. ReVille was the Head of The Citadel's Honor Committee and possessed a special relationship with the President, The Citadel Board of Visitors and other Citadel officials. In addition, Plaintiff is informed and believes that President Rosa and other Citadel officials knew ReVille on a personal basis.

46. In addition to this special relationship, ReVille was an employee of The Citadel when the former camper came forward in 2007. Thus, at the time The Citadel received the

allegations in 2007, The Citadel had the ability and the duty to control the actions of ReVille and/or discipline him in accordance with The Citadel's internal policies and procedures.

47. Plaintiff is informed and believes that The Citadel was put on notice of ReVille's propensity to molest children while he was employed by The Citadel during a summer furlough and therefore was subject to The Blue Book of Regulations and that had The Citadel followed its espoused convictions and code then ReVille would not have been allowed to coach and teach young children. (See Exhibit D).

48. Plaintiff is further informed and believes that Citadel graduates are members of the governing body of The Citadel known as The Board of Visitors and that, as graduates of The Citadel and as members of The Board of Visitors, they are required to adhere to The Citadel's Code of Conduct and Core Values.

49. The Citadel's knowledge of the danger ReVille posed also placed The Citadel in a special relationship with all subsequent employers of ReVille as well as the families and children who only came into contact with ReVille because of The Citadel's implicit representation that he was not a danger to the safety of young children. In addition, The Citadel has continued to hold ReVille out to the public as a man of honor and as a decorated cadet despite The Citadel's knowledge of the incidents of 2002 and 2007.

50. Further, The Citadel undertook the duty to warn and/or prevent other victims from being sexually abused by ReVille and, after undertaking this duty, The Citadel failed to use due care and was negligent in a number of particulars.

51. President Rosa has publicly admitted that The Citadel had a duty to do more upon receipt of the 2007 allegations by a former camper.

52. After ReVille's 2002 confession, and after the 2007 allegations were made to The Citadel, it was reasonably foreseeable that ReVille would not stop preying on young boys and that The Citadel's silence would enable ReVille to continue to sexually abuse his victims undetected.

53. The Citadel only demonstrated concern with concealing the abuse for the protection of its own public image. The safety of children and the prevention of further sexual abuse by ReVille were apparently of no significance.

54. The decisions to ignore and conceal the threat ReVille posed to young boys in the community were made by Citadel officials acting within the scope of their official duty. These officials acted in a reckless and grossly negligent manner in executing their official state duties, and but for The Citadel's continued silence and failure to act, the repeated sexual abuse and irreparable emotional and mental harm to this victim would not have occurred.

55. Plaintiff suffered serious, permanent injuries as a result of The Citadel's willful, wanton, reckless, grossly negligent and negligent acts and/or omissions by:

i. Failing to follow their own policies and procedures despite the foreseeability that other victims would be injured and that Plaintiff would suffer the sexual abuse described herein;

ii. Failing to warn the public and in particular Plaintiff of Skip Reville;

iii. Failing to properly investigate the 2002 and 2007 incidents of childhood sexual abuse;

iv. Failing to discipline its own Cadet and to enforce The Citadel's disciplinary code;

v. Failing to control the conduct of its own Cadet and to prevent ReVille from abusing others and in particular Plaintiff;

vi. Failing to report ReVille's conduct to law enforcement;

vii. Failing to report ReVille's conduct to ReVille's employers despite the fact that the Citadel knew or had reason to know that ReVille continued to be employed in this community and worked with potential victims;

viii. Failing to report and/or warn Plaintiff's parents of ReVille's conduct;

ix. Failing to follow their internal policies, procedures and regulations, which created the risk that other children would be sexually abused by ReVille;

x. Breaching its duty of due care which was continuous and ongoing; and

xi. In such other and further particulars as the evidence at trial may show.

56. Plaintiff is entitled to damages as a result of acts and/or omissions of The Citadel.

**COUNT TWO**
**Outrage**

57. Plaintiff reincorporates and realleges all preceding paragraphs as if fully set forth here.

58. The Citadel acted in a reckless manner that The Citadel knew or should have known was likely to inflict severe emotional distress on any victim of ReVille's sexual abuse, including this victim, due to The Citadel's failure to act to stop, prevent, or eliminate ReVille's ability to sexually abuse other children.

59. The Citadel knew that choosing not to report ReVille would permit ReVille to continue working with and around children and to create opportunities where he could prey on young children.

60. The Citadel's deliberate concealment to protect its own public image, despite knowing that The Citadel's silence enabled ReVille to continue to victimize and sexually abuse young boys is conduct so extreme as to exceed all bounds of decency. It is atrocious and utterly intolerable in a civilized society.

61. This victim would never have been in contact with ReVille had The Citadel not remained silent about ReVille since 2002. These actions and omissions of The Citadel directly and proximately caused this victim's emotional distress.

62. The emotional distress suffered by this young boy, who suffered in silence for years out of fear that his parents would not love him anymore if he told them about ReVille's abuse, would have been prevented had The Citadel reported to law enforcement after being put on notice in 2002 and in 2007, is so severe that no reasonable person could be expected to endure it.

63. Plaintiff is entitled to damages as a result of the aforementioned acts and/or omissions of The Citadel.

WHEREFORE, Plaintiff respectfully prays for the following:

i. Judgment against Defendant for actual damages, special damages and consequential damages, and treble damages in an amount to be determined by the jury;

ii. Costs of this action; and

iii. All such other and further relief as this Court deems or the trier of fact deems proper.

iv. In addition, Plaintiff prays for relief by way of requiring The Citadel to use its considerable resources to establish and fund a Childhood Sexual

Abuse Prevention Program that will benefit the Charleston Community and the State of South Carolina.

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W. Mullins McLeod, Jr.
Julie L. Moore

*Attorneys for Plaintiff*

3/19, 2012
Charleston, South Carolina



## A Message from the President

A safe and secure campus is essential to The Citadel's realizing its vision of educating principled leaders. The Citadel Public Safety Department plays an integral role in providing a safe environment in which students, faculty and staff can live and learn. The Citadel regularly evaluates the security needs of the community and continues to consider these needs on an ongoing basis. This publication is a part of that effort. It tells you who to call and what to do if you are the victim of a crime. It also outlines policies aimed at promoting a safe learning and work environment. These policies work in conjunction with federal, state, and local laws, which the Department of Public Safety enforces. Please carefully consider the recommendations in this publication and work with Citadel Public Safety to help make The Citadel a safe and secure campus. Although the college and the Department of Public Safety go to great lengths to promote a safe and secure environment, personal safety is an individual responsibility. Together we must take personal responsibility for our own safety, as well as the safety of those around us. Working together, we will continue to keep The Citadel a safe campus for all.

**The Citadel Public Safety Department**

The Citadel Public Safety (PSAF) has complete police authority to apprehend and arrest anyone involved in illegal acts on campus, and also in areas immediately adjacent to the campus. The department consists of a team of law enforcement officers, including a director, deputy director, operations officer, and an investigator, as well as four shift supervisors and eight state patrol officers. All PSAF law enforcement officers are state commissioned law enforcement officers operating under the authority and supervision of the State Law Enforcement Division (SLED). They have jurisdiction both on and off campus for incidents which occur on Citadel property. The Citadel encourages all members of The Citadel community to immediately report any criminal offense, suspected criminal activity, or other emergency directly to Citadel Public Safety. PSAF reports all criminal offenses to SLED. PSAF personnel investigate all allegations of criminal activity. PSAF personnel and/or representatives of city, state, or federal law enforcement authorities prosecute all criminal offenses which occur on Citadel property. PSAF personnel work closely with local, state, and federal police agencies and have direct radio communication with the City police department on the City police radio network. PSAF is also a part of the Charleston County 911 Emergency System. Local law enforcement agencies report any criminal activity engaged in by students at off-campus locations to Citadel PSAF. PSAF provides this information to the Commandant, the Dean of The Citadel Graduate College (CGC), or the Provost, as appropriate, for disciplinary action or other appropriate response.

**Incident Reporting:**

To report a crime, on or off campus, contact Public Safety at (843) 953-5114, or by dialing 811 from any campus phone. You may also contact the City of Charleston Police Department at (843) 577-7074, the County of Charleston Sheriff's Department at (843) 202-1700, or the Isle of Palms Police Department, for incidents at The Citadel Beach House, at (843) 886-6522. Any suspicious on-campus activity should be reported to PSAF immediately. In addition, you may report a crime on campus to the following: Director of The Citadel Staff,



ALL-STATE LEGAL®
EXHIBIT
A

## Request to Fill a Temporary Staff Position

### Requesting Department

Request Number: 5393 Position Request Date Aug-16-2006

Type of Hire: New Hire Type of Position N/A

Employee: ReVille, Louis N. Employee [redacted]

Building: Thompson Hall Floor 1st Room 117 Phone 953-5365

Department Center for Academic Enrichment Account No 184570

Assignment Period Number HT0205 Begin Aug-22-2006 End Jun-30-2007

Payment Type Hourly Rate Proposed Amount 11.50

Payment Method Installments

Department Email Chris.Fudge Department Phone 953-7386

Requested by Burges, Judith C.

### Human Resources

Verification Pay Rate 11.50 Job Code 1 Salary Code 1 0430 Earnings Code 020

Comments: 8/22/2006-cbs

Approve

Disapprove Request with Comments

Request List Fill Position Menu

Close One-Stop



EXHIBIT B

ALL-STATE LEGAL

[redacted]

LOW AVI TEST GROUP

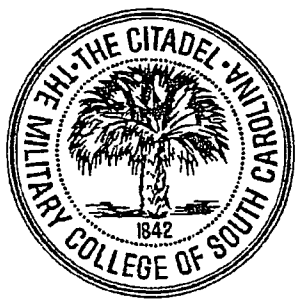
- NO MEMBERS [redacted]
- FOUND BY S.L. ON FIRST PAT-DOWN
  - MOM WAS UPSET
  - SECOND ON 3/5
- CAME FOR FOLLOW UP (2 TIMES)
  [redacted] DID COME BACK FOLLOW UP
- SHOP WAS ASKED TO VERIFY POSITIVE RESULT [UNKNOWN WHO]
- NO JOBS THAT NOT ON PROBATION

[redacted] WAS FOUND TO BE
TO INTOXICATED ON OPIOIDS
- WAS WITH HIS MOM, HER
BOYFRIEND - SHOT

EXHIBIT C

# BLUE BOOK

# REGULATIONS




## For The

## SOUTH CAROLINA CORPS OF CADETS

## 2008-2009

ALL-STATE LEGAL®
EXHIBIT
D

accompanied by appropriate record of counseling on CC Form 98. Cadet Commanders can only be reduced by the Commandant. The Office of the Commandant will be the reduction authority for all other rank holders.

b. The cadet becomes conduct deficient.

c. The cadet becomes physically deficient.

d. Cadets become academically ineligible for their class privileges or have insufficient credit hours to be classified as a member of their class.

e. All cadets found guilty of hazing and those cadets found guilty of major violations of the Fourth Class System including sexual harassment will be considered by the Commandant for transfer in order to facilitate good order and discipline.

f. Recommendation for filling vacancies left by reduction will be expedited through the chain of command to the Commandant's Department.

2. **Company Transfers.**

a. Cadet transfers from one cadet company to another are made under one or more of the following circumstances:

(1) If the cadet exceeds the semester or annual demerit authorization, a permanent transfer may be directed

(2) The cadet unit commander with concurrence of the Battalion TAC Officer, recommends to the Commandant that a transfer is required in the interest of good order and discipline within the company. These transfers are approved only as a last resort.

(3) Cadet Captains and above and sword bearing NCOs who are reduced are also permanently transferred.

(4) Cadets receiving a Class I punishment of more than 80 tours are automatically given a permanent transfer.

(5) Cadets requesting a company transfer for other reasons may do so through the cadet chain of command and TAC Officer to the Commandant.

b. Requests to return to one's original unit (for other than permanent transfers) must be made in writing to the Commandant, via the gaining unit commander and Battalion TAC, and will be the exception.

c. The transfer process requires written clearance and sign out from the original unit; acceptance by sign in and signing for property in new unit and authenticated by the TAC.

## N. CADET BEHAVIOR WHILE ON LEAVE OR FURLOUGH.

1. Cadet conduct during periods of leave or furlough is expected to be in accordance with the same standards as apply when the cadet is on campus. Cadets on Furlough may be subject to discipline for misconduct per Section V, paragraph 1.e., of the College Regulations.

2. Cadets who attend The Citadel Summer School will adhere to cadet regulations set forth in this regulation and as published in the Summer School Regulation by the Office of the Provost.

## O. OFFENSES OF CADETS ATTENDING THE CITADEL SUMMER

SCHOOL OR EMPLOYED BY THE CITADEL DURING SUMMER FURLOUGH.

1. **Expulsion may be the punishment for the following offenses:**

a. Knowingly making a false oral or written statement in response to an oral or written requirement from an individual or officer of the college authorized by position or function to place such a requirement;

b. Receiving or giving unauthorized assistance on examinations, cheating, and/or plagiarism;

c. Stealing or the commission of any act which is a felony under the laws of the State of South Carolina or the United States;

d. Violating The Citadel's drug policy as outlined in Chapter 3 of this Book;

e. Sexual assaults or attempted sexual assault;

f. Sexual harassment as defined in Chapter 3 of this Book;

g. Sexual activity on campus (students may not engage in serious sexual activity on campus. Serious sexual activity may include but is not limited to oral sex, sexual intercourse, or public display of nudity or partial nudity.

2. **Dismissal may be the punishment for the following offenses:**

a. Drunkenness, bringing intoxicating beverages onto the campus, or the possession of intoxicating beverages on the campus;

b. Disobedience to the directives of or an act of disrespect to any official of the college;

c. Commission of any unbecoming act or one which would tend to bring discredit to the college;

d. Discharge or possession of firearms on campus, except under proper supervision on authorized ranges;

e. Participation in extremist organizations, gang activities, racist or skinhead organizations, or any activity that will adversely affect the good order of The Citadel.

3. **Suspension may be the punishment for the following offenses:**

a. Insubordination or disorderly conduct;

b. Calling another student to personal account for actions taken while in the discharge of duties;

4. Other punishment may be imposed by the appropriate authority for any disorderly act, neglect, or misbehavior listed in regulations specifically prepared for students other than cadets.

5. All students, including cadets, who attend Summer School at The Citadel will abide by Summer School and other regulations published separately.

6. Cadets employed by The Citadel during furlough may be expelled, dismissed, or suspended for the commission of Class I offenses.

| | |
|---|---|
| STATE OF SOUTH CAROLINA | ) IN THE COURT OF COMMON PLEAS |
| | ) NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) CIVIL ACTION NO.: 2012-CP-10-1858 |
| JOHN DOE 2, | ) |
| Plaintiff, | ) |
| vs. | ) **ANSWER ON BEHALF OF THE DEFENDANT, THE CITADEL** |
| THE CITADEL, | ) |
| Defendant. | ) |

FILED
2012 JUN 20 PM 3:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**TO: W. MULLINS MCLEOD, JR., ESQUIRE, and JULIE L. MOORE, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF**

AND NOW COMES the Defendant, THE CITADEL (hereinafter, "The Citadel"), by and through its undersigned counsel, and files this Answer and Defenses to Plaintiff's Complaint, showing the Court as follows:

**FOR A FIRST DEFENSE AND BY WAY OF ANSWER**

1. Each and every allegation of the Plaintiff's Complaint not specifically admitted herein is denied, and The Citadel demands strict proof thereof.

**JURISDICTION AND VENUE**

2. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 1 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 1 of the Plaintiff's Complaint and demands strict proof thereof.

3. The Citadel admits the allegations of Paragraph 2 of the Plaintiff's Complaint.

4. The Citadel admits the allegations of Paragraph 3 of the Plaintiff's Complaint only to the extent that the Plaintiff alleges that conduct alleged in the Plaintiff's Complaint

occurred in Charleston County, South Carolina. The remaining allegations of Paragraph 3 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary, The Citadel denies the allegations of Paragraph 3 of the Plaintiff's Complaint and demands strict proof thereof.

5. The allegations of Paragraph 4 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary, The Citadel denies the allegations of Paragraph 4 of the Plaintiff's Complaint and demands strict proof thereof.

**FACTUAL BACKGROUND**

6. The Citadel admits the allegations of Paragraph 5 of the Plaintiff's Complaint only to the extent that General Mark Clark started The Citadel Summer Camp and that The Citadel operated the summer camp on its campus during the years of 1957 through 2006. The Citadel denies the remaining allegations of Paragraph 5 of the Plaintiff's Complaint and demands strict proof thereof.

7. The Citadel admits the allegations of Paragraph 6 of the Plaintiff's Complaint only to the extent that Louis "Skip" ReVille (hereinafter "ReVille") was a cadet at The Citadel and that ReVille served as a camp counselor at The Citadel Summer Camp several years. The Citadel denies the remaining allegations of Paragraph 6 of the Plaintiff's Complaint and demands strict proof thereof.

8. The Citadel denies the allegations of Paragraph 7 of the Plaintiff's Complaint and demands strict proof thereof.

9. In responding to the allegations of Paragraph 8 of the Plaintiff's Complaint, The Citadel craves reference to Exhibit A to the Plaintiff's Complaint, a written document, which

speaks for itself and is the best and only evidence of its contents. The Citadel specifically rejects and denies any attempt to characterize the contents of this document. The Citadel denies the allegations of Paragraph 8 of the Plaintiff's Complaint.

10. In responding to the allegations of Paragraph 9 of the Plaintiff's Complaint, The Citadel craves reference to Exhibit A to the Plaintiff's Complaint, a written document, which speaks for itself and is the best and only evidence of its contents. The Citadel specifically rejects and denies any attempt to characterize the contents of this document. The Citadel denies the allegations of Paragraph 9 of the Plaintiff's Complaint.

11. In responding to the allegations of Paragraph 10 of the Plaintiff's Complaint, The Citadel craves reference to the statutes of the State of South Carolina for the determination of criminal offenses in 2002. The Citadel denies the remaining allegations of Paragraph 10 of the Plaintiff's Complaint and demands strict proof thereof.

12. The allegations of Paragraph 11 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary, The Citadel denies the allegations of Paragraph 11 of the Plaintiff's Complaint and demands strict proof thereof.

13. The Citadel denies the allegations of Paragraph 12 of the Plaintiff's Complaint and demands strict proof thereof.

14. The Citadel admits the allegations of Paragraph 13 of the Plaintiff's Complaint only to the extent that a former camper reported misconduct by ReVille to President Rosa's office in April 2007. The Citadel denies the remaining allegations of Paragraph 13 of the Plaintiff's Complaint and demands strict proof thereof.

15. The Citadel denies the allegations of Paragraph 14 of the Plaintiff's Complaint and demands strict proof thereof.

16. The Citadel denies the allegations of Paragraph 15 of the Plaintiff's Complaint and demands strict proof thereof.

17. The Citadel denies the allegations of Paragraph 16 of the Plaintiff's Complaint and demands strict proof thereof.

18. In responding to the allegations of Paragraph 17 of the Plaintiff's Complaint, The Citadel craves reference to the transcript of the meeting among in-house counsel for The Citadel, the former camper, and the former camper's parents, a written document, which speaks for itself and is the best and only evidence of its contents. The Citadel specifically rejects and denies any attempt to characterize the contents of this document. The Citadel denies the allegations of Paragraph 17 of Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

19. The Citadel admits the allegations of Paragraph 18 of the Plaintiff's Complaint only to the extent that it agreed to investigate the former camper's allegations of misconduct by ReVille. The Citadel denies the remaining allegations of Paragraph 18 of the Plaintiff's Complaint and demands strict proof thereof.

20. The Citadel denies the allegations of Paragraph 19 of the Plaintiff's Complaint and demands strict proof thereof.

21. The Citadel denies the allegations of Paragraph 20 of the Plaintiff's Complaint and demands strict proof thereof.

22. The Citadel denies the allegations of Paragraph 21 of the Plaintiff's Complaint and demands strict proof thereof.

23. The allegations of Paragraph 22 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary, The Citadel denies the allegations of Paragraph 22 of the Plaintiff's Complaint and demands strict proof thereof.

24. The allegations of Paragraph 23 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed necessary, The Citadel denies the allegations of Paragraph 23 of the Plaintiff's Complaint and demands strict proof thereof.

25. The Citadel denies the allegations of Paragraph 24 of the Plaintiff's Complaint and demands strict proof thereof.

26. The Citadel denies the allegations of Paragraph 25 of the Plaintiff's Complaint and demands strict proof thereof.

27. The Citadel denies the allegations of Paragraph 26 of the Plaintiff's Complaint and demands strict proof thereof.

28. The Citadel denies the allegations of Paragraph 27 of the Plaintiff's Complaint and demands strict proof thereof.

29. The Citadel denies the allegations of Paragraph 28 of the Plaintiff's Complaint and demands strict proof thereof.

30. The Citadel denies the allegations of Paragraph 29 of the Plaintiff's Complaint and demands strict proof thereof.

31. In responding to the allegations of Paragraph 30 of the Plaintiff's Complaint, The Citadel craves reference to Exhibit D, a written document, which speaks for itself and is the best and only evidence of its contents. The Citadel specifically rejects and denies any attempt to

characterize the contents of this document. The Citadel denies the allegations of Paragraph 30 of Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

32. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 31 of the Plaintiff's Complaint without citation to the specific studies referred to by the Plaintiff. Therefore, The Citadel denies the allegations of Paragraph 31 of the Plaintiff's Complaint and demands strict proof thereof.

33. The Citadel denies the allegations of Paragraph 32 of the Plaintiff's Complaint and demands strict proof thereof.

34. The Citadel denies the allegations of Paragraph 33 of the Plaintiff's Complaint and demands strict proof thereof.

35. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 34 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 34 of the Plaintiff's Complaint and demands strict proof thereof.

36. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 35 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 35 of the Plaintiff's Complaint and demands strict proof thereof.

37. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 36 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 36 of the Plaintiff's Complaint and demands strict proof thereof.

38. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 37 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 37 of the Plaintiff's Complaint and demands strict proof thereof.

39. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 38 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 38 of the Plaintiff's Complaint and demands strict proof thereof.

40. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 39 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 39 of the Plaintiff's Complaint and demands strict proof thereof.

41. Upon information and belief, The Citadel is without sufficient knowledge or information to admit or deny the allegations of Paragraph 40 of the Plaintiff's Complaint. Therefore, The Citadel denies the allegations of Paragraph 40 of the Plaintiff's Complaint and demands strict proof thereof.

42. The Citadel denies the allegations of Paragraph 41 of the Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

**COUNT ONE**

43. The Citadel incorporates by reference, as if set forth at length, the allegations of Paragraphs 1 through 42 of this Answer, inclusive.

44. The allegations of Paragraph 43 of Plaintiff's Complaint constitute conclusions of law to which no response is necessary or appropriate. To the extent a response is deemed

necessary, The Citadel denies the allegations of Paragraph 43 of the Plaintiff's Complaint and demands strict proof thereof.

45. The Citadel denies the allegations of Paragraph 44 of the Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

46. The Citadel denies the allegations of Paragraph 45 of the Plaintiff's Complaint and demands strict proof thereof.

47. The Citadel denies the allegations of Paragraph 46 of the Plaintiff's Complaint and demands strict proof thereof.

48. The Citadel denies the allegations of Paragraph 47 of the Plaintiff's Complaint and demands strict proof thereof.

49. The Citadel admits the allegations of Paragraph 48 of the Plaintiff's Complaint only to the extent that The Board of Visitors of The Citadel consists of some graduates of The Citadel. The Citadel denies the remaining allegations of Paragraph 48 of the Plaintiff's Complaint and demands strict proof thereof.

50. The Citadel denies the allegations of Paragraph 49 of the Plaintiff's Complaint and demands strict proof thereof.

51. The Citadel denies the allegations of Paragraph 50 of the Plaintiff's Complaint and demands strict proof thereof.

52. The Citadel denies the allegations of Paragraph 51 of the Plaintiff's Complaint and demands strict proof thereof.

53. The Citadel denies the allegations of Paragraph 52 of the Plaintiff's Complaint and demands strict proof thereof.

54. The Citadel denies the allegations of Paragraph 53 of the Plaintiff's Complaint and demands strict proof thereof.

55. The Citadel denies the allegations of Paragraph 54 of the Plaintiff's Complaint and demands strict proof thereof.

56. The Citadel denies the allegations of Paragraph 55 of the Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

57. The Citadel denies the allegations of Paragraph 56 of the Plaintiff's Complaint and demands strict proof thereof.

**COUNT TWO**

58. The Citadel incorporates by reference, as if set forth at length, the allegations of Paragraphs 1 through 57 of this Answer, inclusive.

59. The Citadel denies the allegations of Paragraph 58 of the Plaintiff's Complaint and demands strict proof thereof.

60. The Citadel denies the allegations of Paragraph 59 of the Plaintiff's Complaint and demands strict proof thereof.

61. The Citadel denies the allegations of Paragraph 60 of the Plaintiff's Complaint and demands strict proof thereof.

62. The Citadel denies the allegations of Paragraph 61 of the Plaintiff's Complaint and demands strict proof thereof.

63. The Citadel denies the allegations of Paragraph 62 of the Plaintiff's Complaint and demands strict proof thereof.

64. The Citadel denies the allegations of Paragraph 63 of the Plaintiff's Complaint and demands strict proof thereof.

65. The Citadel denies that the Plaintiff is entitled to any of the relief requested in the Wherefore Clause of the Plaintiff's Complaint, including all subparagraphs, and demands strict proof thereof.

**FOR A SECOND DEFENSE**
**(Statute of Limitations)**

66. The Plaintiff's claims are barred by the applicable statute of limitations.

**FOR A THIRD DEFENSE**
**(Laches)**

67. The Plaintiff's claims are barred by the doctrine of laches.

**FOR A FOURTH DEFENSE**
**(Unclean Hands)**

68. The Plaintiff's claims are barred by the doctrine of unclean hands.

**FOR A FIFTH DEFENSE**
**(South Carolina Tort Claims Act)**

69. The Plaintiff's claims are barred by the provisions of the South Carolina Tort Claims Act, specifically S.C. Code Ann. §§ 15-78-60 (2), (5), (20), (23), and (25).

**FOR AN SIXTH DEFENSE**
**(South Carolina Tort Claims Act)**

70. The Plaintiff's recovery, if any, is limited by the provisions of the South Carolina Tort Claims Act, specifically S.C. Code Ann. § 15-78-120.

**FOR AN SEVENTH DEFENSE**
**(Public Duty Rule)**

71. The Plaintiff fails to state a claim for which relief can be granted for negligence on the grounds of the well-established "public duty" doctrine requires the existence of a "special relationship" to establish a legal duty to warn. The Citadel had no special relationship with

Plaintiff or ReVille at the time of the Plaintiff's claims that would give rise to a legal duty to warn the Plaintiff or any other individual about ReVille.

**FOR AN EIGHTH DEFENSE**
**(Waiver/Estoppel)**

72. The Plaintiff's claims are barred by the doctrines of waiver and/or estoppel.

**FOR AN NINTH DEFENSE**
**(Lack of Proximate Cause)**

73. No act or omission on the part of the Defendant either caused or contributed to any alleged injury or damage Plaintiff may have sustained.

**FOR AN TENTH DEFENSE**
**(Intervening & Superseding Criminal Acts of a Third-Party)**

74. The Plaintiff's damages were caused by intervening willful, malicious, and criminal acts of a third-party, unforeseeable by The Citadel. The Citadel pleads those intervening willful, malicious, and criminal acts of others as a complete bar to Plaintiff's recovery.

**FOR AN ELEVENTH DEFENSE**
**(Intervening & Superseding Acts of a Third-Party)**

75. The Plaintiff's damages were caused by a third-party for whom The Citadel has no liability. The Citadel pleads those acts of others, whether intervening, superseding, or otherwise, as a complete bar to Plaintiff's recovery.

**FOR AN TWELFTH DEFENSE**
**(Failure to State a Claim)**

76. Some of the Plaintiff's claims are barred by his failure to state sufficient facts to give rise to any cause of action against the Defendant.

**FOR AN THIRTEENTH DEFENSE**
**(Reservation of Additional Defenses)**

77. The Citadel reserves the right to assert any additional and further defenses that may be revealed by information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

**PRAYER**

WHEREFORE, having fully answered Plaintiff's Complaint in this matter, The Citadel respectfully prays:

a. That Plaintiff's claims be dismissed;

b. That Plaintiff take nothing by reason of his suit;

c. That the Defendant recover its costs;

d. For trial by jury; and

e. For any such further relief to which they may be entitled.

Respectfully Submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: _____

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ATTORNEYS FOR THE DEFENDANT, THE CITADEL

June 20, 2012
Charleston, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CIVIL ACTION NO.: 2012-CP-10-1858 |
| JOHN DOE 2, | ) | |
| | ) | |
| Plaintiff, | ) | **CERTIFICATE OF SERVICE** |
| | ) | |
| vs. | ) | |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendant. | ) | |

FILED
2012 JUN 20 PM 3:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The undersigned hereby certifies that on June 20, 2012, a true copy of the Answer on behalf of the Defendant, The Citadel, has been sent to and served upon all counsel of record via US Mail, postage prepaid to the following address(es):

W. Mullins McLeod, Jr., Esquire
Julie L. Moore, Esquire
McLeod Law Group, LLC
134 Meeting Street, Suite #160 (29401)
Post Office Box 21624
Charleston, South Carolina 29413

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: _____
Melanie L. Mason, Paralegal

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON | ) | |
| | | |
| John Doe Camper, | ) | |
| Joe Doe 2, and | ) | |
| Mother Doe on behalf of Joe Doe 3, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 12-CP-10-1858 et al |
| | ) | |
| The Citadel, | ) | |
| | ) | |
| Defendant. | ) | |

# TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 18, 2014, before The Honorable R. Markley Dennis in Courtroom 4D of the Charleston County, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Mullins McLeod, Esq.
Charleston, South Carolina

Dawes Cook, Esq.
Charleston, South Carolina

Deborah Garrison
*Circuit Court Reporter – 9th Judicial Circuit*
P O Box 901
Johns Island, South Carolina 29457
*dgarrison@sccourts.org*

THE COURT: All right, Mr. Cook and Mr. McLeod. Are all of these Motions still viable?

MR. COOK: No, only the summary judgment Motions.

THE COURT: Thank you. Mr. Cook.

MR. COOK: Thank you, Your Honor. As a procedural matter, Your Honor, we are here on three cases:

John Doe Camper versus The Citadel;

John Doe 2 versus The Citadel; and

Mother Doe on behalf of John Doe 3.

THE COURT: Okay.

MR. COOK: These are Mr. McLeod's cases. I notice that we got an *amicus curaie* brief from Chip Sloan. They've got some other cases that are not -- there are Motions pending in those cases, but they're ---

THE COURT: All right.

MR. COOK: They are similar but different.

THE COURT: Okay. Thank you.

MR. COOK: Your Honor, this is -- I apologize for Friday morning, burdening the Court with seminal legal issues but there is

a huge legal issue that is going to have to be resolved at some point. I'm going to argue this morning that there is no further factual development that needs to happen.

THE COURT: Okay.

MR. COOK: You've seen a stack of things. I'm going to stipulate for the sake of argument that they're all ripe and that this was the most egregious dropping-of-the-ball that you could possibly imagine and that Skip ReVille should have been apprehended years before he was.

THE COURT: Okay.

MR. COOK: All that being said, let me give you a little bit of factual background of the ongoing dispute.

THE COURT: Okay.

MR. COOK: There are two kinds of cases here: John Doe Camper actually was a camper who, in 2002, was shown pornography and invited to masturbate by Skip ReVille. Nobody at The Citadel knew anything about that until 2007 when Joe Doe Camper, who by then was nineteen years old, and his parents called The Citadel, called the president's

office and said 'we've got a problem that occurred in your camp' five years earlier.

There are a lot of facts that are not germane to this Motion for summary judgment but, just by way of background, the dad was a Citadel grad, wanted his son to go The Citadel. He'd had a lot of problems as a teenager, academically and otherwise, and he seemed to be wanting to get his son into The Citadel.

Mark Brandenburg, who was then and still is General Counsel of The Citadel communicated with the Insurance Reserve Fund; you know, 'looks like we've got a claim.'

He made arrangements to go out and interview the family. You can look up that transcript on the internet because it was produced, you know, under FOIA and the Post & Courier published it back in 2011 when the truth about Skip ReVille came to light.

So for purposes of all of our arguments today, we will assume that that report was not adequately investigated. Maybe it should have been reported to the police right away, that maybe that could have changed history.

So -- but that has nothing to do with the Motions for summary judgment.

With regard to John Doe Camper, he makes two claims. One is that he's got a claim just like the one that we argued a little while ago (prior hearing) with Mr. Arpaio, that he has a claim for having been assaulted back in 2002 when he was a camper.

He's also got a separate claim of that 'I am' -- that's he's been very upset and has had mental issues because after 2011, when he heard that Skip ReVille had molested all these other children he felt great guilt, felt betrayed that The Citadel had not turned it over to the police and reported it in 2007. That's caused him emotional distress.

So we will deal with those two separately. That one is not part of our statute of limitations.

But his claim arising from what happened in 2002 is barred by the statute of limitations for all the same reasons that we argued about a few minutes ago, but there's one difference. That is, there is no issue of fact as to any fraudulent concealment as

to him because he actually did make a claim in 2007. He was nineteen years old at that time. So what possible argument could you have that he was not on notice of the possibility that he might have a claim against The Citadel in 2007, when he was past the age of majority, because he made a claim. All right?

So whatever fraudulent concealment that had happened at that point, if there was any, -- and in this case there really is no evidence of any priors of that, but I don't want to argue that fact. But even if there was, even if there was massive internal cover up of everything that Skip ReVille was doing, by 2007 he knew it. He knew that he had been molested, he knew that it was at The Citadel's summer camp, he didn't call Skip ReVille to complain about it, he called the president's office at The Citadel to complain about it, in 2007.

The only thing that could save him would be if the sexual abuse statute of limitations applies. That is purely a question of law, and I would respectfully

adopt the same argument that we made earlier, that it is crystal clear that the statute of limitations for the Tort Claims Act is part and parcel of your right to sue The Citadel, or sue any State agency. You don't have a right, you have sovereign immunity but for the enactment of the Tort Claims Act; which the Act is supposed to be construed in favor of immunity.

The argument that one was passed later, well, so was the tolling provision. The tolling provision specifically said 'this applies to the Tort Claims Act.' The Tort Claims Act specifically said 'this applies to the tolling provision.' So the legislature knows how to lash those, and it chose not to do that. I think Your Honor is already aware of that, as you commented to Mr. Bell about that, as well.

So that is the difference, I would submit, with regard with regard to that claim. That is that there is no issue of fact because he actually did make a claim in 2007. He did not sue until 2011.

THE COURT: Okay.

MR. COOK: Moving on to what is the other weighty question that the Court is going to have to deal with, is dealing with -- we call these the downstream claims: Joe Doe 2 and Joe Doe 3. This same argument is going to apply to some extent to the emotional distress argument that Camper Doe, but putting him aside right now I'm going to talk about John Doe 2 and John Doe 3.

THE COURT: Okay.

MR. COOK: Those are brothers. They were both molested by Skip ReVille before this complaint was made in 2007. In fact, the evidence has revealed that Skip ReVille was living in their home in 2006, which was before anything was ever reported to The Citadel about any misconduct on his part.

They didn't go to summer camp. They didn't have any affiliation with The Citadel. Skip ReVille molested them -- I believe that he was their basketball coach at -- something to do -- I can't recall whether it was Pinewood Academy, but it was -- it had nothing whatsoever to do with The Citadel or

with summer camp. That's why we call these the downstream plaintiffs, because the claim against The Citadel is 'if you had been more diligent, if you had caught him earlier and turned him over to the police, he would have never been out at large to molest us.'

Now, in the case of these two, that's a hard argument to make in regard to any cover-up or failure to investigate in 2007, because they already had a relationship with Skip ReVille and been molested before that. But even if they could make that argument, there is no duty running from The Citadel to them.

I want to come in with a blank slate about everything that we think that we know about negligence claims. Laced throughout, almost everything in that big stack of documents that you've got is intended to prove that it was reasonably foreseeable that The Citadel didn't do a good investigative job on somebody who was accused of sexual misconduct with a child, that he would probably go on and molest other people -- including the plaintiffs. That is their

case. They've done a magnificent job in getting hundreds of thousands of pages of documents, taking days and days of deposition pulling out evidence where they can show that The Citadel could have done a more detailed investigation. If they had called the police; if they had done other things, that maybe Skip ReVille would have been taken off the street sooner. There are a lot of other people, you know, who are equally guilty of that: parents, employers, schools that they work for. This guy was a master manipulator, fooled everybody. Obviously he fooled somebody because he had befriended this family to where he was living in their guest house.

So the question is, is there -- and I start with this quote, in the case of Elda Chenski (phonetic) v. Reynolds, which was decided in 2011, the Supreme Court quoted from the *Allen* case, which is one we all can cite in the creation of where is the duty, because it says "foreseeability of injury standing alone does not give rise to a duty." That is very important, because almost every

time I've been in a negligence case the argument that I hear is, 'he owed him a duty because it was foreseeable that that person would be injured by my negligent conduct.' But the Supreme Court has said, at least three times, that is the wrong question.

"Foreseeability of injury standing alone does not give rise to a duty. We know that the existence of a duty is a question of fact for the Court."

So then we go to a case -- and we've briefed all of this, of course, but I'd like the Court's indulgence, because it is so important.

THE COURT: Sure.

MR. COOK: There is a case called *Faile v. South Carolina Department of Juvenile Justice* which talks about the duty to protect somebody from criminal acts of a third party. It says, "Under South Carolina law there is no general duty to control the conduct of another or to direct a third person or a potential victim of danger."

Then it cites cases. "We recognize five exceptions to this rule:

One, where the defendant has a special relationship to the victim.

Two, where the defendant has a special relationship to the injurer.

Three, where the defendant voluntarily undertakes the duty.

Four, where the defendant negligently or intentionally creates the risk.

Five, where statute imposes a duty on the defendant.

So most of those we're very familiar with. I am not making this argument as to where people were actually molested at The Citadel, because you have a relationship with that person.

You know, you're probably familiar with the Deminghard (phonetic) case that talks about when does an employer have a duty to control an employee who is committing a criminal act while he is employed but it's not within the force and scope of his employment. There are a set of facts that you have to prove there.

This is different. His conduct,

Skip ReVille's contact with these plaintiffs had nothing to do with their association with The Citadel or with his employment at The Citadel. There is no connection there.

So the Court goes on to talk about the case of Doe v. Marion. There are two cases that I think are closely analogous to this one and I -- I'd like to address both of those. One is *Doe v. Marion* and one is *Doe v. Walmart*.

*Doe v. Marion* was decided in 2007. In that case there was a psychiatrist or therapist who was seeing a pediatrician who was a child molester, and was seeing them I part for that reason. The question arose did that psychiatrist, knowing that he was in frequent contact with children, did she have a duty to report him. Actually she came within the definition of people who are required to report sex abuse.

But the Court, nevertheless, said that statutory obligation to report did not create a duty running to these plaintiffs, because she didn't know these specific plaintiffs. She didn't know that he was

going to molest them.

Now, it's well known, all the way back to the Terrasotte (phonetic) case that if somebody comes into you and says, 'I am going to go shoot my wife', then the duty could arise because it's a specific threat to a specific person. But the Court, in *Doe v. Marion*, said 'we are not going to extend that to the general population.'

It's true what the plaintiff's will say here, 'Well, we were children. You knew that he was a child molester, so you should know that he might molest us.' But that's not what the court's look at when they're deciding whether there is a duty running from one to the other.

To give you another analogy, we're celebrating the -- well, not celebrating but it's the anniversary of the bombing of the Boston marathon. We now know that the FBI actually interviewed one of those bombers. So you could ask a lot of questions about, 'Well, shouldn't they have caught them? Shouldn't they have done a better job?' But even if it turns out that they were

negligent, that doesn't make the FBI liable to the ultimate victims, because there was not a specific threat to a specific individual.

That case is illustrated very well in the *Doe v. Walmart Stores* case. That was the case where some people suspected child abuse. So they took photos of the child to document it. They sent the photos in to Walmart. Walmart has a policy that they won't print anything that shows nudity -- of children, in particular. So they destroyed the pictures. So there was a lawsuit because it allowed the plaintiff to be abused by the abuser because of Walmart having, arguably, violated some twenty internal arguments as well as arguably violating a statute by not turning it to the court (sic). They did a thorough analysis and said, "We find the Circuit Court properly granted summary judgment as to these causes of action because Walmart owed no duty to the victim. It is clear that Walmart had no general duty to control the conduct of the victim's father or warns the victim of the danger of sexual

abuse. Further, none of the exceptions enumerated in Faile apply here. Walmart had no special relationship with either the victim or his father because it did not have the ability to monitor, supervise or control either. Walmart did not negligently or intentionally create the risk of the father's sexual abuse. Lastly, Walmart's duty to report under the reporter's statute cannot give rise to civil liability."

THE COURT: I understand what you're -- let me hear from them as to why I should not be granting summary judgment on those -- for those reasons.

MR. COOK: Thank you, Your Honor.

MR. MCLEOD: Thank you, Your Honor. Mullins McLeod. May it please the Court, ---

THE COURT: Yes, sir.

MR. MCLEOD: First of all, with regard to the statute of limitations argument for the Camper, I will address that first because that's what Dawes did first.

Your Honor, he's right that in 2007 the camper and his family reported the camper being sexually abused at The Citadel. At

that meeting in Dallas, there was a hundred and sixty-nine page transcript that was recorded at the insistence of the family for the sole reason of making sure that ReVille didn't abuse any other children. That was their purpose and intent for going to Dallas.

Your Honor, they did not file a claim. In fact, they didn't even have a lawyer. As the father submitted in an affidavit, which is one of these many exhibits which we've shared with the Court, he said 'if we wanted to file a lawsuit, we would have brought a lawyer.' In fact, the father says in the statement, he says 'this kid needs something to stand on, this needs to be stopped.'

The irony of this case, Your Honor, is that it was unbeknownst to this family, a Citadel graduate and an innocent victim, that Mark Brandenburg had authored an e-mail two months before even going to Dallas to meet with this family, and in his e-mail -- talk about *mens rea* -- he specifically says, "My goal in conducting an investigation is to ensure that nothing happens, criminal or

civil." So his intent and his motives were to go placate the family, to ensure them that they didn't need to do anything further because The Citadel and President Rosa were going to pick up the baton and make sure that this predator didn't abuse any other children.

That is set forth, Your Honor, in the camper's depositions and in the father's affidavit that we've given to the Court.

In fact, The Citadel, through President Rosa and Mark Brandenburg are estopped from arguing the statute of limitations because of their own conduct.

THE COURT: I appreciate it. I think I've articulated my basis -- I just think -- the legislature could have done a lot of things. I don't know why they didn't. Maybe they chose not to.

Back to the sexually violent predator, I've attended -- a lot of the AG's have come and talked about the Sexually Violent Predator Act and said, 'it's not our goal to keep them in jail.' It's not? One of them said yesterday, 'it's to keep them in

jail.' Of course it is. Okay.

Is that what they intended? I don't know. I think that issue needs to be addressed. I'm not granting summary judgment, because of the nature of this. It really deals with whether or not -- I think that is the reason they created that. I think this problem suddenly started coming to light, and ReVille is just one of them. The legislature said, 'we're going to fix that, we're going to provide people -- individuals have a right to' -- and I think that's -- I don't know why they picked twenty-seven but whatever the reason is, maybe there've been studies that say by them you're cognizant of things. Nevertheless, I think that statute has a purpose and right now I am not going to grant it at this point.

Let's go to the next level.

MR. MCLEOD: I will. Thank you, Your Honor.

THE COURT: Okay.

MR. MCLEOD: First off, you know, this is not a case of passive negligence, this is not a case of just failing to act.

You know, if we begin, the genesis of ---

THE COURT: Let me ask you a question.

MR. MCLEOD: Yes, sir?

THE COURT: Doesn't it all stem from the fact that they didn't do something that -- that he wasn't arrested and was therefore allowed to be out in public, caused harm?

MR. MCLEOD: It doesn't, Your Honor.

THE COURT: All right, tell me why it does not.

MR. MCLEOD: All right. First off, Your Honor, the duty itself is created in several layers.

Number one, if their conduct -- and we've alleged that we've proven through these depositions a deliberate concealment, to cover up the fact that Skip ReVille was a sexual predator. In fact, Jennifer Shealy worked in the president's office during this timeframe and has testified in this case, Your Honor, that President Rosa used the words "close hold." That this report of

sexual abuse would not go outside the president's office, that President Rosa -- she testified that he deliberately orchestrated a cover up and was deliberately indifferent to ---

THE COURT: Assuming all of that is correct, how in the world do you get them responsible for him going out and doing something criminal?

MR. MCLEOD: Because under the Doe v. Marion case -- okay? Number one, they created the hazard, they created the risk. When you create the risk, you have a duty to act.

And, Your Honor, in addition to creating the risk, in this case the duty comes from the statute. Title IX governed everything that happened with regard to ReVille at The Citadel. Title IX made it clear, Your Honor, that The Citadel, once it knows that Skip ReVille is a sexual predator, that they must stop the harassment, they must rehabilitate the victim, and they must make sure that it doesn't reoccur; i.e., that it doesn't happen again. So the duty can arise

from those statutes as well.

THE COURT: Absolutely.

MR. MCLEOD: Absolutely, Your Honor.

THE COURT: I understand that, but these people weren't at The Citadel.

MR. MCLEOD: They weren't, Your Honor, but this case -- for example, if I choose to drink and drive, and get in a car accident with and innocent driver, I can't come into court and say, 'Well, I didn't know I was going to wreck with that car. I didn't know that I was going to get into an accident with ---'

THE COURT: Yeah, but your actions caused that. You have a duty not to do that. That's clear.

MR. MCLEOD: That's right.

THE COURT: Well, that's not analogous.

MR. MCLEOD: If you look at the Greenville Memorial Auditorium case, Your Honor, you will ---

THE COURT: That was the bottle thrower.

MR. MCLEOD: The bottler thrower, that's right. So in that case, the governmental entity said, 'How could we ever know that a bottle thrower is going to throw a bottle and hurt somebody if we don't know who that person is.' Of course, what the Court said was that the cause of action was based on the Auditorium's negligence ---

THE COURT: It happened on the Auditorium premises and they have a responsibility to -- that's why I keep saying this didn't happen on The Citadel premises. This was because he went out and caused harm.

MR. MCLEOD: Actually John Doe 2 was abused on The Citadel premises.

THE COURT: If that's the case, then it loses. The argument is that the people were not on the premises.

MR. MCLEOD: Well, Doe 2 was -- and it's included in the memorandum, Your Honor. ReVille brought him on campus and abused ---

THE COURT: Let me just do this, guys. Let me look at your memoranda and read those thoroughly. I will take it under

advisement. If I need further argument on that issue, I'll get back with you.

MR. MCLEOD: Thank you, Your Honor.

THE COURT: Is that the sole basis of your summary judgment?

MR. COOK: We have ---

THE COURT: Primarily the statute of limitations issue and the duty issue?

MR. COOK: Primarily, (affirmative nod). There are others but I'll ---

THE COURT: I'll look at it. If we need to reconvene, we can come back together again. Let's do that. Thank you. I am not trying to cut you off, but I need to look at these and read them all thoroughly. Thank you. I'm taking it under advisement.

(HEARING CONCLUDED)

STATE OF SOUTH CAROLINA )
) CERTIFICATE
COUNTY OF CHARLESTON )

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on April 18, 2014, before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

_____

Deborah Garrison

Charleston, South Carolina
September 6, 2014

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON | ) | |
| | | |
| Doe 2, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 12-CP-10-1858 |
| | ) | |
| The Citadel, | ) | |
| | ) | |
| Defendant. | ) | |

# TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on June 5, 2015, before The Honorable R. Markley Dennis in Courtroom 4C of the Charleston County, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

W. Mullins McLeod, Jr., Esq.
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Appearing for Plaintiff

Dawes Cook, Esq.
Randall Stoney, Esq
BARNWELL WHALEY
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Appearing for Defendant

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THE COURT: Let me go ahead and make statement right now that I've read all the memos, the replies and they're all incorporated for purposes of review.

I'll be happy to hear from you fully on any arguments that you want to make. I'm not going to cut you off. I think I pretty much know which way that I'm going to go but -- if you want to talk about it in that sense, then I will. This is one that truly -- off the record a second.

(OFF RECORD DISCUSSION)

THE COURT: Whatever y'all want to do. I can tell you where I am with this in a general sense and then you can address it. How about that?

I believe without the action taken by The Citadel once they received some notice that something had happened, then they -- and let me say this, Mullins, you and I disagree on one thing. You talked about -- and I don't quarrel with the long history of some indicators. Okay? I just don't believe that the present status of the law gets you there. I think The Citadel has to do something to

get you over the hurdle that is created by this long line of cases. You know what? Again, folks, it's y'all's case but we're got two things running right now. One of them is the *Bibby* case. The *Bibby* case, I don't know what they are going to do with that. Maybe y'all do, maybe y'all have an inside track. That's my case -- not my case but it's one that I threw up there to see what happens.

You know if they choose to take the position -- although, I don't know that you have that here -- at least it shows some indication of what I'd expressed, I think, before in one of the discussions. I understand in *Doe v. Marion* where they talk about the criminal aspect of it, I think the foreseeability and all those issues.

And I agree with you, Dawes, because I've tried -- where I've probably run into this the most is in trying people who have been determined to be sexually-violent predators and the likelihood of recidivism, the percentages that accompany that.

Mine has always been -- and this is where I have really held out to go beyond *Doe*

*v. Marion*. If he's been arrested, he can't hurt anybody.

The problem that I have with yours, Mullins, is as I read the history it's arguable as to when he left after they had that conversation. Clearly there was some contact; how much, I don't know; that's arguable, I think. But the problem that I had is that everything occurred, or the majority of it occurred before. So -- even in the best world, at least from my standpoint the only point that I can allow a jury to consider would be the damage(s) that accrued after. That is so incredibly speculative that I don't know how you would do that.

MR. MCLEOD: The ---

THE COURT: Let me finish and then you can address the argument.

Because without that notice, while it's egregious, while it is unbelievable that somebody could be that -- despicable, I guess is the best word for it, to set themselves up and truly, truly, truly use his brain to figure out how to harm children. What a

horrific individual. He's where he belongs. To be candid with you, I'm glad that I had sentenced him before I had a chance to read all this stuff. I may have had to recuse myself, I am not sure that I could have been totally fair in imposing a sentence.

I think that there are some things that hopefully The Citadel has changed. I am not going to be critical, I wasn't there. Maybe they're doing it a different way.

MR. MCLEOD: I hope.

THE COURT: But be that as it may, I just don't -- I don't see it.

Now, having said that, my thought was, 'well, deny it and that cuts his damages in half' and maybe the best way to frame this issue -- because you won't hold back and I understand that -- is to send this up. Even though there is damage after the notice. That way then you don't have the expense and the trauma of a trial, and you don't have a potential defense verdict.

If they want to change the law, they can. Then it would become much clearer, for lots of things and maybe even for negotiating

a full settlement of everything.

That's my problem.

You can say, 'that's not your problem, Judge, you delved into an area where you don't need to go there, and that's the practice of law.' I confess that right off the bat. But it just seems to me to make better sense, because I can't give you -- and I am not even sure that I can give you advice at all. But the best thing to do is to say 'no, I agree that under the present law you can't.' Bibby can change that. Bibby could change a lot of things. So could Greg's case. I don't know what -- but having said that, that is where I am in reading your various memorandums.

Now I'll throw it back to you and you're free to argue if you wish to do so.

MR. MCLEOD: Yes, sir. Thank you, Your Honor, and may it please the court.

THE COURT: Sure.

MR. MCLEOD: First off, on the -- we say that it is all downstream abuse. They say that there is a majority of upstream abuse and some downstream abuse.

In 2005, a Citadel employee, who will testify in this trial, was a camp counselor who was trained by The Citadel and ---

THE COURT: I read all of that but I don't think that triggers it. Your argument, I don't agree with you. I know that he said that he saw something, that he reported something and that they didn't do anything.

MR. MCLEOD: The difference, Your Honor, is that this particular counselor reported Reville as being a pedophile and Jenny Garrett fired him.

And just so Your Honor is aware -- okay -- the reason why the *Bibby* case doesn't -- and that's not our case.

THE COURT: I know it's not.

MR. MCLEOD: It's a voluntary undertaking ---

THE COURT: Mullins, ---

MR. MCLEOD: --- and it's the policies and procedures that they had in place both at the camp and at the school that means that they are responsible.

And, Your Honor, I don't want to cut you off -- because I'm not going to.

THE COURT: I am going to cut you off, because I get to do that.

MR. MCLEOD: Yes, sir. In the *Fickling* case, for example, -- it was a trip-and-fall on a City of Charleston sidewalk -- the City didn't own the sidewalk. The appellate court specifically said that summary judgment was inappropriate ---

THE COURT: Mullins, you don't have to tell me about summary judgment. I've been reversed so many times that I probably could tell you every single thing that you shouldn't do about summary judgment. I have. That's why I said I've read your brief. You pulled your brief out.

MR. MCLEOD: Yes, sir.

THE COURT: I have read your brief.

MR. MCLEOD: Yes, sir.

THE COURT: I've read it fully. I've read the cases again. I mean, yesterday that's all that I did. I sat there and reread just about every case. I went back

and read the *Bibby* case. I agree with you that you're not talking about a special relationship.

MR. MCLEOD: Correct.

THE COURT: You've said 'that's not how we get there.' I don't disagree with that. My point is this, the *Bibby* case and Bruce's decision, if they come out in some area of what he said, where we're talking about -- and I am not -- this isn't a premise but you can spin off the -- the language off of that to get to where I think we are, and that is an obligation to society to do certain things.

The problem that I have, assuming the accuracy of everything that you've just said, he's a pedophile. He's not there anymore. They don't know, nor do they have a duty to keep up with him. Only when they had the situation where they had knowledge -- because there are lots of pedophiles. Just because you're a pedophile doesn't mean that you're going to be arrested. What is the basis to arrest somebody for being a pedophile? The question is, what happens

when the pedophile acts consistent with that disorder. That's what I think triggers this. That is what I think is the egregious act that gets you over the hurdles of the present law. That is founded/encapsulated in what happened when the camper, or the father, came and said 'this is what happened.' Because you've got all the policies of what they were supposed to do, to report them. That's criminal conduct.

MR. MCLEOD: Not only report them but arrest them.

THE COURT: I understand but that's the point where you are. That's the problem that I have, that it is only from that date forward. I don't have to roll the clock back and say, 'yeah, what about all these other things that you knew and should have known?'

They didn't voluntary undertake anything. They got rid of him. They fired him. Right?

MR. MCLEOD: No, they didn't fire him.

THE COURT: Well, he -- they

parted ways, they separated.

MR. MCLEOD: The issue is the causation issue.

THE COURT: It always is.

MR. MCLEOD: Here's the thing, we pointed out in our brief, on page nine, that we've got one of the foremost experts in the country on childhood sexual abuse. He specifically says that, (reading): "Victims of sexual abuse who suffer repeated acts of assault and molestation are unequivocally harmed by each act. Repeated sexual abuse reinforces extreme ..." ---

THE COURT: Mullins. I've read that.

MR. MCLEOD: But ---

THE COURT: Mullins, the problem is that you can't say, 'okay, you' -- you can argue that it's aggravating a preexisting condition by two subsequent abuses. But the problem that you have is that you really don't have enough time to really make a realistic ---

MR. MCLEOD: Your Honor, ---

THE COURT: Mullins, look. You

and I can argue -- we're arguing the threshold issue here. It really is the crux of this case, in my opinion.

It takes, I believe, a change of everything that we see right now in the law. I disagree with your reading of the law that says you've got the right to bring in all the things that happened before.

Once they took -- voluntarily undertook -- would you agree with me, let's talk about this in an abstract fashion. Assuming the counselor -- excuse me -- counselor's (sic) father doesn't come forward. No conversation every takes place. Do you have a case?

MR. MCLEOD: Absolutely, Your Honor.

THE COURT: All right. That's where I differ with you.

MR. MCLEOD: Absolutely. I just need to know if you're going to grant this Motion you previously denied, I need to understand are you doing it on duty or are you doing it because it's upstream ---

THE COURT: I'm doing it because

---

MR. MCLEOD: --- abuse or downstream abuse, or both?

THE COURT: He's going to prepare the Order. I'm doing it on the basis of what he set forth. The bottom line is that in this case, if your -- if all of your damages were removed from the time that he was reported -- I mean, you're talking about -- seriously, best case scenario, the father comes in May -- in May? I think. Is that when he reported?

MR. COOK: April.

THE COURT: April. Mark had -- Brandenburg had the conversation in July.

MR. COOK: July.

THE COURT: He's gone in August.

MR. MCLEOD: If I could just put two things on the record.

THE COURT: Sure.

MR. MCLEOD: Okay. First, ---

THE COURT: I assume that they are not in your memo?

MR. MCLEOD: First off, that argument that they made is like telling

someone who has been raped -- 'well, the last -- you've been raped twenty times but the last ten should be okay because you were raped the first ten, therefore you don't have damages.'

THE COURT: Mullins.

MR. MCLEOD: I think that is really what ---

THE COURT: Mullins, I'm not arguing damages. I'm not arguing damages. You've got damage, I would -- there's no question about that. I would even direct a verdict of damage if we got there. That's not the issue. You're arguing the point that I agree with you a hundred and ten percent. You don't have any issue about damage. It's horrific, punitive and otherwise, if you get there.

The problem is that under the present law the exceptions are, and we went through them, and the only one that I can get you there is voluntarily putting themselves in the fray. They did that by investigating something and then didn't take any steps. That's the problem.

MR. MCLEOD: And I would just also add that by -- they also undertook the responsibility and the duty by adopting policies and procedural. Federal law -- I understand, I'm going to sit down because I don't want you mad at me.

THE COURT: I'm not mad at you.

MR. MCLEOD: I just want to make sure that I understand why you are throwing me out, so that when we got to Columbia I can ---

THE COURT: I am not throwing you out. I'm just -- I think the law throws you out.

MR. MCLEOD: We have to disagree on this one.

THE COURT: The problem that I have is that I think -- I appreciate all the policies but that doesn't say I voluntarily agree to do anything. It says that once I do something, once I learn something, then I have a duty to take some action. I don't have a duty to go out and, let's say, 'let me go check the history of every employee that has ever worked here.' I don't think that

you have that duty.

I'd say this, even with knowledge that something happened, unless it was -- let's just -- maybe with the knowledge that the father said they would have a duty, based on their policies, to call the police. I wouldn't disagree with that at all.

The problem is that that doesn't resurrect everything, in my opinion.

I appreciate where you are. Quite frankly, from a strategic standpoint I think it's the best way to go up.

MR. MCLEOD: So you are ruling on the duty issue?

THE COURT: That's right.

MR. MCLEOD: Okay.

THE COURT: I think that I just said, Mullins, that I would direct a verdict on damages. I don't question damage. There is a tremendous amount of damage.

What I said was that the -- the damages, I agree with you. Maybe you could give the charge of -- the only thing that I could think of is the charge you give for preexisting conditions where you say that you

are only entitled to the damage that occurred after -- that you aggravated. The problem is, I agree with you, I don't know how you separate them. It's so intertwined and therefore it flows from the get-go. That's a good argument. Maybe they will come back on once you undertake it, that you take a person as you find them, damaged as they are, and you are responsible for them. I don't know.

I just think you've got -- the biggest problem is, all the things that transpired, that occurred before that conversation, if they don't act, -- that would be an interesting thing, too. Do you have a duty to call the police? That's an interesting statement. I don't know where that is, frankly. They sure had a chance in the *Doe* case to do that.

MR. MCLEOD: The difference is that they had the police department -- and that's the irony of all these cases, is that in the newspaper we talk about that they should have reported. They had an obligation to arrest, an obligation ---

THE COURT: Mullins, you're

preaching to the choir.

MR. MCLEOD: An obligation, period.

THE COURT: You're preaching to the choir.

MR. MCLEOD: Okay.

THE COURT: The problem is that if they had arrested Reville -- let's take it this way. They arrest Reville, that doesn't make him responsible for your man.

MR. MCLEOD: Well, that's where we just disagree.

THE COURT: That's right. They're ---

MR. MCLEOD: And we're just talking. I don't want you mad at me.

THE COURT: I'm not mad at you but that probably sets up for the purposes of review, if they want to look at my ramblings, precisely what I'm saying. They had no duty to him, at all at the point they learned of anything. So everything that happened, they had no responsibility for that, because that's the way the law is.

Now, once they arrested him, your

damage is still existing. Isn't it?

See, the problem is that an arrest is what, to me, -- if there is one out there. I wanted to ask y'all. I don't know, I'm taking them one at a time. I haven't looked at them all. Is there one out there that the damages occurred after July?

MR. MCLEOD: Yeah, we've got one.

THE COURT: That's the one that needs to be brought. Under the present law, that's one that I would let go based on what I've said right here, because that's the one that I'm -- that brings -- that frames, I think, gets directly at what *Doe v. Marion* talks about.

That is the one that needs to focus that issue because that's the critical issue, I think; to me, it is. No questions, ifs, ands or buts there are damages there. No questions, ifs, ands or buts, had they taken and acted on their policy, that person would have been protected because he would have been in jail.

Now all we've got is foreseeability and what we know he did -- but it doesn't

really matter because you're right. That is where your policy, I think, slams -- I think is the hammer. You have a duty by virtue of what you said that you would do once you knew, and you didn't. By virtue of your not doing that, not following your own policy, that person was injured. Totally.

The problem that we've got now -- and that's why I said I could argue about that for the two months, but that doesn't help you. That creates a nightmare situation.

MR. MCLEOD: Well, you know how much I respect you. I am not going to ---

THE COURT: Let me tell you something, you ---

MR. MCLEOD: --- argue with you. I respect your ruling, although ----

THE COURT: --- don't have to respect me.

MR. MCLEOD: Oh, I do. You know I do.

THE COURT: You don't have ---

MR. MCLEOD: I respect your ruling. I disagree with it strenuously. You know I

do. Look, I respect your ruling. I disagree with it strenuously. Let's just go to Columbia and see what they say.

THE COURT: That's fine with me. I hope and pray that I'm around when you get to come back and they say, 'Judge, you were totally wrong.' And I'll say, 'yep, I knew it.' MR. MCLEOD: I am going to look forward to that day, Judge.

THE COURT: I am, too. Prepare me the Order, please, based on primarily the duty issue. You know the issues about outrage, I agree with you there. That is not your case anyway. It's a negligence case, is what it amounts to.

MR. MCLEOD: If you want to throw out outrage, just for the record, uh, I understand and recognize that it is an intentional tort. For the record of appeal, our position is that if you are reasonably certain that an outcome is going to occur, then you intended that act as a matter of law. That's all that we are saying, Your Honor.

THE COURT: You can argue that.

The problem that I have with that -- and I will say so that they can address that, too. It varies from year to year what the recidivism rate is of pedophiles, people who have the disorder of -- what is it that they use now, "paraphilia undefined" or "undisclosed" or something, under the DMS-V. The DMS-V lumps it all together. But be that as it may, I remember statistically they said that it was thirty-seven percent to fifty-eight percent likely to reoffend. I said, 'hummm, that's interesting, so that is sixty-three percent that they won't reoffend.' I mean, better than fifty percent that way. So it just depends on which way you spin the statistics.

MR. MCLEOD: That's what makes sex abuse cases different than every other tort, when you talk about foreseeability. When you talk about the medical literature, it's really not in dispute. They don't stop.

THE COURT: Right. That's something that I think that I said a year ago, and I agree with you. I've just got to get it to them so that they can say that.

The only way that I think that I can do that, at least from my perspective, is to give me something that occurred after they had knowledge. Because I don't quarrel, I respect Mr. Cook -- he quarrels, and that's fine. I think that would be the trigger date. That was the thing that said, 'okay, I am not going to do something, and I will just take my chances down the line.'

I agree with you, that's where we're talking about getting into a different ballgame. We're not talking about an alcoholic. An alcoholic can get drunk and get in a car and run into and kill somebody. But we know the history of sex offender, especially from what they knew about this guy. I mean, this guy -- (negative gesture), he is one despicable human being.

MR. COOK: We spent a few days with him, Judge.

THE COURT: I can't imagine how you -- I admire your patience. I've read the depositions, and I admire you.

MR. COOK: It was good to see him in an orange suit with his head shaved, and

where he was. That was the only consolation.

MR. MCLEOD: They are going to have to sit in the chair at some point. I ain't going anywhere, and I ain't going fast. I want it to be next week, but they're going to sit in that chair and a record is going to be made on the conduct that these people did.

THE COURT: Mullins, ---

MR. MCLEOD: It's going to be a good day. I just ---

THE COURT: Mullins, I hope and pray that day never comes but that everybody in this room is compensated.

MR. MCLEOD: Our representation is going to make it happen. Off the record, ---

THE COURT: I just think that there may be some things -- what we've got to do is get some pressure points. They can still argue that didn't -- that is still a toss up as to what my position is. I feel strongly about any damages occurring afterwards. That is the next one to tee up. We'll get the same Motion and -- the ruling will be different, unless *Bibby* changes something.

MR. COOK: We filed something in a brief from *Bibby*, what they are arguing, in case you want to see that.

THE COURT: Well, I am going to read that. You filed that in response?

MR. COOK: I did.

THE COURT: Well, okay. I haven't read the response yet.

MR. COOK: I've got an extra copy that I can hand you.

THE COURT: Thank you.

MR. MCLEOD: (Tenders).

THE COURT: But, Mullins, I agree with you that there are some things that need -- my able assistant said 'here it is'.

MR. COOK: Okay.

THE COURT: I don't disagree with anything that you say. Part of me says, 'naw, I need to let this go so that all of this stuff can be outted.'

MR. MCLEOD: It's bad stuff.

THE COURT: But by the same token, that is not fair when I don't feel that there is a legal basis to keep it there. I can articulate a legal basis, as much as I think

it's bad.

And I don't think it's fair to The Citadel either. So I -- I don't think it's fair to put your people through it, to go through the trauma of a trial and get a verdict that -- because I've been on that side too, as a plaintiff. For a jury to say 'sorry', you talk about trauma, talk about disappointment. To me it was. I can't imagine -- I know how I felt. My clients had to feel exponentially worse.

(OFF RECORD DISCUSSION)

THE COURT: Going forward, if this helps all the people -- I know that it doesn't help your pocketbook but hopefully it will help what we're all about.

(HEARING CONCLUDED)

STATE OF SOUTH CAROLINA )
) CERTIFICATE
COUNTY OF CHARLESTON )

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on June 5, 2015 before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

_____

Deborah Garrison

Charleston, South Carolina
June 5, 2015

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF CHARLESTON<br><br>John Doe 2<br>☐ Plaintiff<br><br>v.<br><br>The Citadel<br>☒ Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | IN THE COURT OF COMMON PLEAS<br><br>CASE NO.<br>2012-CP-10-1858<br><br>MOTION AND ORDER INFORMATION FORM AND COVER SHEET |

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| W. Mullins Mcleod, Jr., Bar No.<br>Address:<br>134 Meeting Street, Ste 160, Charleston, SC 29401<br>phone: 843.277-6655 fax:<br>e-mail: Mullins@McLeod-LawGroup.com other: | M. Dawes Cooke, Jr./John Fletcher, Bar No.<br>Address:<br>Post Office Drawer H, Charleston, SC 29402<br>phone· 843.577.7700 fax: 843.577.7708<br>e-mail: mdc@barnwell-whaley.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Notice of Motion and Motion for Summary Judgment
Estimated Time Needed:20 minutes Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

W. Dawes Cooke, Jr. 3/5/14

Signature of Attorney for ☐Plaintiff / ☒Defendant Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

| **JUDGE'S SECTION** | |
|---|---|
| ☐ Motion Fee to be paid upon filing of the attached order.<br>☐ Other: | _____<br>JUDGE<br><br>CODE: _____ Date: _____ |

**CLERK'S VERIFICATION**

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO.: 2012-CP-10-1858 |
| JOHN DOE 2, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT** |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendants. | ) | |

FILED
2014 MAR -6 PM 1:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**TO: W. MULLINS McLEOD, JR., ESQ. AND JAMES B. MOORE, III, ESQ., ATTORNEYS FOR PLAINTIFF**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant, The Citadel ("Defendant"), will move before this Court, at least ten (10) days from the date hereof or as soon as thereafter as counsel may be heard, for an Order granting Defendant summary judgment and entering judgment against the Plaintiff pursuant to Rule 56 of the South Carolina Rules of Civil Procedure because there are no genuine issues of material fact supporting Plaintiff's claims. The grounds for this Motion are that:

(a) Defendant is entitled to summary judgment as to all claims because, under South Carolina law, Defendant owed no common law or statutory duty of care to Plaintiff. *See e.g., Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007).

(b) Defendant is entitled to summary judgment as to all of Plaintiff's claims because such claims are barred by the statute of limitations contained in the South Carolina Tort Claims Act, at S.C. Code § 15-78-110, because he did not file this action within two years after the loss was discovered or within one year of reaching the age of eighteen. *See* S.C. Code § 15-3-40.

(c) Defendant is entitled to summary judgment as to Plaintiff's outrage claim (Count 2) because that claim is barred by the South Carolina Tort Claims Act, *see e.g.*, S.C. Code § 15-78-30(f) and because Plaintiff has had other potential remedies available to him.

(d) Defendant is entitled to summary judgment as to Plaintiff's outrage claim (Count 2) because Plaintiff cannot proffer a scintilla of evidence that The Citadel acted with the requisite level of culpability for an outrage claim.

(e) Plaintiff's potential recovery is limited to $300,000.00 under the South Carolina Tort Claims Act, S.C. Code § 15-78-120(a)(1), because Plaintiff's claims involve a single alleged "occurrence."

This Motion may also be supported by a memorandum of law filed subsequent hereto, and by the argument of counsel at the hearing of these motions. This Motion will also be supported by the pleadings, depositions, discovery and documents produced in this matter.

BARNWELL, WHALEY, PATTERSON, AND HELMS, LLC

By: M Dawes Cooke

M. Dawes Cooke, Jr., Esq.
Randell C. Stoney, Esq.
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700
*Counsel for Defendant The Citadel*

Dated: March 5, 2014
Charleston, South Carolina

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of March, 2014, a true copy of **Defendant's Notice of Motion and Motion for Summary Judgment** has been served upon Plaintiff's counsel by mailing a copy via U.S. mail, properly addressed with sufficient postage affixed thereto, as follows:

FILED
2014 MAR -6 PM 1:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY

W. Mullins McLeod, Jr., Esquire
Julie L. Moore, Esquire
D. Ellis Roberts, Esquire
McLeod Law Group, LLC
134 Meeting Street, Suite 160
Charleston, South Carolina 29401

Julia G. Childers, Legal Assistant

BARNWELL WHALEY
PATTERSON & HELMS LLC
75 YEARS 1938-2013
Attorneys for businesses & professionals since 1938

**M. Dawes Cooke, Jr.**
**John W. Fletcher**
**jfletcher@barnwell-whaley.com**

March 5, 2014

*1 538*
The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

RE: John Doe 2 vs. The Citadel
Civil Action No.: 2012-CP-10-1858
BWPH File No.: 1.537

Dear Julie:

Enclosed please find the original and one (1) copy of Defendant The Citadel's Notice of Motion and Motion for Summary Judgment, along with a Motion and Order Information Form and Cover Sheet and our firm's check in the amount of Twenty-Five and 00/100 ($25.00) Dollars for the filing fee. Please file the original Motion and return a clocked copy to us in the self-addressed, stamped envelope provided for your convenience. By copy of this letter we are serving a copy of the Motion upon Plaintiff's counsel.

Sincerely,

M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosures (as stated)

cc: W. Mullins McLeod, Jr., Esquire
Julie L. Moore, Esquire
D. Ellis Roberts, Esquire

M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K Michael Barfield

William C. Helms, III*

* Registered patent attorney
· Retired

Ernest B. Lipscomb, III*
J. Gail Rahn
Todd M. Musheff
John A. Jones
Lucinda D. Gardner
John W. Fletcher

Alissa D Fleming
Barbara J. Wagner, Ph.D
Jeremy E. Bowers
D. Summers Clarke, II
Jeffrey M. Bogdan
Bradley B. Banias

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON ) | C/N: 2012-CP-10-1860 |
| JOHN DOE CAMPER, ) | |
| ) | |
| Plaintiff, ) | |
| v. ) | |
| ) | |
| THE CITADEL, ) | |
| ) | |
| Defendant. ) | |

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON ) | C/N: 2012-CP-10-1858 |
| JOHN DOE 2, ) | |
| ) | |
| Plaintiff, ) | |
| v. ) | |
| ) | |
| THE CITADEL, ) | |
| ) | |
| Defendant. ) | |

FILED
2014 APR 17 PM 2:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON ) | C/N: 2012-CP-10-1859 |
| MOTHER DOE, on behalf of ) | |
| JOHN DOE 3, ) | |
| ) | |
| Plaintiff, ) | |
| v. ) | |
| ) | |
| THE CITADEL, ) | |
| ) | |
| Defendant. ) | |

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

AND NOW COMES Defendant The Citadel, The Military College of South Carolina ("Defendant" or "The Citadel") in the above-captioned matters and files the following Memorandum in Support of Motion for Summary Judgment with regard to the claims asserted by Plaintiffs Camper Doe, John Doe 2 ("Doe 2") and Mother Doe on behalf of John Doe 3 ("Doe 3")[1]:

## INTRODUCTION

These are suits by victims of Louis "Skip" ReVille against The Citadel, alleging negligence for failing to prevent ReVille from molesting them. ReVille's crimes were unspeakable. Nevertheless, their claims against The Citadel cannot stand. The claims of Camper Doe, who actually attended The Citadel's summer camp and encountered Reville there in 2002, are barred by the statute of limitations. Doe 2 and Doe 3 never attended the summer camp and had no association with The Citadel, so the Citadel did not owe them any duty to protect them from Skip ReVille.

The instant Motion for Summary Judgment involves the following Plaintiffs who have filed the actions identified above: Camper Doe, Doe 2 and Doe 3.

In his action, Camper Doe alleges that he was sexually abused by Louis ReVille ("ReVille") during the summer of 2002, while he was a camper attending The Citadel's summer camp program. Camper Doe turned 18 in February of 2006. He commenced his lawsuit against The Citadel on March 19, 2012, nearly a decade after his abuse and six years after reaching the age of majority.

On April 23, 2007, the father of Camper Doe reported to The Citadel that ReVille had engaged in sexual misconduct with his son at The Citadel Summer Camp five years prior, in or around 2002. Camper Doe's father spoke by telephone with in-house General Counsel for The

---

[1] For ease of reference, The Citadel will refer herein collectively to Camper Doe, Doe 2 and Doe 3 as "Plaintiffs," where appropriate.

Citadel, Mark Brandenburg; during that telephone conversation, Camper Doe's father told Attorney Brandenburg that on a single occasion during Camper Doe's stay at the summer camp (some five years earlier), a counselor named "Skip" invited his son, then a minor, into his room; the two of them "watched pornography and masturbated while [Camper Doe] was in 'Skip's' room." (*See* Ex. A ¶ 3). Attorney Brandenburg subsequently spoke with Camper Doe, by then of majority age, via telephone. Camper Doe reported that "on one occasion, 'Skip' had invited him into his room and showed him pornography" and "convinced him to masturbate while in the room." (*See id.* ¶ 4).

Attorney Brandenburg telephoned ReVille, who coincidentally had submitted his resignation from his part-time temporary employment with The Citadel Writing Center on March 22, 2007 and had recently worked his final day at The Citadel. (*See* Fudge Deposition, at 58:18-59:20; Separation Form; Timesheet Printout (attached hereto as Exs. B-D, respectively)). When confronted by Attorney Brandenburg, ReVille emphatically denied Camper Doe's allegations.

Brandenburg continued his investigation on July 1, 2007, when he met with Camper Doe and his parents in Texas. Camper Doe discussed what had happened to him and mentioned there was another camper in the room at the time. (*See* Ex. E, at 74:1-25). Camper Doe's father expressed a desire for privacy, stating, "I don't want to be another name in the Charleston papers." (*See id.*, at 121:24-122:2). Camper Doe's Father further stated that he did not want for his family to "go and be a part of Charleston gossip." (*See id.*, at 144:10-11). At the close of the interview, Camper Doe's father discussed the fact that The Citadel had not accepted Camper Doe for admission as a cadet and stated that, by admitting him as a cadet, The Citadel, "can be part of the root cause to fix him." (*See id.*, at 123:16-17). Camper Doe's father also expressed his belief 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 id.*, at 123:19-23).

In compliance with the wishes of Camper Doe and his family, Attorney Brandenburg

worked with Citadel admissions employees seeking a solution that would allow Camper Doe's admission as a cadet. (*See* Brandenburg Depo., Vol. I, at 205:25-206:25 (attached hereto as Ex. F)). When it was determined that Camper Doe lacked the requisite academic qualifications for admission, Brandenburg proposed to Camper Doe and his parents that the IRF would pay for the necessary courses at a community college in order to allow him to reapply to The Citadel. (*See id.*, at 207:1-208:16). Attorney Brandenburg never heard again from Camper Doe or his parents.

The following facts are indisputable with regard to Camper Doe's report in 2007 and The Citadel's response thereto (*see generally* Ex. E):

- The report concerned an incident that had occurred approximately five years prior.
- The summer camp closed the year prior to Camper Doe's report.
- ReVille had resigned from his employment at The Citadel prior to Camper Doe's report.
- Camper Doe's report did not identify any physical sexual contact between ReVille and any minor.
- Camper Doe was an adult, with the autonomy to make his own decision with regard to the complaint.
- Camper Doe was unwilling to report the incident to the police, desiring to maintain his anonymity. In fact, Camper Doe or his family never reported the incident to law enforcement prior to ReVille's arrest in 2011.
- After the interview of Camper Doe and his family, they did not follow up with Attorney Brandenburg concerning the incident.

In light of the cumulative effect of those factors and in compliance with all applicable laws, Attorney Brandenburg did not report the alleged incident to law enforcement or recommend that it be reported to law enforcement.

In October 2011, incidents of sexual misconduct by ReVille came to light, and various law enforcement agencies initiated investigations into ReVille's activities. At the completion of

those investigations, charges were filed against ReVille in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous charges of criminal sexual conduct with a minor, solicitation of a minor, lewd acts upon a minor, and dissemination of obscene material. The Honorable R. Markley Dennis, Jr., sentenced ReVille to fifty years imprisonment.

Does 2 and 3 allege that – although ReVille began abusing them well before Camper Doe's report to The Citadel and stopped abusing them shortly after Camper Doe's interview, when their family moved out of state — The Citadel should be held liable because it did not prevent ReVille from abusing them. (*See* Ex. G). Does 2 and 3 do not claim that ReVille molested them at The Citadel or in the course or scope of ReVille's employment at The Citadel. They do not claim that any agent of The Citadel knew of Does 2 or 3. They do not claim that any agent of The Citadel actually knew or intended that ReVille would molest them. They do not allege that they attended the summer camp. Nevertheless, they allege that The Citadel caused the molestation by failing to publicly disclose or report ReVille's past act of alleged misconduct. As set forth above, Does 2 and 3 were abused by ReVille *before* Camper Doe made his report; they were only abused for a short time after Camper Doe was interviewed by Attorney Brandenburg. (*See* Ex. G).

Plaintiff Camper Doe alleges claims sounding in: (a) negligence/gross negligence (Count 1); (b) negligence/gross negligence in hiring, retention or supervision (Count 2); (c) invasion of privacy (Count 3); (d) outrage (Count 4); (e) outrage as to The Citadel's knowledge of 2002 "confession" (Count 5); (f) outrage as to The Citadel's conduct in 2007-11 (Count 6); (g) breach of fiduciary duty (Count 7); (h) assault (Count 8); (i) false imprisonment (Count 9); (j) sexual harassment (Count 10). Plaintiffs Doe 2 and Doe 3 allege claims sounding in negligence/gross negligence and outrage.

## ARGUMENTS

### A. Standard of Review

The standards governing a motion for summary judgment are well-settled in South Carolina:

> This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (*citing George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).
>
> An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

*See Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 576, 735 S.E.2d 528, 532-33 (Ct. App. 2012) (affirming grant of summary judgment). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

"[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

## B. The Citadel Owed No Duty of Care to Remote Victims Doe 2 and Doe 3, Who Had No Relationship With The Citadel

Doe 2 and Doe 3 claim that The Citadel breached a duty of care to them in connection with its handling of Camper Doe's 2007 disclosure, even though they were never molested at the Summer Camp or through any connection to The Citadel. They contend simply that but for The Citadel's failure to unmask ReVille, he would not have remained at large and capable of molesting them. In fact, discovery has revealed that ReVille befriended the family of Doe 2 and Doe 3 while he was a coach and Doe 2 was a player on a basketball team that practiced at Pinewood Preparatory School. (*See* Ex. G). It has further been discovered that ReVille began molesting Does 2 and 3, and even lived on their property, well before Camper Doe made his disclosure to The Citadel in 2007. (*See* Ex. G). There is no evidence that anyone at The Citadel was aware of ReVille's relationship with Does 2 and 3 or that he was abusing Doe 2 or Doe 3.

A plaintiff must prove three elements to recover on a claim for negligence: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *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 grant of summary judgment).

The genesis of a duty of care lies in the relationship between the defendant (The Citadel) and the injured person (Does 2 and 3):

> "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. *South Carolina State Ports Authority*, 289 S.C. at 377, 346 S.E.2d at 326.

*Ravan v Greenville Cty.*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). In this case, a relationship between The Citadel and Does 2 and 3 was essentially non-existent. There is nothing that would support the imposition of a duty of care under the law. The sole basis on which Plaintiffs contend that The Citadel owed them a duty is that it was foreseeable that if The Citadel conducted an inadequate investigation and failed to apprehend ReVille, he would likely continue to molest children, including the Plaintiffs. It is well established that "foreseeability 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 that physician who negligently conducted sexual abuse physical examination owed duty to third parties foreseeably injured by the examination) (citations omitted).

"[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). The Supreme "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) (*citing McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007)).

"'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) (affirming grant of summary judgment) (*citing Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991)), *aff'd*, 346 S.C. 97, 551 S.E.2d 579 (2001). In this regard, South Carolina courts traditionally find no duty of care to protect a victim of violence or prevent an act of violence by a third person:

> 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. *Rogers v. South Carolina Dep't of Parole & Cmty Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995); *Rayfield v. South Carolina Dep't of Corr* , 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), *cert. denied,* 298 S.C. 204, 379 S.E.2d 133 (1989); Restatement (Second) of Torts § 314 (1965). 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) (finding duty of care existed under second exception where defendant had *custody* of perpetrator of assault).

For purposes of this argument only, the Court may accept as true the allegation by Doe 2 and Doe 3 that The Citadel and its agents failed to act with reasonable care and caution in relation with ReVille. Plaintiff's claims cannot survive because, as a matter of law, there was no duty of care flowing from The Citadel to Does 2 and 3.

### 1. There Can Be No Duty of Care Based on a Special Relationship Between The Citadel and Does 2 and 3

It is clear that there is no duty of care imposed by the relationship between The Citadel and Does 2 and 3. There is no evidence that any agent of The Citadel knew either of these Plaintiffs or had any relationship with them prior to ReVille's abuse, let alone a "special relationship." There is no evidence that The Citadel had the ability to control, supervise, or monitory Does 2 and 3. Importantly, there is no evidence that Doe 2 or Doe 3 was ever in the custody of The Citadel or was in a fiduciary relationship with The Citadel. Moreover, there is no evidence that any allegedly culpable agent of The Citadel knew that ReVille was abusing these Plaintiffs. Simply put, there is no evidence to support a duty of care based on a special relationship between The Citadel and Does 2 and 3. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011) ("Wal-Mart had no special relationship with either the victim or his father because it did not have the ability to monitor, supervise, or control either.").

**2. The South Carolina Supreme Court Has Foreclosed the Possibility of the Existence of a Duty of Care Based on a Special Relationship Between The Citadel and ReVille**

The question of whether a duty of care may be imposed on The Citadel because of its former relationship with ReVille is controlled by the Supreme Court's decision in *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). In *Marion*, the plaintiff alleged that he had been sexually abused by Marion, his pediatrician, beginning in 1999. Starting in 1984, Marion received ongoing psychiatric treatment from the defendant, Dr. Graf, for his "predilection for child molestation." The plaintiff alleged that Dr. Graf was negligent in failing to notify proper authorities of Marion's proclivity toward child sexual abuse. The Supreme Court affirmed the grant of Dr. Graf's motion to dismiss, finding that no common law duty of care flowed from Dr. Graf to protect plaintiff from sexual abuse by a third person:

> The defendant may have a common law duty to warn potential victims under the "special relationship" exception when the defendant "has the ability to monitor, supervise and control an individual's conduct" and when "the individual has made a specific threat of harm directed at a specific individual." *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). In Bishop, this Court relied on "[t]he seminal case on the liability of one treating a mentally afflicted patient for failure to warn or protect third persons threatened by a patient" and stated:
>
> > When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.
>
> *Bishop*, 331 S.C. at 87, 502 S.E.2d at 82 (*quoting Tarasoff v. Regents of Univ. of California*, 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976)). The key is there must be a specific threat made by the patient to harm a readily identifiable third party. *Id.*

> Petitioner argues Dr. Graf had a duty to warn James Doe because he was a member of a readily identifiable group of future patients of Dr. Marion. In *Gilmer v. Martin*, 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct.App.1996), the Court of Appeals rejected a similar argument, holding "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of **a distinct, specific, overt threat** of harm which the individual makes towards a particular victim."
>
> Petitioner's claim fails to allege a specific threat against James Doe necessary to create a duty to warn. Therefore, the Court of Appeals did not err in affirming the trial court's dismissal of Petitioner's claims.

*See id.*, 373 S.C. at 400-01, 645 S.E.2d at 250-51 (emphasis added); *but see Bishop*, 331 S.C. at 88, 502 S.E.2d at 82 (finding duty could exist where state agency with custody of abusive mother was aware mother had made specific threats to harm specific victim and failed to warn that victim of mother's release). In addition, the Supreme Court held that no duty could be found under the South Carolina mandatory reporter statute, S.C. Code § 20-7-510. *See id.*, 373 S.C. at 399, 645 S.E.2d 250.

The Supreme Court expounded on its *Marion* analysis in *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011). In *Wal-Mart*, relatives of a minor child photographed evidence of the physical abuse of the child by his parents, with the intention of bringing that evidence to the attention of DSS. The relatives brought those photographs to a Wal-Mart store to be developed. Wal-Mart destroyed some of the photographs because they depicted nudity of the child. The child's relatives pleaded with a Wal-Mart employee to give them the photographs so that they could be given to DSS. Subsequently, the child's father began sexually abusing the child. The child's relatives sued Wal-Mart alleging that: (a) Wal-Mart violated its obligations under the mandatory reporting statute and (b) Wal-Mart was negligent in the hiring and supervision of its employees and violated twenty internal company policies. The trial court granted Wal-Mart's motion for summary judgment, holding, *inter alia*, that Wal-Mart owed no common law duty to the minor child. The Supreme Court affirmed the trial court's grant of summary judgment, stating in relevant part:

> We find the circuit court properly granted summary judgment as to these alternative causes of action because Wal–Mart owed no duty to the victim. It is clear Wal–Mart had no general duty to control the conduct of the victim's father or warn the victim of the danger of the sexual abuse. Further, none of the exceptions enumerated in *Faile* apply here. Wal–Mart had no special relationship with either the victim or his father because it did not have the ability to monitor, supervise, or control either. *Doe v. Marion, supra.* Wal–Mart did not negligently or intentionally create the risk of the father's sexual abuse. Lastly, as discussed above, Wal–Mart's duty to report under the Reporter's Statute cannot give rise to civil liability.

*See id.*, 393 S.C. at 247-48, 711 S.E.2d at 912.

Likewise, in the instant case, there is simply no basis for the imposition of a duty of care on The Citadel to protect Does 2 and 3 from abuse by ReVille. The Citadel was not aware of Doe 2 or Doe 3, let alone that ReVille was abusing these particular individuals. There is no evidence that The Citadel was aware that Doe 2 and Doe 3 were at risk of abuse by ReVille. There is no evidence that The Citadel was aware of a specific threat to either Doe 2 or Doe 3. If the psychiatrist in *Doe v. Marion* owed no duty — despite knowing that Dr. Marion has access to a specific class of prospective victims through his pediatric practice — there would certainly be no duty here, where The Citadel had no knowledge of the abuse or risk of abuse of Doe 2 or Doe 3. This case falls squarely within *Doe v. Marion* and its progeny. As a result, this Court should grant The Citadel summary judgment.

This result is consistent with the law of South Carolina and elsewhere. *See e.g., Hornback v. Archdiocese of Milwaukee*, 752 N.W.2d 862, 874 (Wis. 2008) ("There is no state in which employers are recognized as being negligent for failing to seek out, find, and warn future employers of sexually dangerous former employees. Even those states that have recognized a negligent referral doctrine do not impose liability when a referral letter is sent by a past employer to a future employer of such an employee unless actual misrepresentations are made in such a letter."); *Myers v Lindala*, 675 N.W.2d 635 (Minn. Ct. App. 2004) (holding church and its governing body owed no duty to protect plaintiff from sexual abuse by known child abuser); *Cohen v. Wales*, 133 A.D.2d 94, 95, 518 N.Y.S.2d 633, 633 (N.Y. App. Div. 1987) (finding no

duty of care owed by school board that "recommended a former employee for a position as a grammar school teacher with the Tri-Valley School District without disclosing that the teacher had been charged with sexual misconduct.").

### 3. There Is No Evidence That The Citadel Voluntarily Undertook a Duty to Does 2 and 3

The record does not support the imposition of a duty of care on The Citadel based on an alleged voluntary assumption. South Carolina recognizes voluntary assumption of a duty in limited circumstances:

> The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in the Restatement of Torts, which states:
>
> > 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.
>
> Restatement (Second) of Torts § 323.

*See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (refusing to extend doctrine beyond Restatement formulation).

None of these circumstances are present here. The Citadel never undertook to perform any services for Does 2 or 3. There is no evidence that The Citadel acted with knowledge that its conduct was necessary for the protection of Does 2 or 3. To the contrary, Does 2 and 3 were, at all relevant times, strangers to The Citadel. Moreover, there is no evidence that The Citadel's alleged conduct — allegedly failing to report ReVille to authorities — increased any risk to Does 2 or 3. To the contrary, the evidence is clear that ReVille was already abusing those Plaintiffs prior to the time of the July 1, 2007 interview of Camper Doe. The Citadel's conduct did not

increase the likelihood that ReVille would abuse Doe 2 or 3. Instead, the claim is that The Citadel failed to prevent future acts of abuse. These circumstances plainly do not support the recognition of a duty of care based on an alleged voluntary assumption of the duty.

**4. There Is No Evidence That The Citadel Intentionally or Negligently Created the Risk to Does 2 and 3**

As set forth above, The Citadel did not — either intentionally or negligently — create the risk encountered by Does 2 and 3. In fact, ReVille was already abusing them, at the time of the Camper Doe investigation. Plaintiff can proffer no evidence that The Citadel created ReVille's desire to abuse children or encouraged ReVille to abuse children. The Citadel did not "create" any dangerous condition that would not have existed otherwise. Instead, the only claim in this case is that The Citadel failed to stop ReVille from abusing children by reporting the Camper Doe complaint to law enforcement. In other words, Does 2 and 3 claim that The Citadel did not act to vitiate an already existing risk. This is insufficient to create a duty of care under this exception.

**5. No Statute Imposes a Duty On The Citadel**

Finally, there is no evidence that would support a finding of a duty of care imposed by statute. Courts in South Carolina are especially reluctant to recognize a private right of action arising out of a statute governing the duties of a public official:

> However, when the statute at issue creates or defines the duties of a public official, the public duty rule applies. [*Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct. App. 1988).] "'This rule holds that public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually.'" *Vaughan,* 370 S.C. at 441, 635 S.E.2d at 634 (quoting *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation,* 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999)). The public duty rule represents a presumption that such a statute "has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public," and thus does not satisfy the elements of the two-part *Rayfield* test. 297 S.C. at 105, 374 S.E.2d at 915. The presumption may be overcome when the statute creates a " special duty" to the plaintiff. 297 S.C. at 106, 374 S.E.2d at

916. In *Rayfield,* this court stated:

> "A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not to cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office."

*Trask v. Beaufort County,* 392 S.C. 560, 567, 709 S.E.2d 536, 539 (S.C. App. 2011). In *Trask,* the Court of Appeals held that no private right of action exists against a county coroner for violating the statute prohibiting the destruction of human remains. In *Edwards v. Lexington County Sheriff's Department,* 386 S.C. 285, 688 S.E.2d 125 (2010), the Supreme Court applied the public duty rule to find that a family court litigant who was assaulted by her ex-boyfriend in family court could not sue the Sheriff's Department for violating a statute requiring the Sheriff to "provide any measures necessary to protect the victims and witnesses, including ... physical protection in the courthouse." Applying these principles, this Court should conclude that there are no statutory duties of care imposed on The Citadel.

**a. The Mandatory Reporting Statute Does Not Create a Duty**

In *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011), the Supreme Court held that, even if the Defendant is a mandatory reporter under a state child abuse statute, this does not create a private right of action or a duty of care. *See id.*, 393 S.C. at 248, 711 S.E.2d at 912 ("Wal–Mart's duty to report under the Reporter's Statute cannot give rise to civil liability."); *accord Doe v. Marion,* 373 S.C. 390, 645 S.E.2d 245 (2007).

In any event, it is clear that The Citadel was *not* a mandatory reporter under the version of the reporting statute in effect at the time of the Camper Doe investigation:

> (A) A physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional,

> member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, police or law enforcement officer, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, or a judge must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 20-7-490.
>
> (B) If a person required to report pursuant to subsection (A) has received information in the person's professional capacity which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the reporter must make a report to the appropriate law enforcement agency.

*See* S.C. Code § 20-7-510 (2007) (repealed). The Citadel did not fall within the scope of any of these provisions or requirements of the mandatory reporting statute in effect in 2007.

**b. The Jessica Horton Act Does Not Create a Duty**

Under the Jessica Horton Act, "[t]he chief of the campus police of an institution of higher learning, or his designee, immediately shall notify the State Law Enforcement Division . . . if the officer or another official of the institution is in receipt of a report alleging that an act of criminal sexual conduct has occurred on the property of the institution." *See* S.C. Code § 59-154-10(B).

First, this statute does not apply in this case because it was not in effect at the time of the report made by Camper Doe in April, 2007. The Jessica Horton Act did not become effective until June 6, 2007. *See* 2007 Act No. 53, § 2, effective June 6, 2007. Under South Carolina law, in the absence of express legislative intent, statutes normally only apply retroactively:

> Where the legislative intent is not clear, we adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application. *See State v. Varner*, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992). The exception to the presumption of prospective operation arises when the statute is remedial or procedural in nature. *State v. Davis*, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348,

> 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). However, as indicated, legislative intent is paramount in determining whether a statute will have prospective or retroactive application. *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

*See State v. Bolin*, 381 S.C. 557, 561, 673 S.E.2d 885, 886-87 (Ct. App. 2009). This is particularly so where the statute imposes affirmative obligations: "where a statute ... creates new obligations [or] imposes a new duty ... it will be construed as prospective only.'" *See Southeastern Site Prep, LLC v. Atlantic Coast Bldrs. and Contractors, LLC*, 394 S.C. 97, 106, 713 S.E.2d 650, 655 (Ct. App. 2011) (*quoting* 82 C.J.S. Statutes § 585 (2009)).

Second, Does 2 and 3 are not within a specific identifiable class to be protected under the Jessica Horton Act. The Jessica Horton Act concerns the reporting of claims of certain crimes of sexual violence. To the extent the statute protects anyone, it is the general public and *victims* of crimes. Does 2 and 3 are not part of any special class protected by the statute. As the Supreme Court stated with respect to the child abuse reporting statute described above, "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing civil liability." *Doe v. Marion, supra,* 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007)

Finally, it is clear that the information reported by Camper Doe would not have triggered the Jessica Horton Act. As set forth above, the statute is triggered by a report of "criminal sexual conduct." The crimes of "criminal sexual conduct" are defined in S.C. Code §§ 16-3-651 through 16-3-659.1. Nearly all of those statutes require "sexual battery," which is defined to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." See S.C. Code § 16-3-651(h). Camper Doe never reported a "sexual battery" to anyone at The Citadel.

The only exception to the requirement of a sexual battery is third-degree criminal sexual conduct with a minor: "A person is guilty of criminal sexual conduct with a minor in the third

degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." See S.C. Code § 16-3-655(C). Again, the report by Camper Doe, which expressly denied any physical contact, would not have triggered this statute. There is no evidence that Camper Doe reported any "act upon or with" his body.

For the foregoing reasons, this Court should reject the invitation to impose a duty of care arising from the Jessica Horton Act.

**c. The Clery Act Does Not Impose a Duty of Care**

It is further anticipated that Does 2 and 3 will argue that a duty of care was created by The Clery Act, 20 U.S.C. § 1092(f). That statute is explicit that it is not intended to either:

> (i) Create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or
>
> (ii) *Establish a standard of care.*

*See* 20 U.S.C. § 1092(f)(14)(A) (emphasis added). Numerous courts have held that there is no private right of action under the Clery Act. *See Moore v. Murray St. Univ.*, 2013 WL 960320, at *3 (W.D. Ky. March 12, 2013) (attached hereto as Ex. U); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 760 (E.D. Tenn. 2009); *King v. San Francisco Cmty. Coll. Dist., No. C 10–01979 RS*, 2010 WL 3930982, at *4–5 (N.D. Cal. Oct. 6, 2010) (attached hereto as Ex. V); *accord* Brett A. Sokolow, *et al.*, *College and University Liability for Violent Campus Attacks,* 34 J.C. & U.L. 319, 344 (2008) ("[T]he Clery Act specifically notes that it cannot give rise to a private right of action to enforce its terms. . . . The enforcing authority for the Clery Act is the U.S. Department of Education."). As a consequence, Doe 2 and Doe 3 may not rely upon the Clery Act to impose a duty of care on The Citadel.

### d. Title IX Does Not Impose a Duty of Care On The Citadel

It is also anticipated that Does 2 and 3 will argue that a duty of care was imposed by Title IX, 20 U.S.C. § 1681. Specifically, it is believed that they will posit that The Citadel was obligated under Title IX to engage in certain investigatory and remedial actions in response to Camper Doe's 2007 complaint.

Title IX itself does not impose such obligations. Instead, it is anticipated that Does 2 and 3 will base their argument heavily on the United States Office for Civil Rights, Department of Education's 2000 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("OCR Guidance"). (*See* Ex. H). In particular, it is anticipated that Does 2 and 3 will rely on "administrative" provisions of the OCR Guidance governing how certain entities should respond to complaints of sexual harassment. However, the OCR Guidance makes clear that its revisions from the 1997 version of the guidance are intended to solidify that it is *not* intended to set standards applicable in damages claims:

> The 1997 guidance contained a section titled "Liability of a School for Sexual Harassment." To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; *it does not address standards applicable to private litigation for monetary damages.*

(*See* Ex. H, at 3 (emphasis added)).

The OCR Guidance further clarifies that the United States Supreme Court had foreclosed the use of its "administrative" standards to define liability for money damages:

> The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by *Gebser* and *Davis*.

(*See* Ex. H, at 4). The *Gebser* case referenced in the OCR Guidance further cements that the administrative standards set forth in the OCR Guidance should not form, in any measure, the grounds for a civil damages claim:

> [T]he failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. [Citation omitted.] We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

*See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). Applying *Gebser*, a court has held that it was error to use the OCR Guidance's "administrative" provisions to define a standard of care in a civil lawsuit:

> Plaintiffs continue to assert negligence per se claims, arguing that "34 C.F.R. 106.8(b) ... requires a school receiving Title IX funds to establish 'procedures providing for the prompt and equitable resolution of student complaints' relating to all forms of sexual harassment, including sexual assault," and that this regulation incorporates an Office of Civil Rights of the Department of Education (OCR) Guidance requiring a school's procedures to "accord[ ] due process to both parties involved." . . . If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule.
>
> In fact, Defendant noted in its motion for summary judgment that Plaintiffs' strategy of "mak[ing] an end run around these principles by asserting state-law negligence-based claims and relying on Title IX regulations and OCR Guidance to establish the duty element of those claims ... [is] preempted by the Supreme Court's jurisprudence on the private right of action under Title IX"

*Doe v. University of the South*, 2011 WL 1258104, at *14 (E.D. Tenn. March 31, 2011) (attached hereto as Ex. I).

Moreover, Does 2 and 3 cannot posit that they are the intended benficiaries of a statute intended to protect the civil rights of students. Title IX is not a general statute for the prevention of violence. That statute is not designed to protect a specific class of persons from the specific abuse sustained by Does 2 and 3. In other words, Title IX is not intended to protect unknown future victims of sexual abuse; rather, it is intended to vindicate the civil rights of students to ensure that there is no discrimination in educational programs. Does 2 and 3 can cite to no

authority extending Title IX to impose a duty of care flowing to a person who is not a student and who, in fact, has no relationship with the defendant. To find a duty created by Title IX would, in essence, turn Title IX into a statute for the protection of the general public, rather than for the protection of a specific class of persons.

### C. The Claims of Camper Doe and Doe 2 Are Barred by the Statute of Limitations Contained in the Tort Claims Act

#### 1. The Relevant Provisions

Camper Doe and Doe 2 cannot reasonably dispute that The Citadel is a governmental entity governed by the SCTCA. *See* S.C. Code § 59-101-10 ("There are universities and colleges as follows: . . . another styled The Citadel, the Military College of South Carolina."). As a result, Camper Doe and Doe 2 may only assert tort claims against The Citadel to the extent the SCTCA permits:

> The TCA "is the *exclusive civil remedy available* for any tort committed by a government entity, its employees, or its agents except as provided in § 15–78–70(b)." *Wells v. City of Lynchburg*, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); *see* S.C. Code Ann. § 15–78–200 (2005) ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty.").

*See Health Promotion Specialists, Inc. v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 635, 743 S.E.2d 808, 814 (2013) (emphasis added); *Proctor v. Dep't of Health & Envtl. Ctrl.*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) ("The [SCTCA] governs *all tort claims* against governmental entities and is the *exclusive civil remedy* available in an action against a governmental entity or its employees.") (emphasis added). Section 15-78-20(b) of the SCTCA provides that (emphasis added): "[t]he General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, *only to the extent* provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved."

The Tort Claim Act, the exclusive basis for any tort claim against The Citadel, contains its own controlling statute of limitations:

> [A]ny action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

*See* S.C. Code § 15-78-110. Camper Doe and Doe 2 did not file a SCTCA claim before the filing of these cases, so their tort claims are governed by the two year statute of limitations.

When a minor is injured, the SCTCA permits limited, temporary tolling of the period:

> If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 [the SCTCA] of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued . . . within the age of eighteen years . . . the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought *cannot be extended* . . . (b) *in any case longer than one year after the disability ceases.*

*See* S.C. Code § 15-3-40 (emphasis added). Thus, the statute of limitations governing a claim for harm to a minor may be extended during the claimant's minority, but not beyond the claimant's nineteenth birthday.

**2. The Plaintiff's Claims Are Barred Under the Discovery Rule**

"The courts of South Carolina apply the 'discovery rule' to determine when a cause of action accrues under the Tort Claims Act." *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E. 2d 879, 883 (Ct. App. 2010). South Carolina courts have defined the relevant timing under the discovery rule as follows:

> Under the discovery rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371-72, 597 S.E.2d 27, 29 (Ct.App.2004). The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations. *Id.* at 371, 597 S.E.2d at 29.

*See Gillman v. City of Beaufort*, 368 S.C. 24, 27-28, 627 S.E.2d 746, 748 (Ct. App. 2006) (affirming grant of motion to dismiss under SCTCA statute of limitations); *accord Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004).

> The statute does not necessarily run from the date of the negligent act, but from when the injury resulting from the negligent act is discovered or may be discovered by the exercise of "reasonable diligence." [*Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 190-91, 534 S.E.2d 1, 8 (Ct. App. 2000).] "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The date on which discovery should have been made is an objective, not subjective, question." *Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. Additionally, the fact that the injured party does not comprehend the full extent of his injuries is immaterial. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

*See Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 570-71, 608 S.E.2d 459, 462 (Ct. App. 2005) (affirming grant of summary judgment).

Traditionally, a full appreciation of the extent of one's injuries in a sexual abuse case is not necessary to begin the running of the statute of limitations. *See Doe v. R D.*, 308 S.C. 139, 417 S.E.2d 541 (1992) (non-SCTCA case). Moreover, the statute starts to run as to all wrongdoers when it begins to run against any one of them. In *Tollison v. B & J Machinery Co.*, 812 F. Supp. 618 (D.S.C. 1993), an injured person amended her complaint following an injury to add a defendant that had inspected the plant, claiming it should have detected a dangerous condition. *Id.* at 619. The court held that once the statute of limitations began to run as to one defendant, it ran for *all actions* related to that injury: "The important date under the discovery rule is the date that a plaintiff *discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer.* If, on the date of injury, a plaintiff knows or should know that she has some claim against someone else, the statute of limitations begins to run *for all claims based on that injury.*" *Id.* at 620 (emphasis added).

In *McClain v. Jarrard*, 354 S.C. 218, 580 S.E.2d 763 (Ct. App. 2003), a medical malpractice plaintiff learned, more than three years after discovering his injury, that another party's conduct contributed to his injury. The Court of Appeals affirmed summary judgment on the statute of limitations, even though plaintiffs are granted considerable "latitude for discovery of an injury in the medical malpractice context." *See id.* at 764. Although plaintiff did not discover the *additional defendant's* malpractice until the deposition of an expert against the first doctor, the Court held that the plaintiff's knowledge of the *existence* of the additional doctor when he discovered his injury was sufficient to trigger the statute as to all. The Court concluded that "the notice of a potential claim against a different defendant 'triggered the statute of limitations, rather than the discovery of evidence actually supporting the potential claim.'" *See id.* (*quoting Tanyel v. Osborne*, 312 S.C. 473, 441 S.E.2d 329, 331 (Ct. App. 1994) (holding that statute against second driver implicated by later testimony ran from date of accident, not when plaintiff discovered negligence of second driver)).

These principles have been applied in negligent hiring/supervision claims similar to this one. In *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997) (per curiam), several congregants sued a church and its superintendent, Pearson, for claims arising out of alleged sexual abuse by a pastor, Brunson, in 1989 and 1990. After an investigation, Brunson eventually resigned, and the church dropped its investigation. Although the church undertook reforms, the victims filed suit. During discovery, the girls learned that ministers in the Conference knew Brunson had previously acted inappropriately at another church but "'swept it under the rug.'" The court dismissed the claims of negligent hiring and supervision based on the statute of limitations. Plaintiffs argued that "the limitations period for the negligent hiring and supervision claims did not begin to run when they knew they were injured but began when they knew the Conference and [the pastor] had injured them." *Id.* at 418, 483 S.E.2d at 482. The Court disagreed, explaining that the action had to be commenced within three years after a reasonable person should have known that he

had a cause of action, "not three years after a full-blown theory of recovery had been developed." *Id.* The Court further stated that "the proper focus is upon the date of discovery of the injury, *not the date of the discovery of the wrongdoer.*" *Id.* (emphasis added) (*citing Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994)). The victims could not dispute that they were aware of the sexual abuse more than three years before bringing the action. *Id.* "Therefore, even though [the victims] did not know the exact nature of the wrong at the time, they knew their rights had been invaded. The trial judge was therefore correct in his ruling concerning when the statute of limitations began to run on the causes of action alleging negligent supervision and negligent hiring." *Id.* at 418-19, 483 S.E.2d at 482.

The South Carolina Court of Appeals has held that, in the absence of some basis for tolling, the statute of limitations on a negligence claim relating to sexual abuse of a minor begins to run, at the latest, on the last date of abuse:

> Doe testified Fischer molested him from 1977 until 1982. Doe acknowledged he knew Fischer's actions were wrong when they occurred and said he had thought about what Fischer did to him at least once a day ever since the acts took place. Even assuming each act of molestation gave rise to a distinct cause of action, the statute of limitations would have expired in 1988, *six[[2]] years after the last act of molestation in 1982*, and more than ten years before Doe even retained Howe, which occurred in 1999.
>
> Because nothing in the record suggests that a dispute exists regarding any of the factual issues regarding the applicability of the statute of limitations in the underlying case, such as estoppel or some discrepancy as to the operative dates, we hold Doe's claim against Porter-Gaud, as a matter of law, had lapsed long before Howe undertook to represent him. The trial judge, therefore, correctly concluded *Doe could not, as a matter of law, prove his claim of legal malpractice against Howe because the underlying action would not have been successful in that the statute of limitations would have barred Doe from maintaining it.*

*See Doe v. Howe*, 367 S.C. 432, 443, 626 S.E.2d 25, 30 (Ct. App. 2005) (emphasis added).

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[2] Under South Carolina law in effect at the relevant time in *Doe v. Howe*, negligence actions arising or accruing before April 5, 1988 had to be commenced within six years of the time at which the statute began to run. After that date, the statutory period was reduced to three years.

Camper Doe claims that ReVille sexually abused him in 2002, while he was a minor. Camper Doe turned 18 in February of 2006. However, he did not file this action until March 19, 2012, almost a decade after ReVille abused him. Granting Camper Doe the benefit of every doubt, the very latest that the statute of limitations on any of his claims could have possibly begun to run would have been in 2002, when the abuse occurred. Applying the tolling of Section 15-3-40, the statute of limitations on Camper Doe's claims expired, at the very latest, when Camper Doe turned 19 in February of 2007 — more than five years before Camper Doe filed this lawsuit. Camper Doe can show no grounds to delay the statute of limitations under the discovery rule. He does not claim that he was unaware ReVille had caused him a loss at the time of the alleged abuse or that he repressed memories regarding the abuse. There is no evidence that he did not contemporaneously know that ReVille's actions caused him injury. Camper Doe's alleged injuries and the nature of ReVille's conduct was open, obvious and apparent. The alleged abuse occurred on The Citadel's campus at its summer camp program. Camper Doe can proffer no evidence that the discovery rule should have started to run at any time *after* his abuse.

Similarly, Doe 2 alleges that ReVille's abuse of him ceased in the summer of 2007. Doe 2 turned eighteen in September of 2010, and nineteen in September of 2011. He did not commence this action until March of 2012. Applying the statute of limitations in the SCTCA, Doe 2's statute of limitations began to run by summer of 2007 and expired in the summer of 2009. Applying the SCTCA's proper tolling rules, the statute would have lapsed no later than Doe 2's nineteenth birthday in September 2011, six months before he sued The Citadel. Again, Doe 2 can show no reason why the statute of limitations on his claims did not immediately begin to run at the time ReVille abused him. As a result, Doe 2's claims are also time-barred under the SCTCA.

### 3. Camper Doe's and Doe 2's Claims Against The Citadel Are Barred Under the Supreme Court's Recent *Bishop of Charleston* Decision

On January 8 of this year, the South Carolina Supreme Court handed down its ruling in *Doe v. Bishop of Charleston*, 2014 WL 60341(S.C. Jan. 8, 2014) (attached hereto as Ex. J), addressing, among other things, the application of the statute of limitations in cases brought against the Catholic church relating to sex abuse by priests. The Court held that the plaintiff's complaint should survive a motion to dismiss based on the statute of limitations because he alleged that the Catholic Church fraudulently concealed its possible liability for the priest's actions, which if true would toll the statute. Camper Doe's and Doe 2's claims against The Citadel are barred under this decision, insofar as fraudulent concealment does not apply under the SCTCA and, in any event, is not alleged and did not occur here.

*Bishop of Charleston* was an appeal from an order granting a motion to dismiss an action alleging sexual abuse by a priest. The Complaint in that matter very specifically alleged that the defendants had engaged in an effort – through formal church policy – to conceal misconduct from the plaintiff to avoid a lawsuit. (*See* Ex. K). The South Carolina Supreme Court held that, based on those specific allegations, the plaintiff could withstand a motion to dismiss on statute of limitations grounds under the three-year statute of limitations, applying common law tolling for fraudulent concealment:

> The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule)." *Kreutner v David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (internal footnote omitted). Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations. *Strong v. University of South Carolina School of Medicine*, 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994).
>
> Appellants allege respondents engaged in a systematic practice of secrecy and concealment of their knowledge of sexual abuse by employees, including the employee who appellants allege committed the abuse at issue. The employer's knowledge of an employee's dangerousness is an element of the tort of negligent

> supervision. [Citation omitted.]. Thus, appellants' allegations could, if proven, *toll the statute of limitations*.

(*See* Ex. J, at p.9 (emphasis added)). In other words, because the plaintiff had made very specific factual allegations of an intentional cover up designed to hide the church's role in abuse and to prevent lawsuits, the court could not dismiss his complaint at the Rule 12 stage.

As an initial matter, it should be noted that *Bishop of Charleston* concerns *tolling* of the statute of limitations for fraudulent concealment, *not* the issue of when the statute of limitations begins to run in the first instance. Tolling and accrual/discovery rule are two distinct issues:

> Cases addressing S.C. Code Ann. § 15-3-535 [codifying the discovery rule in tort cases] usually have not described that statute as "tolling" the statute of limitations. The cases typically state that the statute of limitations "begins to run" on the date the plaintiff either knew or should have known through the exercise of reasonable diligence that she had a cause of action. *See, e.g., Roe v. Doe*, 28 F.3d 404 (4th Cir. 1994); *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997); *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994); *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Dorman v Campbell*, 331 S.C. 179, 500 S.E.2d 786 (Ct.App.1998); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997); *see also Mills v. Killian*, 273 S.C. 66, 254 S.E.2d 556 (1979) (concluding "the accrual upon discovery rule represents the more equitable and rational view" in a case that arose prior to the enactment of section 15-3-535). Section 15-3-535 does not contain any express "tolling" provisions, unlike S.C. Code Ann. § 15-3-40, which we have described as a "tolling statute." *See Wiggins, supra* (using "begins to run" language when discussing section 15-3-535 and "tolling" language when discussing section 15-3-40).

*See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327 n.3, 435 S.E.2d 672, 675 n.3 (2000). The Court held in *Bishop of Charleston* that fraudulent concealment *tolls* the statute of limitations. This is not the same as the discovery rule, which governs the *accrual* of a cause of action (*i.e.*, when the statute starts to run). To invoke *Bishop of Charleston,* Camper Doe and Doe 2 must plead and prove the elements of fraudulent concealment, not merely claim that they were unaware they had potential claims against The Citadel.

Fraudulent concealment could not apply here, as a matter of law. Camper Doe had no relationship with The Citadel after he finished the Summer Camp in 2002. Doe 2 *never* had any specific relationship with The Citadel that would support fraudulent concealment tolling. *Bishop*

*of Charleston* relied, as the basis for its "fraudulent concealment" discussion, on *Strong v. Univ. of South Carolina Sch. of Medicine*, 316 S.C. 189, 447 S.E.2d 850 (1994). In *Strong*, the Court – after discussing when the statute began to run under the discovery rule –rejected the plaintiff's argument that fraudulent concealment tolled the statute, noting that tolling could only occur while there was a formal relationship between the parties:

> Plaintiff claims that the Medical School fraudulently concealed the negligent follow-up treatment of the Plaintiff. "[T]he practically universal rule is that deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action, thereby inducing him to postpone institution of suit will be held to toll the statute.". 1 David W. Louisell and Harold Williams, Medical Malpractice ¶ 13.03 p. 13-67 (1993). The fraudulent concealment defense to the statute of limitations flows from the patient-physician relationship. *When the relationship ends, the duty to disclose, which is the basis of fraudulent concealment claim, ceases to exist absent extenuating circumstances such as the withholding or altering of plaintiff's medical records. Thames v. Dennison*, 821 S.W.2d 380 (Tex. App. 1991); *see also O'Neal v. Throop*, 596 N.E.2d 984 (Ind. Ct. App. 1992) (when physician-patient relationship terminates, the constructive fraud terminates and the statute of limitations begins to run). The doctor-patient relationship between the Plaintiff and the respondent ended in June 1989. There are no allegations of circumstances created by the respondent to prevent Plaintiff's discovery of the facts. Thus, constructive fraud on the part of the Medical School, if any, ended by June 1989.

*See Strong*, 316 S.C. at 191-92, 447 S.E.2d at 852 (emphasis added). Under *Strong,* after the relationship between a plaintiff and defendant ends, the basis for tolling for fraudulent concealment also ends. Camper Doe's claims revolve around events occurring at the summer camp in 2002. Plaintiff can proffer no evidence that he had any ongoing relationship with The Citadel after that time. To the extent there ever might have been fraudulent concealment, any duty by The Citadel to disclose ended when Camper Doe's relationship with The Citadel ended. Even if there was a factual basis to toll the statute of limitations under *Bishop of Charleston,* this would not avail Camper Doe because such tolling would have ended in 2002. Doe 2 *never had any* relevant relationship with The Citadel to support fraudulent concealment tolling.

Further, Camper Doe and Doe 2 can proffer no evidence and do not allege that The

Citadel specifically concealed any material information to prevent them from filing suit. Unlike the *Bishop of Charleston* case, where the plaintiff made highly-detailed allegations of church policies designed to conceal its involvement in abuse, there is no evidence that The Citadel concealed any facts from Camper Doe and Doe 2 following their abuse.

Finally, *Bishop of Charleston* is inapplicable because fraudulent concealment does not apply to the SCTCA statute of limitations, which requires that claims be brought "within two years after the date *the loss* was or should have been discovered." *See* S.C. Code § 15-78-110 (emphasis added). This differs from the statute of limitations governing tort claims against private defendants (discussed in *Bishop of Charleston)*, which requires that an action be commenced "within three years after the person knew or by the exercise of reasonable diligence should have known *that he had a cause of action.*" *See* S.C. Code § 15-3-535 (emphasis added). Because the SCTCA focuses on the "loss," Camper Doe and Doe 2 cannot dispute that actual or constructive knowledge of *the injury*, not of misconduct or a potential cause of action against a particular defendant, triggers the statute of limitations:

> Bayle asserts the Circuit Court erred in defining "loss" as the date of his wife's death rather than the date he learned of a possible latent defect in the road surface. We disagree. . . . The Tort Claims Act *contains a definition of loss that differs from that of other statutes.* Therefore, Bayle's reliance on medical or legal malpractice cases not governed by the Act is misplaced. . . .
>
> Bayle's "loss," according to the clear provisions of the statute, was the death of his wife, rather than the date he learned of a possible latent defect in the road surface. When statutory language is unambiguous, this Court may not impose a contrary meaning. . . .
>
> Provisions of the Tort Claims Act establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting the liability of the State. . . . Viewing the evidence, as we are constrained to do, in the light most favorable to Bayle, the evidence does not demonstrate a genuine issue of material fact existed that a person possessing common knowledge and experience would not have known a possible cause of action existed on the date of Patricia's tragic death. Bayle knew the circumstances of Patricia's death and should have been on notice to investigate further.

> The Tort Claims Act provides potential claimants with two years in which to file suits. This two year period begins on the date of loss regardless of whether the plaintiff knows the cause of the loss. Bayle's knowledge of his loss triggered the statute and put Bayle on notice to timely investigate and determine its cause. Bayle's belated discovery of *the cause of* the loss does not entitle him to reversal of the order granting summary judgment. Bayle did not investigate sooner and did not file this claim until more than two years from the date of his wife's death.

*See Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 121-127, 542 S.E.2d 736, 739-42 (Ct. App. 2001) (emphasis added). Because the statute of limitations under the SCTCA runs from discovery of the "loss," the fraudulent concealment issues underpinning *Bishop of Charleston* could not exist. Camper Doe and Doe 2 cannot dispute that they were aware of the "loss" immediately upon the occurrence of ReVille's abuse. The Act does not require anything beyond knowledge *of an injury* for the statute of limitations to run. Therefore, the *Bishop of Charleston's* discussion of the concept of fraudulent concealment has no relevance to the SCTCA's statute of limitations.

**4. The "Sex Abuse Statute of Limitations", S.C. Code § 15-3-555, Does Not Apply**

It is anticipated that Camper Doe and Doe 2 will argue that their claims should be governed by S.C. Code § 15-3-555, which governs statutes of limitations in certain sexual abuse matters:

> An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later.

*See* S.C. Code § 15-3-555(A) ("Sex Abuse Statute of Limitations").

Contrary to these anticipated arguments, the Sex Abuse Statute of Limitations does not apply. The Court of Appeals has held that, irrespective of the type of case, the SCTCA's statute of limitations *always* controls tort claims against government entities:

> Even if Olson had been permitted to proceed against the University under the Handicapped Accessibility Act, the Tort Claims Act's statute of limitations would

bar the action.

The Tort Claims Act is the *exclusive* remedy when a party is injured by a governmental entity. Section 15-78-200 announces:

> *Notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act" is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty.* The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

(emphasis added). . . .

The Tort Claims Act thus governs this action regardless of the Handicapped Accessibility Act. At most, the Handicapped Accessibility Act provides evidence of a duty owed to Olson by the University to maintain its buildings in a manner in which they are accessible to the handicapped—it does not supplant or override the Tort Claims Act.

We find the Circuit Court properly declined to permit *Olson to pursue a cause of action based on the Handicapped Accessibility Act. The two-year statute of limitations found in the Tort Claims Act is applicable to all causes of action against the University and other governmental entities whether the alleged duty violated arises under the Handicapped Accessibility Act, another statute, or common law.*

*See Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 215-26, 544 S.E.2d 38, 49 (Ct. App. 2001) (emphasis added), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003); *accord Murphy v. Richland Mem. Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995) (holding that SCTCA did not violate Due Process Clause because different statute of limitations applied to government entities than to private defendants).

Although no appellate court has yet ruled on the issue, at least one other trial court has expressly held that Section 15-3-555 *does not* apply to claims under the SCTCA:

> Although § 15-3-555 would ordinarily allow an additional tolling period in a case such as this one brought against a non-tort claims defendant, the legislature has not seen fit to include § 15-3-555 as an exception listed in § 15-78-110. . . . The legislative intent appears to limit minor tolling in Tort Claims Act cases only to

> the extensions set forth in § 15-3-40. Therefore the Defendants' motions are granted and the case is dismissed.

*See Ghegan v. Beaufort Cty. Sch. Dist.*, No. 07-CP-03-3771 (March 17, 2009) (Order Granting Summary Judgment) (attached hereto as Ex. L). In addition, other jurisdictions have reached a similar conclusion under their own laws. For example, in *Osborn v. Salinas*, 958 P.2d 1142, 1143-44 (Idaho 1999), the Idaho Supreme Court held that statute of limitations under that state's Tort Claims Act (180 days after age 18) applied rather than a sexual abuse statute (five years after age 18). The court held that, because the Tort Claims Act specifically contained (like South Carolina) a provision tolling the statute during the claimant's minority, "there is no reason to apply [the sexual abuse statute], when a statute exists that specifically applies to minors filing actions against governmental entities." *See id.*, at 1144. Similarly, in *V C. v. Los Angeles Unified Sch. Dist.*, 139 Cal. App. 4th 499 (Cal. Ct. App., 2d Dist. 2006), the court was confronted with whether a plaintiff could obtain the benefit of a sex abuse statute of limitations (8 years after age of majority) in an action against a school district. The court held that the California Tort Claims Act governed the timeliness of the plaintiff's claims: "In sum, we find nothing in the language or legislative history of [the sex abuse statute] that establishes the Legislature intended to modify either the date of accrual or the claim requirements of [the Tort Claims Act] when there is an allegation of sexual abuse against a public entity." *See id.*, at 514.

In addition, the Sex Abuse Statute of Limitations applies only to actions "arising out of an act of sexual abuse," whereas Camper Doe's and Doe 2's suits against The Citadel arise out of The Citadel's alleged negligent hiring and/or supervision of ReVille. The plain purpose of the Sex Abuse Statute of Limitations is to create a longer statute of limitations as to claims against *the perpetrator* of abuse, as distinguished from claims against third parties. In *Doe v. Bishop of Charleston, supra* (Ex. J), discussed above, the Supreme Court expressly noted that a claim against a sexual abuser's employer is distinct from the claim against the abuser:

> *Appellants argue the trial court erred because respondents' negligent supervision of an employee is the tort at issue, not the sexual abuse itself.* We agree.

> An employer may be liable for negligent supervision when (1) his employee intentionally harms another when he is on the employer's premises, is on premises he is privileged to enter only as employee, or is using the employer's chattel; (2) the employer knows or has reason to know he has the ability to control the employee; and (3) the employer knows or has reason to know of the necessity and opportunity to exercise such control. [Citation omitted.] This rule has been applied to find an employer liable for negligent supervision when the employee sexually assaulted a minor and the employer had some notice of the employee's prior inappropriate sexual behavior with another minor. [Citation omitted.] *The employer's liability is direct, not derivative.*

(*See* Ex. J, at pp.8-9 (emphasis added)). Thus, the Supreme Court observed that the claim of supervisory negligence was separate and distinct from the actual sexual abuse.

The Court had previously recognized a similar distinction under the SCTCA in *Greenville Memorial Auditorium v. Martin,* 301 S.C. 242, 391 S.E.2d 546 (1990). In that case the plaintiff, a patron at a rock concert at the Auditorium, was struck by a bottle thrown from the balcony by another patron and sued the Auditorium for negligence. The Auditorium argued that the claims against it were barred by S.C. Code Ann. Section 15-78-60(20), which provides that a governmental entity "is not liable for a loss resulting from the act or omission of a person other than an employee including, but not limited to, the criminal acts of third persons." The Court rejected this argument, holding that the complaint alleged that the defendant was liable by virtue of its own negligence, not because of the criminal acts of the third party. "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." 391 S.E.2d at 549. Applying this principle to this case, these claims *against The Citadel* arise out of The Citadel's alleged negligent hiring and/or supervision, not out of sexual assault. As a result, by its very terms, Section 15-3-555 would not apply to such claims.

## D. Defendant Is Entitled to Summary Judgment As to Camper Doe's Claims Because He Cannot Proffer Evidence that The Citadel Acted in a Grossly Negligent Manner

This Court should also enter summary judgment against Camper Doe because there is no evidence The Citadel was "grossly negligent." Under the SCTCA, The Citadel may not be held liable for a loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." *See* S.C. Code § 15-78-60(25). Camper Doe cannot dispute that he was a client of The Citadel, who is claiming injury from a failure to supervise or protect him. Therefore, under this statute, Camper Doe must show that The Citadel acted in a *grossly* negligent manner in order to recover.

"'[W]hile gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.'" *Proctor v. Department of Health and Env'tal Control*, 368 S.C. 279, 294, 628 S.E.2d 496, 504 (Ct. App. 2006) (*quoting Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000)); *accord Staubes v. City of Folly Beach*, 331 S.C. 192, 205, 500 S.E.2d 160, 168 (Ct. App. 1998) ("Gross negligence is a mixed question of law and fact and should be presented to the jury unless the evidence supports only one reasonable inference."), *aff'd*, 339 S.C. 406, 529 S.E.2d 543 (2000).

As an initial point, as used in this context, "gross" negligence does not simply mean "extreme" or "severe" negligence. Rather, under the SCTCA, the definition of "gross negligence" imposes a stringent standard on Camper Doe:

> Gross negligence is proved by demonstrating the "intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do," or "the failure of slight care." [*Jinks v. Richland Cnty.*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003).] It has also been defined as the absence of care that is necessary under the circumstances. *Id.* Whether a defendant's actions are grossly negligent is ordinarily a mixed question

of law and fact. *Id.*

*See Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 190-91, 742 S.E.2d 667, 671 (Ct. App. 2013) ("While far from perfect, there is no evidence in the record indicating DSS failed to exercise slight care.") (holding that trial court erred in denying JNOV). "'A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing.'" *Hamilton v Charleston Cty. Sheriff's Dep't*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012) (*quoting Jackson v. South Carolina Dep't of Corrections*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989)). The fact that a defendant "might have done more does not negate the fact that it exercised 'slight care.'" *Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278; *accord Clyburn v. Sumter Cty. Sch. Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (Ct. App. 1993) ("[T]he only reasonable inference that can be drawn from these facts is that the School District, at the very least, exercised 'slight care.'").

Cases construing the "gross negligence" standard under the SCTCA illustrate the stringency of that rule. In *Hamilton,* an inmate sued the county alleging improper supervision of a guard who sexually assaulted her. In support of her claim, the plaintiff proffered expert testimony of gross negligence:

> Dr. Kirkham, a criminologist, testified the Department was grossly negligent because it "was in gross violation of what would have been nationally accepted standards." He explained the Department ignored a foreseeable harm of sexual assaults against inmates by failing to minimize contact of male officers with female inmates, monitor the officers' whereabouts, and implement adequate supervision mechanisms such as cameras and locked doors.

*See Hamilton*, 399 S.C. at 255-56, 731 S.E.2d at 729. The Court of Appeals affirmed the grant of a directed verdict, holding that the plaintiff could not overcome Section 15-78-60(25), even though there was evidence that the county violated relevant security standards, because there was evidence of *some* care:

> Although Dr. Kirkham testified the Department violated nationally accepted standards, the Department provided uncontradicted evidence that it met minimum security standards set for South Carolina. In addition, there is no evidence the

> Department knew or should have known of the necessity to exercise additional supervision of Officer Aiken to prevent him from harming Hamilton. We find the only inference from the evidence is that *the Department exercised at least slight care* in its supervision of Officer Aiken. *See Jackson v. S.C. Dep't of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) (stating to be guilty of gross negligence defendant's conduct must not have given slight care to what he was doing). Accordingly, the trial court properly granted the Department a directed verdict on Hamilton's negligent supervision claim.

*See Hamilton*, 399 S.C. at 257, 731 S.E.2d at 730 (emphasis added).

In a case considering a school's failure to prevent a fatal shooting, the Supreme Court applied the "gross negligence" standard:

> In this case, the students were high school age and the School District had no direct knowledge or notice of the animosity between Dunlap and Floyd. The only reasonable inference that can be drawn is that the School District, at the very least, exercised "slight care" to ensure the safety of its students. The principal, assistant principal and the two security monitors constantly monitored the hallways and were in constant contact with each other by walkie talkies. The teachers stood in their doorways to watch students during the change of class. Some of the doors were locked to limit the flow of traffic. A list of suspended students was circulated daily. There was an intervention system set up to help resolve conflicts between the students. At the very least, "slight care" was taken.

*Etheredge*, 341 S.C. at 311-12, 534 S.E.2d at 277-78.

In another case, the Court of Appeals held that a school did not act in a grossly negligent manner in failing to prevent sexual misconduct by a teacher:

> Gross negligence means the failure to exercise a slight degree of care. Gross negligence involves an intentional, conscious failure to do something which it is incumbent upon one to do or the intentional doing of a thing one ought not to do. The term is relative and means the absence of care that is necessary under the circumstances. *Hollins v Richland Cty. Sch. Dist. One*, 310 S.C. 486, 427 S.E.2d 654 (1993); *Clyburn v. Sumter Cty. Sch. Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (Ct. App. 1993); *Grooms v. Marlboro Cty. Sch Dist.*, 307 S.C. 310, 414 S.E.2d 802 (Ct. App. 1992).
>
> There is no evidence in this case that the District had notice of improper sexual contact between Steward and any other students prior to the incident involving Moore. There is no evidence Steward made inappropriate advances toward Moore either in or out of the classroom prior to this incident. Also, there is no evidence Moore or anyone else ever complained to the District either about Steward's conduct during summer school or her tutoring in her home. At best,

> there is evidence aplenty that Steward's summer school classroom was conducted in a lax manner, and while some of the summer school teachers observed what they considered "inappropriate" behavior in the classroom, they did not report it to the administration and did not consider the behavior to be of such a character that it might harm the students. Whether or not Hilson adequately monitored Steward's classroom is of no significance, inasmuch as none of the alleged classroom incidents were of such a character that the administration would have, if aware of them, reasonably anticipated that Steward would engage in sexual intercourse with a student in her own home after school hours.
>
> We therefore are bound to follow the precedent of *Brockington* and *Doe*. As in those cases, the crux of Moore's case is the sexual conduct of an employee of a public entity. Absent some evidence indicating notice to the District of Steward's inappropriate sexual proclivities, there is no basis to conclude the District knew or should have known of the necessity for supervising her conduct outside the classroom.

*See Moore by Moore v. Berkeley Cty. Sch. Dist.*, 326 S.C. 584, 591-92, 486 S.E.2d 9, 13 (Ct. App. 1997).

In this case, Camper Doe cannot show a complete absence of care by The Citadel. During the camp session at issue, The Citadel had a weeklong formal training program, along with detailed information provided to camp counselors. (*See* Ex. W). This training included a number of relevant subject areas concerning sexual harassment, camper supervision and safety. These procedures included a prohibition on counselors being alone in rooms with campers. (*See id.*). Moreover, there was a hierarchy at the camp, which provided a level of supervision.

> Q: Who was supposed to oversee the fact that the campers were -- were staying in their rooms at night after Taps?
>
> A: There were usually details of counselors from each section so that it would be somebody that the campers in a particular section were familiar with, being aware of what was going on after such time as we believed the campers to be asleep and weren't seeing any kind of movement from a room down to the latrine, as an example, that then the -- the CCQs were aware of what was going on in the barracks. Camp staff is available in -- in the barracks, there was a duty person detailed to be able to -- to monitor what's going on in the barracks.
>
> Q: How many times a week would you be in the barracks at 11:30 to make sure that the campers were staying in their rooms at night?

A: I can't say. It was sometimes, but not -- not every night.

(*See* Ex. P, at pp.23-24). Major Bates further testified that "the rules and procedures were, in fact, there and we had a multiplicity of counselors and staff people who were there to help ensure that the rules were followed." (*See id.*, at p.34).

Finally, and most importantly, there is no evidence that anyone at The Citadel had actual or constructive knowledge that ReVille was actually sexually abusing Camper Doe or other campers. Although Camper Doe attempts to spin several non-sexual incidents into knowledge of sexual abuse, this is simply not supported by the evidence. In reality, the only evidence is that The Citadel had no knowledge whatsoever that ReVille was abusing Camper Doe or anyone else. While The Citadel's conduct was not perfect, Camper Doe cannot show a complete absence of any care. The Citadel acted with at least slight care under the SCTCA.

Because he cannot show a complete absence of care, Camper Doe cannot show that The Citadel acted in a grossly negligent manner as that term is used under the SCTCA. Therefore, this Court should grant The Citadel's Motion for Summary Judgment.

**E. Defendant Is Entitled to Summary Judgment as to Plaintiffs' Intentional Tort Claims Under the Tort Claims Act**

Plaintiffs have alleged numerous intentional tort claims, including outrage claims based on the conduct of ReVille and other alleged agents of The Citadel and other intentional torts (assault, etc.) based on the actual abusive acts of ReVille. For the reasons that follow, this Court should grant summary judgment as to all intentional tort claims.

As discussed above, the SCTCA delineates the standards governing Plaintiffs' claims. The SCTCA's provisions "establishing limitation[s] on an exemption to the liability of the state . . . *must be liberally construed in favor of limiting the liability of the state.*" S.C. Code Ann. § 15-78-20(f) (emphasis added). Of relevance, the Tort Claim Act specifically states that a "loss" thereunder "*does not include* the intentional infliction of emotional harm." *See* S.C. Code § 15-78-30(f) (emphasis added). Moreover, under the SCTCA, a governmental entity may not

be held liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice, intent to harm*, or a crime involving moral turpitude." *See* S.C. Code § 15-78-60(17) (emphasis added). Because Plaintiffs' intentional tort and outrage claims are premised on claims of malice and intent to harm, those claims against The Citadel must fail.

Construing the SCTCA "liberally in favor of limiting the liability of the state," this Court should enter summary judgment as to Plaintiffs' intentional tort claims:

> [A]mendment of the Complaint would not save this [outrage] cause of action, since the Department, as a state agency, has sovereign immunity with regard to this tort claim. See S.C. Code Ann. §§ 15-78-10 et seq. (containing a limited waiver of the state's sovereign immunity for certain torts but otherwise restoring the state's common law immunity from suit). Specifically, the South Carolina Tort Claims Act defines "loss" to exclude "the intentional infliction of emotional harm," *see* S.C. Code Ann. § 15-78-30(f); provides for governmental entities an exemption from liability for loss resulting from employee conduct that constitutes intent to harm, § 15-78-60(17); and protects state agencies from liability for losses resulting from any claim covered by the South Carolina Workers' Compensation Act, see § 15–78–60(14).

*See Newman v. South Carolina Dep't of Employment and Workforce*, 2010 WL 4791932, at *2 (D.S.C. Sept. 22, 2010) (attached hereto as Ex. M), *report and rec adopted*, 2010 WL 4666360 (D.S.C. Nov. 18, 2010) (attached hereto as Ex. N); *Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Harkness v. City of Anderson*, 2005 WL 2777574, at 4 (D.S.C. Oct. 25, 2005) ("Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act . . . on the claim of outrage, otherwise known as intentional infliction of emotional distress. [Citation omitted.] The court agrees. The SCTCA does not waive sovereign immunity for this claim.") (attached hereto as Ex. O); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'"); *accord Lindquist v. Tanner*, 2012 WL 3839237, at *4 (D.S.C. April 12, 2012) ("Plaintiff concedes that her claim for

'intentional' infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act.'") (attached hereto as Ex. P), *report and rec. adopted in part*, 2012 WL 3839235 (D.S.C. Sept. 4, 2012) (attached hereto as Ex. Q).

In addition to the foregoing, Plaintiffs' outrage claims fail because they had other causes of action that, had they been timely asserted, they could have utilized to obtain compensation for their injuries. South Carolina has been clear that the tort of outrage was never intended to replace existing claims or causes of action; rather, such a claim may exist only when no other tort claim is available for a Plaintiff against that defendant:

> The tort of outrage was designed *not as a replacement* for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct *where no remedy previously existed.* Here, an action for defamation, which is the usual remedy to be employed against one who has published falsehoods, is available to Todd.

*See Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985) (emphasis added); *Levine v. Walterboro City Police Dep't*, 2006 WL 2228993, at *2 (D.S.C. Aug. 3, 2006) ("Intentional infliction of emotional distress is a claim of last resort. In this context, plaintiff could have pursued a defamation claim against newspaper. Since that alternative remedy was available, Todd suggests that a claim for intentional infliction of emotional distress cannot lie.") (attached hereto as Exhibit X).

In this case, to the extent Plaintiffs were injured through any fault of The Citadel, there are numerous tort remedies that were available for them to pursue. This is not a situation where, but for the tort of outrage, Plaintiffs would be utterly without recourse. Because alternative theories have been available for Plaintiffs to pursue any claims against The Citadel, Plaintiffs should not be allowed to use the tort of outrage as a replacement for those tort remedies.

**F. Plaintiffs Cannot Show That The Citadel Acted with the Necessary Level of Culpability to Support Their Outrage Claims**

In addition to the foregoing, to the extent Plaintiffs base outrage claims on *The Citadel's* conduct (rather than on vicarious liability), such claims fail. The elements of outrage are:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
>
> (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
>
> (3) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."
>
> *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (*quoting Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007))

*Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 193, 742 S.E.2d 667, 672 (2013). "Facts which may show extreme insensitivity on the part of the defendant do not necessarily establish the tort of outrage." *Hawkins v. Greene*, 311 S.C. 88, 91, 427 S.E.2d 692, 694 (Ct. App. 1993). "Recklessness implies the doing of a negligent act knowingly; it is a conscious failure to exercise due care. If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (internal citation and quotation marks omitted).

Cases finding conduct constituting "outrage" are incredibly rare; to the contrary, even in cases involving knowing egregious conduct, South Carolina courts refuse to impose liability. *See e.g.*, *Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) (supervisor threatened

and ridiculed speech impediment of employee with cerebral palsy); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (homeowner's association president refused to allow access to books and records in violation of bylaws); *Strickland v. Madden*, 323S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) (doctor mistakenly told patient's daughter that father had died); *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 411 S.E.2d 664 (1991) (newspaper referred to plaintiff's murdered daughter as "drifter" and high school drop-out who "had no family to encourage her to continue her education"); *Manley v Manley*, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (plaintiff was involuntarily committed to state hospital; where defendants acted in reasonable good faith); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) (verbally abusive accusations that plaintiff owed hundreds of thousands of dollars in taxes and filed fraudulent tax returns); *Save Charleston Found'n v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985) (converting promissory note and maliciously bringing action based on note).

One of the rare deviations from this trend was *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991). There, an employer forced an employee to perform exercises that aggravated a known bladder problem (causing plaintiff to lose control of her bladder) knowing that plaintiff's physician advised her not to exercise. The employer required her to continue or be fired and to do so in front of others who witnessed her incontinence. The Court found that the jury could find this conduct "outrageous and intolerable in a civilized society." *Id.* at 29, 402 S.E.2d at 892; *accord Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (finding conduct sufficiently severe where home buyer subjected realtor to repeated public browbeatings, obscenities, and threats over two years, entered her home without permission and verbally attacked publicly).

The Citadel respectfully posits that there is no evidence *it* acted in an "outrageous" manner. There is no evidence that it acted to intentionally harm Plaintiffs or with reckless disregard. There is no evidence that The Citadel intended for ReVille to abuse Plaintiffs or cause them emotional distress. There is no evidence of any act taken with conscious knowledge that

Plaintiffs would suffer extreme emotional distress.

**G. The Maximum Possible Recovery of Doe 2 and Doe 3 in These Cases Should Be Limited to $300,000.00 Each, as They Allege Injury from a Single "Occurrence"**

For the reasons discussed below, Does 2 and 3, who allege abuse by ReVille outside of the context of the camp itself after the 2007 report by Camper Doe, should be limited in their recovery in these cases to a maximum of $300,000.00 each. Moreover, the Court should rule that the *maximum total* amount that The Citadel can ever be held liable for under the Tort Claims Act for such "downstream" cases (i.e., cases involving ReVille victims who were not molested through any affiliation with The Citadel) is $600,000.00.

Under the Tort Claims Act, a claimant's (or the recovery of multiple claimants) recovery is limited to certain amounts *per* occurrence:

> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

*See* S.C. Code § 15-78-120(a)(1) & (2). The term "occurrence" under the Tort Claims Act means "an unfolding sequence of events which proximately flow from a single act of negligence." *See* S.C. Code § 15-78-30(g).

It is apparent that Does 2 and 3 are claiming liability for an unfolding sequence of events that proximately flowed from a single alleged act of negligence by The Citadel: The Citadel's failure to report ReVille to law enforcement or otherwise take action to stop ReVille following the July 1, 2007 interview of Camper Doe. While Doe 2 and 3 may try to characterize this alleged negligence as comprising multiple actions or omissions, these alleged acts or omissions are not separate or independent acts of negligence; rather, they all allegedly converged to result

in one thing – the failure to stop ReVille, as a result of which he was able to remain at large.

While there is not much authority discussing what constituted a single "occurrence" under the Tort Claims Act, the South Carolina Supreme Court's discussion in *Boiter v. South Carolina Dep't of Transp.*, 393 S.C. 123, 712 S.E.2d 401 (2011), is illustrative. In that case, plaintiffs were injured in an automobile accident occurring at an intersection controlled by a traffic light. The bulb for the red light on that signal had burned out earlier on the day of the accident. The plaintiffs sued, *inter alia*, the South Carolina Department of Transportation (DOT) and the South Carolina Department of Public Safety (DPS). With regard to DOT, plaintiffs claimed negligence in failing to enact a procedure to ensure that bulbs were replaced *before* they burned out. With regard to DPS, plaintiffs alleged negligence in failing to respond to a call from a citizen more than an hour before the accident reporting the burned out bulb by sending an officer out to direct traffic at the intersection. The jury returned a verdict for the plaintiffs in the amount of $1.875 million. After trial, the verdicts were reduced to $300,000.00 for each plaintiff, for a total of $600,000.00.

On appeal, the Supreme Court held that the trial court erred in reducing the verdicts under the Tort Claims Act because there were multiple "occurrences":

> We are persuaded that two independent and separate acts of negligence occurred here — one by SCDOT and one by SCDPS. There is no indication that the Respondents' actions combined to form a single act of negligence. Unlike the situation presented in Chastain, we have two separate and distinct acts of negligence involving two separate and distinct entities together with separate verdicts against each of them. As found by the jury, SCDOT was negligent in not having a re-lamping policy in place, and SCDPS was negligent in not following its own policy to notify a SCDOT technician when a light had burned out. Based on the facts presented here, we cannot see how SCDOT's negligent act "unfolded" into SCDPS' negligent act. SCDPS only became involved due to a citizen call regarding the burned-out light bulb; SCDOT never called SCDPS regarding the light, and SCDPS never informed SCDOT about the citizen call. We can find no causal connection between the actions of SCDOT and SCDPS; had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true. Therefore, we do not believe that these two separate and independent acts of negligence constituted an unfolding sequence of events which

injured the Boiters.

> Respondents cite to language found in section 15-78-120(2), arguing that it demonstrates the General Assembly's recognition that the number of governmental entities involved in a particular occurrence does not increase the statutory limits on liability. While we do not disagree with Respondents' view, we do not believe this ends the inquiry. In many situations, negligent acts from more than one entity would still equal but one occurrence. However, under these facts, there were two separate entities which committed two separate and independent acts of negligence, and we do not believe the General Assembly's intent was to limit recovery in such situations based on there being only one occurrence. Accordingly, we hold each Respondent's act of negligence was a separate occurrence entitling the Boiters to a combined verdict of 1.2 million dollars, and we reverse the circuit court.

*See id.*, 393 S.C. at 134-35, 712 S.E.2d at 406-07.

In *Boiters*, the controlling fact was the there were two completely distinct acts of negligence by the defendants: (a) failing to have a policy to ensure that lights were replaced prior to burning out (SCDOT) and (b) failing to have a policy to properly respond to a report that a light was burned out (SCDPS). In *Boiters,* the SCDOT and SCDPS were negligent in two vastly separate and different ways. Unlike the facts in *Boiters*, in this case, a single state agency is alleged to have failed to stop ReVille from remaining at large. Without this single event, Doe 2 and Doe 3 would have no claim against The Citadel. The alleged acts or omissions leading up to this event are not "distinct" or "independent" because, standing alone, they could not form the basis of a claim against The Citadel.

The Supreme Court reached a similar conclusion in the context of defining "occurrence" under a liability insurance policy in *Owners Ins. Co. v. Salmonsen,* 366 S.C. 336, 622 S.E.2d 525 (2005). There, the insured was a distributor of an allegedly defective synthetic stucco product that had been sued in a class action products liability action. The question before the Court was how many "occurrences" were involved in multiple sales of the defective product. The Court concluded that because the insured had not committed independent acts giving rise to liability for each sale, "placing a defective product into the stream of commerce is one occurrence." By

analogy, The Citadel's alleged failure to unmask ReVille, allowing him to continue to molest children, was like placing a defective product into commerce. No matter how many separate injuries ensued, they were all caused by a single "occurrence" — failing to report ReVille to law enforcement.

Finding that there is a single "occurrence" in Does 2 and 3's claims is consistent with case law from other jurisdictions:

> [Plaintiff] argues that in the present case the County's failure to replace its exposed gooseneck rail with a safer system was a proximate cause of his injuries. He *also* contends that the County's placement of the exit gap constituted a second separate proximate cause which contributed to his injuries.
>
> We believe Plaintiff's argument was expressly answered by our Supreme Court in *Folz v. State*, 110 N.M. 457, 465, 797 P.2d 246, 254 (1990). In *Folz* the Court noted that, although the term " 'single occurrence' " is not defined in the Tort Claims Act, where multiple negligent acts or omissions antedate the event giving rise to liability, the term "'single occurrence'" as used in the Act refers "to all harm that, although proximately caused by a particular risk arising from the concurrent operation of one or more successive acts or omissions on the part of a governmental entity, [is] triggered by a particular event giving rise to liability." *Id.* at 461, 463, 797 P.2d at 250, 252. Thus, under the circumstances existing here, *all injuries sustained by Plaintiff, which were alleged to have been proximately caused by successive negligent acts or omissions that combined concurrently to create a risk of harm to him, constituted a "single occurrence"* within the meaning of Section 41-4-19.

*See Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 762-63, 906 P.2d 742, 753-54 (N.M. Ct. App. 1995) (emphasis added); *accord Carson v. City of Prichard*, 709 So. 2d 1199, 1205 (Ala. 1998) ("The 'occurrence' that triggered liability in this case was the overall failure of the Board to remedy the problems stemming from its sewage system, and, although there were numerous incidents of sewage overflow, the failure of the Board to remedy the overflow was a 'single occurrence' within the meaning of § 11–93–2.[[12]]"); *Tarrant Cty. v. English*, 989 S.W.2d 368, 379 (Tex. Ct. App.-Ft. Worth 1998) ("[T]he damage caused to English's property by diesel migration from the County's property was a single occurrence of injury"); *Texas Dep't of Mental*

*Health and Mental Retardation v. Petty*, 817 S.W.2d 707, 720 (Tex. Ct. App. 1991) (finding a single occurrence where plaintiff had alleged "single, ongoing, indivisible injury"). Where, for instance, the negligence stems from acts in the driving of a vehicle causing an accident (even where there are multiple alleged negligent acts), it is appropriate to conclude there is a single occurrence:

> The Court is not persuaded by Plaintiffs' contentions that Cooper's alleged falling asleep and his failing to brake constitute two separate causal factors which result in two separate occurrences. Nor, is the Court persuaded by Plaintiffs' contention that Cooper's placement of his foot on the gas pedal instead of the brake created a separate occurrence. Instead, the Court finds that the claims herein were the result of a single causal factor. For the foregoing reasons the Court finds that the March 7, 1990, accident constituted a single "occurrence" within the meaning of 2 Del.C. § 1329.

*See Tumbull v. Fink*, 1994 WL 89641 (Del. Super. Ct. 1994) (attached hereto as Ex. R), *aff'd*, 668 A.2d 1370 (Del. 1995).

The Citadel's construction of these provisions of the Tort Claims Act is consonant with traditional tort law, which recognizes that negligence can be part of sequence of unified actions. Under South Carolina law, "[a] negligent act or omission is a proximate cause of injury if, *in a natural and continuous sequence of events*, it produces the injury, and without it, the injury would not have occurred." *See Hurd v. Williamsburg County*, 353 S.C. 596, 579 S.E.2d 136, 144 (Ct. App. 2003).

For the foregoing reasons, this Court should rule that Doe 2 and Doe 3 each allege in their lawsuits a single "occurrence" under the Tort Claims Act.

**H. Defendant Is Entitled to Summary Judgment as to Camper Doe's Assault and Battery and Outrage Claims Because ReVille Acted Beyond the Scope of Employment**

The South Carolina Supreme Court has held that an act of violence by an employee is not attributable to his employer unless the act was taken in furtherance of the interest of the employer. In *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006), the plaintiff

was violently attacked by two Food Lion employees on the store's premises with store box cutters. The trial court directed a verdict for Food Lion on *respondeat superior* claims, since the employees acted outside the scope of employment. The Supreme Court affirmed, stating:

> The act of a servant done to effect some independent purpose of his own *and not with reference to the service in which he is employed*, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. [*See Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964).] Under these circumstances *the servant alone is liable* for the injuries inflicted. *Id.* If a servant steps aside from the master's business for some purpose *wholly disconnected with his employment*, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. *Id.*
>
> The trial court appropriately granted a directed verdict because petitioners failed to produce any evidence that the Food Lion employees were acting within the scope of their employment or in furtherance of Food Lion's business when they attacked petitioners. The only reasonable inference from the testimony is that Brown and Cameron attacked Ronnie for their own personal reasons and not for any reason related to their employment. They were acting "to effect an independent purpose of their own." *See Lane, supra* (act of servant done to effect some independent purpose of his own is not within scope of his employment). Food Lion was not legally liable because the employees stepped away from their job of stocking shelves. *See Lane, supra* (employer not liable where employee stepped away from the employer's business to play a prank); *Hamilton v. Davis*, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990) (same).

*See Armstrong*, 371 S.C. at 276-77, 639 S.E.2d at 53 (emphasis added).

Assuming *arguendo* that ReVille was an employee of The Citadel at the relevant time, Camper Doe can proffer no evidence that ReVille's sexual abuse was with reference to the service in which he was employed. To the contrary, the claimed abuse was motivated solely by ReVille's own deviant personal, sexual motives. Camper Doe cannot plausibly argue that ReVille's conduct benefited The Citadel in any imaginable way.

In addition, these alleged torts, which inherently involve ReVille's intent to harm, may not be asserted against The Citadel under the SCTCA. *See* S.C. Code Ann. § 15–78–60(17) (stating that "governmental entity is not liable for a loss resulting from .... employee conduct ....

which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude"); *accord Kinard v. City of Greenville*, 2012 WL 1340103, at *7 (D.S.C. April 18, 2012) ("[T]he City has immunity for the claims made against it for the intentional tort of assault and battery and accordingly these claims against the City are dismissed with prejudice.") (attached hereto as Ex. S); *Landrum v. Spartanburg Cty.*, 2011 WL 3652291, at *5 (D.S.C. Aug. 18, 2011) ("The County has immunity for the claims made against it for the intentional torts of assault and battery; therefore, the County is entitled to summary judgment on these claims.") (attached hereto as Ex. T).

**I. Defendant Is Entitled to Summary Judgment as to Camper Doe's Sexual Harassment Claims Because This Case Does Not Involve an Unlawful Employment Practice and He Failed to Exhaust Administrative Remedies**

Camper Doe alleges that ReVille sexually harassed him in violation of S.C. Code Ann. §§ 1-13-10 to 100 and that The Citadel should be held strictly liable for ReVille's actions. (*See e.g.*, Pl.'s Compl. ¶¶ 42-44).

Chapter 13 of Title 1 of the South Carolina Code is known as the South Carolina Human Affairs Law ("SCHAL"). *See* S.C. Code § 1-13-10. The SCHAL is devoted to issues concerning discrimination in the employment context. *See e.g.* S.C. Code § 1-13-80 (defining "unlawful employment practice[s]"). Nothing in the statute indicates that the legislature intended for it to remedy sexual harassment or abuse in any other context. The SCHAL is, by its terms, an employment statute. Camper Doe does not allege that he was an employee of The Citadel or that The Citadel directed an unlawful employment practice directed at him. As a result, Camper Doe cannot prove a claim under the SCHAL.

In addition, even if the SCHAL could apply outside of the employment context, Camper Doe has failed to timely exhaust administrative remedies. The SCHAL requires that parties aggrieved by violations of the statute first bring their complaints to State Human Affairs Commission: "[a]ny person shall complain in writing under oath or affirmation to the

Commission within one hundred eighty days after the alleged discriminatory practice occurred." *See* S.C. Code § 1-13-90(a). For "complaints asserting expressly or in substance a violation by a state agency or department or local subdivisions of a state agency or department of Section 1-13-80," the statute creates an administrative procedure for the investigation and adjudication of such claims. *See* S.C. Code § 1-13-90(c). "'The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy.'" *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2012) (*quoting Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs.*, 92 Md. App. 551, 609 A.2d 353 (1992)). If Camper Doe wished to assert a claim for violation of the SCHAL, he should have filed a complaint with the Human Affairs Commission within 180 days after the challenged practice. Because he did not do so, Camper Doe cannot file a lawsuit eight years after the fact because he failed to exhaust his administrative remedies.

**J. To the Extent Camper Doe's Claims Allege Harm from an Alleged Failure to Investigate His 2007 Report, His Claims Fail Because The Citadel Was Under No Duty to Camper Doe**

In addition to the foregoing, many of Camper Doe's claims focus not on the actual alleged abuse by ReVille in 2002, but on what occurred after he contacted The Citadel in 2007. To the extent Camper Doe's claims are based on The Citadel's alleged conduct *after* he reported his alleged abuse — which occurred after he had reached the age of majority and five years after he was abused — those claims fail as a matter of law. Plaintiff can cite no law that would impose a duty of care on The Citadel for the benefit of Camper Doe to investigate his claims. Moreover, Camper Doe can cite to no authority finding that the alleged failure to properly investigate a completed act of abuse could cause him any foreseeable, legally cognizable harm. Therefore, Camper Doe can make no showing that an action lies against The Citadel for any alleged conduct occurring in or after 2007.

Even if a duty existed, Camper Doe's claim boils down to negligent infliction of emotional distress. He claims that he was distressed to learn in 2011 that his 2007 complaint had not resulted in ReVille being prevented from molesting other children. To the extent he alleges claims concerning the investigation of his 2007 report, Camper Doe does not seek to remedy any physical injury. His only possible claim is for emotional distress.

As the law of South Carolina stands, the modern trend of the Supreme Court has been to recognize emotional distress damages in three isolated circumstances: (a) when accompanied by a physical injury, such as in a car accident; (b) outrage; and (c) negligent infliction in the context of a claim by a "bystander." In the nearly thirty years since *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), the Supreme Court has refused to extend liability for emotional distress damages beyond these three limited circumstances. There is no allegation of physical injury from the alleged post-2007 actions of The Citadel. As set forth above, Plaintiffs cannot succeed on outrage claims. There is no evidence that The Citadel's purpose in failing to report ReVille to law enforcement authorities was to injure Camper Doe. He also does not meet the requirements to recover for negligent infliction of emotional distress under South Carolina law. There is no evidence to support emotional distress damages as an element of damages flowing from a physical injury or under a "bystander" theory. As a result, because he can not support a claim for emotional distress from such conduct, Camper Doe cannot support a claim concerning The Citadel's conduct after Camper Doe's 2007 report.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

## CONCLUSION

For the reasons set forth above, this Court should grant Defendant The Citadel summary judgment in the cases captioned above.

BARNWELL, WHALEY, PATTERSON, AND HELMS, LLC

By: M. Dawes Cooke

M. Dawes Cooke, Jr., Esq.
Randell C. Stoney, Esq.
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700
*Counsel for Defendant The Citadel*

Dated: April 17, 2014
Charleston, South Carolina

2012-CP-10-1860

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 17th day of April, 2014, a true copy of DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT has been served upon Plaintiff's counsel via electronic mail as follows:

W. Mullins McLeod, Jr., Esquire
Julie L. Moore, Esquire
D. Ellis Roberts, Esquire
McLeod Law Group, LLC
134 Meeting Street, Suite 160
Charleston, South Carolina 29401
mullins@mcleod-lawgroup.com
Jackie@mcleod-lawgroup.com
james@mcleod-lawgroup.com

FILED
2014 APR 17 PM 2:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Julia G. Childers, Legal Assistant
Barnwell Whaley Patterson & Helms, LLC

DEFENDANT'S EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

| | |
|---|---|
| John Doe 2,<br><br>Plaintiff,<br><br>-vs-<br><br>President John W. Rosa, individually,<br><br>Defendant. | C/A #: 2:12-cv-00794-RMG<br><br>**AFFIDAVIT OF MARK C. BRANDENBURG** |

PERSONALLY appeared before me, Mark C. Brandenburg, who, being duly sworn, deposes and states as follows:

1. I am the General Counsel at The Citadel, The Military College of South Carolina. I have been employed as the General Counsel at The Citadel since October, 2005.

2. On Monday, April 23, 2007, I received a message from Wanda Milligan, Administrative Assistant to the President, concerning a phone call she received on that day from [redacted] Ms. Milligan took notes during her conversation. A copy of her notes is attached as Exhibit A.

3. I called Mr. [redacted] at approximately 4:00 pm on April 23, 2007. Mr. [redacted] stated that his son, [redacted] attended The Citadel Summer Camp during the summers of 1998, 1999, 2000, 2001, and 2002. He alleged that a counselor named "Skip" invited [redacted] into his room during one of the summers [redacted] attended the camp. Mr, [redacted] further alleged that "Skip" and [redacted] watched pornography and masturbated while [redacted] was in "Skip's" room.

4. I subsequently spoke via telephone with [redacted] At the time of that conversation, [redacted] was nineteen (19) years old. He reported that, on one occasion, "Skip" had invited him into his room and showed him pornography. He also said that "Skip" convinced him to masturbate while in the room. [redacted] could not remember the year in which this incident occurred.

5. I reviewed graduation programs for The Citadel Summer Camp from 2001 and 2002. Louis "Skip" ReVille is listed as a CCQ during the 2001 summer camps. He is identified as the Senior Counselor in 2002. Copies of the relevant pages from these graduation programs are attached as Exhibit B.

6. Prior to Mr. [redacted] phone call on April 23, I had never heard any allegations concerning ReVille.

7. Between April 23 and August, 2007, I discussed the [redacted] allegations with Lt Gen John W. Rosa, USAF (Ret.), President of The Citadel. Lt Gen Rosa never directed me to conceal any information from anyone concerning ReVille.

8. No official from The Citadel ever directed me to conceal any information from anyone concerning ReVille.

9. I had no knowledge of the termination of Mr. ReVille's employment on April 20, 2007, nor did I have any knowledge as to his future employment. More specifically, I did not enter into any agreement, with Mr. ReVille or anyone else, for Mr. ReVille to resign from employment from The Citadel for any reason related to the accusation made against him.

10. Upon information and belief, I am not acquainted with, and have had no personal connection with, any of the children who were victimized by Mr. ReVille after April of 2007.

FURTHER DEPONENT SAYETH NOT!

MARK C. BRANDENBURG

**SWORN** to before me this
12TH day of March, 2013.

Patricia M. Kinard
Notary Public for South Carolina
My Commission Expires: 12/01/2018

PATRICIA M. KINARD NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 12-01-2018

{Client Matter\000001\0537\DIS\00390267.DOC}

CITADEL 0003608

23 ~~Apr~~ 07, 1545

[redacted] '72

c) [redacted]

son [redacted] 18 yrs
came around 10 yrs old
came to yrs
counselling for couple
yrs.
One day said did not want
to come back

Today - told father had
problems at Citadel
Summer Camp

Met Gen Rosa 2005
in CO at his retirement

- son been on drugs
- "One more kid"
- happened when son was
12/13 yr old

*Counselors in Charge of Quarters*

**Skip ReVille**
Robert Killian
G Harding
Rob Heaton
Nick Smith
Travis Taylor
Joe Walker



CITADEL 0003610

# *The Citadel Summer Camp*

Charleston, SC

## *Graduation Exercises*

First Session
July 7th, 2001

*Counselors in Charge of Quarters*

**Skip Reville**
Rob Heaton
Robert Jackson
Robert Killian
Nick Smith
Travis Taylor
Joe Walker

236

CITADEL 0003611

# *The Citadel Summer Camp*

Charleston, SC




## *Graduation Exercises*

Second Session
August 4th, 2001

# Graduation Exercises

**Summerall Chapel**
**August 3, 2002**
**10:15 a.m.**

**-Program-**

Invocation.....Chaplain (Col.) David Golden

Advance the Colors.....Crumpton Color Guard

Welcome and Introduction of Guests.....Major Bill Bates

Report to Parents.....Major Bates

Remarks.....Brigadier General J. Emory Mace

Mark Clark Awards.....General Mace

Senior Counselor Awards.....Lieutenant Skip ReVille

Outstanding Section Awards.....General Mace

Creative Youth Development Award.....General Mace

Thomas S. Blair Award.....General Mace

Awarding of Graduation Certificates.....General Mace

Benediction.....Chaplain Golden

237
CITADEL 0003612

# The Citadel Summer Camp

Charleston, SC

THE CITADEL
1957
Summer Camp

## Graduation Exercises

First Session
July 6th, 2002

# Graduation Exercises

## Summerall Chapel
## August 3, 2002
## 10:15 a.m.

### -Program-

Invocation.....Chaplain (Col.) David Golden

Advance the Colors.....Crumpton Color Guard

Welcome and Introduction of Guests.....Major Bill Bates

Report to Parents.....Major Bates

Remarks.....Brigadier General J. Emory Mace

Mark Clark Awards.....General Mace

Senior Counselor Awards.....Lieutenant Skip ReVille

Outstanding Section Awards.....General Mace

Creative Youth Development Award.....General Mace

Thomas S. Blair Award.....General Mace

Awarding of Graduation Certificates.....General Mace

Benediction.....Chaplain Golden

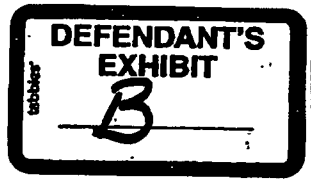
238
CITADEL 0003613

# The Citadel Summer Camp

Charleston, SC

# Graduation Exercises

Second Session
August 3rd, 2002




IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | | |
|---|---|---|
| JOHN DOE 2, | ) | CIVIL ACTION NO.: |
| | ) | 2:12-CV-00794RMG |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| PRESIDENT JOHN W. ROSA, Individually, | ) | |
| | ) | |
| Defendant. | ) | |

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

DEPOSITION OF: LT. COLONEL L. CHRISTINE FUDGE

DATE TAKEN: Tuesday, April 9, 2013

TIME: 10:00 a.m.

PLACE: 134 Meeting Street
Suite 160
Charleston, SC 29401

REPORTED BY: TERI L. SAMPSON, RPR,
Notary Public and Certified
Live Note Reporter

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784

forms that we could verify?

A I would think so.

Q Okay. Okay. So, then, in 2007, you signed another separation form for Mr. Reville?

A Uh-huh (affirmative).

(Discussion off the record.)

MS. MOORE: And this will be Exhibit 6.

BY MS. MOORE:

Q And again, that's your signature in the middle of the page?

A Yes, it is.

Q Okay. And that's Mr. Reville's name in the top box?

A Yes, it is.

Q Okay. Under "Type of separation," what is selected in 2007?

A It looks like "resignation."

Q Okay. And what is selected as the reason for separation in the next box?

A Mutually satisfactory release.

Q Explain why those two items were checked.

A He said he wasn't going to come back for the next school year.

Q Okay. And why is the form dated March 22nd, 2007?

A The forms can be dated any time. It would have an effective date and the effective date would be what they would go by.

Q Okay. So the -- okay. So did Mr. Reville come talk to you about this?

A I believe so.

Q Would there have been an email exchanged about this?

A I'm not sure.

Q Okay. Did you fill out this form?

A No.

Q Who would have filled this form out?

A Our office manager.

Q So was the office manager sitting in the meeting with you and Mr. Reville when you discussed his resignation?

A I can't say.

Q Well, how else would she have filled out the form?

A She may have asked me.

Q Okay. What's your understanding of the Freedom of Information Act?

A I'm not sure what you mean.

Q Do you know -- do you know what the Freedom of Information Act is?

DEFENDANT'S EXHIBIT

## I. EMPLOYING DEPARTMENT

| Employee Name: Louis N. ReVille | Employee ID (Last 4 of SSN): | Department: Writing and Learning Center |
|---|---|---|
| Position Number: HT0205 | Effective Date of Separation: 4/20/07 | Position Type: ☐ Permanent ☑ Temporary |

Type of Separation:
☑ Resignation ☐ Reduction in Force ☐ Deceased
☐ Retirement ☐ Termination ☐ End of Temporary Employment

Reason for Separation (Please attach any documentation)

| | | |
|---|---|---|
| ☐ Accept Other Employment (110) | ☑ Mutually Satisfactory Release (115) | ☐ Dismissed for Cause (237) |
| ☐ Job Dissatisfaction (111) | ☐ Moving to New Location (119) | ☐ Layoff (240) |
| ☐ Domestic Duties or Pregnancy (112) | ☐ Abandoned Position (230) | ☐ Other (242) |
| ☐ Attend School (113) | ☐ Ineptitude for Job (231) | ☐ Contract Expiration (350) |
| ☐ Failure to Report to Work (114) | ☐ Chronic Absenteeism/Tardiness (232) | ☐ Regular Retirement (460) |
| ☐ Personal Reasons (115) | ☐ Expired Layoff Rights (233) | ☐ Early Retirement (461) |
| ☐ Long Term Disability (116) | ☐ Unsatisfactory Performance (234) | ☐ Disability Retirement (470) |
| ☐ Resign While on Layoff (117) | ☐ Physical or Mental Impairment (235) | ☐ Death (510) |

Is the employee eligible for rehire in your dept? ☑ Yes ☐ No

If you checked "No", please explain: _____

Did the employee have supervisory responsibilities? ☐ Yes ☑ No If yes, complete the following section

Employee Name(s)

Interim/New Supervisor Name:

Is the employee returning as a temporary employee? ☐ Yes ☑ No

If yes, what dept? _____ Return date _____

Chris Fudge — Signature of Supervisor

3/22/07 — Date

## II. HUMAN RESOURCES USE

**EMPLOYMENT**

☑ HRS
☐ HRIS
☐ Personnel File
☐ Employment Vendor
☐ Date of Employment: _____
☐ E-mail Separation Notice

J. Thomas — Signature — Date

**BENEFITS**

☐ Exit Interview
☐ HRS
☐ Insurance Division
☐ Retirement System
☐ Other _____

Signature — Date

HR-402

RECEIVED
MAR 22 2007
HUMAN RESOURCES

PAY TYPE 4 TEMPORARY

1370 WRITING CENTER

APR 16 - APR 30 | 4R20 | MAY 01 2007

PAGE 2

| | | |




RE: SUMMER CAMP INTERVIEW

JULY 1, 2007



THE CITADEL 0000287
(FOIA 2011)

11:35:34 A. And he at that time pulled out his penis and started masturbating and asked us to join him, and I got up, said I was tired, went to the bed and just said I was going to fall asleep and --

Q. Okay.

A. -- just go to sleep.

Q. This was in his room?

A. That's right.

Q. Okay.

A. He -- he kind of got a little aggressive and was asking me to come back to the computer and join them --

Q. All right.

A. -- which I ended up doing.

11:36:14 Q. Was over there with him?

A. That's right.

Q. Okay. And had he joined?

A. That's right.

Q. Okay.

A. And I did it. Immediately after, I felt completely violated.

Q. Okay.

A. I mean, it was just a horrible experience for me. I didn't tell anyone until this year.

Q. Okay.



THE CITADEL 0000433
(FOIA 2011)

12:28:52 : got on the phone and told his dad, and said, I'll call you back, and that's when he called you.

: Right.

: So I don't even think he even -- I don't even think you ran it by , if you were going to call the Citadel or not. You just picked up the phone and called.

: I just picked up the phone and --

: The only thing ever said to me is -- he said, Mom, I don't want -- he said, I have felt guilty for years, I -- that I never said anything when I could have, and maybe he's done 12:29:19 this to other kids because I didn't talk.

: Yeah.

: And he said, I don't want him to do this to anybody else.

: Right.

: That's -- that's my side of the --

: Okay.

: -- what happened that day.

: But one of the things is -- is, you know, I don't want to -- you know, I -- I



THE CITADEL 0000527
(FOIA 2011)

young man deserves for the Citadel to take another look at him. I think this young man needs an education. He needs to be -- if he's been able to go from -- from -- from -- you know, go from 100 percent to zero and back --

: Yeah.

: -- and get to a point, you know --

: Uh-huh.

: -- I think he deserves a chance.

: Yeah.

: And -- and that's -- you know -- but it's up to him. He's an adult. But for me, I think the Citadel was -- was part of the root cause. I think that it can be part of the root cause to fix him.

: Right.

: And, you know, I think it's a very inexpensive way for the Citadel to say, do you know what --

: Right.

: -- we'll fix our own.

: Yeah.

: We'll -- we'll -- we'll keep



THE CITADEL 0000531
(FOIA 2011)

12:48:18 know, that's why you don't see us with -- with attorneys.

: Right.

: You don't see us with anything. I want to do whatever this happens -- and -- and you guys can do -- the Citadel can do all the investigating and looking and so forth to -- to -- to corroborate story --

: Uh-huh.

: -- but we don't want to go and be part of the Charleston gossip.

: Sure.

: And that's not what anybody needs.

12:48:49 THE WITNESS: Yeah.

: Well, it's not going to help anybody.

: It won't help anybody.

: Right, right.

: And -- you know, and all I'm saying is -- is not the Citadel but the summer camp was -- was -- was part of the root cause. Now I'm just, you know, as a parent saying, you know --

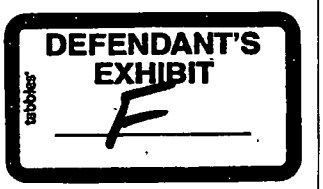
: Uh-huh.

: -- there's no way that you



THE CITADEL 0000573
(FOIA 2011)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | CASE NO. 2011-CP-10-9200 |
| MOTHER DOE A, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendant. | ) | |




| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | CASE NO. 2012-CP-10-1860 |
| JOHN DOE CAMPER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendant. | ) | |

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF CHARLESTON | ) | CASE NO. 2012-CP-10-1858 |
| JOHN DOE 2, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| THE CITADEL, | ) | |
| | ) | |
| Defendant. | ) | |

VOLUME I VIDEOTAPED
30(b)(6) DEPOSITION OF: MARK BRANDENBURG

STATE OF SOUTH CAROLINA ) THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON ) CASE NO. 2012-CP-10-1859

MOTHER DOE 2, ON BEHALF )
OF JOHN DOE 3, )
)
Plaintiff, )
)
vs. )
)
THE CITADEL, )
)
Defendant.

VOLUME I VIDEOTAPED
30(b)(6)DEPOSITION OF:MARK BRANDENBURG

DATE TAKEN: Wednesday, June 5, 2013

TIME: 10:00 a.m.

PLACE: Pierce Herns Sloan & Wilson
321 East Bay Street
Charleston, South Carolina

REPORTED BY: EVE WILBANKS
Registered Professional
Reporter, Certified LiveNote
Reporter and Notary Public

* * * * * * * * * * * * * * * * *

POST OFFICE BOX 21784

CHARLESTON, SOUTH CAROLINA 29413-1784

see what I talked to him about at previous meetings. And when I pulled it up on the computer and then when I saved it, it said "modified."

Q. All right.

A. That's my best guess. I'm sorry.

Q. Then page 80, that's the August list, right?

A. That's a meeting we had in August, yes.

Q. And the Doe case is on both the August and September list?

A. Correct, yes.

Q. And then what is 81? That's dated September.

A. That would be a meeting that I had with him on September 3rd or somewhere close to that, I would guess.

Q. So we have a July, August and September meeting with General Rosa, all of which the Doe case was --

A. Right.

Q. -- talked about?

A. Right.

Q. Okay. Who is on -- on document 83, this is August 8th, 2007, who is that --

A. The name -- the number is really

scratched out. August 8th of 2007?

Q. Yeah.

A. Yeah.

Q. Who is that? Telephone call with who?

A. John Powell.

Q. Who is that?

A. He's the director of admissions.

Q. And what was decided was they couldn't get Doe into school that year; is that right?

A. What was happening at this time is I was having -- I'd had a phone call on August 3rd from Doe's father, and I believe there were other phone calls during that time period. But his -- his goal was to get his son into The Citadel. And so I went down -- or I called downstairs and I talked with John and I said, Where is he? You know, what is the -- what is the status, so to speak, of him?

And John says to me, He's missing Algebra II. Also lacks two lab sciences. The state requires three lab sciences, Biology I and II. He said, Even if we -- I think he said, Even if we substitute a physical science for one of the lab sciences, we were still -- still going to come up two courses short for what he had to have in order to matriculate.

And so I called the father back again -- the negotiations that were back and forth during this time period was he wanted his son in The Citadel. And so I went back to the father and I said, We can't put him in this year. This is August 8. So this is probably within two or three days of the freshman class reporting that year. And I said, We just can't do it. We -- he needs two courses; we can't let him come in. And it's going to be -- I think I even said -- yeah, I said, It's not fair -- It's going to be unfair to him because he's just not going to be prepared.

And so in the course of these negotiations and also talking with the Insurance Reserve Fund and downstairs, the thought was, let's have him go to a -- like a Trident Tech, a technical school someplace, and get the two high school courses that he needs and get a -- and get a couple of other courses, get ahead, and The Citadel will pay for it.

Q. Right. That was the 20,000?

A. That's the 20,000. And that was the negotiations with the Insurance Reserve Fund, and the Insurance Reserve Fund said, We'll -- you know, We'll put up the $20,000 that he can use to

fund those -- to fund those classes. And maybe it was a week later, because I see -- I see one other conversation with the father on 8/13, but sometime in there -- whether between 8/8 and 8/13 or after 8/13 is when the class matriculated. And after that, I didn't hear anything more. But the agreement was -- you know, that the father had agreed to, was the 20,000 to go to a technical school or something, and then -- and I said -- the father asked, Could he come next year guaranteed? And my recollection is we said, We can't guarantee it, but, you know, we'll certainly look favorably on the application. And he was supposed to go back and talk with young Doe and get the -- and get them all to agree to it, and I didn't ever hear from him after that.

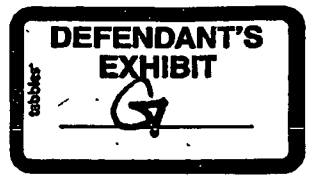
Q. So you had only talked to Doe's dad from July 1st up through this time. You never talked to Doe, right?

A. Right.

Q. And when you and Doe's dad worked out some type of agreement, Doe never agreed to it, to the best of your knowledge?

A. To the best of my knowledge, he didn't.

Q. During any of your briefings to the




# EXHIBIT G

**EXCERPT FROM THE DEPOSITION OF JOHN DOE #2 (pages 36-37, 75-88, 92-95 and 138-39)**

***In an effort to protect the confidentiality of Plaintiff Doe #2, this document is being submitted under separate cover to the Court for its in-camera review.***




65 FR 66092-01
NOTICES
DEPARTMENT OF EDUCATION

# Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

Thursday, November 2, 2000

*66092 AGENCY: Office for Civil Rights, Department of Education.

ACTION Request for comments

SUMMARY: The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), is proposing to issue a new document that would replace the 1997 document entitled "Sexual Harassment Guidance. Harassment of Students by School Employees, Other Students, or Third Parties," issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We are revising the guidance in limited respects in light of recent Supreme Court cases relating to sexual harassment in schools.

We intend the proposed revised guidance to serve the same purpose as the 1997 guidance. It continues to provide educational institutions with guidance about the standards under Title IX of the Education Amendments of 1972 (Title IX) that we use, and that institutions should use, to investigate and resolve allegations of sexual harassment of students.

We request from all interested parties written comments on the portions of the guidance revised to address the Supreme Court decisions.

DATES: We must receive your comments on or before December 4, 2000.

ADDRESSES: Address all comments regarding the revised guidance to Jeanette J. Lim, U.S. Department of Education, Office for Civil Rights, 400 Maryland Avenue, SW., room 5036 Switzer Building, Washington, DC 20202-1100. For all comments submitted by letter, you must include the term "Sexual Harassment Guidance Comments" If you prefer to send your comments through the Internet, use the following address: ocr@ed.gov.

You must include the term "Sexual Harassment Guidance Comments" in the subject line of your electronic message

FOR FURTHER INFORMATION CONTACT: Jeanette J. Lim. Telephone: (202) 205-5557 or 1-800-421-3481. If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 260-0471.

For additional copies of this document, individuals may call OCR's Customer Service Team at (202) 205-5557 or toll-free at 1-800-421-3481.

Individuals with disabilities may obtain this document in an alternative format (e g., Braille, large print, audiotape, or computer diskette) on request to OCR's Customer Service Team listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

**Invitation To Comment**

We invite you to submit comments regarding the proposed revised guidance in Appendix A that relates to the revisions made to address recent Supreme Court decisions.

During and after the comment period, you may inspect all public comments about this proposed revised guidance in room 5036, 330 C Street, SW., Washington, DC, between the hours of 9:30 a m. and 5:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Public Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public record for this proposed guidance If you want to schedule an appointment for this type of aid, you may call (202) 205-8113 or (202) 260-9895. If you use a TDD, you may call the Federal Information Relay Service at 1-800-877-8339.

**Purpose and Scope of the Revised Guidance**

In March 1997, we published "Sexual Harassment Guidance. Harassment of Students by School Employees, Other Students, or Third Parties" (62 FR 12034) We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination and is covered by Title IX It was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers regarding the realities of sexual harassment and best practices for responding to and preventing sexual harassment. We also made the document available for public comment.

Since the issuance of the guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students: Gebser v Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the Gebser decision did not change schools' obligations to take reasonable steps to prevent and eliminate sexual harassment as a condition of their receipt of Federal funding. In most important respects, the substance of the 1997 guidance was reaffirmed in the Court's opinions in Gebser and Davis, but we have determined that in certain areas the 1997 guidance could be strengthened by further clarification and explanation of the regulatory basis for the guidance.

We are, therefore, issuing this proposed revised guidance The scope of the revisions is limited. They are intended to reaffirm our standards regarding sexual harassment, to clarify the regulatory basis for the 1997 guidance, and to illustrate how and why the administrative enforcement of Title IX's nondiscrimination requirements differs from private lawsuits for money damages. In making clarifications to the guidance flowing from the Supreme Court decisions, we also have taken the opportunity to make a few additional clarifications that we believe will be helpful to schools, including clarifying some examples from the 1997 guidance and adding some additional examples to illustrate the Title IX standards discussed in the guidance. It is important to note that these are just examples Neither they nor the proposed revised guidance create new Title IX standards

**Title IX Compliance Standard**

In Gebser and Davis, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by a student who has been sexually harassed.

- The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment.

- In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the recipient's program and the conditions of Gebser are met, i e., an official who has authority to address the harassment *66093 has actual knowledge of the harassment and is deliberately indifferent in responding to the harassment. The Court also clarified that deliberate indifference means that "the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Davis, 526 U.S at 648.

The Court was explicit in Gebser and Davis that the liability standards established in these cases are limited to private actions for monetary damages. See, e.g , Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies such as the Department to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. See Gebser, 524 U.S. at 292.

The Gebser Court further explained that the standard for obtaining damages in private actions was grounded in its "central concern" arising out of the contractual nature of Title IX—that by accepting Federal funds, a recipient does not unintentionally expose itself to a large monetary damage award for discrimination of which it was unaware and which it would have been willing to correct (524 U S. at 287). Under the Court's rulings, liability for money damages arising out of sexual harassment of students, either by employees or by other students, cannot arise unless the school has actual notice of the harassing conduct and is deliberately indifferent in response

The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX by Federal agencies, such as the Department's Office for Civil Rights (OCR). Under our Title IX regulations, we must first investigate complaints and determine whether our investigation "indicates a failure to comply" with the statute or regulations. If it does, we must attempt to secure compliance by voluntary means. This may include requiring the school to take remedial action necessary to overcome the effects of the discrimination (Gebser, 524 U S. at 288 (citing the Department's regulations in 34 CFR 106.3)). Only if that fails, and the recipient is provided both an opportunity for a hearing and express findings of its failure to comply, will the recipient face the possibility of the loss of continued Federal funding. See 34 CFR 106.71, 100.8, 100.9. In contrast to the Court's concerns in Gebser about the possibility of an award of money damages in a private lawsuit for harassment the recipient had not known about, fund termination under administrative enforcement comes only after the recipient has notice of a violation and an opportunity to correct it (Gebser, 524 U.S. at 289). In addition, the financial sanction under administrative enforcement is limited to termination of, or refusal to grant or continue, Federal assistance (Gebser, 524 U.S. at 290). As recognized by the Court in Gebser, 524 U S. at 287-292, our enforcement actions, therefore, do not raise the Court's concern that a school district not be held liable for large damage awards for past acts of which it was unaware.[FN1] Moreover, the Court's discussion makes clear that under this incremental administrative enforcement scheme, we identify a violation of Title IX or the Title IX regulations, and a school is obligated to take corrective action in response to this violation, at a point before either the statutorily required conditions applicable to termination of funds or the Court-mandated conditions applicable to obtaining money damages in private litigation have necessarily been satisfied. See Gebser, 524 U.S at 287-292.

Accordingly, our proposed revised guidance does not change the standards that we use, and that a school district should use, to determine the school district's responsibility for sexual harassment of students. Rather, the proposed revised guidance clarifies that these standards apply to our ability to find a violation and seek corrective action in administrative enforcement of Title IX.

Because the focus of the guidance is on a school's administrative responsibilities under the nondiscrimination requirements of the Title IX statute and regulations, rather than its liability to private litigants, the proposed revised guidance no longer describes a school's compliance obligations in terms of "liability" or "Title VII agency law." Instead, the proposed revised guidance explains the regulatory basis for a school's Title IX responsibilities to take effective action to prevent, eliminate, and remedy sexual harassment occurring in its program.

**The Court Confirmed Important Principles From the 1997 Guidance**

In Davis, Gebser, and a third opinion, Oncale v. Sundowner Offshore Services, Inc. (Oncale), 523 U.S 75 (1998) (a sexual harassment case decided under Title VII of the Civil Rights Act of 1964 (Title VII)), the Supreme Court confirmed several fundamental principles articulated by the Department in the 1997 guidance. In these areas, no changes in the guidance are necessary. The Court—

- Endorsed the Department's power to set regulatory requirements under Title IX The Court held that, for example, a school district's failure to promulgate a grievance procedure, as required by the Title IX regulations, does not constitute unlawful discrimination, but, nevertheless, such a regulatory requirement can be administratively enforced by the Department (Gebser, 524 U.S. at 292).

- Affirmed the Department's interpretation that student-on-student (peer) harassment is covered by Title IX and resolved a circuit court split on this issue (Davis, 526 U.S. at 633).

- Described the type of conduct that rises to the level of peer sexual harassment in a manner consistent with our guidance. The Court explained that conduct had to adversely affect the student's educational benefits or opportunities, such that the victim is effectively denied equal access to these benefits and opportunities (Davis, 526 U.S. at 648-651).

- Held that not all conduct of a sexual nature rises to the level of sexual harassment, Davis, 526 U.S. at 648-651, thus affirming our guidance to schools that teachers and school administrators need to use common sense and good judgment in responding appropriately to allegations of sexual harassment. See also Oncale, 523 U.S. at 79-82.

- Affirmed our position that the context of the behavior at issue is crucial in determining whether sexual harassment has occurred. See, e.g , Davis, 526 U S. at 650 (citing our 1997 sexual harassment guidance), Oncale, 523 U.S. at 81.

- Held that sexual harassment may constitute discrimination under Title VII even if the harasser and victim of harassment are of the same sex (Oncale, 523 U.S. at 79-82). This is consistent with the Department's position in the 1997 guidance that same-sex sexual harassment can constitute discrimination under Title IX.

- Made clear that, although the applicability of Title VII agency principles in private Title IX lawsuits for money damages is limited, it is still appropriate to look to Title VII principles in determining what constitutes sexual harassment (Davis, 526 U.S. at 651, citing ***66094** Meritor Savings Bank, FSB v. Vinson (Meritor), 477 U.S. 57, 67 (1986) (Title VII case)).

**Discussion of Important Clarifications**

**I. Liability Section Deleted and Guidance Refocused: Basis for School's Responsibility Is the Title IX Regulations, Not Title VII Agency Law**

The 1997 guidance contained a section titled "Liability of a School for Sexual Harassment." To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; it does not address standards applicable to private litigation for monetary damages. Accordingly, the proposed guidance replaces this section with a new section that focuses on a school's responsibilities to prevent and eliminate sexual harassment discrimination in its programs as a condition of its receipt of Federal financial assistance, as summarized in the following section.

*A. Sexual Harassment by Employees*

The 1997 guidance indicated that when teachers or other employees, when providing aid, benefits, or services to students, abuse or take advantage of their status as a person of authority to engage in sexual harassment, a school is responsible for that

harassment even if other school officials did not find out until later that the harassment occurred.[FN2] The 1997 guidance described determinations about a school's responsibility in these cases, in part, in terms of the Title VII agency-derived concept that if a teacher or other employee abuses the authority given him or her by the school, it is as if the school itself harassed the student (62 FR 12039) The Gebser Court rejected Title VII's agency principles for the purpose of determining a school's liability for monetary damages under Title IX.[FN3] However, the concept that in some cases a school must take action to remedy the effects of an employee's discrimination exists in the longstanding Title IX regulations without reliance on Title VII agency law.[FN4]

The Department's Title IX implementing regulations prohibit sex-based discrimination in the operation of the recipient's programs and activities.[FN5] Among other things, a recipient cannot, on the basis of sex, treat students differently; provide different aid, benefits, or services to students; deny or limit aid, benefits, or services to students, or otherwise limit a student's enjoyment of a right, privilege, or opportunity (34 CFR 106 31). (For brevity and clarity, the regulatory requirements are generally summarized as a school's obligation to ensure that a student is not denied or limited in his or her ability to participate in or benefit from the school's program on the basis of sex.) The Department has historically interpreted the regulatory requirements to reflect Congress' understanding that Title IX's prohibitions against discrimination are not limited to official policies and practices established by the school district or high-level officials to govern school programs, activities, benefits, and services. Sex-based discrimination against individual students can also occur if employees, as they are carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students, (1) condition these benefits on the student's submission to sexual advances, or (2) otherwise take advantage of their position of responsibility to engage in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. (For brevity and clarity, the proposed revised guidance generally refers to these types of employee harassment as harassment that occurs in the context of providing aid, benefits, or services to students and causes a denial or limitation of a benefit )

Thus, the regulations do not distinguish discrimination by the recipient directly, e.g., actions by the school board or high-level school officials, from discrimination that occurs if an employee is acting in the context of providing aid, benefits, or services to students and the employee engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex. This is because a school, in large part, can only operate its programs and activities through the responsibilities it gives its teachers and other employees The key under the Title IX regulations is that the recipient cannot discriminate in providing aid, benefits, or services to students See 34 CFR 106.31(b). If the recipient provides aid, benefits, or services to students through its employees, and an employee, in the context of providing these to students, engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex, the recipient is responsible for the discrimination.

What does it mean to be responsible for the discrimination? The Title IX regulations require a written assurance from every recipient stating that all of its education programs and activities will be operated in compliance with Title IX and the regulations, including committing itself to take whatever remedial action is necessary to eliminate discrimination in its programs (34 CFR 106 4(a) (citing the remedial requirements of 106.3(a))) Section 106.3(a) of the regulations requires that ***66095** if a recipient discriminates on the basis of sex, it must take action necessary to overcome the effects of the discrimination The Gebser Court expressly affirmed this type of remedial action required under our regulations, including remedying the effects of the harassment on the victim (524 U.S at 288). Thus, under the regulations, if the recipient discriminates against a student, the recipient must remedy the effects of that discrimination on the victim As previously discussed, this includes situations in which discrimination occurred because an employee of the recipient, in the context of providing aid, benefits, or services to students, took action that denied or limited a student's ability to participate in or benefit from the school's program.

It has been our longstanding interpretation of the civil rights statutes and our regulations that the school's responsibility to take reasonable steps to remedy the effects of its discrimination is triggered when the violation occurs (e.g., a school employee, in the context of providing aid, benefits, or services to students, engages in action that denies or limits the student's ability to participate in or benefit from the school's program), regardless of how or at what point other school authorities learned of the discrimination For instance, if we investigated a complaint and found that a teacher of an advanced placement math class

routinely and without an educational basis gave female students lower grades than their male counterparts, we would find that the school has discriminated against students on the basis of sex and that corrective action is required. In order to resolve the discrimination in providing aid, benefits, or services, of which other school officials subsequently became aware through our investigation, we would not only require a recipient to take proactive steps to end the discrimination and prevent its recurrence, but would also require the recipient to remedy the effects of the discrimination, including effects on the victims.

Thus, the proposed revised guidance clarifies that the school discriminates if a teacher or other employee, in the context of providing aid, benefits, or services to students, engages in harassing conduct that causes a denial or limitation of a student's ability to participate in or benefit from the school's program on the basis of sex. The proposed revised guidance also clarifies that, because the school is responsible for this discrimination, the school is responsible both for taking reasonable proactive steps to end the harassment and prevent its recurrence and for remedying any effects of the sexual harassment on the victim.

If, on the other hand, an employee harassed a student outside of this context, i e., the harassment occurred in the school's program, but not in the context of providing aid, benefits, or services to students, the school is responsible for the sexual harassment under the same standards that apply to peer and third party sexual harassment. These have not changed from the 1997 guidance. In these instances, if the harassment was sufficiently serious to effectively limit or deny a benefit, but the school took prompt, effective steps once it learned or should have learned of the harassment to end it and prevent its recurrence, the school has avoided violating Title IX.

In determining whether an employee's harassing conduct occurs in the context of providing aid, benefits, or services to students, it is important to consider all the circumstances related to the harassment, including the position of the harasser and the age and level of education of the students involved. The Court recognized in Davis that school officials and employees have a great degree of supervision, control, and disciplinary authority over all aspects of elementary and secondary school-age children's conduct (526 U.S. at 646). Moreover, school-age children are generally expected and required to obey adults as part of their participation in school programs and activities.

Thus, the proposed revised guidance outlines factors that we will consider in determining whether the harassing conduct occurred within the context of the employee's provision of aid, benefits, or services to students. These factors include the age of the student, the authority generally given to the harassing employee, the actual degree of influence of the harassing employee over the student, as well as the place, time, and nature of the harassing conduct. These determinations regarding the context of the harassment need to be made on a case-by-case basis

*B. Peer and Third Party Sexual Harassment*

The standards described in the 1997 guidance applicable to peer and third party harassment are the same in the proposed revised guidance.

*C. Effect of Grievance Procedures*

The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by Gebser and Davis This proposed revised guidance clarifies that its focus is on the effect of grievance procedures in our enforcement actions.

Schools are required by the Title IX regulations to disseminate a policy against sex discrimination and to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment The Gebser Court specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate (524 U.S. at 292). Strong policies and effective grievance procedures are essential in order to let students and employees know that sexual harassment will not be tolerated, to ensure that they know how to report it, and to let students and employees know that students can report harassment without fear of adverse consequences.

If a school does not have effective policies and procedures, as required by the Title IX regulations, its own inaction may hamper early notification and intervention and may permit a sexually hostile environment to exist in its program and activities. In this case, we would require the school to take corrective action, including remedying the effects of the harassment on the victim

*D. OCR Case Resolution*

The 1997 guidance discussion of liability contained a subsection titled "OCR Case Resolution." Because the focus of the proposed revised guidance is specifically OCR enforcement, this section has been retained and clarified. This section lets schools know that, even if the school discriminates, the school does not immediately lose Federal funds on that basis alone. Consistent with the Title IX statute, we provide recipients with the opportunity to take timely and effective corrective action before issuing a formal finding of violation.

*E. Notice of Harassment*

The "notice" section has been moved up in the proposed revised guidance to reflect its connection to the discussion of a school's responsibility for remedying sexual harassment. For the reasons discussed in the following paragraphs, although additional clarification has been provided, this section has not been substantively revised. ***66096**

**i. In Cases in Which Notice is Required To Trigger a School's Responsibility, a School Will Be Responsible if It Knew or Should Have Known About the Harassment**

The 1997 guidance stated that a school has "notice" of sexual harassment if it "knew, or in the exercise of reasonable care should have known," about the harassment The proposed revised guidance retains this notice standard The type of constructive notice described in the 1997 guidance has historically been the way we hold recipients responsible for complying with the civil rights laws, and it is a reasonable basis for holding a school responsible for taking appropriate action in response to sexual harassment. It does not require a school to predict future behavior or to be aware that harassment is occurring or has occurred if there is no reasonable basis for the school to know about it Instead, the guidance describes a reasonable duty to fully investigate if there are obvious problems, such as the report of some incidents of harassment or a widespread graffiti campaign in public areas.

The Gebser Court rejected a constructive notice, or "should have known" standard, as the basis for imposing monetary damages because of its central concern that a recipient should not be exposed to large damage awards for discrimination of which it was unaware This aspect of the Gebser opinion, however, is not relevant in our enforcement actions in which recipients voluntarily take corrective action as a condition of continued receipt of Federal funds. Moreover, as stated previously in the section entitled "Title IX Compliance Standard," under our administrative enforcement, recipients are always given actual notice and an opportunity to take appropriate corrective action before facing the possible loss of Federal funds

**ii. Notice Can Be Provided to Any Responsible School Employee**

Under Gebser, in order to receive monetary damages, notice of sexual harassment must be given "at a minimum, [to] an official of the recipient entity with authority to take corrective action to end the discrimination" (524 U.S. at 290). The 1997 guidance, however, specifically rejected the position suggested by some parties that notice must be given to managerial or designated employees. In fact, the 1997 guidance made clear that an employee who receives notice of the harassment, if he or she does not have the authority to address the harassment, may still be required to report the harassment to the appropriate school official with authority to take corrective action.

The proposed revised guidance retains and clarifies this position as a condition for continued receipt of Federal funds. For purposes of our administrative enforcement of Title IX, the Department will consider a school to have notice of harassment and a duty to respond if a responsible school employee has notice of the harassment. A responsible school employee would include any employee who either has the authority to take action to address harassment or has the duty to report sexual harassment

or other misconduct by students or employees to appropriate school authorities, as well as an individual who a student could reasonably believe has the authority to either address the harassment or the responsibility to report it to someone with the authority to address it. This interpretation of the regulations is fully consistent with Gebser and Davis. As previously discussed, the Gebser Court recognized that Title IX responsibilities to respond to harassment can be triggered before all statutorily required conditions for fund termination have been satisfied, including the condition requiring formal notice of violation to appropriate school officials.

In addition, this requirement is based on a reasonable expectation of what steps a school can and should take to fulfill its responsibilities under the regulations to respond to and prevent discrimination in its education program As the 1997 guidance recognized, it is reasonable to expect that teachers and other employees will see, or be told, that sexual harassment is occurring, and, thus, schools should make sure that their employees at least report what they see or what is told to them Moreover, young children may not understand the formal status of, or lines of authority of, school employees and may reasonably believe that an adult, such as a teacher or school nurse, is a person that they can and should tell about incidents of sexual harassment.

**II. Definition of Sexual Harassment**

The section from the 1997 guidance titled "Severe, Persistent, or Pervasive" has been re-titled "Factors Used to Evaluate Sexual Harassment." It now contains four subsections:

*A. Types of Harassment*

In the 1997 guidance, we described two different types of sexual harassment· quid pro quo and hostile environment (62 FR 12038) As discussed in the following paragraphs, our description of these terms in the 1997 guidance is consistent with our regulations and with applicable case law, and, therefore, these terms have been retained for their usefulness in determining whether conduct is sexual harassment We have modified the proposed revised guidance to better represent these concepts, and the discussion of quid pro quo and hostile environment harassment has been moved from the introduction to this section.

In Burlington Industries, Inc. v. Ellerth (Ellerth), 524 U.S. 742 (1998)—a Title.VII sexual harassment case—the Court discussed the usefulness of the distinction between quid pro quo and hostile environment harassment The Court held that this distinction continues to be relevant in determining whether conduct rises to the level of discrimination The Court found that quid pro quo harassment requires a tangible employment action to result from the harassment. If this is not the case, e.g., a harasser threatens but does not take action if the victim refuses to succumb to the harasser's sexual advances, the conduct is considered hostile environment harassment. The conduct must then be sufficiently serious to alter the conditions of the victim's employment Our description of these terms in the 1997 guidance is consistent with our regulations and with the Court's holdings in Ellerth, and, therefore, these terms have been retained for their usefulness in determining whether conduct is sexual harassment The proposed revised guidance has modified the discussion of the basis of a school's responsibility for harassment by teachers and other employees, including both quid pro quo and hostile environment harassment, to clarify the regulatory basis for that responsibility

*B. Quid Pro Quo Harassment*

In addition to the clarifications previously outlined, the section from the 1997 guidance titled "Recipient's Response" has been modified slightly to eliminate references to quid pro quo harassment because, in determining an appropriate response, the proposed revised guidance focuses instead on whether or not the harassment by a teacher or other employee occurred in the context of the employee's provision of aid, benefits, or services to students.

*C. Hostile Environment Harassment*

As explained in the following paragraphs, in the proposed revised guidance the definition of conduct that creates a hostile environment is substantively the same as in the 1997 *66097 guidance, but the discussion contains several revisions to clarify that the Davis definition and the guidance definition are consistent.

The Davis Court concluded that student-on-student sexual harassment "if sufficiently severe can likewise rise to the level of discrimination actionable under the statute" (526 U.S. at 650). The Court held that to support a claim for damages, student-on-student sexual harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits" (Davis, 526 U.S. at 650). However, physical exclusion is not necessary, it is enough if the student victims of sexual harassment can show that the harassment "so undermined and detracts from the victims" educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Id. (citing Meritor, 477 U S. at 67).

Although the terms used by the Court in Davis are in some ways different from the words used to define hostile environment harassment in the 1997 guidance (see, e.g , 62 FR 12041, "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"), the definitions are consistent. The Court's definition, like the Department's 1997 guidance, is a contextual description intended to capture the same concept—that under Title IX the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. See 62 FR 12045 (the conduct must have limited the student's ability to participate or altered the conditions of the student's educational environment); 34 CFR 106.31(b) (prohibiting recipients from denying or limiting a student's ability to participate in or benefit from the school's program).

This requirement is consistent with Meritor, a Title VII case cited approvingly by the Davis Court, which requires sexual harassment to be "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment'" (477 U.S. at 67).[FN6] See also Harris v. Forklift Systems, Inc , 510 U.S. 17, 22 (1993) (which applied Meritor to hold that a victim need not show serious psychological injury as long as she can show the conduct created an abusive or hostile environment). The proposed revised guidance clarifies some examples given in the 1997 guidance to make clear that peer-on-peer acts are not sexual harassment under Title IX if they merely make the student victim feel upset. As the discussion in 62 FR 12041 makes clear, our definition reflects a continuum of severity. The "or" merely indicated that a particularly severe incident may not need to be persistent to be a problem under Title IX.

Under Davis, determining whether harassment is actionable "depends on a constellation of surrounding circumstances, expectations, and relationships" (526 U.S. at 651 (citing Oncale, a Title VII case)) Similarly, the core of the 1997 guidance's definition of harassment is the detailed discussion of these underlying factors (for example, the age, relationship, and numbers of people involved), and the Davis Court cites the factors in the 1997 guidance approvingly (526 U.S. at 651).

In addition, like the Court in Davis, we require schools to respond to conduct that, from an objective perspective, is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program (62 FR 12041). In Oncale, 523 U S. at 82, the Court emphasized that the objective severity of harassment is to be based on the perspective of a reasonable person in the victim's position "'considering all the circumstances'" (citing Harris, 510 U.S. at 23, in which the Court used a "reasonable person" standard to determine whether sexual conduct constituted sexual harassment).

Finally, even looking only at the words the Court used in Davis, this would not change our compliance standard for administrative enforcement in cases of peer harassment. That is, we will always determine whether the conduct is objectively offensive, and some level of severity is always required in order to limit or deny a student's ability to participate in or benefit from a school's program. In addition, a recipient's obligation, upon notice of peer harassment, to stop the harassment and prevent its recurrence is related to the pervasiveness of the harassment

Thus, although the Court referred to the conduct as being "severe, pervasive, and objectively offensive" and the 1997 guidance referred to the conduct as being "severe, persistent, or pervasive . . . from both a subjective and objective perspective," both inform a contextual description intended to identify elements to evaluate whether the conduct is sufficiently serious that it can affect a student's rights under Title IX.

*D. Welcomeness*

This section from the 1997 guidance has been moved, but remains the same in substance.

**III. FERPA**

The Department administers the Family Educational Rights and Privacy Act (FERPA), which establishes requirements pertaining to disclosure of information from a student's "education records" without the consent of the student. Thus, the requirements of FERPA are involved if there are questions about disclosure of information from a student's "education records" in cases of student-on-student harassment. As noted in the 1997 guidance, the Department interprets FERPA generally to prevent a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment There are exceptions in the case of a sanction that directly relates to the person who was harassed, such as an order that the harasser stay away from the victim, or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions Furthermore, if we are conducting a civil rights investigation, FERPA does not prohibit schools from disclosing to us information from a student's "education records," including information about applicable sanctions or discipline (20 U.S.C. 1232g(b)(1)(C)).

The 1997 guidance promised additional guidance in this area Accordingly, the revised guidance clarifies that the Department interprets FERPA to permit a student who filed a harassment complaint to learn the outcome of his or her complaint, i.e , to learn whether the complaint was investigated and whether harassment was found—because this information directly relates to the victim. However, it remains the Department's position that FERPA prevents a school from disclosing to a victim the sanction or discipline imposed upon the student found to have harassed the victim (unless, as previously described, the sanction is directly related to the victim or there is a statutory exception) The *66098 Department recognizes that information about the sanctions is important to the victim's remedy because this information enables the victim to determine whether the school responded appropriately to the complaint Thus, the Department has proposed and supported a statutory amendment to FERPA to permit this disclosure.

*Reiteration of Important Aspects of the 1997 Guidance*

*A. Importance of Common Sense and Judgment*

As with the 1997 guidance, the proposed revised guidance focuses on the school's responsibility, and important role, in taking reasonable steps to eliminate and prevent sexual harassment. A significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student's academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn The proposed revised guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

Several sexual harassment issues involving young students that were widely reported in the press at the time the 1997 guidance was being developed were discussed in the preamble to the guidance. The preamble noted that these incidents provide a good example of how the guidance can assist schools in understanding what is sexual harassment and in formulating appropriate responses As the Department stated then, a kiss on the cheek by a first grader does not constitute sexual harassment.

Since the 1997 guidance was published, we have heard from educators, parents, and other interested parties that some schools continue to overreact to incidents of childish behavior or immature conduct that do not rise to the level of sexual harassment. Accordingly, the proposed revised guidance, like the 1997 guidance, illustrates that in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment. For example, age is relevant to determining whether a student welcomed the conduct and to determining whether the conduct is serious enough to rise to the level of sexual harassment. Age is a factor to be considered by school personnel when determining how best to inform students about a school's policies and procedures in order to prevent sexual harassment from occurring

However, we have also learned that some schools, perhaps out of confusion regarding the legal standards for liability for money damages for sexual harassment, or perhaps out of a misplaced notion that "kids will be kids," continue to avoid responding to serious incidents of sexual harassment. If harassment has occurred, the critical issue under Title IX is whether the school recognized that sexual harassment can constitute sex discrimination and whether the school took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, address the effects of the harassment. As the proposed revised guidance makes clear, if harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond The important thing is for school employees or officials to pay attention to the school environment and not be afraid to act in a reasonable, commonsense manner in response to sexual harassment, often responding as they would to other types of serious misconduct Accordingly, important discussions from the 1997 guidance regarding the recipient's response, requests for confidentiality, prevention strategies, and effective grievance procedures remain intact in the proposed guidance.

In addition, in describing the obligation of the school to take action when harassment occurs, in the proposed revised guidance the term "effective" has generally been substituted for the term "appropriate." This is a clarification intended to underscore the need for action to be effective and does not represent a change from the 1997 guidance. This clarification should be read consistently with the need to use common sense and good judgment It does not mean that there is any need for schools to overreact and impose the most severe sanctions, e g., suspension or expulsion of students who have engaged in harassment, if other sanctions are consistent with the nature of the misconduct and can reasonably be expected to be effective. As recognized in the guidance, if a school's initial steps are ineffective, a series of escalating steps may be necessary in order for the action to be effective in responding to the harassment.

*B. Applicability of Guidance to Same-Sex Harassment*

The 1997 guidance explained that Title IX protects any "person" from sex discrimination. Thus, Title IX protects both male and female students from sexual harassment, and schools have an obligation to deal with complaints of sexual harassment equally whether the complainant is male or female. Additionally, the guidance explained that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex, a position subsequently supported by the Supreme Court's 1998 decision under Title VII in Oncale. The 1997 guidance explained that all students, regardless of their sexual orientation, are protected from sexual harassment under Title IX, and this remains our position in the proposed revised guidance. By promptly and effectively addressing sexual harassment discrimination occurring in education programs or activities, school personnel are in the best position to ensure a safe and nondiscriminatory learning environment for every student. The focus of the proposed revised guidance, like the 1997 guidance, is harassment involving conduct of a sexual nature; thus, both explain that gender-based harassment is beyond their scope. Of course, gender-based harassment, including harassment based on sex-stereotyping, can also be a violation of Title IX

The harassment of students on the basis of sexual orientation is a serious problem. As noted in the 1997 guidance and in the proposed revised guidance, some State and local laws may prohibit discrimination on the basis of sexual orientation, and, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. In January 1999 we joined with the National Association of Attorneys General in issuing the publication "Protecting Students from Harassment and Hate Crime, A Guide for Schools" (Guide) The Guide provides educators with practical

guidance for protecting students from all forms of harassment, including harassment on the basis of sexual orientation. As the Secretary of Education, Richard Riley, stated in the introduction to the Guide: "Our schools owe students a safe environment that is conducive to learning and that affords *66099 all students an equal opportunity to achieve high educational standards. Harassment and hate crimes undermine these purposes and may cause serious harm to the development of students who are victimized by this behavior." The Guide is a useful resource that school officials may use to ensure that all students attend schools in a safe environment free from all forms of harassment. The Guide is available on our web page at:

http://www.ed.gov/pubs/Harassment.

*C. Additional Information on the Development of the 1997 Guidance*

Because the substance of the revised guidance has not changed significantly, many of the comments that we received from interested parties in response to a draft of the 1997 guidance, and our responses to those comments, remain relevant and unchanged. We, therefore, are attaching that portion of the 1997 Federal Register notice as Appendix B to this document.

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Dated: October 26, 2000.

Norma V. Cantu1,

Assistant Secretary for Civil Rights.

**Appendix A—Sexual Harassment Guidance: Harassment of Students [1] by School Employees, Other Students, or Third Parties Summary of Contents**

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***First Amendment***
Introduction. Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities [2] The Supreme Court, the Congress, and Federal executive departments and agencies, including the Department of Education, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX. [3] This guidance focuses on a school's fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding.

Sexual harassment can include unwelcome verbal, nonverbal, or physical conduct of a sexual nature. If a student is sexually harassed, the harassing conduct can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program This guidance describes the regulatory basis for a school's compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to remedy it effectively if it does occur.

Applicability of Title IX. Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities The guidance uses the terms "recipients" and "schools" interchangeably to refer to all of those institutions The

"education program or activity" of a school includes all of the school's operations. [4] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment. [5] Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

A student may be sexually harassed by a school employee, [6] another student, or a non-employee third party (e.g , a visiting speaker or visiting athletes) Title IX protects any "person" from sex discrimination Accordingly, both male and female students are protected from sexual harassment [7] engaged in by a school's employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i e., even if the harasser and the person being harassed are members of the same sex [8] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls. [9]

Although Title IX does not prohibit discrimination on the basis of sexual orientation, [10][11] sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student's sexual orientation (e g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e g , if a male student or a group of male students target a gay student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX.

Although a comprehensive discussion of gender-based harassment is beyond the scope of this guidance, it is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX and the Title IX regulations if it rises to a level that denies or interferes with benefits, services, or opportunities and is directed at individuals because of their sex. [12] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual ***66100** harassment alone would be sufficient to do so [13]

Title IX Regulatory Compliance Responsibilities. As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department's Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX [14]

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department's Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of compliance, specifies that recipients must agree that education programs or activities operated by the recipient will be operated in compliance with the Title IX regulations, including taking any action necessary to remedy its discrimination or the effects of its discrimination in its programs. [15]

The regulations set out the basic Title IX responsibilities a recipient undertakes when it accepts Federal financial assistance, including the following specific obligations [16] A recipient agrees that, in providing any aid, benefit, or service to students, it will not, on the basis of sex—

- Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service; [17]

- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; [18]

- Deny any student any such aid, benefit, or service; [19]

- Subject students to separate or different rules of behavior, sanctions, or other treatment, [20]

- Aid or perpetuate discrimination against a student by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any benefit, service, or opportunity to students; [21] and

- Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity [22]

For the purposes of brevity and clarity, this proposed revised guidance generally summarizes this comprehensive list by referring to a school's obligation to ensure that a student is not denied or limited in the ability to participate in or benefit from the school's program on the basis of sex.

The regulations also specify that, if a recipient discriminates on the basis of sex, the school must take remedial action to overcome the effects of the discrimination. [23]

In addition, the regulations establish procedural requirements that are important for the prevention of, or correction of, sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination [24] and adoption and publication of grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination. [25] The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance [26]

As explained in this guidance, based on these regulatory requirements, schools need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties. This guidance explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance with these requirements

Harassment by Teachers and Other Employees Sexual harassment of a student by a teacher or other school employee may be discrimination in violation of Title IX. [27] This guidance outlines the circumstances under which an employee's actions can cause discrimination and trigger the school's responsibility for taking effective corrective action In sum, a recipient's responsibility for employee harassment is distinguishable based on whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. If the answer is yes, as described in the next paragraph, this triggers the recipient's responsibilities. What this means for purposes of OCR's administrative requirements is that the recipient must take reasonable steps to eliminate the hostile environment caused by the harassment, to prevent its recurrence, and to remedy its effects (Of course, under OCR's administrative enforcement, a recipient will always have actual notice and an opportunity to take appropriate corrective action before facing the loss of Federal funds.) By contrast, if the harassment occurs in the school's

program, but not in the context of the employee's provision of aid, benefits, or services to students, the recipient's responsibility is not triggered until it has notice. Thus, if upon notice, it takes prompt and effective steps to end the harassment and prevent its recurrence, it has satisfied its obligations under the Title IX regulations, and the recipient is not responsible for the effects of the harassment on the victim that occurred prior to notice.

When is an employee acting in the context of providing aid, benefits, or services to students? A recipient is responsible for the nondiscriminatory provision of aid, benefits, or services to students, and a recipient generally provides these to students through the responsibilities it gives its employees If an employee, in the context of providing aid, benefits, or services to students, takes advantage of his or her position of responsibility over students and engages in actions that deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex, [28] the recipient is responsible for the discrimination. [29]

For example, in some instances, an employee will condition the provision of aid, benefits, or services to a student on submission to sexual harassment. In other instances, an employee's conduct is sufficiently serious that it creates a hostile environment in a situation in which an employee takes advantage of the responsibilities given to him or her by the school to provide aid, benefits, or services to students to engage in harassment, or, because of the way the school is run, the employee reasonably appears to be taking advantage of this position of responsibility when engaging in the harassment (For more information see "Types of Harassment: Quid Pro Quo Harassment and Hostile Environment Harassment," as well as the paragraphs that follow in this section ) For brevity and clarity, this proposed revised guidance generally refers to the types of employee harassment described in this paragraph as causing a denial or limitation of a benefit that occurred in the context of the employee's provision of aid, benefits, or services to students. Factors to be considered in determining whether an employee's harassing conduct occurred in the context of providing aid, benefits, or services to students are outlined in the following paragraphs of this section In the situations described in this paragraph, because the school is responsible for the denial or limitation of the student's ability to participate in or benefit from the school's program on the basis of sex, the school is responsible for taking timely and effective action to end the harassment, prevent its recurrence, and remedy its effect on the victim

On the other hand, if a teacher or other school employee engages in harassment of a student outside of this context, i e , if the harassment occurs in the school's program, but not in the context of the employee's provision of aid, benefits, or services to students, and if the harassment is sufficiently serious to create a hostile environment, the school is responsible, upon notice of the harassment, for taking prompt and effective action to stop the harassment and prevent its recurrence. [30] (This is the same standard applicable to peer and third party harassment, which is discussed in the following section.) As explained in "Notice of Employee, Peer, or Third Party Harassment," for the purposes of this guidance, a school has notice of harassment if a responsible school employee actually knew, or in the exercise of reasonable care should have known, about the harassment. If, upon notice, the school takes immediate and effective action reasonably calculated to end the harassment, eliminate the hostile environment, and prevent its recurrence, it has avoided violating the Title IX regulations If, upon notice, [31] the school fails to take prompt and effective action, its own failure to act has allowed the student to continue to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program. If this occurs, the school is then responsible for taking corrective action to remedy the effects of the harassment on the victim that could have been prevented if the school had responded promptly and effectively, as well as taking corrective action to stop the harassment and prevent its recurrence. (See the sections on "OCR Case Resolution" and "Recipient's Response.")

In assessing a school's responsibility under the Title IX regulations for an employee's sexual harassment of a student, OCR considers whether or not the sexual ***66101** harassment occurred in the context of the employee's provision of aid, benefits, or services to students In determining this, OCR will consider on a case-by-case basis the nature and circumstances of the harassing conduct as it relates to the employee's provision of aid, benefits, or services to students in the school's program. If an employee engages in quid pro quo harassment, i e., the employee conditions an educational benefit or decision on a student's submission to sexual conduct, the student clearly is being denied or limited in his or her ability to participate in or benefit from the school's program on the basis of sex. In addition, the harassment is clearly occurring in the context of the employee's provision of aid, benefits, or services to students. An example would be a teacher who conditions a student's grade on submission to sexual advances and then gives the student a poor grade for rejecting the harassment. In situations that do not involve quid pro quo

harassment, but in which an employee's sexually harassing conduct is sufficiently serious to create a hostile environment, OCR will consider the following interrelated factors in determining whether the harassment occurred in the context of the employee's provision of aid, benefits, or services to students:

- The degree of responsibility given to the employee, including informal and formal authority to provide aid, benefits, or services to students, to direct and control student conduct, or to discipline students generally;

- The degree of influence the employee has over the particular student involved, including in the context in which the harassment took place,

- Where and when the harassment occurred; and

- The age and educational level of the student involved, and, as applicable, whether, due to the student's age and educational level and the way the school is run, it would be reasonable for a student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

These factors are applicable to all recipient educational institutions, including elementary and secondary schools, colleges, and universities.

In cases involving allegations of harassment of elementary and secondary school-age students by a teacher or school administrator during any school activity, [32] consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services. This is because elementary and secondary schools are typically run in a way that gives teachers, school officials, and certain other school employees a substantial degree of supervision, control, and disciplinary authority over the conduct of students [33] For example, a teacher may sexually harass an eighth grade student in a school hallway Even if the student is not in any of the teacher's classes and even if the teacher is not a designated hallway monitor, given the age and educational level of the student and the status and degree of influence of teachers in elementary and secondary schools, it would be reasonable for the student to believe that the teacher had at least informal disciplinary authority over students in the hallways Similarly, a high school coach may require an athlete to come to his office for a post-game discussion of the athlete's performance and then use this meeting to make sexual advances. In these examples, all the factors (nature and circumstances of the harassment, age and education level of the student, employee's position of responsibility, employee's degree of influence over the student, and where and when the harassment occurred) would indicate that the harassment occurred in the context of the employee's provision of aid, benefits, or services to students With respect to other types of employees, e.g., custodial employees, these same factors would be considered to determine whether or not it would be reasonable for the student to believe that the employee had a position of responsibility over him or her and, thus, was in a position to take advantage of that responsibility to limit or deny aid, benefits, or services to the student.

On the other hand, consider the case in which a university custodian sexually harasses a graduate student in the hallway of a university building Based on the considerations set out in the factors listed previously, even though the harassment occurred in the hallway of a university building, due to the age and education level of the student, taken together with the employee's lack of authority or influence over that student, OCR would conclude that the harassment did not occur in the context of the employee's provision of aid, benefits, or services to students Thus, as previously described, the university's obligation to respond promptly and effectively would be triggered when it knew or should have known of the harassment.

Harassment by Other Students or Third Parties. If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know [34] about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. [35] As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under

the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own action has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex [36] In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim.

Similarly, sexually harassing conduct by third parties, who are not themselves employees or students at the school (e.g., a visiting speaker or members of a visiting athletic team), may also be of a sufficiently serious nature as to interfere with a student's ability to participate in or benefit from the education program. As previously outlined in connection with peer harassment, if the school knows or should know [37] of the harassment, the school is responsible for taking prompt and effective action to eliminate the hostile environment and prevent its recurrence. The type of appropriate steps that the school should take will differ depending on the level of control that the school has over the third party harasser. [38] For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. This issue is discussed more fully in "Recipient's Response." If, upon notice, the school fails to take prompt and effective corrective action, its own failure has permitted the student to be subjected to a hostile environment that limits the student's ability to participate in or benefit from the education program. [39] In this case, the school is responsible for taking corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim.

Notice of Employee, Peer, or Third Party Harassment. As described in the section on "Harassment by Teachers and Other Employees," schools may be responsible for certain types of employee harassment that occurred before other school officials had notice of harassment, as described in this section. On the other hand, as described in that section and the section on "Harassment by Other Students or Third Parties," in situations involving certain other types of employee harassment or harassment by peers or third parties, a school will be in violation of the Title IX regulations if the school "has notice" of a sexually hostile environment and fails to take immediate and effective corrective action. [40] A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment. [41] A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility. [42] Accordingly, schools need to ensure that employees are trained so that employees with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.

A school can receive notice of harassment in many different ways. A student may have filed a grievance with the Title IX coordinator [43] or complained to a teacher or other responsible employee about fellow students harassing him or her. A student, parent, or other individual may have ***66102** contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the harassment. The school may receive notice about harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to harassment that it reasonably should have known about, i e., if it would have learned of the harassment if it had exercised reasonable care or made a "reasonably diligent inquiry." [44] For example, in some situations if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. [45] In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision ) [46]

If a school otherwise knows or reasonably should know of a hostile environment and fails to take immediate and effective corrective action, a school has violated Title IX even if the student has failed to use the school's existing grievance procedures or otherwise inform the school of the harassment.

Grievance Procedures. Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[47] (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by the Title IX regulations. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

Without a policy and procedure, a student does not know either of the school's obligation to address this form of discrimination or how to report harassment so that it can be remedied. If the alleged harassment is sufficiently serious to create a hostile environment and it is the school's failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment to deny or limit a student's ability to participate in or benefit from the school's program on the basis of sex,[48] the school will be responsible under the Title IX regulations, once informed of the harassment, to take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim

OCR Case Resolution. If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third parties, OCR will consider whether—(1) The school has a policy prohibiting sex discrimination under Title IX[49] and effective grievance procedures;[50] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment;[51] and (3) the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects[52] (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.")

If the school has taken each of these steps, OCR will consider the case against the school resolved and will take no further action, other than monitoring compliance with an agreement, if any, between the school and OCR. This is true in cases in which the school was in violation of the Title IX regulations (e g., a teacher sexually harassed a student in the context of providing aid, benefits, or services to students), as well as those in which there has been no violation of the regulations (e g., in a peer sexual harassment situation in which the school took immediate, reasonable steps to end the harassment and prevent its recurrence) This is because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance[53] Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.

***Factors Used To Evaluate Sexual Harassment***

Types of Harassment: Quid Pro Quo Harassment and Hostile Environment Harassment. Sexual harassment may constitute sex discrimination prohibited by Title IX and the Title IX regulations. As outlined in the following paragraphs, sexual harassment may be categorized as either quid pro quo harassment or hostile environment harassment.[54] Sexually harassing conduct can include unwelcome sexual advances, requests for sexual favors, and other physical, verbal, or nonverbal conduct of a sexual nature[55]

It is important to recognize that the line between quid pro quo and hostile environment sexual harassment is often blurred, and the prohibited conduct may involve elements of both What is important is determining whether sexual harassment has denied

or limited a student's ability to participate in or benefit from the school's programs or activities based on sex, regardless of whether it is labeled quid pro quo or hostile environment harassment.

Quid Pro Quo Harassment. Quid pro quo harassment occurs whenever a school employee [56] explicitly or implicitly conditions a student's participation in an education program or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other physical, verbal, or nonverbal conduct of a sexual nature. When quid pro quo harassment occurs, whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm, the student has been treated differently or the student's ability to participate in or benefit from the school's program has been denied or limited based on sex [57]

Hostile Environment Harassment. A sexually hostile environment is created if sexually harassing conduct by an employee, by another student, or by a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. [58]

As outlined in the following paragraphs, OCR considers a variety of related factors to evaluate the severity and pervasiveness of the conduct. OCR considers the conduct from both a subjective [59] and objective [60] perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships." [61] Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level. Relevant factors include the following:

- The degree to which the conduct affected one or more students' education In considering the effect of the harassment on the student in terms of whether it has denied or limited the student's ability to participate in or benefit from the school's program, OCR assesses both tangible and intangible effects. Many hostile environment cases involve tangible or obvious injuries [62] For example, a student's grades may go down or the student may be forced to withdraw from school because of the harassing behavior. [63] A student may also suffer physical injuries or mental or emotional distress. [64] In other cases a hostile environment may exist even if there is no tangible injury to the student. [65] For example, a student may have been able to keep up his or her grades and continue to attend school even though it was very difficult for him or her to do so because of the teacher's repeated sexual advances. Similarly, a student may be able to remain on a sports team, despite experiencing great difficulty performing at practices and games from the humiliation and anger caused by repeated sexual advances and intimidation by several team members that create a hostile environment. Harassing conduct in these examples would alter a reasonable student's educational environment and adversely affect the student's ability to participate in or benefit from the school's program on the basis of sex

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant. [66] For example, if a student, group of students, or a teacher regularly directs sexual comments toward a ***66103** particular student, a hostile environment may be created not only for the targeted student, but also for others who witness the conduct.

- The type, frequency, and duration of the conduct. In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial. [67] For instance, if a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, or takes place throughout the school, or if the taunts are made by a number of students. The more severe the conduct, the less the need to show a repetitive series of incidents, this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e g., attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks, it need not be as persistent to create a hostile environment Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment [68] On the other hand, conduct that is not severe will not create a hostile environment; e.g., a comment by one student to another student that she has a nice figure

Indeed, depending on the circumstances, this may not even be conduct of a sexual nature. [69] Similarly, because students date one another, a request for a date or a gift of flowers, even if unwelcome, would not create a hostile environment However, there may be circumstances in which repeated, unwelcome requests for dates or similar conduct could create a hostile environment. For example, a person, who has been refused previously, may request dates in an intimidating or threatening manner.

- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment. A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of and relationship between the alleged harasser and the subject or subjects of the harassment For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student. [70]

- The number of individuals involved. Sexual harassment may be committed by an individual or a group. In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be if done by a group Similarly, while harassment can be directed toward an individual or a group, [71] the effect of the conduct toward a group may vary, depending on the type of conduct and the context. For certain types of conduct, there may be "safety in numbers " For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.

- The age and sex of the alleged harasser and the subject or subjects of the harassment. For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student [72]

- The size of the school, location of the incidents, and context in which they occurred. Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus. Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers. [73] Harassing conduct in a personal or secluded area, such as a dormitory room or residence hall, can have a greater effect (e.g., be seen as more threatening) than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating. Each incident must be judged individually.

- Other incidents at the school. A series of incidents at the school, not involving the same students, could—taken together—create a hostile environment, even if each by itself would not be sufficient [74]

- Incidents of gender-based, but nonsexual harassment Acts of verbal, nonverbal or physical aggression, intimidation or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment [75]

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created

Welcomeness. In order for conduct of a sexual nature to be sexual harassment, it must be unwelcome Conduct is unwelcome if the student did not request or invite it and "regarded the conduct as undesirable or offensive." [76] Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome. [77] For example, a student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments The fact that a student may have accepted the conduct does not mean that he or she

welcomed it. [78] Also, the fact that a student willingly participated in conduct on one occasion does not prevent him or her from indicating that the same conduct has become unwelcome on a subsequent occasion. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome. [79]

If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, OCR will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.

Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority. For instance, because students may be encouraged to believe that a teacher has absolute authority over the operation of his or her classroom, a student may not object to a teacher's sexually harassing comments during class; however, this does not necessarily mean that the conduct was welcome. Instead, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or other retaliation.

In addition, OCR must consider particular issues of welcomeness if the alleged harassment relates to alleged "consensual" sexual relationships between a school's adult employees and its students If elementary students are involved, welcomeness will not be an issue: OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual. In cases involving older secondary students, subject to the presumption, [80] OCR will consider a number of factors in determining whether a school employee's sexual advances or other sexual conduct could be considered welcome. [81] In addition, OCR will consider these factors in all cases involving postsecondary students in making those determinations. [82] The factors include the following:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student

- Whether the student was legally or practically unable to consent to the sexual conduct in question. For example, a student's age could affect his or her ability to do so. Similarly, certain types of disabilities could affect a student's ability to do so.

If there is a dispute about whether harassment occurred or whether it was welcome—in a case in which it is appropriate to consider whether the conduct would be welcome—determinations should be made based on the totality of the circumstances. The following types of information may be helpful in resolving the dispute:

- Statements by any witnesses to the alleged incident.

- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser. For example, the level of *66104 detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth Another way to assess credibility is to see if corroborative evidence is lacking where it should logically exist However, the absence of witnesses may indicate only the unwillingness of others to step forward, perhaps due to fear of the harasser or a desire not to get involved.

- Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment; conversely, the student's claim will be weakened if he or she has been found to have made false allegations against other individuals.

- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment. For example, were there witnesses who saw the student immediately after the alleged incident who say that the student appeared to be upset? However, it is important to note that some students may respond to harassment in ways that do not manifest themselves right away, but may surface several days or weeks after the harassment For example, a student may initially show no signs of having been harassed, but several weeks after the harassment, there may be significant changes in the student's behavior, including difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school.

- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred. However, failure to immediately complain may merely reflect a fear of retaliation or a fear that the complainant may not be believed rather than that the alleged harassment did not occur.

- Other contemporaneous evidence For example, did the student claiming harassment write about the conduct and his or her reaction to it soon after it occurred (e g , in a diary or letter)? Did the student tell others (friends, parents) about the conduct (and his or her reaction to it) soon after it occurred?

Recipient's Response. Once a school has notice of possible sexual harassment of students—whether carried out by employees, other students, or third parties—it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action [83] As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. What constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances.

Response to Student or Parent Reports of Harassment; Response to Direct Observation of Harassment by a Responsible Employee. If a student or the parent of an elementary or secondary student provides information or complains about sexual harassment of the student, the school should initially discuss what actions the student or parent is seeking in response to the harassment. The school should explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works. If a responsible school employee has directly observed sexual harassment of a student, the school should contact the student who was harassed (or the parent, depending upon the age of the student), [84] explain that the school is responsible for taking steps to correct the harassment, and provide the same information described in the previous sentence

Regardless of whether the student who was harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf (including in cases involving direct observation by a responsible employee), the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. (Requests by the student who was harassed for confidentiality or for no action to be taken, responding to notice of harassment from other sources, and the components of a prompt and equitable grievance procedure are discussed in subsequent sections of this guidance.)

It may be appropriate for a school to take interim measures during the investigation of a complaint For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate. In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified. In all cases, schools should make every effort to prevent disclosure of the names of all parties involved, except to the extent necessary to carry out an investigation.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation.[85] Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.[86] A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.[87] In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g , by changing housing arrangements[88] or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate[89]

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student[90] For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, as discussed in the section on "Harassment by Teachers and Other Employees," the employee engaged in the harassment in the context of providing aid, benefits, or services to students. Because the school is responsible for the discriminatory denial or limitation of a benefit to the student, the school is responsible for taking appropriate corrective action, including remedying the effects of the harassment on the victim Thus, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling, or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment[91] and to ***66105** prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses.[92] At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.[93]

Requests by the Harassed Student for Confidentiality. The scope of a reasonable response also may depend upon whether a student, or parent of a minor student, reporting harassment asks that the student's name not be disclosed to the harasser or that nothing be done about the alleged harassment. In all cases, a school should discuss confidentiality standards and concerns with the complainant initially. The school should inform the student that the request may limit the school's ability to respond.

The school also should tell the student that Title IX prohibits retaliation and that, if he or she is afraid of reprisals from the alleged harasser, the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs. If the student continues to ask that his or her name not be revealed, the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students. Thus, for example, a reasonable response would not require disciplinary action against an alleged harasser if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information

At the same time, a school should evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The factors that a school may consider in this regard include the seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result. [94]

Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual complaint of harassment, other means may be available to address the harassment There are steps a recipient can take to limit the effects of the alleged harassment and prevent its recurrence without initiating formal action against the alleged harasser or revealing the identity of the complainant. Examples include conducting sexual harassment training for the school site or academic department where the problem occurred, taking a student survey concerning any problems with harassment, or implementing other systemic measures at the site or department where the alleged harassment has occurred.

In addition, by investigating the complaint to the extent possible—including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX—the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action. In instances affecting a number of students (for example, a report from a student that an instructor has repeatedly made sexually explicit remarks about his or her personal life in front of an entire class), an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even indirectly, the identity of the student who notified the school. Those steps can be very effective in preventing further harassment.

Response to Other Types of Notice. The previous two sections deal with situations in which a student or parent of a student who was harassed reports or complains of harassment or in which a responsible school employee directly observes sexual harassment of a student If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as from a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include the source and nature of the information, the seriousness of the alleged incident; the specificity of the information; the objectivity and credibility of the source of the report; whether any individuals can be identified who were subjected to the alleged harassment, and whether those individuals want to pursue the matter If, based on these factors, it is reasonable for the school to investigate and it can confirm the allegations, the considerations described in the previous sections concerning interim measures and appropriate responsive action will apply.

For example, if a parent visiting a school observes a student repeatedly harassing a group of female students and reports this to school officials, school personnel can speak with the female students to confirm whether that conduct has occurred and whether they view it as unwelcome. If the school determines that the conduct created a hostile environment, it can take reasonable, age-appropriate steps to address the situation. If on the other hand, the students in this example were to ask that their names not be disclosed or indicate that they do not want to pursue the matter, the considerations described in the previous section related to requests for confidentiality will shape the school's response.

In a contrasting example, a student newspaper at a large university may print an anonymous letter claiming that a professor is sexually harassing students in class on a daily basis, but the letter provides no clue as to the identity of the professor or

the department in which the conduct is allegedly taking place. Due to the anonymous source and lack of specificity of the information, a school would not reasonably be able to investigate and confirm these allegations. However, in response to the anonymous letter, the school could submit a letter or article to the newspaper reiterating its policy against sexual harassment, encouraging persons who believe that they have been sexually harassed to come forward, and explaining how its grievance procedures work.

Prevention A policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all students and employees understand the nature of sexual harassment and that the school will not tolerate it. Indeed, they might even bring conduct of a sexual nature to the school's attention so that the school can address it before it becomes sufficiently serious as to create a hostile environment. Further, training for administrators, teachers, and staff and age-appropriate classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond

Prompt and Equitable Grievance Procedures Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. [95] Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place [96]

A school's sex discrimination grievance procedures must apply to complaints of sex discrimination in the school's education programs and activities filed by students against school employees, other students, or third parties. [97] Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment Thus, if, because of the lack of a policy or procedure specifically addressing sexual harassment, students are unaware of what kind of conduct constitutes sexual harassment or that such conduct is prohibited sex discrimination, a school's general policy and procedures relating to sex discrimination complaints will not be considered effective [98]

OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, ***66106** including whether the procedures provide for—

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;

- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;

- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

- Designated and reasonably prompt timeframes for the major stages of the complaint process;

- Notice to the parties of the outcome of the complaint, [99] and

- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. [100]

Many schools also provide an opportunity to appeal the findings or remedy or both. In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry.

Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience. In addition, whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment During the investigation it is a good practice for schools to inform students who have alleged harassment about the status of the investigation on a periodic basis.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. Many schools ensure adequate notice to students by having copies of the procedures available at various locations throughout the school or campus; publishing the procedures as a separate document, including a summary of the procedures in major publications issued by the school, such as handbooks and catalogs for students, parents of elementary and secondary students, faculty, and staff; and identifying individuals who can explain how the procedures work.

A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. [101] The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated. [102] Because it is possible that an employee designated to handle Title IX complaints may himself or herself engage in harassment, a school may want to designate more than one employee to be responsible for handling complaints in order to ensure that students have an effective means of reporting harassment. [103] While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints. Coordination of recordkeeping (for instance, in a confidential log maintained by the Title IX coordinator) will also ensure that the school can and will resolve recurring problems and identify students or employees who have multiple complaints filed against them. [104] Finally, the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates. [105]

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. [106] OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a "prompt and equitable" resolution of the complaint.

In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact-gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly. [107] Similarly, schools are cautioned about using the results of insurance company investigations of sexual harassment allegations. The purpose of an insurance investigation is to assess liability under the insurance policy, and the applicable standards may well be different from those under Title IX. In addition, a school is not relieved of its responsibility to respond to a sexual harassment complaint filed under its grievance procedure by the fact that a complaint has been filed with OCR. [108]

Finally, a public school's employees may have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding. In both public and private schools, additional or separate rights may be created for employees or students by State law, institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to those accused of harassment. Indeed, procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant

First Amendment. In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. [109] Free speech rights apply in the classroom (e g., classroom lectures and discussions) [110] and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus; campus debates, school plays and other cultural events [111]; and student newspapers, journals, and other publications [112]). In addition, First Amendment rights apply to the speech of students and teachers. [113]

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. [114] In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program. [115]

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights. For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment. [116] As an example of the application of free speech rights to allegations of sexual harassment, consider the following·

Example 1 In a college level creative writing class, a professor's required reading list includes excerpts from literary classics that contain descriptions of explicit sexual conduct, including scenes that depict women *66107 in submissive and demeaning roles. The professor also assigns students to write their own materials, which are read in class. Some of the student essays contain sexually derogatory themes about women. Several female students complain to the Dean of Students that the materials and related classroom discussion have created a sexually hostile environment for women in the class. What must the school do in response?

Answer. Academic discourse in this example is protected by the First Amendment even if it is offensive to individuals Thus, Title IX would not require the school to discipline the professor or to censor the reading list or related class discussion.

Example 2· A group of male students repeatedly targets a female student for harassment during the bus ride home from school, including making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, on several occasions, attempting to follow her home off the bus. The female student and her parents complain to the principal that the male students' conduct has created a hostile environment for girls on the bus and that they fear for their daughter's safety. What must a school do in response?

Answer: Threatening and intimidating actions targeted at a particular student or group of students, even though they contain elements of speech, are not protected by the First Amendment. The school must take reasonable and appropriate actions against the students, including disciplinary action if necessary, to remedy the hostile environment and prevent future harassment

**Footnotes**

[1] This guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX 20 U.S.C. 1681 et seq.; 34 CFR part 106, subpart E If employees file Title IX sexual harassment complaints with OCR, the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604.

[2] 20 U.S.C. 1681; 34 CFR part 106.

[3] See, e.g , Davis v Monroe County Bd of Educ , 526 U S. 629, 649-50 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Pub. Sch , 503 U.S. 60, 75 (1992); S. REP. NO. 100-64, 100th Cong , 1st Sess. 14 (1987), Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (1997 guidance), 62 FR 12034 (1997).

[4] 20 U.S C. 1687 (codification of the amendment to Title IX regarding scope of jurisdiction, enacted by the Civil Rights Restoration Act of 1987). See 65 FR 26464 (May 5, 2000) (Department's proposed rulemaking to amend the Title IX regulations to incorporate the statutory definition of "program or activity").

[5] See also Shoreline School Dist , OCR Case No. 10-92-1002 (a teacher's patting a student on the arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); Dartmouth Public Schools, OCR Case No. 01-90-1058 (same as to contact between high school coach and students); San Francisco State University, OCR Case No. 09-94-2038 (same as to faculty advisor placing her arm around a graduate student's shoulder in posing for a picture); Analy Union High School Dist., OCR Case No. 09-92-1249 (same as to drama instructor who put his arms around both male and female students who confided in him)

[6] If a school contracts with persons or organizations to provide benefits, services, or opportunities to students as part of the school's program, and those persons or employees of those organizations sexually harass students, OCR will consider the harassing individual in the same manner that it considers the school's employees, as described in this guidance (See section on "Harassment by Teachers and Other Employees.") See Brown v. Hot, Sexy, and Safer Products, Inc., 68 F.3d 525, 529 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, if a student engages in sexual harassment as an employee of the school, OCR will consider the harassment under the standards described for employees. (See section on "Harassment by Teachers and Other Employees.") For example, OCR would consider it harassment by an employee if a student teaching assistant who is responsible for assigning grades in a course, i e., for providing aid, benefits, or services to students under the recipient's program, required a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

[7] Cf. John Does 1 v. Covington County Sch. Bd , 884 F Supp. 462, 464-65 (M D. Ala 1995) (male students alleging that a teacher sexually harassed and abused them stated cause of action under Title IX).

[8] Title IX and the regulations implementing it prohibit discrimination "on the basis of sex," they do not restrict sexual harassment to those circumstances in which the harasser only harasses members of the opposite sex. See 34 CFR 106.31. In Oncale v. Sundowner Offshore Services, Inc. the Supreme Court held unanimously that sex discrimination consisting of same-

sex sexual harassment can violate Title VII's prohibition against discrimination because of sex. 523 U S. 75, 82 (1998). The Supreme Court's holding in Oncale is consistent with OCR policy, originally stated in its 1997 guidance, that Title IX prohibits sexual harassment regardless of whether the harasser and the person being harassed are members of the same sex. 62 FR 12039. See Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8th Cir 1996) (female student's allegation of sexual harassment by female teacher sufficient to raise a claim under Title IX); Doe v. Petaluma, 830 F Supp. 1560, 1564-65, 1575 (N.D. Cal. 1996) (female junior high student alleging sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX), John Does 1, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by a male teacher ) It can also occur in certain situations if the harassment is directed at students of both sexes. Chiapuzo v. BLT Operating Corp., 826 F.Supp 1334, 1337 (D.Wyo 1993) (court found that if males and females were subject to harassment, but harassment was based on sex, it could violate Title VII); but see Holman v. Indiana, 211 F.3d 399, 405 (7th Cir. 2000) (if male and female both subjected to requests for sex, court found it could not violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee.) In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; e.g., pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in Chiapuzo, a supervisor made demeaning remarks to both partners of a married couple working for him, e.g., as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were based on sex in that they were made with an intent to demean each member of the couple because of his or her respective sex. 826 F.Supp. at 1337. See also Steiner v. Showboat Operating Co., 25 F 3d 1459, 1463-64 (9th Cir. 1994), cert denied, 115 S Ct. 733 (1995) (Title VII case); but see Holman, 211 F.3d at 405 (finding that if male and female both subjected to requests for sex, Title VII could not be violated).

[9] Nashoba Regional High School, OCR Case No. 01-92-1397. In Conejo Valley School Dist., OCR Case No. 09-93-1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment

[10] See Williamson v. A.G. Edwards & Sons, Inc., 876 F2d 69, 70 (8th Cir. 1989, cert. denied 493 U.S. 1089 (1990) (Title VII case), DeSantis v. Pacific Tel & Tel. Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979) (same); Blum v. Gulf Oil Corp , 597 F.2d 936, 938 (5th Cir. 1979) (same)

[11] It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority. See Nabozny v. Podlesny, 92 F.3d 446, 460 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in a ***66108** case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

[12] See Meritor Savings Bank, FSB v. Vinson, 477 U.S: 57, 65-66 (1986), Harris v. Forklift Systems Inc., 510 U.S 14, 22 (1993); see also Hicks v. Gates Rubber Co., 833 F 2d 1406, 1415 (10th Cir. 1987) (Title VII case; concluding that harassment based on sex may be discrimination whether or not it is sexual in nature); McKinney v. Dole, 765 F 2d 1129, 1138 (D.C. Cir. 1985) (Title VII case, physical, but nonsexual, assault could be sex-based harassment if shown to be unequal treatment that

would not have taken place but for the employee's sex); Cline v. General Electric Capital Auto Lease, Inc., 757 F.Supp. 923, 932-33 (N.D. Ill. 1991) (Title VII case).

[13] See Harris, 510 U.S. at 23; Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); see also Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir 1988) (Title VII case; affirming that harassment due to the employee's sex may be actionable even if the harassment is not sexual in nature); Hicks, 833 F.2d at 1415; Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls).

[14] Davis, 526 U.S. at 650 ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."); Franklin, 503 U.S at 75 ("Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' * * * We believe the same rule should apply when a teacher sexually harasses and abuses a student." (citation omitted))

OCR's longstanding interpretation of its regulations is that sexual harassment may constitute a violation. 34 CFR 106 31; See Sexual Harassment Guidance, 62 FR 12034 (1997) When Congress enacted the Civil Rights Restoration Act of 1987 to amend Title IX to restore institution-wide coverage over federally assisted education programs and activities, the legislative history indicated not only that Congress was aware that OCR interpreted its Title IX regulations to prohibit sexual harassment, but also that one of the reasons for passing the Restoration Act was to enable OCR to investigate and resolve cases involving allegations of sexual harassment. S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987) The examples of discrimination that Congress intended to be remedied by its statutory change included sexual harassment of students by professors, id. at 14, and these examples demonstrate congressional recognition that discrimination in violation of Title IX can be carried out by school employees who are providing aid, benefits, or services to students. Congress also intended that if discrimination occurred, recipients needed to implement effective remedies. S. REP NO. 64 at 5

[15] 34 CFR 106 4.

[16] These are the basic regulatory requirements 34 CFR 106.31(a)(b). Depending upon the facts, sexual harassment may also be prohibited by more specific regulatory prohibitions. For example, if a college financial aid director told a student that she would not get the student financial assistance for which she qualified unless she slept with him, that also would be covered by the regulatory provision prohibiting discrimination on the basis of sex in financial assistance, 34 CFR 106 37(a).

[17] 34 CFR 106.31(b)(1).

[18] 34 CFR 106.31(b)(2).

[19] 34 CFR 106.31(b)(3).

[20] 34 CFR 106.31(b)(4).

[21] 34 CFR 106.31(b)(6).

[22] 34 CFR 106.31(b)(7).

[23] 34 CFR 106.3(a).

[24] 34 CFR 106.9.

[25] 34 CFR 106.8(b)

[26] 34 CFR 106.8(a).

[27] Gebser, 524 U.S. at 281 ("Franklin * * * establishes that a school district can be held liable in damages [in an implied action under Title IX] in cases involving a teacher's sexual harassment of a student * * *."); 34 CFR 106 31; See 1997 Sexual Harassment Guidance, 62 FR 12034.

[28] For this reason, harassment of a student by a teacher is more likely than harassment by a fellow student to constitute the type of effective denial of equal access to educational benefits that can breach the requirements of Title IX. See Davis, 526 U.S. at 653

[29] 34 CFR 106.31(b). Cf. Gebser, 524 U.S. at 283-84 (Court recognized in an implied right of action for money damages for teacher sexual harassment of a student that the question of whether a violation of Title IX occurred is a separate question from the scope of appropriate remedies for a violation).

[30] See section on "Notice of Employee, Peer, or Third Party Harassment."

[31] See section on "Notice of Employee, Peer, or Third Party Harassment."

[32] See section on "Applicability of Title IX" for scope of coverage.

[33] Davis, 526 U S at 646.

[34] See section on "Notice of Employee, Peer, or Third Party Harassment."

[35] 34 CFR 106.31(b).

[36] 34 CFR 106.31(b).

[37] See section on "Notice of Employee, Peer, or Third Party Harassment."

[38] Cf. Davis, 526 U S. at 646

[39] 34 CFR 106.31(b).

[40] 34 CFR 106.31(b).

[41] Consistent with its obligation under Title IX to protect students, cf. Gebser, 524 U.S. at 287, OCR interprets its regulations to ensure that recipients take reasonable action to address, rather than neglect, reasonably obvious discrimination. Cf. Gebser, 524 U.S. at 287-88; Davis, 526 U.S. at 650 (actual notice standard for obtaining money damages in private lawsuit).

[42] Whether an employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and school practices and procedures, both formal and informal.

Although there is some overlap between individuals who are "responsible employees" for the purposes of receiving notice about alleged harassment as described in this guidance and individuals who are appropriate school officials with authority to address the alleged discrimination and take corrective action, and, thus, receive actual notice for the purposes of private lawsuits for money damages as specified by the Court in Gebser, 524 U.S at 290, and Davis, 526 U.S. at 642, the concept of responsible employee is broader That is, even if a responsible employee does not have the authority to address the discrimination and take corrective action, he or she does have the obligation to report it to appropriate school officials

[43] The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including complaint investigations. 34 CFR 106.8(a).

[44] 34 CFR 106.31. See Yates v. Avco Corp , 819 F.2d 630, 636 (6th Cir. 1987) (Title VII case); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (same).

[45] For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).

[46] Cf. Katz, 709 F.2d at 256 (finding that the employer "should have been aware of the problem both because of its pervasive character and because of [the employee's] specific complaints * * *"), Smolsky v. Consolidated Rail Corp., 780 F Supp 283, 293 (E.D. Pa. 1991), reconsideration denied, 785 F.Supp. 71 (E.D. Pa 1992) "where the harassment is apparent to all others in the work place, supervisors and coworkers, this may be sufficient to put the employer on notice of the sexual harassment" under Title VII); Jensen v. Eveleth Taconite Co., 824 F.Supp. 847, 887 (D.Minn. 1993) (Title VII case; "[s]exual harassment * * * was so *66109 pervasive that an inference of knowledge arises * * * The acts of sexual harassment detailed herein were too common and continuous to have escaped Eveleth Mines had its management been reasonably alert."); Cummings v. Walsh Construction Co., 561 F.Supp. 872, 878 (S.D. Ga. 1983) ("* * * allegations not only of the [employee] registering her complaints with her foreman * * * but also that sexual harassment was so widespread that defendant had constructive notice of it" under Title VII); but see Murray v. New York Univ College of Dentistry, 57 F.3d 243, 250-51 (2nd Cir. 1995) (concluding that other students' knowledge of the conduct was not enough to charge the school with notice, particularly because these students may not have been aware that the conduct was offensive or abusive).

[47] 34 CFR 106.9 and 106.8(b).

[48] 34 CFR 106.8(b) and 106.31(b).

[49] 34 CFR 106.9.

[50] 34 CFR 106.8(b)

[51] 34 CFR 106 31.

[52] 34 CFR 106 31 and 106.3. Gebser, 524 U.S. at 288 ("In the event of a violation, [under OCR's administrative enforcement scheme] a funding recipient may be required to take 'such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination ' § 106.3 ").

[53] 20 U S C. 1682 In the event that OCR determines that voluntary compliance cannot be secured, OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement.

[54] The terms quid pro quo and "hostile environment" sexual harassment do not appear in the Title IX statutory text or regulations, but were first used by the courts in the context of Title VII and then Title IX. See Meritor Savings Bank, 477 U.S. at 65 (finding that both quid pro quo and hostile environment claims are cognizable under Title VII), Burlington Industries, Inc. v. Ellereth, 524 U.S. 742, 752 (1998) "The principal significance of the distinction between [quid pro quo and hostile environment sexual harassment] is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive"). While Title VII agency principles are not applicable to a finding of liability for monetary damages for sexual harassment in a private lawsuit under Title IX, see Gebser, 524 U S. at 228, Title VII case law remains useful in determining conduct that constitutes sexual harassment under Title IX. Davis, 526 U.S. at 651

[55] See, e g , Davis, 526 U S. at 653 (alleged conduct of a sexual nature that would support a sexual harassment claim included verbal harassment and "numerous acts of objectively offensive touching," Franklin, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse), Meritor Savings Bank, 477 U.S. at 60-61 (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape, sufficient to raise hostile environment claim under Title VII); Harris, 510 U.S. at 20 (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII), Ellison v. Brady, 924 F.2d 872, 873-74, 880 (9th Cir. 1991) (allegations sufficient to state sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff), Lipsett v. University of Puerto Rico, 864 F 2d 881, 904-5 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); Kadiki v. Virginia Commonwealth University, 892 F.Supp. 746, 751 (E D. Va. 1995) (professor's spanking of university student may constitute sexual conduct under Title IX); Doe v Petaluma, 830 F.Supp. at 1564-65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); Denver School Dist. #2, OCR Case No. 08-92-1007 (same as to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); Nashoba Regional High School, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.)

[56] See note 6.

[57] 34 CFR 106 31. See Alexander v. Yale University, 459 F Supp 1, 4 (D Conn 1977), aff'd, 631 F 2d 178 (2nd Cir. 1980) (stating that a claim "that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education * * *"), Crandell v New York College, Osteopathic Medicine, 87 F.Supp.2d 304, 318 (S D.N.Y. 2000) (finding that allegations that a supervisory resident physician demanded that a student physician spend time with him and have lunch with him or receive a poor evaluation, in light of the totality of his alleged sexual comments and other inappropriate behavior, constituted a claim of quid pro quo harassment); Kadiki, 892 F Supp. at 752 (reexamination in a course conditioned

on a college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment) While recognizing the differences between students in schools and employees in the workplace, including age and other factors, quid pro quo harassment of students by their teachers or other school employees is analogous to harassment of employees by their supervisors where, as described in Ellerth, 524 U.S. at 753-54, 761-62, the employee suffers a tangible employment action.

[58] 34 CFR 106.31(b). See Davis, 526 U.S. at 650 (concluding that allegations of student-on-student sexual harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits" supports a claim for money damages in an implied right of action).

[59] In Harris, the Supreme Court explained the requirement for considering the "subjective perspective" when determining the existence of a hostile environment. The Court stated— "* * * if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 510 U.S. at 21-22.

[60] See Davis, 526 U.S. at 650 (conduct must be "objectively offensive" to trigger liability for money damages). See Oncale, 523 U S. at 81, in which the Court "emphasized * * * that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim's] position, considering 'all the circumstances,'" and citing Harris, 510 U.S. at 20, in which the Court indicated that a "reasonable person" standard should be used to determine whether sexual conduct constituted harassment This standard has been applied under Title VII to take into account the sex of the subject of the harassment, see, e g , Ellison, 924 F.2d at 878-79 (applying a "reasonable woman" standard to sexual harassment), and has been adapted to sexual harassment in education under Title IX, Patricia H. v. Berkeley Unified School Dist , 830 F.Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a "reasonable victim" standard and referring to OCR's use of it)

[61] See Davis, 526 U.S. at 651, citing both Oncale, 523 U S. at 82, and OCR's 1997 guidance (62 FR 12041-12042).

[62] Harris, 510 U.S. at 23.

[63] See, e.g., Davis, 526 U S. at 634 (as a result of the harassment, student's grades dropped and she wrote a suicide note); Doe v. Petaluma, 830 F.Supp. at 1566 (student so upset about harassment by other students that she was forced to transfer several times, including finally to a private school), Modesto City Schools, OCR Case No. 09-93-1391 (evidence showed that one girl's grades dropped while the harassment was occurring); Weaverville Elementary School, OCR Case No. 09-91-1116 (students left school due to the harassment). Compare with College of Alameda, OCR Case No. 09-90-2104 (student not in instructor's class and no evidence of any effect on student's educational benefits or service, so no hostile environment).

[64] Doe v. Petaluma, 830 F.Supp at 1566

[65] See Harris, 510 U.S. at 22 (holding that tangible harm is not required). In determining whether harm is sufficient, several factors are to be considered, including frequency, severity, whether the conduct was threatening or humiliating versus a mere offensive utterance, and whether it unreasonably interfered with work performance. No single factor is required; similarly, psychological harm, while relevant, is not required. See id

[66] See Waltman v. Int'l Paper Co., 875 F 2d 468, 477 (5th Cir. 1989) (Title VII case, holding that although not specifically directed at the plaintiff, sexually explicit graffiti on the walls was "relevant to her claim"); see also Hall, 842 F.2d at 1015 (evidence of sexual harassment directed at others is relevant to show hostile environment under Title VII).

[67] See, e g., Andrews, 895 F.2d at 1484 ("Harassment is pervasive when 'incidents of harassment occur either in concert or with *66110 regularity"'), Moylan v Maries County, 792 F.2d 746, 749 (8th Cir. 1986) (Title VII case).

[68] 34 CFR 106.31(b). See also statement of the U S. Equal Employment Opportunity Commission (EEOC): "The Commission will presume that the unwelcome, intentional touching of [an employee's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment " EEOC Policy Guidance on Current Issues of Sexual Harassment, 17. Barrett v. Omaha National Bank, 584 F.Supp. 22, 30 (D. Neb. 1983), aff'd, 726 F 2d 424 (8th Cir. 1984) (finding that hostile environment was created under Title VII by isolated events, i.e., occurring while traveling to and during a two-day conference, including the co-worker's talking to plaintiff about sexual activities and touching her in an offensive manner while they were inside a vehicle from which she could not escape).

[69] See also Ursuline College, OCR Case No. 05-91-2068 (a single incident of comments on a male student's muscles arguably not sexual; however, assuming they were, not severe enough to create a hostile environment)

[70] Davis, 526 U.S. at 653 ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less like to satisfy these requirements than is teacher student harassment."), Patricia H , 830 F. Supp. at 1297 (stating that the "grave disparity in age and power" between teacher and student contributed to the creation of a hostile environment), Summerfield Schools, OCR Case No. 15-92-1929 ("impact of the * * * remarks was heightened by the fact that the coach is an adult in a position of authority"); cf. Doe v. Taylor I S D., 15 F.3d 443, 460 (5th Cir. 1994) (Sec 1983 case, taking into consideration the influence that the teacher had over the student by virtue of his position of authority to find that a sexual relationship between a high school teacher and a student was unlawful).

[71] See, e g., McKinney, 765 F.2d at 1138-49; Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486, 1522 (M.D. Fla. 1991).

[72] Cf Patricia H., 830 F.Supp at 1297

[73] See, e g , Barrett, 584 F.Supp. at 30 (finding harassment occurring in a car from which the victim could not escape particularly severe).

[74] See Hall, 842 F.2d at 1015 (stating that "evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment") (citing Hicks, 833 F.2d, 1415-16) Cf. Midwest City-Del City Public Schools, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school shortly before incidents in complaint, a number of which involved the same student involved in the complaint).

[75] In addition, incidents of racial or national origin harassment directed at a particular individual may also be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment. Hicks, 833 F.2d at 1416; Jefferies v. Harris County Community Action Ass'n, 615 F 2d 1025, 1032 (5th Cir. 1980) (Title VII case).

[76] Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (Title VII case).

[77] See Meritor Savings Bank, 477 U.S. at 68. "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. * * * The correct inquiry is whether [the subject of the harassment] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

[78] Lipsett, 864 F.2d at 898 (while, in some instances, a person may have the responsibility for telling the harasser "directly" that the conduct is unwelcome, in other cases a "consistent failure to respond to suggestive comments or gestures may be sufficient.

* * *"), Danna v. New York Tel. Co., 752 F.Supp. 594, 612 (despite a female employee's own foul language and participation in graffiti writing, her complaints to management indicated that the harassment was not welcome); see also Carr v. Allison Gas Turbine Div. GMC., 32 F.3d 1007, 1011 (7th Cir 1994) (Title VII case; finding that cursing and dirty jokes by a female employee did not show that she welcomed the sexual harassment, given her frequent complaints about it: "Even if * * * [the employee's] testimony that she talked and acted as she did [only] in an effort to be one of the boys is * * * discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct * * * The asymmetry of positions must be considered. She was one woman; they were many men. Her use of [vulgar] terms * * * could not be deeply threatening.* * *").

[79] See Reed v. Shepard, 939 F.2d 484, 486-87, 491-92 (7th Cir. 1991) (no harassment found under Title VII in a case in which a female employee not only tolerated, but also instigated the suggestive joking activities about which she was now complaining), Weinsheimer v. Rockwell Int'l Corp , 754 F.Supp. 1559, 1563-64 (M D. Fla. 1990) (same, in case in which general shop banter was full of vulgarity and sexual innuendo by men and women alike, and plaintiff contributed her share to this atmosphere ) However, even if a student participates in the sexual banter, OCR may in certain circumstances find that the conduct was nevertheless unwelcome if, for example, a teacher took an active role in the sexual banter and a student reasonably perceived that the teacher expected him or her to participate.

[80] The school bears the burden of rebutting the presumption.

[81] Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees

[82] See note 81.

[83] Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.

[84] In some situations, for example, if a playground supervisor observes a young student repeatedly engaging in conduct toward other students that is clearly unacceptable under the school's policies, it may be appropriate for the school to intervene without contacting the other students It still may be necessary for the school to talk with the students (and parents of elementary and secondary students) afterwards, e.g., to determine the extent of the harassment and how it affected them.

[85] Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (employers should take corrective and preventive measures under Title VII); accord, Jones v. Flagship Int'l, 793 F 2d 714, 719-720 (5th Cir. 1986) (employer should take prompt remedial action under Title VII).

[86] See Waltman, 875 F 2d at 479 (appropriateness of employer's remedial action under Title VII will depend on the "severity and persistence of the harassment and the effectiveness of any initial remedial steps"); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987) (Title VII case, holding that a company's quick decision to remove the harasser from the victim was adequate remedial action).

[87] See Intlekofer v. Turnage, 973 F.2d 773, 779-780 (9th Cir. 1992) (Title VII case) (holding that the employer's response was insufficient and that more severe disciplinary action was necessary in situations in which counseling, separating the parties, and warnings of possible discipline were ineffective in ending the harassing behavior)

[88] Offering assistance in changing living arrangements is one of the actions required of colleges and universities by the Campus Security Act in cases of rape and sexual assault. See 20 U.S.C. 1092(f).

[89] See section on "Harassment by Other Students or Third Parties."

[90] University of California at Santa Cruz, OCR Case No. 09-93-2141 (extensive individual and group counseling); Eden Prairie Schools, Dist. #272, OCR Case No. 05-92-1174 (counseling).

[91] Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995).

[92] 34 CFR 106.8(b) and 106.71, incorporating by reference 34 CFR 100 7(e). The Title IX regulations prohibit intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.

[93] Tacoma School Dist. No. 10, OCR Case No 10-94-1079 (due to the large number of students harassed by an employee, the extended period of time over which the harassment occurred, and the failure of several of the students to report the harassment, the school committed as part of *66111 corrective action plan to providing training for students); Los Medanos College, OCR Case No. 09-84-2092 (as part of corrective action plan, school committed to providing sexual harassment seminar for campus employees); Sacramento City Unified School Dist., OCR Case No. 09-83-1063 (same as to workshops for management and administrative personnel and in-service training for non-management personnel).

[94] In addition, if information about the incident is contained in an "education record" of the student alleging the harassment, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, the school should consider whether FERPA would prohibit the school from disclosing information without the student's consent. Id. In evaluating whether FERPA would limit disclosure, the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

[95] 34 CFR 106.8(b). This requirement has been part of the Title IX regulations since their inception in 1975 Thus, schools have been required to have these procedures in place since that time. At the elementary and secondary level, this responsibility generally lies with the school district. At the postsecondary level, there may be a procedure for a particular campus or college or for an entire university system.

[96] Fenton Community High School Dist #100, OCR Case 05-92-1104.

[97] While a school is required to have a grievance procedure under which complaints of sex discrimination (including sexual harassment) can be filed, the same procedure may also be used to address other forms of discrimination.

[98] See generally Meritor, 477 U.S. at 72-73 (holding that "mere existence of a grievance procedure" for discrimination does not shield an employer from a sexual harassment claim).

[99] The Family Educational Rights and Privacy Act (FERPA) does not prohibit a student from learning the outcome of her complaint, i e , whether the complaint was found to be credible and whether harassment was found to have occurred. It is the Department's current position under FERPA that a school cannot release information to a complainant regarding disciplinary action imposed on a student found guilty of harassment if that information is contained in a student's education record unless—(1) the information directly relates to the complainant (e g , an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. See note 94. If the alleged harasser is a teacher, administrator, or other non-student employee, FERPA would not limit the school's ability to inform the complainant of any disciplinary action taken.

[100] The section in the guidance on "Recipient's Response" provides examples of reasonable and appropriate corrective action.

[101] 34 CFR 106.8(a).

[102] Id.

[103] See Meritor, 477 U.S. at 72-73

[104] University of California, Santa Cruz, OCR Case No. 09-93-2131. This is true for formal as well as informal complaints. See University of Maine at Machias, OCR Case No. 01-94-6001 (school's new procedures not found in violation of Title IX in part because they require written records for informal as well as formal resolutions) These records need not be kept in a student's or employee's individual file, but instead may be kept in a central confidential location.

[105] For example, in Cape Cod Community College, OCR Case No 01-93-2047, the College was found to have violated Title IX in part because the person identified by the school as the Title IX coordinator was unfamiliar with Title IX, had no training, and did not even realize he was the coordinator

[106] Indeed, in University of Maine at Machias, OCR Case No. 01-94-6001, OCR found the school's procedures to be inadequate because only formal complaints were investigated While a school isn't required to have an established procedure for resolving informal complaints, they nevertheless must be addressed in some way. However, if there are indications that the same individual may be harassing others, then it may not be appropriate to resolve an informal complaint without taking steps to address the entire situation.

[107] Academy School Dist No 20, OCR Case No. 08-93-1023 (school's response determined to be insufficient in a case in which it stopped its investigation after complaint filed with police); Mills Public School Dist , OCR Case No 01-93-1123, (not sufficient for school to wait until end of police investigation)

[108] Cf. EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424 (7th Cir. 1992) (Title VII case), cert. denied, 506 U.S. 906 (1992)

[109] The First Amendment applies to entities and individuals that are State actors The receipt of Federal funds by private schools does not directly subject those schools to the U S. Constitution See Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982). However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment.

[110] See, e g , George Mason University, OCR Case No. 03-94-2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment), Portland School Dist. 1J, OCR Case No. 10-94-1117 (reading teacher's choice to substitute a less offensive term for a racial slur when reading an historical novel aloud in class constituted an academic decision on presentation of curriculum, not racial harassment)

[111] See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir 1993) (fraternity skit in which white male student dressed as an offensive caricature of a black female constituted student expression).

[112] See Florida Agricultural and Mechanical University, OCR Case No 04-92-2054 (no discrimination in case in which campus newspaper, which welcomed individual opinions of all sorts, printed article expressing one student's viewpoint on white students on campus )

[113] Tinker v. Des Moines Indep. Community Sch. Dist , 393 U.S. 503, 506 (1969) (neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gates); Cf. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996) (holding that a college professor could not be punished for his longstanding teaching methods, which included discussion of controversial subjects such as obscenity and consensual sex with children, under an unconstitutionally vague sexual harassment policy), George Mason University, OCR Case No. 03-94-2086 (law professor's use of a racially derogatory word, as part of an instructional hypothetical regarding verbal torts, did not constitute racial harassment )

[114] See, e g., University of Illinois, OCR Case No. 05-94-2104 (fact that university's use of Native American symbols was offensive to some Native American students and employees was not dispositive, in and of itself, in assessing a racially hostile environment claim under Title VI.)

[115] See Meritor, 477 U.S. at 67 (the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficent degree to violate Title VII), quoting Henson, 682 F.2d at 904; cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citing with approval EEOC's sexual harassment guidelines).

[116] Compare Bethel School Dist. No. 403 v. Fraser, 478 U S. 675, 685 (1986) (Court upheld discipline of high school student for making lewd speech to student assembly, noting that "[t]he undoubted freedom to advocate unpopular and controversial issues in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior "), with Iota Xi, 993 F 2d 386 (holding that, notwithstanding a university's mission to create a culturally diverse learning environment and its substantial interest in maintaining a campus free of discrimination, it could not punish students who engaged in an offensive skit with racist and sexist overtones).

**Appendix B**

This Appendix B provides the text, except as specifically noted, of our analysis of comments received from interested parties in response to a draft of the 1997 guidance, and our response to those comments (62 FR 12035). This text is included for the convenience of interested persons who may not be familiar with the issues that were resolved in 1997. As specifically noted, we are not including the 1997 discussion regarding a conflict among the Federal circuit courts because that conflict was resolved by the Supreme Court in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). Also, where the 1997 text uses the terms "liable" or "liability," the reader is directed to consult the discussion in the SUPPLEMENTARY INFORMATION section of this notice under the heading Title IX Compliance Standard, which explains the ***66112** scope of the proposed revised guidance and why these terms are not used in the proposed revised guidance

**Analysis of Comments and Changes**

In response to the Assistant Secretary's invitations to comment, OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance Many commenters stated that the guidance documents provided comprehensive, clear, and useful information to schools. For instance, one commenter stated that the Peer Guidance was "a godsend * * * in one convenient place [it provides] the clear implications of the statutes, regulations, and case law." Another commenter stated that the Guidance "will assist universities * * * in maintaining a harassment-free educational environment."

Commenters also provided many specific suggestions and examples regarding how the final Guidance could be more complete and clearer. Many of these suggested changes have been incorporated into the Guidance.

The preamble discusses recurring and significant recommendations regarding the clarity and completeness of the document. While the invitations to comment on the Peer Guidance and Employee Guidance did not request substantive comments regarding OCR's longstanding policy and practice in the area of sexual harassment, some commenters did provide these comments. In instances in which OCR could provide additional useful information to readers related to these comments, it has done so in the preamble. Comments are grouped by subject and are discussed in the following sections.

**The Need for Additional Guidance**

Comments: Many commenters agreed that a document combining the Peer Guidance and the Employee Guidance would provide more clarity to schools. Commenters disagreed, however, regarding whether, and what type of, additional information is needed to enhance schools' understanding of their legal obligations under Title IX. Some commenters asked for more detailed analysis regarding the applicable legal standards, including hard and fast rules for determining what is harassment and how a school should respond. Other commenters, by contrast, found OCR's guidance documents, including the extensive legal citations, to be too detailed and "legalistic." They expressed a need for a document that is simpler and more accessible to teachers, parents, school administrators, and others who need to know how to recognize, report, or respond to sexual harassment.

Discussion: As the Guidance makes clear, it is impossible to provide hard and fast rules applicable to all instances of sexual harassment. Instead, the Guidance provides factors to help schools make appropriate judgments.

In response to concerns for more analysis of the legal standards, OCR has provided additional examples in the Guidance to illustrate how the Title IX legal standards may apply in particular cases. It is important to remember that examples are just that; they do not cover all the types of situations that may arise. Moreover, they may not illustrate the only way to respond to sexual harassment of students because there is often no one right way to respond.

OCR also believes that there is a legitimate concern that school administrators, teachers, students, and parents need an accessible document to assist them in recognizing and appropriately responding to sexual harassment Accordingly, OCR has developed, in addition to the final Guidance, a pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. The pamphlet includes information from the Guidance that would be most useful to these groups as they confront issues of sexual harassment. Concurrent with the issuance of this Guidance, the pamphlet will be issued with copies available from all OCR offices and an electronic posting on OCR's website. For a copy of the pamphlet, individuals may call OCR's Customer Service Team at [(202) 205-5557] or toll-free 1-800-421-3481. Copies will also be available from all OCR enforcement offices, and the pamphlet will be posted on OCR's site on the Internet at URL http // www ed.gov/offices/OCR/ocrpubs.html

**Additional Guidance on the First Amendment**

Comments: Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX's prohibition of sexual harassment Several of these commenters wanted OCR to announce hard and fast rules in this area, although commenters disagreed on what those rules should be. For instance, one commenter requested that OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other commenters requested that OCR include specific examples regarding the application of free speech rights.

Discussion: As the documents published for comment indicated, the resolution of cases involving potential First Amendment issues is highly fact- and context-dependent. Thus, hard and fast rules are not appropriate.

However, in order to respond to concerns that schools need assistance in making these determinations, OCR has provided additional examples in the Guidance regarding the application of the First Amendment principles discussed there.

**Application of Guidance to Harassment by Third Parties**

Comments: Several commenters stated that it was unclear whether the Guidance applies if a student alleges harassment by a third party, i.e., by someone who is not an employee or student at the school.

Discussion: The Guidance clarifies that the principles in the Guidance apply to situations in which, for example, a student alleges that harassment by a visiting professional speaker or members of a visiting athletic team created a sexually hostile environment. The Peer Guidance did, in fact, discuss the standards applicable to the latter situation in which students from another school harassed the school's students.

The applicable standards have not changed, but the final Guidance clarifies that the same standards also apply if adults who are not employees or agents of the school engage in harassment of students.

**Application of Guidance to Harassment Based on Sexual Orientation**

Comments Several commenters indicated that, in light of OCR's stated policy that Title IX's prohibition against sexual harassment applies regardless of the sex of the harassed student or of the sex of the alleged harasser, the Guidance was confusing regarding the statement that Title IX does not apply to discrimination on the basis of sexual orientation.

Discussion· The Guidance has been clarified to indicate that if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian If, for example, harassing conduct of a sexual nature is directed at gay or lesbian students, it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students. The Guidance provides examples to illustrate the difference between this type of conduct, which may be prohibited by Title IX, and conduct constituting discrimination on the basis of sexual orientation, which is not prohibited by Title IX. The Guidance also indicates that some State or local laws or other Federal authority may prohibit discrimination on the basis of sexual orientation.

**The Effect on the Guidance of Conflicting Federal Court Decisions**

[The text presented in the 1997 document under this heading (62 FR 12036) is not included here because it became outdated when, following the issuance of the 1997 guidance, the conflict among the circuit courts was resolved by the Supreme Court's decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).]

**Notice**

Comments: Several commenters recommended that additional guidance be provided regarding the types of employees through which a school can receive notice of sexual harassment. Commenters disagreed, however, on who should be able to receive notice. For instance, some commenters stated that OCR should find that a school has received notice only if "managerial" employees, "designated" employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.

Discussion: The Guidance states that a school has actual notice of sexual harassment if an agent or responsible employee of the school receives notice An exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or ***66113** responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student. Thus, the Guidance gives examples of the types of employees that can receive notice of harassment. In this regard, it is important for schools to recognize that the Guidance does not necessarily require that any employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment

or prevent its recurrence. An employee may be required only to report the harassment to other school officials who have the responsibility to take appropriate action.

OCR does not agree with those commenters who recommend that a school can receive notice only through managerial or designated employees For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration.

Comments Several commenters stated that constructive notice, or the "should have known" standard, puts schools in the untenable position of constantly monitoring students and employees to seek out potential harassers.

Discussion· Constructive notice is relevant only if a school's liability depends on notice and conduct has occurred that is sufficient to trigger the school's obligation to respond. As the examples in the Guidance indicate, constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.

**Remedying the Effects of Harassment on Students**

Comments. Several commenters expressed concern regarding the Guidance's statement that schools may be required to pay for professional counseling and other services necessary to remedy the effects of harassment on students. Some comments indicated confusion over the circumstances under which the responsibility for those costs would exist and concern over the financial responsibility that would be created. Others stated that schools should not be liable for these costs if they have taken appropriate responsive action to eliminate the harassing environment, or if the harassers are non-employees

Discussion: The final Guidance provides additional clarification regarding when a school may be required to remedy the effects on those who have been subject to harassment. For instance, if a teacher engages in quid pro quo harassment against a student, a school is liable under Title IX for the conduct and its effects. Thus, appropriate corrective action could include providing counseling services to the harassed student or paying other costs necessary to remedy the effects of the teacher's harassment. On the other hand, if a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, e g , in cases of peer harassment, the extent of a school's liability for remedying the effects of the harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services.

**Confidentiality**

Comments: Many commenters recommended additional clarification regarding how schools should respond if a harassed student requests that his or her name not be disclosed. Some commenters believe that, particularly in the elementary and secondary school arena, remedying harassment must be the school's first priority, even if that action results in a breach of a request for confidentiality. These commenters were concerned that, by honoring requests for confidentiality, schools would not be able to take effective action to remedy harassment Other commenters believe that if requests for confidentiality are not honored, students may be discouraged from reporting harassment. These commenters, therefore, argue that declining to honor these requests would be less effective in preventing harassment than taking whatever steps are possible to remedy harassment, while maintaining a victim's confidentiality. Finally, some commenters were concerned that withholding the name of the victim of harassment would interfere with the due process rights of the accused.

Discussion: The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment (The Guidance also notes that schools should consider whether the Family Educational Rights and Privacy Act (FERPA) would prohibit a school from disclosing information from a student's education record without the consent of the student alleging harassment.) In addition, OCR has provided clarification by describing factors schools should consider in making these determinations These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved. These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.

The Guidance also has been clarified to acknowledge that, because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser. The Guidance informs schools that, in all cases, they should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out a thorough investigation

**FERPA**

Comments Several commenters stated that the Department should change its position that FERPA could prevent a school from informing a complainant of the sanction or discipline imposed on a student found guilty of harassment Some commenters argued that information regarding the outcome of a sexual harassment complaint is not an education record covered by FERPA. Other commenters argued alternatively that any information regarding the outcome of the proceedings is "related to" the complainant and, therefore, the information can be disclosed to him or her consistent with FERPA. In addition, some commenters asked for clarification that FERPA does not limit the due process rights of a teacher who is accused of harassment to be informed of the name of the student who has alleged harassment.

Discussion. As these comments indicate, the interplay of FERPA and Title IX raises complex and difficult issues. Regarding requests for clarification on the interplay of FERPA and the rights of an accused employee, the Guidance clarifies that the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

Regarding whether FERPA prohibits the disclosure of any disciplinary action taken against a student found guilty of harassment, it is the Department's current position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless—(1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or sex offense in a postsecondary institution However, in light of the comments received on this issue, the Department has determined that its position regarding the application of FERPA to records and information related to sexual harassment needs further consideration Accordingly, the section on "Notice of Outcome and FERPA" has been removed from the Guidance. Additional guidance on FERPA will be forthcoming

**Does Title IX Require Schools to Have a Sexual Harassment Policy**

Comments· Several commenters requested additional clarity regarding whether Title IX requires schools to have a policy explicitly ***66114** prohibiting sexual harassment or to have grievance procedures specifically intended to handle sexual harassment complaints, or both

Discussion: Title IX requires a recipient of Federal funds to notify students and parents of elementary and secondary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints Sexual harassment can be a form of sexual discrimination. The Guidance clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does

not have to have a policy and procedure specifically addressing sexual harassment, as long as its nondiscrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. OCR has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school That awareness, in turn, can be a key element in preventing sexual harassment.

[FR Doc. 00-27910 Filed 11-1-00, 8:45 am]

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Footnotes

1 It is the position of the United States Government that the standards set out in OCR's guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief See brief of the United States as Amicus Curiae in Davis v. Monroe County.

2 This did not mean that, when the school only became aware of this type of harassment after it occurred, the school was at risk of losing its Federal funding solely because the harassing conduct had occurred As required by the statute, OCR always provides schools with the opportunity to take reasonable steps to end the harassment, prevent its recurrence, and remedy the effects of the harassment once the school learns about the harassment—either through a student complaint, notice from OCR, or other means discussed in the guidance under "Notice of Employee, Peer, or Third Party Harassment " This issue is discussed further in the section of the proposed revised guidance entitled "OCR Case Resolution "

FN3 As discussed in part II of this notice regarding the definition of harassment, the Supreme Court's distinction between Title IX and Title VII is limited to liability standards The Title VII law continues to be useful in determining what conduct constitutes discrimination on the basis of sex under Title IX

FN4 34 CFR 106.3 Several days after the Gebser decision, the Court handed down two decisions in Title VII sexual harassment cases. Burlington Industries, Inc. v. Ellerth, 524 U S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). These cases affirmed that under Title VII agency principles, employers are liable in monetary damages for the acts of their supervisors who sexually harass subordinate employees. The Court also held that if the victim does not suffer a tangible, adverse employment action as a result of the harassment, the employer can assert an affirmative defense if it can show both—(1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of these preventative or corrective opportunities provided by the employer or to avoid harm otherwise. These decisions do not affect OCR standards for several reasons. The Court in Gebser was clear that its liability analysis under Title VII agency law does not apply to Title IX, nor, more generally, do standards for private monetary relief apply to OCR's administrative enforcement of the civil rights laws Moreover, whether or not the victim of harassment uses available grievance procedures is different in the school context where the degree of influence of the employee harasser and the age of the student may prevent effective use of grievance procedures. Finally, the administrative enforcement process itself makes this type of affirmative defense inapplicable. As is discussed in more detail in the section of the guidance entitled "OCR Case Resolution," if an OCR investigation reveals that a school has taken all appropriate, timely corrective action in response to information about sexual harassment by its employees—whether it learned about the harassment from the victim, from OCR, or some other way—OCR will consider the case resolved and will take no further action against the school

5 Title IX covers all of the operations of federally assisted educational institutions and entities (20 U S C. 1687) The guidance addresses harassment that occurs in education programs and activities covered by Title IX and, thus, assumes in all cases that the harassment occurs in connection with the academic, educational, extracurricular, athletic, and other programs of the school For more information about the scope of coverage, see 65 FR 26426 (May 5, 2000).

6 In fact, the cites to Title VII cases by the Davis Court throughout its discussion of actionable harassment under Title IX indicate that the Court did not intend to change the definition of sexual harassment but that the Court did intend that Title VII law continue to be relevant in determining what constitutes sexual harassment under title IX

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2011 WL 1258104
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

John DOE, Mary Doe, and James Doe, Plaintiffs
v.
The UNIVERSITY OF the SOUTH, Defendant.

No. 4:09–cv–62. | March 31, 2011.

**Attorneys and Law Firms**

Charles B. Wayne, Elisha A. King, DLA Piper LLP, Washington, DC, Michael R. Campbell, Campbell & Campbell, Chattanooga, TN, for Plaintiffs.

Arthur P. Brock, John B. Bennett, Spears, Moore, Rebman & Williams, David A. Love, Rosemarie L. Bryan, Chambliss, Bahner & Stophel, PC, Chattanooga, TN, for Defendant.

**Opinion**

***MEMORANDUM AND ORDER***

HARRY S. MATTICE, JR., District Judge.

***1** Presently before the Court are Defendant's Motion for Summary Judgment [Court Doc. 76] ("MSJ") and Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 77] ("MPSJ"), both filed on July 9, 2010.

In their motion, Plaintiffs argue that Defendant's sexual assault policies and procedures constituted a contract between the University and John Doe and, because the University repeatedly violated its own procedures in Doe's case, John Doe is entitled to an order granting summary judgment on his breach of contract claim (Count I).

Defendant, on the other hand, argues that, because it "substantially complied" with its written sexual assault policies and procedures and because those procedures were fair and reasonable as applied to John Doe, it is entitled to an order granting summary judgment and dismissing John Doe's contractual and quasi-contractual claims (Counts I, II, and XII). Defendant also argues that, as it owed no duty to James and Mary Doe and, to the extent it owed any duty to John Doe, it satisfied its obligations by substantially complying with its own procedure, the negligence claims (Counts V–IX) likewise should be dismissed. Finally, Defendant argues none of its behavior was "outrageous" as a matter of law, and thus the infliction of emotional distress claims (Count IX–XI) must also be dismissed, resulting in the dismissal of the case as a whole.

On July 30, 2010, Plaintiffs filed their response to Defendant's Motion for Summary Judgment [Court Doc. 86] ("Pls.' MSJ Respon."), and Defendants filed their response to Plaintiff's Motion for Partial Summary Judgment [Court Doc. 87] ("Def.'s MPSJ Respon.") On August 6, 2010, Defendant filed its reply regarding its Motion for Summary Judgment [Court Doc. 91] ("MSJ Reply"), and Plaintiffs filed their reply regarding their Motion for Partial Summary Judgment [Court Doc. 90] ("MPSJ Reply").

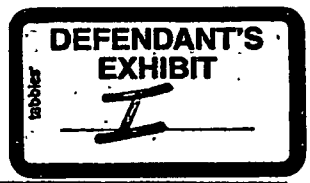
On August 16, 2010, Defendant filed a Motion to Supplement Briefing [Court Doc. 92] with the authority of *Flowers v. Metro. Baptist Schs.*, 1997 WL 330644 (Tenn.Ct.App. June 18, 1997). On August 18, 2010, Plaintiffs filed a response [Court Doc. 93] objecting to Defendant's Motion to Supplement.

On that same day, August 18, 2010, Plaintiffs filed a Supplemental Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment [Court Doc. 94], bringing to the Court's attention certain events occurring after their reply brief was filed. On August 25, 2010, Defendant filed its Response to Plaintiffs' Supplemental Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment [Court Doc. 98].

Finally, associated with some of the substantive motions enumerated above Defendant also filed two motions for leave to file certain exhibits and certain portions of its memoranda under seal, one [Court Doc. 78] in relation to its Motion for Summary Judgment on July 9, 2010, and the other [Court Doc. 88] in relation to its Response to Plaintiffs' Motion for Partial Summary Judgment, on July 30, 2010.

***2** For the reasons explained below, Defendant's Motion for Summary Judgment [Court Doc. 76] will be **GRANTED IN PART** and **DENIED IN PART,** Plaintiffs' Motion for Partial Summary Judgment will be **DENIED,** and Defendant's Motion to Supplement Briefing [Court Doc. 92] will be **DENIED.**

**I. LEGAL STANDARD**



Federal Rule of Civil Procedure 56 permits a party to move for summary judgment—and the Court to grant summary judgment—"if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A party asserting the presence or absence of genuine issues of material facts must support its position by "citing to ... materials in the record, including depositions, documents, ... affidavits or declarations ... or ... showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* ., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir.2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may bear this burden by either producing evidence that demonstrates the absence of a genuine issue of material fact, or by simply " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. To refute such a showing, the nonmoving party may not simply rest on its pleadings. *Behrens v Pelletier*, 516 U.S. 299, 309, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *see Anderson*, 477 U.S. at 249. The nonmoving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Celotex*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McLean v. Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir.2000).

The Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 248–49; *Nat'l Satellite Sports*, 253 F.3d at 907. Such a determination requires that the Court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Anderson*, 477 U.S. at 254. Thus, if the plaintiff must ultimately prove his case at trial by a preponderance of the evidence, the Court must, on a motion for summary judgment, determine whether a jury could reasonably find by a preponderance of the evidence that the plaintiff's factual contentions are true. *See id.* If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994).

## II. FACTUAL BACKGROUND

*3 As both the parties and the Court, in its October 13, 2009 Order Granting Defendant's Motion for Partial Summary Judgment [Court Doc. 34], have extensively covered the factual background of this case, in this Memorandum and Order the Court will provide limited factual exposition and will instead highlight a few particularly relevant events or factual disputes.

This action arises out of an early morning August 30, 2008 incident, after which a female university student (Complainant) accused Plaintiff John Doe of sexual assault. (Court Doc. 1, Compl. ¶¶ 31–32, 53, 62.) Later that morning, Complainant reported the incident to the Sewanee police, who notified the Dean of Students, Eric Hartman, who in turn told the police to notify Dean Mary Beth Walker (now Bankson). (Court Doc. 80, Unredacted Copy of Def.'s Mem. in Supp. of Def's MSJ Filed Under Seal at 3.) ("Def.'s MSJ Mem.") Complainant kept in contact with Dean Bankson and, on September 16, 2008, formally notified Dean Hartman that she would like to make a formal charge of sexual assault against Plaintiff John Doe in relation to the August 30 incident. That day, Dean Hartman appointed Dean Alexander Bruce as investigator.

The next day, September 17, 2008, Dean Hartman left a message that Doe should see him immediately, but Plaintiff did not receive that message until that evening and thus did not meet with Dean Hartman until September 18, 2008 at 10:00 a.m. (Court Doc. 81, Pls.' Mem. in Supp. of MPSJ ¶¶ 23–24) ("Pls.' MPSJ Mem.") At that meeting, Dean Hartman gave Plaintiff the "Faculty Discipline Committee Notification Report," which notified Doe (in its entirety):

[*John Doe* ], you have been accused of *Sexual Assault—Category I.* as a result we request that you appear before the Discipline Committee on *September 19* at *2:00 p.m.* in the Regents' Room.

Witness(es): *Officer Marie Gilliam [now Eldridge], Officer Brian Wiley, [male witness # 1—John Doe's friend], [male witness # 2—John Doe's roommate].*

Where the Infraction Occurred: *Gorgas Hall.*

Date and Time of the Occurrence: *August 29, 2008*

Other Information: *[blank in report]*

Source of Information: *Statements.*

Has the accused ever appeared before the Discipline Committee or been. subject to discipline resulting from violation or University Policy: *No.*

(Court Doc 81–11, Ex. 11 to Pls.' MPSJ Mem.) (underlining added to indicate areas filled in by Dean Hartman and with the identities of the student witnesses obscured.)

In accordance with that notice, at 2:00 p.m. the next day, September 19, 2008, Dean Hartman and three members of Faculty Discipline Committee ("FDC")—consisting of Helen Bateman, Ph.D., a psychologist; John Shibata, Ph.D., a chemist; and Mark Preslar, Ph.D., a linguist,—conducted the disciplinary hearing, found that Doe was guilty of Category 1 Sexual Assault and recommended that result to Dean Hartman. (Def.'s MSJ at 14; Pls.' MPSJ ¶¶ 54, 71.) After this finding that he had committed sexual assault in violation of the University's Sexual Assault Policy and Procedures, the University presented Plaintiff John Doe with two options for punishment: (1) a one semester suspension with the sexual assault on his student record; or (2) withdrawal from the University for two semesters. (Compl. at ¶¶ 53, 62). The University imposed additional conditions for John Doe's return under either option, including re-application to and approval by the University Admission's Committee. (*Id.*) Plaintiff John Doe withdrew from the University with the possibility of returning in the fall of 2009. (*Id.* ¶ 63.) Plaintiff John Doe ultimately decided not to seek re-admission to the University. (*Id.*)

**A. 2008 Sexual Assault Policies and Procedures**

***4** The University's Sexual Assault Policy, UOS–0049 to UOS–0054, is a six-page print out of the information on Defendant's website relating to the relevant procedures (Def.'s MSJ Ex. 8; Pls.' MPSJ Ex. 9) ("Sexual Assault Policy.") It has five sections—I. Conduct Standard, II. Options for Complainants, III. Procedures for a Formal Charge of Sexual Assault, IV. Support Services for Complainants, and V. Support Services for the Respondent—each dealing with a different aspect of the procedures. The "Conduct Standard" section defines "sexual assault" and "effective consent" and then gives some categories of examples of sexual assault. (*Id.*)

The "Options for the Complainant" section lists the "range of options available to a student who believes that she/he has experienced a sexual assault." (*Id.* at 1–2.) Importantly, two of the four different options delineated are

**Report Incident for No Contact Agreement**

The complainant may inform any of the deans of students of the alleged sexual assault. Through discussion with the dean, the complainant may request the establishment of a No Contact Agreement between the complainant and alleged respondent. While a No Contact agreement does not establish whether or not the alleged assault occurred, it does establish that the two students involved agree to have no further contact for a specified period of time. Both students must sign and pledge the agreement. An example of a No Contact agreement is provided below:

*From now until **(date to be determined).** I, **(name of student),** will have no contact with **(name of student).** I will not contact the aforementioned student in person, via mail, via e-mail, via telephone, or any other means of communication nor will I engage in conversations about the aforementioned student. I further agree to maintain a reasonable distance from the aforementioned student so that I do not cause him/her discomfort or uneasiness. I understand that violation of this agreement will result in disciplinary action.*

The No Contact agreement will be kept on file in the Dean of Students office for the time of the agreement and as long as the student is enrolled at the institution.

and

**Report Incident with Formal Charge of Sexual Assault**

Filing a formal charge of sexual assault against another student could result in formal disciplinary action, if the alleged respondent is found responsible. Possible sanctions include warning, probation, suspension. and

expulsion. Students involved may also be required to attend appropriate drug or alcohol rehabilitation programs, or other types of counseling.

To file a formal charge of sexual assault. the complainant must inform one of the deans of students of the alleged sexual assault. This can be done in writing or in person. If a student chooses to make formal charges of sexual assault against another student the charges will be adjudicated in a hearing by the Faculty Discipline Committee.

*5 (*Id.* at 2–3.) The third section establishes the actual procedures to be employed when a student has elected to file a formal charge:

***III. Procedures for a Formal Charge of Sexual Assault***

After a charge has been fired (as explained in section II), the following steps will occur:

**Appointment of an Investigator:** After a dean of students has received a formal charge of sexual assault the Dean of Students will typically be informed of the charge within 24 hours. Normally, the Dean of Students will appoint an investigator (one of the other deans) within 3 class days.

**Notification to respondent:** The Dean of Students will inform the respondent of the charges pending against him or her typically within 5 class days of learning that a formal charge is being pursued. At that time, the respondent will be informed of the services that are available to him or her (detailed below). Additionally, the respondent will be notified of the actual date and time of the hearing at least 24 hours prior to the hearing.

**Convening of the Faculty Discipline Committee:** The Faculty Discipline Committee is composed of the Dean of Students and four faculty members, whom are elected by the faculty, typically for a four-year term. The Dean of Students is the chair of the committee. There are no students on the Faculty Discipline Committee. Three members of the Faculty Discipline Committee constitute a quorum and must be present at all stages of a hearing. Faculty Discipline Committee members who have a close relationship with the students involved or who are closely connected to the issue being adjudicated and who might, therefore, have a difficult time rendering impartial judgment should recuse themselves from the hearing. The committee member should discuss this possibility with the chair of the committee prior to a hearing. If a faculty member has a demonstrable personal bias for or against an accused and does not withdraw on his or her own initiative, the chair will submit the question to a vote by the other members of the committee. At the discretion of the chair, a faculty member who recuses himself/herself from the hearing may, nevertheless, be allowed to present a statement to the committee or serve as a character witness. *(The members of the Faculty Discipline Committee are as follows: Eric Hartman—Chair, Thomas Spacarelli, Tom Macfie, Helen Bateman, John Shibata, and Mark Preslar.)*

**Confidentiality:** Throughout the process for resolving a formal charge of sexual assault, reasonable efforts will be made to maintain the students' confidentiality. At different times in the process, however, it may be important to discuss the alleged incident with witnesses and/or others who have information that is pertinent to the case; or on a need-to-know basis. All students involved in the process are strongly urged to use discretion in discussing the incident or the identities of other student involved in the process. In a small community, public discussion of sexual assault cases can be very hurtful.

***6 Investigation:** The investigator will meet with each of the students involved in the alleged incident as well as any possible witnesses. The investigator will ask all parties involved in the case to submit a written statement regarding the incident; however, providing a written account is an option, not a requirement of the process. The investigator will present the reports to the members of the Faculty Discipline Committee prior to the hearing. The students will have an opportunity to see the other report/s at the beginning of the hearing. The investigation portion of the process typically takes 5–10 class days.

**Character Witness:** The complainant and respondent are permitted to invite a member of the college community (faculty, staff, or student) to speak to their character during the official hearing. This witness will only be present at the hearing during his or her statement

**Hearing Advisors:** The complainant and respondent may be accompanied in the hearing by his/her respective consultant (please see sections IV & V for more information about the consultant role). This consultant may not speak aloud during the hearing, but he/she may confer quietly or by means of written notes with the complainant. It should be noted that the complainant/respondent is not obligated to accept the counsel offered by the consultant; the consultant offers advice and nothing more.

**Hearing Process:**

- Written statements are reviewed by the FDC.
- Character witnesses share verbal statements with the FDC.
- The complainant shares a verbal statement with the FDC; followed by any questions that the FDC may have for the complainant.
- The respondent shares a verbal statement with the FDC; followed by any questions that the FDC may have for the respondent.
- Any witnesses that have information pertaining to the incident will be given a chance to speak with, and be questioned by, the FDC.
- If necessary, the FDC may recall the complainant, respondent or any witness for further questioning.
- Hearing concludes. FDC deliberates in order to determine responsibility.

All students making statements to the committee will be reminded that the Honor Code applies to their statements. Non-students who provide statements will be reminded that honesty is imperative. The complainant and respondent will never be in the hearing room at the same time. Efforts will also be made to ensure that the students will not wait in the same area outside the hearing room. Hearings of the committee will not be recorded unless special permission is requested and granted by the chair.

**Determination of Responsibility:** The FDC will hold a closed meeting and will make a decision in the form of a recommendation to the Dean of Students who has authority to accept, modify, or reject the recommendation of the committee. The decision of whether or not a student is responsible for the alleged charges depends upon a "preponderance of evidence." A "preponderance of evidence" means that there is 51% certainty that the respondent is responsible for a violation of the sexual assault policy.

***7 Notification of decision and sanctions:** The Dean of Students will notify the respondent of the determination of responsibility as well as any sanctions that may apply. If the student is to be suspended and/or expelled, he or she must vacate campus within twenty-four hours.

The complainant will also be notified of the decision by the Dean of Students.

Proceedings and decisions of the committee will not be disclosed except on a need to know basis. All notes and written material from the hearing will be collected and held by the Dean of Students for five years, at which time they will be destroyed or, at the dean's discretion, preserved.

(*Id.* at 3–4.) The fourth section of the Sexual Assault Policy outlines support services for complainants. (*Id.* at 4–6.) Finally, the fifth section of the Policy outlines the "Support Services for the Respondent." These include referrals to Counseling Services, Academic Deans, Chaplains, and Residential Life Staff, but the most significant provision relates to the "Consultant for the Respondent (Hearing Advisor)," a faculty member who advises the Respondent and helps guide him or her through the process:

**Consultant for the Respondent (Hearing Advisor)**

The student accused of sexual assault may confer with a Consultant for the Respondent *(2007–2008 Consultants are: Larry Jones, Nancy Ladd, Christian Miller, and Max Obermiller).* A consultant is familiar with the formal processes for hearing cases of sexual assault and may be helpful to the respondent. The consultant may attend the hearing with the respondent as outlined in Section III. Furthermore, all consultants are familiar with the following topics of discussion:

- The seriousness of the charge(s), procedure, and possible penalties if found responsible.
- The University's conduct standard for sexual assault.
- The University resources available to the respondent.
- The option of informing parents and guardians of the matter. Even though parents cannot participate in the campus hearing, they can provide moral support and advice.
- The option of consulting a lawyer. While an attorney cannot participate in an on-campus hearing, if the matter passes to the criminal or civil courts, legal counsel can be important.

There are limitations on the role of the Consultant to the Respondent.

- The Consultant must instruct the respondent, before they begin to talk, that he or she cannot provide absolute confidentiality; and he/she must state to the respondent that if he or she chooses to testify, that he or she should tell the truth. If despite this caveat, the respondent were to confess to wrongdoing, the Consultant would be obligated to inform the Dean of Students.

(*Id.* at 6.)

In the "Campus Safety" section of the website, the University also provides some additional information on its Sexual Assault program, including available training and resources. (Pls.' MPSJ Ex. 27 at 4.) Plaintiffs focus on the last paragraph in particular:

> *8 Anyone who believes himself or herself to be the victim of a sexual offense or harassment can bring a complaint through the University's procedures detailed in the Student Handbook and the Faculty/ Staff Handbook. No one will be reprimanded or discriminated against in any way for initiating an inquiry or complaint in good faith. ***The University will also endeavor to protect the rights of any person against whom a complaint is lodged.*** At each step of the complaint process, the University's procedures seek to protect, insofar as possible, the privacy of individuals involved in a complaint. Both the accuser and the accused will be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense, or harassment.

(*Id.*) (emphasis added.)

**B. The Appeals Process**

The appeals process is described separately in the "Student Policies" section of the website and relates to all of the Dean of Students' decisions, not just sexual harassment claims:

> An appeal of a Dean of Students' decision may be taken to the Dean of Students or, at the discretion of the Deans, to the Faculty Discipline Committee. It should be noted, however, that the appellate authorities generally give consideration only to those cases involving the most serious matters and the most significant consequences. Decisions of the Faculty Discipline Committee, following written notification to the student involved and a subsequent hearing to examine pertinent information and hear testimony, are made in the form of a recommendation to the Dean of Students who has authority to accept, modify, or reject the recommendation of the committee. In cases of suspension, expulsion or when the Faculty Discipline Committee has made a disciplinary recommendation in the exercise of its original jurisdiction, a student may appeal that decision to the Vice Chancellor.
>
> If a student wishes to appeal a decision of a Dean of Students, such an appeal must be made in writing to the appropriate person or committee within seventy-two hours after notification of the decision. An appeal to the Vice Chancellor from a decision of the Dean of Students for suspension or expulsion must also be submitted within seventy-two hours. Should the penalty imposed by the Dean of Students involve suspension from the college, the requirement that a student leave campus within twenty-four hours of notification is not waived during an appeals process.
>
> Procedures and Guidelines of the Student and Faculty Discipline Committees may be obtained in the Office of the Dean of Students.

(Pls.' MPSJ Ex. 25 at 3–4).

**C. Terms Disclaimer in 2008 Catalog**

As evidenced by Plaintiffs' Supplemental Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment [Court Doc. 94] and Defendant's Response [Court Doc. 98], the parties disagree strenuously over whether, at the time the instant claim arose, any of Defendant's materials it provided to its students—which materials inform the scope of the contractual relationship between the parties—contained the following disclaimer: "This catalog provides information which is subject to change at the discretion of the College of Arts and Sciences. It does not constitute any form of contractual agreement with current or prospective students or any other persons." (Def.'s MSJ Mem. at 30; Def.'s MPSJ Respon. at 6.)

*9 Defendant's original source for the disclaimer was the current version of its website, which Plaintiffs noted and to

which they objected in their response to Defendant's Motion for Summary Judgment. (Pls.' Suppl. Br. ¶ 2.) Plaintiffs contended that their 2008 edition of the relevant website did not contain such a disclaimer and that it was added later. (Pls.' MPSJ Respon. ¶ 2 ) Plaintiffs complain that, despite on-point discovery requests, Defendant, "[i]n its reply brief (Doc. 91)—filed after plaintiffs filed their reply brief (Doc. 90)—the University asserted, for the first time, that a printed, hard-copy version of the academic catalog contained the disclaimer. See Def. Reply at 11–12. In support of its assertion, the University attached, as Exhibit 2, an affidavit from its General Counsel, Donna Pierce, and a copy of the page from the 2008–2009 printed, hard-copy catalog." (*Id.* at ¶ 3.) Plaintiff John Doe argues that he "has no recollection of ever seeing the 400–page hard-copy version of the academic catalog." (Court Doc. 94–5, 2nd. Aff. of J. Doe ¶¶ 2–3.)

Defendant responds that it had revealed this much earlier to Plaintiffs: in its Response to the Court's September 1, 2009 Show Cause Order, filed September 16, 2009, the University stated that the disclaimer language appeared in "[t]he University's on-line catalog and print version." (Court Doc. 98, Def.'s Respon. to Pls.' Suppl. Br. ¶ 1.) Further, Defendant appended the declaration of Edith Morgan, head resident of Gorgas Hall, who "placed copies of the Catalog on the desks of the freshmen football players living in Gorgas, including Doe, the night before the regular arrival date for the freshmen class for the 2008—09 school year." (*Id.* at ¶ 3.)

The dueling affidavits, declarations, and date-stamped copies of the website provide more than enough evidence from which the Court can find that the presence—and/or availability to John Doe—of this disclaimer language in 2008 is a disputed issue of material fact.

## III. PROCEDURAL HISTORY

On June 3, 2009, John Doe and his parents, James and Mary Doe, filed the Complaint [Court Doc. 1], asserting twelve different causes of action (for each plaintiff) and requesting injunctive relief and compensatory and punitive damages. These counts can be grouped into four categories:

1. Contractual and Quasi–Contractual Claims: Count I (Breach of Contract), Count II (Promissory Estoppel), and Count XII (Unjust Enrichment);

2. Title IX/Clery Act Claims: Count III (Declaratory Judgment—Title IX and Clery Act) and Count IV (Title IX—Damages);

3. Negligence claims: Count V (Negligence), Count VI (Negligence *Per se* ), Count VII (Gross Negligence), Count VIII (Negligent Training and Supervision of Employees), and Count IX (Negligent Infliction of Emotional Distress); and

4. Infliction of Emotional Distress claims: Count X (Reckless Infliction of Emotional Distress) and Count XI (Intentional Infliction of Emotional Distress).

*10 On July 17, 2009, Defendant filed a Motion to Dismiss [Court Doc. 10], seeking to dismiss Plaintiffs' claims based upon Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 ("Title IX") and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (the "Clery Act."). While considering this motion, on September 1, 2009, the Court ordered [Court Doc. 30] the parties to submit briefs on "whether Plaintiffs have alleged sufficient facts that would establish that Defendant had explicitly or implicitly entered into a contractual or quasi-contractual relationship with James Doe and Mary Doe" and have standing to pursue such claims against the University. Then, on October 13, 2009, it granted Defendant's motion—dismissing Counts III and IV as to all parties—and dismissed Counts I, II and XII at to James and Mary Doe after finding that they lacked the standing to assert any such claims. [Court Doc. 34]. Thus, after this Order, John Doe's contractual and quasi-contractual claims (Counts I, II, and XII), all Plaintiffs' negligence claims (Counts V–IX), and all Plaintiffs' emotional distress claims (Count X–XI) remained at issue in the case.

On July 9, 2010, both Plaintiffs [Court Doc. 77] and Defendant [Court Doc. 76] filed motions for summary judgment. In their memorandum in support of their motion [Court Doc. 81], Plaintiffs outline the "material facts not in dispute" in detail and then argue that not only do the sexual assault policies and procedures constitute a contract between the University and John Doe, but the University repeatedly violated its own procedures in Doe's case, and thus John Doe is entitled, at this time, to an order granting summary judgment on his breach of contract claim (Count I).

In Defendant's memorandum in support of its motion, Defendant argues that because it "substantially complied" with its written sexual assault policies and procedures, which procedures were fair and reasonable as applied to John Doe, John Doe's contractual and quasi-contractual claims must now be dismissed. (Def.'s MSJ Mem.) Further, Defendant

argues, the negligence claims must also be dismissed, as it owed no duty to James and Mary Doe and, to the extent it owed any duty to John Doe, it satisfied its obligations by substantially complying with its own procedures. (*Id.*) Finally, Defendant argues that the infliction of emotional distress claims must be dismissed because its conduct was not "outrageous" as a matter of law. (*Id.* at 39.) Each party's briefing in response (submitted July 30, 2009) and in reply (submitted August 6, 2009) reiterated these same points.

Finally, the parties filed several accessory motions related to these substantive motions, including:

1. Defendant's Motion to Supplement Briefing [Court Doc. 92]—filed on August 16, 2010 and objected to by Plaintiffs [Court Doc. 93] on August 18, 2010;

2. Plaintiffs' Supplemental Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment [Court Doc. 94], filed August 18, 2010 and responded to by Defendant [Court Doc. 98] on August 25, 2010; and

*11 3. Defendant's two motions for leave to file certain exhibits and portions of its memoranda under seal, one [Court Doc. 78] relating to its Motion for Summary Judgment and filed on July 9, 2010, and the other [Court Doc. 88] relating to its Response to Plaintiffs' Motion for Partial Summary Judgment and filed on July 30, 2010.

These matters are now ripe for review. Further, as Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment were not only submitted at the same time, but also both turn, in large part, on shared issues of fact and law—the content of the University's policies, whether those policies created a contractual relationship with John Doe, and whether the University fulfilled any obligations imposed by those policies—it is appropriate to consider these motions together. Although Defendant's motion for summary judgment adds issues of the "outrageousness" and the duties owed to the parents, discussion of those topics accounted for less than one-quarter of its brief; in addition, Plaintiffs' response fully addressed these "additional" issues, in part by providing short cross-references to arguments made in their Motion for Partial Summary Judgment in order to reserve the majority of their argument (almost two-thirds of their response) for the negligence and emotional distress claims.

Accordingly, the Court will address both motions for summary judgment, and all related motions, in this Memorandum and Order.

## IV. ANALYSIS

### A. Defendant's Motion to Supplement Briefing

In its Motion to Supplement Briefing [Court Doc. 92], Defendant asks for leave to supplement its summary judgment briefing with the authority of *Flowers v. Metro. Baptist Schs.*, 1997 WL 330644 (Tenn.Ct.App. June 18, 1997), because *"Flowers* may be controlling authority here, *see Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir.1989), and the University wishes to bring the opinion to the Court's attention." (Def.'s Mot. to Suppl. MSJ.) Plaintiffs respond that, aside from having no application to this case, as it involved a high school student and drug charges (Pls.' *Flowers* Respon. ¶¶ 4–5), because *"Flowers* is a 'Memorandum Opinion,' a term with a specific meaning under the Rules of the Court of Appeals of Tennessee ... [that it] shall not be cited or relied on for any reason in any unrelated case," it "has 'no precedential value,' ... [and] cannot be 'controlling authority here.' " (Pls.' *Flowers* Respon. ¶¶ 2–3) (citing Tenn. Ct.App. R. 10.)

This Court typically does not find surreplies or other supplemental briefs to be useful or appropriate. Further, *Flowers* was decided more than a decade ago, was available to Defendant at the time it submitted its summary judgment briefing, and could have been incorporated at that point. Finally, any precedential value and utility of the *Flowers* decision appears to be limited, as noted by Plaintiffs. Accordingly, Defendant's Motion to Supplement Briefing [Court Doc. 92] will be **DENIED.**

### B. Defendant's Motions for Leave to File Documents Under Seal

*12 Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Motion for Summary Judgment and Certain Portions of the Memorandum of Law in Support of the Defendant's Motion [Court Doc. 78] and Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 88] both seek leave from the Court to file under seal certain sensitive information—"personally identifiable information" contained in "education records," within the meaning of the Family Educational Rights and Privacy Act, 20 U.S.C.

§ 1232g ("FERPA") and information that would tend to identify Plaintiffs. Both of these disclosures by the University are prohibited, the first by FERPA and the second by United States Magistrate Judge Susan K. Lee's Memorandum and Order granting Plaintiffs' Motion to Proceed Under Pseudonyms and for Protective Order. [Court Doc. 21 at 7] ("Protective Order") ("Defendant **SHALL NOT** identify any Plaintiff to any nonparty other than as may be necessary to defend against this action."), objections to which this Court has already overruled while noting that further analysis would be "merely cumulative and [ ] unwarranted in light of Magistrate Judge Lee's well-reasoned and well-supported [Protective Order]." (Court Doc. 34, October 13, 2009 Order.)

Accordingly, and for good cause shown, Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Motion for Summary Judgment and Certain Portions of the Memorandum of Law in Support of the Defendant's Motion [Court Doc. 78] and Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 88] will be **GRANTED.**

**C. "Retrying" the Underlying Dispute**

As the Court noted in its Memorandum and Order Granting Defendant's Motion for Partial Summary Judgment [Court Doc. 34]:

> This is not a lawsuit between the Complainant and the Plaintiffs. This Court is not asked to make an independent determination as to what happened between the Plaintiff John Doe and the Complainant on August 30, 2008. The Court therefore expresses no opinion as to whether a sexual assault occurred, whether any such acts were consensual, or who, as between John Doe and the Complainant is credible. In short, the instant lawsuit does not call for a judicial determination either in favor or against John Doe's claims or in favor or against the Complainant, regarding the merits of her claims.

(Court Doc. 34 at 12.) (*Doe v. Univ. of the South*, 687 F.Supp.2d 744, 755 (E.D.Tenn.2009)). Despite this admonition, Plaintiffs spend a good deal of their briefing discussing "disputed facts"—whether Officer Wiley's testimony as to Complainant's intoxication is material or admissible (Pls.' MSJ Respon. 3–4), whether Complainant knocked her head on a bed (*Id* at 5), Complainant's alcohol consumption that evening (*Id.* at 6–7), etc.—that relate solely to this underlying event.

***13** Defendant rightly complains of Plaintiffs repeatedly disputing "facts" that have relevance only to the underlying dispute between Plaintiff and Complainant—particularly where Plaintiffs dispute these facts in an attempt to introduce a "gatekeeper" requirement neither found nor implicitly imposed anywhere in the University's guidelines, and thus not at issue to the contractual and quasi-contractual claims. The manner in which they then characterize Plaintiffs' litigation strategy and the Court's role in the case is incorrect, but illuminating:

> Doe attempts to disguise the true intent of this lawsuit by alleging supposed "deficiencies" in the University's disciplinary proceeding on A.B.'s complaint. But these purported "deficiencies" only underscore that Doe is simply unhappy with the process he received-the process that he reviewed and accepted upon enrolling at the University.... It cannot be overemphasized that what the Court is asked to do in this case is review a private university's disciplinary proceeding in which the university determined a student violated the school's code of conduct. The precedents strictly limit a court's power in cases like this to determining whether the private school substantially complied with its established disciplinary policies and procedures.

(*Id.* at 1–2.)

This goes to the heart of Plaintiffs' claims, and to why neither Plaintiffs' nor Defendant's motions for summary judgment as to the contractual claims will be granted. Doe does attempt to import some rights not found in the Sexual Assault Policies

and Procedures into the hearing process, but generally his allegations center on the fact that he believed that he would, if and at the time for a disciplinary hearing arose, be entitled to the process outlined in the University's materials. Plaintiffs argue that the University did not live up to its own procedures in many ways, and that these "deficiencies" were significant to the point that they could have changed the outcome.

Defendant's arguments as to the Court's powers of review seem to regard its disciplinary proceedings as quasi-judicial proceedings entitled to arbitration-like deference and immune from all but the most cursory judicial review, rather than simple claims sounding in contract and tort. This is an incorrect apprehension of the law. Courts not only entertain actions sounding in contract and quasi-contract related to the sufficiency of the process related to school disciplinary proceedings, but where those proceedings involve actual punishment as opposed to making purely academic judgments, the Court's inquiries are even more searching.

Further, Defendant repeatedly asserts that the Court's earlier admonition that this case comes before it in a limited posture means that it cannot review the way in which the University conducted the process. Nothing in the Court's earlier (and now repeated) statements that it would not reach the merits of the underlying dispute between Doe and Complainant mean that the Court will not evaluate any factual discrepancies as they relate to Plaintiffs' claims sounding in contract and tort. In fact, some of Plaintiffs' discussions of these factual disputes actually go to other evidentiary issues, such as the quality of the investigation, rather than the quality of the outcome. For example, Plaintiffs tie the dispute over who, John Doe or Complainant, knocked over the bed to the element of their breach of contract claim addressing the obligation to conduct an investigation appropriately:

> *14 This "fact" is very much in dispute ... [and] the "witness" on whose "testimony" this "fact" is based did not even see the event in question. The flaw here relates to the lack of competent investigation and not to a desire on the part of plaintiffs to have this Court second-guess the decision of the Faculty Discipline Committee.

(*Id.* at 5.) This kind of "impeachment" use—that is, using discrepancies between information available in 2008 but neither uncovered in the investigation nor before the Discipline Committee in 2008 to highlight weaknesses in the competence of the investigation or to attack the impartial nature of the hearing—is one of the few acceptable uses of analyzing the facts surrounding the underlying incident. But any use of "disputed facts" to assess the merits of the Discipline Committee's findings is still, and will remain, irrelevant to this lawsuit.

**D. Negligence Per se**

Plaintiffs continue to assert negligence per se claims, arguing that "34 C.F.R. 106.8(b) ... requires a school receiving Title IX funds to establish 'procedures providing for the prompt and equitable resolution of student complaints' relating to all forms of sexual harassment, including sexual assault," and that this regulation incorporates an Office of Civil Rights of the Department of Education (OCR) Guidance requiring a school's procedures to "accord[ ] due process to both parties involved." (Pls.' MSJ Respon. at 44.) Plaintiffs cite *Teal v. E.I DuPont de Nemours & Co.*, 728 F.2d 799, 802 (6th Cir.1984), for the proposition that a federal regulation (an OSHA regulation in *Teal*) "established an enforceable duty" and thus, since Plaintiffs are "members of the class of persons the regulation was intended to protect," any breach of 34 C.F.R. 106.8(b) is negligence per se.

Plaintiffs' arguments fail on several grounds, but most importantly, their arguments would vitiate the Supreme Court's ruling in *Gebser v. Lago Vista Indep Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). In that case, the Court, interpreting precisely the same regulation at issue here, 34 C.F.R. § 106.8(b), said that "the failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX. Of course, the Department of Education could enforce the requirement administratively ... [but] we have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements." *Id.* at 292. If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule.

In fact, Defendant noted in its motion for summary judgment that Plaintiffs' strategy of "mak[ing] an end run around these principles by asserting state-law negligence-based claims and relying on Title IX regulations and OCR Guidance to establish the duty element of those claims ... [is] preempted by the Supreme Court's jurisprudence on the private right of

action under Title IX" (Def.'s MSJ Mem. at 36, citing *Kemp v. Medtronic, Inc*, 231 F.3d 216 (6th Cir.2000)). Accordingly, Plaintiffs' Negligence Per Se Claims (Count VI) will be **DISMISSED WITH PREJUDICE.**

**E. Duty Owed to Mary and James Doe**

***15** All negligence claims require that a plaintiff establish first and foremost a duty of care owed to plaintiff by defendant, *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn.2005), but Plaintiffs Mary and James Doe have not pointed to any relevant case law establishing any legal duty a private university would have towards the parents of an adult student.

They cite *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 362–63 (Tenn.2008) for the proposition that "[e]ven when the actor and victim are complete strangers and have no relationship, the basis for the ordinary duty of reasonable care ... is conduct that creates a risk to another. Thus, a relationship ordinarily is not what defines the line between duty and no-duty; conduct creating risk to another is." In *Satterfield*, however, the estate of an employee's daughter who had died of mesothelioma was suing her father's employer for negligence, alleging that his employer had negligently permitted their employee to wear his asbestos-contaminated work clothes home from work, thereby regularly and repeatedly exposing employee's daughter to asbestos fibers over an extended period of time. The factual differences between that case—the regular exposure of a minor child living in regular and repeated proximity to clothes shedding a known carcinogen—and this case make the analogy so attenuated as to be useless.

Further, the "evidence" that Mary and James Doe use to establish the fact that they "were far from 'strangers' to the University," actually militates against their argument. For instance, they cite the fact that the Sexual Assault Policies and Procedures suggest that the consultant/hearing advisor should discuss with the accused "[t]he option of informing parents and guardians of the matter. Even though parents cannot participate in the campus hearing, they can provide moral support and advice." (Sexual Assault Policy at 6.) This Policy language James and Mary Doe cite discussing parental involvement, however, is clearly speaking from the perspective of whether parental involvement will be helpful for the *student*, the individual with whom the University actually has a relationship, and not out of a concern for the parents' rights or feelings. For example, the "Advising and Counseling" language—"encouraging parents to communicate directly with their son or daughter if they are concerned about a problem or a decision he or she is about to make" but saying "at the same time, parents will find college faculty and staff very willing to consult with them when this is feasible, not a violation of privacy, and consistent with college policies and expectations"—most clearly seems to suggest to parents to keep their concerns regarding their adult-children-students outside of the University's domain ("feasible"), in part by reminding the parents that the University frequently will not be able to discuss issues relating to the student because it would implicate the privacy concerns of the student, i.e. the individual with whom it has a relationship.

***16** Accordingly, the Court finds that Plaintiffs Mary and James Doe have not established a duty of care owed to them by Defendant, and thus all their claims premised upon a negligence theory and not already dismissed (Count V (Negligence), Count VII (Gross Negligence), Count VIII (Negligent Training and Supervision of Employees), and Count IX (Negligent Infliction of Emotion Distress) will be **DISMISSED WITH PREJUDICE.**

**F. Reckless and Intentional Infliction of Emotional Distress**

Under Tennessee law, a plaintiff must establish the following elements to support a claim for reckless or intentional[1] infliction of emotional distress: "(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury." *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn.1997). Tennessee courts have further explained:

> In describing these elements, we have emphasized that it is not sufficient that a defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress. A plaintiff must in addition show that the defendant's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.
>
> *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 51 (Tenn.2004) (internal citations and quotation marks omitted).

Here, Plaintiffs have not presented sufficient evidence to establish that Defendant's actions constituted either a reckless

or an intentional infliction of emotional distress. As the factual bases of their claims, they rely upon:

> (1) the intentional hiding of exculpatory evidence from John Doe; and (2) the admission by Hartman to Mary Doe that [Complainant's] prescription psychotropic medications and psychological conditions played a significant role in the Committee's decision in spite of (a) the Committee's total lack of knowledge on the subject; and (b) absolutely no evidence that John Doe knew anything about the medications or the psychological conditions.

(Pls.' MSJ Respon. at 45–46.)

In this regard, the Court would first note that Plaintiffs mischaracterize the evidence. Plaintiffs claim evidence relating to Complainant's usage of legally-prescribed drugs is "exculpatory" because they have an expert who asserts the drugs' effects in concert with alcohol would make her appear less incapacitated than she really was. (Pls.' MPSJ Mem. at 34–36). There is, however, conflicting expert testimony asserting that Complainant would instead have appeared much *more* intoxicated, given the mix of drugs and alcohol. (Def.'s MPSJ Respon. at 19–21.) This conflict serves not only to refute the notion that the disclosure of Complainant's medication would be "exculpatory," but also serves to point out that seeking outside medical expert testimony (which, as Plaintiffs acknowledge, had never been done before) would not necessarily have illuminated the discussion, as apparently experts differ on this point, even if the contract had imposed a duty on the University to obtain expert medical assistance (which it does not).

*17 In addition, it is clear that Defendant's experts were considering her alcohol and drug intake in light of her observable (through others' testimony) behavior, not just looking at what her ability to consent was at a clinical level, just as the FDC panel members did in the original hearing. (*Id.*) That is, Defendant's experts' conclusions about the drugs' effects supported the inference that she was incapacitated, which itself serves as some validation of the weight the FDC panel members had accorded testimony as to her behavior.

Much more importantly, though, nothing about the "failure to disclose" was intentional. The procedures do not provide for the hearing participants to disclose publicly the bases for their findings, their notes, or additional materials submitted to them. As will be discussed below, if one reads the Sexual Assault Guidelines to impose an affirmative duty on a party where they use words mandating an action, such as "shall" or "will,"[2] the only affirmative duties the University owes the Respondent are ones like the duty to inform the respondent of the services that are available to him and to notify him of the actual date and time of the hearing at least 24 hours prior to the hearing. (Sexual Assault Guidelines at 3); to have the Investigator meet with the Respondent (*Id.*); notifying the Respondent of the outcome of the hearing (*Id.* at 4); having the Consultant tell the Respondent "before they begin to talk, that he or she cannot provide absolute confidentiality" (*Id.* at 6.) Because there is nothing in either the appeals process or the sexual assault guidelines that requires the University to provide the Respondent after the hearing with any information or copies of information introduced during the hearing, Defendant's failure to do so cannot be deemed an intentional act of hiding information. Further, Plaintiffs have not cited caselaw[3] or suggested anything specific in the provisions that incorporates a *Brady*-like duty to disclose any potentially exculpatory evidence to the Respondent in a private postsecondary education disciplinary hearing context.

Finally, even if the prescription drug material did tend to exculpate John Doe, Plaintiffs have failed to show any actual harm. As they themselves acknowledge: "[t]estimony ***at the hearing revealed*** A.B.'s use of prescription medication, including psychotropic drugs, as well as the psychological conditions from which she suffered." (Pls.' MPSJ Mem. at 33) (emphasis added). There is no indication, as far as the Court can tell, that anyone besides the Complainant knew of her medications and their relationship to the proceeding. The FDC heard and considered the information, along with all the other evidence, in making their recommendation, as did Dean Hartman in making his decision. Even if they had opened their files to Plaintiff, it would only have affected his appeal, and, as has been noted, the Appeals Process gives him absolutely no detailed rights—just the right to appeal and a deadline of 72 hours to file the appeal.

*18 Neither of the only two pieces of evidence Plaintiffs' cite as "outrageous" are, in the Court's view, even accurately portrayed as "wrongful," let alone conduct "so outrageous that it is not tolerated by civilized society." Accordingly,

Plaintiffs' Reckless (Count X) and Intentional (Count XI) Infliction of Emotional Distress claims will be **DISMISSED WITH PREJUDICE.**

**G. Contractual and Quasi–Contractual Claims:**

A breach of contract claim has three elements: 1) the existence of an enforceable contract; 2) nonperformance amounting to a breach of the contract; and 3) damages caused by the breach of the contract. *Atria v. Vanderbilt Univ.*, 142 F. App'x 246 (6th Cir.2005) (citing *Life Care Ctrs. of Am., Inc. v. Charles Town Assocs. Ltd. Partnership, LPIMC, Inc.*, 79 F.3d 496, 514 (6th Cir.1996) (applying Tennessee law)).

In this case, the Court has already determined that there is a disputed issue of material fact as to whether the 2008 Sexual Assault Policies and Procedures, as published on the University's website, either contained a disclaimer or should be read in conjunction with a disclaimer that allegedly appeared in the catalog in 2008 ("This catalog provides information which is subject to change at the discretion of the College of Arts and Sciences. It does not constitute any form of contractual agreement with current or prospective students or any other persons."). But, even if the disclaimer were firmly established, and there was no express written contract, as in *Ku v. State*, 104 S.W.3d 870, 876 (Tenn.Ct.App.2002), "its provisions may be enforced in Tennessee if it creates an implied contract." *Atria*, 142 F. App'x at 255 (citing *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 405 (Tenn.2002)).

Further, it is long-settled in the Sixth Circuit that "the student-university relationship is contractual in nature although courts have rejected a rigid application of contract law in this area." *Doherty v. S. College of Optometry*, 862 F.2d 570, 577 (6th Cir.1988). Finally, the Court may consider "catalogs, manuals, handbooks, bulletins, circulars and regulations of a university [to] help define this contractual relationship." *Atria*, 142 F. App'x at 255.

In Tennessee, "there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement." *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 572 (6th Cir.2003) (citing *TSC Indus., Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn.Ct.App.1987); Tenn.Code Ann. § 47–1–203 (imposing an obligation of good faith and fair dealing upon parties in the performance or enforcement of contracts)). The nature of the duty "depends upon the individual contract in each case." *Id.* Under Tennessee law, however, a breach of the duty of good faith and fair dealing "is not a cause of action in and of itself but as a part of a breach of contract cause of action." *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn.Ct.App.2000); see also Tenn.Code Ann. § 47–1–203 ("This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract ...."); *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 572 (6th Cir.2003) ("Breach of the implied covenant of good faith and fair dealing is not an independent basis for relief.").

*19 Although Defendant argues that the Court's review is extremely circumscribed, the Sixth Circuit has made clear that where the Courts are examining decisions based upon disciplinary factors—rather than academic—the usual, very deferential, standard does not apply. *Doherty*, 862 F.2d at 577. Further, Defendant's repeated reliance on the "substantial compliance" standard, and in juxtaposition to traditional Tennessee and Sixth Circuit contract law, is misplaced, as there are genuine disputes as to material facts as to whether Defendant even substantially complied with its own clearly-stated procedures, let alone some of the rights Plaintiff believes are imported into the contract by implication.

For instance, one of the clearest examples of a provision that the University did not comply with, at least in full, and may have not complied with even substantially is the language addressing the role of the investigator:

> The investigator ***will*** meet with ***each*** of the students involved in the alleged incident as well as ***any possible*** witnesses. The investigator ***will ask all parties*** involved in the case to submit a written statement regarding the incident; however, providing a written account is an option, not a requirement of the process. The investigator will present the reports to the members of the Faculty Discipline Committee prior to the hearing. The students will have an opportunity to see the other report/s at the beginning of the hearing. The investigation portion of the process ***typically takes 5–10 class*** days.

(Sexual Assault Policy at 3–4) (emphasis added). It seems to make explicit a promise that the investigator not only will meet with the Complainant and Respondent but also with ***any*** possible witness, which would definitely include ***any possible*** witnesses identified by the already-identified witnesses, including the Complainant and John Doe. Not only did that not happen in this case, but Dean Hartman affirmatively ordered the investigator not to follow that policy. (Pls.' MSJ Mem. at 26–27.) Further, the language about the investigation typically taking 5–10 class days could be read by a reasonable juror to mean that this investigation, conducted in less than one day, was a breach of the overall contract.

Even as to more tenuous claims, such as Plaintiffs' contention that Defendant had a duty to seek expert medical testimony, even though Plaintiffs mischaracterized the facts in an attempt to have them deemed "outrageous" and even though the terms of the Sexual Assault Policy do not explicitly mandate such testimony, a reasonable juror could conclude in this case, just as in *Atria,* that the University's decision to seek out and then accept medical expert testimony as to *some* evidence (the vaginal abrasions), but not others (Complainant's prescriptions) "was an arbitrary decision and a breach of its implied contract." *Atria,* 142 F. App'x at 247; Pls.' MSJ Mem. at 33–36.

***20** Regardless, the record is replete with competent summary judgment evidence evincing genuine issues of disputed fact as to particular breaches (whether Plaintiff had a right to be present during the hearing or whether allowing Complainant both to seek a no contact agreement and a formal charge effectively eliminated Plaintiff's ability to contact witnesses on his own behalf, just to name a few), and thus summary judgment is inappropriate on the breach of contract claim.

Defendant's arguments as to the quasi-contractual claims—promissory estoppel (Count II) and unjust enrichment (Count XII)—relied largely on a finding of no breach of contract; thus only two minor issues need to be discussed to address these claims fully.

First, Defendant argues that the disclaimer in the catalog effectively forecloses a promissory estoppel claim. (Def.'s MSJ Mem. at 30.) As has already been noted, the existence, presence, and impact of that disclaimer are all rigorously contested issues, supported by competent evidence. Therefore, the alleged disclaimer does not support summary judgment at this stage.

Second, as noted in the Court's ruling on Defendant's Motion to Dismiss [Court Doc. 34], the requirements for recovery under an unjust enrichment theory are as follows: (1) there must be no existing, enforceable contract between the parties covering the same subject matter, *Robinson v. Durabilt Mfg. Co.,* 195 Tenn. 452, 260 S.W.2d 174, 175 (1953); (2) the party seeking recovery must prove that it provided valuable goods and services, *Moyers v. Graham,* 83 Tenn. 57, 62 (1885); (3) the party to be charged must have received the goods and services, *Jaffe v. Bolton,* 817 S.W.2d 19, 26 (Tenn.Ct.App.1991); (4) the circumstances must indicate that the parties involved in the transaction should have reasonably understood that the person providing the goods or services expected to be compensated, *V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd.,* 595 S.W.2d 474, 482 (Tenn.1980); and (5) the circumstances must also demonstrate that it would be unjust for the party benefitting from the goods or services to retain them without paying for them. *Paschall's, Inc. v. Dozier,* 219 Tenn. 45, 407 S.W.2d 150, 154 (Tenn.1966).

In this case, there are several unresolved assertions, supported by evidence but contested by Defendant, that Defendant's behavior as to some of the particular intentional violations (as with the allegation that Dean Hartman is implementing a policy directly contravening the written one as to interviewing parties) which, if accepted, could render strict application of the University's refund provision unjust and inequitable. In essence, Defendant's argument hinges on its having substantially complied with its policies, and, as has been noted, that has not yet been established.

On each of the particular disputed terms or rights, as demonstrated above with the investigation provision, both parties have presented competent summary judgment evidence that raises genuine disputes as to material facts, and thus summary judgment is inappropriate at this time. Accordingly, Defendant's Motion for Summary Judgment [Court Doc. 76] ("MSJ") will be **DENIED** as to John Doe's Contractual and Quasi–Contractual Claims (Counts I, II, and XII), and Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 77] will be **DENIED.**

**H. Negligence**

***21** A negligence claim requires that a plaintiff establish: (1) a duty of care owed to plaintiff by defendant; (2) conduct falling below that standard of care resulting in a breach of

duty by defendant; (3) an injury or loss; (4) cause in fact; and (5) proximate or legal cause. *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn.2005).[4]

In this case, Defendant in essence argues that whatever duty it owes its student in conducting its disciplinary proceedings, it has satisfied by its substantial compliance with those proceedings. (Def.'s MSJ Mem. at 31; Def.'s MSJ Reply at 12–14.) As has already been explained, there are a number of genuine disputes as to material facts currently precluding a finding that Defendant in fact substantially complied with its Sexual Assault Policy-mandated procedures. Further, and contrary to Defendant's contentions, the Sixth Circuit's opinion in *Atria* is again instructive. Although the questions as to the appropriate standard of care there related to the precise way in which to return a test, rather than how to conduct a sexual assault investigation and disciplinary proceeding, the *Atria* court noted:

> However, the fact that it may be difficult to establish "precise criteria" by which to judge a defendant's actions does not mean that the defendant owes others no duty. *See Stehn v. Bernarr MacFadden Foundations, Inc.*, 434 F.2d 811, 815 (6th Cir.1970). Vanderbilt and its agents owe everyone, including Atria, a duty to refrain from conduct that poses an unreasonable and foreseeable risk of harm. In Tennessee "[a]ll persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others. Thus, it has been said that duty is the legal obligation that a defendant owes a plaintiff to conform to a reasonable person standard of care in order to protect against unreason-able risks of harm." *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn.2003) (internal citations omitted). In other words, "a duty of reasonable care exists if defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property ... A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995). The duty of due care applies to a plaintiff's property as well as his person. *Id; Smith v. Roane–Anderson Co.*, 30 Tenn.App. 458, 207 S.W.2d 353, 355 (1947).

*Atria*, 142 F. App'x at 251. As in that case, in this case a jury could find that the harm caused by the University's allegedly and arguably haphazard implementation of its own Sexual Assault Policies was foreseeable, especially where here, as there, the harm was severe: a wrongful conviction by a disciplinary committee.

Accordingly, Defendant's Motion for Summary Judgment on negligence claims as they relate to Plaintiff John Doe will be **DENIED.**

## V. CONCLUSION

*22 For the reasons explained above:

(1) Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Motion for Summary Judgment and Certain Portions of the Memorandum of Law in Support of the Defendant's Motion [Court Doc. 78] and Defendant's Motion for Leave to File under Seal Certain Exhibits Attached to Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 88] are hereby **GRANTED;**

(2) Defendant's Motion to Supplement Briefing [Court Doc. 92] is hereby **DENIED;**

(3) Plaintiffs' Motion for Partial Summary Judgment [Court Doc. 77] is hereby **DENIED;** and

(4) Defendant's Motion for Summary Judgment [Court Doc. 76] is hereby **GRANTED IN PART AND DENIED IN PART.**

Plaintiffs' Negligence Per Se (Count VI), Reckless Infliction of Emotional Distress (Count X), and Intentional Infliction of Emotional Distress (Count XI) claims are hereby **DISMISSED WITH PREJUDICE.**

Plaintiffs James Doe and Mary Doe's Negligence (Count V), Gross Negligence (Count VII), Negligent Training (Count VIII), and Negligent Infliction of Emotion Distress (Count IX) claims are **DISMISSED WITH PREJUDICE.**

After the entry of this Memorandum and Order, Plaintiffs James Doe and Mary Doe will no longer have any claims at issue in this case, but Plaintiff John Doe will proceed to trial on Count I (Breach of Contract), Count II (Promissory Estoppel), Count V (Negligence), Count VII (Gross Negligence), Count VIII (Negligent Training and Supervision of Employees), Count IX (Negligent Infliction of Emotional Distress), and Count XII (Unjust Enrichment).

**SO ORDERED.**

Footnotes

1 The elements of Reckless Infliction of Emotional Distress and Intentional Infliction of Emotional Distress are identical except the intent element. As the Court will be focusing on the second and third elements, it will handle these claims in the same fashion.

2 *C.f. Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir.1993) ("Where the word 'shall' appears in a statutory directive, 'Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory') (citing *United States v Monsanto*, 491 U.S. 600, 607, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989)).

3 Given the difference between the pleading burdens at the motion to dismiss and summary judgment stage, Plaintiffs' citation to *McCormick v. Dresdale*, 2010 WL 1740853 (D.R.I.2010) is inapposite.

4 Defendant argues that Plaintiff must demonstrate special proof that he has suffered a "severe emotional injury," in order to recover on the Negligent Infliction of Emotional Distress (NIED) claim. (Def.'s MSJ Mem. at 38–39; Def.'s MSJ Reply at 19.) If Plaintiff's NIED claim was a "stand-alone" claim, unconnected to the other allegations in the lawsuit, Defendant would be correct to cite the evidentiary rule announced in *Camper v. Minor*, 915 S.W.2d 437 (Tenn.1996).

Plaintiff John Doe's NIED claim, however, is clearly linked to or "parasitic" on the other substantive claims. In *Camper*, the Tennessee Supreme Court "abandoned the traditional 'physical manifestation' rule ... [and i]nstead, we concluded that cases of negligent infliction of emotional distress should be analyzed under the 'general negligence' approach," but limited recovery for NIED claims "to serious or severe emotional injury supported by expert medical or scientific proof." *Estate of Amos v. Vanderbilt Univ.*, 62 S.W.3d 133, 136–37 (Tenn.2001) But, then in *Estate of Amos*, the Tennessee Supreme Court held that "[t]he special proof requirements in *Camper* are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims. [But] when emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims," *Id.* at 136–37. Therefore, Plaintiff John Doe has sufficiently plead his NIED claim.

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407 S.C. 128
Supreme Court of South Carolina.

John **DOE**, Jane **Doe** 1, Jane **Doe** 2 and Jane **Doe** 3, Appellants,
v.
The **BISHOP** OF **CHARLESTON**, A Corporation Sole, and The **Bishop** of The Diocese of **Charleston**, in His Official Capacity, Respondents.
Appellate Case No. 2011–199886.

No. 27345. | Heard April 4, 2013. | Decided **Jan. 8, 2014**. | Rehearing Denied March 6, **2014**.

**Synopsis**

**Background:** Plaintiffs brought separate complaints against diocesan **bishop**, in his corporate and official capacities, seeking to recover damages for sexual abuse allegedly perpetrated by priest within diocese on theory of negligent supervision. Cases were consolidated. **Bishop** moved to dismiss on pleadings, based upon existence of prior settlement agreement. The Circuit Court, **Charleston** County, Kristi Lea Harrington, J., granted motion. Plaintiffs appealed.

**Holdings:** The Supreme Court, Pleicones, J., held that:

[1] order amending settlement agreement to clarify date from which deadline for filing of claims would be calculated superseded prior order to effect that agreement would not be res judicata as to members of class who lacked actual notice of settlement;

[2] terms of settlement agreement did not waive res judicata effect of settlement as to all future claims or statute of limitations defense;

[3] claim of due process deprivation precluded dismissal of complaint for failure of the pleading to state facts sufficient to constitute a cause of action;

[4] plaintiffs were not collaterally estopped from litigating their claims; and

[5] statute of limitations began to run on date plaintiffs knew or by exercise of reasonable diligence should have known that negligent supervision had occurred.

Affirmed in part and reversed in part.

West Headnotes (22)

[1] **Appeal and Error**
⇐ Extent of Review Dependent on Nature of Decision Appealed from

When reviewing the dismissal of an action for failure of the pleading to state facts sufficient to constitute a cause of action, the appellate court applies the same standard of review as the trial court. Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[2] **Pretrial Procedure**
⇐ Availability of relief under any state of facts provable

**Pretrial Procedure**
⇐ Presumptions and burden of proof

If the facts alleged and inferences reasonably deducible from the allegations set forth in a complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal for failure of the pleading to state facts sufficient to constitute a cause of action is improper. Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[3] **Pretrial Procedure**
⇐ Insufficiency in general

Complaint should not be dismissed for failure of the pleading to state facts sufficient to constitute a cause of action merely because the court doubts the plaintiff will prevail in the action. Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[4] **Pretrial Procedure**
⇐ Matters considered in general

Trial court's reliance on transcripts and court orders in underlying class action in ruling on

motion to dismiss complaint seeking to recover damages for alleged sexual abuse for failure of the pleading to state facts sufficient to constitute a cause of action did not convert motion to one for summary judgment. Rules Civ.Proc., Rule 12(b).

Cases that cite this headnote

[5] **Appeal and Error**
⇦ Cases Triable in Appellate Court
**Appeal and Error**
⇦ Striking out or dismissal

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true; however, the interpretation of a judgment is a question of law for the court, to be reviewed de novo. Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[6] **Judgment**
⇦ Application of general rules of construction

As a general rule, judgments are to be construed like other written instruments, with the determinative factor being the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself.

Cases that cite this headnote

[7] **Judgment**
⇦ Application of general rules of construction

In construing a judgment, it should be examined and considered in its entirety; if the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used.

Cases that cite this headnote

[] **Judgment**
⇦ Persons represented by parties

Order amending settlement agreement in class action involving sexual abuse claims against diocese to clarify date from which 120-day deadline for filing of claims would be calculated superseded prior order of court reciting diocese's understanding that agreement would not be res judicata as to members of class who lacked actual notice of settlement.

Cases that cite this headnote

[9] **Compromise and Settlement**
⇦ Conclusiveness
**Limitation of Actions**
⇦ Agreements waiving limitation

Terms of settlement agreement reached in class action against diocese with respect to claims of sexual abuse by priests did not waive res judicata effect of settlement as to all future claims or waive statute of limitations defense as to future claimants who failed to come forward within claims period provided in settlement.

Cases that cite this headnote

[10] **Compromise and Settlement**
⇦ Persons concluded
**Constitutional Law**
⇦ Class Actions

Notwithstanding the ordinarily preclusive effect of a concluded class action suit, absent class members are entitled to due process before their claims are subject to the suit's res judicata effect. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] **Compromise and Settlement**
⇦ Persons concluded

Before absent class members can be finally bound by the resolution of a class action suit, they are entitled to a limited review on the issues whether sufficient notice was given to putative class members and whether class members had adequate representation.

Cases that cite this headnote

[12] **Pretrial Procedure**
⇦ Torts in general

Claim that plaintiffs seeking to recover damages from diocese for alleged sexual abuse were deprived of due process in settlement because settlement failed to provide either sufficient notice or adequate representation to absent class members precluded dismissal of complaint for failure of the pleading to state facts sufficient to constitute a cause of action, as such claims would, if substantiated, entitle plaintiffs to hearing. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., Rule 12(b)(6).

Cases that cite this headnote

[13] **Pretrial Procedure**
⇦ Matters considered in general

Trial court's reliance upon result of litigation of issue of notice, in another county in dismissing complaint seeking damages from diocese for sexual abuse allegedly committed by priests, was inadequate to satisfy trial court's obligation to undertake limited collateral review of question of whether instant plaintiffs received minimal notice to satisfy due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Judgment**
⇦ Persons Not Parties or Privies

Plaintiffs seeking to recover damages from diocese for alleged sexual abuse were not collaterally estopped from litigating their claims by entry of judgment in favor of diocese on same issues raised by other plaintiff in same court, absent any showing that instant plaintiffs were in privity with plaintiff in previous proceeding.

Cases that cite this headnote

[15] **Limitation of Actions**
⇦ Injuries to the Person

Three-year statute of limitations applicable to actions arising out of sexual abuse or incest began to run, with respect to action against diocese for negligent supervision of priests alleged to have committed sexual abuse, on date plaintiffs knew or by the exercise of reasonable diligence should have known that negligent supervision had occurred. Code 1976, § 15–3–535.

Cases that cite this headnote

[16] **Labor and Employment**
⇦ Negligent training and supervision

Employer may be liable for negligent supervision when: (1) his employee intentionally harms another when he is on the employer's premises, is on premises he is privileged to enter only as employee, or is using the employer's chattel; (2) the employer knows or has reason to know he has the ability to control the employee; and (3) the employer knows or has reason to know of the necessity and opportunity to exercise such control.

Cases that cite this headnote

[17] **Labor and Employment**
⇦ Particular cases

Employer may be liable for negligent supervision when an employee sexually assaulted a minor and the employer had some notice of the employee's prior inappropriate sexual behavior with another minor.

Cases that cite this headnote

[18] **Labor and Employment**
⇦ Negligent training and supervision

Employer's liability under a theory of negligent supervision is direct, not derivative.

Cases that cite this headnote

[19] **Limitation of Actions**
⇦ Negligence

**Limitation of Actions**
⇦ Nature of harm or damage, in general

Statute of limitations on a negligence claim accrues at the time of the negligence, or when

facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party.

Cases that cite this headnote

[20] **Limitation of Actions**
⇦ What constitutes concealment

Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations.

Cases that cite this headnote

[21] **Limitation of Actions**
⇦ What constitutes concealment

Plaintiffs' claims against diocese arising out of alleged sexual abuse by priest, which claims were based upon theory of negligent supervision, were not barred by three-year statute of limitations, where plaintiffs alleged diocese's systematic practice of secrecy and concealment of knowledge of sexual abuse by priests, including priest who allegedly committed abuse at issue. Code 1976, § 15–3–535.

Cases that cite this headnote

[22] **Labor and Employment**
⇦ Negligent training and supervision

Employer's knowledge of an employee's dangerousness is an element of the tort of negligent supervision.

Cases that cite this headnote

**Attorneys and Law Firms**

*496 Gregg E. Meyers, of Jeff Anderson & Associates, P.A., of **Charleston**, for Appellants.

*497 Albert P. Shahid, Jr., of Shahid Law Office, LLC, of **Charleston**, for Respondents.

**Opinion**

Justice PLEICONES.

John **Doe**, Jane **Doe** 1, Jane **Doe** 2 and Jane **Doe** 3 (appellants) separately sued the **Bishop** of **Charleston**, a Corporation Sole, and the **Bishop** of the Diocese of **Charleston** in his official capacity (respondents). The cases were consolidated, and respondents moved to dismiss on the pleadings The trial court granted the motion. [1] We affirm in part and reverse in part.

## FACTS

In 2007, in a suit brought in Dorchester County, respondents entered into a class action settlement agreement (the settlement) to settle the claims of "[a]ll individuals born on or before August 30, 1980 who, as minors, were sexually abused at any time by agents or employees of the Diocese of **Charleston**" as well as their spouses and parents, except those whose claims had been independently resolved. The settlement provided for the establishment of a fund from which awards would be made to claimants who established their sexual abuse claims by arbitration.

Appellants allege they did not receive notice of the settlement. In 2009, after the claims and opt-out period provided for in the settlement had expired, they brought suit alleging claims of the type covered by the settlement. Three appellants (siblings) allege that, between 1965 and 1971, as children they were sexually abused by a priest assigned to St. William Church in Ward, South Carolina; one appellant is the parent of the allegedly abused children.

## ISSUES

1. Did the trial court err when it ruled the terms of the settlement do not waive its res judicata effect?
2. Did the trial court err when it found appellants bound by the settlement?
3. Did the trial court err when it found appellants' claims barred by the statute of limitations?

**I. Settlement terms**

[1] [2] [3] The trial court held that appellants' claims were identical to those addressed in the class action settlement, that appellants were members of the class, and thus that their claims were barred by principles of res judicata and collateral estoppel. Appellants argue this was error because respondents waived the res judicata effect of the class action as to all future claims by the terms of the settlement. We disagree. When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. ***Doe v. Marion,*** 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.* The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.* at 395, 645 S.E.2d at 248.

As an initial matter, appellants argue that, for purposes of reviewing the trial court's grant of dismissal under Rule 12(b)(6), this Court must accept as true their allegation that respondents waived a statute of limitations defense as to all putative class members. We disagree.

[4] [5] When reviewing a motion to dismiss[2] for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled ***498** facts must be presumed true. ***Charleston County School Dist. v Harrell,*** 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). However, the interpretation of a judgment is a question of law for the court. 46 Am.Jur.2d Judgments § 73. Questions of law are reviewed *de novo. Town of Summerville v. City of North* ***Charleston,*** 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Thus, we consider the interpretation of the terms of the underlying court-approved class action settlement *de novo.*

[6] [7] "As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *Weil v. Weil,* 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989) (citations and internal quotation marks omitted).

In this case, the language in the settlement-related court orders on which appellants' argument depends arose in the context of discussions about notice to putative class members. The original design of the settlement included a 120–day period after the initial notice of final approval of the settlement for any person to make a claim under it. Notice was to be provided to potential claimants through publication in eleven South Carolina newspapers at least once a week for six weeks and in respondents' own periodical, the Catholic Miscellany, in three consecutive issues.

However, it came to light that respondents had been operating under an Instruction from the Vatican that required them to treat allegations of abuse with great secrecy and that their internal files contained the names of several dozen people about whose possible abuse respondents had already received some notice but who had not previously had any claims resolved. Half were already represented in the class action, and half were not. Of the latter group, all but four were located and notified of the pending class action before the Dorchester court approved the settlement. The Dorchester court remained concerned about these final four people. In its July 30, 2007, order approving the settlement, the Dorchester court stated that

> [t]he Diocese has represented to the Court that 20 individuals who may be class members were identified by it in a search of its files. Sixteen of these were located, and as to the other four, I find, ..., that reasonable efforts were used to locate those individuals and that their present whereabouts are unknown. The Diocese has further stated that it understands that any person who should have had notice, but did not receive notice for whatever reason, would not be bound by the *res judicata* effect of the settlement. Further, the Diocese has stipulated before me in open Court and on the record that any person who comes forward at a later date and can show that he or she should have received notice but did not could participate in an arbitration process with terms identical to the Settlement and Arbitration Agreement before the Court for approval today.

Appellants argue that the language of the July order both removes the ordinary res judicata effect of a class settlement and requires respondents to honor the terms of the settlement as to any future claimant notwithstanding the expiration of the claims period. While we agree with appellants regarding the import of the language of the July order, the Dorchester court entered another order related to the settlement on August 31, 2007. It clarified, in relevant part, that

> in the Court's [July 30] Order ... approving the Class settlement, the Court made reference to the existence of individuals who, according to the Diocese, (1) were potential class members; (2) came forward to the Diocese at some time in the past with their allegations of child sexual abuse; (3) never resolved their potential claims; and (4) were entitled to receive *actual notice* of the proposed class settlement pursuant to the agreement of the parties and earlier instructions from this Court (hereinafter referred to as "Actual Notice *499 Class Members"). The [Respondents] have asked the Court to clarify how the settlement process will treat the Actual Notice Class Members. Accordingly, this Order clarifies and, where in conflict, supersedes the Court's Order of July 30, 2007.
>
> Actual Notice Class Members shall have 120 days from receipt of actual notice of the class settlement to present their claims to an Arbitrator in the same manner as provided for in the Settlement and Arbitration Agreement. Actual Notice Class Members who present their claims more than 120 days after they receive actual notice of the settlement shall be barred from participation in the settlement process and shall be treated like any other class member who has failed to timely present a claim to the class settlement fund.

Appellants argue that the August order alters the terms of the settlement only as to Actual Notice Class Members. They contend that, as general class members, they are entitled to be treated under the more generous terms of the July order. We disagree.

[][8][] The August 2007 order clarifies that the Actual Notice Class Members have 120 days to file claims from the time they receive *actual* notice, rather than being limited to 120 days from the entry of judgment, as the other (constructive notice) class members were limited under the settlement. It also reiterates that any claimant who fails to present her claim within the 120–day notice period will be "barred from participation in the settlement process ... like any other class member who had failed to timely present a claim to the class settlement fund." This language unambiguously indicates that the 120–day claims period for general class members established in the original settlement remained in place and any seemingly contrary language in the July order was superseded by the August order.

[9] Thus, the terms of the July order do not permit appellants to avoid its res judicata effect and that respondents did not waive a statute of limitations defense as to future claimants who failed to come forward within the claims period provided in the settlement.

**II. Issue preclusion**

Appellants argue that the trial court erred when it dismissed their claims on the bases that the settlement is res judicata as to appellants' claims and that appellants' claims are collaterally estopped because they were decided in favor of respondents in another case before the same court. We agree.

[10] [11] Notwithstanding the ordinarily preclusive effect of a concluded class action suit, absent class members are entitled to due process before their claims are subject to the suit's res judicata effect. *See Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 660, 591 S.E.2d 611, 619 (2004) (hereinafter *Hospitality* ). Specifically, before absent class members can be finally bound by the resolution of the class action suit, they are entitled to a limited review on the issues whether sufficient notice was given to putative class members and whether class members had adequate representation. *Id.; see also Richburg v. Baughman,* 290 S.C. 431, 434–35, 351 S.E.2d 164, 166 (1986) (Due process guarantees to persons who never had a chance to present their evidence and arguments on a claim a full and fair opportunity to litigate the relevant issue even when "one or more existing adjudications of the identical issue ... stand squarely against their position" so long as the litigant was not a party or in privity with a party in the previous suit.).

[12] [13] Appellants allege they were deprived of due process in the settlement because it failed to provide either sufficient notice or adequate representation to absent class members. The trial court disagreed. Regarding adequate notice, it held simply that the issue of notice was litigated in Dorchester County, resulting in a final judgment on the merits. Thus, it failed to engage in even limited collateral review whether appellants received minimal notice to satisfy due process. Nor did the trial court analyze appellants' allegations of inadequate representation *500

in the settlement proceedings.[3] Such allegations would, if substantiated, entitle Appellants to a hearing on their underlying claims, so that dismissal on the pleadings was improper. *Doe, supra*

[14] The trial court also held appellants are collaterally estopped from litigating their claims because their issues were actually adjudicated in "a ruling from the same court in favor of these same Defendants" despite the fact that ruling involved a different plaintiff. Appellants argue this was error. We agree. Absent a showing appellants were in privity with the plaintiff in the previous proceeding, they are not collaterally estopped from litigating the same issue. *Richburg, supra.*

**III. Statute of limitations**

Appellants argue the trial court erred when it found that, even absent the res judicata effect of the settlement, the statute of limitations bars their underlying claims. We agree.

[15] The trial court determined that appellants' claims are independently barred by the statute of limitations. It determined, and appellants do not dispute, that S.C.Code Ann. § 15–3–535 (2005) applies to these claims.[4] Section 15–3–535 requires actions "be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." The trial court found appellants were put on notice of their cause of action by the acts of sexual abuse and that none of the alleged actions of concealment could have concealed such harm from them. It held that although three were minors when those acts occurred and the statute was tolled during their minority, the statute of limitations expired at the latest in 1989.[5] Appellants argue the trial court erred because respondents' negligent supervision of an employee is the tort at issue, not the sexual abuse itself. We agree.

[16] [17] [18] An employer may be liable for negligent supervision when (1) his employee intentionally harms another when he is on the employer's premises, is on premises he is privileged to enter only as employee, or is using the employer's chattel; (2) the employer knows or has reason to know he has the ability to control the employee; and (3) the employer knows or has reason to know of the necessity and opportunity to exercise such control. *Degenhart v. Knights of Columbus,* 309 S.C. 114, 116–17, 420 S.E.2d 495, 496 (1992). This rule has been applied to find an employer liable for negligent supervision when the employee sexually assaulted a minor and the employer had some notice of the employee's prior inappropriate sexual behavior with another minor. *Doe by Doe v. Greenville Hosp. System,* 323 S.C. 33, 40–41, 448 S.E.2d 564, 568 (Ct.App.1994). The employer's liability is direct, not derivative. *James v. Kelly Trucking Co.,* 377 S.C. 628, 631, 661 S.E.2d 329, 331 (2008). Thus, the facts alleged in this case would, if established, make out a claim for this independent cause of action, separate from the sexual abuse itself.

[19] [20] "The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule)." *Kreutner v. David,* 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (internal footnote omitted). Deliberate acts of deception by a defendant calculated ***501** to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations. *Strong v. University of South Carolina School of Medicine,* 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994).

[21] [22] Appellants allege respondents engaged in a systematic practice of secrecy and concealment of their knowledge of sexual abuse by employees, including the employee who appellants allege committed the abuse at issue. The employer's knowledge of an employee's dangerousness is an element of the tort of negligent supervision. *See Greenville Hospital System, supra.* Thus, appellants' allegations could, if proven, toll the statute of limitations.

**CONCLUSION**

We hold the language of the settlement does not waive its res judicata effect as to future claimants, so that appellants are not entitled to treatment as class claimants. However, dismissal on the pleadings was not warranted on the questions whether appellants were deprived of notice or adequate representation in the underlying class settlement and, if so, whether the statute of limitations was tolled on their claim of negligent supervision. Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims. We therefore affirm in part and reverse in part and remand for further proceedings consistent with this opinion.

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**AFFIRMED** in part and **REVERSED** in part and **REMANDED.**

**Parallel Citations**

754 S.E.2d 494

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

Footnotes

1 Appellants did not appeal the trial court's dismissal of their Unfair Trade Practices Act cause of action.

2 The trial court's reliance on transcripts and court orders in the underlying class action did not convert the motion to one for summary judgment. See Rule 12(b), SCRCP; *Mullis v. U.S. Bankruptcy Court for the Dist. of Nevada,* 828 F.2d 1385, 1388 (9th Cir.1987) (under federal rules, court may consider facts subject to judicial notice, including orders and record in underlying case); *General Time Corp. v Bulk Materials, Inc.,* 826 F.Supp. 471, 473 (M D Ga 1993) (consent order); *Stahl v. U.S. Dept. of Agriculture,* 327 F.3d 697, 700 (8th Cir.2003) (contract documents).

3 We note that *Hospitality* was decided in light of deference due to judgments from other states' courts under the Full Faith and Credit clause of the United States Constitution. Review of the procedures provided in a domestic class action does not implicate that clause and raises no similar constitutional tension with the guarantees the Due Process clause provides to absent class members. We do not reach the question whether plaintiffs seeking to avoid the preclusive effect of a domestic class action are entitled to anything more than the limited collateral review available under *Hospitality. See also Salmonsen v. CGD, Inc.,* 377 S.C. 442, 457, 661 S.E.2d 81, 90–91 (2008) (quoting *Hospitality* in analysis of domestic class action question).

4 Section 15–3–555, providing a six-year statute of limitations for actions arising out of sexual abuse or incest, became effective in 2001, long after the acts of sexual abuse that gave rise to appellants' claims occurred.

5 It found the youngest appellant was 21 years old in 1986.

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO. 09-CP-10-8055 |
| Jane Doe 2, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Negligence; Recklessness |
| | ) | Intentional Tort |
| The Bishop of Charleston, a | ) | Fraudulent Concealment |
| Corporation Sole, and | ) | Unfair and Deceptive Trade Practices |
| The Bishop Of The Diocese of | ) | |
| Charleston, in his official Capacity, | ) | Jury Trial Requested |
| | ) | |
| Defendants. | ) | |

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CLERK OF COURT
BY

**Second Amended Complaint**

For her complaint, the plaintiff alleges:

**Parties and Jurisdiction**

1. Plaintiff is a citizen and resident of South Carolina. As a child she was sexually molested by a priest of the Diocese of Charleston, James W. McCarthy, when James McCarthy was assigned to Saint William in Ward, S.C. during the approximate time period of 1965 to his departure in 1971.

2. A pseudonym is used for the plaintiff due to the sexual abuse injury which is the subject of this complaint. The defendants will be informed of the identity of the plaintiff.

3. James W. McCarthy was assigned by the defendants to Saint William in Ward, S.C. during the approximate time period of 1965 to his departure in 1971. During his time at St. William, defendants knew, or should have known, that James McCarthy was sexually abusive to children.

4. The Bishop of Charleston, a Corporation Sole, is the corporate entity that governs

the activities of the various entities comprising the Catholic Church throughout South Carolina. It is referred to in this complaint as the Diocese. The Diocese does business in Charleston County, owns property in Charleston County, and has its headquarters in Charleston County. The Diocese operated St. William, in Ward, S.C., and although the acts associated with the abuse of the plaintiff's children took place in and around Ward, S.C., in Saluda County, the acts of negligence and recklessness by others with the Diocese, in exposing the plaintiff's children to the risk presented by James McCarthy, occurred in Charleston County. As a result, venue is proper in either Charleston County or Saluda County.

5. The Bishop of The Diocese of Charleston is the formal head of the Diocese. Presently the Bishop is the Most Rev. Robert E. Gugliemone, a citizen and resident of Charleston County. He is sued in his official capacity, and is a party necessary for complete relief. He is referred to in this complaint as the Bishop. All persons working for the Diocese are subordinate to the Bishop. In this complaint, the Diocese and the Bishop defendants are collectively referred to as the "Diocese defendants," unless they are otherwise specifically referred to.

6. The Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Charleston County.

**Nature of Wrongdoing**

7. Prior to 1965, the Diocese defendants were either reckless or acted intentionally in actively disregarding the risks to children and families for sexual assault of children by their priests and other employees, and then actively, and fraudulently, concealing the

abuse that happened, and the dangers to children the Diocese and its priests solicited into danger.

8. The Diocese defendants were reckless in exposing children to the danger of sexual abuse, or did so intentionally in that the interest of the children at risk were regarded as expendable, in order to promote the interests of priests and the Diocese in appearing to be a more pastoral organization then it was in fact.

9. Charitable immunity does not apply to intentional or reckless conduct such as is alleged in this complaint, and in any event, in 2007 the Diocese explicitly waived all charitable immunity, and explicitly all statute of limitations defenses, for persons sexually abused by its priests prior to 2001, their parents and spouses:

10. Plaintiff was born prior to 1980, as were her children.

11. Plaintiff received no notice of the class action case the Diocese agreed to accept for abuse victims, and under the explicit terms of the order which approved the class action, and by agreement of the Diocese in that action, Plaintiff is not barred by the *res judicata* effect of that class action that would otherwise apply. In addition, the Diocese has waived the defenses of charitable immunity and state of limitations as to class of persons which was defined so as to include the plaintiff, among others.

**For a First Cause of Action:**
**Negligence, Recklessness, and Intentional Misconduct**

12. Allegations above are incorporated into this cause of action as if fully stated.

13. The defendant Diocese employed James McCarthy as a priest.

14. In his capacity as priest, James McCarthy was placed by the defendants in a position of trust and confidence, and had access to the plaintiff and her children. In that

capacity, James McCarthy sexually molested multiple children, including those of the plaintiff.

15. Prior to plaintiff's children being molested, the defendants became aware that James McCarthy was dangerous to children. The defendants ignored that danger, and placed James McCarthy so as to facilitate his access to children whom he could molest. Those decisions by Diocese personnel working on behalf of the Bishop were made or approved in Charleston County.

16. After he was moved by the defendants to Ward, South Carolina, James McCarthy molested the plaintiff's children.

17. The Diocese, Bishop, and its other officials negligently supervised James McCarthy. The Bishop was grossly negligent in supervising James McCarthy in not limiting his access to children or providing protective supervision over him.

18. As a proximate result of the negligence and gross negligence by the Diocese defendants, the Plaintiff's children were sexually abused by James McCarthy.

19. The Diocese defendants were negligent in failing to warn the plaintiff about James McCarthy. The Bishop performed that duty in a grossly negligent manner.

20. Although knowing that James McCarthy was a pedophile, or having reason to know, the Diocese and Bishop, including the Bishops prior to the current Bishop, made no effort, or no competent effort, to ascertain how many children James McCarthy had molested, and no effort, or not competent effort, to locate victims of James McCarthy. If the Diocese did make such an effort, as it has claimed that it did, it assumed the duty but performed it in a negligent manner, relying only on prior reports by abuse victims instead of undertaking an affirmative effort to ascertain victims of James McCarthy. The duty

undertaken by the defendants was performed in a grossly negligent manner, if it was not intentionally performed in a manner designed to be ineffective but done only to enable the Diocese to claim it had made an effort.

21. The defendants' failure to do so was negligent, and grossly negligent if not intentional on behalf of the presiding Bishop from the time the plaintiff's children were abused to the present.

22. As a result of the defendants' negligence, gross negligence, or intentional deception in failing to either prevent plaintiff's children from being abused or identifying the plaintiff's children as a victim of abuse by James McCarthy, a Diocese agent or employee, the plaintiff had impairments to the services of her children which were then exacerbated over time. The conduct of the defendants delayed the plaintiff's discovery that her children had all been molested by James McCarthy, delayed her treatment and treatment for her children, and exacerbated all problems stemming from the plaintiff's children having been sexually abused.

23. As set forth more fully below in the second cause of action, the Diocese defendants have for decades maintained a policy and practice of engaging in fraudulent concealment when their agents and employees sexually abuse children. Those allegations are incorporated into this cause of action as if fully set forth, and that fraudulent concealment by the Diocese defendants, among other things, accounts for the delay in this action being brought against the Diocese defendants.

24. The plaintiff is entitled to actual and punitive damages as a result of the negligence of the Diocese defendants, and gross negligence of the various presiding

Bishops, in failing to perform a proper review for James McCarthy's victims, or in performing that duty in a grossly inadequate, or intentionally inadequate, manner.

**For a Second Cause of Action:**
**Fraudulent Concealment by Diocese Defendants**

25. Allegations above are incorporated into this cause of action as if fully set forth.

26. The Diocese defendants have for decades maintained a policy and practice of engaging in fraudulent concealment when their agents and employees sexually abuse children. That practice, independent of its intentional and knowing waiver, estopps the Diocese from asserting any statute of limitations defenses as to the plaintiff, and forms an independent basis of relief for the plaintiff.

27. The Diocese defendants had a duty to discover, and to disclose, to plaintiff and to each of her children, their knowledge that James McCarthy had a sexual interest in children. That duty arises from

(a) the preexisting fiduciary relationship between the plaintiff and the Diocese defendants, which relationship the Diocese solicited;

(b) from plaintiff having expressly reposed, on behalf of her minor children, a trust and confidence in the Diocese defendants with regard to her children participating in events which would place each of them alone and in a vulnerable position with James McCarthy, the position of trust and confidence being implicit from those circumstances, from the nature of the dealings between the plaintiff and the Diocese defendants, and from their relative positions towards each other in light of the superior knowledge about James McCarthy possessed by the Diocese,

(c) from the essential nature of the Diocese defendants and their inducement to Plaintiff that having her children participate in the activities of the Diocese would be beneficial to them, not harmful to them,

(d) from a practice of secrecy, perhaps stemming from the secrecy provisions in the Code of Canon Law, both 1917 and 1983 versions of that Code, and the 1962 document titled "Instruction," which charges the Diocese to discover, but maintain secrecy about, "other persons solicited" by any person such as James McCarthy who committed the "unspeakable crime" of sexually abusing a child, and

(e) by the undertaking which the Diocese defendants assumed, negligently (and in the case of the individuals included in the Diocese defendants designation, grossly negligently, or intentionally, poorly), in 2005 - 2007 to locate victims such as the plaintiff.

28. Plaintiff's children were sexually abused by James McCarthy after 1962, in that James McCarthy was not assigned to Ward, S.C. until 1965.

29. Concerning each of (a) the dangers James McCarthy represented to Plaintiff's children, and (b) assisting to repair the damage done by James McCarthy, the Diocese defendants were obligated to Plaintiff and her children to engage with each of them in perfect good faith and with full disclosure, without regard to any particular intention of the parties. The relationship the Diocese solicited and assumed as to the plaintiff was inherently fiduciary in that the Diocese purports to be concerned with the best interests of those it solicits as parishioners.

30. Instead of disclosure, the Diocese defendants have operated with secrecy and concealment of all aspects regarding sexual abuse by their agents and employees, including James McCarthy. In its own operations, the Diocese required secrecy and concealment, and it has required its agents and employees to further conceal its knowledge of abuse so as to limit its exposure for being held responsible for sexual abuse of children.

31. Specifically, the Diocese defendants created, as embodied in the Code of Canon law which required it, an archive (Canon 486 in 1983 Code; Canon 375 in 1917 Code), accessible only by the Bishop and chancellor (Canon 487 in 1983 Code; Canon 375 in 1917 Code). Documents may not be removed from the archive except for a brief time, and only by permission of either the Bishop or the moderator of the curia (Canon 488 in 1983 Code; Canons 378-379 in 1917 Code ). Canon 489 (1983 Code) requires that a Secret Archive also be created (Canon 379 in the 1917 Code). In it "documents are to be kept secret" and "protected most securely." Canon 489 (1983 Code), Section 2 states: "Each year documents of criminal cases in matters of morals, in which the accused parties have died or ten years have elapsed from the condemnatory sentence, *are to be destroyed*. A brief summary of what occurred along with the text of the definitive sentence is to be retained." Emphasis added. Similar provisions are in Canon 379 of the 1917 Code (E.g., the Canon states, "promptly once a year, documents in criminal cases *are to be burned* in morals cases . . . ."). Emphasis added. Only the Bishop is to have the key to the secret archive, and documents are not to be removed from the archive (Canon 490, 1983 Code; Canon 379, 1917 Code). The bishop is authorized to include in the secret archive any matter which can be regarded as scandalous.

32. Matters related to agents and employees of the Diocese sexually abusing children, including James McCarthy's sexual abuse of children, including the children of the plaintiff, were regarded as scandalous, and were maintained in the secret archive. As such, those documents would have been intentionally destroyed as called for in either version of the Code.

33. Another technique used by the Diocese to maintain secrecy about sexual abuse matters, or any other matter the Diocese wished to keep secret, was to move the document (or person) to other locations, including moving a document to Rome, where diplomatic immunity could be claimed and production resisted.

34. In 1962 the Diocese defendants expanded on the secrecy required concerning sexual abuse, publishing an "Instruction" which was to be stored in the secret archive. Instruction, page 1. In the instruction, matters involving priests who "solicit or provoke" (p. 1 ¶ 1) a penitent "toward impure and obscene matters" (p. 1 ¶ 1), "which is also silence" (¶ 11) and deemed "a secret of the Holy Office" (p. 3 ¶ 11), "under the penalty of excommunication" (p. 3 ¶ 11). The accused, the accusers, and any witnesses are to be given "The oath of keeping the secret." (p. 4 ¶ 12. See also, p. 5 ¶ 23 and p. 6 ¶ 28).

35. The plaintiff and her children each fit within the "penitent" referred to in the Instruction.

36. The Instruction states that "the worst crime" is "any perpetrated by a cleric or attempt [sic] with a person of his own sex." P. 15, ¶ 71. Plaintiff's abused children are both make and female.

37. The Instruction also defined as "any obscene, external act, gravely sinful, perpetrated in any way by a cleric or attempted by him with youths of either sex." P. 16, ¶ 73.

38. The conduct by James McCarthy towards the plaintiff's male children qualifies under the Instruction as "the worst crime."

39. Among other things, the "Instruction" directs that the Diocese defendants were to assume the duty of locating "other persons solicited by the same confessor" (p. 7 ¶ 29), in this instance, other persons solicited by James McCarthy. See also, Instruction, p. 9 ¶ 37.

40. When that duty was assumed by the Diocese defendants, it was performed in a grossly negligent manner. The Diocese defendants failed to locate the plaintiff, any of plaintiff's children.

41. The "Instruction" states it was approved by the "Most Holy Father John XXIII" in 1962. P. 16.

42. In its Appendix, the "Instruction" sets out the terms of the secrecy to be observed for matters such as the sexual abuse of plaintiff's children. In essence, the secrecy oath provides for absolute secrecy, under pain of excommunication. Only the Pope himself can lift the obligation of secrecy, and it is a secrecy to be maintained "under whatever type of pretext, even for the most urgent and most serious cause [even] [sic] for the purpose of a greater good," unless expressly approved "by the Supreme Pontiff." P. 17.

43. "Whatever type of pretext" overtly endorses lying, even under oath, to this or any other civil tribunal. No qualification is made in the "Instruction" for complying with civil authority.

44. Unless the Pope himself approves otherwise, the "Instruction" directs that secrecy is to be maintained not only by the Catholic plaintiffs such as the plaintiff, but by every member of the Diocese defendants, and by even witnesses to sexual abuse such as the plaintiff's children. That secrecy is to be made despite any law, court order, or oath to which would otherwise require disclosure. Under the "Instruction," the highest obligation, higher than any law, oath, or court order, is to maintain secrecy for the benefit of the Diocese, and any pretext is to be used to maintain the secrecy. Accordingly, unless the Pope has instructed otherwise, the Diocese defendants can all be expected to be obedient to the "Instruction," and to overtly conceal or misrepresent any facts related to sexual abuse. The Diocese defendants have, to date, done so.

45. Absolute secrecy more than sufficient to constitute fraudulent concealment was maintained by the defendants as to James McCarthy's sexual abuse of the plaintiff's children. Consistent with that obligation of secrecy, the Diocese defendants made no effort to either prevent sexual abuse of the plaintiff, or to ascertain that the plaintiff was a victim of the abuse by James McCarthy.

46. As courts began to require the Diocese, despite its commitment to secrecy and deception, to be accountable for sexual abuse, the Diocese had to reach a new level of deception and manipulation to limit the damage to the Diocese from its having to take responsibility for its history of sexual abuse, and to as much as possible conceal the extent of abuse, and to limit as much as possible its responsibility for that abuse.

47. The plaintiff is entitled to actual and punitive damages as a result of the fraudulent concealment of the Diocese defendants in actively maintaining secrecy and

thus failing to perform a proper review for McCarthy's victims, including the plaintiff's children, or in performing that duty in a negligent manner.

48. In addition, and as an independent alternative, as a result of its practice of secrecy, as well as from its explicit waivers, the Diocese is precluded from asserting the statute of limitations, or charitable immunity, as to the plaintiff, and the plaintiff is entitled to actual and punitive damages as a result of the intentional or negligent practices of the Diocese which affected the services of the plaintiffs' children.

49. In addition, as an a second independent alternative, the Diocese voluntarily waived defenses of statute of limitations and charitable immunity as to a class of persons born prior to August 31, 1980 who were themselves or whose children were sexually abused by priests or others associated with the Diocese, a class which includes the plaintiff, and by that explicit waiver the Diocese is precluded as a matter of law from asserting the statute of limitations, or charitable immunity, as to the plaintiff, and the plaintiff is entitled to actual and punitive damages as a result of the intentional or negligent practices of the Diocese which affected the services of the plaintiffs' children.

50 In addition, as an a third independent alternative, the Diocese voluntarily waived defenses of statute of limitations and charitable immunity as to a class of persons born prior to August 31, 1980 who were themselves or whose children were sexually abused by priests or others associated with the Diocese, a class which includes the plaintiff, and by that explicit waiver the Diocese may be precluded by the finder of fact from asserting the statute of limitations, or charitable immunity, as to the plaintiff, and the plaintiff is entitled to actual and punitive damages as a result of the intentional or negligent practices of the Diocese which affected the services of the plaintiffs' children.

51. The Plaintiff is not precluded from making this claim by the prior class action litigation brought against the Diocese, because the order in that litigation provides for those who received no notice of that litigation "for whatever reason," to be not bound by that litigation. Plaintiff received no notice of that litigation.

52. Alternatively, the Plaintiff is not precluded from making this claim by the prior class action litigation brought against the Diocese because that litigation was collusive. The Diocese calculated it could use the class action to pay modest compensation to a limited number of victims, then try to exclude all others by *res judicata.* The Diocese colluded to

(a) cooperate with class counsel who had life-long ties to the Diocese and who held positions within the Diocese,

(b) twice continue hearings in Charleston County for three pending cases, one of which was a class action, so as to keep the Charleston County Circuit Court from deciding dispositive motions or ruling on class status pursuant to SCRCP 23(c),

(c) agreed to a fixed fee for class counsel simultaneously negotiating the recovery for the class,

(d) agreed to class counsel's fee taking priority over the recovery for the class,

(e) agreed to class counsel being paid prior to the class being known or the first class claimant had even an opportunity to file a claim,

(f) agreed to limits on class member recovery for a small fraction of what class counsel would agree to accept when litigating against a Diocese other than his own,

(g) agreed not to disclose to the Charleston County Circuit Court that a class action settlement was in fact reached in the class action pending in Charleston County during a June, 2006 mediation.

(h) agreed to not submit the June, 2006 mediated class settlement to the Charleston County Circuit Court even though the class action settled by that agreement was pending in that court, and no other case was then pending.

(i) agreed to a plan to move class certification and class settlement oversight from the Charleston County Circuit Court in which the pending class action had been settled, to Dorchester County, where no case was then pending, so as to judge-shop for a Circuit Court judge with long social and professional ties to class counsel,

(j) agreed to accept service of three collusively-filed class actions in Dorchester County, one of which was identical, word-for-word and typo-for-typo, to the already-settled class action pending in Charleston County, making that class action case pending in two counties simultaneously,

(k1) agreed to begin communications with a judge in Dorchester County with long social and professional ties to class counsel, apparently giving that judge only limited information, and certain false information, about the pending Charleston County class action and the collusion among counsel,

so as to gain her (apparently unwitting, initial) assistance in depriving the Charleston County court of jurisdiction to review under SCRCP 23(c) the class status of, or the June, 2006 class settlement for, case 05-CP-10-4913.

(k2) Alternatively, the Diocese agreed to begin communications with a judge in Dorchester County with long social and professional ties to class counsel, fully disclosing that a Charleston County class action, 05-CP-10-4913, was pending and that a proposed class settlement had been reached in June, 2006, and seeking the Dorchester County court's active cooperation in depriving the Charleston County court of the jurisdiction to review under SCRCP 23(c) the class status of, and the June, 2006 proposed class settlement for, case 05-CP-10-4913.

(l) agreed to circumvent SCRCP 23 being applied by any Charleston County judge to the class settlement reached in the class action pending in Charleston County, by agreeing to not inform that Court that a class settlement had been reached when asking for the Charleston cases to be dismissed,

(m) agreed to take no position on class certification, even though the Diocese would be obligated to a settlement of $460,000 without class certification but for far more with class certification,

(n) agreed to remain silent about class counsel's false, duplicative, and fraudulent time and billing records in class counsel's application for costs and fees,

(o) agreed to class counsel being paid in fact prior to the class claims period even beginning,

(p) agreed to oppose all objections raised by third parties to the class settlement,

(q) convinced class counsel to abandon his request to the court for nationwide notice and to change his request for only geographically limited notice,

(r) agreed to arbitration of class members claims, to assure that the Diocese would not pay to victims more than the limits the Diocese was willing to accept,

(s) agreed to inform the mediator about the financial limits the Diocese was willing to accept so the arbitrator would not exceed those sums in its awards to class members,

(t) convinced class counsel to acquiesce in letting the Diocese examine its own files for sexual abuse victims, even though the Diocese was alleged to have a history of deliberately secreted information about abuse, and the search by the Diocese was only for persons who had already identified themselves as abuse victims, not for all victims.

(u) agreed to request no post-award fairness hearing in the class action,

(v) agreed to request no review of class counsel's actual fee, even though it appears class counsel might have recovered as much as 51% of all sums paid by the Diocese,

(w) agreed to request of the Dorchester County court no final accounting or final order prior to the September 19, 2009 deadline imposed by the SC

Supreme Court for the Dorchester County court to conclude the class action,

(x) agreed to request no final accounting, and

(y) agreed to take no appeal from any orders of the Dorchester County court affecting the class settlement.

53. Plaintiff presumes that in 2006 and 2007 the Dorchester County Circuit Court was not given complete information about the status of 05-CP-10-4913 and the proposed class settlement, and by the time accurate information was given to the Court, in 2008, it was so far into the class process that even though the Court had authority to modify orders in the class action "at any time" under SCRCP23, the Court elected to take no further action in the class action case.

54. As a result of the concealments by the Diocese, and its collusion in the class action, the Diocese is unable to properly assert any statute of limitations defense as to the plaintiff. Also as a result, the plaintiff was injured, and is entitled to actual and punitive damages in a amount to be determined by the finder of fact.

**For a Third Cause of Action:**
**Unfair and Deceptive Trade Practices**

55. Allegations above are incorporated into this cause of action as if fully stated.

56. The Diocese defendants engaged in unfair and deceptive acts or practices in the conduct of commerce in violation of South Carolina law. The Diocese contends its participation in engaging in unfair and deceptive acts or practices is not sufficiently specified in the allegations prior to this paragraph, so to accommodate the Diocese, we

set forth a short and plain statement of allegations in greater specificity about those various engagements in trade or commerce as defined in South Carolina law.

57. Defendants engage in trade or commerce in that they provide services to the public and advertise services to the public. Providing any services constitutes commerce within the meaning of the UTPA. Commerce in that regard is not confined to conventional consumer transactions.

58. Defendants offer, and advertise, services related to association, entertainment, and pastoral activities. Defendants operate schools, for which tuition is charged. For many years, including time periods pertinent to this complaint, the defendants were supported and maintained by, among other things, gambling revenues, and advertised its gambling activities to the public.

59. Defendants' activities encompass the entire State of South Carolina, and defendants assign and oversee personnel throughout the state for the services it provides throughout the state.

60. Starting not later than 1998, defendants began to accommodate various claims that among the personnel engaged in its operations with the public were a number of persons who had a sexual interest in children. On their own volition under the Code of Canon Law, and operating through instruction from the Vatican, the defendants organized efforts over time to maintain as much secrecy as possible about the pedophiles it employed, and elected as a strategy to maintain as much secrecy as was possible about those pedophiles.

61. The defendants organized internally to absorb and deflect victims of its pedophiles, and to resist, as much as possible, taking any responsibility for its pedophiles.

62. One method eventually adopted by defendants was to offer, and advertise its offer, of counseling services for victims of its pedophiles. The defendants sought to maintain control of victims by making slight compensation for sexual abuse victims, and to contain information about pedophiles, while gathering information from abuse victims.

63. To minimize risks to themselves, the defendants established a person to be responsible for responding to sexual abuse victims of the pedophiles maintained by the defendants. Information was gathered by that person and used to maintain information on pedophiles and their victims, and to minimize the risk of litigation. This was a calculated business strategy by the defendants to protect the organization from all but minimal accountability for its pedophiles.

64. Defendants also collaborated with the Vatican to receive reimbursements for all or some of payments made for victim compensation, collaborating across international borders as well as across state lines to do so.

65. In 2006, the defendants collaborated on a new strategy to minimize its responsibility for the pedophiles it had permitted for decades to sexually abuse children. Working with a member of the Diocese, the defendants adopted a strategy of collusive litigation to advertise for, and gain limited participation in, a claims process that was hoped would, for a price, purchase the ability for defendants to compensate some victims minimally, enabling the defendants to avoid paying any significant compensation, in exchange for being able then to deny all compensation to any other victims who might seek greater accountability.

66. In 2006, the defendants calculated they could collude to present a class action to pay modest compensation to a limited number of victims to secure the smallest amount of

compensation possible for all victims. To pursue that improper objective, defendants made, even to the court, false promises and assurances to gain the court's approval of the class action mechanism, and then used the collusive class action to try to exclude, by *res judicata*, all other victims. Through these means, defendants purchased, for the price of modest recoveries to a group of victims known to be incomplete, the ability to avoid significant recovery to any victim, and avoid outright any recovery at all to many other victims about which the defendants knew or should have known.

67. Defendants cooperated and colluded in this objective with class counsel who had life-long ties to the Diocese and who held positions within the Diocese. He agreed to not disclose to the class his connections to defendants.

68. Defendants collaborated with class counsel to twice continue hearings in Charleston County for three pending cases, one of which alleged a class action, so as to keep the Charleston County Circuit Court from deciding dispositive motions or ruling on class status pursuant to SCRCP 23(c). Defendants and class counsel sought to avoid any independent judge, preferring instead to present their collusive class action only to a judge they had hand-picked, who they calculated would accept information, even if false, and would refuse to explore allegations of false information The defendants and class counsel counted on their hand-picked judge not scrutinizing too closely their collusive actions, including false information given to the court, even when the collusion and false information was plainly exposed for the judge to review. And as defendants expected, the hand-picked judge refused to make any inquiry into any of the collusive conduct, any of the judge-shopping by which that judge was picked, any of the unethical fee provisions, or any of the false or fraudulent information given to that judge. Defendants

refused to request, and the hand-picked judge refused to order, any post-award fairness review for the class action, so as to avoid having to confront the collusive and fraudulent conduct of the class action.

69. Defendants agreed to a fixed fee for class counsel while class counsel simultaneously negotiated a variable recovery for the class, enabling defendants to succeed in pitting class counsel's personal interest against, and ahead of, the interests of his class member clients. Defendants calculated correctly that class counsel would promote his own interests ahead of the class members he represented.

70. To facilitate class counsel putting his own interests ahead of the class he represented, defendants agreed to enable class counsel's fixed fee to take priority over the variable recovery for the class, an unethical conflict of interest.

71. Defendants agreed to class counsel being paid prior to the class being known or before the first class claimant had even an opportunity to file a claim.

72. Defendants negotiated to "buy off" class counsel so as to get, in exchange, limits on class member recovery that were a small fraction of what class counsel would agree to accept when litigating against a Diocese other than his own in a comparable sexual abuse claim. Specifically, by buying off class counsel for a fixed fee that had priority over class member recovery, defendants obtained in exchange a limit of $200,000 for any class member. By contrast, when class counsel settled a comparable individual case for sexual abuse, also filed in South Carolina but against the Diocese of Savannah, not defendants, class counsel recovered over $4 million for a single client, counsel for these defendants also representing the Diocese of Savannah, so these defendants were well aware of the progress of that litigation. By defendants colluding with that class counsel to work

against the class of victims in the South Carolina class action, the defendants avoided having to pay anything close to comparable value for the class of victims, lowered the bar for recovery to all victims, and created a mechanism the defendants later tried to use to bar all other victims.

73. Defendants agreed with class counsel not to disclose to the Charleston County Circuit Court that a class action settlement was in fact reached during a June, 2006 mediation in the class action pending in Charleston County.

74. Defendants agreed with class counsel to ignore the mandatory requirements of SCRCP 23, and agreed with class counsel not submit the June, 2006 mediated class settlement to the Charleston County Circuit Court for approval, even though the class action settled by that agreement was pending in that court, and no other class action case was then pending.

75. Defendants agreed with class counsel to a plan to move the questions of class certification and class settlement oversight from the Charleston County Circuit Court, in which the pending class action had been settled, to Dorchester County, where no case was then pending, so as to judge-shop for a particular Circuit Court judge with long social and professional ties to class counsel.

76. Defendants agreed to accept service of three collusive class actions filed in Dorchester County, one of which was identical, word-for-word and typo-for-typo, to the already-settled class action pending in Charleston County, making the identical class action case pending in two counties simultaneously.

77. Defendants' agreement to accept service was part of the plan with class counsel to ignore the case pending in Charleston, make it quietly go away, and use the hand-

picked, shopped-for judge to approve the class mechanism only in Dorchester County, avoiding any class approval questions in Charleston County.

78. Defendants agreed with class counsel to begin communications with a judge in Dorchester County with long social and professional ties to class counsel, apparently giving that judge only limited information, and at times false information, about the pending Charleston County class action and the collusion among counsel, so as to gain the judge's assistance in depriving the Charleston County court of jurisdiction to review under SCRCP 23(c) the class status of, or the June, 2006 class settlement for, case 05-CP-10-4913. Alternatively, defendants began communications with the judge in Dorchester County with long social and professional ties to class counsel, making full disclosure that (a) a Charleston County class action, number 05-CP-10-4913, was pending, (b) a proposed class settlement had been reached in that action in June, 2006, and (c) the defendants sought the Dorchester County court's active cooperation in depriving the Charleston County court of the jurisdiction to review under SCRCP 23(c) the class status of, and the June, 2006 proposed class settlement for, case 05-CP-10-4913.

79. Defendants agreed to circumvent SCRCP 23 being applied by any Charleston County judge to the class settlement reached in mediation of case 05-CP-10-4913, the class action pending in Charleston County, and defendants agreed to not inform the Charleston County Circuit Court that a class settlement had been reached when defendants agreed to ask for that and two other Charleston cases to be dismissed.

80. Defendants agreed with class counsel to take no position on class certification in the Dorchester County collusive class cases, even though the Diocese would be obligated to a settlement of $460,000 without class certification but more than $8 million with class

certification. The defendants knew that even spending $8 million was a bargain price for effectuating its plan for low compensation to abuse victims in exchange for a protection defendants would later argue barred all compensation for any other victims.

81. Defendants agreed to remain silent about class counsel's false, duplicative, and fraudulent time and billing records that were used to support class counsel's application for costs and fees. Among other things, defendants agreed to be silent when class counsel billed time on February 30 in different years, and when class counsel billed individual time of more than 24 hours per day on numerous occasions, including a day in which class counsel to have worked more than 40, 50, 70 and 90 hours in a single day. The silence by defendants for class counsel's grotesque billing records was among the *quid pro quo* for enabling defendants to obtain the benefits of the collusive class action.

82. Defendants also agreed not to report class counsel's egregious billing conduct to the Office of Disciplinary counsel. The silence by defendants for class counsel's grotesque billing records was among the *quid pro quo* for enabling defendants to obtain the benefits of the collusive class action.

83. Defendants agreed to class counsel being paid prior to the class claims period even beginning.

84. Defendants agreed to oppose, with class counsel, all objections to the class settlement raised by third parties to the class settlement.

85. Defendants succeeded in getting class counsel to abandon his request to the Dorchester County court for nationwide notice to the class, and to change that request for only geographically limited notice, limited only to South Carolina advertising sources.

86. Defendants agreed to arbitration of class members' claims, to assure that the Diocese would not pay to victims more than the limits the Diocese was willing to accept. Claims could be adjusted, if need be, to enable compensation to victims to be adjusted so as to keep overall compensation within the limits desired by the Diocese and the Vatican.

87. Defendants agreed to inform the mediator about the financial limits the Diocese and the Vatican were willing to accept so the arbitrator would not exceed those sums in its awards to class members, and if needed, could adjust the awards to maintain those limits.

88. Defendants got class counsel to acquiesce in letting the Diocese examine its own files to discover sexual abuse victims, even though class counsel claimed the Diocese had, and the Diocese in fact had, a history of deliberately secreting information about abuse, and the search by the Diocese was disingenuous in that it was a search not for all victims but only for persons who had already identified themselves as abuse victims.

89. Defendants agreed to request no post-award fairness hearing in the Dorchester County class action, even though further proceedings were ordered by the South Carolina Supreme Court.

90. Defendants agreed to request, through a fairness hearing or otherwise, review of class counsel's actual fee as a percentage of the common fund for the class, even though it appears class counsel recovered as much as 51% of all sums paid by the defendants. That silence by defendants was part of the *qui pro quo* for the benefits to defendants of the collusive class action.

91. Defendants agreed to request of the Dorchester County court no final accounting or final order prior to the September 19, 2009 deadline the South Carolina Supreme Court

imposed on the Dorchester County court to conclude the class action. That silence by defendants was part of the *qui pro quo* for the benefits to defendants of the collusive class action.

92. Defendants requested no final accounting of the class action.

93. Defendants agreed to take no appeal from any orders of the Dorchester County court affecting the class settlement.

94. In 2006 and 2007 the defendants agreed to withhold from the Dorchester County Circuit Court the complete information about the status of case 05-CP-10-4913 and the proposed class settlement, and then to provide false information to the court. By the time accurate information was given to the Court, in 2008, by others, it was so far into the class process that even though the Dorchester County Court had authority to modify orders in the class action "at any time" under SCRCP23, the hand-picked Dorchester County judge elected to take no further action in the class action case, and the defendants agreed to make no request that the Court take any action, and refused all requests that the Dorchester County Court take further action.

95. The Diocese defendants stated publicly, and to the Court, that the Diocese waived its defenses for persons abused prior to August 31, 1980, yet then refused to do so when such persons came forward. The representation was made by the defendants on the record in an *ex parte* proceeding (ex parte as to other parties who had responded to the court's invitation for objections to the proposed class action).

96. A true and accurate transcript of proceedings in the class action of July 13, 2007 is attached to this complaint. Its text is incorporated into these allegations pursuant to SCRCP 10(c).

97. In the attached transcript, defendants made false representations to the Dorchester County Circuit Court. Using the page numbers of the attachment, on page 1 of 33 the defendants sought to avoid having a record made of the proceedings. Defendants' false statements appear on throughout this transcript, but particularly on page 22 of 33, at lines 17 to 25 and then on to line 1 on that page defendants misrepresented to the court their intention to address other victims who failed to get notice of the class action. The court relied on the false statements by defendants, and was unaware that defendants were engaged in false and collusive conduct with class counsel.

98. For all of these reasons, it is alleged that defendants have engaged in trade and commerce within the meaning of S.C. Code 39-5-10(b), and used false and deceptive trade practices during those actions of trade or commerce. Defendants have operated, advertised, and distributed services, property, and things of value, so as to directly and indirectly affect the people of South Carolina.

99. Plaintiff has suffered an ascertainable loss as a result of the secretive, duplicitous, and untruthful conduct of the Diocese, and is entitled to recover actual damages as a result of the wrongful conduct of the Diocese.

100. The secretive and disingenuous conduct by the Diocese is offensive to public policy, is immoral, unethical, and oppressive. The Diocese engaged in a public relations exercise, in an effort to procure positive publicity, at a certain cost to itself, without having to compensate all of its abuse victims. It designed the compensation specifically to exclude certain victims. The Diocese engaged in collusion and overt misrepresentation in order to achieve its objective to deceive the public, the court, and

those persons sexually abused prior to August 31, 1980, and the parents and spouses of those persons.

101. The unfair and deceptive acts and practices of the Diocese have an impact upon the public interest, and has not only the potential for repetition, it has been repeated. The practices engaged in by the Diocese of misrepresentations to the court and the public through its court statements and its statements to the press are extensions of longstanding practices of deceit and deception by the Diocese. Maintaining secret archives of files, practicing "mental reservation" to support and justify lying (even while under oath), using diplomatic immunity to conceal documents, and mandating that persons conceal abuse are all techniques used by the Diocese to maintain deception. Overtly misrepresenting to a Court and the public are extensions of practices the Diocese has engaged in for years.

102. The false and deceptive practices of the Diocese will continue absent some deterrence in the form of liability and damages as well as injunctive prohibitions. The corrupt practices of the Diocese have been repeated as well as having had the potential for repetition. The Diocese engages in misrepresentations of material fact.

103. The Diocese has intentionally misrepresented even geographic origin and history in presenting information about abuse victims to the court and the public.

104. The Diocese should be enjoined from further use of any deceptive practice, and enjoined from removing, concealing, withholding, destroying, mutilating, altering, or by any other means falsifying any documentary material in its possession, custody, or control.

105. The Diocese violated the UTPA willfully, in that it knew or should have known that its conduct was a violation of S.C. Code § 39-5-20.

106. The plaintiff suffered an ascertainable loss of money as a result of the use or employment by the Diocese of the unfair or deceptive methods in articulating one standard that the Diocese claimed applied to abuse victims prior to 1980, but then, after approval by the state court relying on that representation, the defendants refused to comply with that standard when other victims came forward.

107. The plaintiff is entitled to treble damages as a result of the conduct of the Diocese, as well as actual and punitive damages, and such other and further relief as the court deems just and proper.

**Demand for Jury Trial**

108. Plaintiffs demand a trial by jury.

**Relief Sought**

Wherefore, Plaintiff seeks relief in the form of:

109. Actual damages to be awarded to the plaintiffs by the finder of fact against the various defendants, trebled as authorized by law for the appropriate cause of action,

110. Injunctive relief as requested in this complaint,

111. Costs and disbursements of this action,

112. Attorneys fees as authorized by law,

113. Punitive damages as authorized by law, and for

114. Such other and further relief as the Court deems just and proper.

Respectfully submitted,



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Attorney for Plaintiff

THE COURT: Let the record reflect that the Chinese firewall has taken effect and I am sending my law clerk on his very last day on the very last hearing out of the courtroom.

MR. SHAHID: I don't know if you need to be on the record, Judge, but I guess we're just trying to push forward.

THE COURT: Good.

MR. SHAHID: And we sent letters, I sent you a letter late yesterday afternoon

THE COURT: And I wasn't real sure what we were doing. It's like, hum.

MR. SHAHID: It was just to announce that we had reached an agreement.

THE COURT: I felt like the Sony dog. Okay. You want to stop? Do you want to stop? On our of off?

MR. SHAHID: We don't need to be on the record, do you think?

MR. RICHTER: I think, yeah, I do. Why not? I mean, if you don't mind, let's be on the record. Because I don't know what you -- I don't know what we're talking about. Go



ahead, shoot. What?

MR SHAHID: Judge, I sent by fax a



Attachment: Transcript of ex parte conference page 000001 of 000033

letter to you yesterday.

THE COURT: Right, yeah.

MR. SHAHID: And I copied Mr. Richter, Mr. Haller, the other class counsel attorneys simply to announce the progress we have been making regarding this case.

THE COURT: Wonderful.

MR. SHAHID: One was resolving this issue in a motion. In my conversation with Mr. Pascoe in the courtroom today.

THE COURT: Yes.

MR. SHAHID: It was my understanding he was either going to chat with you, provide you with an interim report as to where he stood. And Mr. Haller and I have been on the phone I think about every day this week, one of the things.

The main concern was the diocese's position on this creation of a subclass and we've had very frank discussions with class counsel about that and we just don't think in, all due respect to what --

THE COURT: That it's necessary.



MR. SHAHID: It's necessary. And we quite frankly think the diocese, quite frankly, thinks that it is going to create more of a problem than what the Court is trying to avoid happening.

THE COURT: Okay.

MR. SHAHID: And what we're trying to do

is take care of those victims to make sure that they are included in the class and they get notice of the class and try to stop whatever potential loophole they may be -- if something strange happens. I guess in which someone pops back up who should have gotten notice who didn't get notice.

And I think that after talking with Mr. Haller about that and class counsel about that, I think we have an understanding as to what would happen to those particular folks, which would be really our problem, and I think that what we've discussed allows us to proceed with the agreement we've signed on January 12th. And then if that person -- as remote as it may be, but if that person shows up then we would have to deal with it.

THE COURT: Let me ask you this



question: It is my understanding that, and I'm not going to be as crisp as I would want to be because I really was not anticipating this issue today.

MR. SHAHID: Right.

THE COURT: I was anticipating only the motion to compel, but there was, as I understand it, a list of some 40 names ab initio that the diocese had and I am not talking about the individuals that the plaintiffs' counsel already knew about,

pursuant to notice already knew about. I'm talking about sum total of 40 individuals that the diocese was aware of had made at some point through going through old records pursuant to -- really to working with Solicitor Pascoe's request, that there were some 40 individuals who were identified as being individuals that were potentially or were sexually abused by priests, by individuals from the diocese and that pursuant to our status conferences I wanted obviously the solicitor have all the information that you have had and I think you've shared that with the solicitor.



And additionally, although he would certainly speak for himself, but my understanding was that you all had shared that with him and that out of that 40 there were 20 people that you all have really been trying to locate and that out of that 20 you got 15 and then there are five folks for which I wanted you all to enter into a protective order and those five names be given to the plaintiff and allow the plaintiff to try to find those five individuals but not contact those people until the diocese had an opportunity to contact them since they had originally come to the diocese.

With regards to the other 20 while

there was some information about those folks coming out of the file -- out of the old files, archive, that there was a real problem with determining really what the status of those other 20 were, that it was less clear about those 20 folks. Go ahead, yes, sir. And that's my memory. Those are the people that have -- let me just for the record, in our discussions and the discussions with the

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solicitor's office, I -- my concern has been that I know that there are some individuals out there for which there's pretty specific indications that they ought to be included in this class, I've wanted them to be included in this class and in the attempts to sort of move -- move those folks that we knew about and the ones that had already responded and there was a real concern and I think legitimately so for those folks that we knew about that had come forward that really the fairness hearing, they had participated in, made contact with plaintiffs' class counsel, that those folks kind of needed to move forward, and yet I know of these 20 people and that 15 we now know of and I think the diocese is trying to make contact, there's another five people that the plaintiffs are specifically going to reach and I don't know about the other 20. You can put on the

record whatever you need to. My concern was, I wanted to be able to go forward on those people that have already gone forward that everybody sort of knows about.

MR. SHAHID: Right.



THE COURT: But I'm not of a mind to force the solicitor, our solicitor has number one gone outside his judicial circuit and I think done a lion's job of really going into Charleston, I think the diocese has done so far a wonderful job of cooperating. He's had to contact the attorney general, U. S. attorney's office, he's dealt with this -- sort of this document that's been floating around out there, he's made contacts with the United States attorney's office, with -- he's reached out to the United States attorney's office in Massachusetts, he's talked to not only plain old garden variety lay lawyers, but those with more familiarity as I understand it with the ((occracy okracy and to try to ascertain what the words mean and done research, worked with the attorney general's office to do the same.

And my concern was, was that I did not -- A, I didn't want the solicitor who is obviously working incredibly diligently, I didn't want him disturbed, I wanted him to continue doing what he was doing but I didn't want to hold these other folks up because

they seemed to want to go forward.

I wanted to fashion a way because it didn't seem fair to me that when we identify actual people, individuals who ought to be included in the class, it didn't quite seem fair to me to just say, listen, either come forward based on publication or you don't because these people already have come forward at some point in their lives. And it just didn't seem fair to me to exclude those folks that ought to have more individual notice. That was the reason that I thought maybe the solution was to come up with some sort of, if you will, additional class or subsection or that we could sort of hold something for those folks and yet go forward on the other ones. We certainly have done that in other class actions that I've been involved in, so I know that the procedure exists so that was my concern in short.

So I want you to put on the record for me, please, Mr. Shahid, about the 40 and that breakdown.

MR. SHAHID: Well, it was actually through the file review the Court alluded, to



the diocese has gone through there were actually 20 -- we had dwindled the number

down to 20 folks who had -- we believe had come forward.

THE COURT: Yes.

MR. SHAHID: Either directly or through a third source.

THE COURT: Right.

MR. SHAHID: And that source could have been through either a parent or a person saying I believe John Doe or Jane Doe may have been abused as well. We located initially 15 we thought were good addresses, solid addresses, of those 20 the Court ordered us through a protective order to turn over five names to class counsel for them to use the sources they had. In the interim we located another name, the number actually was reduced from five to four.

THE COURT: Okay.

MR. SHAHID: So I received from Mr. Haller actually e-mail yesterday as to his efforts from his investigator regarding, I think, two of the four, I do not recall. And so we will follow up on that. So the 20



is down to four names and some of those names, as I recall, are the result of not exactly a direct claim but through a second or third source.

There was a list of folks that we have that we were concerned that were not reported to law enforcement authorities and

so that is a -- whose claims may have been adjudicated through some process outside of what we have done in here. And so we were in the process of identifying the counties that would be the most appropriate county to make that report to. So we have -- that was the second leg of what we've done.

Those -- I think those folks, those 20-odd folks, those cases have already been adjudicated. In other words, there may have been settlement between them and the diocese and that case has been resolved so they would not be -- they would not qualify as a class member.

THE COURT: Okay.

MR. SHAHID: And those folks would -- would not qualify to be part of this action.

THE COURT: Okay. Okay.



MR. SHAHID: So the essential concern is what the Court had said earlier, is to make sure that those people had somehow through either directly or indirectly come to the diocese's attention those people should have gotten direct notice and we've done the best we can in finding them and locating them and will continue that process.

THE COURT: And those are the ones, too, I want you to give the names to the solicitor.

MR. SHAHID: Yes, we can do that.

THE COURT: Great. I thought there were 40 individuals we began some discussions about. I thought there were 40. No?

MR. SHAHID. The number was at one point 45, I think and we had split it, the 45 into two categories, one was not being reported to law enforcement authorities and another crowd being the ones who had not had their case adjudicated and may or may not have been reported to the authorities. And there was some overlay in that because some cases in which the name was reported to law enforcement authorities but had not been made



directly aware of this action.

THE COURT: Right, okay. Oh, yeah, yeah. And those were some folks I was concerned about. The other subcategory, the other group that I was concerned about was that anyone that through Solicitor Pascoe's efforts that we -- because he's -- I mean, obviously he's not involved in the civil matter, he has no dog in that fight so to speak, that is not his focus.

MR. SHAHID: Right.

THE COURT: His focus simply comes from the position of law enforcement to be sure that there is not information of individuals who were -- had crimes committed against them over time for which law enforcement was never

informed.

MR. SHAHID: Right.

THE COURT: And that was his interest. Of course his investigation is not -- his investigation is his investigation and I am so grateful to the diocese for the cooperation that they've given him, but his investigation belongs to him in doing what he needs to do. But in the event that he



disclosed individuals who ought have more individualized, you know, contact or notice, those were the folks I was interested in which is very unusual because it's people we don't know about that could potentially exist. But I don't want him put in a position that for the civil matter he's got to alter what we would normally do in his investigation.

So that was the -- and I know that this is a strange group, my concern is, is that I have some concern that those individuals who might be disclosed in that process and ought be afforded an opportunity to participate in the class not be excluded and that was my interest.

MR. SHAHID: Right.

THE COURT: Yeah.

MR. SHAHID: And hopefully I think that we have --

THE COURT: Done that.

MR. SHAHID: -- done that to the best of our ability.

THE COURT: Yeah, great.

MR. SHAHID: I will say that we --



Judge, I view that responsibility as ongoing and so that we got to find the other four and we've got to find anybody else who has kind of, lack of a better word, comes out of the woodwork.

THE COURT: Absolutely. And I know the record ought to reflect that I have on a weekly basis been apprised of the efforts and I think that they have been reasonable and more than reasonable, those efforts based on what I know.

MR. SHAHID: Thank you.

THE COURT: Yes.

MR. RICHTER: Your Honor, I think that you -- if we make doubly clear what Mr. Shahid went through, I think you'll feel very comfortable about where we are which I think is -- the end is where we are or virtually at the end.

THE COURT: Yes, for the civil matter.

MR. RICHTER: Yes, ma'am. Let me preface my remarks, however, by saying that, and I certainly don't do this in any patronizing way to anybody, I genuinely mean this, and I know my co-counsel joins me in

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this statement. I want to thank you for your concern that you have just been referring to, it's a legitimate concern, it's a legitimate legal concern, but it's a very legitimate humane concern as well. I have shared, as I think has been displayed to Your Honor, a similar set of concerns. I thank you for that and I think that cat is skinned in a good fashion now.

I would also like to thank the solicitor for two things: for performing the function that was imposed upon him by this Court, but I had a chance to meet with him in this process and speak with him more than one time about these matters and I want to thank him in this record for caring again in a legal way, but he too caring in a very personal and humane way about this concerning the best interests of persons who may have not had their best interests heretofore properly looked after and I genuinely salute him for that.

This circuit is fortunate, indeed, not only to have -- I know Mr Pascoe's legal talents because I've known him for years in

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this environment, but beyond that this circuit is very fortunate to have a decent



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man hold the position that he holds.

Now, that having been said, I think that what Mr. Shahid has said to you, and I know that we have written you, both Mr. Shahid and us we have indicated as class counsel in our letter that the subclass idea was a thing that was acceptable to us. We are satisfied and we really have worked very hard.

THE COURT: I know you have

MR. RICHTER: Very much together on this thing

THE COURT: I know you have.

MR. RICHTER: We really think that it's not necessary because of what the diocese has come to. And what the diocese has come to is that if anybody has been missed or if there is anybody who responds as a result of these who have been identified to, the diocese waives all the same defenses that they have given up in this class settlement, consents to the same method of compensation, consents to the same early disposition of that claim



by a same arbitration method, the whole nine yards.

THE COURT: Wow.

MR. RICHTER: And we have put those terms in the letters that we have both submitted to Your Honor -- both sides submitted to Your Honor yesterday and, of

course, they'll be submitted to you in a formal way assuming that Your Honor is now comfortable with that. But we are completely now comfortable with that. So that's said.

Next, as to -- we were initially given five names as I think Your Honor knows. Secondly, as Mr. Shahid told you, that was reduced --

THE COURT: Four

MR. RICHTER: -- to four names. And I have in my hand and he had to leave here because of an involvement that he has with the fire tragedy in Charleston, I have in my hand an affidavit of Steven A. Smith who is the person who we utilized to perform the same functions that Mr. Brucetti has been performing for the diocese and I realize we discussed all this with you before, but I



just want to make a final record here.

THE COURT: Sure.

MR. RICHTER: So that nobody can have any question about where we are and what we've done. I have this affidavit I'd like to hand up And attached to it we have the curriculum vitae or the résumé of Mr. Smith. In summary it is as impressive a law enforcement and expert résumé as any one I have ever seen anywhere and I think opposing counsel and Mr. Brucetti as well will second

my statement in that regard.

Stephen Smith is twice a retiree, he's a full bird colonel retiree on the military side and he's a 30-year SLED, South Carolina Law Enforcement Division retiree on the law enforcement side having done, I think, 25 years of narcotics including undercover work for many years and five years -- his last five years as the deputy director of SLED, I'm not sure which exactly five years, I can't say that, but he finished his career as a deputy director of SLED and is now retired. He has taught all over the country and the world, including teaching in



Russia. He is, as I say, a true expert.

He has followed on Mr. Brucetti's efforts as to these four persons, four names that we have been supplied and I'm -- if you would allow I'd like to hand up his affidavit and CV and I'll work from a copy of this thing. May I hand this up to you, please?

THE COURT: Okay.

MR. RICHTER: The affidavit simply states what I have just said, who he is and how he got to this. The crux of the affidavit is in paragraphs four, five and six. Six -- in four he simply says he used recognized methods. We're a little hammered in the sense that we don't have name, rank, serial number, middle name, father and

mother's maiden names or whatever to make the finding process that much easier, but as you can see on number one in paragraph five he goes through the four victims.

The first was identified as a person living in Georgetown. we were supplied a name, he has not included the names here, and given a relative age. He searched on both sides of those ages, that

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age by two years. We know -- we have confidence, all of us have confidence about the time frame because we know the alleged perpetrator and the assignment as to where the alleged perpetrator would have been, so that we have some comfort about the time frame we're looking in and the locale we're looking in so we then focus on the individual alleged victim.

As you can see his search revealed 231 potential entries, some were in South Carolina, none of which had the first name which matched or were sufficiently close to the victim, so he then moves to a nationwide analysis where he came up with 117 individuals. Again, none appeared to have any connection, one of those 117 had any Georgetown correction -- connection. However, he did identify one who interestingly enough is now a Catholic priest

in Arkansas, so that we have reported all of that back to the diocese for them now to take the next most appropriate action. Similar accounts for all of these.

Number two again in the Georgetown



area we identified, had someone identified by close proximity in age and he found a person in close proximity and age and with a Social Security number which was a South Carolina security -- Social Security and which person had a Georgetown address. We think that's on the money then. That person found has been given, again, the next step under the plan that Your Honor laid out at our last time before you, that goes back to the diocese.

C, there were 269 entries nationwide with the first and last name of that individual and 631 entries with the last name of that individual. However, none gave him sufficient confidence to raise his comfort level at all. He's informed that -- Mr. Smith represents to you in this affidavit that he has been informed the victim C may not, in fact, be an actual victim This person did not come forward to the diocese and declare himself a victim, rather another person according to the diocese files had this person's name mentioned in that alleged victim's files. As I understand it -- did Mr. Shahid or Mr. Smith make contact with

that person? As I understand it Mr. Shahid has actually made contact with that person who has indicated --

THE COURT: He has a great expression on his face like I did, I did, I did?

MR. SHAHID: Tell me which one you're talking about Actually what I did is I made contact with the source of the person.

MR. RICHTER: Yeah, okay.

MR. SHAHID: It was a very interesting conversation.

MR. RICHTER: He was able to make a much more direct -- a much more closer contact than Mr. Smith could do because of the way we're working this thing.

THE COURT: Got it.

MR. SHAHID: I shared this with David. He, quite frankly, said he didn't believe that person was a victim but we're still going to follow through.

THE COURT: Okay. Great.

MR. RICHTER: So we expect that there is nothing to that. But even as to that person, the diocese has given up all of what we recited a while ago it had given up.



THE COURT: Great.

MR. RICHTER: And then there is a person

who has a common name here in South Carolina at least, he had 79 entries Mr. Smith found for that name in South Carolina, a significant number of which were in and around the lowcountry. However, we were not -- we don't know where that person may live, so that is the worst of the findings so far.

We think this translates that two are out, maybe three are out and one may still be there, but in short order we're going to know that.

The last thing I think that we need to tell you, and I say this for everybody's benefit but mostly for your own comfort level as to how many times you need to see us again or what else we need to deal with, if you recall when we started this Mr. Parker's firm, Mr. Bilbro's and Mr Myers had filed objections, you dealt with Mr. Parker here on the spot and that was over and withdrawn. Mr. Bilbro by writing withdrew his and Mr. Haller tells me and/or Mr. Shahid, I



don't know which one told me, I didn't talk to Mr. Myers personally, one or both of them report to me that they have spoken with Mr. Myers who has also withdrawn his, the writing on that. However, Peter has -- Peter Shahid has a meeting on Wednesday of this week because we would like to have that

withdrawal in a form that we could have in our hands, in our files which would mean that there are no objections.

Myers is important only to this extent: If you remember -- I don't know how to characterize it -- he raised an issue about consortium and we huddled, and when I say we, both sides huddled and really as we didn't think there was any legal relief he was entitled to, but as an accommodation to Mr. Myers and to move the matter forward we agreed to do a certain thing. He is now going to withdraw that so that there are no objection issues whatsoever anywhere in the record so that Your Honor can know that you are really at an end about all of that.

So our point is with the diocese having dealt with this in the way it has and



so broadly and accepting, if there is further exposure from any of these people who were entitled to direct notice, but didn't get it, we think that -- we actually think that if we created a subclass and did it and some of them still didn't show up we'd really do more harm in the sense of really now cutting off the rights of those persons. We have now got the diocese saying --

THE COURT: Absolutely, I agree.

MR. RICHTER: -- my arm's wide open to

those people.

THE COURT: There is nothing more that the diocese could possibly do that I am aware of. I mean, at the point in time when the diocese obligates itself to do as it has been described, there is nothing more that they can possibly do insofar as I can even imagine, Mr. Shahid, truly. I mean, what they say is if you come forward in the future we will treat you just the same as we have treated these individuals and the relief is available for you. I know of nothing more that could be done. So I certainly would approve that.

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MR. SHAHID: Well, good.

THE COURT: Yeah.

MR. SHAHID: Just a little caveat.

THE COURT: Uh-huh.

MR. SHAHID: My meeting with Mr. Myers hopefully, and I'm confident that it will, but until the rubber hits the road kind of test.

THE COURT: If it doesn't, I'm prepared to rule.

MR. SHAHID: I'm confident that we've chatted and we just got to iron out those little problems to iron out, and so hopefully by Wednesday or sometime next week we'll have one minor or Mr. Myers saying that's done.

THE COURT: Okay.



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MR. RICHTER: I left one thing out, if you don't mind, just let me add this to the record because I think Your Honor is entitled to an explanation.

THE COURT: Yeah.

MR. RICHTER: On March 9th is when all of this path started being gone down, the path that we have now been dealing with with our various recent appearances before you and



our largely -- or appearance today.

I want to make sure that the record's clear, but Your Honor is clear and the diocese as well as to how and why that came up. It came about in an argument about legal fees is actually about how the issue of this instruction came up. Mr. Pascoe is entitled to both explanation and credit and I would -- in a minute I can do this if you'll indulge me.

I don't think, didn't think then, don't think now that the Church had done right about not reporting these persons who had revealed themselves to the Church as having been abuse victims and didn't have any right to do that and so that issue was raised, and in part to stop that activity Mr. Pascoe has dealt with that, the diocese has dealt with that and hopefully for everybody's benefit, not just everybody here,

but for the public's benefit as well that practice now has been recognized and modified appropriately so that we don't find ourselves back here before you ten years down the line. And so again I want to thank Mr. Pascoe for

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helping to accomplish that and the diocese for helping to accomplish the same thing. And I think with that we have covered the water front, haven't we, Peter?

MR. SHAHID: I think so. Let me just echo a little bit of what Mr. Richter's saying, Judge. Mr. Pascoe and I have had very -- I think very frank conversations regarding the application of reporting statutes and the law and things of that nature and that our bishop has clearly stated that he wants to be transparent on this issue and that arguable there was no obligation to legally maybe, and I say that arguably, to have reported, but there is an obligation in another sense to report and so and some of the folks who came forward were adults when their report was made and not just always a justification, but an explanation I think, and some people wanted anonymity and the Church tried to honor the victims' request for anonymity, but we're trying to make sure and we will to the best of our ability so that those individuals will be reported to the appropriate law enforcement agency and

let the solicitor or sheriff or whatever agency needs to make that call, make that call with hopefully that person's participation and involvement in that.

So hopefully that is the absolute last "t" that needs to be crossed and the last "i" that needs to be dotted with all of this and that's what we're trying to get to. I think we just want complete healing, and if this accommodates that healing, we hope that it will, that it will take that. And so we're here I think all on a common goal to get that magic signature on a magic order.

THE COURT: Absolutely. A couple of things I would say and I think what I want to do is I want to direct to the civil and then to the other part, Solicitor Pascoe's participation. First of all, the civil matter. I will await to see what Mr. Myers' position is, but again, I am prepared to rule in the event that that doesn't happen and but I would ask for a proposed order from plaintiffs' counsel about that in the event that that is needed. And I'm delighted that he is satisfied, that's always a better place



for people to be in a place where they can accept and can join in to and I'm excited

about that, so that's the first thing. And I look for an order in that regard.

Secondly with regards to the attorneys' fees and, of course, I had the opportunity to review Professor Freeman's extensive affidavit about that and, of course, I know him and know him well and have had the opportunity to know him when I practiced law as well as to know him since I've been on the bench and found that along with the other affidavits, but his probably primarily to be most informative.

Aside from that, my own experience in class actions has also been helpful, but also, also reality is when you have an opportunity to sit where I get to sit and watch lawyers on both sides, but I'm going to speak for the moment to the plaintiffs' lawyers, it's like you just want to stand up and cheer because it's what makes me really love lawyers. And I mean that, because lawyers, particularly these lawyers, just go wading into places that lots of -- no one



other than a lawyer would ever wade there, but particularly these groups of lawyers have gone there and have gone to a place that supposedly there was no remedy and made a remedy.

MR. RICHTER: Thank you.

THE COURT: Boy that is fantastic,

that's the best lawyering in my book. So I celebrate everything that you have done and it's extraordinary and it's wonderful and it's all about being a lawyer and why it matters to the world and why it matters to this country that you did and I'm just so proud for you and of you.

MR. RICHTER: Thank you.

THE COURT: Let me also say that the fees, there was a range of fees in this case went up to 2 1/2 million dollars and that's an appropriate fee. Under all the circumstances that's an appropriate fee and that is the fee that I will order be paid --

MR. RICHTER: Thank you.

THE COURT: -- happily. On the basis of the time, the energy, the effort, the effort going forward to deal with the kind of



heartbreak that wonderful lawyers deal with, get their hands dirty in, care about and that's the reason this fee not only has been earned, but will continue to be earned, and I'm happy to order that, think it's appropriate absolutely. So I'll look for an order in that regard as well.

I want to also say that I have been -- as much as any piece of litigation I have ever been involved in been touched by, noticed that there has been an intention on

these lawyers and I know that it comes from about as aggressive a lawyer as there is. There are those that say he practices law like the Texas chainsaw massacre, he takes no prisoners, and even in the most gentle status conferences he's been ready to, you know, take you and Mr. ((Geoly out most every time. And you all have been most patient. And particularly I've watched Mr. ((Geoly also,



just hear the angst and keep moving forward even when you would be gritting your teeth. And so the diocese has been very, very committed to this process being a healing one and I got it.

MR. SHAHID: Thank you.

THE COURT: Irrespective of where they may have been in the past, ain't no question in this process they have been very interested in the healing part of the process so I thank you for that.

MR. SHAHID: Thank you, Judge.

THE COURT: And applaud those efforts, I truly do. And Mr. Brucetti, goodness knows all the work you've been there as well, so.... Now, that's the civil matter.



Attachment: Transcript of ex parte conference page 000028 of 000033

With regards to the criminal matter, you know, my solicitor, of course, you know, I've sung his praises, but I expect his solicitor, and interesting the diocese, as I have been concerned, have been twofold, he and I have had some discussions about it, what you worried about he knows it's twofold, I agreed with you, there certainly has been a period of time that the duty to report didn't



exist, okay, statutorily.

But it transcends that, it transcends that because the reality is, that there are individuals against whom crimes have been committed and the information lies with the diocese and the solicitor is charged with the responsibility to enforce the law. So on a portion of it may be reporting, but on a portion of it -- it's not about reporting, but the information that crimes have been committed lies with the diocese. And I certainly have sensed the diocese has been forthcoming with that information.

Having said that, my solicitor is charged with the responsibility to transcend that. You know, I think, I think and I don't demean in any regard or I have no interest in demeaning the Church and its position in our society and the ancient nature of it. However, there is a little bit of an element

that I have to be mindful of that I have to look to my solicitor to obtain whatever information is appropriate to determine whether or not the solicitor has the information of all the victims. To some

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extent you can liken it to the person that's trying to come clean on all the bad checks that they have written, but it's incumbent not on the victim -- not on the person who is if you will re-pen tent at the time of the checks it's incumbent upon the solicitor and law enforcement to satisfy himself and themselves that they have all of that information as to those victims and potential victims. And I am very satisfied that our solicitor will do that.

I do not see -- finally, I do not see the victim that the civil matter is ended as any more than, Mr. Shahid, and the diocese in a wonderful way allowing the civil matter to go forward and for that I am grateful and I applaud that because it allows those who are hurting to avail themselves of this wonderful settlement that the diocese and the plaintiffs have come to and I applaud that.

That being said, that is a completely different track, that is a completely different circumstance than what my solicitor is doing and they just happen to be parallel perhaps. The fact that you all



Attachment: Transcript of ex parte conference page 000030 of 000033

will go wherever you all will go is of no moment to the solicitor in that sense because his obligations are different and he will do those things that I know he will do to conclude his investigation.

Having said that, I am so grateful, Mr. Shahid, to yours and the church's continuing cooperation and I know that if that should change, no question that I will hear about it from the solicitor as will you.

So I think that, Mr. Solicitor, Mr. Pascoe, anything you need to add? Just continue to do your work.

MR. PASCOE: No, ma'am. Thank you, Your Honor. I would agree 100 percent that I think my matter has nothing whatsoever to do with the civil action that's taking place.

THE COURT: Not at all.

MR. PASCOE: I will add this: I want to thank both sides, all of the attorneys in this case, they have been an absolute pleasure and an honor to work with, the lawyers of this caliber. Mr. Shahid and I talk at least two or three times a week, Mr. Lofton has been great to work with,



Mr. Richter. Very seldom do attorneys from Charleston take the time to come met with me

in the big city of St. Matthews to answer my questions and he did that on 12 hours' notice. So it's been an honor and a pleasure to work with these lawyers. Thank you, Your Honor.

THE COURT: Thank you. So much. Obviously if you are in the need of my assistance at any point, you know, you're there because of my request, my order, and so I continue to be interested if you have anything for me.

MR. PASCOE: Thank you.

THE COURT: All right. I will look -- I am on vacation next week and I see -- unless you all see of, I see of no reason for us to continue meeting like this. I am prepared, I am ready to sign orders. And again, in the event that Mr. Myers withdraws, that's fine, I look for an order to reflect that. In the event he doesn't, I'm looking for a proposed order. Otherwise I'm looking for an order of attorneys' fees. I approve the settlement, I shared that with you. You all were so



gracious and kind to inform me of it, I think it's extraordinary and I will look for orders when I return from vacation. I will be in St. George the week of the 23rd, for your information. I'm looking for orders from you that week. The week after that, I think the next week I'm actually in St. George, if not

St. George, Orangeburg. I'm either in St. George or Orangeburg for the three weeks after this coming week for -- after my vacation and would like your orders from you just as soon as they're ready

MR. RICHTER: We'll have it for you thank. You very much.

THE COURT: Thank you. Thank you all so much.

MR. SHAHID: Thanks, Judge.



Attachment: Transcript of ex parte conference page 000033 of 000033

# Certificate of Service

I hereby certify that I have caused a copy of the enclosed

## Second Amended Complaint

in each of civil actions

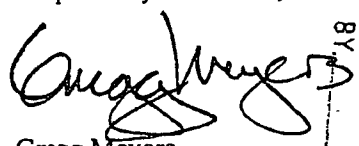
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09-CP-10-8054
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09-CP-10-8056

by causing a copy of the document to be placed in the United States mail, first-class postage pre-paid, addressed to:

Peter Shahid
89 Broad Street
Charleston SC 29401

Done March 22, 2010

Respectfully submitted,



Gregg Meyers
PO Box 1297
Charleston, S.C. 29402
843-720-8714

FILED
2010 MAR 22 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY




COPY

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

John Donald Ghegan,

Plaintiff,

vs.

Beaufort County School District and The Beaufort County Board of Education,

Defendants.

Case No. 07-CP-07-03771

ORDER

(granting Summary Judgment)

This matter came before me pursuant to Defendants' Motions for Summary Judgment based on a statute of limitation defense in this sexual abuse case. The undisputed dates are as follows:

1) During school year 2003, the Plaintiff was a victim of the aforementioned crime.
2) That the perpetrator was arrested during 2004.
3) That the Plaintiff reached majority in December of 2005.

This case falls under the waiver of immunity provisions as provided in the South Carolina Tort Claims Act (The "Act"). §15-78-110 of the Act provides for a 2 year statute of limitations, "...*Except as provided for in Section 15-3-40...*".

§15-3-40 extends the limitations period for minors for an additional year after majority is reached.

South Carolina Code of Laws §15-3-555 allows for up to a 6-year extension of the statute of limitations in cases involving sexual abuse. Although §15-3-555 would ordinarily allow an additional tolling period in a case such as this one brought against a non- tort claims defendant, the legislature has not seen fit to include §15-3-555 as an exception listed in §15-78-110.

"The cardinal rule of statutory construction is to ascertain and effectuate the inten of the legislature." Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "Under the plain meaning rule, it is not the court's plac to change the meaning of a clear and unambiguous statute." Id. "Where the statute's language is plain and unambiguous, and conveys a definite meaning, the rules of

statutory construction are not needed and the court has no right to impose another meaning." Id. at 122, 542 S.E.2d at 739-40. "What a legislature says in the text of a statute is considered the best evidence of legislative intent or will." Id. at 122, 542 S.E.2 at 740. "Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id.

The legislative intent appears to limit minor tolling in Tort Claims Act cases or to the extensions set forth in §15-3-40. Therefore the Defendants' motions are granted and the case is dismissed.

AND IT IS SO ORDERED:

Marvin H. Dukes III
Master-in-Equity for Beaufort County

Tuesday, March 17, 2009
Beaufort, SC




2010 WL 4791932
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Columbia Division.

Millicent NEWMAN, Plaintiff,
v.
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE, [1] Defendant.

C/A No. 3:10–942–CMC–PJG. | Sept. 22, 2010.

**Attorneys and Law Firms**

Bonnie Travaglio Hunt, Hunt Law, N. Charleston, SC, for Plaintiff.

Vance J. Bettis, Gignilliat Savitz and Bettis LLP, Columbia, SC, for Defendant.

**Opinion**

**REPORT AND RECOMMENDATION**

PAIGE J. GOSSETT, United States Magistrate Judge.

**1 The plaintiff, Millicent Newman ("Newman"), an African American female, filed this action against her former employer, the South Carolina Employment Security Commission, a state agency that has since been legislatively reconstituted as the South Carolina Department of Employment and Workforce ("Department"). Newman's Complaint asserts claims of race discrimination and hostile work environment in violation of 42 U.S.C. § 1981 (Counts 1 and II); retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and South Carolina law (Count III); intentional infliction of emotional distress (Count IV); and wrongful discharge (Count V). (*See generally* Compl., ECF No. 1–1 at 4–14.) The Department removed this action to federal court, and this matter is now before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC for a Report and Recommendation on the Department's motion to dismiss the complaint or, alternatively, for judgment on the pleadings as to all claims. (ECF No. 6.) Having carefully considered the parties' submissions, the court concludes that the Department's motion should be granted.

**DISCUSSION**

**A. Standard for Rule 12(b)(6) and Rule 12(c)**

A motion under Federal Rule of Civil Procedure 12(b)(6) or 12(c) examines the legal sufficiency of the facts alleged on the face of the plaintiff's complaint. *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999); *see also Independence News, Inc. v. City of Charlotte,* 568 F.3d 148, 154 (4th Cir.2009) (applying the same standard for Rule 12(c) as for Rule 12(b)(6)). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007).

**B. Newman's Claims**

All of Newman's claims fail as a matter of law. First, her claims purportedly brought pursuant to 42 U.S.C. § 1981 cannot lie against the Department. *See Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 109 S.Ct. 2702, 105 L Ed.2d 598 (1989) (holding that alleged violations of § 1981 against state actors and governmental entities must be pursued exclusively under 42 U.S.C. § 1983). [2] Even recharacterizing Newman's claims as arising under § 1983, however, such claims fail as a matter of law against the Department because, as an arm of the State of South Carolina, it is not a "person" within the meaning of that statute. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Finally, any claims Newman might have against the Department pursuant to Title VII are insufficiently pled. *See* Fed.R.Civ.P. 9(c) (requiring that with regard to claims that have necessary conditions precedent, the complaint must allege that all such conditions precedent have been performed); *United Black Firefighters of Norfolk v. Hirst,* 604 F.2d 844, 847 (4th Cir.1979) (holding that a complaint asserting Title VII claims that does not allege that procedural prerequisites have been met is properly dismissed). Amending the Complaint to cure this deficiency would not avail Newman, as any Title VII claims are time barred in any event. Newman filed this action well after the expiration of her ninety-day statutory time frame in which to file a lawsuit on such claims. *See* 42 U.S.C. § 2000e–5(f)(1); (*see generally* Def.'s Mem. Supp. Mot. Dismiss, ECF No. 6–1 at 6–7 (discussing untimeliness of Title VII claims);

Pl.'s Resp. Opp'n Def.'s Mot. Dismiss, ECF No. 15 (failing to address the Department's argument that Title VII claims are time barred)).

*2 Newman's state law claims against the Department fail as well. Her claim of intentional infliction of emotional distress, like her Title VII claim, is insufficiently pled. *See Hansson v. Scalise Builders of South Carolina,* 374 S.C. 352, 650 S.E.2d 68, 70 (S.C.2007) (listing elements of intentional infliction of emotional distress). Again, amendment of the Complaint would not save this cause of action, since the Department, as a state agency, has sovereign immunity with regard to this tort claim.[3] *See* S.C.Code Ann. §§ 15–78–10 *et seq.* (containing a limited waiver of the state's sovereign immunity for certain torts but otherwise restoring the state's common law immunity from suit). Specifically, the South Carolina Tort Claims Act defines "loss" to exclude "the intentional infliction of emotional harm," *see* S.C.Code Ann. § 15–78–30(f); provides for governmental entities an exemption from liability for loss resulting from employee conduct that constitutes intent to harm, § 15–78–60(17); and protects state agencies from liability for losses resulting from any claim covered by the South Carolina Workers' Compensation Act, *see* § 15–78–60(14). *See also Ward v. City of N. Myrtle Beach,* 457 F.Supp.2d 625, 646–47 (D.S.C.2006) (holding that a plaintiff's state claims for outrage and negligence against the city were barred due to the exclusivity provision in the South Carolina Workers' Compensation Act and the exclusion contained in the South Carolina Tort Claims Act); *Dickert v. Metropolitan Life Ins. Co.,* 311 S.C. 218, 428 S.E.2d 700 (S.C.1993) (holding that a plaintiff who asserts a claim of intentional infliction of emotional distress arising out of her employment is asserting a "work-related injury" within the scope of the Workers' Compensation Act).[4]

Finally, Newman's wrongful discharge cause of action is precluded under South Carolina law providing that the public policy exception to at-will employment does not apply where the employee has a statutory remedy. *See Stiles v. Am. Gen. Life Ins. Co.,* 335 S.C. 222, 516 S.E.2d 449, 452 (S.C.1999) (Toal, J., concurring). Here, as an employee of the state who was not subject to at-will termination, Newman had statutory remedies available to her to redress this claim, which is based on her allegation that she was terminated because she refused to participate in fraud. *See* S.C.Code Ann. § 8–17–310 *et seq.* (State Employee Grievance Procedure Act); S.C.Code Ann. § 8–27–10 *et seq.* (Whistleblower Act). As such, she cannot maintain a claim for the tort of wrongful discharge. *See Dockins v. Ingles Markets, Inc.,* 306 S.C. 496, 413 S.E.2d 18 (S.C.1992) (Fair Labor Standards Act); *Gleaton v. Monumental Life Ins. Co.,* C/A No. 2:09–1667–MBS, 2010 WL 419921, *9 (D.S.C. Jan.28, 2010) (Title VII and 42 U.S.C. § 1981); *Lawson v. South Carolina Dep't of Corrections,* 340 S.C. 346, 532 S.E.2d 259 (S.C.2000) (holding that the plaintiff could not maintain a claim for wrongful discharge because the Whistleblower Act afforded a statutory remedy, even if the plaintiff failed to invoke it).

*3 In response to the Department's motion,[5] Newman requests that the court dismiss her claims under 42 U.S.C. § 1981 without prejudice so that she may re-file "with the proper parties named."[6] (Pl.'s Mem. Opp'n Def.'s Mot. Dismiss, ECF No. 15 at 4.) Such relief is unnecessary, as the dismissal of her claims against the Department with prejudice does not impact any claim she may have against other potential defendants. Similarly, although Newman requests that her wrongful discharge claim be remanded to state court, remand is not appropriate since the claim fails as a matter of law.

## RECOMMENDATION

All of the claims asserted in Newman's Complaint fail as a matter of law. Accordingly, the court recommends that the Department's motion for judgment on the pleadings (ECF No. 6) be granted.

Footnotes

1 Pursuant to Rule 25 of the Federal Rules of Civil Procedure, the South Carolina Department of Employment and Workforce is substituted for Defendant South Carolina Employment Security Commission. *See* Act No. 146, 2010 S.C. Acts 1168.

2 The United States Court of Appeals for the Fourth Circuit has opined that this aspect of Jett was not affected by the Civil Rights Act of 1991. *See Dennis v. County of Fairfax,* 55 F.3d 151, 156 n.1 (4th Cir.1995).

3 Although the Department concedes that by removing this case it waived its immunity under the Eleventh Amendment to the United States Constitution from suit in federal court, it did not waive its state law sovereign immunity from suit on intentional torts. *See Stewart v. State of North Carolina,* 393 F.3d 484 (4th Cir.2005).

4 Newman does not appear to dispute that her intentional infliction of emotional distress claim against the Department is barred by sovereign immunity, as her response contains no discussion of the issue.

5 Newman also includes an extensive discussion of qualified immunity in her response. The court fails to see the relevance of this argument, as no state officials are named as defendants in this action.

6 Newman includes as an attachment to her response a motion to amend her complaint. Although the motion states that a proposed amended complaint is attached, no such attachment appears in the record. Accordingly, the court cannot determine which "proper parties" Newman seeks to include.

End of Document

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DEFENDANT'S EXHIBIT N

2010 WL 4666360
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Columbia Division.

Millicent NEWMAN, Plaintiff,
v.
SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE, Defendant.

C/A No. 3:10–942–CMC–PJG. | Nov. 18, 2010.

**Attorneys and Law Firms**

Bonnie Travaglio Hunt, Hunt Law, Charleston, SC, for Plaintiff.

Vance J. Bettis, Gignilliat Savitz and Bettis LLP, Columbia, SC, for Defendant.

**Opinion**

## OPINION AND ORDER

CAMERON McGOWAN CURRIE, District Judge.

*1 Through this action, Plaintiff, Millicent Newman ("Newman" or "Plaintiff"), seeks recovery under various state and federal statutes for alleged discrimination, hostile treatment, and retaliation in employment as well as for wrongful termination in violation of public policy. All of Newman's causes of action relate to her employment with and termination from Defendant, the South Carolina Department of Employment and Workforce ("the Department"). [1]

For the reasons set forth below and in the Report and Recommendation of the Magistrate Judge, the undersigned concludes that the Department is entitled to dismissal or judgment on the pleadings as to all claims.

## PROCEDURAL BACKGROUND

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(e), (g), DSC, this matter was referred to United States Magistrate Judge Paige J. Gossett for pre-trial proceedings and a Report and Recommendation ("Report"). On September 22, 2010, the Magistrate Judge issued a Report recommending that the Department's motion to dismiss or for judgment on the pleadings be granted in full and that Newman's claims be dismissed with prejudice. Dkt. No. 17.

The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and Recommendation and the serious consequences if they failed to do so. Newman timely filed an Objection on October 12, 2010, raising one general and two specific arguments. Dkt No. 18. The Department responded to Newman's Objection on October 16, 2010, addressing Newman's specific objections and arguing that the court should adopt the Report and dismiss all of Newman's claims with prejudice. Dkt. No. 23.

## STANDARD

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the court. *See Mathews v. Weber,* 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a *de novo* determination of any portion of the Magistrate Judge's Report and Recommendation to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). In the absence of an objection, the court reviews the Report and Recommendation only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.,* 416 F.3d 310, 315 (4th Cir.2005) (stating that "in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation") (citation omitted).

## REPORT, OBJECTION AND RESPONSE

**Report and Recommendation.** The Report recommends that Newman's claims under 42 U.S.C. § 1981 be dismissed as legally deficient, because claims against state actors and governmental entities based on such allegations may be maintained only under 42 U .S.C. § 1983. Report at 17. The Report also notes that the claims would fail if recast as Section 1983 claims because the Department, an arm of the State, is not a "person" within the meaning of the statute. *Id.* The Report recommends that Newman's claims under 42 U.S.C.

§ 2000e *et seq.* ("Title VII") be dismissed with prejudice because they are insufficiently pled and time-barred in any event. Report at 2–3 (noting action was filed well after the statutory time frame for filing the lawsuit).

*2 The recommendations as to Newman's state law claims are essentially the same. As to her state law claim for intentional infliction of emotional distress, the Report recommends dismissal for insufficient pleading and also notes that amendment would be futile in light of the state's sovereign immunity and other defenses to this claim. Report at 3–4 (distinguishing sovereign immunity from Eleventh Amendment immunity and discussing exclusivity of remedies under the Worker's Compensation Act). The Report recommends dismissal of Newman's claim for wrongful discharge in violation of public policy ("*Ludwick* claim") because such claims are barred where, as here, other statutory remedies are available. Report at 4. [2]

Finally, the Report recommends denial of two requests Newman makes in her response to the Department's motion. First, the Report recommends denial of Newman's request that dismissal of her Section 1981 claim be without prejudice to refiling the same or similar claims against different defendants. The Report notes that such a limitation on the dismissal is unnecessary to preserve Newman's right to bring suit against persons not named as parties in this action. Second, Newman requests that her wrongful discharge claim be remanded rather than resolved by this court. The Report recommends against remand given that this claim clearly fails as a matter of law.

**Objection.** In her Objection, Newman first offers a generic argument that the Report erred in recommending dismissal of her "causes of action in their entirety." Dkt. No. 18 at 1. In support of this argument, she notes that the standard for dismissal "is still a very liberal standard." *Id.* at 1–2 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 545, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Newman does not, however, point to any aspect of the Report which even arguably misapplied the relevant legal standards. Thus, this argument does not raise any specific objection.

Newman next addresses the specific recommendation that her *Ludwick* claim be dismissed based on availability of statutory remedies. She maintains that this recommendation is in error because "there is no other remedy available." In support of this contention, she points to various reasons she believes the available remedies would not be effective. For example, she argues that the State Employee Grievance Procedure Act ("Grievance Act"), S.C.Code Ann. § 8–17–310 *et seq.*, does not offer a remedy regarding the fraud "due to the involvement of the state in the fraud and the failure of the State to allow the Plaintiff to address these complaints." Dkt. No. 18 at 2. She also argues that the Whistleblower Act, S.C.Code Ann. § 8–27–10 *et seq.*, does not provide "a remedy that is reasonable for the loss of her position" because "the statute is excessively limited and does not cover the Plaintiff's cause of action." Dkt. No. 18 at 3. In addition, Newman argues that the *Ludwick* claim should be remanded to state court rather than resolved by this court because the state court is better suited to address this state-law claim.

*3 Finally, Newman argues that the Report errs in suggesting that dismissal with prejudice will not preclude her from pursuing related claims against other defendants in some other action. Her only support for this argument is the bald statement that because the potential defendants "are employed with the State the fact is that the case will be dismissed because the Causes of action are dismissed in this action."

**Response.** The Department responded to the above Objection noting, first, that a *Ludwick* claim is only available to an at-will employee who is without a statutory remedy to redress the challenged limitation. Dkt. No. 23 at 2. The Department asserts that Newman not only had a right to challenge her termination under the Grievance Act but, in fact, pursued a grievance in which she challenged her termination on multiple grounds. While her current claim of retaliation for refusal to commit fraud was apparently not raised, Newman clearly had and exercised a statutory right to challenge her termination through the grievance procedure. [3]

The Department argues that termination for refusal to commit fraud (the basis of Newman's *Ludwick* claim) would have been an abuse of discretion, remediable under the Grievance Act. It also notes that no employee of Newman's Department could have been included on the Grievance Committee panel which heard Newman's grievance. Dkt. No. 23 at 3. Thus, the allegations underlying Newman's *Ludwick* claim could have been considered by the Grievance panel which would not have been biased by inclusion of employees of Newman's Department. In any event, the Department notes that an employee may not bypass or ignore an available remedy in order to pursue a *Ludwick* claim. *See id.* (citing *Law v. South Carolina Dept. of Corrections,* 368 S.C. 424, 629 S.E.2d 642, 650–51 (S.C.2009) (rejecting argument that employee may

bypass the remedy provided by the Grievance Act in favor of a wrongful discharge claim under *Ludwick* based on a generalized fear that the grievance process will be biased)). Moreover, if Newman was dissatisfied with the decision of the panel, she had the right to pursue an appeal to an administrative law court and then to the state court of appeals. *Id.* at 4–5, 337 S.E.2d 213. She could not, however, pursue a wrongful discharge claim either in an attempt to relitigate her grievance or as an alternative to it. *Id.* (citing, *e.g., Earle v. Aycock*, 276 S.C. 471, 279 S.E.2d 614 (S.C.1981) (holding that failure to appeal decision of Grievance Committee to the state court system "precluded [plaintiff] from raising the validity of the discharge in a collateral action as the decision of the committee became the law of the case, and the doctrine of res judicata bars the relitigation of this issue.")).

The Department also notes that the present allegations would have supported a claim under the Whistleblower Act. Dkt. No. 23 at 4. As the Department notes, Newman's objection to consideration of this Act is based not on its applicability to her allegations, but on her view that the remedies are inadequate or the prerequisites to suit unwarranted. The Department argues that these limitations are irrelevant and that the Whistleblower Act remains an available statutory remedy which bars Newman from pursuing a *Ludwick* claim. Dkt. No. 23 at 4 (citing *Frazier v. Target Corp.*, 2009 WL 3459221 (D.S.C.2009) (finding *Ludwick* claim barred by available statutory remedy despite limitations on the relief available under the applicable statute)).

*4 Finally, the Department argues that Newman's objection to dismissal with prejudice is without merit. The Department notes that, while a number of Newman's potential claims against third-parties may be foreclosed for other reasons, a with-prejudice dismissal of the suit against the Department would not, alone, preclude pursuit of a claim against any other defendant.

## DISCUSSION

**General Objection.** To the extent Newman's reference to the standard of review is intended as an objection, it is too general to warrant treatment as a specific objection. Consequently, it does not support *de novo* review of any portion of the Report.

The court has, therefore, reviewed the Report for clear error except as noted below. Finding none, the court adopts the reasoning and recommendation of the Report as to the recommendation that the federal claims and any state law claims other than the *Ludwick* claim be dismissed. The recommendation that the *Ludwick* claim should be dismissed and that all dismissal rulings should be with prejudice are addressed below.

**Specific Objection as to *Ludwick* Claim.** In light of Newman's specific objection, the court has conducted a *de novo* review of the recommended dismissal of her *Ludwick* claim (for wrongful discharge in violation of public policy). For reasons argued by the Department and summarized above, the court finds the Report correctly recommends dismissal of this claim. First, Newman cannot now argue that she had no available remedies when she failed to offer this argument in response to the motion to dismiss (which raised this defense). Even if she were allowed to introduce this argument at this time, it would fail because both the Grievance Act and the Whistleblower Act provide statutory remedies which preclude pursuit of a *Ludwick* claim. That the available remedies under these Acts may be limited and that the Acts may impose procedural hurdles to recovery do not modify this conclusion. To the contrary, such restrictions reflect an exercise of legislative judgment which this court should not allow to be circumvented through pursuit of a common law *Ludwick* claim.

**Specific Objection as to Dismissal with Prejudice.** The court, likewise, finds the second aspect of Newman's Objection unsupported. The dismissal of claims against the Department does not preclude Newman from pursuing any claim against any other defendant. Most critically, a claim dismissed because the Department is not a proper defendant as to that claim does not preclude assertion of the same claim against a person who may properly be named as a defendant. That this or another court may conclude that a particular claim against some other defendant is barred for the same reasons that it is barred as to the Department does not mean that this decision has any preclusive effect.

## CONCLUSION

For the reasons set forth above, the court adopts the reasoning and recommendation of the Report, grants the Department's motion, and dismisses all of Newman's claims with prejudice.

*5 IT IS SO ORDERED.

Footnotes

1 Prior to legislative reconstitution in its present form, the Department was known as the South Carolina Employment Security Commission.

2 South Carolina first recognized a claim for wrongful discharge in violation of public policy in *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213, 216 (S.C.1985). As explained in a number of subsequent cases, such claims may not be pursued where there are statutory remedies available for redress of the challenged termination. *See, e.g., Stiles v. Am. G. Life Ins. Co.*, 335 S C. 222, 516 S E.2d 449, 452 (S.C.1999) (Toal, J., concurring); Report at 4 (listmg other cases so holding).

3 In addition, the Department argues that Newman should be precluded from now arguing that she did not have an available statutory remedy because she failed to raise this argument before entry of the Report, despite the Department's earlier reliance on the available statutory remedies as a defense to the *Ludwick* claim.

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2005 WL 2777574
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Anderson Division.

Curtis L. HARKNESS, Plaintiff,
v.
CITY OF ANDERSON, S.C., City of Anderson, S.C. Police Department, Defendants.

No. C.A. 8:05-1019-HMH. | Oct. 25, 2005.

**Attorneys and Law Firms**

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James D. Jolly, Jr., Logan Jolly and Smith, Anderson, SC, for Defendants.

**Opinion**

**OPINION AND ORDER**

HERLONG, J.

*1 This matter is before the court on the City of Anderson, S.C. ("Anderson") and the City of Anderson, S.C. Police Department's ("Anderson Police Department") (collectively "Defendants") motion for summary judgment. Curtis L. Harkness ("Harkness") filed a complaint pursuant to 42 U.S.C. § 1983 alleging that the Defendants violated his constitutional rights. Harkness also alleges state law claims for false arrest, outrage, and slander per se. For the reasons set forth below, the court grants the Defendants' motion for summary judgment.

## I. PROCEDURAL AND FACTUAL BACKGROUND

The matter arises from the arrest of Harkness on March 9, 2002, in connection with two murders in Anderson, South Carolina. On March 8, 2002, at approximately 11:07 p.m., the Anderson County Public Safety Division was notified that multiple shots had been heard near Piedmont Avenue. (Defs.' Mem. Supp. Summ. J. 2 Ex. 1 (Zamberlin Aff. ¶ 4).) At approximately 11:40 p.m., Sergeant John A. Zamberlin ("Zamberlin"), a detective with the Anderson Police Department, arrived on the scene and found Lamar Warnsley ("Warnsley"), who had died of gunshot wounds. (*Id.* ¶¶ 5-6.) A second gunshot victim, Marcus Hunter ("Hunter"), had been transported to the hospital. (*Id.* ¶¶ 5, 7.) Hunter died later at the hospital. (*Id.*)

Zamberlin and Lieutenant Layton Creamer ("Creamer") notified the victims' parents of their sons' deaths. (*Id* ¶ 8.) Warnsley's mother informed Zamberlin and Creamer that she last saw Warnsley between 4:00 and 4:30 p.m. on March 8, 2002, when he left the house with a man named "Marcus" and a young man named "Dustin." (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶ 9).) Lieutenant James Johnson ("Johnson") and Sergeant Ken Ebernickle ("Ebernickle") determined that "Dustin" was possibly a twelve-year-old boy named Russell Calhoun. (*Id.* ¶ 10.) Subsequently, Warnsley's mother identified Russell Calhoun as the young man that she knew as "Dustin" (hereinafter "Dustin"), who was with Warnsley on the day of the shootings. (*Id.* ¶ 12.)

On March 9, 2002, detectives located Dustin, and he voluntarily submitted to an interview at the Anderson Police Department. (*Id.* ¶ 11.) At 9:20 a.m., Dustin provided a written statement regarding the shooting incident in which he related that he met up with Hunter and Warnsley at Warnsley's house around 3:00 p.m. on March 8, 2002. (Defs.' Mem. Supp. Summ. J. Ex. 1-B (Dustin's First Statement).) Dustin declared that Warnsley had a silver and black .380 caliber gun and intended to kill "Kurt." (*Id.*) Dustin did not know Kurt's last name, but knew the location of his residence. (*Id.*) The two men and Dustin left Warnsley's house and went to Anderson Mall (*Id.*) Around 10:00 p.m., Warnsley, Dustin, and Hunter left the mall and walked to Friendship Court Apartments. (*Id*) Warnsley had placed the gun in his waistband. (Defs.' Mem. Supp. Summ. J. Ex. 1-B (Dustin's First Statement).) According to Dustin, Warnsley again said that he intended to kill "Kurt." (*Id.*) At this time, Dustin called for a cab and went home. (*Id.*) When Dustin left, Warnsley and Hunter were walking with a white male named "John." (*Id.*) Dustin also stated that Warnsley had stolen a moped from "Kurt's" cousin, "Tez," and Kurt had been riding by Warnsley's house. (*Id.*)

*2 The officers were unable to corroborate Dustin's claim that he had called a cab. (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶ 14).) The officers brought Dustin in for additional questioning, and Dustin admitted lying about calling a cab because he was afraid the shooter would come after him. (*Id.* ¶ 15.)



In a second written statement given at 1:51 a.m. on March 9, 2002, Dustin said that he met Warnsley and Hunter at Warnsley's house around 3:00 p.m. on March 9, 2002. (Defs.' Mem. Supp. Summ. J. Ex. 1-C (Dustin's Second Statement).) Warnsley had a black and silver gun with him and said that he was going to kill "Kurt." (*Id.*) The group went to the Little General store and were walking back to Warnsley's house when "Kurt" drove by in a blue car. (*Id.*) Warnsley fired his gun four times, hitting the car. (*Id.*) "Kurt" stopped the car a little bit up the road, examined the car, and drove off. (*Id.*) After returning to Warnsley's house, Warnsley, Hunter, and Dustin walked to the mall. (Defs.' Mem. Supp. Summ. J. Ex. 1-C (Dustin's Second Statement).) Around 10:00 p.m., they left the mall and walked to Friendship Court Apartments towards Warnsley's house. (*Id.*) At that time, "Kurt" drove up beside them in a gray Cadillac with rims on the wheels. (*Id.*) "Tez" was in the car with "Kurt." (*Id.*) "Kurt" exited the car and took Warnsley's gun, shooting Warnsley once in the head. (*Id.*) Then "Kurt" shot Hunter twice and Warnsley four more times. (Defs.' Mem. Supp. Summ. J. Ex. C (Dustin's Second Statement).) Dustin again informed the officers in his statement that he knew where Kurt lived. (*Id.*) In addition, Dustin said that "Kurt" had bumps on his face. (*Id.*)

The detectives attempted to verify Dustin's statements. (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶ 18).) They determined that "Kurt" was possibly Harkness, a known drug dealer with a gray Cadillac and a bad complexion. (*Id.* ¶ 18a.) The detectives' conclusion was corroborated by Dustin identifying "Kurt's" house and the gray Cadillac on the property to Zamberlin. (*Id* ¶ 18c.) A license plate check revealed that the Cadillac was registered to Harkness. (*Id.* ¶ 18c).) Dustin showed Zamberlin the route Warnsley, Hunter, and he took from the mall to Friendship Court Apartments. (*Id.* ¶ 18d.) Ebernickle confirmed that "Tez" was related to Harkness and lived next door. (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶ 18e).)

Dustin was shown a photographic line-up at 3:13 p.m. on March 9, 2002. (*Id.* ¶ 19.) From the photographic line-up, Dustin identified Harkness as the person who shot Warnsley and Hunter. (*Id.*) Based on Dustin's statements and his identification of Harkness, two arrest warrants for murder were obtained. (*Id.* ¶ 20).) Harkness was arrested at 9:49 p.m. on March 9, 2002. (*Id.* ¶ 21.) After arraignment, Harkness was transferred to Anderson County Detention Center on March 11, 2002. (*Id.* ¶ 24.)

*3 The Anderson Police Department continued investigating the murders and later determined that Dustin murdered Warnsley and Hunter. (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶¶ 25, 32).) The charges against Harkness were dropped, and he was released from jail. (*Id.* ¶ 32.) Harkness filed suit alleging constitutional violations pursuant to 42 U.S.C. § 1983 [1] and state causes of action for false arrest, [2] outrage, and slander per se. The Defendants move for summary judgment on all of Harkness's causes of action on the grounds that (1) they had probable cause to arrest Harkness for murder; (2) they are not proper parties to a § 1983 action; (3) the police officers are entitled to qualified immunity; (4) the Defendants are immune from a suit for outrage; (5) Harkness fails to state a claim upon which relief may be granted for outrage; and (6) Harkness fails to state a claim for slander per se. Harkness failed to respond to the summary judgment motion.

## II. DISCUSSION OF THE LAW

### A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in the non-moving party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Moreover, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *Id.*

**B. False Arrest**

The Defendants allege they are entitled to summary judgment on Harkness's false arrest claim because they had probable cause to arrest Harkness. "The fundamental question in determining whether an arrest is lawful is whether there was probable cause to make the arrest." *Wortman v. Spartanburg,* 310 S.C. 1, 425 S.E.2d 18, 20 (S.C.1992) (internal quotation marks omitted). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Id.* "South Carolina follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury." *Jones v. City of Columbia,* 301 S.C. 62, 389 S.E.2d 662, 663 (S.C.1990). However, in this case, the evidence only supports one conclusion-the Defendants had probable cause to arrest Harkness.

*4 The Defendants had a good faith belief that Harkness had committed the murders based on the statements given by Dustin. (Defs.' Mem. Supp. Summ. J. Ex. 1 (Zamberlin Aff. ¶ 33).) The officers verified many aspects of Dustin's statements. Further, Dustin identified Harkness from a line-up. (*Id.*) In addition, Dustin was a twelve-year-old boy with no violent criminal history. (*Id.*) Harkness has produced no evidence to counter the overwhelming evidence that the Defendants had probable cause to arrest him. As such, there are no genuine issues of material fact concerning Harkness's false arrest claim, and the court grants the Defendants' summary judgment motion on the claim.

**C. Outrage**

The Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act ("SCTCA"), South Carolina Code of Laws Section 15-78-10 et seq., on the claim of outrage, otherwise known as intentional infliction of emotional distress. *Doe v. S.B.M.* 327 S.C 352, 488 S.E.2d 878, 879 (S.C.Ct.App.1997). The court agrees. The SCTCA does not waive sovereign immunity for this claim. Section 15-78-50 of the SCTCA states, "Any person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim" as provided in this chapter. S.C.Code Ann. § 15-78-50(a) (2005). "Loss," as defined by section 15-78-30, expressly excludes "intentional infliction of emotional harm " S.C.Code Ann. § 15-78-30(f). Furthermore, the SCTCA excludes liability for "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." § 15-78-60(17). As such, an employee's intentional torts are excluded from suit under the SCTCA. *See id.* [3] Therefore, the Defendants are entitled to summary judgment.

**D. § 1983 claim**

The Defendants allege that they are entitled to summary judgment on the § 1983 action because the Defendants are not entities that can be sued under § 1983. Harkness alleges that the Defendants falsely arrested him in violation of the Fourth and Fourteenth Amendments of the Constitution. (Compl.¶ 14.) However, Harkness has failed to establish a basis for liability under the Supreme Court's holding in *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In *Monell,* the Court held,

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694. Harkness has neither alleged nor provided evidence of an official policy or custom. As such, the Defendants are not proper defendants and are entitled to summary judgment on the § 1983 claims. [4]

**E. Slander per se**

*5 Additionally, the Defendants move for summary judgment on Harkness's slander per se claim. Harkness

alleges that the Defendants wrongfully accused him of committing the murders. (Compl.¶ 17.) Although accusations of a crime are slanderous per se, these defamatory statements may be protected by a qualified privilege. *See Holtzscheiter v. Thomson Newspapers Inc.*, 332 S.C. 502, 506 S.E.2d 497, 502 (S.C.1998). "The protection of [qualified] privilege extends generally to remarks made in the prosecution of an inquiry regarding a crime which has been committed; and for the purpose of detecting and bringing the criminal to punishment." *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641, 643 (S.C.1946), *distinguished by, Pelot v. Davison-Paxon Co.*, 218 S.C. 189, 62 S.E.2d 95 (S.C.1950).

However, the speaker can lose this qualified privilege by speaking with actual malice. *See Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 447 S.E.2d 194, 196 (S.C.1994). "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Id.* "[T]he burden will be upon the plaintiff to show ... actual malice." *Bell*, 38 S.E.2d at 643. There is no evidence that the Defendants acted with actual malice in investigating the murders and arresting Harkness. Therefore, the Defendants are entitled to summary judgment on this claim because there is no genuine issue of material fact.

It is therefore

ORDERED that the Defendants' motion for summary judgment, Document number 13, is granted.

IT IS SO ORDERED.

Footnotes

1 Harkness alleged essentially the same false arrest claim in both the third and sixth causes of action. As such, the third and sixth causes of action will not be addressed separately.

2 Harkness alleged essentially identical § 1983 claims as a result of false arrest in the first and fifth causes of action. As such, the first and fifth causes of action will not be addressed separately.

3 The court declines to address the Defendants' other arguments for dismissal of Harkness's outrage claim.

4 Even if Harkness had sued the officers individually, his § 1983 action would fail because there was probable cause to arrest Harkness. As such, there has been no violation of Harkness's federal rights. "Probable cause will be found to exist when the facts and circumstances within an officer's knowledge-or of which he possesses reasonably trustworthy information-are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed." *Gomez v. Atkins*, 296 F.3d 253, 262 (4th Cir.2002) (internal quotation marks omitted). Dustin's statements and his identification of Harkness provided the officers with probable cause to arrest Harkness.

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2012 WL 3839237
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Charleston Division.

Carole LINDQUIST, Plaintiff,
v.
Ray TANNER and Charleston County Parks and Recreation Commission, a division of Charleston County, Defendants.

No. C/A 2:11-3181-CWH-BM. | April 12, 2012.

**Attorneys and Law Firms**

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Joanna Brooks Stroud, Carol B. Ervin, Young Clement Rivers, Charleston, SC, Richard J. Morgan, Robert Hayne Hodges, III, Mcnair Law Firm, Columbia, SC, for Defendants.

**Opinion**

**REPORT AND RECOMMENDATION**

BRISTOW MARCHANT, United States Magistrate Judge.

*1 This action has been filed by the Plaintiff, a former employee of the Defendant Charleston County Parks and Recreation Commission, alleging various causes of action against the named Defendants. The Defendant Tanner is alleged to be an assistant manager with the Recreation Commission, and was one of Plaintiff's supervisors.

Shortly after the filing of the Amended Complaint in this action, the Defendant Recreation Commission filed a motion to dismiss Plaintiff's First, Second and Fifth causes of action as against this Defendant. The Defendant Tanner also filed a motion to dismiss, seeking dismissal of Plaintiff's First and Fifth causes of action against him. After receiving an extension of time, Plaintiff filed memoranda in opposition to the Defendants' motions, following which the Defendant Recreation Commission and Tanner filed reply memoranda.

These motions are now before the Court for disposition. [1]

**Allegations of the Amended Complaint**

Plaintiff alleges that she was employed by the Defendant Recreation Commission from February 25, 2008 to November 29, 2010. Plaintiff alleges that she was offered a full-time management position working with the Recreation Commission at its Mullet Hall Equestrian Center on Johns Island, South Carolina, which she accepted, "thereby forming a contract of employment." Plaintiff alleges that she was initially contacted by the Defendant Tanner, Assistant Manager, about an operations position that was open, and that she also discussed the terms and conditions of this position with Maintenance Supervisor Mark Bullock. Plaintiff alleges that Tanner told her that her salary was being budgeted from the Maintenance Department, but that this was not of any concern as this was the same way he [Tanner] had been hired. Plaintiff further alleges that she was advised by Tanner and Bullock that in order to by-pass an advertising requirement, they would designate her initially as a seasonal employee, but that this was only a designation for administrative convenience. Plaintiff alleges that she did not accept a position as a seasonal employee, nor was she offered such a position. Plaintiff alleges that she then "entered [into] a contract of employment with the Defendant CCPRC. The terms and conditions of the contract were both oral and written and included the CCPRC's policies and procedures."

Plaintiff alleges that her supervisors were Tanner and Operations Supervisor Wendy Jackson, and that her duties were always Operational. Plaintiff alleges that in January 2009 she was assured that her full-time Operations position had been formally budgeted to Operations as of July 1, 2009. Plaintiff also alleges that within six months of her hiring, the technical designation of her position became full-time, although this did not affect her duties and responsibilities.

Plaintiff alleges that during her tenure at Mullet Hall, as early as May 2008, she became the victim of sexually explicit and inappropriate language and behavior by the Defendant Tanner. Plaintiff alleges that Tanner's conduct included crude and explicit language, unwanted touching and grabbing of the Plaintiff, kissing Plaintiff on the mouth, urinating in her presence, following her in a menacing manner and sneaking up behind her, blocking her movements, and intimidation of a physical and verbal nature. Plaintiff alleges that because of the nature of her work, she was required to be alone in remote areas of the facility from time to time, and that "upon information and belief" she was followed to remote

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areas by Tanner and caused to feel exposed, frightened and intimidated, especially so after Tanner became aware of her complaints. Plaintiff further alleges that she was the victim of intimidating behavior by co-worker Robert Newman.

*2 Plaintiff alleges that she complained on numerous occasions to her supervisor, Wendy Jackson, pursuant to the Recreation Commission's appropriate policies and procedures. Plaintiff alleges that these complaints occurred over the initial ten (10) month period that she worked at Mullet Hall. However, Plaintiff alleges that Jackson failed to follow the Recreation Commission's procedures by failing to take the matter seriously, designating Tanner's behavior as merely "cocky". Further, although Jackson allegedly spoke to Tanner, Plaintiff alleges that the sexually harassing and inappropriate behavior continued and escalated.

Plaintiff alleges that on March 5, 2009, she reported another incident of unwanted and unacceptable physical touching and kissing and attempted kissing by Tanner to Maintenance Supervisor Mark Bullock. Plaintiff alleges that she never encouraged Tanner, and made it clear that his advances were unwanted. Thereafter, on March 24, 2009, Plaintiff filed a formal EEO complaint with the Recreation Commission's Human Resources Department, since no action had been taken with regard to her complaint. Plaintiff alleges that her supervisors claimed that they had investigated her allegations, but later admitted that they had not performed an investigation.

Plaintiff alleges that, prior to her formal HR complaint, she had received good reviews for her work. However, within one month of filing her complaint with Human Resources, her performance reviews and ratings dropped significantly, even though Plaintiff alleges her work continued to be of the same good quality. Plaintiff further alleges that after her April 2009 review, she did not get another written review until her termination in November 2010. Plaintiff alleges that she inquired about and pursued her complaint up the chain of command pursuant to the Recreation Commission's Policies and Procedures, but was advised by her supervisors that they did not believe her allegations that she was being harassed. Plaintiff alleges that, after she filed her HR complaint, she had several discussions with Jackson, Bullock and Supervisor Dave Chapell regarding her complaints, all to no avail.

Plaintiff alleges that after she filed her formal HR complaint, she ceased getting pay increases, her hours were intentionally and systematically diminished, and eventually she was removed from the schedule under the pretext of lack of work. Plaintiff alleges that in the Fall of 2008, she averaged thirty-five hours per week plus overtime, but that after the HR complaint was filed, the Defendants intentionally and systematically reduced her hours, first to thirty hours (which is less than required for a full-time position), and then by ceasing to assign her to work shows, effectively eliminating overtime. Plaintiff alleges that when she filed a complaint with the Equal Employment Opportunity Commission (EEOC) in December 2009, her hours were further reduced to twenty-five hours, following which her hours were reduced again to fifteen hours in April, and to five hours as of August 2010. Plaintiff alleges that, although the Defendants claimed that her reduction in hours was necessitated by lack of work, the Defendants had actually hired personnel during that time, including outside workers for shows instead of offering overtime to the Plaintiff.

*3 Plaintiff further alleges that as of May 2009, the Defendants drastically altered their attitude toward the Plaintiff; she was deprived of her management and operations duties, which Plaintiff believes were then assigned to new hires; that she received undue attention and unequal discipline compared to similarly situated workers; and that she was embarrassed and chastised in front of other employees for activities such as having a personal cell phone and other conduct, which had not only been previously acceptable for her but which Plaintiff alleges continued to be acceptable for other employees. Plaintiff also alleges that she was increasingly forced to do heavy labor and maintenance work, which she was not hired to do, and which was also above and beyond the maintenance duties occasionally performed by all workers; and that she was mandated to do work without proper training or tools and then chastised or disciplined for not doing it properly or fast enough. Plaintiff makes other allegations of unfair treatment, such as that she was advised to make her own schedule and then disciplined for not arriving at work in a punctual manner, and being advised that she would no longer be assigned specific tasks and then disciplined for not performing those tasks. Plaintiff alleges that this unequal and disciplinary conduct was engaged in by Tanner, Bullock, Jackson or Chapel on different occasions.

Plaintiff alleges that she also experienced retaliation from Tanner, who made disparaging remarks about Plaintiff to venders, mandated that she clean up after his personal parties, that she take care of his animals (including buying their food without reimbursement), and by making comments to mutual friends that he "owned" her. Plaintiff alleges that Tanner

attempted to discredit her by contesting her veracity with regard to the existence of his unacceptable conduct. Plaintiff alleges that this was all in retaliation for Plaintiff making a complaint about Tanner's unwanted advances, touching, and harassment.

Plaintiff alleges that she was eventually terminated, supposedly for lack of work, which Plaintiff alleges was a pretextural reason, and that her termination was actually retaliation for using the EEO system. Plaintiff alleges that she has experienced extreme emotional trauma, depression and distress as a result of the negative comments about her reputation to vendors and others in the horse community, and from the sexual harassment and hostile environment she endured. Plaintiff further alleges that, since her termination, she has been unable to find work in the equestrian community and has been negatively affected financially.

After exhausting her administrative remedies with the EEOC, Plaintiff filed this lawsuit asserting claims for intention infliction of emotional distress [First Cause of Action] against both Defendants Recreation Commission and Tanner, for Breach of Contract [Second Cause of Action] against the Defendant Recreation Commission, for sexual harassment and a hostile work environment [Third Cause of Action] against the Defendant Recreation Commission, for unlawful retaliatory discharge [Fourth Cause of Action] against the Defendant Recreation Commission, for defamation and defamation *per se* [Fifth Cause of Action] against both Defendants Recreation Commission and Tanner, and for civil assault and battery [Sixth Cause of Action] against the Defendant Tanner. *See generally, Plaintiff's Amended Complaint*

***Discussion***

*4 When considering a motion to dismiss pursuant to Rule 12(b), the Court is required to accept the allegations in the pleading as true, and draw all reasonable factual inferences in favor of the Plaintiff. The motion can be granted only if Plaintiff has failed to set forth sufficient factual matters to state a plausible claim for relief "on its face". *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *see also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). After careful review and consideration of the arguments presented pursuant to this standard, the undersigned finds and concludes that the Defendants' motions should be **granted,** in part, and **denied** in part, as set forth hereinbelow.

**I.**

**(First Cause of Action)**

In her First Cause of Action, Plaintiff alleges that the Recreation Commission and Tanner acted "negligently, willfully, wantonly, recklessly, grossly negligently, and intentionally"; engaged in conduct that was "extreme and outrageous as to exceed all possible bounds of decency"; and that as a "direct and proximate result of the outrageous actions taken by and through the agents, servants, officers and or employees of the Defendants", Plaintiff suffered severe emotional distress and outrage, entitling her to damages.[2] *Amended Complaint,* ¶¶ 77–81.

With respect to the Defendant Tanner's motion to dismiss, Plaintiff has withdrawn her claim for outrage (also known as intentional infliction of emotional distress) against this Defendant. *See Plaintiff's Memorandum in Opposition* [Court Docket No. 22], pp. 3–4; *see also* [Court Docket No. 30, p. 1, n. 1]. Therefore, Tanner is entitled to dismissal as a party Defendant from Plaintiff's First Cause of Action. With respect to the Defendant Recreation Commission, this Defendant argues that Plaintiff's outrage claim is barred by, *inter alia,* the exclusive remedy provision of the South Carolina Worker's Compensation Act, the relevant portion of which provides

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all of the rights and remedies of such employee, .... as against his employer, at common law, or otherwise, on account of such injury, loss of service or death.

S.C.Code Ann. § 42–1–540.

Plaintiff concedes that her claim for "intentional" infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act, S.C.Code Ann. § § 15–78–30, 50. *Plaintiff's Memorandum*

*in Opposition* [Court Docket No. 21], p. 4; *cf. Rucker v. Greenville County Sheriff Dep't.*, No. 10–1533, 2012 WL 951789 at *3 (D.S.C. Mar.20, 2012) [Applying South Carolina Tort Claims Act to counties.]. However, Plaintiff argues that her claim is for "negligent" infliction of emotional distress, which she argues is not barred by the Tort Claims Act, but then somewhat confusingly argues that, because the South Carolina Worker's Compensation Act only bars claims for "accidental" injuries, her outrage claim should not be dismissed because Plaintiff's injuries were caused by "intentional" acts by the Defendant, even though she has already conceded that the South Carolina Tort Claims Act bars her claim for intentional infliction of emotional distress. *See also Washington v. The McCormick Correctional Institution*, No. 07–26, 2007 WL 3046696 at * 2 (D.S.C. Oct.16, 2007)["[A] negligence action would be barred by the exclusive remedy provision of the South Carolina Workers' Compensation Act."].

*5 In any event, the South Carolina Supreme Court has specifically held that claims for intentional infliction of emotional distress are subject to and barred by the South Carolina Workers Compensation Act. *Dickert v. Metropolitan Life Ins. Co.*, 311 S.C. 218, 428 S.E.2d 700, 701 (S.C.1993) [Intentional infliction of emotional distress is within the scope of the Act]; *McClain v. Pactive Corp.*, 360 S.C. 480, 602 S.E.2d 87, 89 (S.C.Ct.App.2004) ["[I]ntentional infliction of emotional distress constitutes a personal injury that falls within the scope of the Act."]; *Palmer v. House of Blues Myrtle Beach Restaurant Corp.*, No. 05–3301, 2006 WL 2708278 (D.S.C. Sept.20, 2006). While the Supreme Court has found that an exception to the exclusivity provision of the Worker's Compensation Act can apply where the allegedly intentional conduct was committed by the employer through an "alter ego" of the employer itself; *see Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863, 869–870 (S.C.Ct.App.2004) ["An exception to the exclusivity provision exists where the injury is not accidental but rather results from the intentional act of the employer or its alter ego."]'; Tanner does not qualify as an "alter ego" of the Recreation Commission under the allegations of the Complaint. *See Dickert*, 428 S.E.2d at 701 [To fall under this exception, the tortfeasor must be a "dominant" corporate owner or officer of the employer]; *Sturgis v. Safe Passage, Inc.*, No.2000–CP–46–1092, 2002 WL 1362078 at * 3 (S.C.Comm.Pl. Mar. 11, 2002) [Noting difference between assailant merely being a supervisory employee or a person who can genuinely be characterized as the alter-ego of the corporation]. Further, even if Tanner could be deemed to be the "alter ego" of the Recreation Commission itself, the claim would still be barred by the South Carolina Tort Claims Act, as it would at that point be against Tanner in his official capacity, which would be the same as suing the Recreation Commission itself. *See* S.C.Code Ann. § 15–78–30, 50.

While Plaintiff could conceivably proceed on a claim for outrage against Tanner in his individual capacity; *see Southern Holdings, Inc. v. Horry County, South Carolina*, No. 02–1859, 2007 WL 896111 at * 8–9 (D.S.C. Mar.21, 2007) [allowing claim against Defendant in individual capacity where Defendant is alleged to have acted outside the scope of his employment]; Plaintiff has consented to the dismissal of Tanner as a party Defendant under this cause of action. *See* Plaintiff's Memorandum in Opposition [Court Docket No. 22], pp. 3–4. Therefore, as the Defendant Recreation Commission is also entitled to dismissal as a Defendant under Plaintiff's First Cause of Action for outrage, this claim should be dismissed *in toto*.

## II.

### (Second Cause of Action)

In her Second Cause of Action, Plaintiff alleges that she and the Defendant Recreation Commission "entered into a contract of employment, memorialized verbally and by the employer's handbook, policies and procedures", and that the Defendant thereafter breached her contract of employment "by altering and diminishing Plaintiff's hours, job description, [and] paying duties without her acceptance of the same", and by the Defendants "failure to follow its own regulations (which were part of the employment agreement) regarding EEO matters, discipline, termination and internal investigations." *Amended Complaint*, ¶ ¶ 82–90. The Defendant Recreation Commission argues in its motion to dismiss, *inter alia*, that this claim is subject to dismissal for failure of the Plaintiff to plead the elements of a contract sufficient to take the employer/employee relationship outside of an at-will employment relationship. The undersigned agrees.

*6 The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771, 773 (S.C.1997), citing *Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins., Co.*, 313 S.C. 215, 437 S.E.2d 122 (S.C.Ct.App.1993). With respect to employment, however, there is a presumption in

South Carolina that employees are at-will, and therefore in order to survive a Rule 12 Motion to Dismiss on a claim for breach of a contract of employment, a Plaintiff must "plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship ....". *Perrine v. G4S Solutions (USA), Inc.*, No. 11–1210, 2011 WL 3563110, at * 2 (D.S.C. Aug.9, 2011)["[T]here is a presumption in South Carolina that employees are at-will, and in order to survive a Rule 12 motion to dismiss on a claim for breach of a contract of employment, a Plaintiff must 'plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship ....' "], quoting *Amason v. P.K. Management, LLC*, No. 10–1752, 2011 WL 1100169, at * 6 (D.S.C. Mar.23, 2011); *see also Prescott v. Farmer's Tel. Co–Op., Inc.*, 335 S.C. 330, 516 S.E.2d 923, 927, n. 8 (S.C.1999) [In South Carolina, "there is a presumption of at-will employment"].

Here, a review of the allegations of the Amended Complaint shows that Plaintiff has only alleged in very general and conclusory terms that she was offered a job by the Recreation Commission, that she accepted, "thereby forming a contract of employment", that Tanner and Bullock "were authorized to hire Plaintiff and make her the offer of employment", and that she "discussed the terms and conditions of the position" with both Bullock and Tanner. *Amended Complaint*, ¶ ¶ 24, 27, 29. Plaintiff further alleges that "terms and conditions of the contract were both oral and written and included the [Recreation Commission's] policies and procedures", that the contract of employment was "memorialized verbally and by the employer's handbook, policies and procedures", and that the Defendant's conduct constituted a breach of that contract. *Amended Complaint*, ¶ ¶ 33, 83, 86–88. However, these allegations do not establish the existence of an employment contract. Any job is going to involve an offer (by the employer) and acceptance (by the employee), as well as the terms of the employment (things such as a starting salary, etc.), all of which are included in the allegations of the Complaint. That does not, however, mean that Plaintiff had a "contract" for employment. Plaintiff has not alleged that she was hired to work for a definite term or that her obtaining a job with the Recreation Commission had any other indices of a contract of employment, such as buyout provisions, right to severance pay, etc. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996) ["While the pleading standard is a liberal one, bald assertions and conclusions of law" are not sufficient to avoid dismissal of a complaint for failure to state a proper claim.]; *Frey v. City of Herculaneum*, 44 F.3d at 671 ["Complaint must contain facts which state a claim as a matter of law and must not be conclusory"].

*7 In her response brief, Plaintiff argues that her description of the nature of her employment and the terms and conditions thereof as contained in the Amended Complaint are sufficient to maintain a breach of contract claim, and that with respect to South Carolina being an at-will employment state, the at-will employment status can be altered by a Defendant's conduct, including language in an employee handbook or from oral or other written conduct. However, while Plaintiff is correct that an employer can alter an employee's at-will status through mandatory language in a handbook; *cf. Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 634 S.E.2d 15, 20 (S.C.Ct.App.2006); Plaintiff has identified no such handbook in her Amended Complaint, nor does she set forth any language from any handbook to show a genuine issue of fact as to whether the at-will employment relationship was altered by any such language. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir.2002) [Plaintiff has burden of alleging facts sufficient to state all the elements of a claim]. Rather, Plaintiff simply alleges that she entered into a contract of employment that was "memorialized verbally and by the employer's handbook, policies and procedures." *Amended Complaint*, ¶ 83. Such general and conclusory allegations are not sufficient to state a claim for breach of contract under the applicable law and standards. *See Twombly*, 550 U.S. at 555 ["While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... [f]actual allegations must be enough to raise a right to relief above the speculative level"]; *House v. New Castle County*, 824 F.Supp. 477, 485 (D.Md.1993) [Plaintiff's conclusory allegations insufficient to maintain claim]; *see also Iqbal*, 129 S.Ct. at 1949–1950["[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"].

Therefore, the Defendant is entitled to dismissal of this cause of action.[3] *Amazon*, 2011 WL 1100169, at * 6; *cf. Williams v. Intier Automotive Interiors of America, Inc.*, No. 09–1144, 2010 WL 5811848 (D.S.C. Nov.5 2010); *see also Harper*, 423 F.Supp. at 196["[W]here the claims in a complaint are insufficiently supported by factual allegations, these claims may be properly dismissed by summary dismissal"].

III.

**(Fifth Cause of Action)**

In her Fifth Cause of Action, Plaintiff alleges that Tanner, both in his individual capacity and as Assistant Manager of Mullet Hall, a facility controlled by the Defendant Recreation Commission, sent or caused to be sent, delivered or caused to be delivered, false, defamatory and injurious statements regarding the Plaintiff, that these statements were published to potential employers and others within the equestrian community and to other persons, that Tanner had no legal privilege to publish said statements to any third party, and that the Defendants' conduct constituted defamation and defamation *per se,* entitling her to damages. *Amended Complaint,* ¶ ¶ 115–121. Both Defendants assert in their motions to dismiss that Plaintiff has failed to adequately plead a claim for defamation and defamation *per se,* and also cite the South Carolina Tort Claims Act as a defense to this claim.[4]

*8 Defamatory communications can take two forms: libel and slander. Slander is a spoken defamation, while libel is a written defamation or one accomplished by actions or conduct. *Swinton Creek Nursery v. Edisto Farm Credit,* 334 S.C. 469, 514 S.E.2d 126 (S.C.1999). Both forms of defamation are alleged in the Amended Complaint. In South Carolina, the elements for a defamation claim are: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Murray v. Holnam, Inc.,* 344 S.C. 129, 542 S.E.2d 743, 748 (S.C.Ct.App.2001). Plaintiff has alleged the necessary elements for a defamation claim in her Amended Complaint. Specifically, she has alleged that Tanner made disparaging remarks about her to vendors including comments intended to discredit her by contesting her truthfulness concerning her conduct, and by also making comments to mutual friends that he "owned" her. Plaintiff further alleges that Tanner published these disparaging comments to third parties, including outside vendors, causing her great humiliation and embarrassment, holding her up to public ridicule and scorn, and damaging her professional reputation such that she has had difficulty obtaining new employment.

Such conduct, if it in fact occurred, could constitute defamation, and even defamation *per se,* at least with respect to those comments made to outside vendors, as the statements are alleged to have been intentionally made to third parties and the alleged defamatory meaning is arguably obvious on the face of the statements themselves. *See Holtzscheither v. Thomason Newspapers, Inc.,* 332 S.C. 502, 506 S.E.2d 497, 508–509 (S.C.1998)[[D]efamation allows a plaintiff to recover injury to [her] reputation as the result of the defendant's communication to others of a false message about the plaintiff.... The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se.*]; *White v. Wilkerson,* 328 S.C. 179, 183, 493 S.E.2d 345 (1997) [Defamation is actionable *per se* if it charges the Plaintiff with unfitness in one's business or profession]. While Tanner argues that the South Carolina Tort Claims Act expressly prohibits claims against a government employee for tortuous conduct within the scope of his or her employment, Plaintiff asserts her defamation claim against Tanner both as an agent of the Recreation Commission and individually. Furthermore, the SCTCA does not grant an employee immunity from suit if it is proved his conduct is not within the official scope of his employment *or* he acts with actual malice *or* he has an intent to harm. *See McCall v. Williams,* 52 F.Supp.2d 611, 615 (D.S.C.1999) ["SCTCA does not grant an employee 'immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.' "] (quoting S.C.Code § 15–78–70(b) (Supp.1997)); *Sanders v. Prince,* 304 S.C. 236, 403 S.E.2d 640, 643 (S.C.1991) [same].

*9 As for the Defendant Recreation Commission, this Defendant argues that, even assuming Tanner made defamatory statements, none of these allegations mention or allege anything about the Recreation Commission, but instead allege comments by Tanner as an individual about personal things unrelated to the Recreation Commission.[5] However, it is certainly arguable that Tanner's comments to outside vendors of the Recreation Commission concerning Plaintiff's veracity and her honesty as an employee of the Recreation Commission, were sufficiently based on both his and the Plaintiff's employment to avoid dismissal of this claim against the Recreation Commission, at least at this early stage of the proceedings. *Cf. Yost v. City of Charleston,* No. 09–2024, 2009 WL 4162274 (D.S.C. Nov.24, 2009) [Defamation claim may be maintained against an employer, rather than an agent of the employer, where the defamation is based on one's employment]; *King v. Charleston County School Dist.,* 664 F.Supp.2d 571, 586–587 (D.S.C.2009). That is all that is required for purposes of stating a claim. *Vogt v Greenmarine Holding, LLC,* 318 F.Supp.2d 136, 144,

n. 6 (S.D.N.Y.2004) [Finding that Plaintiffs had asserted sufficient facts to allege improper conduct by the named defendants, and that "[w]hether plaintiffs will be able to demonstrate the truth of those facts after discovery is an entirely different question, but plaintiffs are entitled to make the attempt"]; *see also Austen v. Cattertion Partners V, LP,* 709 F.Supp.2d 168, 177 (D.Conn.2010) [*Iqbal's* plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely"], citing *Twombly,* 550 U .S. at 556 (internal quotation marks and citations omitted).

Therefore, the Defendants are not entitled to dismissal of Plaintiff's Fifth Cause of Action for Defamation.

***Conclusion***

Based on the foregoing, the Defendants' motions to dismiss should be **granted, in part, and denied, in part.** The motions should be **granted** with respect to Plaintiff' First and Second Causes of Action, but should **be denied** with respect to Plaintiff's Fifth Cause of Action.

The parties are referred to the Notice Page attached hereto.

Footnotes

1 This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), D.S C. The Defendants have filed motions to dismiss. As these are dispositive motions, this Report and Recommendation is entered for review by the Court.

2 Although Plaintiff alleges in her Complaint that she is entitled to both "actual and punitive" damages, Plaintiff has specifically withdrawn any claims for punitive damages against the Recreation Commission under any of her state law causes of action. *See Plaintiff's Memorandum in Opposition* [Court Docket No. 21], p. 3.

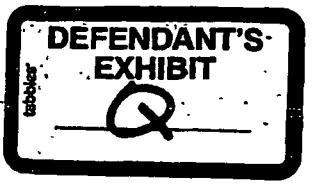
3 Defendant Recreation Commission has also moved to dismiss based on the statute of limitations. *See* Court Docket No. 29, pp. 4–5. However, since the undersigned has found that the Defendant is entitled to dismissal based on Plaintiff's failure to sufficiently allege the existence of a contract, it is not necessary to reach this second issue

4 A tort alleging an injury to reputation is not barred by the exclusivity provision of the South Carolina Worker's Compensation Act. *See Ray v Bechtel Savannah River, Inc* , No. 06–2946, 2007 WL 1960587, at *2 (D.S.C. July 2, 2007), (citing *Cason v. Duke Energy Corp.*, 348 S.C 544, 560 S.E.2d 891, 893 (S.C.202)). Therefore, that statute is not at issue with respect to Plaintiff's defamation claim.

5 The Defendant Recreation Committee also asserts that Plaintiff's defamation claim should be dismissed because of the use of the conjunctive "and" between "individually" and "agent". However, that is not a basis for dismissal at this time, and in any event at this point in the proceedings, the allegations of the Complaint can be construed as alleging that Defendant Tanner took certain actions in his official capacity and took other actions in his individual capacity. Plaintiff's allegations are also sufficient to meet the standard of § 15–78–70(b), which provides, *inter alia,* "that the employee's conduct was not within the scope of his official duties *or* that it constitute actual fraud, actual malice, intent to harm, *or* a crime involving moral turpitude."].

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2012 WL 3839235
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Charleston Division.

Carole LINDQUIST, Plaintiff,
v.
Ray TANNER, Charleston County Parks and Recreation Commission, Defendants.

Civil Action No. 2:11–3181. | Sept. 4, 2012.

**Attorneys and Law Firms**

Jennifer Munter Stark, Jennifer Munter Stark Law Office, Charleston, SC, for Plaintiff.

Joanna Brooks Stroud, Carol B Ervin, Young Clement Rivers, Charleston, SC, for Defendants.

**Opinion**

**ORDER**

RICHARD MARK GERGEL, District Judge.

*1 This matter comes before the Court on Defendants' partial motions to dismiss. (Dkt.Nos.7, 10). Plaintiff has filed responses to these motions and Defendants have filed replies. (Dkt.Nos.21, 22, 29, 30). This matter was referred to the Magistrate Judge for pre-trial handling pursuant to 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C. The Magistrate Judge issued a Report and Recommendation on April 12, 2012 recommending that the motions be granted in part and denied in part. (Dkt. No. 31).[1] Specifically, the Magistrate Judge recommended that the Defendants' motions to dismiss First and Second Causes of Action be granted and the motions to dismiss the Fifth Cause of Action be denied. No party filed objections regarding the Magistrate Judge's recommended disposition of the First and Fifth Causes of Action, and Plaintiff filed an objection regarding the recommendation that the Second Cause of Action, alleging a breach of contract, be dismissed. (Dkt. No. 32). Having fully reviewed the Complaint, the various memoranda of law filed by the parties and the applicable case law, the Court grants Defendants' motion to dismiss the First Cause of Action and denies Defendants' motions to dismiss the Second and Fifth Causes of Action.

**Legal Standard**

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber,* 423 U.S. 261, 270–71, 96 S.Ct. 549, 46 L.Ed 2d 483 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection has been made. The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations" of the Magistrate Judge. 28 U.S.C. § 636(b)(1).

Rule 12(b) (6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.... Our inquiry then is limited to whether the allegations constitute a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " *Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir.1992) (quotation marks and citations omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *E. Shore Mkts. Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir .1980). However, while the Court must accept the facts in a light most favorable to the non-moving party, it "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

To survive a motion to dismiss, the complaint must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A complaint has "facial plausibility" where the pleading "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

**Factual Background**

*2 Plaintiff, a former employee of the Charleston County Parks and Recreation Commission ("Commission"), alleges in her complaint that she was subjected to sexually explicit language, unwanted touching and grabbing, kissing and other inappropriate conduct by a managerial employee of the Commission, Defendant Tanner. (Dkt. No. 6, ¶¶ 39, 40). Plaintiff further alleges that she reported such conduct to her superiors, pursuant to the policies of the Defendant Commission, and no corrective action was taken. (*Id.* ¶¶ 45–48). Plaintiff alleges that she thereafter filed a formal complaint with the Defendant Commission's Human Resource Department and with the United States Equal Employment Opportunity Commission. (*Id.* ¶¶ 50, 61). Plaintiff alleges that her hours were thereafter reduced, her assignments were made more demanding and her employment was ultimately terminated, all in retaliation for her filing formal complaints regarding the sexually hostile work environment. (*Id.* ¶¶ 57, 60–70, 73, 108–112).

Defendants subsequently moved to dismiss the First Cause of Action, alleging intentional infliction of emotional distress, the Second Cause of Action, alleging breach of contract, and Fifth Cause of Action, alleging defamation. (Dkt. No. 7, 10). No motion to dismiss was filed regarding the Third Cause of Action, alleging a violation of Title VII for the creation of a sexually hostile work environment, the Fourth Cause of Action, alleging retaliatory discharge, and the Sixth Cause of Action, alleging civil assault and battery. The Magistrate Judge recommended that the Defendants' motion to dismiss the First Cause of Action be granted and the motion to dismiss the Fifth Cause of Action be denied. (Dkt. No. 31 at 7–10, 14–17). No party filed an objection to the Magistrate Judge's recommendations as to the First and Fifth Causes of Action. The Court has reviewed those portions of the Magistrate Judge's Report and Recommendation relating to the First and Fifth Causes of Action, finds that they accurately and appropriately address the legal and factual issues, and adopts those portions of the Magistrate Judge's Report and Recommendation as the Order of the Court.

The Defendant Commission has further moved to dismiss Plaintiff's Second Cause of Action alleging a breach of contract. The Magistrate Judge recommended that the motion be granted and the Plaintiff has timely filed objections to that recommendation. As further set forth below, the Court denies the motion to dismiss the Second Cause of Action.

**Discussion**

Plaintiff's Second Cause of Action alleges that the sexually hostile work environment to which she was subjected and her termination constituted a violation of the Commission's handbook, policies, and procedures, which she alleges was part of her employment contract. (Dkt. No. 6 ¶¶ 33, 83–89). The Defendant Commission argues that Plaintiff was an employee at will and cannot state a cause of action for breach of contract even based upon the allegedly abusive and illegal conduct of Defendants. A review of the relevant case law does not support such a legal proposition.

*3 It is well settled that, under certain circumstances, an employee's employment at will relationship with her employer can be modified by an employee handbook or by the written policies of the employer. *Hessenthaler v. Tri–County Sister Help, Inc.*, 365 S.C. 101, 616 S.E.2d 694, 697–99 (S.C.2005). For an employment policy to be enforceable in contract, it must be "definitive in nature, promising specific treatment in specific situations." *Id.* at 698. Further, the South Carolina Supreme Court has explicitly recognized that the employment at will doctrine is "subject to certain prohibitions against illegal discrimination ..." *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905, 910 (S.C.2005). This can include an employer's sexual harassment policy. *See Hessenthaler*, 616 S.E.2d at 699; *Bookman v. Shakespeare Co.*, 442 S.E.2d 183, 148–49 (S.C.Ct.App.1994).

At this stage of the litigation, the Court must assume all facts alleged by Plaintiff to be true and view all facts in a light most favorable to the Plaintiff. Plaintiff alleges that the Defendant Commission's policies and procedures were part of her employment contract, and that the alleged sexually hostile work environment and retaliatory discharge contravened those contractual rights, (Dkt. No. 6 ¶¶ 33, 45, 83, 85). The Court finds that the complaint has "facial plausibility" and "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," making disposition by a motion to dismiss inappropriate. *Ashcroft*, 556 U.S. at 678.[2]

**Conclusion**

Defendants' motions are granted in part and denied in part. The Court **GRANTS** Defendants' motion to dismiss the First

Cause of Action and **DENIES** the motions to dismiss the Second and Fifth Causes of Action.

AND IT IS SO ORDERED.

Footnotes

1 This case was reassigned to the undersigned on August 24, 2012. (Dkt. No. 42).

2 An employer has a variety of potential defenses available that can be addressed at the summary judgment stage, which can include whether the employer's policies are sufficiently definitive and specific to give rise to a contractural right for the employee. The Court simply finds that, at this stage, the complaint makes sufficient allegations to survive a motion to dismiss the breach of contract claim.

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1994 WL 89641
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, New Castle County.

Mark TURNBULL, as guardian ad litem for Steven Turnbull, a minor, Plaintiff,
v.
Kenneth FINK, administrator of the estate of Patricia Turnbull, Kenneth Deshields, and Delaware Authority for Regional Transit, Defendants.
Lorraine J. SHENTON, Plaintiff,
v.
DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT, a/k/a DART, and Franklin Cooper, Jr. and State Farm Mutual Automobile Insurance Company, Defendants.
Rosemarie MYERS and Jean Sachs, Plaintiffs,
v.
DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT, a/k/a DART, and Franklin Cooper, Jr., Defendants.
THE TRAVELERS INSURANCE CO., Vernalee P. Frey, and Virgil Frey, d/b/a Claymont Hardware and Supply, Plaintiffs,
v.
DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT, a Delaware Corporation, and Franklin Cooper, Jr., Defendants.
Virgil FREY, Vernalee Frey, his wife, Mark O. Frey, and V.V.M., Inc., t/a Claymont Hardware and Supply, Plaintiffs,
v.
DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT, a/k/a DART, and Franklin Cooper, Jr., Defendants.

C.A. Nos. 90C-10-135, 91C-04-279, 92C-03-033, 92C-03-080, 92C-03-057. | Submitted Nov. 8, 1993. | Decided Feb. 17, 1994.

Upon parties joint motion for declaratory judgment.

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**Opinion**

**OPINION AND ORDER**

ALFORD, Judge.

*1 Mark Turnbull, as guardian *ad litem* for Steven Turnbull, a minor, and Lorraine Shenton ("Plaintiffs") filed personal injury lawsuits against the Delaware Administration for Regional Transit ("DART") [1] and its bus drivers Kenneth Deshields ("Deshields") and Franklin Cooper, Jr. ("Cooper") (collectively "Defendants"). Plaintiffs assert claims against Defendants arising from separate accidents involving DART as a Defendant.

Defendants filed a motion pursuant to 10 *Del.C.* § 6501 on August 20, 1992, requesting the Court declare the

$300,000.00 limitation of liability imposed by 2 *Del.C.* § 1329 constitutional. Additionally, on November 16, 1992, Plaintiffs filed a joint motion for declaratory relief pursuant to Superior Court Civil Rule 57 asking the Court to declare the $300,000.00 limitation of liability contained in 2 *Del.C.* § 1329 unconstitutional. The actions involve a common issue, thus the Court ordered the cases consolidated for the purpose of resolving the motions for declaratory judgment only.

On February 9, 1993, the Court granted the Department of Transportation's Motion to Intervene to in order file an *amicus curiae* brief The Department of Transportation's brief[2] in support of the constitutionality of 2 *Del.C.* § 1329 was filed on March 1, 1993. Plaintiffs' answering brief was filed on April 1, 1993. The Delaware Trial Lawyers Association ("DTLA") with permission of the Court, filed its brief in support of the unconstitutionality of said statute on April 1, 1993. The Court heard oral arguments on November 8, 1993. This is the Court's decision on the parties' motion.

## FACTS

On October 28, 1988, an automobile driven by Patricia Turnbull, mother of the minor Plaintiff, collided with a DART bus driven by Defendant Deshields. Ms. Turnbull died as a result of the accident, and Plaintiff, who was eighteen months old at the time of the collision, suffered serious injuries. Mark Turnbull, acting as guardian *ad litem* for Steven Turnbull, filed an action against the Estate of Patricia Turnbull and Defendants DART and Deshields for personal injuries Plaintiff incurred in the accident. Defendants deny all liability resulting from the collision.

In a separate incident, a DART bus driven by Defendant Cooper collided with an automobile driven by Plaintiff Shenton ("Shenton") on March 7, 1990. Shenton suffered serious injuries as a result of the collision. After Defendants' bus collided with Plaintiff Shenton's automobile, it then crashed into a hardware store owned by Vernalee and Virgil Frey (collectively "the Freys"). Approximately five seconds elapsed between the bus' collision with Shenton's automobile and the impact with the hardware store. Shenton filed an action against Defendants seeking damages for personal injuries and lost wages. The Freys also filed an action against DART and Cooper for property damage to their hardware store.

DART is covered by two separate insurance policies. DTA purchased commercial primary liability insurance provided by Reliance Insurance Company with single liability limits of $1,000,000.00 and a $5,000,000.00 commercial umbrella policy provided by General Star Indemnity Company. Both policies identify DART as the insured and were in force at the time Plaintiffs' claims arose.

## DISCUSSION

*2 Three issues are raised by the joint motion for declaratory judgement. First, whether DTA's purchase of insurance, in excess of $300,000.00, waives the limitation of liability contained in 2 *Del.C.* § 1329. Second, whether the $300,000.00 limitation of liability infringes upon Plaintiffs' constitutional rights in violation of the United States and Delaware Constitutions. Third, whether the Shenton accident constituted one or more "occurrences" within the meaning of 2 *Del.C.* § 1329.

"There is a strong presumption of constitutionality attending a legislative enactment which, unless the evidence of unconstitutionality is clear and convincing, the court will be reluctant to ignore." *Justice v. Gatchell,* Del.Supr., 325 A.2d 97, 102 (1974) (citing *State Highway Dept. v. Delaware Power & Light Co.,* Del.Ch., 167 A.2d 27 (1961). Statutes should not be disturbed except in clear cases and then only upon weighty considerations. *Justice,* 325 A.2d at 102, *State v. Blount,* Del.Super., 472 A.2d 1340, 1346 (1984). A person who challenges the validity of a statute has the burden of overcoming the presumption. *State v. Brown,* Del.Supr., 195 A.2d 379 (1963).

### Waiver of Sovereign Immunity

The constitutionality of 2 *Del.C.* § 1329 is being challenged in the instant action. It provides:

> Any operation, service or program provided by the Delaware Transportation Authority or its auspices not covered by a general liability policy, self-insurance or other insurance policy as shall be legally established and funded by said Authority shall be covered and protected by the doctrine of

> sovereign immunity of the State which shall be applicable not only to the Authority but to each of its agencies, administrations, subsidiaries and each of their respective officers and employees; which immunity shall apply to and against any lawsuit or liability arising from any such operation, service or program, except as specifically excepted under this section. No legal or equitable action seeking damages as a result of any operation, service or program described in the preceding sentence shall be permitted or damages recovered except as such activity is and shall be covered by an insurance program procured in accordance with laws and for which adequate funding is available. In the event that insurance has been provided, such claim, including any award for damages or costs assessed against the Authority, its administrations, subsidiaries officers or employees either individually or on behalf of their employer shall not exceed the amount of said insurance covering the risk or loss or the amount of $300,000 whichever amount shall be the lesser for any and all claims arising out of a single occurrence.

2 *Del.C.* § 1329.[3] (emphasis added).

Plaintiffs contend that DTA's purchase of insurance in excess of $300,000.00 constitutes a waiver of the defense of sovereign immunity pursuant to 18 *Del.C.* § 6511. Plaintiffs cite *Doe v. Cates,* Del.Supr., 499 A.2d 1175 (1985) as authority for the State to waive its immunity. Plaintiffs contend that 18 *Del.C.* § 6511 grants DART the authority to waive its sovereign immunity and that DART did in fact waive its immunity by purchasing insurance in amounts in excess of the $300,000.00.

*3 Defendants contend that 18 *Del.C.* § 6511 is not applicable to the instant case. Defendants cite *Fiat Motors v. Mayor and Council,* Del.Supr., 498 A.2d 1062 (1985), for the proposition that the purchase of insurance beyond the scope of the liability limit does not constitute a waiver of sovereign immunity. Defendants contend that although *Fiat* involved a municipality, its holding is nevertheless applicable to the instant case.

Defendants further argue that 18 *Del.C.* § 6511 specifically refers to insurance procured by the "State Insurance Coverage Program" and state that insurance policies procured by DTA in the instant case are not covered by the State Insurance Coverage Program.

Title 18 *Del.C.* § 6511 provides:

> The defense of sovereign immunity is waived and cannot and will not be asserted as to any risk or loss covered by the *state insurance coverage program,* whether same be covered by commercially procured insurance or be self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.

18 *Del C.* § 6511. (emphasis added). Title 18 *Del.C.* § 6511 is a presumptive waiver of the sovereign immunity defense. *Doe v. Cates,* Del.Supr., 499 A.2d 1175 (1985). Consequently, immunity is waived or waivable under 18 *Del.C.* § 6511. *Sandt v. Delaware Solid Waste Authority,* Del.Super., C.A. 90C-10-234, Herlihy, J. (Aug. 25, 1993). Furthermore, § 6511 waives immunity only as to risks covered by the State Insurance Program. *Doe,* 499 A.2d at 1181, *Sandt,* at 9.

The State Insurance Program was established by the General Assembly and was intended to protect the public from wrongful acts of State officials and its employees. *Pajewski v. Perry,* Del.Supr., 363 A.2d 429, 435 (1976). The act established a committee whose responsibilities included insuring any risks to which the State may be exposed through either a self-insurance program or through insurance contracts. However, despite the committee's attempts to obtain legislation and appropriations to purchase insurance or to fund a self-insurance program, the General Assembly has never acted. *Doe,* 499 A.2d 1175, 1179, *Sandt,* at 10.

In *Doe* the Court found that the State did not waive its sovereign immunity where the State had not provided insurance to protect itself against risks. The Supreme Court affirmed Superior Court's ruling that the State did not waive its sovereign immunity under § 6511, stating that as a matter

of law that the State had overcome the presumptive waiver of immunity under 18 *Del.C.* § 6511.

The Superior Court in *Sandt* considered the issue of whether the existence of an insurance policy covering a plaintiff's claim constituted a waiver of sovereign immunity under 18 *Del.C.* § 6511. In *Sandt* a tort claim was brought against the Delaware Solid Waste Authority, a state agency. Despite the agency's purchase of insurance, the Court found that the agency had not waived its sovereign immunity under 18 *Del.C* § 6511 finding that the General Assembly had never acted to set up the state insurance coverage program. *Id.* at 10. Consequently, in light of the Court's findings in *Sandt* that the "state insurance coverage program" does not exist, this Court must necessarily find that the insurance procured by DART was not purchased under such program; and thus *Sandt* necessitates a finding that DART could not have waived its sovereign immunity under 18 *Del.C.* § 6511.

*4 Furthermore, 18 *Del.C.* § 6511 is general in nature while 2 *Del.C.* § 1329 is more specific in that it relates to the purchase of insurance by DTA, a specific state agency. When confronted with general and specific statutes regarding the same issue, the specific statute prevails over the general statute. *Slater v. Cole,* 541 A.2d 595, 596 (1988) (citing *Blue Cross & Blue Shield of Delaware, Inc. v. Elliott,* Del.Super., 449 A.2d 267). Consequently, the limitation of liability contained in 2 *Del.C.* § 1329, the more specific statute, determines the extent to which DTA may waive its sovereign immunity.

Plaintiffs also argue that the use of tax revenues by a state agency to purchase insurance renders the purchase part of the state insurance program. The Court finds this argument to be without merit. In the instant case, the insurance was purchased pursuant 2 *Del C.* § 1309(20) which grants DTA authority to purchase insurance for any losses it deems desirable.[4]

Plaintiffs concede that the only method of waiving sovereign immunity is by act of the General Assembly. The purchase of insurance is not such an act. Furthermore, the legislature's intent to limit DTA's liability is clear in that 2 *Del.C.* § 1329 provides that claims against DTA, "shall not exceed the amount of said insurance covering the risk of loss or the amount of $300,000.00 whichever amount shall be the lesser." 2 *Del.C.* § 1329. The clear import of the language, "whichever amount shall be the lesser," is that the General Assembly intended that even where DTA procures insurance coverage above the $300,000.00 limit, a claimant would be limited to $300,000.00. It is also true that were the coverage amount of the policy less than $300,000.00, a claimant would be limited to the lower insurance policy limits. "Where a party seeks to hold a State agency liable under a statute, any reasonable doubt as to the proper construction of the statute should be resolved in favor of the State." *Sandt,* at 7 (citing *Dept of Community Affairs v. M. Davis & Sons,* Del.Supr., 412 A.2d 939, 942 (1980)). The Court now turns to Plaintiffs' constitutional challenges.

**Constitutional Challenge to 2 *Del.C.* § 1329**

Plaintiffs contend that 2 *Del.C.* § 1329 violates their constitutional rights under the state and federal constitutions based upon four grounds: (1) it deprives Plaintiffs of a trial by jury; (2) it violates the separation of powers doctrine; (3) it deprives Plaintiffs of their due process rights by preventing access to the courts; (4) it deprives Plaintiffs of their right of equal protection. Plaintiffs also argue that 2 *Del.C.* § 1329 should be declared violative of public policy.

**1. Right to Trial by Jury**

*5 Plaintiffs contend that the limitation of liability imposed by the statute violates Article 1, Section 4 of the Delaware Constitution[5] because it infringes upon a jury's ability to determine damages. Stated another way, Plaintiffs contend that the limitation of liability violates their right to have a judgment executed should a jury assess damages greater than $300,000.00. The Court finds that Plaintiffs' contention is meritless. The State has the right to limit its sovereign immunity. Del. Const. Art. I, § 9.

**2. Separation of Powers**

DTLA contends that the 2 *Del.C.* § 1329 limitation of liability provision constitutes legislative interference with the functions of the judiciary, namely the right to have a jury determine the amount of the damages. Yet, DTLA cites no authority to support its position.

The Court finds this argument to be without merit. The doctrine of separation of powers "is a rule forbidding one branch of the government from exercising powers exclusively assigned to another, and forbidding one branch of government from allowing its powers to be exercised by another branch." *Opinion of the Justices,* Del.Supr., 380 A.2d 109, 113 (1977).

**3. Due Process**

Plaintiffs argue that 2 *Del.C.* § 1329 is unconstitutional because it is violative of their due process rights because it prevents them from seeking full redress of their claims in contravention of Article 1, section 9, of the Delaware Constitution.

Defendants contend that this due process argument was raised and rejected by the Delaware Supreme Court in *Sadler v. New Castle County,* Del.Supr., 565 A.2d 917 (1989). Defendants contend that the legislature has the right to limit liability under 2 *Del.C.* § 1329, maintaining that there is no common law right to sue a state agency. The Delaware Constitution provides:

> All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the *due course of law,* and justice administered *according to the very right of the cause and the law of the land,* without sale, denial or unreasonable delay or expense ...

Del. Const. Art I, § 9. (emphasis added).[6] The Court is not persuaded by Plaintiff's arguments. Article 1, Section 9, by its own terms, limits any remedy for injury attributable to the State. *Morris v. Blake,* Del.Supr., 552 A.2d at 850 (1992). The last sentence of Article 1, § 9 "clearly contemplates the authority of the General Assembly to limit the extent to which the State, either directly or through its political subdivisions, will be subject to suit." *Sadler v. New Castle County,* Del.Supr., 565 A.2d 917 (1989).

In *Board of Regents v. Roth,* 408 U.S. 564, (1972), the United States Supreme Court reasoned that the starting point of a due process challenge was to identify the property right that is involved. Implicit in Plaintiffs' arguments is the claim that there exists a constitutional right to a judgment by jury. This issue has been raised and decided by the Supreme Courts of the United States and the State of Delaware. *Roth,* 408 U.S. at 561, *Doe v. Cates,* Del.Supr., 499 A.2d at 1182.

In *Roth,* the Court ruled that a person obtains a property interest when he has a legitimate claim of entitlement to the property. *Id.* at 561. Plaintiffs do not have a legitimate claim of entitlement to a jury verdict exceeding the amount of the state's waiver of sovereign immunity. *Doe,* 499 A.2d at 1182. Plaintiffs' due process argument fails because there is no fundamental right of action of which they are deprived. *Id.* at 1183.

**4. Equal Protection Argument**

*6 Next, Plaintiffs contend that 2 *Del.C.* § 1329 violates the Fourteenth Amendment of the United States Constitution arguing that the $300,000 liability limitation does not rationally advance a legitimate state interest. Plaintiffs argue that the limitation of liability creates impermissible classifications composed of: (1) those persons whose damages are greater than or less than $300,000.00; and (2) those persons with injuries caused by DART employees and those persons with injuries caused by other state employees who operate vehicles.

Plaintiffs further contend that since DART has primary insurance coverage of up to $1,000,000.00 and an umbrella policy providing $5,000,000.00 of coverage there is no rational basis for limiting Plaintiffs' recovery. As authority Plaintiffs cite *F.S Royster Guano Co. v. Commonwealth of Virginia,* 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed 989 (1920).

Defendants posit that there is no violation of the equal protection clause because under § 1329 all claimants face the same treatment. Defendants argue that all claimants, regardless of injury, are subject to the $300,000.00 limitation of liability and there is no disparate treatment between similarly situated persons. Defendants point out that the legislature has broad discretion in enacting laws which affect similarly situated persons differently citing *McGowan v. Maryland,* 366 U.S. 420.

Defendants also contend that 2 *Del.C.* § 1329 does in fact have a rational basis, arguing that it is a legitimate goal of the legislature to seek to limit a state agency's monetary liability. Last, Defendants point out that the $300,000 limitation of liability appears in other Delaware statutes citing 10 *Del.C.* § 4013 and 18 *Del.C.* § 3902.

In analyzing an equal protection challenge to socioeconomic legislation such as 2 *Del.C.* § 1329 the Courts have utilized the rational basis standard. *Cheswold Vol. Fire Co v. Lambertson Const.,* 489 A.2d 413 (1984) (citing *Zobel v. Williams,* 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982)). Delaware courts have traditionally afforded legislative classifications where discrimination is not based on race, color, religion, ancestry or other inherently suspect classifications, a presumption of reasonableness. These

classifications do not involve a suspect class or fundamental right. *Marine v. State,* Del.Supr., 607 A.2d 1185, 1207 (1992). (citing *Justice v. Gatchell,* Del.Supr., 325 A.2d 97,102 (1974)). A classification created by statute will not be set aside if any state of facts may reasonably justify it. *Marine,* 607 A.2d at 1207 (citing *Traylor v. State,* Del.Supr., 458 A.2d 1170, 1177 (1983). Under the rational basis standard, a statute is prohibited only if it arbitrarily or irrationally discriminates among similarly situated persons. *Id.* at 418. (citing *Williamson v. Lee Optical of Oklahoma Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 533 (1949).

The Court finds that 2 *Del.C.* § 1329 does not create impermissible classifications. *Doe v. Cates,* Del.Supr., 499 A.2d 1175 (1985). In *Doe* the Court found no discriminatory treatment as between claimants who had redress against the State because of the State's purchase of insurance and those claimants who lacked redress because the State declined to purchase insurance. The Court found that, "... plaintiffs who have the same types of claims are treated equally." *Id.* at 1182.

*7 Although in *Doe* the Delaware Supreme Court determined the issue of waiver of sovereign immunity under the State Tort Claims Act, this Court finds *Doe* to be controlling in the instant case as well. Under 2 *Del.C.* § 1329, persons with claims exceeding the $300,000.00 limitation of liability are treated the same as those claimants with claims below $300,000.00. Similarly, those claimants who are injured by employees of State agencies which have elected to purchase insurance are treated the same and those claimants who are injured by state employees of state agencies which did not purchase insurance.

Thus, in the instant case, the Court finds no merit to Plaintiffs' arguments. This Court finds that there is a rational basis to the legislature's decision to limit the liability of DTA and that the classifications created by the statute serve a legitimate purpose. The Court takes judicial notice of the fact that on a daily basis large numbers of persons are transported by DART buses within the state. Therefore, the potential exposure to risks of loss is high. The legislature may properly take measures to reduce such risks; thus, the classifications created by the statute are not arbitrary.

Plaintiffs further argue that public policy considerations require the Court to interpret Defendants' purchase of insurance policies exceeding $300,000.00 in liability coverage as a waiver of the liability limitation found in 2 *Del.C.* § 1329. Plaintiffs contend that for the Court to do otherwise would require citizens to underwrite the premiums paid to Defendants' insurance carriers with tax dollars, while not permitting injured citizens to recover damages to the full extent of their losses. Plaintiffs contend that permitting Defendants' insurers to escape their contractual obligations as a result of sovereign immunity deprives citizens of the benefit of a public expenditure.

The Court finds that the preservation of the public treasury against unusually large recoveries in tort cases is an important governmental interest *Smith v. City of Philadelphia,* 516 A.2d 306, 311, (1986), *Trujillo v. City of Albuquerque,* 798 P.2d 571 (1990). For the foregoing reasons, the defendant's motion to declare 2 *Del.C.* § 1329 constitutional is GRANTED.

**Occurrence**

With respect to the accident(s) involving Cooper and Shenton, and Cooper and the Freys, it is argued that should the Court affirm the constitutionality of 2 *Del.C.* § 1329, Plaintiffs should be entitled to recover $600,000.00 in damages, contending that the collisions constituted two separate occurrences within the meaning of 2 *Del.C.* § 1329.

Defendants contend that the March 7, 1990, accident constituted one "occurrence" and that the collisions were the result of one continuous flow of events. Defendants cite *McCoy v. Draine,* Del.Super., Graves, J. (Feb. 1, 1991).

The issue to be decided is whether the March 7, 1990, accident involved one or two "occurrences" as that term is used in 2 *Del.C.* § 1329. Both parties cite *McCoy* as authority for their positions. The Court ruled in *McCoy* that an accident which occurred within seconds of each other and which involved separate victims was one occurrence. *Id.* at 5. The Court in *McCoy* defined "occurrence" within the context of an insurance contract. This Court nevertheless finds the ruling in *McCoy* to be persuasive.

*8 In *McCoy* the Court adopted a causation theory finding that "occurrence" means the cause giving rise to the claims of injury. *Id.* The parties assert that approximately five seconds separated Cooper's impact with the Shenton automobile and his impact with the hardware store belonging to the Freys.

The Court is not persuaded by Plaintiffs' contentions that Cooper's alleged falling asleep and his failing to brake

constitute two separate causal factors which result in two separate occurrences. Nor, is the Court persuaded by Plaintiffs' contention that Cooper's placement of his foot on the gas pedal instead of the brake created a separate occurrence. Instead, the Court finds that the claims herein were the result of a single causal factor. For the foregoing reasons the Court finds that the March 7, 1990, accident constituted a single "occurrence" within the meaning of 2 *Del.C.* § 1329.

IT IS SO ORDERED.

Footnotes

1 DART was established as a subsidiary of the Delaware Transportation Authority ("DTA") and an agency of the Department of Transportation on October 1, 1979, pursuant to 2 *Del.C.* § 1307(a).

2 The Department of Justice filed an *amicus curiae* brief on behalf of the Department of Transportation. 10 *Del.C.* § 6511 provides that when a statute is alleged unconstitutional, the Attorney General of the State shall be entitled to be heard.

3 2 *Del.C.* § 1329 became effective on July 12, 1988.

4 The statute states in pertinent part that the Delaware Transportation Authority shall have all powers necessary or convenient to ... (20) Procure insurance against any losses in connection with its property, operations or assets of any portion of any of its administrations or subsidiaries in such amounts and from such insurers as it deems desirable. Defendants point out that 2 *Del.C.* § 1309(20) became effective after 18 *Del.C.* § 6511.

5 Article 1, section 4 of the Delaware Constitution provides in relevant part that "Trial by jury shall be as heretofore." Del. Const. Art. 1, § 4.

6 This section of the Constitution is sometimes referred to as the remedy-for-injury clause. See *Morris v. Blake,* Del.Super., 552 A.2d 850, (1988), aff'd *Sussex County v. Blake,* Del.Supr., No. 340,1991, Moore, J. (June 26, 1992).

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2012 WL 1340103
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United States District Court,
D. South Carolina,
Spartanburg Division.

Ira Milton KINARD, Plaintiffs,
v.
CITY OF GREENVILLE; Officers and or Former Officers C.B. Mills, Matthew Scott Jowers, Jeremiah Milliman, and American Services, Inc., Defendants.

C/A No. 6:10–3246–TMC. | April 18, 2012.

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**Opinion**

## OPINION & ORDER

TIMOTHY M. CAIN, District Judge.

*1 This matter is before the court on the Defendants American Services, Inc. ("American Services"), City of Greenville ("City"), Officer C.B. Mills ("Mills"), and Officer Jeremiah Milliman's ("Milliman's") Motions to Dismiss. In his Second Amended Complaint, Plaintiff Ira Milton Kinard ("Plaintiff") asserts federal claims pursuant to 42 U.S.C. § 1983 for violations of his 4th, 6th, 7th, 8th, and 14th Amendment rights and a state law cause of action for assault and battery and intentional infliction of emotional distress. Pursuant to Rule 12(b)(6), Fed.R.Civ.P., Defendant American Services and Defendants the City, Mills, and Milliman filed two separate motions to dismiss for failure to state a claim (Dkt. # 44 and 45). For the reasons set forth below, these motions are granted in part and denied in part.

## STANDARD FOR A MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. *Ostrzenski v. Seigel,* 177 F.3d 245, 1251 (4th Cir.1999). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*quoting Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.' " *Iqbal,* 129 S.Ct. at 1949 (*quoting Twombly,* 550 U.S. at 557).

## FACTUAL AND PROCEDURAL BACKGROUND

In his Complaint, Plaintiff alleges that on November 22, 2008, he was brought to Greenville Memorial Hospital ("Hospital") by emergency medical services ("EMS") complaining of migraines, and lower back pain and muscle spasms, and/or a severe leg cramp. He was transported to the emergency room ("ER") by wheel chair where Plaintiff states that he lowered himself to the floor. Plaintiff alleges that Mills, an off-duty City of Greenville police officer working as a private security guard for American Services, verbally accosted him using derogatory expletives and gender slurs and physically assaulted him by doing "knee drops" on Plaintiff's back. He alleges Mills pulled him back into the wheelchair, transported him out of the ER, and placed him into a police car. Plaintiff alleges City of Greenville police officers Matthew Jowers ("Jowers") and Milliman pulled him into the police car while verbally accosting him with gender slurs and offensive language. He further alleges Jowers made sexual comments to him alluding to rape and then slammed the door on his leg several times.

*2 Plaintiff alleges the verbal assault and threats continued on the ride to the Greenville County Detention Center ("GCDC") and the GCDC refused to accept him because of his condition and "because he had not properly been arrested." He states he was sent back to the Hospital by

DEFENDANT'S EXHIBIT 8

EMS. Plaintiff alleges he suffered physical pain and assault, emotional suffering and distress, mental anguish, undue grief, indignity, and loss of enjoyment of life.

Plaintiff originally brought this action in state court. Defendants removed the action to this court and filed motions to dismiss. Plaintiff sought leave to amend his complaint and submitted a proposed amended complaint. United States District Judge J. Michelle Childs granted Defendants' motions to dismiss. Judge Childs also granted Plaintiff leave to amend, but she found the proposed amended complaint which Plaintiff had submitted was insufficient to cure the deficiencies of the original complaint. Therefore, she granted Plaintiff thirty days to file another amended complaint which she ordered must contain definite statements of fact to address the deficiencies outlined in her order. Plaintiff thereafter filed an amended complaint and the next day he filed a motion to amend his amended complaint. Judge Childs granted this motion to amend to allow Plaintiff to clarify the proper defendants and further explain the basis for certain causes of action. Plaintiff subsequently filed his Second Amended Complaint and Defendants have again filed motions to dismiss this complaint.

## DISCUSSION

**1) American Services' Motion to Dismiss**

American Services moves for dismissal with prejudice of all of Plaintiff's claims based upon Plaintiff's failure to comply with the Judge Child's order and also for failure to state a claim pursuant to Rule 12(b)(6). First, the court will address American Services' argument that all of Plaintiff's claims should be dismissed with prejudice for failing to follow the court's prior order. The Federal Rules of Civil Procedure recognize that courts must have the authority to control litigation before them, and this authority includes the power to order dismissal of an action for failure to comply with court orders. Fed. R.Civ.P. 41(b).

The Fourth Circuit Court of Appeals has identified four factors to be considered before dismissing a case pursuant to Rule 41(b): (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir.1978). These factors "are not a rigid four-prong test," and "the propriety of a dismissal ... depends on the particular circumstances of the case." *Ballard v. Carlson*, 882 F.2d 93, 94 (4th Cir.1989). "[D]ismissal as a sanction is an extreme remedy to be used only when a party has displayed callous disregard to its obligations or exhibited very bad faith." *Berry v. South Carolina Dep't of Soc. Servs.*, 1997 WL 499950, at 6 (4th Cir.1997). The Fourth Circuit has also mandated that before dismissing a case with prejudice, district courts must give a party "clear and explicit" warning of the consequences of failing to satisfy the court's orders. *See Choice Hotels Int'l, Inc. v. Goodwin & Boone*, 11 F.3d 469, 472 (4th Cir.1993).

***3** In this case, upon consideration of the *Davis* factors, the court finds dismissal would be too harsh a sanction in this instance as it appears that the failure to follow the court's prior orders was not the fault of Plaintiff (as opposed to his counsel) and the amount of prejudice caused to American Services is minimal. Accordingly, the court will not dismiss with prejudice all of Plaintiff's claims for failing to follow the court's prior order. American Services' Motion to Dismiss for failure to state a claim is discussed below.

**A) Section 1983 claims** [1]

American Services moves to dismiss on the ground that Plaintiff fails to plead facts in his Second Amended Complaint sufficient to allege a § 1983 claim. Specifically, American Services contends that Plaintiff has failed to allege facts which demonstrate that: 1) American Services acted under the color of state law; 2) American Services' policies and customs caused a deprivation of Plaintiff's civil rights; and 3) American Services violated Plaintiff's constitutional rights. The court agrees.

Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C.A. § 1983. To state a § 1983 claim, Plaintiff has to establish that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

To impose liability under § 1983 against a county or city, Plaintiff must allege that the action at issue was one that "execute[s] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or that represents informal governmental "custom." *See Monell v. Dept. of Soc. Servs.,* 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Counties and other local governments cannot be held liable under § 1983 for injuries inflicted by their employees or agents based on the theory of respondeat superior. *Id.* at 694.

Similarly, a private corporation is not liable under § 1983 for torts committed by it employees when such liability is predicated solely upon a theory of respondeat superior. *See Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 727 (4th Cir.1999); *see also Powell v. Shopco Laurel Co.,* 678 F.2d 504, 506 (4th Cir.1982) (holding that the principles of § 1983 municipal liability articulated in *Monell v. Dep't of Soc.* are "equally applicable to the liability of private corporations" and "a private corporation cannot be saddled with section 1983 liability via respondeat superior alone."). "[P]rivate corporations can only be held liable under § 1983 if "an *official policy or custom of the corporation* causes the alleged deprivation of federal rights." *Rodriguez v. Smithfield Packing Co., Inc.,* 338 F.3d 348, 355 (4th Cir.2003) (emphasis added) (*citing Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 727 (4th Cir.1999).

***4** Plaintiff has failed to plead any facts demonstrating that a specific policy or custom of American Services led to his alleged injuries. Plaintiff alleges that the Defendants "were acting under th (sic) cover of pretense of South Carolina law, customs, practices, usage or policy at all times mentioned herein as police officers or other such personnel or employees and had certain duties imposed upon them with regard to the Plaintiff herein." (2nd Am. Compl. at ¶ 26). However, Plaintiff does not identify a specific policy or custom of American Services nor allege a direct causal link between that policy or custom and his injuries. *Walker v. Prince George's County, Md.,* 575 F.3d 426, 431 (4th Cir.2009) (finding that a plaintiff is obliged to identify a policy or custom that caused injury).

In his response to American Services' Motion to Dismiss, Plaintiff refers to "the specific policy of the Greenville Police Department that allowed Plaintiff to be falsely arrested at Greenville Memorial Hospital after he was transported there by Greenville Emergency Medical Services, which violated his Constitutional right to seek medical treatment." (Dkt. # 50—Pl.'s Mem. Opp. Mot. to Dismiss at 2). First, Plaintiff refers to a policy of the Greenville Police Department, and not American Services. Second, Plaintiff still has not identified a "specific" policy.

Plaintiff's allegations are far too general and vague. He has not pled that American Services adopted a policy or custom pursuant to which Mills acted. Plaintiff's conclusory assertions are insufficient.[2] Accordingly, Plaintiff's 1983 claims against American Services are dismissed with prejudice.[3]

**B) State Law Claims**[4]

**i) Intentional Infliction of Emotional Distress**

Plaintiff alleges a state law claim of intentional infliction of emotional distress.[5] To establish such a claim, Plaintiff must show Defendants: (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized community"; (3) such actions actually caused plaintiff's emotional distress; and (4) the emotional distress was so severe "no reasonable man could be expected to endure it." *Hansson v. Scalise Builders,* 374 S.C. 352, 650 S.E.2d 68, 70 (S.C.2007) (*citing Ford v Hutson,* 276 S.C. 157, 276 S.E.2d 776 (S.C.1981).

In *Hansson,* the South Carolina Supreme Court found that the plaintiff's testimony he lost sleep and developed a habit of grinding his teeth was not sufficient to survive summary judgment. The court held that:

> 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.

*5 *Hansson,* 650 S.E.2d at 72.

Here, Plaintiff alleges he suffered "physical pain, emotional suffering, indignity, physical assault, and loss of his aforementioned Federal rights, and the Plaintiff did suffer the loss of enjoyment of life, mental anguish, emotional distress, undue grief, and will likely suffer from the effects of the Defendants actions now and in the future." (2nd Am.Compl.¶ 34). These allegations are not sufficient to state a cause of action for intentional infliction of emotional distress. As Plaintiff cannot prevail on a claim of intentional infliction of emotional distress on the facts as alleged, this cause of action is dismissed. *Twombly,* 550 U.S. at 555 ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... [f]actual allegations must be enough to raise a right to relief above the speculative level"). Again, because Plaintiff has had multiple attempts to sufficiently state his claims, the court dismisses this claim with prejudice. *See supra n. 3.*

**ii) Assault and Battery**

Plaintiff also alleges a state law claim of assault and battery. An assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant and a battery is the actual infliction of any unlawful, unauthorized violence on the person of another. *Herring v. Lawrence Warehouse Co.,* 222 S.C. 226, 72 S.E.2d 453 (S.C.1952). Under South Carolina caselaw, liability of an employer, under the doctrine of respondeat superior, is established if the employee was at the time engaged in the discharge of duties entrusted to him in reference to the particular matter in hand and acting within the apparent scope of his employment. Reviewing Plaintiff's Second Amended Complaint, the court finds that Plaintiff has sufficiently alleged a cause of action for assault and battery against American Services based upon Mills' alleged actions. Accordingly, the court denies American Services' Motion to Dismiss this claim.

**2) City of Greenville, Mills, and Milliman's Motion to Dismiss**

Defendants the City and Officers Mills and Milliman, in their official capacities, move for dismissal for failure to state a claim pursuant to Rule 12(b)(6). The City contends that Plaintiff's § 1983 claims it should be dismissed because Plaintiff has failed to plead a specific policy or custom of the City that caused a deprivation of Plaintiff's rights and the City cannot be held liable for an intentional tort of its employees. The Officers Mills and Milliman, in their official capacities, contend they should be dismissed because a claim against them in their official capacities is the same as a claim against the City. Finally, these Defendants contend that Plaintiff may not recover punitive damages or prejudgment interest pursuant to § 1983 or the South Carolina Torts Claim Act ("SCTCA").

**A) Section 1983 claims against the City**

Plaintiff alleges that the City is liable under § 1983 for failure to train and supervise the officers involved in the alleged incident. The City contends that it cannot be held vicariously liable for the actions of its employees pursuant to § 1983. The court agrees.

*6 The doctrine of respondeat superior generally does not apply to claims brought under § 1983. *Monell,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611. As noted above, a municipality may be liable under § 1983 only if the alleged wrongful conduct causing the constitutional deprivation is undertaken to effectuate an official policy or custom of the municipality. *Fisher v Washington Metro. Area Transit Auth.,* 690 F.2d 1133, 1142–43 (4th Cir.1982). Once it is demonstrated that there is a policy established and maintained by the municipality, the municipality is liable for deprivations of constitutional rights caused by actions pursuant to that policy. *Id.* Further, a municipality may be liable for the wrongful acts of its employees if the municipality knew of a pervasive, unreasonable risk of harm from a specific source and as the result of a deliberate indifference or tacit authorization, did not take corrective action. *Slakan v. Porter,* 737 F.2d 368 (4th Cir.1984). Generally, a failure to supervise gives rise to a § 1983 liability only where there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel. A single act or isolated incidents are normally insufficient to establish supervisory inaction upon which to predicate § 1983 liability. *Wellington v. Daniels,* 717 F.2d 932, 936 (4th Cir.1983).

Further, "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In *Drewry v. Stevenson,* 2010 WL 93268 (D.Md.2010), the court dismissed a constitutional failure to

train claim because the complaint alleged no facts showing 1) the nature of the training of sheriff's officers by the County, 2) that any failure to train was a deliberate or conscious choice by the County, or 3) that the conduct was caused by a failure to train. *Id.* at * 4. Further, as *Drewry* notes, "[a] single incident of misconduct by a police officer is not sufficient to state a claim for inadequate training." *Id.*

Here, the allegations in Plaintiff's Second Amended Complaint are insufficient to state such a claim. Plaintiff alleges that the City failed to adequately train and supervise the officers involved in the alleged incident and failed to institute proper procedures and policies to protect Plaintiff's constitutional rights. Plaintiff seems to be questioning the City's allowance of Mills' employment as a private security guard by American Services'. (Dkt. # 50—Pl.'s Mem. Opp. Mot. to Dismiss at 2.) However, Plaintiff does not allege that the City was deliberately indifferent to Plaintiff's rights in allowing Mills to work as a private security guard or that the City was aware of any unreasonable risk of harm in the manner in which it employed or trained officers.[6] Further, Plaintiff does not allege that any other incidents have occurred in which officers exhibited behavior similar to that alleged by Plaintiff in this case. The court finds that Plaintiff's conclusory allegations are simply insufficient to state a § 1983 claim against the City. Again, because Plaintiff has made multiple attempts to sufficiently state his claims, the court dismisses these claims with prejudice. *See supra n. 3.*

**B) Section 1983 claims against Defendants Mills and Milliman in their official capacities**

*7 As Defendants Officers Mills and Milliman note, Plaintiff has not specified in his Second Amended Complaint whether he is suing the officers in their individual or official capacities. These Defendants contend that, to the extent that they are being sued in their official capacities, Plaintiff has failed to state a claim against them. The court agrees. A suit against an officer in his official capacity is the same as a suit against the governmental entity. *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Furthermore, the court notes that Judge Childs dismissed these claims with prejudice in her prior order. (Dkt. # 26 at 10). Therefore, to the extent that the Plaintiff is alleging claims against Mills and Milliman in their official capacities, these claims are dismissed with prejudice.

**C) State Law Claim against the City**

The City contends that it is immune from Plaintiff's state law claim of assault and battery.[7] While the SCTCA provides a limited waiver of immunity for tort actions against the state, the state has not waived its immunity for intentional torts. South Carolina Code Ann. § 15–78–60(17) states that a "governmental entity is not liable for a loss resulting from .... (17) employee conduct .... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." Therefore, the City has immunity for the claims made against it for the intentional tort of assault and battery and accordingly these claims against the City are dismissed with prejudice.

**C) Punitive Damages**

Finally, the City contends that Plaintiff cannot recover punitive damages on his § 1983 or state law claims against the City. First, the court points out that Judge Childs dismissed with prejudice Plaintiff's claims for punitive damages against the City. (Dkt. # 26 at 11). Furthermore, as the court is dismissing with prejudice these claims against the City, such a claim is also now moot.

Based on the foregoing, Defendants' Motions to Dismiss are **GRANTED** in part and **DENIED** in part. Furthermore, as all the claims against the City of Greenville are dismissed with prejudice, the City of Greenville is dismissed as a defendant.

**IT IS SO ORDERED.**

Footnotes

1 As an initial matter, the court notes that in his Second Amended Complaint Plaintiff has alleged a § 1983 claim pursuant to the 8th Amendment. (2nd Am.Compl.¶ 6). However, Plaintiff's 8th Amendment claim was dismissed with prejudice by Judge Childs. (Dkt. # 26 at 8).

2 The question of whether American Services was a state actor is a difficult one and need not be addressed because Plaintiff has failed to allege or establish that any deprivation of his federal rights was caused by an official policy or custom of American Services. *See Austin,* 195 F.3d 715.

3 Ordinarily, leave to amend is granted liberally to cure any defects in a pleading Fed.R Civ.P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). However, Plaintiff does not request further amendment, and the defects that were

apparent in Plaintiff's claims in his original complaint have not been cured. Plaintiff previously requested, and the court granted, leave to address the deficiencies in his pleading. Plaintiff has now been provided several opportunities to attempt to cure the deficiencies in his claims, which he has failed to do. The court concludes that further leave to amend is unwarranted. *Cf. Pittston Co. v United States*, 199 F.3d 694, 705 (4th Cir.1999) (noting that leave to amend should be freely given "[i]n the absence of any apparent or declared reason—such as ... repeated failure to cure deficiencies by amendments previously allowed" (*quoting Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222(1962)). Because Plaintiff has made multiple attempts to sufficiently state his claims, the court dismisses these claims with prejudice. *Feeley v. Total Realty Mgmt.*, 660 F.Supp.2d 700, 715–716 (E.D.Va.2009) and *Robinson v Morgan Stanley*, 2008 WL 4874459, at *7 (N.D.Ill. June 18, 2008).

4 Although Plaintiff sets out his cause of action as one, for assault and battery and intentional infliction of emotional distress (2nd Am. Compl. at 7), the court addresses these as separate causes of action.

5 As American Services points out, this cause of action was not alleged in Plaintiff's original complaint and when Judge Childs granted Plaintiff leave to amend, leave was not granted to add additional causes of action but rather to clarify the proper defendants and further explain certain already alleged causes of action.

6 The court notes that Plaintiff has not alleged exactly what the City's policy is on allowing officers to work as private security guards or if there is even any official policy on this subject.

7 The court will not address Plaintiff's cause of action of intentional infliction of emotional distress as it is being dismissed as previously discussed herein.

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2011 WL 3652291
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Greenville Division.

Diane LANDRUM, in her capacity as Personal Representative of the Estate of Aaron Clark Gray, Plaintiff,
v.
SPARTANBURG COUNTY, Chuck Wright, Christopher Raymond, and Glen Stuart, in their individual capacities, Defendants.

C.A. No. 7:10–cv–00007–JMC. | Aug. 18, 2011.

**Attorneys and Law Firms**

Karl B. Allen, Greenville, SC, for Plaintiff.

Andrew Todd Darwin, Holcombe Bomar Gunn and Bradford, Spartanburg, SC, for Defendants.

**Opinion**

## OPINION AND ORDER

J. MICHELLE CHILDS, District Judge.

*1 This matter is before the court on Defendants' Spartanburg County (the "County") and Spartanburg County Sheriff Chuck Wright's ("Wright") Motion for Summary Judgment [Doc. 24] on Plaintiff Diane Landrum's ("Landrum") Amended Complaint [Doc. 6], pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff filed no response to these Defendants' Motion for Summary Judgment.

For the reasons set forth below, the court grants Defendants' (the County and Wright) Motion for Summary Judgment on Plaintiff's Third, Fourth, Fifth, and Sixth causes of action.

## FACTUAL AND PROCEDURAL HISTORY

This case arises out of a drug bust organized and conducted by the Spartanburg County Sheriff's Department on February 10, 2005. On February 7, 2005, the Spartanburg County Sheriff's Office Narcotics Unit received information that Aaron Clark Gray ("Gray") was distributing crack cocaine in the Spartanburg area, and the Narcotics Unit purchased $400.00 worth of crack cocaine using an undercover operative. The informant maintained contact with Gray throughout the week with the intention of making a second purchase from Gray.

On February 10, 2005, the Narcotics Unit arranged to purchase $1,600.00 worth of cocaine from Gray at a residence located on Overhill Circle in Spartanburg County. After the purchase was completed by the informant, Defendant Glen Stuart ("Stuart") and Defendant Christopher Raymond ("Raymond") remained in the vicinity to obtain a description of the residence for the purposes of obtaining a search warrant. As Stuart and Raymond drove by the residence in an unmarked vehicle, they observed a car leaving which Raymond recognized as Gray's vehicle. Stuart and Raymond followed the car and radioed for a marked unit to initiate a traffic stop.

Before the second unit arrived, Gray turned into a driveway also located on Overhill Circle. At that time, Stuart believed that Gray was acting as if he was attempting to evade them and as if he knew something was wrong. According to the officers, they decided to place Gray under arrest and Raymond parked his vehicle at the mouth of the driveway. The officers exited the vehicle and instructed Gray to get out of the car and to get on the ground. Both officers were wearing marked clothing and allegedly told Gray numerous times to get out of the car and to get on the ground. According to the officers' testimony, as Stuart and Raymond approached Gray's vehicle, Gray placed the car in reverse and backed toward the officers. As the car was backing up and in fear of being struck by the vehicle, Raymond fired at the vehicle.

According to the officers' testimony, Gray began to drive erratically in the yard, turned the car around, and proceeded forward. Then, he reversed directly toward Stuart. Believing he was going to be overrun as the car was within three to five feet of him, Stuart fired at the vehicle. Raymond, also believing that the car was going to strike Stuart, fired at the vehicle. The car came toward Raymond, and he fired again. The car then slowed and came to rest. The officers approached the car, saw Gray slumped over, and immediately called for medical assistance. Stuart estimated the entire incident, from the initial approach on the vehicle to the call for emergency medical services, took no more than fifteen seconds. Gray was transported to Spartanburg Regional Medical Center where he later died from his wounds.




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*2 Some of the above facts as provided by the officers and the County are disputed by Landrum. In her Amended Complaint, Landrum alleges that Stuart and Raymond did not have probable cause or reasonable suspicion to seize Gray, nor did they have proper identification or authority to attempt to seize Gray. Landrum alleges that Stuart and Raymond attempted to seize Gray by opening his car door and attempting to pull him out of the car. Gray rebuffed their attempts and tried to flea the area. Landrum alleges that "at no time did Gray attempt to use his car as a weapon to threaten the lives of Stuart and Raymond." [Doc. 6 at ¶ 8]. Furthermore, Landrum alleges that "[w]ithout legal justification or threat to their personal safety, Defendants Raymond and Stuart began firing multiple, numerous and excessive shots in the residential neighborhood striking innocent homes, (interior and exterior), striking the vehicle being operated by Gray and striking the body of Gray." *Id.*

Additionally, Landrum alleges that the County was grossly negligent in hiring Raymond and Stuart when it knew or should have known that they were unqualified and not suitable to be deputies, in failing to supervise Raymond and Stuart when they knew that one or more had engaged in similar unlawful and excessive force conduct in the past, and in failing to properly train the other officers at the scene to intercede when they observed Raymond and Stuart applying unnecessary and excessive force against Gray. [Doc. 6]

Landrum has set forth the following causes of action:

1) a survival action claim under 42 U.S.C. § 1983 against Raymond and Stuart for illegal seizure of Gray in violation of the Fourth Amendment;

2) a wrongful death action claim under 42 U.S.C. § 1983 against Raymond and Stuart for use of excessive force during the seizure of Gray in violation of the Fourth Amendment;

3) a claim under 42 U.S.C. § 1983 against Wright under a supervisor liability theory for allowing an unconstitutional custom, policy and practice;

4) a survival action for common law assault and battery against the County based on the shooting of Gray.

5) a wrongful death action for common law assault and battery against the County based on the shooting and killing of Gray;

6) a wrongful death action for gross negligence against the County based on the shooting and killing of Gray.

Even with the court's understanding that there are substantial facts which are being disputed by Landrum, this does not affect the particular findings in favor of summary judgment for Defendants the County and Wright. Because this order solely entails claims against the County and Wright, only the third through sixth causes of action will be discussed herein.

## LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). To prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

*3 The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. Rather, the non-moving party must demonstrate that specific, material facts exist which give rise to a genuine issue. *See id* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *See Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248.

## DISCUSSION

### A. Plaintiff's Third Cause of Action

Plaintiff alleges that "prior to February 10, 2005, Defendant Wright developed and maintained policies or customs exhibiting deliberate indifference to the constitutional rights of persons of Spartanburg County, which caused the violation of Mr. Gray's rights " [Doc. 6, at ¶ 21]. The County filed a Motion for Summary Judgment [Doc. 24] on behalf of itself and Wright, contending that Landrum's 42 U.S.C. § 1983 claims against the County and Wright should be dismissed because she failed to allege that Gray's constitutional rights were deprived as a result of an official County custom, policy, pattern, practice, or procedure which was adhered to by the County Sheriff's Office and Wright.

Here, Landrum claims that it was the policy and/or custom of Wright to "inadequately and improperly investigate citizen complaints of police misconduct, and Sheriff Wright instead tolerated the acts of misconduct." [Doc. 6, at ¶ 22]. She sets forth general allegations of deliberate indifference but puts forth no evidence in support of these blanket allegations. Furthermore, Landrum fails to provide any evidence of how any policy or procedure maintained by the Sheriff's Department directly led to the alleged violation of Gray's constitutional rights. Landrum cannot demonstrate that the policies of the County's Sheriff's Department are unconstitutional, and the record fails to demonstrate any pattern or practice of unconstitutional conduct by Sheriff Wright or his deputies.

### 1. Official Capacity of Wright

The County further argues that Landrum's 42 U.S.C. § 1983 claims against Wright in his official capacity should be dismissed. A suit against an officer in his official capacity is the same as a suit against the governmental entity. *See Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Therefore, to the extent that the Court construes the Amended Complaint as making allegations against Wright in his "official" capacity as Sheriff of Spartanburg County, these claims are dismissed with prejudice.

*4 The South Carolina Supreme Court, United States District Court for the District of South Carolina, and the United States Court of Appeals for the Fourth Circuit have all held that South Carolina sheriffs and deputy sheriffs are state officials. In *Gulledge v. Smart,* 691 F.Supp. 947 (D.S.C.1988), the court conducted an extensive review of South Carolina state law concluding that sheriffs and deputy sheriffs are state officials and therefore are not "persons" for purposes of § 1983 when sued in their official capacity. In reaching this determination, the court relied on many of the same factors cited by the Supreme Court in *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), which ultimately held that this particular inquiry is on a state-by-state basis.

In *Gulledge,* the district court found that the "state constitution establishes the elective office of county sheriff and his term of office" and that the state General Assembly "prescribes his duties and compensation." *Gulledge,* 691 F.Supp at 954 (citing S.C. Const. art. V § 24). The South Carolina Code of Laws also sets forth sheriffs' "arrest powers," which in turn "relate primarily to state offenses." *Id.* Furthermore, although "the sheriff as an elected official is not subject to hiring and firing by the state, the legislature has nevertheless prescribed that the Governor is the public official empowered to remove the sheriff from office for misconduct and to fill a vacancy in that office." *Id.* (citing S.C.Code Ann. §§ 1–3–240, 23–11–40). Therefore, when sued pursuant to 42 U.S.C § 1983 in their official capacities, sheriffs are not "persons" amenable to suit.

### 2. Individual Capacity of Wright

Landrum's Amended Complaint states that Wright is being sued in his individual or personal capacity, rather than his official capacity. [Doc. 6 at ¶ 2) "Personal-capacity suits .... seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, on the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.' " *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (quoting *Ky. v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). However, Landrum has not alleged or provided any evidence that Wright had any personal involvement with the incident in question.

It is well settled that "in order for an individual to be liable under § 1983, it must be affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's

rights." *Davis v. DSS,* 941 F.2d 1206 (4th Cir.1991) (quoting *Wright v. Collins,* 766 F.2d 841 (4th Cir.1985)). Landrum's Amended Complaint contains no allegations of personal involvement of Wright in the incident where Gray was fatally wounded. The allegations against Wright are merely that he was the Sheriff of Spartanburg County at the time of the incident, and that as Sheriff, he "developed and maintained policies or customs exhibiting deliberate indifference" to constitutional rights. [Doc. 6 at ¶ 21) ].

*5 Additionally, a plaintiff may not allege a constitutional cause of action against Defendants to recover damages for the unconstitutional acts of other employees. The United States Supreme Court has clearly held that a governmental entity may not be held liable for the acts of its employees under a *respondeat superior* theory because of the employment relationship. *See Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). To the extent that Landrum seeks to impose vicarious liability on Defendant Wright for alleged conduct of Raymond and Stuart, these allegations must be dismissed pursuant to *Monell.*

There is no evidence that Wright caused the deprivation of a federal right belonging to Gray. Accordingly, Landrum has failed to carry the burden of proof against Wright, and the court finds in favor of Defendant Wright.

**B. Plaintiff's Fourth and Fifth Causes of Action**

Landrum's Fourth and Fifth causes of action in the Amended Complaint allege that the County is liable to Landrum based upon the common law intentional torts of assault and battery inflicted upon Gray. South Carolina defines an assault as the placement of a person "in reasonable fear of bodily harm by the conduct of the defendant." *Jones by Robinson v. Winn–Dixie Greenville, Inc.,* 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct.App.1995). Battery is "the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree." *Id.* at 432. Both of these torts outline intentional conduct rather than negligent conduct.

South Carolina Code § 15–78–60(17) states that a "governmental entity is not liable for a loss resulting from .... (17) employee conduct .... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." The South Carolina Tort Claims Act provides a limited waiver of immunity for tort actions against the state, but the state has not waived its immunity for intentional torts. *See* S.C.Code § 15–78–60(17). The County has immunity for the claims made against it for the intentional torts of assault and battery; therefore, the County is entitled to summary judgment on these claims.

**C. Plaintiff's Sixth Cause of Action**

Plaintiff alleges that the County was grossly negligent in the hiring and supervision of Raymond and Stuart. South Carolina courts have defined gross negligence as "the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One,* 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); *Clyburn v. Sumter County District Seventeen,* 317 S.C. 50, 451 S.E.2d 885 (1994); *Richardson v. Hambright,* 296 S.C. 504, 374 S.E.2d 296 (1988). "It is the failure to exercise slight care." *Clyburn,* 317 S.C. at 53, 451 S.E.2d at 887. Gross negligence ordinarily is a mixed question of law and fact, but when the evidence supports but one reasonable inference, the question becomes a matter of law for the court and summary judgment may be appropriate. *See Id.,* 317 S.C. at 53, 451 S.E.2d at 887–88.

*6 However, in *Sims v. Greenville County,* 211 F.3d 1265 (Table), at *4 (4th Cir.S.C. Apr. 14, 2000), the court held that while the plaintiff "failed to present any evidence that Greenville County *intentionally* and *consciously* provided an allegedly inadequate training program to its officers that was bound to result in the use of excessive force during multiple-officer takedowns," the County had the burden of proof to demonstrate they were entitled to one of the exceptions listed under S.C.Code Ann. § 15–78–60. *Id.* The *Sims* court found support from *Etheredge* which held that "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Etheredge v. Richland Sch. Dist. I,* 330 S.C. 447, 499 S.E.2d 238, 242 (Ct.App.1998).

Here, Landrum has not provided any evidence to demonstrate that the County was grossly negligent in the hiring and supervision of Raymond and Stuart or in the training of other officers on the scene in question. Therefore, these Defendants are entitled to summary judgment on this claim.

**CONCLUSION**

For the foregoing reasons, the court **GRANTS** Defendants' (Spartanburg County and Sheriff Chuck Wright)

Motion for Summary Judgment on the Third, Fourth, Fifth and Sixth causes of action. [Doc. 24].

**IT IS SO ORDERED.**

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2013 WL 960320
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Paducah Division.

Jazmine MOORE, Plaintiff
v.
MURRAY STATE UNIVERSITY, Defendant.

No. 5:12–CV–00178. | March 12, 2013.

**Attorneys and Law Firms**

Kimberly Lynn Bunton, Louisville, KY, for Plaintiff.

Richard L. Walter, Boehl Stopher & Graves, LLP, Paducah, KY, for Defendant.

**Opinion**

**MEMORANDUM OPINION AND ORDER**

THOMAS B. RUSSELL, Senior District Judge.

*1 This matter comes before the Court on the Defendant's motion to dismiss. (Def.'s Mot., Docket Number ("DN") 4.) The Plaintiff has responded. (Pl.'s Resp., DN 6.) The Defendant has replied. (Def.'s Reply, DN 12.) Fully briefed, this matter is now ripe for adjudication. Having considered the matter and being fully advised, the Defendant's motion is **GRANTED** on the Plaintiff's claims arising under federal law. The Court declines to exercise supplemental jurisdiction over the remaining state law claims and **REMANDS** those claims to state court.

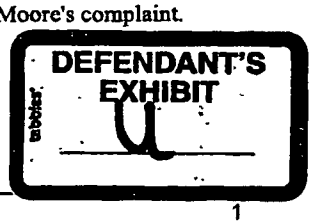
I.

In the fall of 2011, Plaintiff Jazmine Moore ("Moore") was enrolled as student at Murray State University ("MSU" or "University") and was also a member of the women's track and field team. (Compl., DN 1–2, ¶ 5.) She alleges that on September 14, 2011, she was sexually assaulted by a male student while in her dormitory on campus. (*Id.* at ¶ 6.) Approximately six weeks later, on October 28, 2011, Moore notified Jennifer Severns ("Severns"), MSU's head coach for women's head track and field, about the assault. (*See* Email of Oct. 28, 2011, DN 1–2, p. 15.)[1] Moore explained that her absence from mandatory team events was the result of the sexual assault. (*Id.*) At the conclusion of the email, Moore asked Severns for information about available resources that could help her with the physical and psychological impacts of the assault. (*Id.*) Three days later, on October 31, Severns responded to Moore. (*Id.* at p. 16.) Severns encouraged Moore to go to the Women's Center on MSU's campus and offered to schedule an appointment and accompany Moore during her visit to the center. (*Id.*) Moore replied that she wanted Severns to schedule the appointment and take her to the Women's Center. (*Id.*) Through a series of emails Severns and Moore arranged for Moore to go to the Women's Center on November 11, 2011. (*Id.*) Severns explained that she could not accompany Moore on the date of the appointment because she would be out of town for a regional track and field competition. (*Id.*) Moore told Severns that the appointment on November 11 was "fine" and that "I'll go then." (*Id.* at p. 17.) It appears that Moore went to the Women's Center by herself on the scheduled date. Severns allegedly never reported the sexual assault to the MSU Police Department and never followed up or otherwise inquired about Moore's condition. (Compl. DN 1–2, ¶ 13.) Moore self-reported the sexual assault to campus police on December 16, 2011. (*Id.* at ¶ 14.)

Moore filed suit against MSU alleging that Severns's failure to report the sexual assault compromised physical evidence, witness statements, and Moore's safety and security. (*Id.* at ¶ 15.) Additionally, she claims that she "suffered harm and damages in not being able to return and participate in [MSU's] women's track and field team and ultimately the [loss] of scholarship and ability to return to [MSU] as a full-time student." (*Id.* at ¶ 16.) She seeks compensatory and punitive damages for her injuries.

*2 Moore asserts three state and two federal causes of action: (1) negligence; (2) negligence *per se;* (3) failure to comply with the Michael Minger Act, KRS § 164.948 *et seq.;* (4) failure to comply with the Jeanne Clery Act, 20 U.S.C. § 1092 *et seq.;* (5) and failure to comply with Title IX, 20 U.S.C. § 1681 *et seq.* (*Id.* at pp. 5–12.) This action was originally filed in state court, but MSU removed to this Court pursuant to 28 U.S.C. § 1331 and § 1441. (*See* Notice of Removal, DN 1, p. 1.)

MSU now moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the entirety of Moore's complaint.




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II.

The Federal Rules of Civil Procedure require that pleadings, including complaints, contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). A complaint may be attacked for failure "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, the court will presume that all the factual allegations in the complaint are true and will draw all reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 434 (6th Cir.2008) (citing *Great Lakes Steel v. Deggendorf,* 716 F.2d 1101, 1105 (6th Cir.1983)). "The court need not, however, accept unwarranted factual inferences." *Id.* (citing *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987)). Additionally, "[w]hen a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto ... and exhibits attached to the defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir.2008) (citing *Amini v. Oberlin Coll.,* 259 F.3d 493, 502 (6th Cir.2001)).

Even though a "complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). Instead, the plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted). A complaint should contain enough facts "to state a claim to relief that is plausible on its face." *Id.* at 570. A claim becomes plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly,* 550 U.S. at 556). If, from the well-pleaded facts, the court cannot "infer more than the mere possibility of misconduct, the complaint has alleged—but has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 1950 (citing Fed.R.Civ.P. 8(a)(2)). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

III.

*3 Moore fails to state a claim under the Jeanne Clery Act, 20 U.S.C. § 1092 *et seq* because there is no private right of action under that statute. The Clery Act "is a landmark federal law ... that requires colleges and universities across the United States to disclose information about crime on and around their campuses." *Summary of the Jeanne Clery Act,* Clery Center for Security on Campus, http://www.securityoncampus.org/ summary-jeanne-clery-act (last visited March 8, 2013). "The Act is enforced by the United States Department of Education." *Id.* Indeed, the Act itself provides:

> Nothing in this subsection may be construed to—
>
> (i) Create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or
>
> (ii) Establish a standard of care.

20 U.S.C. § 1092(f)(14)(A). Relying on the language of the statute, other courts have concluded that there is no private right of action under the Act. *See Doe v. Univ. of the S.,* 687 F.Supp.2d 744, 760 (E.D.Tenn.2009); *King v. San Francisco Cmty. Coll. Dist.,* No. C 10–01979 RS, 2010 WL 3930982, at *4–5 (N.D.Cal. Oct. 6, 2010) ("[T]he Act itself does not provide any private right of action."); *see also* Brett A. Sokolow, *et al , College and University Liability for Violent Campus Attacks,* 34 J.C. & U.L. 319, 344 (2008) ("[T]he Clery Act specifically notes that it cannot give rise to a private right of action to enforce its terms.... The enforcing authority for the Clery Act is the U.S. Department of Education."). Because no private right of action exists, Moore's cause of action under the Clery Act fails as a matter of law.

IV.

Moore also fails to state a claim under Title IX, 20 U.S.C. § 1681 *et seq.* Generally speaking, Title IX provides that "[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 subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.

§ 1681(a). In *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court held that Title IX was enforceable through a private right of action. The Court later decided that money damages are available in a private suit, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), and that, in the case of teacher-student sexual harassment, such damages are only recoverable where the school district has been "deliberately indifferent" to the harassment, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Finally, the Court held that student-on-student sexual harassment is actionable under Title IX. *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). But, as is the case with teacher-student sexual harassment, the entity receiving federal funds may only be held liable for student-on-student sexual harassment where it "acts with deliberate indifference to known acts of harassment in its programs or activities." *Id.* at 633.

*4 Summarizing *Davis*, the Sixth Circuit Court of Appeals held that in order to establish a *prima facie* case of student-on-student sexual harassment for the purposes of Title IX, the plaintiff must show:

> (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) that the funding recipient had actual knowledge of the sexual harassment, and (3) that the funding recipient was deliberately indifferent to the harassment.

*Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir.1999) (citing *Davis*, 525 U.S. at 632–42). In the present case, there is no dispute that MSU is subject to Title IX; it is a recipient of federal funds. Furthermore, the type of sexual assault at issue here—an alleged rape—is the type so severe, pervasive, and objectively offensive that it could be said to deprive Moore of the educational opportunities and benefits provided by MSU. *Id.* at 855–56 (finding that a rape is that type of sexual harassment that fulfills the first element of the *prima facie* Title IX case). It is the second and third prongs of the *Davis* test at which Moore's Title IX claim fails as a matter of law. Moore has not alleged that MSU had actual knowledge of sexual harassment *prior* to the assault and there are no allegations that the University was deliberately indifferent to additional incidents of harassment *after* the assault. In fact, the complaint contains no allegations that any further harassment occurred after the assault.

The relationship between causation and deliberate indifference is vitally important in a student-on-student sexual harassment case and is the point on which this case turns. Under Title IX, plaintiffs do not seek to recover against the perpetrator of the harassment. Rather they bring suit against the entity receiving federal funds "for its *own* decision to remain idle in the face of known student-on-student harassment in its schools." *Davis*, 526 U.S. at 643. Relying on the text of Title IX, the Supreme Court held:

> [Title IX's] plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be held liable for damages unless its deliberate indifference "subject[s]" its student to harassment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it....
>
> These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.

*5 *Id.* at 644–45.

The critical piece missing from Moore's complaint is any allegation that she was "subjected" to or experienced sexual harassment *after* notifying Severns about the assault occurring on September 14, 2011. Prior to that time, Severns did not have actual knowledge that Moore had experienced any form of sexual harassment, and even assuming, but not finding, that Severns was deliberately indifferent after gaining knowledge of the assault, there are no allegations in the complaint that her indifference "subjected" Moore to harassment, "cause[d] [her] to undergo" harassment, or "made [her] liable or vulnerable to it." *Id.* at 645. Assuming that MSU was deliberately indifferent after receiving notice of the assault, Moore's complaint is entirely silent and contains no allegation of how that indifference "subjected" her to additional harassment.

Case law supports the proposition that Title IX liability arises only after the institution learns of harassment and is deliberately indifferent to it. For example, in *Soper,* the Sixth Circuit affirmed the district court's Rule 12(b)(6) dismissal because the "defendants did not have actual knowledge of the harassment until *after* the fact [of the harassment] and plaintiffs have failed to present any evidence of deliberate indifference attributable to defendants." *Soper,* 195 F.3d at 855 (emphasis added). In *Williams v. Bd. of Regents,* 477 F.3d 1282, 1296 (11th Cir.2007), the court explicitly held that "a Title IX plaintiff at the motion to dismiss stage must alleged that the Title IX's deliberate indifference to the initial discrimination subjected the plaintiff to *further* discrimination." (emphasis added). In *Reese v. Jefferson Sch. Dist.,* 208 F.3d 736 (9th Cir.2000), a group of high school girls brought a Title IX claim against the school district, alleging that the district had been deliberately indifferent to sexual harassment perpetrated by a group of their male peers. No incidents of harassment occurred *after* the school district learned of the girls' allegations. The Ninth Circuit affirmed dismissal of the Title IX claim and held that the school district was "not liable for the alleged *antecedent* harassment of female students by male students." *Id.* at 740 (emphasis added). "The school district was not deliberately indifferent to sexual harassment of which [it had] actual knowledge in such a way as to cause the plaintiffs to undergo harassment or make them liable or vulnerable to it." *Id.* (quotations omitted). "The plaintiff ... did not report their harassment to anyone in authority until May 28, 1997.... There is no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations. Thus, under *Davis,* the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment." *Id.* (citation omitted).

In the present case, Moore alleges that she was sexually assaulted on September 14, 2011. She informed Severns of the assault on October 28, 2011. The complaint contains no allegations that Moore was subjected too or experienced further sexual harassment after October 28, 2011. Accordingly, even if MSU was deliberately indifferent to Moore, there are no allegations that the indifference caused her to experience further or additional harassment. As a result, her cause of action under Title IX fails as a matter of law. *See Elgamil v. Syracuse Univ.,* No. 99–CV–611 NPMGLS, 2000 WL 1264122, at *8 (N.D.N.Y. Aug.22, 2000) ("The circuits that have taken the question up have interpreted [*Davis* ] to mean that there must be evidence that actionable harassment continued to occur *after* the appropriate school official gain actual knowledge of the harassment.")

V.

*6 United States District Courts have "federal question" jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In addition to federal question jurisdiction, district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *Id.* § 1367(a). Thus, a district court is granted jurisdiction to hear causes of action arising under state law so long as those claims "form part of the same case or controversy" giving rise to the court's federal question jurisdiction.

Although district courts are granted supplemental jurisdiction under § 1367(a), they may, in their discretion, decline to exercise that jurisdiction for the reasons listed in § 1367(c). Specifically, a district court may decline jurisdiction over a supplemental state law claim where the court "has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c)(3). The Sixth Circuit instructs that "generally, 'if the federal claims are dismissed before trial ... the state claims should be dismissed as well.' " *Landefeld v. Marion Gen. Hosp., Inc.,* 994 F.2d 1178, 1182 (6th Cir.1993) (quoting *Taylor v. First of Am. Bank–Wayne,* 973 F.2d 1284, 1287 (6th Cir.1992)). When deciding whether to decline jurisdiction under § 1367(c)(3), a district court must weigh several factors and "should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Id.* (citing *Aschinger v. Columbus Showcase Co.,* 934 F.2d 1402, 1412 (6th Cir.1991)). If a district court declines jurisdiction over a supplemental state law claim, it must dismiss the case if it was originally brought as a federal action or otherwise remand to the state court from which it was removed.

In the case at bar, Moore asserts three claims arising under Kentucky state law: (1) negligence, (2) negligence *per se,* and (3) failure to comply with the Michael Minger Act, KRS § 164.948 *et seq.* Because Moore's federal causes of action have been dismissed, however, the Court, pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over the remaining state claims and remands them to state court. To do otherwise would cause this Court to needlessly decide state law issues best reserved for state court.

## CONCLUSION

Defendant Murray State University, pursuant to Federal Rule of Civil Procedure 12(b)(6), moved to dismiss the entirety of Plaintiff Jazmine Moore's complaint. For all of the foregoing reasons, Counts Two and Four of Moore's complaint, which allege violations of the Jeanne Clery Act, 20 U.S.C. § 1092 *et seq.*, and Title IX, 20 U.S .C. § 1681 *et seq.*, are **DISMISSED.** The remaining Counts One, Three, and Five, all allege claims arising under state law. Pursuant to 28 U.S.C. § 1367(c), the Court declines to exercise supplemental jurisdiction over those claims and they are **REMANDED** to state court.

Footnotes

1 The emails between Moore and Severns were attached as an exhibit to Moore's complaint and therefore may be properly considered by the Court when ruling on MSU's motion to dismiss. *See Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir.2008).

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2010 WL 3930982
Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court, N.D. California, San Francisco Division.

Aaron KING, Plaintiff,
v.
SAN FRANCISCO COMMUNITY COLLEGE DISTRICT, San Francisco Community College Police Department, Rodney Santos, Victor Ngoi, Don Q. Griffin, Mark Robinson, Philip R. Day, Jr., Charlton Fotch, San Francisco Police Department, and Does 1–100, Defendants.

No. C 10–01979 RS. | Oct. 6, 2010.

**Attorneys and Law Firms**

Aaron King, San Francisco, CA, pro se.

Jennifer N. Logue, Louis A. Leone, Stubbs & Leone, Walnut Creek, CA, for Defendant.

**Opinion**

**ORDER GRANTING MOTIONS TO DISMISS AND GRANTING IN PART AND DENYING IN PART MOTION FOR A MORE DEFINITE STATEMENT**

RICHARD SEEBORG, District Judge.

## I. INTRODUCTION

*1 From the fall of 2006 until he was suspended in 2009, pro se plaintiff Aaron King was a student enrolled in the defendant San Francisco Community College District ("SFCC District" or "District"). During that time, King made repeated complaints to the District's police department and administration that an individual was stalking, threatening, and sexually harassing him on campus. Based on the District's handling of his complaints, King brings this action against the District, several named members of the District's administration and police department, [1] and the San Francisco Police Department ("SFPD"). The SFPD moves to dismiss the complaint in its entirety and the District moves to dismiss all claims but two and ten. Additionally, the District moves for a more definite statement with respect to claims two, six, seven, eight, and ten. For the reasons discussed below, the SFPD's motion to dismiss is granted with leave to amend. The District's motion to dismiss is granted with leave to amend as to some claims. Its motion for a more definite statement is granted in part and denied in part.

## II. BACKGROUND

According to King's complaint, for more than two years he was repeatedly "stalked, threatened, sexually harassed, harassed and terrorized" on the District's campuses while he was enrolled as a student. Although he made numerous complaints to the District's administration and police department, the stalker was allowed to remain on campus "unpunished and unchallenged." Instead of responding to his complaints, King contends that the District and named defendants retaliated against him. He was arrested by the District Police Department, suspended from classes, and prevented from completing his degree. King alleges that these actions were motivated, in part, by unlawful discrimination. He claims that the District and named defendants engage in racial profiling and also apply a "gender-based, dual standard" in responding to victims of crimes.

Based on these contentions, King seeks damages and injunctive relief for violations of his rights under: (1) the Fourteenth Amendment; (2) Title IX; (3) the Sixth Amendment; (4) 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986; (5) the Clery Act; (6) the California Education Code; (7) the California Unruh Civil Rights Act; (8) California common law; (9) the rules and regulations of the SFCC District; and (10) federal and California sexual harassment laws. In his complaint, King asserts all claims against a group of defendants that he labels "CCSF." CCSF, as defined by King, includes the District, the District Police Department, and District employees Rodney Santos, Victor Ngoi, Don Q. Griffin, Mark Robinson, Philip R. Day, Jr., and Charlton Fotch, "individually and/or collectively." While King's complaint names members of the District's administration and police department, as of the hearing on the District's and SFPD's motions, King had not served any of the individual District employees. Thus, any claims against individual District employees, either in their official or personal capacities, are not presently at issue. Accordingly, this order addresses only King's claims against institutional defendants SFPD and the District.




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## III. LEGAL STANDARD

*2 In a claim for relief, the plaintiff must present "a short and plain statement" demonstrating that he is entitled to relief. Fed.R.Civ.P. 8(a)(2). If the complaint does not meet this standard, the defendant may move to dismiss for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Under Rule 12(b)(6), dismissal is appropriate if either the claimant does not raise a cognizable legal theory or otherwise fails to allege sufficient facts to support a cognizable claim. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1988). Thus, while a legally sufficient complaint does not require "detailed factual allegations," it must contain more than "unadorned" assertions of harm or bare legal conclusions without factual support. *Ashcroft v. Iqbal,* — U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). In evaluating a Rule 12(b)(6) motion to dismiss, all material allegations in the complaint are accepted as true and construed in the light most favorable to the non-moving party. *Pareto v. FDIC,* 139 F.3d 696, 699 (9th Cir.1998).

Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint is granted liberally. Fed.R.Civ.P. 15(a) ("leave shall be freely given when justice so requires"). Where a motion to dismiss is granted, the claimant should be given leave to amend unless additional facts "could not possibly cure the deficiencies" in the complaint. *Doe v. United States (In re Doe),* 58 F.3d 494 (9th Cir.1995). If amendment would be futile, then dismissal without leave to amend is within the court's discretion. *See, e g ., Saul v. United States,* 928 F.2d 828, 843 (9th Cir.1991).

Instead of challenging the legal sufficiency of a claim, a party may move for a more definite statement where the complaint is "so vague or ambiguous" that the respondent is unable frame a reasonable response. Fed.R.Civ.P. 12(e). Such a motion is only appropriate where the complaint is so indefinite as to be unintelligible. *See Wood v. Apodaca,* 375 F.Supp.2d 942, 949 (N.D.Cal.2005). As a disfavored remedy, motions for a more definite statement are rarely granted. *See Cellars v. Pacific Coast Packaging, Inc.,* 189 F.R.D. 575, 577 (N.D.Cal.1999).

## IV. DISCUSSION

### A. *SFPD's Motion to Dismiss*

Defendant SFPD moves to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted. As discussed above, King's complaint arises from the alleged failure of the SFCC District to respond to his complaints about a stalker on the District's campuses. The complaint does not contain any allegation of misconduct by the SFPD. King names the SFPD as a defendant in his complaint, but fails to allege that the SFPD is liable under any of his ten claims for relief.[2]

In his opposition, King acknowledges that his complaint does not raise any claim against the SFPD. He argues, however, that there is a "contractual, agency relationship" between the SFPD and the SFCC District. King's only factual allegation against the SFPD is that it holds a record of his arrest by the SFCC District Police Department. Based on this asserted agency relationship, King seeks to amend his complaint to add the SFPD to his definition of "CCSF," thereby asserting all claims against the SFPD.

*3 While detailed allegations are unnecessary, the plaintiff must provide sufficient facts to support "a reasonable inference that the defendant is liable for the misconduct alleged." *Bell Atlantic Corp.,* 550 U.S. at 570. Merely changing the label applied to the SFPD does not cure the lack of factual allegations against the SFPD giving rise to liability. Therefore, the SFPD's motion to dismiss is granted. Although King is accorded leave to amend his complaint, he should do so only if, in good faith, he is able to provide factual allegations supporting each claim asserted against the SFPD.

### B. *SFCC District's Motion to Dismiss*

#### 1. *Constitutional Claims*

King alleges violations of his constitutional rights under the Fourteenth Amendment (claim one) and the Sixth Amendment (claim three). King cannot maintain a direct cause of action under the Constitution. Instead, 42 U.S.C. section 1983 provides the exclusive remedy for violations of federal constitutional rights committed by state actors. *See Jett v. Dallas Indep Sch. Dist.,* 491 U.S. 701, 735, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir.1992). Moreover, the Eleventh Amendment is not abrogated by section 1983

*Quern v. Jordan,* 440 U.S. 332, 342, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Claims for damages under that federal civil rights statute are barred against a state or state official acting in his or her official capacity.[3] *Id.* at 338. Furthermore, under the law of this Circuit, the SFCC District represents an arm of the State for purposes of the Eleventh Amendment. *Cerrato v San Francisco Community College Dist.,* 26 F.3d 968, 972 (9th Cir.1994) (stating "community college districts are dependent instrumentalities of the state of California"). It is therefore apparent that no set of additional facts could support a section 1983 claim against the District as a state entity. Accordingly, the District is dismissed from King's first and third claims without leave to amend.

***2. Title IX***

King's second claim is based on violations of Title IX of the Education Amendments of 1972 ("Title IV"). 20 U.S.C. §§ 1681–88. Under Title IX, a student may not "be excluded from participation in, be denied the benefits of, or be subject to discrimination under" a federally funded educational program on the basis of gender. Congress has abrogated the States' Eleventh Amendment immunity for Title IX claims. *See Stanley v. Trs. of the Cal. State Univ.,* 433 F.3d 1129, (9th Cir.2006) (citing *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 72, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)). Thus, with respect to this claim, the District moves only for a more definite statement under Rule 12(e). It contends that King's claims are presented "shotgun" style, where each successive claim incorporates all of the preceding paragraphs of the complaint. *See Destfinó v. Kennedy,* No. CV–F–08–1269 LJO DLB, 2009 U.S. Dist. LEXIS 18138, 2009 WL 63566 (E.D.Cal. Jan. 7, 2009), at *14 (explaining that incorporating all prior paragraphs, regardless of relevance, is an impermissible form of pleading).

*4 King alleges that he was stalked, threatened, sexually harassed and terrorized on the CCSF campuses by a person who had access to the District's territory and facilities "under the guise of being a student." He states that the harassment, including sexual harassment, recurred for over two years and that he repeatedly communicated this issue to the District during that time. He contends that such failure to respond to the harassment by a third party was willful and amounted to "shielding" the third party. King claims that he was suspended from classes and prevented from graduating in retaliation for his complaints to the District. Furthermore, he accuses the District of gender-based differences in its response to criminal complaints. In sum, King is apparently claiming that the District's own acts of gender discrimination or its response to third-party sexual harassment violated his rights under Title IX. If the Title IX claim were the only claim alleged, then the District's motion for a more definite statement would be unwarranted.

The issue with King's complaint, however, is that essentially the entire complaint is incorporated into each of his ten claims and alleged against all defendants. Furthermore, many of King's individual "claims" cite numerous separate statutes or causes of action. Taken in total, King's complaint is insufficiently definite with respect to which allegations are relevant to any given claim. Ultimately, King's complaint is being dismissed in substantial part with leave to amend. Thus, for any amended complaint, King is advised to keep in mind the Rule 8 pleading standard of a "short and plain statement of the claim." Fed.R.Civ.P. 8(a)(2). Incorporation by reference, when used to incorporate relevant allegations, is wholly appropriate and promotes concise pleadings. *See Destifino,* 2009 U.S. Dist. LEXIS 18138, at *13, 2009 WL 63566 (citing *Fontana v. Haskin,* 262 F.3d 871, 877 (9th Cir.2001)). Wholesale incorporation without regard to relevance, however, should be avoided. Thus, the District's 12(e) motion for a more definite statement is granted.

***3. 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986***

In his fourth claim, King raises violations of 42 U.S.C. sections 1981, 1983, 1985(3), and 1986. Section 1981 prohibits racial discrimination by private and state actors and section 1983, as stated above, provides the remedy for constitutional violations under color of state law. *See* 42 U.S.C. §§ 1981 and 1985. Section 1985 prohibits conspiracies to interfere with civil rights and section 1986 provides liability for failure to prevent section 1985 conspiracies. *See* 42 U.S.C. §§ 1985 and 1986. As previously discussed, the SFCC District is an arm of the State for Eleventh Amendment purposes, thus barring King's section 1983 claim for monetary relief against the District or District employees in their official capacities In addition to section 1983 claims, the Ninth Circuit has held that state entities are immune from section 1981, 1985, and 1986 claims under the Eleventh Amendment. *See Mitchell v Los Angeles Community College District,* 861 F.2d 198, 201 (9th Cir.1988) (holding Los Angeles Community College District is a state entity immune from section 1981, 1983, and 1985 claims); *Cerrato,* 26 F.3d at 972, 975 (holding section 1983, 1985, and 1986 claims against SFCC District barred by the Eleventh Amendment). Therefore, the District's motion to dismiss the fourth claim

against the District as a state entity is granted without leave to amend.

**4. *Clery Act***

*5 King's fifth claim is based on alleged violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"). 20 U.S.C. § 1092(f). The Clery Act mandates the annual publication of security policies and crime statistics for institutions of higher education participating in certain federal programs. *Id.* While the District's compliance with the Clery Act may be relevant evidence, the Act itself does not provide any private right of action. § 1092(f)(14)(A)(I) ("Nothing in this subsection may be construed to ... create a cause-of action against any institution of higher education or any employee of such an institution for any civil liability ..."). The District's motion to dismiss claim five is granted and, as private enforcement is not authorized, the dismissal is without leave to amend.

**5. *California Statutory Claims***

In his sixth claim, King asserts violations of numerous sections of the California Education Code.[4] King's seventh claim is brought under the California Unruh Civil Rights Act. Cal. Civ.Code § 51 ("This section shall be known as ... the Unruh Civil Rights Act."); *see also Gatto v. County of Sonoma,* 98 Cal.App.4th 744, 757, 120 Cal.Rptr.2d 550 (2002) (stating that courts consistently describe claims arising under Civil Code sections related to section 51 as Unruh Civil Rights Act claims). As to these alleged state law violations, the District contends that dismissal is warranted by King's failure to follow the claims presentation requirements of the California Government Claims Act ("Claims Act"). Cal. Gov.Code §§ 905, 945.4. For his Unruh Civil Rights Act claim, King does not specify the precise section(s) under which he brings suit. Nonetheless, courts have held that violations under various California Civil Code sections related to the Unruh Civil Rights Act are subject to the Government Claims Act. *See, e.g., Lopez v. Chertoff,* No ED CV 07–1566–LEW, 2009 U.S. Dist. LEXIS 16943 (E.D.Cal. Mar. 2, 2009), at *6–7.

Under the Claims Act, suits against public entities "for money or damages" may not proceed unless a written claim has been presented and first acted upon or rejected by the entity. Cal. Gov.Code § 945.4. As the California Supreme Court explained, claim presentation to the public entity is not merely procedural. Instead, it is "an integral part of plaintiff's cause of action." *State of California v. Superior Court,* 32 Cal.4th 1234, 1240, 13 Cal.Rptr.3d 534, 90 P.3d 116 (2004). As such, it is the plaintiff's burden "to allege facts demonstrating or excusing" compliance with the Act. *Id.* at 1241–42, 13 Cal.Rptr.3d 534, 90 P.3d 116. Otherwise, the complaint is subject to dismissal for failure to state a claim. *Id.* Requiring claimants to follow the Claims Act does not "unfairly bar just claims," as the Act incorporates procedures for relief from strict compliance. *Id* at 1245, 13 Cal.Rptr.3d 534, 90 P.3d 116 (referring to a claimant's right to petition the entity and court to present late claims, an entity's obligation to notify claimants as to deficiencies in the claim and its ability to waive defects in presentation, as well as the possibility of a claimant alleging sufficient excuse such as equitable estoppel). *Id.* at 1245, 13 Cal.Rptr.3d 534, 90 P.3d 116.

*6 The purpose of claim presentation is to place the public entity on notice of a compensable claim that, if unresolved, may lead to litigation. *See Green v. State Center Community College,* 34 Cal.App.4th 1348, 1359, 41 Cal.Rptr.2d 140 (1995). Under section 915, the Claims Act establishes the required contents of such a claim, including: "(1) the names and addresses of the claimant and the person to whom notices are to be sent, (2) a statement of the facts supporting the claim, (3) a description of the injury *and* the amount claimed as of the time of presentation, and (4) the name(s) of the public employee(s) who caused the injury, if known." *Loehr v. Ventura County Community College Dist.,* 147 Cal.App.3d 1071, 1082, 195 Cal.Rptr. 576 (1983) (emphasis in original). While strict compliance is not mandated, *"some* compliance with *all* of the statutory requirements" is necessary. *City of San Jose v. Superior Court,* 12 Cal.3d 447, 456–57, 115 Cal Rptr. 797, 525 P.2d 701 (1974) (emphasis in original).

In this case, King's complaint does not include a statement, or sufficient facts to conclude, that he has complied with the claims presentation requirements of the Claims Act. In his opposition, King states that he made numerous attempts to resolve his issues prior to filing his complaint in federal court. In particular, he claims that he appealed directly to defendants Santos, Robinson, Fotch, Griffin, and Ngoi. He also sought to resolve his situation through the SFCC District Office of Affirmative Action, SFCC District Office of Student Advocacy, and the San Francisco Police Commission. To support his contention that he exhausted alternative remedies before filing this suit, King's opposition includes several statements detailing his attempts to communicate with members of the SFCC District administration and police department. These efforts included making numerous complaints, including in writing, and filing several police

reports against the alleged stalker with the SFCC District Police Department. For example, King states that on August 1, 2009, he sent a letter to defendant Santos seeking "remedy" of the continuing harassment by the alleged stalker and indicating "that he would pursue legal remedy." On October 17, 2009, he sent a letter to the SFCC District Office of Affirmative Action "detailing retaliatory suspension and arrest, seeking remedy ." On February 23, 2010 and April 9, 2010, King sent "revised formal complaint[s]" to the SFCC District Office of Affirmative Action, again seeking remedy for his suspension and arrest.

While it is apparent that King engaged in extensive communication with the District, the legal question is whether any of his written communications substantially comply with the requirements of the Government Claims Act. Ultimately, King's factual statements are insufficient to demonstrate that he satisfied the requirements by placing the District on notice of a potential suit for damages, including the amount sought. King, however, also seeks remedies beyond damages including, among other relief, an order lifting his suspension from the San Francisco Community College District. The District does not move to dismiss claims six and seven in their entirety. Instead, it moves to dismiss the claims to the extent that monetary relief is sought.

*7 At this point, however, the Court need not determine whether King's claims primarily seek damages or injunctive relief. Instead, the District's motion to dismiss claims six and seven is granted with leave to amend. To the extent King elects to advance an amended claim that includes a request for monetary relief, he may do so only if, in good faith, he can allege sufficient facts to demonstrate or excuse compliance with the Government Claims Act. The District's motion for a more definite statement at this point is denied. As the District notes, however, King's current complaint cites twenty-four sections of the California Education Code without articulating which facts are relevant to any purported violation of a specific section. In any amended complaint, King must renew his claims without wholesale incorporation by reference, if such incorporated material is irrelevant to the claim.

***6. California Common Law***

King's eighth claim advances several common law claims for relief under California law including defamation, negligence, discrimination, retaliation, extortion, conspiracy, fraud, and emotional distress. Tort recovery against public entities in California, however, is limited by the State's sovereign immunity. *See In re Ground Water Cases,* 154 Cal.App.4th 659, 688, 64 Cal.Rptr.3d 827 (2007). In other words, a private right of action against state entities exists only where liability is available by statute. *Id.* (Tort liability for public entities in California is "wholly statutory."). For these claims, King raises only "common law provisions and standards." The District also objects to King's failure to comply with the claims presentation requirements with respect to any claims for damages. Based on the failure to provide any statutory basis for liability, the claim is dismissed with leave to amend. The District's alternate motion for a more definite statement is therefore unnecessary and is denied.

***7. Rules and Regulations of SFCC District***

In his ninth claim, King raises violations by the defendants of the Rules and Regulations of the SFCC District. As the District contends, the internal regulations of the SFCC District are not statutes or rules of law. In his opposition, King points only to the California Education Code as providing a potential basis for liability. Section 72000(a) states that "[t]he district and its governing board may sue and be sued, and shall act in accordance with Section 70902." Cal. Ed.Code § 72000(a). This general language, however, does not establish liability for violations of the District's rules and regulations. While discriminatory application may be relevant to King's other claims, the regulations themselves do not provide an independent basis for a claim. Thus, the District's motion to dismiss is granted without leave to amend.

***8. Federal and California Sexual Harassment Laws***

King's final claim avers "violations of federal and California Sexual Harassment Intent." In the manner previously noted, King incorporates all preceding paragraphs and asserts that federal and California sexual harassment "statutes and standards" were violated. Here, the District only moves for a more definite statement. In this case, King's general allegation of unlawful sexual harassment is sufficiently vague to preclude a meaningful response by the District. Accordingly, the District's motion for a more definite statement is granted. Furthermore, principles of sovereign immunity bar claims against the District as a state entity unless the Eleventh Amendment is specifically abrogated or the State waives its immunity. In any amended complaint, King must limit his claims to those in which a statute authorizes an action against the District.

## IV. CONCLUSION

*8 For the reasons discussed above, the San Francisco Police Department's motion to dismiss the complaint against it is granted with leave to amend. The San Francisco Community College District's motion to dismiss is granted with leave to amend claims six, seven, and eight. Its motion to dismiss is granted without leave to amend claims one, three, four, five, and nine. Finally, the District's motion for a more definite statement is granted for claims two and ten and denied for claims six, seven, and eight. King must file any amended complaint within 20 days from the date of this order.

IT IS SO ORDERED.

Footnotes

1 King names the San Francisco Community College District Police Department as a separate defendant. In its motion, the District notes that the police department is not a separate legal entity and therefore its motion to dismiss with respect to the "District" is intended to include claims against the SFCC District Police Department.

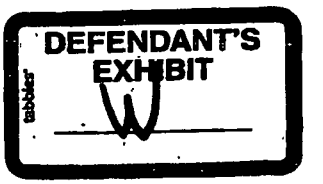
2 All ten claims are directed against King's group of defendants "CCSF," which does not include the SFPD nor any employee of that department.

3 Under *Ex parte Young*, the Eleventh Amendment does not bar suits in federal court against a state official for prospective relief. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908). Also, claims for damages against state officials acting in their individual capacity are unaffected by the Eleventh Amendment. *See Hafer v. Melo*, 502 U.S. 21, 30–31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

4 King's complaint refers to "rights protected by California Education Code §§ 200, 220, 231.5 et seq.; 66010.2 et seq.; 66017 et seq.; 66030 et seq.; 66201 et seq.; 66251, 66252 et seq.; 66270, 66281.5, 66292 et seq.; 66301, 67380, 67381, 67385, 67385.7 et seq.; 69811 et seq.; 70902 et seq.; 72012 et seq. 76031, 76033, 76034 et seq.; 76120 et seq."

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# Counselor Handbook




# 2002

## Training: June 9 – 15

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## First Session: June 16 – July 6
## Second Session: July 14 – August 3

Phone: 843-953-7120 / Fax: 843-953-6803
E-mail: summercamp@Citadel.edu
http:://www.citadel.edu/summercamp

# ALMOST EVERYTHING A COUNSELOR NEEDS TO KNOW...A TO Z

## ACADEMIC REVIEW:

1. Before the start of each session, counselors may apply to be Academic Review Tutors for a certain subject during that 3-week camp session. Based on the information provided in the application, counselors will be chosen and assigned a group of campers who enrolled in the program prior to arriving at camp. Tutors are paid in addition to their regular salary at the rate of $10.00 per camper per week. Counselors are given learning materials, pencils, and paper for each subject. A suggested lesson plan is provided but in most cases the tutoring needs to focus on the individual needs of the campers. In many cases, teachers of campers who are being tutored will send a letter outlining the strengths and weaknesses of the camper in that particular subject. At the end of the camp session, tutors complete individual "Academic Review Report Cards" that are included in each camper's graduation packet. Information that the tutor must include for each student includes: strengths, weaknesses and the number of contact hours.

2. Duties of an Academic Review Tutor include:

    a. You must be present for all tutoring sessions. Classes take place 3 times a week after lunch in the Mess Hall (12:15 – 1:15p.m.) Some subjects are taught on Monday, Wednesday, and Friday while others are on Tuesday, Thursday, and Saturday. There are no tutoring sessions on Sunday. You are expected to be present, even on your day off.

    b. An "Academic Review Attendance Card" must be completed for each tutoring hour. The Director of Safety and Education will provide this card at the beginning of each class and it must be returned at the end of the hour. If a camper is not present at the beginning of the tutoring class, immediately notify the Director of Safety and Education.

## ACTIVITY INSTRUCTION:

1. Counselors will be given individual activity teaching schedules. Be on time to your activities and be prepared. Counselors will be provided lesson plans for each activity (lesson plan notebooks will be kept with the activity equipment). Follow the lesson plans to the best of your ability.

2. March the section from the barracks to the same activity that you teach (during the first period in the morning and the first period in the afternoon).

3. Activity periods last for 50 minutes (i.e. from 8:30 - 9:20). **Do not let campers leave activities early**. Campers have 10 minutes between classes built into their schedule. When campers leave, they will go as a section AND BE marched by an attending counselor.

4. **Take an active roll in the instruction of every activity period.**

5. Monitor heat and humidity and allow water and rest breaks as needed. Be ready in case a Black Flag / Rainy Day schedule must be implemented (See "Black Flag".)

6. Use camp grading objectives in planning activity instruction. Grade campers individually on the last Monday and Tuesday of each session. All campers must receive a grade for each activity. Grades are due at the end of each morning or afternoon activity period during the grading days of that session.

## ACCOUNTABILITY:

1. **COUNSELORS NEED TO BE AWARE OF THEIR CAMPERS' WHEREABOUTS AT ALL TIMES!**

   ★ If campers leave an activity site (for any reason), a counselor will accompany them.

2 Recreation Periods on Mondays, Wednesdays, and Fridays from 3:30 - 4:20 p.m. are the ONLY times when a camper will not have directly-assigned supervision. Even during this time, counselors will be assigned to generally monitor and be aware of campers.

3. Safety and accountability are impossible if a camper's whereabouts are unknown. It is the counselor's responsibility to investigate whether or not a camper from his/her section or activity is in the infirmary, or otherwise missing.

4. If a counselor determines that a camper is missing from a formation: DO NOT MOVE THE SECTION!

   a. NOTIFY THE SENIOR COUNSELOR
   b. MAKE SURE ANOTHER COUNSELOR IS TAKING CHARGE OF THE SECTION
   c. BEGIN INVESTIGATING WHERE THE CAMPER MAY BE

## ALCOHOL:

1. NO ALCOHOL IS ALLOWED ON CAMPUS AT ANY TIME!

2. Camp personnel are reminded of the requirements to legally consume alcoholic beverages. Those counselors who may legally do so should exercise extreme caution in returning to camp/campus after consuming alcoholic beverages. **THERE WILL BE ABSOLUTELY NO CONTACT BETWEEN A COUNSELOR WHO HAS CONSUMED ANY ALCOHOL AND ANY CAMPER.**

3. Violation of the letter or the intent of the prohibition on alcohol will result in immediate dismissal.

## ANNOUNCEMENTS:

1. Announcements in the barracks are to be made ONLY by staff members or the CCQ on duty.

2. Announcements in the Mess Hall should be given to one of the Senior Counselors at least five minutes prior to the time for announcements.

## APPEARANCE:

1. The camp furnishes counselors with camp uniforms. Counselors will wear a complete camp uniform at all times (Summer Camp or a Citadel PT t-shirt, camp shorts, socks, and tennis shoes). When in camp uniform, counselors will wear tennis shoes, with socks. No sandals or open toe shoes are permitted.

2. Counselor uniform for:
   a. Opening Day of each session is: camp polo shirt and camp shorts.
   b. Beach trips is: camp t-shirt and appropriate swim wear
   c. Dances is: camp polo shirt and either camp shorts or khaki shorts, slacks, or skirt
   d. Riverdogs games is: same as for dances
   e. Variety Show and Parents Reception is: same as for dances
   f. Graduation is: camp polo shirt and camp shorts, no hats or sunglasses

3. You are expected to present a clean, neat appearance at all times, from the start of the day onward: Clean shaven / Appropriate hair cut / Hair brushed / Clean uniform

   Note: Chains and Jewelry- The wearing of a wristwatch, a wrist identification bracelet, and not more than two rings is authorized. Religious medals / medical tags may be worn on a necklace if they are covered by the T-shirt and are not seen. Women may wear small post-type earrings. The earrings will be unadorned, spherical, gold, silver, diamond, or pearl and not larger than ¼ inches. Earrings will fit snugly against the earlobe and will be a matched set with only one earring per ear.

4. Fines may be levied for infractions of camp rules regarding appearance.

5. At the end of camp, staff and counselors will be charged for any uniforms not returned to the camp office (Deas Hall). Charges will be deducted from the final paycheck.

## AUTOMOBILES:

A counselor may have an automobile on campus provided it meets all guidelines issued by the campus Department of Public Safety. Vehicles will be registered, at no charge, with Camp Director of Personnel and Administration, who will issue a dashboard registration card. This card must be outwardly visible at all times. Counselors will park only in designated areas.

## AWARDS:

1. Campers in each **division** (Junior and Senior) compete as a section for the **Best Section Award**. The award is based on overall behavior, room inspection results, section grading, intramural competition, marching skills, Field Day events, etc. Campers in the winning section receive a "Best Section" ribbon and the Head Section Counselor's name is engraved on a plaque.

2. All campers are eligible to compete for individual trophies in specific sports activities **(Tennis, Racquetball, Swimming, Wrestling, Track, Dance and Rifle)**, and in camp barracks' tournaments **(Ping-Pong, Table Golf, Chess, and Summer Camp Game)**.

3. Approximately 20% of the campers in each section will be designated **Mark Clark Award** winners, as Outstanding Campers in the section. This award is based on behavior (counselors' section grades), activity grading, specialized activity grading and points earned from tournament and other camp activities. The Camper with the highest total score is designated as **First Honor Graduate** and receives a plaque and a partial scholarship award to

attend the Citadel. The Camper with the next highest total score is designated the **Second Honor Graduate,** and receives a plaque.

4. One camper in each section will be selected as **Matthew Pantsari Senior Counselor Award** winner. The Senior Counselor Award winner cannot simultaneously be a Mark Clark Award winner. This camper is recognized for teamwork within the section, holding the respect of fellow campers and section counselors, and making a significant contribution to his/her section.

5. One counselor each session is selected as **John P Smyth Creative Youth Development Award** winner. One junior counselor each summer is selected as **Thomas S Blair Award** winner. These outstanding counselor awards are based on the quality of work at camp. Winners receive a partial scholarship award, a plaque, and their names are engraved on plaques displayed in the camp office.

6. Work with your campers to ensure they do not give up on themselves. Grading for Mark Clark Award competition takes place the last Monday/Tuesday of camp. Each camper has a chance to "turn things around."

## BEACH TRIPS:

Each section will have the opportunity to spend an afternoon at The Citadel Beach House. The counselors of that section are required to chaperone the trip. The bus will leave the front of the barracks at 1:30p.m. and will return before evening activities. Dinner will be served at the Beach House. Because the trip runs through Specialized Activity, SCUBA participants are not able to go on the beach trip. For accountability purposes, campers in SCUBA will be assigned to a section for the afternoon and will rotate with that section through activities.

## BICYCLES:

Counselors may have bicycles. A rack is provided in the barracks sallyport for storage of bikes. Bikes will not be stored in counselor rooms, on the galleries, or in the stairwells. Be prepared to provide security for your bike, and DO NOT allow campers to ride bikes!

## BLACK FLAG:

1. In case of excessive heat and/or humidity, the Directors will decide if normally scheduled activities will be suspended. In case of a "black flag", an alternate schedule will be followed for camp activities.

2. See: **Black Flag / Rainy Day (BF/RD) Schedule.**

3. When the BF/RD Schedule is to be implemented, as much advance notice as possible will be given to counselors. Counselors should be ready to move campers to their alternate activity quickly and safely.

4. Under the BF/RD Schedule, each outside activity has an alternate activity/site. Counselors with outside activity responsibilities should review the schedule and become familiar with their campers' alternate activity/site.

## CAMP CHAPLAIN:

1. The Chaplain to the Summer Camp is the current serving Chaplain to the Corps of Cadets. He administers our chaplaincy program, arranges all services, and takes care of camper and counselor religious and spiritual welfare needs, as required. The current chaplain is Chaplain (Col) David Golden, US Army, Ret.

2. The Camp Chaplain assists in coordinating scheduled services for Jewish campers/counselor on Friday evenings and for Roman Catholic campers/counselors on Sunday mornings.

**CODE OF CONDUCT:**

Employees of the camp are required to sign a "Code of Conduct" agreement. This agreement lists several regulations that are to be recognized by counselors and staff members at all times. Violation of any of the policies will result in immediate dismissal.

**COMPUTER ROOM:**

The Senior Counselor will have a key to the barracks Computer Room for use by counselors. This room is especially helpful when writing "Counselor Letters" to parents. Please take special care of this room so that the camp's privilege of using it is not revoked. **CAMPERS ARE NEVER ALLOWED IN THE COMPUTER ROOM.**

**COUNSELOR LOUNGE:**

An air-conditioned room in the barracks will be designated as a "counselor lounge", for use during free time and periods off. This is a common area for use by all counselors. Care must be exercised to ensure the activities of a few do not interfere with others. Care must also be taken to ensure the lounge is kept clean. If problems arise with the lounge, it may be closed.

a. Male and female counselors, and guests who are properly "signed-in," may jointly use the lounge.
b. The lounge may be used from 0830 to 0200, daily.
c. Camp employees and visitors are expected to self-police behavior and cleanliness in this area.
d. Individuals may be barred from the lounge for disruptive behavior, and the lounge may be closed entirely if problems persist.

**CURFEW:**

Counselors under the age of 18 have a curfew of 12:00 midnight. For accountability, these individuals must report to the Staff Duty Officer in the front sallyport to sign-in each night.

**DAYS OFF:**

1. Days off will be assigned at the beginning of each session. Assignments will be given to each HSC. Section counselors will then make their night duty schedules.

2. Days off usually run from after dinner until the 7:00 a.m. meeting 36 hours later. When making the night duty schedule with your section, try to make sure you are not scheduled for night duty the night before your day off. If you are, you will be expected to work. Schedules will NOT be rearranged.

3. In order to optimize rest and relaxation, counselors should try to spend their days off away from camp.

4. Counselors may attend camp meals on days off, but will be in proper camp uniform while in the Mess Hall.

5 Counselors should try to get sufficient rest during their days off.

6. If returning to the barracks late at night, please do so **QUIETLY.**

7. Counselors cannot change their days off. If a counselor has a problem with his/her day off, he/she will coordinate with the Head Section Counselor, the Senior Counselors and the Directors before the session begins. **COUNSELORS CANNOT REARRANGE SCHEDULES!**

8. Counselors who sign up to tutor Academic Review are expected to meet this obligation, regardless of day off schedule.

## DANCES:

1. Remember: The Citadel Summer Camp Dances are for the campers... not for counselors to find a boy- or girlfriend. Counselors will **NOT** bring guests to dances. This rule also applies to counselors on their "day off."

2. **Counselors will act as chaperones and be visible at all times.** Counselors will be assigned to perform specific functions or monitor various areas during the dance. Assignments will be handed out and posted in the guardroom on the day of the dance.

3. Counselors MUST BE PROPERLY DRESSED IN UNIFORM WHILE AT A DANCE. If a counselor is on a "day off" and desires to attend the dance, he/she must be in uniform.

4. Counselors exhibiting inappropriate behavior may be dismissed.

5. At the end of the dance, sections will be dismissed one at a time and return to the barracks in formation. Everyone should stay in the auditorium until his/her section is dismissed.

**Remember: You are accountable for your campers <u>and</u> yourself.**

## DISCIPLINE:

1. Counselors are responsible for discipline within their section and at their activities. Counselors must handle discipline in a positive nature. Reoccurring problems or those of a significant nature will be channeled through the Head Section Counselor, to the Senior Counselors, and to the Directors, if necessary.

2 Discipline Reports are used to document a camper's negative behavior. Making use of these forms enables the staff and counselors to keep a record of problems we have had with a particular camper. Discipline reports must be filed in the barracks guardroom. You can find blank reports in various locations:

- Activity Notebooks
- Guardroom
- Deas Hall Camp Office
- Mess Hall Podium
- Head Section Counselor Notebooks

★ **REMEMBER:** Use of "discipline report forms" helps let the camper know what they did wrong. Having the camper take "time out" to fill in the report is a good way to punish negative

behavior. Campers with excessive reports will be sent to the senior counselor, and if the problems persist, the parents will be called.

3 **Lead by example and be a positive influence!** Be specific rather than general. Avoid group punishment. Be positive and encouraging, but never give the camper false hope (i.e. "you'll probably win the Mark Clark Award", " I bet you will be the First Honor Graduate", etc.).

4. Campers are not going through a fourth-class system. Push-ups, or any form of physical punishment, are prohibited when disciplining campers.

5. Campers are 10 - 15 years old. They are not adults! They are not cadets! Treat them with kindness and encouragement.

**REMEMBER: Praise publicly / Punish privately**

## EQUIPMENT POLICY:

1. Activity heads will sign for the equipment for their activity from the Operations Officer. They should verify the amount and condition of equipment for which they sign. Counselors who are instructing an activity will also verify equipment accountability at the end of each period. Broken equipment should be brought to the attention of the camp Operations Officer and Logistics Officer.

2. Do not leave equipment at an activity site until the counselors instructing the next class arrive. If the next instructor does not arrive within a reasonable amount of time (after the next class starts), notify a staff member immediately. Equipment should be returned to the respective storage areas at the end of morning and afternoon activity sessions (11:20 a.m. and 3:20 p.m. M/W/F or 4:20 T/T/S).

   - **Deas Hall Storage Equipment (hallway by the Camp Office)**
     - **Basketball**
     - **Racquetball**
     - **Swimming**
     - **Volleyball**
     - **Dodge Balls**

   - **Barracks Equipment Room (designated room- # TBA)**
     - **Flag Football**
     - **Soccer**
     - **Softball**
     - **Team Handball**
     - **Tennis**
     - **Referee equipment**
     - **Cones for intramurals**

   - **Air Rifle (locked closet in the Air Rifle Room)**
     - **Air Rifle equipment**
     - **Ping Pong equipment**

3. Failure to properly account for equipment may mean that a counselor has to pay for the equipment.

4. Any problems concerning equipment or Deas Hall personnel should be directed to the camp Operations Officer.

## EVENING ACTIVITIES:

The camp offers the following evening activities for campers and counselors:

1. Field Games: 1st night of each session
2. Intramural Sports: between sections
3. Video/Movie Nights: All movies watched by campers must be G or PG
4. Dances: Saturday, and the final Friday of each session
5. *Riverdogs* Baseball Game

## FINES:

1. All personnel hired by the Camp are expected to abide by the rules set forth in this Counselor Handbook and in the Code of Conduct agreement of which they have signed. As a reinforcement mechanism, counselors may be subject to monetary fines for minor infractions of the rules.

2. Fines may be routinely levied for: missing a morning meeting; being late or absent from scheduled activity; being late or absent from required duty; uniform or room condition infractions and equipment or property damage.

3. Counselors are expected to pay their fines on paydays.

4. The Senior Counselors collect fines.

5. Fines collected will be returned to the camp, and may be used for the general good of the camp as determined by the Directors.

## FORMATIONS:

1. Counselors must attend all formations (except on their days off). The first formation of the day is a meeting in the front sallyport at 7:00 a.m. (Head Section Counselors may authorize one counselor to miss this meeting in order to supervise section campers in the barracks. The HSC will report for that counselor during roll call.)

2. Counselors are expected to march with their section to all meals and retreat.

3. For the 1st activity period in the morning / afternoon, counselors assigned to teach an activity, will march the campers they are instructing to the appropriate location. If necessary, one counselor should be sent ahead to ensure equipment is ready. Counselors will march campers back to the barracks after the last morning / afternoon activity ends. Campers will not be allowed to march themselves back to the barracks.

4. Head Section Counselors must insure all campers and counselors are in formation and in proper camp uniform. **Accountability relates directly to SAFETY; campers should be accounted for at all times!**

5. Night duty counselors will march their campers to evening activities, and remain with them during the activity. (On movie nights, campers sit as a section with their counselors. **Night duty counselors sit IN the auditorium, watching the movie with their section.**) The night duty counselors will march their section back to the barracks after the activity.

6. Both campers and counselors should be prompt to formations. Early in the session, counselors need to be extra early for formations. Special attention may be required for campers as they adjust or there may be a specific problem camper who needs assistance.

## FUN:

1. This is the second priority of camp! While campers, counselors, and staff members are not required to have fun, most at least make an attempt at it.

2. Safety should never be jeopardized in the interest of fun. After over forty years of existence, the camp program has proven that it can be an enjoyable experience. Do your part to ensure each camper has the opportunity for an enjoyable and FUN experience.

3. ***Competition should not be over-emphasized and EFFORT should be consistently recognized.***

## GIFTS FROM PARENTS OR CAMPERS:

1. Counselors and staff members should never accept money or goods from a camper (including his or her family or friends.)

2. If gifts are offered, the staff member or counselor should politely inform the giver of this camp policy and thank them for the thought.

## GUARDROOM:

The barracks guardroom is an office of the camp. It must be maintained in an orderly manner. The guardroom and front sallyport are not lounges. CCQs and CITs are responsible for cleanliness of these areas. **The telephone in the guardroom is for official business only.**

## HARASSMENT:

1. **Every camper deserves the opportunity to experience camp life free from any form of harassment.** Each camper should be able to experience camp without being subject to physical, mental or sexual harassment, assault, slurs, degradation or pressure of any kind.

2. No counselor will subject a camper to harassment.

3. No counselor will strike, lay hands upon, threaten with violence, or offer to do bodily harm to a camper.

4. No counselor will allow tyrannical, abusive, shameful, insulting, or humiliating treatment to a camper.

5. Campers may be disciplined by:
   a. reprimand (e.g., explain how the action will not be tolerated)
   b. loss of privileges (e.g., starting Rec. Period fifteen minutes late)
   c. additional duty (e.g., sweeping the section gallery or a portion of the quad).

6. If a counselor has tried remedies for a camper and does not see changes in behavior, the counselor should seek assistance from the Head Section Counselor, Senior Counselors, or Directors.

7. Campers should not be subject to harassment from other campers.
   a. Older campers may try to control younger campers
   b. Multi-year campers may try to control newer campers
   c. Campers who are heavy or wear glasses may be subject to comments/slurs
   d. Campers of one race may be subject to comments by those of another race
   e. Campers of one sex may offend those of another
   f. Campers may threaten other campers

8. Counselors must constantly monitor sections and activities to ensure no form of harassment takes place.

9. The definition of "Sexual Harassment" as defined in the Blue Book Regulations for the Corps of Cadets states: "Sexual harassment is unwanted sexual attention. It is frequently a display of power intended to demean, embarrass, intimidate or coerce a person. It includes but is not limited to unwanted requests or demands for sexual favors, propositions, questions about a person's sexual experiences, lewd comments, leering, sexual insults or innuendos and sexually explicit jokes. It also includes unwanted touching, fondling, patting, pinching or kissing, as well as blocking a person's way. Sexual graffiti and sexually explicit pictures (including those on computers), cartoons, or objects can also constitute sexual harassment. Although some forms of sexual harassment may be unintentional, words and behaviors such as those described above may be harassing when viewed or heard by others. Words which are demeaning to one gender are also forms of sexual harassment. Both men and women can be sexually harassed and it can also occur between members of the same sex."

10. All counselors must accept personal responsibility for the fair, equitable, proper, and effective treatment of every camper and every other counselor.

## HOTEL SIERRA:

1. "Hotel Sierra" is a code phrase often used for "homesickness." Homesickness can happen to any camper, regardless of age, when separated from familiar surroundings.

2. On the first day of camp, especially while parents are leaving, campers tend to be very susceptible to homesickness. For some campers, this is their first time away from home. Counselors should be extra patient with these campers. Try not to single them out and attempt to get every camper fully engaged in the activities at hand. Most campers will successfully adapt to new surroundings with involvement, support, and positive reinforcement.

3. Parents may experience "child-sickness" when separated from campers. Counselors should discourage excessive contact with parents, which may contribute to the camper's homesickness. Let the Directors know if there is a situation where a parent is contributing to the ongoing homesickness of a camper.

## INDIVIDUAL EXCELLENCE:

1. This is the fourth priority of the camp.

2. Campers, counselors, and staff are encouraged to do their best to "excel", but never at the expense of Safety, Fun, or Team Play. Keep in mind that **effort, not perfection, should be recognized.**

## INFIRMARY:

1. Campers and counselors may use the camp's Infirmary when required for medical assistance

2. Sick call will be held each morning at the time of the first activity. Campers should go on "sick call " if they need medical assistance, or have been instructed to do so by the medical staff. Sick call will usually be broken into two portions: campers with sports injuries, who need to see the trainer; and those with sickness, infection, or medical problems, who need to see the doctor or nurse.

3. The nurses of the Infirmary administer medications to campers:
   - Routine medications are administered near meal times and at bedtime.
   - Campers who need medications will usually go to the Infirmary at a different time than those who need to see the doctor, nurse, or trainer.

4. The Infirmary is not a place for home sick campers.

5. Counselors and staff must remember the staff of the Infirmary are trained professionals. Their considered opinion will be followed without comment or discussion.

## JOB DESCRIPTIONS:

Job descriptions for Staff, Counselors, CCQs, and CITs are found later in this Handbook.

## JUNIOR COUNSELORS and COUNSELORS-in-TRAINING:

1. Counselors in Training (CITs) are 16-year old employees whose primary role is to serve as operational assistants to the camp staff. CITs are hired for one session of camp, but may be asked to remain in camp and take a position as a JC (Junior Counselor) depending on position availability.

2. Junior Counselors (JCs) are 16- and 17-year olds who have been assigned to a section of campers.

3. For safety and liability reasons, JCs and CITs have certain restrictions that may not apply to other counselors. Other counselors must be mindful of not putting a JC or a CIT in a position where these rules could be violated.

**Junior Counselor and CIT Code of Conduct**

Junior Counselors and Counselors-in-Training must remember they are no longer campers. They must continuously demonstrate maturity well beyond that expected of the oldest campers.

Automobiles will be permitted on campus when approved by parents. All vehicles must be registered with the campus Public Safety office, through the Director of Personnel and Administration. Possession of a vehicle on campus and its use are privileges and are revocable. The limit of travel during off-duty hours is a radius of 25 miles from The Citadel campus, unless specific exceptions are requested by parents and approved by the Directors.

Nightly curfew for all Junior Counselors and Counselors-in-Training is 12:00 a.m. All JCs and CITS are required to be in the barracks by that time and will be required to check in with the staff member on duty.

**WHILE ON CAMPUS, JUNIOR COUNSELORS AND COUNSELORS-IN-TRAINING WILL COMPLY WITH THE FOLLOWING REGULATIONS**

1. Use of tobacco, alcohol, and/or drugs, in any form, is forbidden.
2. Counselors will not use profanity or any obscene remarks or gestures.
3. Counselors will never use force when disciplining a camper. Campers are not cadets; they are 10- to 15-year old campers!
4. While on campus, there will be limited interaction between Summer School students and Camp personnel.
   - Camp personnel will have no direct contact with Summer School students other than casual

meeting encounters.
- Summer School students and Camp personnel are not permitted to visit each other's living area/rooms, unless on official business/or registered with the guard at the gate.

5. Sexual activity, in any form, with any person, is prohibited while on campus. "Sexual Activity" includes kissing, hand-holding, lying together, groping, fondling and sexual intercourse.
6. Counselors and campers may NOT visit the living areas of members of the opposite sex at any time unless specifically authorized by the Senior Counselors or Directors.

4. Even though there are differences in counselor positions, where campers are involved, JCs and CITs are the same as counselors. **Counselors and staff should NEVER call attention to counselor-level distinctions to the campers.**

## LANGUAGE:

1. Counselors and staff are expected to use proper language **at all times**. Campers are at an impressionable age and will often repeat what they hear from other campers and counselors.

2. Campers are also expected to use proper language. Counselors must monitor the language of the campers in their care and make corrections when indicated.

3. Cussing, cursing, profanity, vulgarity, insults, name-calling, derogatory, demeaning or threatening language will not be tolerated. Off-color and derogatory "jody calls" will not be tolerated. Counselors are expected to insure a proper tone in all counselor-camper, camper-counselor and camper-camper discourse. **IN SHORT, DO NOT USE IMPROPER LANGUAGE.**

## LAUNDRY:

1. Laundry service is provided for campers and counselors by the campus Laundry. Laundry is picked up and delivered twice each week. The dates for pickup and delivery are posted in each camper's room and announced in the Mess Hall.

2. Campers and counselors will count their laundry, complete the forms, and carry their laundry to the quadrangle for pick up. Counselors should supervise this process and ensure their campers have clean cloths and clean bedding. Bedding should be changed at least weekly (see the master schedule and remind your campers).

3. Counselors who so desire may make use of the vending washers and dryers on campus (the Laundromat is located between Deas Hall and LeTellier Hall.)

4. Every counselor is expected to have clean uniforms to wear during camp. "I didn't get my laundry done," is not an excuse for being in an improper or dirty uniform. Uniforms that are torn or permanently stained may be exchanged in the camp office.

## MAIL CALL:

Individual sections do Mail Call. Each morning the Director of Personnel and Administration collects outgoing mail from the guardroom and delivers it to the campus Post Office. Incoming mail is then returned to the barracks, sorted by section and put in section boxes for counselors to distribute after lunch. Campers enjoy getting mail, so be sure to check the boxes and ensure all items are delivered to the camper to whom addressed.

## MENTORING:

**Counselors are the leadership of the camp. Act responsibly and maturely. Campers are aware of your actions and are easily influenced. Set a good example!**

## MESS HALL:

1. Counselors sit at the end of each table ("mess carvers") and are responsible for camper behavior, as well as their own. The Mess Hall is a place to eat (not to play games, throw food, etc.). Food should not be taken from the Mess Hall. Sections will be kept quiet during announcements and behavior monitored at all times.

2. Should a counselor have a problem with the food, mess hall employees, etc., he/she should report the situation to the camp Logistics Officer; to include any special food or dietary needs (e.g. pork substitutes for Jewish or Muslim campers.)

3. At breakfast, sections will rotate to the cereal tables. An announcement will be made after the morning prayer as to whose turn is first (the winners of room inspection the day before.) Counselors need to pay attention to the rotation and control their campers.

## MONEY:

1. Counselors will neither loan money to, nor borrow money from, campers at any time. Additionally, campers and counselors are prohibited from selling items at camp.

2. Remind your campers to keep their valuables secured and not give their lock combinations to their roommates.

3. Before campers arrive, check lock boxes in each room and make sure they can be secured. Report any problems to the Logistics Officer. Continue to monitor this situation during camp sessions.

4. Security of cash is especially important on Wednesdays when campers receive spending money. Caution your campers to take care of their money and keep it safe.

5. If a section is to hold a pizza party, counselors must be extremely careful regarding money collected from campers. Money collected will be documented on a section roster, and turned over to the Senior Counselors. At no time should a counselor appear to profit by collecting money for a section party.

6. On Wednesdays, campers are given $10.00 in spending money. Head Section Counselors will see the Director of Personnel and Administration at the beginning of lunch meal, to receive money and a roster for their section. HSCs will have each camper sign for their $10.00, and return their roster and any extra cash to the Director of Personnel and Administration, before leaving the Mess Hall. Extra money and rosters will not be taken from the Mess Hall, without specific approval.

## NIGHT DUTY:

1. Counselors are scheduled to work several night duty shifts during each camp session. Prior to the start of each session, section counselors will get together and make their section's night duty schedule. The schedule is then submitted to the Senior Counselor for approval. Copies are then distributed to the Directors and staff for further accountability.

2. Once approved and published, night duty schedules will not be changed without written approval from the Senior Counselor or one of the Directors.

3. One of the two counselors scheduled for night duty will remain with the section, in the barracks all night. The schedule will indicate which counselor is required to be present for the overnight shift.

4. Counselors without night duty may leave campus **after** dinner.

5. Night duty counselors are responsible for:
   a. Being present on the gallery for a minimum of 30 minutes or until campers settle down for the night. (Both night duty counselors will be on the gallery for at least 30 minutes.)
   b. Maintaining order in their section (noise, chaos, etc.).
   c. Insuring all campers take a shower before Taps.
   d. Insuring all lights in camper rooms are turned off at Taps.
   e. Providing an "All-in Report" to the on-duty CCQ (within fifteen minutes of Taps).
   f. Keeping campers in their own rooms after Taps.
   g. Insuring camper accountability (infirmary visits, etc.).

6. Each evening, a staff member is assigned duty as Staff Duty Officer, to:
   a. Insure all counselors assigned for night duty are present.
   b. Monitor evening events.
   c. Be present on campus during evening activities and in the barracks from after Taps until breakfast the next morning.
   d. Receive the "All-In Reports" from the CCQ on duty.
   e. Insure order is maintained in the barracks.
   f. Insure the guard on duty plays "first call" for Reveille/breakfast at 0715.
   g. Conduct accountability check of JC / CIT curfew.

7. Visibility is the first line of defense against section disorder. Counselors must remain on the galleries at least 30 minutes after Taps and maintain order among campers.

8. Campers may not "switch" rooms (even if it is "just for the night"). Night duty counselors are responsible for enforcing this rule. Campers who do not observe this policy will lose privileges.

9. Campers will NEVER be allowed to sleep in a counselor's room. If a camper is experiencing difficulty, visit the camper in their room with their roommate present, or talk to them on the gallery or in a counselor room with another counselor present. NEVER allow a camper to sleep in a counselor's room and NEVER sleep in a camper's room.

## PARTIES (PIZZA) :

Counselors may have no more than one section party after Taps per session. These parties are encouraged, but for maximum value should be tied to a positive event: when campers have performed particularly well during inspections, section grading, behavior, and/or intramural competition. Head Section Counselors must receive advance permission from the Senior Counselor, and give notice to the Staff Duty Officer. For accountability, money collected for these parties MUST be documented and signed by the camper on a Section Roster. Turn the completed money collection roster in to the Senior Counselors.

## PERIOD OFF:

Each day, counselors will be assigned one 50-minute activity time slot as a period off. Counselors enrolled in summer school will not be afforded this privilege, due to the time already taken out of the camp schedule for their classes.

## PROMPTNESS:

1. Bugle calls apply to both campers and counselors. Counselors on duty are expected to be on time for all formations.

2. **Counselors are expected to be at their assigned activity on time**. Repeated instances of being late to formations and activities will result in monetary fines for counselors.

3. Counselors in summer school classes are especially susceptible to being late. Extra care must be taken to proceed quickly to assigned activities. Once at an activity site, counselors should not leave the activity site until another counselor has arrived.

## QUIET, PLEASE!

1. Order and discipline by Summer Camp personnel is important. The camp must be a good neighbor and be courteous of others at all times.

2. There are several campus facilities that deserve special attention, regarding noise:
   a. Deas Hall – Many camp activities take place in Deas Hall. Summer School activities also take place here. Whenever campers are in hallways, they should remain orderly and quiet. Campers should only take the stairwells allocated for camper use (signs will be displayed.)

   b. Mark Clark Hall – Mark Clark Hall is one of the most visited buildings on campus, and the camp also uses it for many activities. Campers must maintain good order and discipline in this building. Counselors should regularly monitor bathrooms. When in Mark Clark Hall, campers should never be without counselor supervision.

   c. Murray Infirmary – Campers visit the Infirmary to receive medications, for routine sick call, and for emergency treatment. Only campers who stay in the Infirmary on orders of the medical staff due to injury or illness will be left without counselor supervision. Orderliness is important so that nurses and doctors can properly treat campers. Counselors will routinely be assigned to accompany campers to the Infirmary to assist in maintaining order and discipline. The Director of Safety & Education will monitor camper and counselor conduct in the infirmary on a daily basis.

3. Quiet and discipline in the barracks is extremely important.
   a. The Summer Camp can be quite taxing on campers, as well as counselors. Quiet must be maintained to ensure everyone gets a good rest, at night and after lunch.

   b. When Summer Camp shares barracks space with other activities, like the SC Police Corps, the need for general quiet becomes even more important.

   c. Many counselors are taking summer school classes. Quiet is needed for study time.

4. **It is a counselor's duty to control and maintain discipline of campers.** Noise levels must be kept down when inside all buildings. Campers who fail to observe rules should be immediately corrected.

## QUAD CHAOS:

"Quad Chaos" is a term used for activities that occur on the barracks quadrangles during free time. Even when "no one is in charge" of camper activities, counselors must be aware of what is taking place. SAFETY must not be compromised for the sake of fun.

## RAIN (See Black Flag):

1. When the Black Flag / Rainy Day (BF/RD) Schedule is to be implemented, as much advance notice as possible will be given to counselors. Counselors should be ready to move campers to their alternate activity quickly and safely.

2. Under the BF/RD Schedule, each outside activity has an alternate activity/site. Counselors with outside activity responsibilities should review the schedule and become familiar with their campers' alternate activity/site.

## RECREATION PERIOD:

Recreation period takes place on Mondays, Wednesday, and Fridays from 3:30 to 4:20. After the last Activity Period on these days, campers return to the barracks for Rec. Period formation. After formation, campers are free to leave the barracks. Permissible destinations include:

- Mark Clark Hall / Snack Bar
- Parade Ground
- Library/Museum
- Deas Hall

Counselors will be assigned to various locations to supervise campers. Assignments will be posted in the guardroom before the session starts.

## REGULATIONS:

Counselors will abide by regulations of The Citadel and are expected to conduct themselves accordingly: the college's Honor Code and Summer School Regulations apply. College regulations give the Directors disciplinary authority over Summer Camp personnel.

## RELATIONS (COUNSELOR/STAFF):

1. Camp counselors are responsible for the day-to-day supervision of campers and their activity instruction. Within each section, the Head Section Counselor is responsible for that section's other counselors.

2. Camp staff members are primarily responsible for planning and coordination, which allows counselors to operate effectively.

3. Counselors in Charge of Quarters (CCQs) are primarily responsible for the security of the camp's barracks.

4. Counselors-in-Training (CITs) have two responsibilities: security of the camp's barracks during daylight hours and performing various support and training activities, e.g., intramural referees, marking fields, supplying water to activity sites.

5. Counselors and staff must strive to work together in order for the camp to operate efficiently and professionally. Recognition that staff, counselors, CCQs and CITs have different responsibilities is important. Each person must perform his/her own duties. Any concerns or problems should be brought to the attention of the Senior Counselors or Directors without hesitation.

6. Counselors with problems or questions, no matter how small, should normally consult, first, their Head Section Counselor. The Senior Counselors are usually the next to be consulted, but any staff member, including the Directors, may be approached regarding questions or problems. Staff members must be ready to correct problems brought to their attention.

7. Counselors should not hesitate to direct parents to the Senior Counselors or Directors concerning any camper-related problems.

8. **Counselors will not have "dating relationships" with other counselors while camp is in session.** Such behavior is not conducive to smooth operation of the camp and may result in dismissal.

## ROOMS:

1. **Counselor and staff rooms will be kept neat and clean at all times.** Staff members (including the Directors) will check rooms periodically. Failure to maintain rooms in proper order may result in fines.

2. Counselors are allowed to have televisions, VCRs, computers, stereos, and video games. Other appliances (i.e., refrigerators, microwaves, hotplates, etc.) are not acceptable.

3. If furniture in a counselor's room is moved, it must be returned to its normal arrangement before the end of camp. Furniture may not be arranged in such a manner to create a safety hazard.

4. The guardroom, front sallyport and staff rooms are not lounging areas for either campers or counselors. Help maintain these areas for official camp business.

5. A room designated as the "Counselor Lounge" will be set aside for use by camp personnel during off-duty time. **Campers are not allowed in the Lounge.** Failure to maintain the Lounge in an orderly manner and excessive noise may result in a person being banned from the Lounge or the closing of the Lounge altogether (See "Counselor Lounge".)

6. Campers should not enter another camper's room unless invited by the occupants. Campers are also not permitted to visit other rooms after Taps. **CAMPERS MUST SLEEP IN THEIR OWN ROOMS. Staff and counselors on night duty will enforce this rule.** Likewise, counselors should not visit camper's rooms after Taps, except in case of illness, injury, assisting a camper or while maintaining order.

7. **No member of the opposite sex should enter any camper's room for any reason without prior approval of the Senior Counselors, or Directors.** Should the need arise, staff or counselors will enter in pairs and never alone.

8. Staff and counselors should use discretion when visiting with campers in his/her room. Always leave the door open, and insist that another counselor or camper is present.

## SAFETY:

1. **THIS IS THE #1 CAMP PRIORITY!**

2. In case of injury, the Senior Counselors, Directors, or the Staff Duty Officer will be immediately notified. Follow established safety procedures (located in activity notebooks and posted in barracks) to get aid for the injured individual, and then proceed to transport him/her to the Infirmary. If an injury is sufficiently serious, contact a staff member for evacuation to the Medical University of South Carolina Emergency Room.

3. The counselors present when an accident occurs are responsible for promptly filling out of an Accident Report. If no counselor was present, the Head Section Counselor of the camper will complete the Accident Report. Accident forms should be turned in to the Safety and Education Officer within six hours of an accident.

4. Blank Accident Reports are in all activity notebooks, the guardroom, and the camp office.

## SCUBA INSTRUCTION:

SCUBA TAKES PLACE FROM 4:30 TO 6:00, MONDAY – FRIDAY. Due to time constraints and the large amount of material to cover over the 3-week session, it is very important that SCUBA participants are prompt in getting to class. Two people will be assigned to assist with SCUBA and their primary functions include:

1. Ensuring all participants are in the sallyport, with proper materials (swim suit, towel, book, fins, etc.) in hand, at 4:25 p.m.
2. Escorting campers to Deas Hall by 4:30 p.m.
3. Assisting Instructors with camper accountability and discipline during the class.
4. Escorting campers to the Mess Hall after the class, eating dinner with them, and escorting them back to the barracks.

**For accountability purposes, Section Counselors need to know which of their campers are participating in SCUBA**

## SPECIALIZED ACTIVITIES:

1. Counselors are assigned to work with a specialized activity. These assignments are based upon individual interests (as indicated on the employment application) and the needs of the camp. Assignments are announced during staff training.

2. Counselors will be at their specialized activity **every day (except days off)** and be on time.

3. Some counselors are assigned Hunter Safety & Trapshooting as their specialized activity. This activity takes place after lunch on WLI Field, behind the mess hall. Counselors assigned to this activity have a rest period during the regularly scheduled specialized activity period (4:30 - 5:30 p.m.), Monday through Saturday. The Director of Marksmanship is coordinator for this activity.

4. Specialized activities last an entire hour (4:30 - 5:30 p.m.), Monday through Saturday.
   **DO NOT LET CAMPERS LEAVE EARLY!**

5. Counselors cannot cancel a specialized activity for a day; therefore, counselors involved with outdoor specialized activities should prepare for rainy days.

6. Counselors involved with each specialized activity will present a skit for the campers on the first Monday night of each session. After the skits, campers sign-up to participate in one of the activities offered.

## TEAM PLAY:

1. This is the third priority of the camp.

2. Team Play encourages sportsmanship and group involvement by everyone in all activities. Activity instructors and coaches for intramurals must ensure each camper gets an opportunity to participate.

3. Unsportsman-like conduct will not be tolerated and violators will be asked to sit out of the activity. Activity instructors and coaches must take the lead in monitoring daily activities and intramural competition. Support for a section is to be encouraged, but good sportsmanship must always be practiced. Stop improper actions; council players; expect and demand good sportsmanship.

4. At the beginning of camp, counselors should remind campers of the "Best Section" competition. This award is based on the combined results of numerous competitions:

   - Room inspections results
   - Track Meet results
   - Field Day results
   - Marching competition results
   - Team cooperation
   - Team spirit
   - Counselor leadership
   - Overall behavior

## TELEPHONES:

1. Telephones in the camp office and guardroom are for official business use only. Should the need arise, counselors may use the phones in the camp office to contact camper parents.

2. Head Section Counselors and staff members should plan to have telephones in their rooms. These phones will be an important resource for their communications. **Campers should not be permitted to use these telephones unless the Directors give specific permission.**

3. Other counselors are allowed to bring their own telephones for personal use, but this privilege may be revoked for cause (i.e., letting campers use counselor phones.)

4. Campers will have routine access to telephones in Mark Clark Hall to contact parents during Recreation Periods (Rec. Time), M-W-F/ 3:30 to 4:20. Counselors should be prepared to assist campers in placing collect or credit card calls, if required.

5. Campers should not use the pay phone located in the barracks.

6. A 24-hour cell phone will be provided to the camp. The Senior Counselors will have the phone during the day and at night the Staff Duty Officer will have the phone.

## TOBACCO:

The use of tobacco (in any form) by campers, counselors, or staff members is prohibited at camp. Campers found with tobacco products will receive punishment. Counselors found with tobacco products will be dismissed.

## VALUABLES:

1. Counselors and campers should secure any valuables in lock boxes. When campers are checking into camp, try to discourage them from keeping expensive, pilferable items. Encourage parents to take such items when they depart on Opening Day.

2. Before campers arrive, each session, counselors check the condition of the lock boxes in each room and assure they can be secured. During daily checks of camper rooms, and when talking to

campers, be aware of any security problems. Report problems to the Director of Logistics and the Senior Counselors.

3. The camp attempts to provide a secure environment but it is not responsible for lost or stolen items.

## VEHICLES:

1. Operators of any camp vehicle, including the golf cart, must have a valid drivers' license in their possession and obey all traffic regulations. Only individuals who participate in "Vehicle Safety Training", during staff training, may drive assigned vehicles.

2. Operators of the golf cart must exercise great care:
   a. The cart is small and not seen as readily as other vehicles.
   b. While highly maneuverable, the golf cart is considered a vehicle and is not allowed on sidewalks.
   c. Passengers may not be carried in the back of the golf cart.

## VISITORS:

1. Counselors and staff members should challenge anyone in the barracks who is not:
   a. a camp employee
   b. a member of the vending machine or janitorial service staffs
   c. maintenance personnel
   d. College official (President, Director of the Physical Plant, etc.)
   e. affiliated with the SC Police Corps

2. Summer school students are <u>not</u> allowed in the camp barracks without a counselor or staff <u>escort</u>.

3. Visitors wishing to see camp personnel will report to the guardroom. The CCQ/CIT on duty will page the counselor, who must come to the sally port and escort the visitor to his/her room. A barracks pass will be given to all visitors and must be outwardly displayed when visiting. <u>No visitor of the opposite sex will be allowed into a counselor's room</u>.

4 Guests of camp personnel may visit with their host/hostess in the Counselor Lounge provided they observe all rules pertaining to the lounge.

5. Visitors are not allowed in the Mess Hall without the prior approval of the Senior Counselors or Directors.

# MOST IMPORTANTLY:

- <u>USE GOOD JUDGMENT AT ALL TIMES</u>
- <u>BE A GOOD ROLE MODEL</u>
- <u>BE SAFE</u>
- <u>HAVE FUN</u>

# The Citadel
# Summer Camp

## INTRODUCTION:

Attending and working at camp can be a fun experience for both campers and counselors, but only if both parties use good judgment and common sense. Unfortunately, campers do not always demonstrate the maturity of high school and college students; therefore, counselors should always be sure to take the initiative, act responsibly, and follow the camp's established focus:

**1. Safety** **2. Fun** **3. Team Play** **4. Individual Excellence**

Counselors should set the example by their actions, attitude, language, room condition and arrangement, and personal appearance (clothing, hair, hygiene, etc.).
Counselors should lead by a positive example. REMEMBER, you should not be a "friend" to campers, you are their MENTORS. **Treat them friendly, firm, and fair.**

---

## ADMINISTRATIVE STRUCTURE OF THE CITADEL SUMMER CAMP

**CAMP SUPERVISOR**
↓
**DIRECTOR**
↓
COLLEGE SUPPORT----------**DEPUTY DIRECTOR**----------OFFICE SUPPORT
↓

| Athletic Officer | *Asst. Athletic (Mks. Director) | Operations Officer | SENIOR COUNSELOR (2) | Supply Officer | *Asst. Athletic (Waterfront Director) |
|---|---|---|---|---|---|
| ↓ | | | ↓ | | ↓ |
| Special Activity | | | Sections: A B C D E F G H I J | | CCQs |

(20 - 26 Campers)
Head Section Counselor
Assistant Counselor
Assistant or Junior Counselor
Assistant or Junior Counselor

# ALMOST EVERYTHING A COUNSELOR NEEDS TO KNOW...A TO Z



## ACTIVITY INSTRUCTION:

1. Counselors will be given individual activity teaching schedules. Be on time to your activities and be prepared. Counselors will be provided lesson plans for each activity. Follow the lesson plans to the best of your ability.

2. Counselors should march the section to the same activity that they teach during the first period in the morning and in the afternoon.

3. **All counselors are expected to take an active roll in the instruction of every activity period.**

4. Counselors should monitor heat and humidity and allow water and rest breaks as needed.

5. Counselors will utilize the camp grading objectives in the planning of activity instruction. Counselors will grade campers individually on the last Monday and Tuesday of each session. All Campers will receive a grade for each activity. Grades will be due at the end of each morning or afternoon activity period during the final two days of the session.

6. Activity periods last for 50 minutes (i.e. from 8:30 - 9:20). **Do not let campers leave activities early**. Campers have 10 minutes between classes built into their schedule. When campers leave, they should go as a section.

## ACCOUNTABILITY:

1. **COUNSELORS NEED TO KEEP ABREAST OF THEIR CAMPERS' WHEREABOUTS AT ALL TIMES!** (Recreation Periods on Mondays, Wednesdays, and Fridays from 3:30 - 4:20 p.m. are the ONLY times when a camper will not have assigned supervision. During this time, counselors should continue to be aware of what their campers are doing and where they are).

2. Safety is impossible if a camper's whereabouts are unknown. It is the counselors' responsibility to investigate whether or not a camper from his/her section or activity is in the infirmary, etc.

## ALCOHOL:

*****NO ALCOHOL OF ANY TYPE IS ALLOWED ON CAMPUS AT ANY TIME!
*****Violators will be replaced immediately.**

## ANNOUNCEMENTS:

1. Announcements in the barracks are to be made ONLY by staff members or the CCQ on duty.

2. Announcements in the Mess Hall should be given to one of the Senior Counselors at least five minutes prior to the time for announcements.

## APPEARANCE:

1. The Camp furnishes counselors with camp uniforms. Counselors should wear a complete camp uniform at all times (Summer Camp or a Citadel PT t-shirt, camp shorts, socks, and tennis shoes).

2. Counselors are expected to be clean and have a "neat " appearance.
   *Males- clean shaven/ appropriate hair cut, etc.
   *Females- hair brushed, etc.

## AUTOMOBILES:

Any counselor may have an automobile on campus provided it meets all guidelines issued by the Department of Public Safety. All vehicles must be registered (at no charge) with the appointed Counselor, who will issue a dashboard registration card. This card must be outwardly visible at all times. Counselors will park only in designated areas.

## AWARDS:

1. Campers in each division (Junior and Senior) compete as a section for the **Best Section Award**, which is based on the group's overall behavior, room inspection results, section grading, intramural competition, Field Day events, etc. Campers are awarded ribbons and **the best Junior Counselor and the best Senior Counselor receive special recognition** and their names engraved on plaques displayed in the Camp Office.

2. All campers compete for individual trophies in some of the sports activities ( **Tennis, Racquetball, Swimming, Wrestling, Sailing, Track**), and in camp barracks tournaments:
   **Ping Pong**
   **Table Golf**
   **Chess**
   **Summer Camp Game**

3. One counselor each session, and one junior counselor each summer will be awarded Outstanding Counselor wards based on the quality of their work at camp (see #1 above). Winners also receive a partial scholarship award. Their names will be engraved plaques and displayed in the Camp Office.

4. Each section will also award approximately five (5) **Mark Clark Award** medals to the Outstanding Campers in each section. This award is based on behavior (counselors' section grades), activity grading,

and points earned from tournament placement. The Camper with the highest cumulative score will also be designated as **First Honor Graduate** and receive a partial scholarship award to attend the Citadel.

## BICYCLES:

Counselors may have bicycles. A rack is provided in the Sallyport for storage of bikes. Bikes will not be stored in counselor rooms, on the galleries, or in the stairwells. DO NOT allow campers to ride bikes!

## CAMPERS' CHAPLAIN:

Chaplain to the Summer Camp is the current serving Chaplain to the Corps of Cadets. He administers our chaplaincy program, arranges all services, and takes care of camper and counselor religious and spiritual welfare needs as required. The current serving chaplain is: Chaplain Charles Clanton, US Army Retired.

## COUNSELOR FORUMS:

Counselors will have opportunities throughout the session to voice their opinions or ask questions regarding any facet of the camp program. The Director, Deputy Director, and Staff Members will meet with interested counselors periodically, or upon request. If you see something that needs to be addressed, do not hesitate to bring it to the Director or Deputy Director's attention.

## COUNSELOR LOUNGE:

An air-conditioned room with a television set will be designated in each barracks (girls & boys) for use during free time and periods off.

## DAYS OFF:

1. In order to optimize rest and relaxation, counselors should try and spend their days off away from camp.
2. You may attend meals on your days off, but you will be expected to be in proper camp uniform while in the Mess Hall.
3. Counselors should try to get sufficient rest during their days off.
4. If returning to the barracks late at night, please do so **QUIETLY**.
5. Counselors should not change their days off. If a counselor has a problem with his/her day off, he/she should coordinate with the Senior Counselor and the Director or Deputy Director for any requested schedule changes. **COUNSELORS SHOULD NOT REARRANGE SCHEDULES ON THEIR OWN!**

## DANCES:

1. Remember: The Citadel Summer Camp Dances are for fun... not to find a boyfriend or girlfriend.
2. **Counselors should act as chaperones and be visible at all times.**

3. Persons exhibiting inappropriate behavior will be dismissed immediately.

4. At the end of the dance, sections will be dismissed one at a time and return to the barracks in formation. Everyone should stay in the auditorium until his/her section is dismissed.

**Remember: Accountability, accountability, accountability.**

## DISCIPLINE:

1. Counselors are responsible for the discipline of their section and/or the campers whom they are instructing. Counselors should handle discipline in a positive nature being specific rather than general. Reoccurring problems or those of a significant nature should be channeled through the Head Section Counselor to the Senior Counselor and to the Director or Deputy Director, if necessary.

2. Counselors should be positive and encouraging, but never give the camper false hope (i.e. "you'll probably win the Mark Clark Award", " I bet you will be the First Honor Graduate", etc.).

3. The campers are not going through a fourth-class system. Push-ups, etc., are not appropriate when disciplining campers. **Lead by example and be a positive influence!**

4. Campers are 10 - 15 years old. They are not adults, nor are they cadets. Treat them with kindness and encouragement.

****REMEMBER: Praise publicly/ Punish privately**

## EQUIPMENT POLICY (DEAS HALL):

1. Counselors must sign-out equipment in their own name from the Deas Hall Equipment Room. Counselors should verify the appropriate amount of equipment for which they sign. Counselors will also verify that all equipment is accounted for at the end of each period. Broken equipment should be brought to the attention of the camp Athletic Officer and equipment room personnel.

2 Equipment should be returned at the end of each activity session (morning and afternoon- 11:20 a.m. and 3:20 p.m. M/W/F or 4:20 T/T/S). Counselors should not leave equipment at an activity site until one of the counselors instructing the next class arrives. If one does not arrive within a reasonable amount of time (after the next class starts), they should notify a staff member immediately.

3. Any problems concerning equipment or Deas Hall personnel should be directed to the camp Athletic Officer.

## EVENING ACTIVITIES:

The camp offers the following evening activities for campers and counselors:

Intramural Sports between sections (Monday, Wednesday, Thursday)
*Video/Movie Nights (Sunday, Tuesday, Friday)
Dances (Saturday, and the final Friday of each session)

***Note: Movies will be chosen by the Director, Deputy Director, or a Senior Counselor.**

## FORMATIONS:

1. Counselors will attend all formations (except on their days off).

2. Counselors are expected to march with their section to all meals and retreat unless excused by the Senior Counselor.

3. For the 1st activity period in both the morning and afternoon, counselors assigned to teach an activity period will march the campers they are instructing to the appropriate field or court. If necessary, one counselor should be sent ahead to pickup equipment from Deas Hall. Counselors should also lead campers back to the barracks after the last morning activity ends at 11:20 a.m. Campers should not be allowed to march themselves back to the barracks.

4. Head Section Counselors should check to insure that all campers and counselors are in formation and in proper camp uniform. **Accountability relates directly to SAFETY; campers should be accounted for at all times!**

5. Night duty counselors will march their campers to evening activities. On movie nights, campers should sit as a section with their night duty counselor, who will march his/her section back to the barracks after the activity.

6. Campers (and counselors) should be prompt to formations; however, because the camp program is not designed to mold campers into cadets, counselors should demonstrate discretion when urging promptness.

## FUN:

This is the second priority of camp! While campers, counselors, and staff members are not required to have fun, most at least make an attempt at it, without jeopardizing safety constraints. After over forty years of existence, the camp program has proven that it can be an enjoyable experience. Emphasis should be on ensuring that camp, for each camper, is enjoyable and FUN (within a safe and secure environment). ***Competition should not be over emphasized and EFFORT should be consistently recognized.***

## GIFTS FROM PARENTS OR CAMPERS:

1. Counselors and staff members should not accept gifts of money or goods from a camper, his or her family, or a camper friend. As an exception, small gifts of minor value may be accepted.

2. If prohibited gifts are offered, the staff member or counselor should politely inform the giver of this camp policy and thank them for the thought. If gifts are "forced" upon the staff member or counselor, or are left at the camp without the opportunity to refuse them, they should be turned over to the Director or Deputy Director.

## HOTEL SIERRA:

1. Secret code-word for "homesickness."
2. On the first day of camp, while parents are leaving, campers tend to be more susceptible to homesickness. Counselors should be gentle and patient with these campers, but try not to single the camper out. For some campers, this is their first time away from home.

## INDIVIDUAL EXCELLENCE:

This is the fourth priority of the camp. Campers, counselors, and staff are encouraged to do their best to "excel", but not at the expense of Safety, Fun, and Team Play. Again, **Effort, not perfection, should be recognized.**

## JUNIOR COUNSELORS:

1. Junior Counselors are 16 and 17 year old employees. For safety and liability reasons, these counselors have certain restrictions places on them that may not apply to cadet and incoming freshmen counselors. Other counselors should not put a junior counselor into a position where these rules could be violated.

**Junior Counselor Code of Conduct**

First year Junior Counselors must remember that they are no longer campers, or of camper age, and must demonstrate maturity beyond that expected of campers. Likewise, returning Junior Counselors are expected to comply with this expectation.

Junior Counselors will be afforded the privilege of having automobiles on campus; however, they must have written parental approval and be registered with the Senior Counselor. This privilege may be revoked at any time. The limit of travel during off hours is a radius of 25 miles, unless specific exceptions are requested by parents and approved by the Director or Deputy Director.

Nightly curfew for Junior Counselors is 11:00 p.m. All Junior Counselors will be required to be in the barracks by that time and will be required to check in with the staff member on duty. In addition, all Junior Counselors must be in their own rooms by 11:15 p.m.

Alcoholic beverages, in any form, and their consumption are prohibited. Junior Counselors will neither purchase nor consume alcoholic beverages. **There is NEVER an exception to this rule.**

**NOTE: All staff, counselors, and CCQs are restricted from using tobacco (in any form) while at camp.**

2. Even though there are differences in counselor positions, when campers are involved, Junior Counselors are the same as Senior Counselors; Counselors and Staff members should not point out counselor-level distinctions to the campers.

## LANGUAGE:

Counselors and staff are expected to use clean language at all times. Profanity and insults will not be tolerated. Campers are at an impressionable age and will often repeat what they hear from other campers and counselors. Campers are expected to use proper language, and counselors should do their best to insure that they do.

## LAUNDRY:

Camper, counselor, and staff laundry is picked up and delivered twice each week. The dates for pickup and delivery will be posted in each campers room and announced in the Mess Hall. Campers and counselors will count their laundry the night before, complete the forms, and then carry their laundry to the quadrangle the next morning.

## MENTORING:

**You are the leadership of the camp. Please act responsibly and maturely. Campers are aware of your actions and you need to set a good example!**

## MESS HALL:

1. Counselors will sit at the end of each table ("mess carvers') and will be responsible for camper behavior, as well as their own. The Mess Hall is a place to eat, and not to play games, throw food, etc. Food should not be taken from the Mess Hall, and counselors should not take ice coolers into the Mess Hall. Sections should be kept quiet during announcements, and loudness monitored at all times.

2. Should a counselor have a problem with the food, employees, etc., he/she should report the situation to the camp Operations Officer. This includes any special food or dietary needs; e.g. pork substitutes for Jewish or Muslim campers.

## MONEY:

Counselors should neither loan money to, nor borrow money from other counselors and/or campers at any time. Additionally, campers and counselors are prohibited from selling items at camp.

## NIGHT DUTY:

1. Counselors scheduled for night duty are expected to stay in the barracks all night. If two counselors in the same section have night duty, both will stay unless one is released by the staff member on duty.

2. Head Section Counselors make up their own night duty schedule and submit it to the Senior Counselor for approval. This will be accomplished before the start of each session.

3. Counselors without night duty may leave campus after their last duty (i.e. officiating intramurals, if scheduled) or after supper, whichever is later.

4. Night duty counselors are responsible for:
   a. Maintaining order in their section (radio, noise, etc.)
   b. Insuring that all campers take a shower before taps.
   c. Insuring that all lights in camper rooms are turned off at taps.
   d. Providing an all -in report to the on-duty CCQ within five minutes of taps.
   e. Keeping campers in their own rooms after taps.
   f. Insuring camper accountability (infirmary visits, etc.)

5. Each evening, a Staff member is assigned night duty to:
   a. Insure that all counselors assigned to night duty are present.
   b. Be present on campus during evening activities and in the barracks from after Taps until breakfast the next morning.
   c. Receive the "All-In Report" from the CCQ on duty.
   d. See that order and quiet is maintained in the barracks.
   e. Insure that the CCQ plays first call for breakfast at 0715.

*****Counselors and Staff on night duty are expected to be available to campers at all times.**

6. Visibility is the first line of defense against section disorder. If counselors remain on the galleries for a while after taps and INSIST on camper obedience, then disturbances and problems will be minimal.

7. Counselors are not allowed to change their night duty schedule without the approval of the staff member on night duty AND the Senior Counselor (or the Director/ Deputy Director in the Senior Counselor's absence).

8. Campers may not "switch" rooms (even if it is "just for the night"). Night duty counselors are responsible for enforcing this rule. Campers who do not observe this policy will lose privileges.

## PARTIES (PIZZA, TACO, ETC.):

Counselors may have a section party after taps (no more than one per session) when campers have performed particularly well during inspections, section grading, behavior, and/or intramural competition. These parties are encouraged. Head Section Counselors must receive permission in advance from both the night duty staff member AND the Senior Counselor.

## PERIOD OFF:

Counselors will be assigned one 50-minute time slot as a period off each day. Counselors enrolled in summer school will not be afforded this privilege due to the time taken out of the camp schedule for their classes.

## PROMPTNESS:

1. Bugle calls apply to both campers and counselors. Counselors on duty are expected to be on-time for all formations.

2. **Counselors are expected to be at their activity classes on time**. Counselors in summer school classes are susceptible to being late; therefore, other counselors should not leave an activity site until another counselor has arrived.

## QUIET, PLEASE!

In the past, there has been a problem with excessive noise while inside campus buildings. **Please make sure the campers keep the noise level down when inside all buildings. Campers who fail to observe this rule should be immediately corrected.**

## QUAD CHAOS:

Term used for activities that occur on the barracks quadrangles during free time.

## RAIN:

In the case of rain, the Director or Deputy Director will decide if normally scheduled activities will be conducted. In the case of a "rain out" an alternate schedule will be distributed.

## REGULATIONS:

Counselors will abide by regulations of The Citadel, and are expected to conduct themselves accordingly: The school's Honor Code and Summer School Regulations apply. By school regulations, the Director and Deputy Director have disciplinary authority to uphold these requirements.

## RELATIONS (COUNSELOR/STAFF):

1. Counselors with problems or questions, no matter how small, should consult with a staff member. The Senior Counselors should be the first staff members consulted. However, any staff member - including the Director and Deputy Director- may be consulted at any time regarding questions or problems.

2. Counselors should direct parents to staff members concerning any camper-related problems.

3. Counselors and staff must strive for good working relations in order for the camp to operate humanely, efficiently, and professionally. Any concerns or problems should be brought to the attention of the Director and/or Deputy Director without hesitation.

4. Any staff member may correct any recognizable problem that arises.

5. Any counselor, junior counselor, or CCQ should consult a staff member should a complex problem or difficult situation arise.

6. Counselors **will not** have "dating relationships" with other counselors while camp is in session.

## ROOMS:

1. Counselor and staff rooms should be kept neat and clean at all times. Staff members (including the Director and/or Deputy Director) will check rooms periodically.

2. Counselors are allowed to have televisions, VCRs, computers, stereos, and video games. Other appliances are not acceptable (refrigerators, microwaves, etc.).

3. If moved or broken, furniture in camper and counselor rooms will be returned to its original placement at the end of camp.

4. The camp office, WCID radio room, and staff rooms are not lounging areas for campers and counselors. Please maintain these rooms for official camp business.

5. Campers should not enter another camper's room unless they have been invited by the occupants. Campers are also not permitted to visit other campers (or counselors) after taps. **CAMPERS MUST SLEEP IN THEIR OWN ROOMS. Staff and Counselors on night duty will enforce this rule.** Like wise, counselors will not visit with campers in their rooms after taps. Counselors should only enter a camper's room after taps in the case of illness, injury, or needed assistance.

6. **No member of the opposite sex should enter any campers room for any reason without prior approval of the Senior Counselor, Director, or Deputy Director.** Should this need arise, Staff or Counselors will enter in pairs, and never alone.

7. Staff, Counselors, and CCQs should use discretion when visiting alone with campers in his/her room. It is always a good idea to leave the door open, and when possible visit in groups.

## SAFETY:

THIS IS THE #1 CAMP PRIORITY! In case of injury, the Senior Counselor OR the Director/ Deputy Director will be immediately notified. The counselors present will be directly responsible for prompt filling out of an Accident Report and the transporting of the concerned camper to the Infirmary. Accident forms are turned in to the Senior Counselors.

## SPECIALIZED ACTIVITIES:

1. Counselors are assigned to work with a specialized activity based upon their interests, as indicated on the employment application.

2. Counselors are expected to be at their specialized activity each day and to be on time.

3. Specialized activities last an entire hour (4:30 - 5:30 p.m.), Monday through Saturday. DO NOT LET CAMPERS LEAVE EARLY!

4. Counselors cannot cancel a specialized activity for a day; therefore, counselors involved with outdoor specialized activities should be prepared for rainy days.

5. Counselors involved with specialized activities will present a skit for the campers on the first Monday night of each session. After the skits, campers will sign-up to participate in one of the activities offered.

## TEAM PLAY:

This is the third priority of the camp. Team Play encourages sportsmanship and group involvement by everyone in all activities. Unsportsman-like conduct will not be tolerated and violators will be asked to sit out of the activity.

## TELEPHONES:

Head Section Counselors will have telephones in their rooms. **These telephones are for camp business and should never be used by campers.** Other counselors may be allowed to have telephones provided they bring their own; this privilege may be revoked for cause.

## TOBACCO:

The use of tobacco (in any form) by campers, counselors, and staff members is prohibited at camp.

## VALUABLES:

Counselors and campers should secure any and all valuables in lock boxes or Deas Hall lockers. The camp is not responsible for stolen or lost items.

## VISITORS:

1. Counselors and staff members should challenge anyone in the barracks who is not a camp employee, a member of the vending machine or janitorial services staffs, maintenance personnel, or college official (President, Director of the Physical Plant, etc.). Unescorted summer school students are not allowed in the boys camp barracks without a counselor or staff member escort. Additionally, no one outside of the camp program may cross the barricades set up in the girls barracks.

2. Counselors must have all of their visitors report to the Camp Office (guard room). The CCQ on duty will page the counselor who must then come to the office and escort the visitor to his/her room.

3. Visitors are not allowed in the Mess Hall without the prior approval of the Director or Deputy Director.

2006 WL 2228993
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Charleston Division.

Lavata Maria LEVINE, Plaintiff,
v.
WALTERBORO CITY POLICE DEPARTMENT; and Press Printing International Inc., d/b/a Walterboro Newspapers Inc., d/b/a The Press and Standard, Defendants.

C/A No. 2:05-2906-18. | Aug. 3, 2006.

**Attorneys and Law Firms**

Margie L. Bright Matthews, Margie Bright Matthews Law Office, Walterboro, SC, for Plaintiff.

Scott Timothy Justice, Scott T. Justice Law Office, North, SC, for Defendant Walterboro City Police Department.

**Opinion**

**ORDER and OPINION**

DAVID C. NORTON, District Judge.

*I. BACKGROUND*

*1 On January 26, 2002 defendant Walterboro City Police Department ("police") arrested plaintiff Lavata Maria Levine in the parking lot of a Walterboro, South Carolina movie rental store. Plaintiff was fifteen at the time. Three days later[1], defendant Press Printing International, Inc., d/b/a Walterboro Newspapers, Inc. d/b/a The [Walterboro] Press and Standard ("newspaper") published a photograph of plaintiff in a police car with "an accompanying caption falsely indicating that plaintiff was charged with public disorderly conduct, assault, battery and malicious damage." (Compl.¶ 14.) Plaintiff contends newspaper labeled her a "malicious teen." (Pl.'s mem. in opp., doc. 18, at 8.) Plaintiff initiated this suit in state court on August 12, 2005, alleging police's detention was illegal.[2] Plaintiff further alleges newspaper's publication invaded her privacy and violated S.C.Code Ann. § 20-7-8520. At the hearing on newspaper's motion to dismiss, plaintiff further alleged the complaint includes a claim for intentional infliction of emotional distress.

This action was removed to this court on October 11, 2005. Newspaper filed a motion to dismiss on March 22, 2006. Plaintiff did not respond, so this court granted the motion on May 17, 2006. The court vacated that order on June 21, 2006, and permitted plaintiff to file a memorandum in opposition. Newspaper's motion to dismiss is again before the court.

*II. DISCUSSION*

**a. Section 20-7-820**

At the hearing on this motion, plaintiff conceded that § 20-7-8520 does not restrict a newspaper's activities. As such, dismissal of this claim is proper.

**b. Invasion of Privacy**

Plaintiff concedes that the arrest was in a public parking lot in full public view. South Carolina "does not recognize a right of privacy in connection with that which is inherently a public matter." *Meetze v. Associated Press,* 230 S.C. 330, 95 S.E.2d 606, 609 (1956).

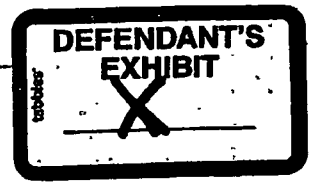
> A person may by his acts ... lose to some extent the right of privacy that otherwise would be his. There are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion and the publication of his connections with such occurrence is not an invasion of privacy.

Plaintiff was arrested in the public parking lot of a movie rental business, a location she describes as a "business parking lot." Plaintiff's right to privacy does not extend to matters that occur on public property in broad daylight. Dismissal of this claim is proper.

**c. Intentional Infliction of Emotional Distress**

Plaintiff belatedly contends her complaint includes an allegation for intentional infliction of emotional distress. Even if plaintiff's complaint properly alleges this cause of action (a dubious assumption), as against a media defendant this claim is amid the alien corn.

> The tort of outrage was designed not as a replacement for the existing tort actions. Rather, it was conceived as a remedy for tortuous conduct where




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> no remedy previously existed. Here, an action for defamation, which is the usual remedy to be employed against one who has published falsehoods, is available to [plaintiff].

*2 *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 173, 321 S.E.2d 602, 613 (Ct.App.1984) (*rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472). Intentional infliction of emotional distress is a claim of last resort. In this context, plaintiff could have pursued a defamation claim against newspaper. Since that alternative remedy was available, *Todd* suggests that a claim for intentional infliction of emotional distress cannot lie.

Further, it is doubtful plaintiff can meet the elements of the tort. Intentional infliction of emotional distress punishes conduct "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community." *Todd*, 283 S.C. at 166, 336 S.E.2d at 609. Whether the evidence suggests defendant's conduct may "reasonably constitute outrageous conduct" is a question of law for the court. *Id.* at 168, 336 S.E.2d at 609. Only if sufficient evidence exists may a jury determine if the conduct was in fact outrageous behavior. *Id.* To survive the initial inquiry, plaintiff must demonstrate that defendant's behavior can reasonably been seen as beyond the pale. This substantial obstacle is even more apparent when applied to a newspaper; practical considerations warn against permitting such claims for every misquote. The court shares plaintiff's concern for damage to her reputation,[3] but the tort of intentional infliction of emotional distress requires an unusually high degree of damning evidence-all the more exacting in the First Amendment context. As such, the court cannot conclude that defendant's conduct as described in the complaint amounts to extreme, outrageous, atrocious and utterly intolerable behavior.

Finally, plaintiff draws sustenance from the South Carolina Supreme Court's consideration of the claim against a newspaper in *Upchurch v. N.Y. Times Co.*, 314 S.C. 531, 431 S.E.2d 558 (1993). However, factual distinctions render *Upchurch* a disappointing Barmecide feast[4] *Upchurch* considered a family's intentional infliction of emotional distress claim against the Spartanburg Herald based on printed accounts of a family member's death. The supreme court held the third party family members could not maintain the action since they were not the target of defendant's conduct.[5] In contrast, plaintiff brings the claim in her own right. Therefore, *Upchurch* addresses an aspect of the claim which is not relevant in the instant action. The court did not have to reach whether plaintiffs could in fact bring the claim, as was the case *Todd*.

## III. *CONCLUSION*

For the reasons stated above, it is therefore **ORDERED** that newspaper's motion to dismiss plaintiff's claims with prejudice is **GRANTED.**

**AND IT IS SO ORDERED.**

Footnotes

1 Newspaper's briefs state the publication was on June 29, 2002, not in January.

2 As the court noted at the hearing, it must have been a slow news day on January 29, 2002, and a slow litigation day on August 12, 2005.

3 "The purest treasure mortal times afford is a spotless reputation." William Shakespeare, *Richard II*, act. 1, sc.1.

4 Elizabeth Webber and Mike Feinsilber, *Merriam-Webster's Dictionary of Allusions* 43 (1999).

5 The court noted that the family members could have brought the claim if defendant had committed a violent act against the decedent in the family members' presence. *Upchurch*, 314 S.C. at 538, 431 S.E.2d at 558. This caveat does not apply to the present action.

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STATE OF SOUTH CAROLINA ) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON ) CASE NO. 11-CP-10-9200

Mother Doe A,

Plaintiff,

vs.

The Citadel,

Defendant.




STATE OF SOUTH CAROLINA ) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON ) CASE NO. 12-CP-10-1860

John Doe Camper,

Plaintiff,

vs.

The Citadel,

Defendant.

STATE OF SOUTH CAROLINA ) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON ) CASE NO. 12-CP-10-1858

John Doe 2,

Plaintiff,

vs.

The Citadel,

Defendant.

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that responsibility
CCQs very often were attending summer school classes, and so trying to work around that schedule of -- of what CCQ was in the -- in the front sally port at any given time sometimes became problematic, and so we were looking at the idea of having the CITs relieve the CCQs of that responsibility during the daylight hours, when there were obviously lots of other folks around, so that if a CIT needed some assistance, they would be able to get some assistance from somebody else.
Q CITs were 16 years old?
A CITs were usually 16, 17 years old
Q And they were not paid?
A I -- I believe that's correct
Q Okay So you replaced your CCQs, who were 17, 18, to 22, with 16-year-olds, who were unpaid, during the day?
A During -- during those daylight hours, that was part of what we were doing, yes.
Q Okay. Under Roman numeral five, programs, ID, open -- "On opening night, rules need to be explained by the director " What rules did you explain to the campers when they were being introduced to the camp on opening night?

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A It seems to me that most of what we were talking about was just general rules for movement, where they were going, when they would go there, the -- the fact that they were under direction of a counselor and were to take their -- their lead from what the counselors were telling them, rules dealing with medications, rules dealing with injuries that would require them to go to the infirmary, there were a variety of different specialized programs and how they were going to operate those. Just general laydown of the camp I believe would be appropriate for what we were talking about.
Q Okay. Did you tell the campers that after Taps, they were supposed to stay in their rooms and not leave their rooms?
A I believe that would have been covered, yes
Q And what was the purpose of that?
A Just to know where everybody was and to ensure that they were getting a good night's sleep.
Q Who was supposed to oversee the fact that the campers were -- were staying in their rooms at night after Taps?
A There were usually details of counselors from each section so that it would be somebody that the campers in a particular section were familiar with,

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being aware of what was going on after such time as we believed the campers to be asleep and weren't seeing any kind of movement from a room down to the latrine as an example, that then the -- the CCQs were aware of what was going on in the barracks. Camp staff is available in -- in the barracks, there was a duty person detailed to be able to -- to monitor what's going on in the barracks.
Q How many times a week would you be in the barracks at 11:30 to make sure that the campers were staying in their rooms at night?
A I can't say. It was sometimes, but not -- not every night
Q You didn't live in the barracks?
A That's correct.
Q You didn't have an assigned room in the barracks?
A That's correct.
Q And the senior counselor was the person in charge of the barracks at night after you and Miss Garrott had gone home for the day?
A Correct.
Q I'm handing you the 1998 Citadel Summer Camp Counselor Survivor guide, Box, it looks like, 316-00167 through 00294 Do you recognize this as the Counselor

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Survivor Handbook that would have been passed out regarding the 1998 summer camp session?
A It looks like a -- a Counselor Handbook that we would have used, yes
Q Okay
A I don't recognize this one I have no reason -- I mean, it doesn't have any initials on it, but I'd say yeah, this is my copy or something like that, but, yeah, this looks like what we went through.
Q Okay If you'll turn --
MR STONEY. Louis, is there a date on this that I'm missing?
MR HERNS: It was just in the box for 1998, and the only reason I know that it's 1998 is the -- when you look at the people on the last page, 00307, they would have been at the camp in 1998, specifically Rob Lyon, Kenny Davis, and Mike Arpaio
BY MR. HERNS.
Q If you'll turn to 00173, was there difficulties or problems with campers being shown R-rated movies while attending The Citadel Summer Camp?
A I don't believe there was a -- a specific problem Most of the movies that we showed, we applied for a license and were granted a license to -- to show



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a minute. Let him -- he's entitled to answer the question. Let him finish his answer.
A (Continuing) But I think the rules and procedures were, in fact, there and we had a multiplicity of counselors and staff people who were there to help ensure that the rules were followed.
Q They failed miserably, didn't they, under your watch?
MR. STONEY: Objection
BY MR HERNS.
Q Correct?
A I think there were failures, yes.
Q Significant failures, 17 to 22 young boys were molested by Skip ReVille from 19 -- from 2001 to 2003 That's significant, correct?
A I would consider even one to be significant
Q And it was your job to make sure it didn't happen and it was your job to enforce the rules that the campers stay in their rooms so a predator like Skip ReVille can't get to them, correct?
MR STONEY: Objection.
A (Continuing) As director of the camp, that's correct.
Q And you did not do your job and protect those young boys that had been entrusted to you from the

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predator of Michael Arpaio and Skip ReVille?
MR. STONEY: Objection
A (Continuing) As director of the camp, I can understand what you're saying.
Q Okay. Let's move to 00178. Okay Under rooms, Item No. 5, "Campers are also not permitted to visit other campers or counselors after Taps. Campers must sleep in their own room. Staff and counselor on night duty will enforce this rule." That was the -- the rule that was in place in 1998?
A It -- that's what it appears, yes.
Q And it goes on to say, "Likewise, counselors will not visit with campers in their rooms after Taps"?
A That's what it says
Q Okay. What was the purpose of you putting this in the Counselor Survivor Handbook, Item 5 under rooms for 1998, what was the purpose that -- that you included this?
A I think it was just a -- a general orderliness of making sure that campers were in their rooms. The part up there at the very beginning where it says, "unless they've been invited by" other -- "by the occupants," so that a camper has the option of saying, "I don't want you in here," and then when we get down to the fact of them sleeping in their own

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rooms for accountability purposes and safety, and when we start looking at staff and counselors on night duty enforcing the rule counselors not visit with campers in their rooms after Taps, so that campers are, in fact, allowed to go to sleep again and -- and have an uninterrupted night, should only enter a camper's room after Taps in case of illness, injury, or needed assistance So we were drawing some clear guidelines for why and under what circumstances a counselor should enter a camper's room.
Q Pedophiles don't sexually abuse children, young male children, out in the open, do they?
MR. STONEY: Objection.
A (Continuing) I'm assuming, I have no basis to answer your question.
Q Pedophiles molest children behind closed doors, don't they?
MR. STONEY Objection.
A (Continuing) I would think that that would be the normal pattern, that they would seek privacy, if that's what you're saying
Q They would groom their -- their targets, get their trust and confidence, and then bring them in to show them pornography and masturbate?
MR. STONEY: Objection

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BY MR. HERNS:
Q Behind closed doors?
MR. STONEY: Objection
A (Continuing) I'm not expert enough to say that, but what you just said makes sense to me.
Q Well, that's what Mike Arpaio did.
A What you just said makes sense to me.
Q Mike Arpaio got a young little 10-year-old camper to come into his room and he would sleep with him and he would sexually abuse him, correct?
A That's what I understand
Q And it was at night after Taps?
A That's what I understand.
Q And the young 10-year-old boy would sleep with Michael Arpaio in his room, or Michael Arpaio would sleep in the young camper's room?
A That's what I understand. And in all of those cases, it was my understanding that there was somebody, a third party, also present.
Q So you knew that even a third party being present doesn't mean that a pedophile isn't going to not sexually abuse a young child?
A I don't think I knew that at the time that I was director of the camp. I think that became evident during the -- the proceedings after I had already left



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| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF CHARLESTON** | **COURT OF COMMON PLEAS**<br>**NINTH JUDICIAL CIRCUIT**<br>**CASE NO: 2012-CP-10-1858** |
| JOHN DOE 2,<br><br>Plaintiff,<br><br>vs.<br><br>THE CITADEL,<br><br>Defendant. | **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

FILED
2014 APR 18 PM 2:40
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff in the above-captioned action, by and through his undersigned attorneys of record, submits this Memorandum in Opposition to the Motion for Summary Judgment filed on March 5, 2014 by Defendant, where Defendant contends it is entitled to summary judgment on the grounds: (1) that The Citadel owed no duty of care to Plaintiff pursuant to Doe v. Marion, 645 S.E.2d 245 (2007); (2) that Plaintiff's claims are barred by the two-year statute of limitations of the South Carolina Tort Claims Act [TCA], or the statute of limitations of S.C. § 15-3-40; (3) that Plaintiff's outrage claim is barred by the TCA, is barred by nature of other remedies being available to Plaintiff, and that the evidence does not support outrage; and (4) that Plaintiff's claims involve a single occurrence as defined by the TCA so as to limit Plaintiff's potential recovery to $300,000.

Plaintiff will demonstrate herein that Defendant's arguments for summary judgment fail and that discovery has established that Defendant owed Plaintiff a duty that it thereafter violated and that Defendant's conduct constituted the tort of outrage. Moreover, Defendant's arguments that Plaintiff's claims are barred by the statute of limitations, per S.C. Code § 15-78-110, fails, because Plaintiff's claims are governed by the statute of limitations in S.C. Code § 15-3-555—the sexual abuse statute of limitations that extends the limitation period for actions arising out of child

sexual abuse to six years from the victim's twenty-first birthday. Defendant's position that the general two year statute of limitations provided by the TCA applies ignores the plain language of the controlling statute, as well as the well-settled rule of statutory interpretation that where two statutes are in conflict, the more recent and specific statute will prevail. See Hodges v. Rainey, 533 S.E.2d 578, 581 (2000).

Furthermore, Plaintiff's outrage claim is neither barred by the TCA, S.C. Code § 15-78-30(f), nor is it subject to summary judgment for Defendant. The evidence establishes that The Citadel's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, so as to render liability a question for the jury. See Todd v. S.C. Farm Bureau Mutual Insurance Co., 321 S.E.2d 602, 609 (S.C. Ct. App. 1984), *portion of opinion quashed and verdict reinstated*, 336 S.C.2d 472 (S.C. 1985). Finally, a determination on the occurrence issue is not appropriate at summary judgment, but, in any event, the evidence establishes that there are multiple occurrences of negligence by The Citadel and not a single occurrence as postured by Defendant.

## STANDARD OF REVIEW

Summary judgment is appropriate only where there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law." Grooms v. Marlboro County School Dist., 414 S.E.2d 802, 803 (S.C. Ct. App. 1992). In evaluation of whether a genuine dispute as to material facts exists, the court must liberally construe all evidence, including all reasonable inferences flowing from that evidence, in the light most favorable to the non-moving party. See, e.g., David v. McLeod Regional Medical Center, 626

S.E.2d 1, 3 (S.C. 2006); Fleming v. Rose, 567 S.E.2d 857, 860 (S.C. 2002); Grooms, 414 S.E.2d at 803.

On a motion for summary judgment, the trial judge must take into consideration all documents and evidence contained within the case's record, to include pleadings and discovery documents such as depositions, answers to interrogatories, and admissions, as well as any affidavits submitted by the parties in conjunction with the motion. See Higgins v. Medical Univ. of South Carolina, 486 S.E.2d 269, 272 (S.C. Ct. App. 1997). Summary judgment is not appropriate where the parties disagree as to the conclusion to be drawn from facts pertinent to the case, and it "is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." Madison ex rel Bryant v. Babcock Center, Inc.; S.C. Dep't of Disabilities and Special Needs; and Batchelor, 638 S.E.2d 650, 655 (S.C. 2006); Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672, 675 (S.C. 2000).

**PROCEDURAL BACKGROUND AND STATEMENT OF FACTS**

On March 19, 2012, Plaintiff filed negligence/gross negligence and outrage causes of action against Defendant for its conduct in concealing a 2007 report of child sexual abuse by Louis "Skip" ReVille and allowing ReVille to leave Citadel employment as a decorated alumnus and former employee, instead of as a known child molester, where he was able to continue contact with children and sexually abuse Plaintiff. Defendant Answered on June 20, 2012. To date, the evidence in this complaint consists of deposition testimony, interrogatory and request for production responses, and voluminous documentation.

The evidence shows that The Citadel failed to take action in complaints about ReVille from 2001-2007, violated its own polices and protocols requiring the report of ReVille to its own law enforcement entity- Public Safety- and the prosecution of ReVille, and permitted ReVille to leave

Citadel employment with no record of the sexual abuse. The Citadel endorsed ReVille as an educator and coach in the Charleston community; allowed ReVille to continue banking on his reputation at the Citadel to secure continued employment with children; and allowed ReVille to remain at large preying on and sexually abusing Plaintiff and other boys despite the foreseeability of further child sexual abuse by ReVille. Defendant's own expert, Gary Margolis, opined to the foreseeability that a child sexual abuser will continue to abuse children where he works and spends his time:

Q. Do you agree with me, Dr. Margolis, that child sexual predators create risk of harm to children in their communities?

A. Yes, sir. I do.

Q. And why?

A. They pose a risk to the health and safety of children.

Q. If a child sexual predator is accused of abusing 11-to-15-year-old boys in the past, in your opinion, is it foreseeable that he will abuse 11-to-15-year- old boys near where he lives and works in the future?

A. Again, based on my law enforcement experience, not any psychological experience as such, I would agree with that, more likely than not, it would.

Q. Would you agree, based on your law enforcement experience and your academic background and education, that if you became aware in 2007 that a man has sexually abused children in 2002 and 2003 at a summer camp where he worked, would you agree that it would be foreseeable that any victims he was to have from 2004 through 2007 and 2007 through 2011 would occur where he worked and spent his time?

A. I would agree that it would predispose me to believe that he would be offending again and would have offended again.

Q. Would you agree with me that if you were notified that an individual had sexually abused a minor on campus five years previously, and that individual is currently on campus, and that there are minors on campus when that report comes in five years later, that that person poses a threat to the campus?

A. I would agree with you, yes.

Q. And when that individual leaves the campus, he's a threat to minors wherever he goes off campus, correct?

A. I would agree that that's a reasonable assumption.

(Exhibit 1 Margolis Deposition, Vol. I., p. 18-20).

Defendant claims that it conducted an "investigation" into the 2007 complaint of child sexual abuse by ReVille and that there is no evidence of a cover up. However, the evidence establishes otherwise. During the time period at issue in the cover up, Jennifer Shiel worked within the President's Office, and more particularly as an assistant to General Counsel, Mark Brandenburg. Ms. Shiel testified as follows:

Q. And during the time period from when the report was made until the time that you left the Citadel, having lived through it, do you believe there was a conscious effort to cover up or conceal this report of sexual abuse?

Mr. Kovach: Objection.

A. Yes.

Q. And was President Rosa in charge ultimately of making sure that this report was concealed and covered up?

Mr. Kovach: Objection.

A. In my opinion, yes.

(Exhibit 2 Jennifer Shiel Deposition, January 21, 2014, p. 36:9-20).

Q. Having worked in the President's office during this time period, was there ever any doubt in your mind that President Rosa wanted this report of sexual abuse to be kept under wraps?

Mr. Kovach: Objection.

A. No. It was very clear that- the term that was used about it was "close hold." I mean only people that needed to know about it were supposed to know about it. That was it.

(Exhibit 3 Shiel Deposition, p. 46:12-20).

Defendant's expert, Mr. Margolis, hired by the Citadel to presumably conduct an independent and thorough investigation into the Citadel and its employees' actions in regards to the 2007 ReVille complaint,[1] admits that another investigator looking at the facts presented could conclude that there was a cover up of ReVille's child sexual abuse, as well as admits that his investigation **did not** uncover any evidence that Defendant and others at the Citadel **did not** engage in a cover up:

> Q. can you point me to any evidence that The Citadel did not engage in a cover-up to make sure that Skip ReVille's name appeared nowhere with regard to any allegations that Doe had made?
>
> A. In terms of the civil defense sheets that were created?
>
> Q. In terms of anything.
>
> A. I cannot.

(Exhibit 4 Margolis Deposition, p. 109:7-13, 278:17-25, 279:2-3). It will not be lost on the jury that Gary Margolis did not interview Jennifer Shiel.

In order for Mr. Margolis's firm to have found a cover up, "[w]e would need to have found evidence that implied intent, intent to collusion, you know, intent to hide in some way, shape, or form was deliberate in that regard." (Exhibit 5 Margolis Deposition, p. 109:17-20). Defendant's expert conveniently ignored the articulation of Defendant's intent to cover up the child sexual abuse memorialized by Defendant's General Counsel: "I am hopeful that by conducting an investigation on behalf of the school, no "formal" investigation—criminal or civil—will occur." (Exhibit 6 Brandenburg Email, May 8, 2007). Yet, since 2011 when ReVille was arrested and The

[1] In late 2012, the Citadel Hired Margolis Healy and Associates to investigate the actions taken in regards to the 2007 disclosure of child sexual, which concluded with a written report. (Exhibit 7 Investigation Into The Citadel's Handling of Allegations Involving Louis N. "Skip" ReVille Findings, March 31, 2013).

Citadel had to acknowledge that it knew of ReVille's child sexual abuse in 2007, The Citadel continues to cover up what it specifically knew, under the guise of an expressed opinion by the President that if university officials conceal a report of sexual abuse- "it would be a huge lack of integrity and lack of character...it would be unconscionable." (Exhibit 8 Rosa Deposition, January 2014, p. 187:7-16).

Prior to ultimately hiring Margolis Healy Associates, the Citadel hired and fired two other investigative firms to investigate the Citadel's knowledge and actions taken as to the 2007 sex abuse complaint. One was Guideposts Solutions, who the Citadel terminated due to a conflict of interest, and the other was Manuel, Daniels, Burke International, LLC (MDBI), which is headquartered in Alexandria, Virginia and comprised of former agents of the Federal Bureau of Investigations. Anthony Daniels, who enjoyed a 27 year career in the FBI that included positions as the Assistant Director of the FBI Academy and Deputy Assistant Director of the Criminal Division at FBI Headquarters, runs MDBI. See www.mdbinternational.com/anthony_daniels.php. MDBI wanted to conduct an "extensive" investigation and made it apparent from the get go that it would not ignore evidence of concealment in its review of the Citadel's actions in 2007. (Exhibit 9 Douglas Snyder Deposition, October 18, 2013, p. 44-45) (Exhibit 10 MDBI Preliminary Assessment of Issues- Issue Outline, September 8, 2012). MDBI stated in an email:

> If you look at the things the bishops promised to put in place, to include the accountability piece, you will see that both Penn State and The Citadel behaved in precisely the same fashion as the pre-Charter Catholic Church when allegations began to roll in. They did not aggressively investigate, they did not report to civil authorities, they made no attempt to reach out to victims...

(Exhibit 11 MDBI Email, August 17, 2012).

The Citadel was not forthright with MDBI, failing to disclose to MDBI that President Rosa had not only charged an Institutional Program Assessment Committee (IPAC) to evaluate all

aspects of the Citadel's procedures and operations, define the most serious risks, and recommend corrective actions to eliminate these risks, but had recently received the final IPAC report. (Exhibit 12 Letter from John Palms to Defendant, August 23, 2012). This report concluded:

> Based on the results of the study, the case of Skip ReVille is but one of too many instances in which the institution's realities are at odds with its ideals and values. The report further concludes that the continuation of the status quo in these areas of the college's operations poses serious risks to The Citadel.

(Exhibit 13 IPAC Final Report, September 7, 2012, p. 21). The IPAC found that "[t]he Citadel is at high immediate risk for inappropriate sexual behavior to occur between its representatives and minors. The risk is ongoing through the year." The Panel "see[s] a need for change in order to prevent harm coming to children who are involved with The Citadel, as well as to mitigate and minimize risk. ACTION IN THIS AREA SHOULD BE CONSIDERED TO BE A HIGH PRIORITY." (Exhibit 14 IPAC Report, Appendix 6, p. 70).

Yet, The Citadel withheld the existence of the IPAC and its report from MDBI. (Exhibit 15 Email chain between Tony Daniels and Ann Franke[2], October 15, 2012). As MDBI member, John Harley, concluded "I don't think The Citadel has dealt with MDBI, or Ann forthrightly....The last thing they want is a truly clean, comprehensive and independent investigation that may make Citadel and its leaders look worse than they already look." (Id.). Thereafter, the Citadel terminated MDBI's services and engaged Margolis Healy and Associates.

In 2007, The Citadel had knowledge that ReVille had sexually abused numerous children when he was employed by the Citadel as a camp counselor. Specifically, on April 23, 2007, a

[2] In late 2012, the Citadel hired Ann Franke of Wise Results, LLC as well to conduct an independent review of the handling of a 2007 child sexual abuse report. On April 3, 2013, Ms. Franke provided the Citadel with her "Institutional Review Report to the Citadel Board of Visitors- Recommendations for Moving Forward." See http://www.citadel.edu/root/images/Public_Documents/Franke_IRT_report.pdf.

former Citadel camper's father called President Rosa in his office at the Citadel, because the father had just learned that his son [hereinafter Camper Doe] had been sexually abused by an adult male counselor at the Citadel camp. (Exhibit 16 Affidavit of Father Doe, May 24, 2013, p. 1). The father had two priorities—taking care of his son and making sure that the counselor, Skip, did not abuse any other children—and he, his wife, and the victim decided "the most effective way to stop or prevent future abuse was to report [their] son's abuse to Lt. Gen. John W. Rosa." (Id.). President Rosa gave the complaint to the Citadel's General Counsel, Mark Brandenburg, who returned the father's call. (Exhibit 17 Brandenburg Deposition, June 2013, p. 50, 104-105). The father asked Mr. Brandenburg whether he was calling on behalf of President Rosa, because the family "did not want anything to fall through the cracks" and believed President Rosa would see the evil in the sex abuse and take appropriate care of the complaint. (Exhibit 16 Affidavit of Father Doe, p. 2 and Exhibit 18 Camper Doe Deposition, March 26, 2014, p. 226, 228). The father reported that his son had been sexually abused by camp counselor Skip while his son was a camper in the summer of 2002—that Skip showed pornography and masturbated with his son, showered with the campers, and had done this to another named camper. (Exhibit 19 Brandenburg Deposition, p. 109).

On that same day, Mr. Brandenburg had a telephone conversation with the victim, where the victim told him the counselor who abused him was Skip; that Skip had campers watch pornography and masturbate and Skip would join in; that Skip did this with other campers for more than one year; and other counselors were never involved. (Exhibit 20 Brandenburg Deposition, p. 75, 107, 111-112). On April 23, 2007, The Citadel had the name of a Citadel employee accused of child sexual abuse and the names of multiple victims. (Exhibit 21 Brandenburg Deposition, p. 112). The evidence reveals that on April 24, 2007, Mr. Brandenburg called ReVille at the Citadel's

writing center where he was working and asked ReVille to come meet him in Bond Hall. (Exhibit 22 ReVille Affidavit, May 21, 2013). Col. Trez, Executive Assistant to President Rosa; attended this meeting with Mr. Brandenburg, and rather than take any immediate and effective corrective action, they told ReVille of the child sexual abuse complaint and made it known that their main concern was to protect the Citadel. ReVille asked them what he needed to do, and "their reply was that, while they conduct their own investigation, I should lay low and stay off campus." (Id.). Mr. Brandenburg confirms that the meeting occurred on April 24, 2007; however, by June 2013, he states he cannot recall whether he told ReVille to "lay low" and to stay off campus. (Exhibit 23 Brandenburg Deposition, p. 98-99, 130-131). Defendant's expert agrees that allowing a sexual molester to leave campus means that he is a threat to minors wherever he goes off campus. (Exhibit 1 Margolis Deposition, Vol. I, p. 20:6-11).

**Untrue that Information Not Shared With The Citadel's President**

President Rosa has and continues to perpetrate lies about his knowledge and actions taken, or not taken, in regards to the 2007 complaint of child sexual abuse. (Exhibit 24 Rosa's Press Release). Despite currently acknowledging that all matters of sexual abuse should be handled the same, regardless of whether there is a civil lawsuit or criminal prosecution (Exhibit 25 Rosa Deposition, January 2014, p. 148), he previously ensured that the 2007 complaint was characterized as some sort of settlement case against the school rather than as the disclosure of unlawful child sexual abuse that it was. (Exhibit 26 Rosa Deposition, July 2013, p. 194).

The Citadel ensured that the General Counsel files did not indicate in any way a child sexual abuse claim against ReVille. In October 2007, the General Counsel file list did not contain Camper Doe's sexual abuse claim against ReVille anywhere, despite listing other "possible litigation" files. (Exhibit 27 File List and File System attached to Email from Jennifer Shiel,

October 24, 2007). However, in 2010, Camper Doe's name appears on the File List annotated with code 113, which signifies that it is litigation involving the Citadel, and with description--"alleged sexual abuse at summer camp." (Exhibit 28 File List attached to Email from Susan Danko, June 15, 2010, p.1- camper's name redacted). Furthermore, instead of annotating that the complaint was against ReVille, the entry's keyword is "Arpaio". (Id.). The lack of including the camper's complaint in October 2007 but then including it three years later disguised as an Arpaio complaint is evidence of The Citadel's cover up of its knowledge of sex abuse by ReVille. If The Citadel had included the ReVille complaint in the General Counsel files for any year, the information would have been available to the South Carolina Budget and Control Board, notifying the board of potential liability that extended beyond the Arpaio sex abuse complaints.

The Citadel's expert witness agrees that it "raises questions and suspicions" that Mr. Margolis evidently overlooked in his review. (Exhibit 29 Margolis Deposition, p. 208-209). Mr. Margolis also agrees that a reasonable conclusion from Citadel administrators telling ReVille to lay low on April 24, 2007 and the suspicious annotation (and lack of annotation) of the ReVille complaint on the General Counsel file lists is that The Citadel was covering up the sex abuse report. (Exhibit 30 Margolis Deposition, 236-237). Plaintiff's experts agree. (Exhibit 31 Mary Jo McGrath Expert Witness Report, June 17, 2013; Exhibit 32 Initial Expert's Report of James D. Ginger, Ph.D.; and Exhibit 33 McGrath Deposition, February 3, 2014).

President Rosa knew of the April 2007 child sexual abuse complaint no later than graduation that year, which was May 6th, and he knew the perpetrator's name was Skip ReVille. (Exhibit 34 Brandenburg Deposition, p. 76:15-25, 212-213). On May 16, 2007, Mr. Brandenburg memorialized the information known by The Citadel at that time in a letter to the Insurance Reserve Fund, copying President Rosa, even though President Rosa already knew all of the information

contained in the letter. (Exhibit 35 May 16, 2007 letter; and Exhibit 36 Brandenburg Deposition, p. 39:6-17). Defendant's expert Ann Franke notes that President Rosa knew all of the details of the General Counsel's investigation: "5/16/07- MB [Mark Brandenburg] wrote to IRF about potential claim, but no litigation hold in place. Jennifer cc'd Gen. Rosa, which perplexed MB, but he now appreciates it...because Gen'l already knew info." (Exhibit 37 Franke Notes, Bates Stamped 6702). Mr. Margolis's investigation likewise revealed that President Rosa knew what Mr. Brandenburg knew:

> Q: And do you see down towards the last part of the page in your notes, again, it states: "If president stands up and fires attorney," question, "makes him a scapegoat." And then in bold letters, it says: "Should I go?. I knew what he knew." Those notes indicate President Rosa's response to your question or your firm's question regarding the extent of his knowledge as compared with Mr. Brandenburg; isn't that correct?
>
> A: I do recall him making that statement. I actually remember that quite clearly.

(Exhibit 38 Margolis Deposition, 195-196).

Thus, by May 16, 2007, The Citadel knew that the camper and another camper were "coerced into the counselor's room, where the counselor showed them pornographic movies and convinced them to masturbate;" "the counselor watched the movies and masturbated as well;" and "the counselor engaged in this activity frequently, though, and with many other campers." (Exhibit 35 May 16, 2007 letter). Moreover, by at least May 1, 2007, The Citadel knew that the other camper, who was coerced to masturbate by ReVille along with Camper Doe, currently was a cadet at the Citadel. (Exhibit 39 Brandenburg Deposition, p. 135-136 and Exhibit 40 Brandenburg Email, May 1, 2007).

The evidence further includes testimony from Jennifer Shiel, who has personal knowledge of the April 23, 2007 phone call and testified that, at the direction of President Rosa, from the beginning there was a concerted effort to keep the report of sex abuse within the President's office

so that no other Citadel departments would know. (Exhibit 41 Shiel Deposition, p. 35-36). Ms. Shiel understood that President Rosa's and other administrators' priority was to protect The Citadel's interests in dealing with the sex abuse complaint and that President Rosa wanted the complaint kept "close hold" so that no one outside of the President's Office would know about it. (Exhibit 42 Shiel Deposition, p. 41; 46).

Ms. Shiel further testified that President Rosa and Mr. Brandenburg socialized outside of work, but that at work, Mr. Brandenburg absolutely was deferential to President Rosa and nervous about pleasing him. (Exhibit 43 Shiel Deposition, p. 31). She testified it was not possible that President Rosa would have left his subordinates to inquire into the 2007 ReVille sex abuse without being updated and consulted, further supported by Mr. Margolis's notes that Defendant and Mr. Brandenburg talked three times a week. (Exhibit 44 Shiel Deposition, p. 30; and Exhibit 45 MHA Interview Notes, 0078). In addition, on January 30, 2006, President Rosa previously provided his guidance for the "planning, preparation, and conduct of the 2006 Citadel Summer Camp session," showing his participation and leadership in such matters. (Exhibit 46 Course of Action/Decision Brief, 30 January 2006, Citadel 00278). Moreover, in keeping with President Rosa's conduct of maintaining information close hold is his remark of "Amen" to Col. Trez's suggestion to keep another matter "off the net" in 2009. (Exhibit 47 Rosa and Trez Email chain, July 2009).

President Rosa and other Citadel employees kept the 2007 report of sexual abuse by ReVille "close hold" despite knowing that a child molester is a threat to the community at large:

Q: Is a child sexual predator an ongoing threat to the community at large?

A: It could—yes.

(Exhibit 48 Col Trez deposition, p. 54).

Q: ...Skip ReVille is on campus, the next day when he tries to find ReVille, he's on The Citadel Campus, wouldn't you agree that if that person who has been accused

of being a pedophile is on The Citadel campus, that that's a current threat to not only The Citadel, but the public at large?

A: Possibly...

(Exhibit 49 Rosa Deposition, JULY 29, 2013, p. 168).

**Untrue that ReVille's Record Revealed No Other Complaints**

The Citadel continues to perpetuate that it looked into ReVille's record and no other complaints existed. (Exhibit 24 Press Release). In fact, Mr. Brandenburg's "investigation" unveiled information that ReVille had been fired from another school and had been caught in violation of a camp rule forbidding counselors to be alone in a room with a camper. Specifically, the day after the complaint came in, Mr. Brandenburg met with the former director of the camp, Jennifer Garrott, where she disclosed that ReVille had been asked to leave his prior job at Pinewood Prep and said this with a "knowing look," which Mr. Brandenburg testified means, "she looked at me like, Oh goodness, could this be another Arpaio case? Which, of course, is exactly what we were worried about." (Exhibit 50 Brandenburg Deposition, p. 114-115). Mr. Brandenburg had prior experience litigating child sexual abuse claims that had been filed against another former camp counselor and Citadel cadet, Michael Arpaio. (Exhibit 51 Brandenburg Deposition, p. 100). ReVille had worked at Pinewood Prep prior to his employment with the Citadel that started in August 2006. Any effort by the Citadel to screen ReVille prior to hiring him in 2006 would have revealed his termination from Pinewood Prep. Exhibit 52 (MDBI Preliminary Assessment of Issues - Open Questions, September 8, 20112). Apparently, no effort was made to check ReVille's employment history.

Also on April 24, 2007, Ms. Garrott disclosed to Mr. Brandenburg that in the summer of 2003, she caught ReVille in his barracks room alone with a camper rubbing Icy Hot on the camper's leg, even though the camp had a policy forbidding counselors from being alone in a room

with campers and making it a terminable offence. (Exhibit 53 Garrott Deposition, Vol II, p. 56-57, 93). Yet, Ms. Garrott did not fire ReVille when she caught him in direct violation of the policy and has admitted that she should have. (Exhibit 54 Garrott Deposition, Vol. II, p. 55-56). Defendant's own expert witness, Ann Franke, states that policies regarding the safety of children should be strictly enforced, absent some exigent circumstance for the policy violation, and serious consequences imposed for violations in order to rightly protect children. (Exhibit 55 Franke Deposition, March 17, 2014, p. 49:13 through P. 51:19). Ms. Franke opines that Ms. Garrott should have fired ReVille when he violated the policy against being alone with campers, because a sore muscle would not be the type of emergent situation that justifies departure from strict enforcement of the policy. (Exhibit 55 Frank Deposition, p. 50-51).

Moreover, ReVille's file contained his counselor performance evaluation stating, "senior counselor material if learns to distance himself, works well with younger kids," and his counselor application where he listed his qualifications as "5'11"; brown hair; brown eyes; athletic; can cook, recite poetry, dance; enjoys walks on the beach." (Exhibit 56 Counselor Reviews, p. 4; and Exhibit 57 Summer Camp Application). ReVille's record indeed contained other complaints and red flags.

**Untrue that ReVille No longer Affiliated With Citadel at Time of Complaint**

The Citadel contends that ReVille was no longer affiliated with the school and had ended his employment on April 20, 2007. However, the evidence establishes otherwise. ReVille was working in The Citadel's writing lab on April 24, 2007 when Mr. Brandenburg tracked him down to meet with him, admitted to by Mr. Brandenburg. (Exhibit 58 Brandenburg Deposition, p. 131:10-12, 132:4-8). Furthermore, The Citadel's expert witness, Ann Franke documented in her investigation that on April 24, 2007, "Skip was employed by C[itadel] at that point w/o contact w/ kids." (Exhibit 59 Franke Notes, Bates No. 6698). ReVille had a Citadel email address at that

time as well. (Exhibit 60 Brandenburg Deposition, p. 45). Additional evidence of ReVille's employment at the Citadel includes ReVille's statements in his application to the South Carolina Employment Security Commission, Unemployment Insurance Division, where he notes his "last day worked for the school was 04/30/07." (Exhibit 61 ReVille Unemployment File, dated 6/7/07, p. 19). A year later, in April 2008, ReVille applied for a job at Velocity Sports in Mount Pleasant, noting that his prior employment with the Citadel lasted from August 2006 to May 2007. (Exhibit 62 Velocity Sports Application, p. 2).

The Citadel's concealment of the report of abuse is further evidenced by the fact that even if ReVille was no longer employed when the report was made, the Citadel had a policy that clearly stated: (1) that there are no time period restrictions regarding sexual misconduct investigations; (2) that individuals currently or formerly with the camp will be investigated; and (3) that ReVille was subject to The Citadel's Standards of Review. (Exhibit 63 Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues). When confronted with the policy, President Rosa attempts to explain it away by citing the fact that the camp was closed in April 2007, as if this policy is an artifact of some sort. The Citadel Summer Camp closed in December 2006, only four months before the report of sexual abuse was made to The Citadel. Furthermore, President Rosa knew that Citadel Public Safety had "complete police authority to apprehend and arrest anyone involved in illegal acts on campus." (Exhibit 64 Message from President Rosa).

**The Citadel's Excuse that Conduct Occurred 5 Years Ago and Involved No Touching is Inexcusable**

In defense of The Citadel's actions, President Rosa offered that the child sexual abuse complaint was from five years prior. (Exhibit 24 Press Release). He now contends that this fact "was not significant to me." (Exhibit 65 Rosa Deposition, January 2014, p. 142:3-9). He also now agrees that the report from a nineteen year-old of abuse that occurred when he was fourteen years-